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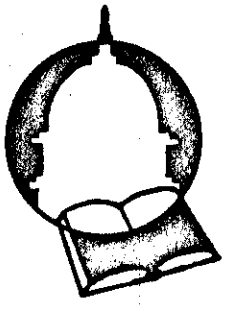
THE NATURAL BORN CITIZEN QUALIFICATION FOR THE OFFICE OF PRESIDENT: Is George W. Romney Eligible? 1968



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PREFACE

From time to time there emerges upon the political scene a potential candidate for the office of President who was born outside the United States of parents who were citizens of the United States at the time of his birth. The appearance of such a potential candidate gives rise to questions about his eligibility for the office in the light of the constitutional requirement that the president be a "natural born citizen".

In the past questions were raised about the eligibility of, among others, the late Governor Christian A. Herter, who had been born in Paris, France, and of Franklin D. Roosevelt, Jr., who was born on Campobello Island in Canada. Now similar questions are being raised about the eligibility of Governor George W. Romney, who was born in Mexico. The New York Law Journal late last year, for example, published a two-part article by Isidor Blum, which argued that Governor Romney was not a "natural born citizen" and another article by Eustace Seligman, which argued that he was.1/ There is no definitive answer to these questions, nor can there be one unless and until the United States Supreme Court decides them.

1/ These articles are reproduced in a separate paper by this Service (424/225; A-224). The New York Law Journal is a daily legal periodical published in New York City; Mr. Blum, an attorney, is its Contributing Editor. Eustace Seligman, a senior partner in the New York law firm of Sullivan & Cromwell, was a director of American Motors Corporation when Governor Romney was president, and is New York counsel for the company. Additional sources for material on these questions are set out in an Appendix to this paper.

It is the purpose of this paper to discuss the provisions of the Constitution and laws of the United States which might be considered by the Court in reaching a decision on the eligibility for the presidency of a person born abroad of an American parent or parents, with particular reference to the circumstances of Governor Romney's birth and the statutes in effect at the time, as well as other possibly pertinent statutes heretofore or thereafter in effect.

There is no doubt that Congress, by appropriate statute, may constitute any person a "citizen at birth", that is, one who is a citizen solely by virtue of the circumstances of his birth; illustrative statutes are referred to herein. There would seem to be no doubt, either, that by virtue of one such statute, Governor Romney has been a citizen from the moment of his birth. The critical question, however, is whether, in all instances, one who is made by statute a citizen at and from his birth is, because of that alone, a "natural born" citizen within the meaning of the constitutional requirement. "Citizen at birth" and "natural born" citizen are not necessarily synonymous. Did the Framers have in mind that only one class of persons might properly be regarded as "natural born citizens"? If so, what was this class? Or did they contemplate that the Congress, by appropriate statute, might thereafter, and from time to time, give specific and possibly varying meanings to that phrase; just as Congress may from time to time, make provision for who may become, or are to be considered as, citizens. If the meaning of the term, as intended by the

Framers, can be modified only by a Constitutional Amendment, did the Fourteenth Amendment have any such effect? As indicated, the answers to these questions, in the view of some, are not free of doubt.

The Factual Background

George W. Romney was born in Colonia Dublan, Chihuahua, Mexico, on July 8, 1907.[2] His father, Gaskell Romney, a member of the Mormon Church (Church of Jesus Christ of Latter Day Saints), had been born in St. George, Utah, on September 22, 1871. When polygamy, then practiced by the Mormons, was outlawed in 1885, Gaskell's father, Miles Park Romney, was living in St. Johns, Arizona, with three of his wives and their children. "Overnight he was reduced from the leading citizen of the community to a hounded and hunted man. He and others in the same plight sought asylum in Mexico."[3] The head of a Mormon mission in Mexico, Helaman Pratt, obtained permission from Mexican President Diaz for Miles Park Romney and other Mormon refugees to establish colonies in Mexico.

Gaskell Romney, George's father, was fourteen when he left Arizona, with his father, to live in Mexico. After about eight years there, he spent a year at college in Salt Lake City, then returned to Mexico and married Anna Amelia Pratt, a daughter of Helaman Pratt, on February 20, 1895. Mahoney does not mention where or when Miss Pratt was born but it is assumed that she too was an American citizen.[4] From about 1900 to 1902

2/ The Source of this information, as well as all that follows about the background of Romney's birth, is The Story of George Romney by Tom Mahoney (Harper and Brothers, N.Y. 1960) pp. 48-63.

3/ Mahoney, p. 51

4/ Mahoney states that Romney's parents "had retained their American citizenship". p. 53

Gaskell was assigned to a Mormon mission in Pennsylvania and New York while his wife and two children remained in Mexico. After completing his missionary tour, Gaskell Romney returned to Colonia Dublan where he became a successful furniture maker, house builder and door manufacturer. It was there that his fourth son, George Romney, was born on July 8, 1907.

George Romney arrived in the United States at the age of five when his family fled Mexico before a rebel uprising. He did not return thereafter to Mexico to live.

The Statutory Law in 1907

When George Romney was born in 1907, there were two significant statutes in effect. The first, R.S. Sec. 1993 (1875), provided that:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

If Gaskell Romney was born in the Territory of Utah in 1871 and did nothing prior to July 8, 1907 to cause him to lose the citizenship he had acquired by the fact of his birth in the United States, then his son, George Romney, though born in Mexico, was a United States citizen from the moment of his birth by reason of the operation of this statute. There can be no question about this conclusion.

The second statute affected the status of children born abroad to a United States citizen father and provided:

> That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intentions to become residents and remain citizens of the United States and shall further be required to take the oath of allegiance to the United States upon attaining their majority. Act of March 2, 1907, Section 6, 34 Stat. 1228 1229.

Since George Romney had left Mexico for the United States at the age of five and never thereafter returned to live in Mexico, this second statute imposed no duties upon him to do anything to retain the citizenship he had acquired through his father.

It might seem quite logical to argue that anyone who is a citizen from the moment of his birth is "natural born" citizen, eligible to be President. Before a court reached this conclusion, however, it would certainly look at the constitutional provisions to determine if they supported the conclusion.

The Constitutional Provisions

Article II, Section 1, clause 5 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 ... been fourteen Years a Resident within the United States.

The term "natural born citizen" is used nowhere else in the Constitution and is nowhere in it defined. The word "citizen" is used several times, as in the statement of qualifications of Representatives and Senators, and in the delineation of the scope of the judicial power of the United States, in each instance, without any definition.

The proceedings at the Constitutional Convention throw no light on the meaning of the term "natural born citizen".

Article I, Section 8, clause 4 confers upon Congress the power "To establish an uniform Rule of Naturalization", but the word "naturalization is nowhere defined.

Amendment XIV, Section 1 provides, among other things, that:

> 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.

If it were called upon to determine whether George Romney was eligible to be President, it would be primarily to these constitutional provisions and the statutes in operation at the time of his birth that the Court would look, though it might find it necessary also to examine other citizenship statutes as well as the common law of England, "the principles and history of which were familiarly known to the framers of the Constitution".5/

5/ United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898).

Natural Born v. Naturalized

Whatever else can be said about the meaning of the term "natural born", it can fairly be concluded that it includes no one who is "naturalized". To conclude that Governor Romney was a "natural born citizen", the first thing the Court would have to do is hold that the Fourteenth Amendment does not exhaust the ways in which persons can become citizens. As we have seen, the first sentence of that Amendment provides that "All persons born or naturalized in the United States" are citizens. If that sentence describes the only ways persons can become citizens, then, to be a citizen, anyone born outside the United States would have to be naturalized. There is no other constitutional alternative. Under this theory, the statute making citizens of children born abroad to American fathers would be a naturalization act and such children would not be eligible for the presidency.

The Supreme Court, in dictum, has lent support to this theory. In Wong Kim Ark,[6/] the Court said:

> The Fourteenth Amendment of the Constitution, in the declaration that "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", 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

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6/ Id. at 702-03.

> 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 can only become a citizen by being naturalized, either by treaty, as in the case of annexation of foreign territory; or by authority of Congress, exercised either by declaring certain 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 tribunals as in the ordinary provisions of the naturalization act. [emphasis added]

It must be emphasized that this observation of the Court is simply a dictum because not necessary to its holding. What the Court held was that Wong Kim Ark, who was born in San Francisco in 1873, was a citizen of the United States at birth in virtue of the Fourteenth Amendment, despite the fact that his parents were of Chinese descent and subjects of the Emperor of China, it being agreed that they were not employed in any diplomatic or official capacity under the Emperor. The dictum may be somewhat strengthened, however, by a 1961 holding of the Court that, in 1906 "R.S. Sec. 1993 provided the sole source of inherited citizenship status for foreign-born children of American parents".7/ While far from conclusive, this may be said to constitute at least an implied rejection of any independent constitutional source of inherited citizenship.

"Natural Born" at Common Law

If the Court should find that the Fourteenth Amendment does not exhaust the ways in which persons can become citizens, and there

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7/ Montana v. Kennedy, 366 U.S. 308, 312 (1961)

would seem to be little evidence in the record that the Congress which proposed the Amendment thought about the problem one way or the other, the Court would then try to ascertain what the Framers meant when they used the term "natural born citizen". This would bring them to an examination of the English common law because "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history".8/

The authorities disagree about who were natural born citizens at common law as the Framers understood that law. Before considering the different views, however, perhaps one observation should be made. If the Fourteenth Amendment does not confine the class of natural born citizens to those born in the United States and subject to its jurisdiction, then the scope of the class would seem to have been fixed by the intent of the Framers and it is arguable that no Act of Congress could either enlarge or diminish it. If it could be established, for instance, that one principle of common law familiarly known to the Framers was that a person born abroad was a natural born citizen only if both his parents were citizens, an Act of Congress making a citizen at birth a person born abroad whose father was a citizen even if his mother was an alien, though constitutional, could not have the effect of

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8/ Smith v. Alabama, 124 U.S. 465, 478 (1888)

making such person a natural born citizen eligible for the presidency. And if the common law, as the Framers knew it, made a person born abroad a natural born citizen if either of his parents was a citizen, a child born abroad of a citizen mother and an alien father would be eligible for the presidency even if no act of Congress made such persons citizens at all. As Mr. Chief Justice Marshall has said: "It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it ... . It is emphatically the province and duty of the judicial department to say what the law is."9/

Ascertaining what the Framers understood to be the common law meaning of "natural born citizen" is an exhausting exercise in legal history which others have done with varying results.10/ For the purposes of this paper, it is enough to state that in order to say what the law is, the judicial department will have to decide whether at common law in 1787 the term "natural born citizen" was limited only to those persons born

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9/ Marbury v. Madison, 1 Cranch (5 U.S.) 137, 176.

10/ See Appended Bibliography.

in the United States and subject to its jurisdiction or whether it included as well some or all of the following classes of persons born abroad (and possibly other classes):

1. Both of whose parents are citizens;
2. Either of whose parents is a citizen;
3. Whose father is a citizen;
4. Whose parental status falls in 1, 2, or 3, with the additional requirement that one or the other of the citizen parents be abroad in the diplomatic or military service of the Government.

The decision will depend largely upon whether the common law encompassed only the unwritten law of England or included some of its statutes as well.

Development of the Statutes Providing Derivative Citizenship

One of the classical aids in construing constitutional terms is the meaning given them by the legislature. A legislative construction is especially significant if it is contemporaneous with the adoption of the constitutional provision. There was such a contemporaneous legislative construction of the term "natural born citizen".

The first Naturalization Act of March 26, 1790 (less than two years after the adoption of the Constitution) contained, among other things, the following provision:

> 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 ... .11/

This kind of legislative definition of the term "natural born citizen", ambiguous though it is since it does not make clear whether both parents must be citizens or whether it is sufficient if either parent be a citizen, would ordinarily be entitled to great weight in the deliberations of the Court because it was enacted so soon after ratification of the Constitution. At best, however, legislative definitions of constitutional words and phrases are but opinions about their meaning and as the Court has stated: "These opinions of course are not binding on the judicial department, but they are always entitled to high respect".12/ Judicial respect for this 1790 congressional determination of "natural born citizen" may be somewhat dimmed because less than five years after it was adopted, it was altered. In 1795, the language of the earlier provision became: "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".13/

11/ Act of March 26, 1790, 1 Stat. 103, 104.

12/ The Propellor Genessee Chief v. Fitzhugh, 12 Howard 443, 458 (Dec. term 1851)

13/ Act of Jan. 29, 1795, 1 Stat. 414, 415.

The words "natural born", preceding "citizens", were eliminated. The debate on the 1795 bill as recounted in Volume 4 of the Annals of Congress, however, gives no clue as to the reason for their elimination.

More important, perhaps, than this change or even the reason for it, if one could be found, may be the fact that from time to time thereafter, the statutes defining, or conferring, derivative citizenship have undergone other changes and that for a period of more than fifty years many persons born abroad of American parents were without benefit of any statute conferring derivative citizenship upon them.

There was a provision in the Act of April 14, 1802, that:

> ... 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: ...14/

Taken literally, this statute does not confer derivative citizenship upon children born abroad of parents who became citizens, whether by birth or otherwise, after April 14, 1802. It was not until February 10, 1855, after scholars had questioned whether such children were citizens at all, let alone natural born citizens, that Congress acted to correct the situation. At that time it was provided, with retroactive effect;

> That persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers are or shall be at the time of their birth

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14/ 2 Stat. 153, 155

> citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States ... .15/

While the earlier statutes had dealt with "children of citizens" this one deals with "persons ... whose fathers are ... citizens". Let it be assumed that the Act of 1790, defining natural born citizens, was declaratory of the common law and required that both parents of the child born abroad be citizens in order to make him a natural born citizen. Let it be assumed, also, that this 1855 Act, which is substantially the same as the law in force at the time of Governor Romney's birth, intended to make a child born abroad a natural born citizen if his father was a citizen, regardless of the citizenship status of his mother. The question then arises whether Congress has the constitutional power to enlarge the class and make someone eligible for the presidency who had not theretofore been eligible. And if it be assumed that the 1790 Act made a child born abroad a natural born citizen if either of his parents was a citizen, then the question becomes can Congress, by this 1855 Act, make someone ineligible for the presidency, namely, a child born abroad of a citizen mother and an alien father, who had theretofore been eligible. There is no doubt about the power of Congress to make

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15/ 10 Stat. 604

anyone at all a citizen, either from birth or some later date. The only question is about the extent of its power to make someone a "natural born" citizen.

Even since Governor Romney was born, the statutes dealing with derivative citizenship have undergone several changes. At the present time, persons born outside the United States are "citizens of the United States at birth":

(a) if both parents are citizens of the United States and one of them had a residence in the United States or its outlying possessions prior to the birth;

(b) if either parent is a citizen who has been physically present in the United States or one of its outlying possessions for one year prior to the birth and the other parent, though not a citizen, is a national of the United States;

(c) if one parent is an alien and the other a citizen who has resided in the United States or an outlying possession for at least ten years prior to the birth, five of which are subsequent to age fourteen and periods of honorable service in the United States Armed Forces may be counted against the residence requirements, provided also that the person comes to the United States before he reaches age 21 and remains for a continuous period of five years, provided also that the period of residence begins after age fourteen and is completed before age twenty-eight.

These and other ways of acquiring derivative citizenship are to be found at 8 U.S.C. 1401 and 1401a.

It should be noted that under existing law, some people, born abroad, who would have been citizens at birth under the law in effect at the time of Governor Romney's birth are not made citizens at all, e.g., children of alien mothers whose fathers, though citizens, had resided in the United States for less than ten years prior to the birth of the child. Others are made citizens at birth now who would not have been citizens at all at the time Governor Romney was born, e.g., a child of an alien father and a citizen mother who had resided in the United States for at least ten years prior to the birth.

The purpose of setting forth these successive changes in the derivative citizenship statutes is not to determine who was or was not a natural born citizen at any moment in our history, if citizens at birth are to be equated with natural born citizens. The purpose, rather, is to show that, if the 1790 Act defined the class of what the Framers understood to be natural born citizens, subsequent statutes have at times enlarged and at other times contracted the class. Because there has been no consistent interpretation of the constitutional term by the Congress, even its contemporaneous 1790 interpretation may not be considered controlling by the Court. And as simple as the solution might seem, it is questionable whether the Court would conclude that a natural born citizen is anyone whom Congress, by law, makes a citizen at birth.

It must be remembered that under its plenary naturalization power there may be no limit to the categories of persons Congress may make citizens at birth.

Summary

There is no one judicial opinion, nor any combination of them, which can be said to define the term "natural born citizen". Although the Court has often discussed its meaning, any statements it has made have been dicta because the term "natural born citizen" could be at issue only in a case challenging the eligibility of a person to hold the office of President. There can be no doubt, however, that the final word on the meaning of the term belongs to the Court.

If it should be called upon to interpret the term, perhaps the first thing at which the Court will look is the Fourteenth Amendment. It could find that the Fourteenth Amendment, whether it is simply declaratory of, or alters, the understanding of the Framers, makes anyone born outside the United States a non-citizen unless naturalized, even if naturalization be accomplished by a statute making him a citizen at birth. If it made this finding, there would be no need for the Court to look further. No one born outside the United States would be eligible for the presidency.

If the Court finds that the answer turns, not upon the Fourteenth Amendment, but upon the common law meaning of "natural born citizen", it could adopt the theory that the common law embraced only the unwritten law of England and that, under the unwritten law, natural born citizens

included only those born in the realm and subject to the King's allegiance, with the possible exception of those born of citizen parents who were abroad on the diplomatic or military service of the King. Under this theory, Governor Romney would not be a "natural born citizen". On the other hand, it could adopt the theory that the common law included those statutes of England not inconsistent with the Framers' notions of law as expressed in the Constitution. Under this theory, it could hold that Governor Romney was a "natural born citizen" eligible for the presidency.

Finally, it could reach the most simple, but perhaps least likely, conclusion that anyone Congress makes a citizen from the moment of birth is a "natural born citizen" eligible to be President.

There would seem to be no doubt that the statute in existence at the time made Governor Romney a citizen from the moment of birth.

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1. Binney, Horace. The Alienigenae of the United States. 2 American Law Register 193-210 (1854).

This Article, pointing out that, under the statute then in effect, the only children born abroad who were United States citizens were those whose parents were citizens on or before April 14, 1802, led to the enactment of a new statute in 1855 which made children born abroad citizens if their fathers had been citizens at the time the children were born and had, at some prior time, resided in the United States.

2. Blum, Isidor. Is Gov. George Romney Eligible To Be President? Parts 1 & 2. The New York Law Journal, Oct. 16 & 17, 1967 p. 1.

"The answer would seem to be that he is not a natural born citizen, but is a naturalized citizen." Oct. 16 p. 1.

3. Freedman, Warren. Presidential Timber: Foreign Born Children of American Parents. 35 Cornell Law Quarterly 357-66 (1950).

"It is submitted that a foreign born child of American parents can rightfully aspire to the position of President and hold such high office in accord with the eligibility requirements laid down both under common law principles and the entire body of statutory law." (p. 357).

4. McElwee, Pinckney G. Natural Born Citizen. Extension of Remarks of John Dowdy. 113 Congressional Record [Daily Ed. June 14, 1967]: H7255-60.

The author finds "no proper legal or historical basis on which to conclude that a person born outside of the United States could ever be eligible to occupy the Office of the President of the United States". (p. H7260).

5. Morse, Alexander Porter. Natural Born Citizens of the United States - Eligibility for the Office of President. 66 Albany Law Journal 99-100 (April 1904).

"The question is often asked: Are children of citizens of the United States born at sea or in foreign territory, other than offspring of American ambassadors or ministers plenipotentiary, natural born citizens of the United States, within the purview of the constitutional provision? After some consideration of the history of the times, of the relation of the provision to the subject-matter and of the Acts of Congress relating to citizenship, it seems clear to the undersigned that such persons are natural born, that is, citizens by origin; and that, if otherwise qualified, they are eligible to the office of president." (p. 99).

6. Seligman, Eustace. A Brief for Gov. Romney's Eligibility for Presidency. New York Law Journal, Nov. 15, 1967, p. 1.

"Since Governor George Romney was a United States citizen by blood from birth, he is a natural born citizen and therefore eligible to be President". p. 1.