

## Correspondence: Letters to the Editor of New York Law Journal

**Emanuel Finkel** of New York, N.Y., wrote a letter titled, “Romney’s Eligibility for Presidency”, published Friday October 20, 1967.

A striking feature of the article on Governor Romney’s eligibility for the Presidency (New York Law Journal, October 17 and 18, 1967), is Professor Blum’s need for more words to explain the phrase “natural born” of Article II than the Founding Fathers required to write an entire constitution that would cover so many aspects of a new nation being launched into history. Your contributor ranges from a Plantagenet-Valois war of high medieval times to the judicial adventures of Wong Kim Ark, a native of California, born in the nineteenth century of parents owing allegiance to the Emperor of China, before concluding, that the framers and those who voted on the constitution did not think of “natural” as meaning “pertaining to nature” and did not intend “born” to signify “brought into the world.”

It requires no citation of authority to assert that the meaning of words should first be sought in every day acceptance. Only rarely should the legislative enactments of another country in bygone centuries be assumed to have been in the minds of the average legislator or voter. When can they be said to have been influenced by what generations unborn would legislate?

Neither the fourteenth century nor the Fourteenth Amendment is required to tell us what the average man in 1787 or in 1967 understood by the expression “natural born citizen.” He reasons that there are two kinds of citizens, those who were so born and those who acquire that status later. A citizen by birth, he readily believes, is eligible for the Presidency unless there is some other requirement not met.

Article II, after reciting that “No Person except a natural born citizen\*\*\*shall be eligible to the Office of President,” does, indeed, go on to add the requirements that “neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”

The men who drafted that article and submitted it to their fellow citizens and to the gaze of posterity well knew the importance of what they were doing. They would have no hereditary king, but they did seek freely elected presidents to guide the country in their times and in the ages to come. Surely, clarity and the prevention of doubts would have been their goal in setting forth the qualifications of the head of state, one who well might have it within his power to help a newborn,

struggling nation grow and prosper or to cause it to weaken and die. Would men who numbered amongst themselves signers of the Declaration of Independence, that model of lucidity and inspirational phrasing, content themselves with a requirement that only antiquarian research would make plain?

The framers considered the possibility of a candidate for President who was born within the country and yet had lived most of his life abroad. They met that with the clear provision for fourteen years' residence in the United States. If their intention was what Professor Blum says, would they not have added a requirement setting forth clearly what they thought?

Let us not amend the constitution by the device of saying that words do not mean what the average person believes them to. Few, indeed, are the sections of the constitution or the legislative enactments that could successfully resist an attack predicated on the theory that speech was given by God to men so that he might conceal his thoughts.

Former judge, of Criminal Court of the City of New York, **Benjamin Gassman**, wrote a letter titled, "On Romney's Eligibility", which was published October 26, 1967.

The article written by Isidor Blum and published in the *Law Journal* is very enlightening, and undoubtedly was brought about by Representative Celler's statement earlier this year in which he raised a question of Governor Romney's eligibility to run for the Presidency. Mr. Blum's article shows considerable research. However, I do not fully concur with his conclusions. Representative Celler's statement pointed out that the Governor was born in Mexico after his parents left the State of Utah and took up temporary residence in Mexico, later returning to the United States whence they took their child with them. No claim is made that the Governor's parents had renounced their United States citizenship. They remained at all times citizens of the United States.

Article 2, section 1, of the United States Constitution provides 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 to the office of president; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident within the United States."

Webster's dictionary defines "natural born" as "native, not alien, as a natural born citizen."

“Every citizen born in the United States and subject to the jurisdiction thereof, becomes at once a citizen of the United States and needs no naturalization” (United States v. Perkins, 17 F. Supp. 177, 180). That proposition is plain. However, is a person born outside of the United States, of parents who are citizens of the United States, considered a “natural born” citizen of the United States? That question has been answered in the affirmative, both by statute and court decisions.

The act of March 2, 1907 (chap. 2534, 34 Stat. 1229) cited by Mr. Blum was the forerunner of section 1401, volume 8, U. S. C. A., which states as follows:

“The following shall be nationals and citizens of the United States at birth: (a) A person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person.”

“A person born in the United States is a citizen thereof irrespective of the nationality of his parents. Conversely, a person whose parents are citizens of the United States inherits their citizenship irrespective of the place of his birth” (Tomasicchio v. Acheson, 98 F. Supp. 166, 168).

It would thus appear that children born outside of the United States of parents who are citizens of the United States become citizens *at birth*.

This principle of law was also enunciated in Lee Bang Hong v. Acheson (110 F. Supp. 48, 49) wherein the court said:

“The plaintiff (Lee Bang Hong) was born in San Chun Village, Chungshaw, Kwantung, China, on July 13, 1934. He is a blood son of Lee Chin Fat, a United States citizen. Lee Bang is a United States citizen by birth by virtue of the fact that he is the son of a United States citizen.”

Doyle v. Town of Diana (203 App. Div. 239, 169 N. Y. S. 864) was a taxpayer’s action to restrain the levying of taxes for the erection of a memorial to the soldiers and sailors of the town. The proposition to erect the memorial was carried by one vote. On the trial, the right to vote of one Eliza Weed was challenged on the ground that she was not a citizen. In upholding her right to vote, the Appellate Division, Fourth Department, said:

“The right to Eliza Weed to vote is challenged upon the ground that she was not a citizen. It appears that she was born in Canada. She was never naturalized, but it appears that her father was a citizen of the United States\*\*\*. Her father being a

citizen of the United States, she was likewise a citizen thereof, although born in Canada.”

In Governor Romney’s case, his parents were both citizens of the United States. They moved from the State of Utah into Mexico and the Governor was born in Mexico. At no time have the elder Romneys renounced their United States citizenship. They later returned to the United States. It is my opinion that under the circumstances, Governor Romney is a “natural born citizen” of the United States, eligible to run for the Presidency.

Because the question of eligibility was raised, I agree with Representative Celler that this question should be determined and all doubt laid at rest prior to the Republican National Convention. This may possibly be done by an action for a declaratory judgment brought under title 28 U. S. C. A., section 2201, provided that there is present a controversy or a justiciable case. Mr. Blum pointed out in his learned article that a controversy or a justiciable case would exist, giving the federal courts jurisdiction “if the Secretary of State (of New Hampshire) were to reject a petition nominating Governor Romney (as a candidate in the primaries of that State) or if another candidate were to seek to exclude his name from the ballot.” Such an eventuality would certainly give rise to a declaratory judgment action which would settle the question raised once and for all.

**Howard N. Meyer** of Rockville, N. Y. wrote a letter concerning President Johnson’s eligibility titled “Johnson’s Eligibility” on October 26, 1967.

Professor Blum’s essay on the eligibility of Gov. Romney is most provocative. It brings to the surface a serious question that I long have entertained: The acquisition of the territory now known as the State of Texas was entirely illegal, the fruit of a war of aggression only recently (1962) characterized by the then Attorney General as an episode of which we cannot be proud.

Accordingly, since that region is not legally a part of the United States, the present incumbent is, and has been, ineligible.

**Osmond K. Fraenkel** of New York, N. Y., titled his comment letter to the Editor, “Challenge on Presidency”, and it was published November 3, 1967.

On behalf of Governor Romney it is, no doubt, contended that anyone who, at the moment of his birth is an American citizen should be considered eligible. Much could be said in support of this construction of the words “natural born” contained in Article II, section 1, of the constitution but for the language employed in section 1 of the Fourteenth Amendment. There a distinction is made between persons born “in” the United States and those naturalized.

The argument that the Act of Congress (8 U. S. C. 1401) should be deemed a naturalization statute runs up against the fact that it operates automatically and confers citizenship on the children born abroad of native born or naturalized Americans “at the time of their birth.” It requires no co-operation by the person so born abroad except only when he continues to reside abroad until he becomes eighteen. As that was not the case with Governor Romney, that proviso is inapplicable.

But a dilemma exists if, as has been said, the Fourteenth Amendment defines the only way by which citizenship can be obtained (see *United States v. Wong Kim Ark*, 169 U. S. 649 at 702): birth in the United States or naturalization. If that is a sound exposition of the amendment, then it would seem to follow that any statute which attempts to confer citizenship on anyone not born *in* the United States must, to be constitutional, be considered a naturalization statute, regardless of its automatic operation at birth. If so, then children born outside the United States cannot be considered “natural born.” And then Mr. Blum is correct in declaring Governor Romney ineligible.

How this issue could be presented to a court raises quite other problems. I agree with Mr. Blum that no one could raise the issue except another candidate—most easily in a primary election. But it is unlikely that anyone would try on account of the possible political backfire.

But there is another possibility—that if Romney were elected, a defeated candidate might challenge the result. He would certainly have standing, since he would be one of the persons eligible for consideration by the House of Representatives should Romney be declared ineligible. For then the House, under the Twelfth Amendment, could select from the three persons “having the highest numbers” (is. e., of electoral votes), leaving out the winner, whose majority would then disappear.

Ordinarily, there would be only one such person, since it has seldom happened that electoral votes were cast for any except the candidates of the two major parties. But it has happened twice recently; in 1956 one Walter B. Jones received one vote;

in 1960 Senator Harry F. Byrd received fifteen. Theoretically, therefore, if some minor party candidate or individual favored by an elector received even one vote, that person might be elected President by the House!

On November 3, 1967, a comment letter was also printed written by **William Sondericker** of New York, N. Y., who titled that letter, "Straight-Jacket Approach".

Professor Blum's polemic on Governor Romney's presidential disability, while interesting, erudite and intellectually persuasive, reminds me of those who still argue today that Congress in adopting the Fourteenth Amendment in 1868 never intended a result like that achieved through *Brown v. Board of Education* in 1954 (347 U. S. 483).

They would revert to the straight-jacket approach exemplified by the decision in *Plessy v. Ferguson* (163 U. S. 537, 1896), rather than the dynamic attitude taken by Mr. Justice Harlan in his dissent in that case and the view of Justice Cardozo, who looked upon the constitution not merely as a body of rules for the present, but as principles for a progressive future.

Consider also, the following opposing views:

"It [the constitution] speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court and make it the mere reflex of the popular opinion or passion of the day." [Chief Justice Taney in the *Dred Scott Case*, 19 Howard 393 1857].]

Versus

"The subject is the execution of those great powers on which the welfare of a nation essentially depends. ...This provision is made in a constitution intended to endure for ages to come and consequently, to be adapted to the various crises of human affairs." [Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheaton 316 (1819).]

"We read its [the constitution's] words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the

constitution as a continuing instrument of government.” [Chief Justice Stone in *United States v. Classic*, 313 U. S. 299 (1941).]

In the latter light “natural born Citizens” as used in Article II, section 1, of the constitution should be construed to encompass today not only a native, born within the territorial limitations of the country, but also a citizen born outside the United States of American parents. This would be realistic and consistent with the existing American law regarding “nationals and citizens” since a person within the latter class need not go through naturalization procedures to attain such status.

If Governor Romney were held disqualified by Article II, section 1, it would lead to the anomalous result of holding him a national and a citizen of the United States at birth who was neither naturalized nor expatriated by any affirmative act, yet not a natural born citizen within the meaning of the constitution.

“Who also hath made us fit ministers of the new covenant: not in the letter, but in the spirit: for the letter killeth, but the spirit giveth life.” [2 Cor. 3:4-9.]

**Emanuel Finkel** of New York, N. Y. started this correspondence of the articles concerning the eligibility of Governor Romney to the Presidency. He ends with this letter titled “*Presidential Eligibility*”, a response to a letter from Howard N. Meyer.

The dimensions of the rather scholarly discussion of Governor Romney’s eligibility for the Presidency were remarkably extended by the publication of Howard N. Meyer’s letter in your issue of October 26, 1967. Your correspondent started from a premise which some may consider a conclusion that the status of Texas in our federal union is “entirely illegal, the fruit of war of aggression.” Any difficulties in proof are met by quoting an Attorney General who said that the war referred to is “an episode of which we cannot be proud.” Lack of pride must be equal to illegality, for the writer then concluded that since President Johnson was born in improperly acquired territory he always was and still remains ineligible for the Presidency.

Before banishing our Chief Executive from the Potomac to the Pedernales, let us recall that the war with Mexico—referred to by Mr. Meyer—did not bring about the admission of Texas to the United States. That was done in December, 1845, at a time when peace prevailed.

It was not until May, 1846, that hostilities broke out that were ended almost two years later by a treaty by which Mexico ceded territory which had the Rio Grande

as its eastern boundary. Since all Texas lies to the east of that river, let us readmit it to the union and renaturalize President Johnson. It is apparent that he has just escaped being declared a de jure citizen of our sister republic and thus more properly a candidate for its President than for ours.

But the matter cannot be laid to rest so easily. Mr. Meyer may well point out that the Treaty of Guadalupe-Hidalgo that ended the war ceded us a vast territory that is now Arizona, New Mexico, California, Nevada, Utah and part of Colorado. Adopting his view that a period of 119 years of quiet enjoyment (disturbed but briefly by Poncho Villa's raids) does not overcome original illegality. Richard Nixon, a prominent professional brother of ours, may be required to forego Presidential ambition, since he is a native of California, an important part of the acquisition from Mexico.

It is unfortunate that Mr. Meyer "long entertained" his interesting view before making it better known. The passing of time has made it possible for the statute of limitations to be raised as a defense in an action to recover from Mr. Nixon the salary he received in the eight "illegal" years he served as Vice-President, a position for which the requirements are the same as those for the Presidency.