Is Presidency Barred to Americans Born Abroad?

By Cyril C. Means, Jr.

"No Person except a natural born Citizen or a Citizen of the United States at the time of the Adoption of this Constitution shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have…been fourteen Years a Resident within the United States."

--Art. II, Sect. 1, par. 5, *Original Constitution* (1787).

"…no person Constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States."

--*Twelfth Amendment* (1804).

One out of every 200 *born* Americans is not a native of the United States but is a child born abroad of American parentage.

Natives, irrespective of parentage, are "natural born" citizens, in the sense of the original Constitution's presidential-eligibility clause. Those of foreign birth *and* parentage, who are individually admitted to American citizenship by judicial proceedings subsequent to birth, are not "natural born" citizens and are ineligible. It is only the tiny group between the larger two—the citizens by parentage, as they are sometimes called—who present a question.

A citizen by parentage is one who, though born outside the United States, is a citizen from birth because one (or both) of his parents, at the time of his birth, was an American citizen. Acts of Congress declare who are citizens by parentage. From 1790 to 1934, only an American *father* could transmit citizenship by parentage to his child born abroad. Since 1934, either parent, if citizens, does so.

Few today, citizens by parentage already number such notable figures as Under Secretary of State Herbert Hoover, Jr., former Representative Franklin D. Roosevelt Jr., and Governor Christian A. Herter of Massachusetts, who were born, of American parents, in England, Canada and France, respectively. Governor Herter's growing mention for a place on the Republican ticket in 1956 has revived the question of the constitutional eligibility of such citizens to the nation's highest office.

In coming decades, the numerous progeny born abroad by the hundreds of thousands of American couples, civilian and military, stationed in occupied and

allied countries since World War II, will reach maturity and present the question—unless by then it has been authoritatively answered—on a broader scale.

Citizens by parentage, like natives, are *born* citizens. In the respect both natives and citizens by parentage differ from non-natives of foreign parentage who are naturalized, after birth by judicial proceedings to which they or their parents are parties.

On the other hand, in 1898, six justices of the Supreme Court expressed the opinion that citizens by parentage were no less "naturalized" than those of foreign parentage and birth individually admitted to citizenship by judicial proceeding after birth. Acts of Congress, said these judges, conferred "citizenship upon foreign-born children of citizens" as a class, and other acts of Congress enabled "foreigners individually to become citizens by proceeding in the judicial tribunals," but both types of legislation were enacted pursuant to Congress's constitutional power "to establish an uniform rule of naturalization.

While this passage in the majority opinion in that case (United States v. Wong Kim Ark) was not necessary to the decision of the question there presented, and thus is not a binding precedent, it is an important pronouncement by six of the country's foremost judges. In no case has the question of the presidential eligibility of citizens by parentage been decided, commented on or even argued.

Does it follow from the fact that citizens by parentage are "naturalized" that they are ineligible to the Presidency? Not at all. The Constitution does not say that a "naturalized" citizen is ineligible, but that only a "natural born Citizen" is eligible. If therefore, it is possible for one to be a natural-born and a naturalized citizen at the same time, such a person is eligible.

The vast majority of citizens are either natural-born and not naturalized (i. e., natives) or naturalized and not natural-born (i. e., those of foreign birth and parentage, admitted to citizenship after birth). The only group left is citizens by parentage.

They are "naturalized," from the moment of birth under pre-existing acts of Congress. The controlling question, however, is to be answered: Are they also "natural born" citizens, within the meaning of those words as used in the presidential-eligibility clause?

"Natural born Citizen"—like its British genitor, "natural born subject"—never was an expression in common use, and today is but an archaism. It has not

appeared in a federal statute since 1795. For 160 years, the only American legal text containing it has been the presidential-eligibility clause in the Constitution of 1787.

That instrument was framed in Philadelphia by a Federal Convention consisting of laymen and 33 lawyers. Every one of the 55 had been born a "natural born subject" of the King and a native of the Empire, 47 having been born in the 13 colonies and 8 in other dominions of the Crown. Since 1708 a British statute had provided that the children of British fathers born outside the Empire were "natural born subjects," and since 1714 a clause of the English Act of Settlement of 1700 had been in effect which disqualified, for life, from all manner of officeholding, all persons born outside the Empire, Although…Naturalized…Except such as are born of "English Parents."

Thus, the legal system in which the 33 lawyers among the framers had been trained, and under which all of them had grown to manhood, contained important statutory enactments characterizing citizens by parentage both as "natural born subjects" and as "naturalized," but assimilating them to natives, rather than to other naturalized subjects, in regard to eligibility to office. To the framers in 1787, there would have been no incongruity in suggesting that a citizen by parentage was both "naturalized" and "natural born"; to them, "native" and naturalized" were the mutually exclusive terms, which never overlapped nor applied to the same person, while "natural born" and "naturalized" did overlap in every case, and only in the case of a citizen by parentage. Moreover, there is some indication in the records of their proceedings that their use of the term "natural born" may have been with deliberate intent to qualify citizens by parentage for the Presidency.

Virginia alone among the 13 colonies attempted a thoroughgoing revision and codification of the English statutes during the Revolutionary period. The Virginia citizenship law of 1779 (authored by Jefferson and Wythe) conferred citizenship by parentage upon Virginian children born abroad. In an amendatory act of 1783, a disqualification from all manner of officeholding was imposed on all citizens who should become such, after birth, through judicial naturalization proceedings, but natives and citizens by parentage alike were exempted from this disqualification. The Virginia acts of 1779 and 1783 thus reproduce, in operation and effect, the British system set forth in the parliamentary acts of 1708 and 1700, respectively, although the Virginia legislation did not employ the words "naturalized" or "natural born" to describe the varieties of citizenship conferred.

The Federal Convention of 1787 debated the qualifications of Representatives and Senators on August 8, 9 and 13, before getting to those of the President. There was a group, spearheaded by Gouverneur Morris of Pennsylvania and Pinckney of South Carolina, who would have favored restraining eligibility to the Senate to "natives," but were willing to compromise at a residence requirement of 14 years. (The most recent immigrant among the eight delegates who were not natives of the 13 colonies, Hamilton, had landed in New York 15 years before.) The Gouverneur Morris-Pinckney faction was opposed by a group of "liberals"—Hamilton, Franklin, Madison and Wilson—who were against any constitutional requirement of a period of citizenship for holding office, and favored leaving the fixings of such requirements to Congress as an incident of its power to establish "an uniform rule of naturalization." The debates were spirited, and resulted in a compromise whereby 9 years' citizenship was required of Senators, and 7 of Representatives, and both requirements were spelled out in the Constitution.

Advocate of confining public office to natives though he was, Gouverneur Morris also favored a proviso which would have imposed these requirements only on citizens thereafter naturalized. Those who supported this saving clause argued that those already naturalized had been granted equality with natives under State laws, and that it would be a breach of good faith for the new Constitution to deprive them of this, even for a limited period. The proviso failed of adoption by only one vote.

Against Foreigners in Government

Meanwhile, on July 25, 1787, John Jay, in New York, had written Washington, as president of the Federal Convention:

"Permit me to hint whether it would not be wise and reasonable to provide a strong check to the admission of foreigners into the administration of our National Government, and to declare expressly that the command in chief of the American Army shall not be given to, nor devolve on, any but a natural *born* citizen." (Underscoring Jay's.)

Jay had been Chief Justice of New York, and was soon to become the first Chief Justice of the United States. Children had been born to him abroad while he, accompanied by his wife, was on diplomatic missions in Spain and France during the War of Independence. Both as a lawyer and as a father his use of "natural born citizen" rather than "native citizen" is significant.

What prompted Jay's "hint"? The very day he wrote Washington, a Connecticut newspaper (the *Fairfield Gazette*) published the text of an anonymous "letter,"

dated Philadelphia, June 19, intimating that the Federal Convention (which was sitting behind closed doors) was concocting a monarchical form of government and planning to invite Prince Frederick Augustus, the second son of George III, to accept an American crown. Jay had seen enough of monarchies in Madrid and Paris; he had no desire to see one established here. As Secretary of Foreign Affairs under the Articles of Confederation, he doubtless heard of the Frederick Augustus rumor even before it was published in the *Fairfield Gazette*. A requirement of natural-born citizenship for our chief magistracy would effectively exclude European princes.

Hamilton, in Philadelphia, got hold of a copy of the "letter" purportedly disclosing the Fredrick Augustus scheme on August 20, and was sufficiently disturbed to write to friends in Connecticut asking who was behind it. They eventually assured him that it was a "fictitious performance," manufactured in their State by a republican Federalist to frighten anti-Federalists into accepting a stronger national Constitution lest a worse fate (monarchy) befall them. Some former Tories, however, had got behind the scheme with sincere support.

At any rate, the framers felt it prudent to "leak" the following unofficial statement to the Philadelphia press, which was published in the *Pennsylvania Journal* on August 22:

"We are informed that many letters have been written to the members of the Federal Convention from different quarters, respecting the reports idly circulating that it is intended to establish a monarchical government, to send for [Prince Frederick Augustus], &c. &c.—to which it has been uniformly answered, 'though we cannot, affirmatively, tell you what we are doing, we can, negatively, tell you what we are not doing—we never once thought of a king.'"

Meanwhile, inside Independence Hall, the framers were attending to the matter. On August 20, Gerry of Massachusetts moved that the Committee of Detail "be instructed to report proper qualifications for the President." On August 22, Rutledge of South Carolina, for the Committee, reported the following: "He shall be of the age of 35 years, and a Citizen of the United States, and shall have been an Inhabitant for 21 years."

This 21 years' residence requirement was an admirable way of excluding European princes, but it also disqualified three of the eight foreign-born among the delegates: Hamilton, McHenry of Maryland, and Butler of South Carolina. Interestingly, Jay's "natural born citizen" suggestion to Washington either was not transmitted by him to the Committee of Detail, or, if it was, was not adopted by it, at this point. (August 22).

Keeping Royalty Out

On September 2, however, Washington wrote Jay thanking him for the "hints contained in your letter" (of July 25), and on September 4, the Committee of Eleven (the drafting committee which succeeded the Committee of Detail) redrafted the presidential-eligibility clause to provide that "no person except a natural born citizen or a citizen of the United States at the time of the adoption of this Constitution shall be eligible," and reducing the residence requirement from 21 years to 14, which would still be adequate to exclude foreign princes, but would restore to eligibility all 55 delegates.

One sees in the "citizen…at the time of the adoption of this Constitution" clause a reincarnation of the saving proviso which Gouverneur Morris (a member of the Committee of Eleven) had favored for Congressmen on August 13. Since the 14 years' residence requirement applied to natives and naturalized alike, there was no defaulting, in respect of those already naturalized, in the States' undertakings that they were to be on a par with natives.

For those born or naturalized *after* the adoption of the Constitution, however, a discriminatory regime was set up. Some would be eligible; others would not be. A line had to be drawn between the two groups. Where? It would have been easy to draw it, in terms, between "natives" and "naturalized." In the debates on Senators' and Representatives' qualifications, the delegates had spoken of "natives" and "native Citizens" 13 times, of "natural born citizens" not once. The latter expression makes its first and last appearance, in their proceedings, in September 4 report of the Committee unanimously and without discussion.

Six of the Committee of Eleven were members of the bar and a seventh had studied law. It is very difficult to account for their adoption of the term "natural born citizen," in preference to the "native citizens" of the floor debates of August 9 and 13, unless they believed the former to be the term which more accurately reflected their purpose.

This leads one to focus attention on the difference in legal meanings between the two terms—as they were understood by minds steeped in the English legal tradition in 1787—and the only difference which such scrutiny reveals is that, whereas all "natives" (except the children of foreign diplomats and invading armies) were "natural born subjects," the converse of this proposition was not true. Some "natural born subjects" were not "natives," and these were none other than foreign-born children of native parentage.

If, as seems very likely, Washington passed Jay's "hint" to the Committee of Eleven and mentioned its source, those who knew of Jay's foreign-born progeny would have an additional reason for thinking of citizens by parentage. As Jay had held the nation's highest post under the Articles of Confederation—President of Congress—such details of his family life must have been matters of widespread knowledge.

In enacting the earliest naturalization law under the new Constitution, the First Congress provided for judicial proceedings for the admission, subsequent to birth of citizenship of individuals of foreign birth and parentage, and declared them simply "citizens." In a separate sentence, it declared that as a class,

"…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."

This clause was inserted in the House of Representatives, at the behest of a member who made specific reference to the English Act of Settlement of 1700 as the precedent Congress ought to follow. The members of the First Congress (of whom 20 had been delegates to the Federal Convention, and 8 members of the Committee of Eleven) thus appear to have been expressing the opinion that citizens by parentage were eligible to the only office (the Presidency) as to which the Constitution had followed the Act of Settlement in imposing a lifelong disqualification. The Act of Settlement had disqualified those born abroad "although…Naturalized…Except such as are born of English Parents"; the Constitution had disqualified everyone "except a natural born citizen." The First Congress thus appears to be expressing the opinion that these two disqualifications were identical in scope.

A question does arise as to whether it is a legislative function to express such an opinion as to the presidential eligibility of citizens by parentage, or whether such a declaration goes beyond Congress's power "to establish an uniform rule of naturalization." In 1795, the Third Congress passed the second naturalization law, which repealed and suspended the 1790 Act. The 1795 Act characterizes the foreign-born children of citizens, along with other nonnatives, who, after birth, are individually and judicially naturalized, simply as "citizens," dropping the "natural born" characterization discriminating the former from the latter which had been in the Act of 1790. The 1795 practice has been followed in subsequent nationality legislation.

While the debates preceding the 1795 enactment are too sketchily reported to clarify why this particular change was made, we do know that Madison was

chairman of the House committee where it was made. By this time Madison had shifted from his early Federalism and broad-constructionism to his later anti-Federalism and strict-constructionism, as appears from his speeches on other features of the 1795 bill; probably this accounts for his deletion of "natural born" from the 1790 text. If so, this means not that Madison thought that the First Congress had been in error in ruling that citizens by parentage were "natural born" and therefore presidentially eligible, but merely that that Congress had acted beyond its delegated powers in making such a ruling.

As a convert to Jeffersonian States' Rightsism, Madison in 1795 may have believed that no federal authority was competent to declare what citizens are "natural born" and therefore presidentially eligible, and that such a function was among the undelegated powers reversed to the several States. Subsequent Supreme Court decisions have made such a doctrine untenable, but a good argument can still be made that, while some branch of the *Federal* Government is empowered to determine this question, Congress is not that branch.

Article III of the original Constitution deals with the "judicial Power of the United States." It does two things with this judicial power: It tells who shall exercise it, and it defines the cases to which it extends. In general, Article III says that the judicial power is vested in the federal courts. It also enumerates, among the cases coming within the scope of the judicial power, "all Cases…arising under this Constitution."

Where the Constitution itself prescribes the qualifications for the office, as it does in the case of the President, Vice President, Senators and Representatives, controversies concerning the existence of such qualifications in a particular individual would clearly seem to be "Cases…arising under this Constitution," and therefore, by the very words of Article III, within the scope of the federal judicial power.

In the case of Senators and Representatives, however, Article III is not the only part of the Constitution which must be considered. There is also Article I, which expressly provides that "Each House shall be the Judge of the…Qualification of its own Members." There is no special clause like this concerning the qualifications of President and Vice President.

In 1929, the Supreme Court had before it a case involving certain exercises of power by the Senate in judging the qualifications of one of its members. The Court held that the power the Senate was exercising was "not legislative but judicial in character" and that, in exercising it, the Senate "acts as a judicial tribunal" whose

jurisdiction over such questions is exclusive, so that such questions cannot be tried in the ordinary federal courts.

In other words, the Supreme Court held that the clause of Article III vesting federal judicial power generally in the federal court system had been overridden by the exception made by Article I's provision that each house should be the judge of its own members' qualifications; this provision, in effect, makes each house a special court for that single purpose. On the other hand, the Supreme Court was careful to assert that the question before the Senate, sitting as a special court, were of a kind to which, in the absence of the special provision in Article I, the power of the ordinary federal courts would extend. That is to say, they were questions which, in their nature, were susceptible of resolution by judicial power.

This is important, because the qualifications of the President and Vice President, as laid down by the Constitution, are of the same type and character as those of Senators and Representatives, as prescribed by the same instrument. On the other hand, as there is no special court created to try controversies concerning the qualifications of the President and Vice President, it follows that these come within the jurisdiction of the ordinary federal courts.

The apprehension has sometimes been voiced that the federal courts, because they refuse to decide "political" questions, would decline to decide whether a given citizen was eligible to the Presidency as a natural-born citizen. In the light of the Supreme Court's reasoning in the 1929 case concerning the qualifications of Senators, and the logical inferences therefrom, I find this contention impossible to accept. A question remains legal, though it has political consequences.

While it would be presumptuous to predict how the federal courts would decide either the question of their own jurisdiction or (assuming a favorable decision on the jurisdiction issue) how they would answer the question which is the title of this article, it is my opinion, based on the reasons above discussed, that the federal courts would assume jurisdiction and would be justified in deciding that American children born abroad are eligible to the offices of President and Vice President of the United States.

No Challenge—No Decision

The question will never be decided by a court, however, unless someone brings it there in a concrete case. Now, it would be possible for a citizen by parentage to be nominated and elected, and serve out his term or two, without the question ever being litigated by anyone.

There are three stages at which someone might challenge such a candidate's eligibility. (1) Before the conventions. Somebody might try to keep his name off the ballot in the presidential preference primary in some State. (2) Between the convention and the meeting of the electoral colleges in the several States. Someone, in some State, might try to prevent his name's going on the ballot which "advises" the presidential electors how the population of the State thinks they should cast the State's vote. Or someone might even attempt to enjoin the electors, although already so "advised," from voting for him. (3) During his term of office. An attempt might be made to challenge the bills signed by him as legal nullities.