## Is Gov. George Romney Eligible to Be President? Part 2

By Isidor Blum

Alternative requirements, one of which has long been a dead letter, are prescribed in Article II of the Constitution for eligibility to the office of President. A person had to be either a natural born citizen of the United States or a citizen at the time of the adoption of the Constitution. In either case he must have been for fourteen years a resident within the United States. The second of these alternative requirements is said to have been included so that men born in foreign lands, who had come here and had rendered great service to their adopted country, might not be ineligible. 2 Story, Commentaries on the Constitution (1833), section 1499; 2 Bancroft, History of the Formation of the Constitution, 6th ed. (1893), 192-93. Alexander Hamilton and James Wilson, in particular, have been mentioned in this connection.

But a number of our early Presidents were not born citizens of the United States. Martin Van Buren was the first President who was born after the Declaration of Independence and John Tyler was the first who was born after the adoption of the Constitution and thus was a citizen of the United States from the time of his birth.

The British colonies in North America were a part of the dominions of the Crown, and all persons born in them were natural-born British subjects. It was as British subjects that the colonists protested against measures of Parliament and the King. On October 14, 1774, the Continental Congress asserted that the colonists were entitled to the exercise and enjoyment of such of "the rights, liberties and immunities of free and natural-born subjects" as "their local and other circumstances enable them to enjoy." In an address to Governor Dunmore dated June 12, 1775, which was written by Thomas Jefferson, the members of the Virginia House of Burgesses described themselves as "his Majesty's dutiful and loyal subjects."

When the thirteen colonies became independent states, persons who adhered to the cause of independence, or at least remained here and did not oppose it, became citizens of the several states. Young v. Peck (N.Y., 1837), 21 Wend. 385; Calais v. Marshfield (1849), 30 Me. 511; Moore v. Wilson's Adm'rs. (1837), 18 Tenn. 406; State v. Adams (1876), 45 Iowa 99; State ex rel. Phelps v. Jackson (1907), 79 N. H. 504, 65 Atl. 657. See Shanks v. Dupont (1830), 3 Pet. 242, 247. See article by John Reeve, 6 Hall's American Law Journal (1817), 30.

Different dates were taken here and in Great Britain as that on which the change occurred. American courts took the date of the Declaration of Independence as the date of the separation. British courts took the date of the treaty of peace in 1783. Inglis v. Sailor's Snug Harbor (1830), 3 Pet. 99; Doe v. Acklam (K.B., 1824), 2 B. & C. 779, 107 E. R. 572.

"The word 'citizen' was adopted in place of 'subject' by nearly all the states… [It] was understood as conveying the idea of membership of a nation…" Moore v. Happersett (1875), 21 Wall. 162, 165. "The sovereignty has been transferred from one man to the collective body of the people—and he who before was a subject of the king is now a citizen of the state." State v. Manuel (N.C., 1830), 4 Dev. & Bat. 20, 25.

No national or political entity of which there could be citizens was established by the Articles of Confederation. When, however, the Constitution was adopted, the citizens of the states became, ipso facto, also citizens of the United States.

On becoming independent, the states continued in force the common law by which the affairs of their inhabitants had been governed. In some states the common law was expressly adopted by a provision in the state constitution or by statute. In several it was simply recognized by the courts as still being law.

Included in the body of the common law thus adopted was the doctrine that a person was a subject, or, in the new terminology, a citizen, of the country in whose territory he was born.

Naturalization was another matter. This was statutory, and the colonies had long been making their own laws in this field. Virginia enacted naturalization laws in 1680, 1705, and 1769; South Carolina, in 1696 and 1704, and Pennsylvania, in 1700 and 1742. Most of the Colonial statutes required only the taking of an oath or dispensed with any requirement. Many provided for the collective naturalization of a large number of unnamed persons.

"So in the colony of New-York, by an act passed in 1683, and by another passed July 5, 1715, all foreigners theretofore residing in the colony who had been freeholders, were to be deemed as having been naturalized; and all Protestants of foreign birth then residing in the colony, were declared to be natural subjects, and entitled to all the rights, privileges and advantages of natural born subjects on taking the oaths of allegiance, &c. Van Schaak's Col. Laws, 97-100); and by 14 statutes passed subsequently, the last of which was in 1773, an immense number of

aliens were naturalized by name, on taking the same oaths." Lynch v. Clarke (N.Y., 1844), 1 Sandf. Ch. 583, 648.

One of the "repeated injuries and usurpations" charged against "the present King of Great Britain" in the Declaration of Independence was that he "has endeavored to prevent the population of these states; for that purpose obstructing the Laws for the Naturalization of Foreigners."

After independence the states continued to facilitate naturalization. Their freedom in this and other respects was not hampered by the adoption in 1781 of the Articles of Confederation, for in these the states did little more than enter into a "firm league of friendship." But some states were more liberal than others in their naturalization policies, and this did not promote friendship, but caused disaffection for the Articles provided that "the free inhabitants of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of citizens in the several states." See Federalist. No. 42.

James Madison, in a letter to Edmund Randolph in August 1782, said: "A uniform rule of naturalization ought certainly to be recommended to the states."

Naturalization was not mentioned in the series of resolutions, comprising what is called the Virginia Plan, which were mainly prepared by Madison and were presented in the Federal Convention by Governor Randolph. These resolutions dealt with the structure of government and with basic principles and not with a specification of powers. Proposals concerning naturalization were, however, included in the New Jersey Plan and in the plan which Charles Pinckney of South Carolina presented.

In the fourth of the eighteen clauses of Article I, section 8, of the Constitution, preceded only by the grants of the tax power, the power to borrow money, and the commerce power, Congress is given power "To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."

These two powers were separately proposed and voted on in the Convention. They were joined in one clause by the Committee of Style, perhaps because they were similar in wording and both were designed to bring about uniformity. Naturalization, proceedings were until recently conducted predominantly in the state courts. They still can be conducted in a state court, but it is only seldom that this is done.

When Congress in 1790 took up the enactment of a naturalization law, there were some who wanted to require only an application and the taking of an oath. But they did not prevail.

The structure and the language of statutes enacted in that year and in 1795 and 1802 indicate how these early Congresses regarded the provisions they enacted concerning children born to American Citizens in foreign lands. These Congresses included a number of men who had had a part in drafting the Constitution and in securing its ratification.

Each of the three statutes containing these provisions was entitled "An Act to Establish a Uniform Rule of Naturalization."

The Act of March 26, 1790, provided that an alien who had resided in the United States for two years might be admitted to become a citizen on application to a court in any state in which he had resided for one year and on making proof of his good character and taking an oath or affirmation to support the Constitution, and that on the recording of the proceedings he "shall be considered as a citizen of the United States."

It further provided that his children, dwelling here and under twenty-one, "shall also be considered as citizens of the United States." Then, in language somewhat similar to that of the British statutes, came the following:

"And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States shall be considered as natural born citizens; Provided that the right of citizenship shall not descend to persons whose fathers have never been resident in the United States."

In the first two sections of the Act of January 29, 1795, the requirements for naturalization of aliens were increased and the procedure to be followed was set forth in greater detail than in the act of 1790. Section 3 read as follows:

"And be it further enacted, That the children of persons naturalized dwelling within the United States, and being under the age of twenty-one years, at the time of such naturalization; and the children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States: Provided, that the right of citizenship shall not descend to persons, whose fathers have never resided in the United States."

It will be observed that in the act of 1795 the phrase "natural born," which was used in the act of 1790, was omitted.

In a statute enacted April 14, 1802, Congress again put into a single sentence a provision concerning the two categories. After three sections dealing with the naturalization of aliens and matters of procedure and courts, it was provided that children who were under twenty-one when their parents were naturalized "shall if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are, or have been citizens of the United States, shall though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: Provided, That the right of citizenship shall not descend to persons whose fathers never resided within the United States." 2 Stat. 74, 79-80.

Each of these three statutes was entitled "An Act to Establish a Uniform Rule of Naturalization." In two of the statutes children born in a foreign country to American citizens and children of foreigners who were naturalized were dealt with in a single sentence.

Evidently it was the understanding of the successive Congresses that in enacting these provisions they were exercising power to establish a uniform rule of naturalization.

That is in fact the definition and the limit of the power vested in Congress by the Constitution. As Chief Justice Marshall observed in a different context, "The simple power of the national legislature is to prescribe a uniform rule of naturalization." Osborn v. Bank of the United States (1824), 9 Wheat, 738, 827.

Congress, in the exercise of that power, "has enacted general laws under which individuals may be naturalized, but the instances of collective naturalization by treaty or by statute are numerous." Boyd v. Nebraska ex rel. Boyd (1892), 143 U. S. 135, 162.

Whether by design or by inadvertence, the provision in the act of 1802 concerning children born abroad to American fathers applied only if on the date of the enactment of the statute, April 14, 1802, the father was or had been an American citizen. Consequently, Chancellor Kent pointed out, "the benefits of this provision narrows rapidly, and the period will soon arrive, when there will be no statute regulation for the benefit of children born abroad of American parents, and they will be obliged to resort for aid to the dormant and doubtful principles of the English common law." 2 Commentaries (1826), 52-53. See also the statement of Representative Cutting Cong. Globe, 33rd Cong. 1st Sess. 170 (1854), quoted in Kennedy v. Kennedy (1962), 366 U. S. 308, 315.

Persons born abroad were in a number of cases held aliens because their fathers, American citizens, were born after 1802. Among the cases are Brown v. Shilling (1856) 9 Md 56, and State v. Phelps (1907), 79 Vt. 504, 65, Atl. 657. See also Sasperias v. De La Motte (S.C., 1857), 11 Rich. Eq. 38, 46. But see Ludlam v. Ludlam (1863), 26 N.Y. 356.

The act of 1802 remained on the statute books for more than fifty years. Bills to amend it were introduced in 1841, 1848 and 1852, but did not come to a vote. It was apparently because of an article written by Horace Binney, an eminent Philadelphia lawyer, that a new statute was enacted in 1855. Chief Justice Taft, in Weedin v. Chin Bow (1927), 274 U. S. 657, 663, said concerning this article:

"Mr. Binney demonstrates that under the law then existing the children of citizens of the United States born abroad, and whose parents were not citizens of the United States on or before the 14th of April, 1802, were aliens, because the Act of 1802 only applied to such parents, and because under the common law which applied in this country, the children of citizens born abroad were not citizens but aliens."

Excerpt from Mr. Binney's article were quoted in the Weedin case and in United States v. Wong Kim Ark (1898), 169 U. S. 649. What appears to have been an earlier draft of the article was published, without the author's name in 2 American Law Registers (1854), 193.

On February 10, 1855, Congress enacted the following:

"That persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: Provided, however, That the rights of citizenship shall not descend to persons whose fathers never resided in the United States." 10 Stat. 604.

Except for slight changes in wording, this statute long remained unaltered. In 1917 Congress added the requirement, shown in the provision quoted at the outset of this paper, that children born abroad who continue to reside outside of the United States shall, in order to receive the protection of the Government, record their intention to become residents and remain citizens of the United States and shall also take the oath of allegiance.

Both the acts of 1855 and 1907 provided, as did the earlier statutes, that the rights of citizenship should not descend to children whose fathers never resided in the United States. This was construed to mean that he must have resided here before the child's birth. Weedin v. Chin Bow, supra.

Under the present statute, 8 U. S. C. 1401, one of the parents of a child born abroad must be an American citizen and must have resided in the United States for a specified period before the birth of the child.

In the Civil Rights Act of April 9, 1866, Congress for the first time enacted legislation concerning citizenship by birth. In the first section of that act it was stated that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." 14 Stat. 27.

On June 16, 1866, Congress proposed to the states the Fourteenth Amendment, which on July 28, 1868, was declared ratified. The first sentence in this Amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

This provision, which was included only in the late stage of the drafting of the Amendment, was designed to secure more firmly the rights of the newly emancipated Negroes, but it has had other consequences as well. In United States v. Wong Kim Ark (1898), 169 U. S. 649, for example, it was largely because of this provision that a boy, born in this country to Chinese nationals who were domiciled here, was held to be an American citizen, although his parents were by statute precluded from becoming citizens.

The phrase "subject to the jurisdiction thereof" was intended to exclude Indians. Elk v. Wilkins (1884), 112 U. S. 94.

The Government had from its beginning treated Indians as members of autonomous tribes with which it dealt in treaties. Among the treaties it had made were a number in which groups of Indians were collectively made citizens. In 1924, Congress enacted a statute in which "all non-citizen Indians born within the territorial limits of the United States" were "declared to be citizens of the United States." Act of June 2, 1924, 43 Stat. 253.

It has been said that "the right of citizenship of the native born derives from section 1 of the Fourteenth Amendment." Schneider v. Rusk (1964), 377 U. S. 163, 166.

But there was no Fourteenth Amendment until 1868. What of those who were born in the United States before that year?

Under the common law, which was adopted by the original thirteen states and by almost all that have since joined the Union, all persons born here became citizens of the states by birth. There is, however, no common law of the United States. United States v. Hudson (1812), 7 Cr. 32; Wheaton v. Peters (1834), 8 Pet. 591; Smith v. Alabama (1888), 124 U. S. 465, 478.

There is but scant authority for any suggestion that citizenship of the United States by birth in the United States can be based on the English common-law doctrine.

In United States v. Rhodes (1866), Abb, 28, 40-41. Fed Cas. 16,151. Justice Swayne said that all persons born in the United States are natural born citizens. "Such", he said, "is the rule of the common law, and it is the common law of this country, as well as of England."

In Lynch v. Clarke (N. Y. 1844), 1 Sandf. Ch. 583, where a daughter who was born to British subjects during their temporary sojourn in New York was held to be a citizen of the United States, Assistant Vice Chancellor Sandford said that the question "must be determined by the national unwritten law."

In an opinion in which he explored the history of American citizenship, he said, speaking of the United States, and not of the several states, that it was "indifferent whether we say that we inherited the common law, or the principles of the common law." Citizenship, he asserted, "has become a national subject, and in the absence of constitutional or statutory provision it must be regulated by the principles of the common law."

Judge Selden, in Ludlam v. Ludlam, supra, made it clear that he was not concerned with "the question very earnestly debated soon after the organization of the Government, whether the common law of England became the law of the Federal Government on the adoption of the Constitution." He was only assuming, he said, "what has always been conceded, that the common law may properly be resorted to in determining the meaning of the term used in the Constitution, where that instrument itself does not define them."

"It seems to have been the generally accepted view before the adoption of the Eighteenth Amendment that, except in cases of naturalization, United States citizenship was derived from state citizenship." Burdick, The Law of the Constitution (1922), 1693.

Aliens who were naturalized became, by the terms of the statute, citizens of the United States.

Justice Story was speaking of persons who were citizens by birth in the United States when he said: "Each citizen of a state is ipso facto a citizen of the United States." 2 Commentaries on the Constitution (1833), sec. 1693.

An earlier commentator, William Rawle, said: "The citizens of each state constituted the citizens of the United States when the Constitution was adopted…They became citizens of the latter, without ceasing to be citizens of the former, and he who was subsequently born a citizen of a state, "becomes at the moment of his birth a citizen of the United States." A View of the Constitution (1824), 80.

Senator Reverdy Johnson of Maryland, who was probably the best constitutional lawyer in the 39th Congress, said during the debate on the Fourteenth Amendment: "Who is a citizen of the United States is an open question. The decision of the courts and the doctrine of the commentators is, that every man who is a citizen of a State becomes ipso facto a citizen of the United States: but there is no definition as to how citizenship in the United States can exist except through the medium of citizenship in a State." Cong. Globe, 39th Cong. 1st Sess. 2893; Flack, The Adoption of the Fourteenth Amendment (1908), 23, 90.

That this view was generally held is confirmed also by statements made since the adoption of the Fourteenth Amendment.

Justice Bradley, in the Slaughter-House Cases (1873), 16 Wall. 38, 112, said: "The question is now settled by the Fourteenth Amendment itself, that citizenship of the United States is the primary citizenship in this country, and that state citizenship is secondary and derivative, dependent upon citizenship of the United States and the citizen's place of residence."

Chief Justice White, in the Selective Draft Law Cases (1918), 245 U. S. 369, 389, said that the Fourteenth Amendment has "broadened the national scope of the Government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative…"

One may be a citizen of the United States without being a citizen of a state. It has indeed been remarked that an important additional element, namely, residence within the state, is necessary in order for a citizen of the United States to be a citizen of a state. The Slaughter-House Cases, supra, per Miller, J., at 74. See also Van Dyne, Citizenship of the United States (1904), 283 et seq.

For example, an American citizen who makes his residence abroad may relinquish his state citizenship, along with his residence in a state, while remaining a citizen of the United States. Moreover, his son, who is born abroad, becomes at birth a citizen of the United States and will remain one regardless of whether he later becomes a resident and thus a citizen, of a state.

But besides making citizenship of the United States clearly independent of citizenship of a state, and no longer derivative therefrom, the provision in the Fourteenth Amendment distinctly defines how citizenship of the United States may be acquired.

Justice Field, in the Slaughter-House Cases, supra, at 95, alluded to both of these aspects of the provision.

The Fourteenth Amendment, he said, "recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the Constitution or laws of any state or the condition of their ancestry."

What Justice Field conveyed in his paraphrase of the language of the Fourteenth Amendment was more fully expounded by Justice Gray in United States v. Wong Kim Ark, supra, at 702.

"The Fourteenth Amendment," said Justice Gray, "in the declaration that 'all persons born or naturalized in the United States and subject to the jurisdictions thereof, are citizens of the United States and of the State wherein they reside' contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States and subject to the jurisdiction thereof; becomes at once a citizen of the United States, and needs no naturalization."

A person born out of the jurisdiction of the United States, Justice Gray continued, "can only become a citizen by being naturalized, either by treaty, as in

the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring the classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunal, as in the provisions of the naturalization acts."

The Fourteenth Amendment has thus confirmed the difference in respect of the basis of their citizenship, between a person who is born in the United States and one who is born to American parents in a foreign country. One who is born here is a citizen by reason of that fact. He is a native-born citizen, or, in the language of Article II of the Constitution, a "natural born citizen." One who is born in a foreign country to American parents is likewise a citizen from the time of his birth, but he is a citizen by virtue of a naturalization statute. He is, that is to say, a naturalized citizen.

This difference underlay the decision in Zimmer v. Acheson (C. A. 10, 1951), 191 F. 2d 209, aff'g (D. C. Kan., 1950) 91 F. Supp. 313. Zimmer was born in Germany in 1905, a son of American citizens. Except for some trips to the United States, he remained continuously in Germany until he was drafted into the German Army in 1940. His application in 1947 for an American passport was denied.

The Act of March 2, 1907, contained a provision that when "any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen." 34 Stat. 1229. The presumption was rebuttable.

The refusal of a passport was upheld by the Court of Appeals on the ground that Zimmer had resided continuously in Germany during the period from 1926 to 1931 and thus had ceased to be an American citizen.

"There are only two classes of citizens of the United States," the court said, "native-born citizens and naturalized citizens; and a citizen who did not acquire that status by birth in the United States is a naturalized citizen."

A similar ruling was made in Schufaus v. Attorney General (D. C. Md., 1942), 45 F. Supp. 6.

Can the question whether Governor Romney is eligible to the Office of President be judicially determined?

Decision of a question of this kind is not vested in the legislative or the executive branch of the government, nor does it involve either legislative or executive

discretion. It appears, therefore, not to be a political question in the sense in which the term is used in constitutional law, but to be a justiciable question. Marbury v. Madison (1803, 1 Cr. 137, 170; Luther v. Gorden (1849), 4 How. 1, 42, 51; Barker v. Carr (1962), 369 U. S. 186, 195, 202; Powell v. McCormack (1967), 266 F. Supp. 354.

More than this, however, is required. The federal judicial power under Article III of the Constitution is limited to "cases" and "controversies." Although a question be justiciable, it must be presented in a justiciable case, an "actual controversy" which "is appropriate for judicial determination…The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests…It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon hypothetical state of facts."

This was said in an action for a declaratory judgment. Aetna Life Insurance Co. v. Haworth (1937), 300 U. S. 227, 240, 241. The Declaratory Judgment Act has not affected the requirement in the Constitution that there must be a justiciable case or controversy. It has merely given a new remedy.

Although it is well established that a friendly suit with feigned issues is not a case or controversy, there have been some important litigations in the Supreme Court that bore indicia of having been pre-arranged. Fletcher v. Peck (1810), 6 Cr. 87; Carter v. Carter Coal Co. (1936), 298 U. S. 238.

But who could sue, and against whom could an action be brought?

A plaintiff would have to "show he has sustained or is immediately in danger of sustaining a direct injury…It is not sufficient that he has merely a general interest common to all members of the public." Ex parte Levitt (1937), 302 U. S. 633, 634.

A justiciable case or controversy could arise from a dispute over the naming of Governor Romney as a candidate in a Presidential preference primary in one of the four states that have such primaries.

In New Hampshire, where the first of these primaries will be held, a candidate's name is printed on the ballots on the petition of fifty voters, of the same political party as his, in each Congressional District in the state. N. H. Rev. Stat. Ann., 58:3. The statute provides that petitions shall be in such form as the Secretary of State may prescribe and that his decision as to the regularity of petitions shall be final. This would scarcely preclude judicial determination of a question of substance.

Litigation could ensue if the Secretary of State were to reject a petition nominating Governor Romney or if another candidate were to seek to exclude his name from the ballot.

Neither of these events is likely to occur, and in any event no litigation could be commenced until next year. The New Hampshire primary election will be held on March 12, and the earliest date on which a nominating petition may be filed is sixty days before the primary, namely, January 12.