NATURAL BORN CITIZENSHIP

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THE LAW BEFORE THE AMERICAN REVOLUTION

NATURAL BORN SUBJECTS

British colonization of North America began in 1607, when Englishmen established a permanent settlement in Jamestown, Virginia. The following year, the Court of King's Bench in England ruled in *Calvin's Case* that persons born within the realm of England became natural born subjects of the King, even if their parents were aliens. That ruling, of course, applied to anyone born in the American colonies, which were officially part of the realm.

In fact, this was one cause of the American Revolution: The inhabitants of the Colonies correctly considered themselves to have the same rights as all other British subjects, except that they weren't represented in Parliament. They felt they were treated as second-class subjects.

BLACKSTONE'S COMMENTARIES

Many of the Framers of the Constitution of the United States of America were lawyers. Before the Revolution, lawyers were trained in the common law of England. Just a few years before the Revolution, an authoritative treatise describing both the broad outlines and the particulars of English common law was published: *Blackstone's Commentaries*, published in four books between 1765 and 1769.

The first of those books, The Rights of Persons, contained a brief statement defining the term natural born subjects:

> "The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it ...
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> "Allegiance, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth." *Blackstone's Commentaries*, Book 1, Chapter 10.

The *Commentaries* are widely acknowledged to have had a strong influence on the development of American law; they were the most influential compilation of British common law available at the

time of the Constitutional Convention. Many common law concepts were incorporated into the Constitution, such as "habeas corpus," "trial by jury," "due process," "ex post facto," and others.[1] Every lawyer in the American colonies was taught that being born in the colonies gave one the status of natural born subject. It was a phrase with a specific meaning in English jurisprudence.

JUS SOLI AND JUS SANGUINIS

Jus soli and *jus sanguinis* are Latin phrases describing alternative sources of a person's citizenship. As explained by Polly Price of Emory University School of Law:

> "*Calvin's Case* led to what is today known in international law as the *jus soli*, the rule under which nationality is acquired by the mere fact of birth within the territory of a state. The other great rule for assigning nationality at birth, the *jus sanguinis*, is identified with the civil law. It holds that, regardless of the place of birth, nationality is acquired by descent following the status of at least one parent (usually the father). The United States, Great Britain, and many Latin American countries traditionally have favored the *jus soli* over the *jus sanguinis* as a rule for acquisition of citizenship by birth. By contrast, the *jus sanguinis* has been the favored rule in almost all European nations. " Price, Polly J. (1997) "Natural Law and Birthright Citizenship in Calvin's Case (1608)," Yale Journal of Law & the Humanities, Volume 9, Iss. 1, Article 2.

Thus, any child born within the borders of the United States obtains citizenship at birth by virtue of *jus soli* (this is further explained below in the discussion regarding *U.S. v. Wong Kim Ark*). However, children born outside the United States, if born to U.S. citizens, can also obtain citizenship at birth by virtue of *jus sanguinis*. Ms. Price explains:

> "No nation relies exclusively on one of these principles to determine who is a natural-born subject or citizen. In Britain, even before *Calvin's Case*, various acts and proclamations provided that a child born out of the territory of England could also be a natural-born subject, as long as the child's parents owed allegiance to the sovereign of England. This is an example of the *jus sanguinis* operating alongside the *jus soli*. In the history of both Britain and the United States, the *jus sanguinis* has always been established by statute, never by judge-made law." *Id.*

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[1] See, e.g., Stoner, James, Why You Can't Understand the Constitution Without the Common Law, (Library of Law and Liberty, 2012). *Stare decisis* and many of the tenets of property law also derive from the English common law. Note that while the Constitution included many concepts taken from the common law of England, the United States has no federal common law.

> "There is, however, one clear exception to the statement that there is no national common law. *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.* The code of constitutional and statutory construction which therefore is gradually formed by the judgments of this Court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority." *Smith v Alabama*, 124 U.S. 465 (1888), citing Moore v. U.S., 91 U.S. 270 (1875) (emphasis added).

This distinction is crucial to a full understanding of the "natural born citizen" clause. A child may become a natural born citizen by virtue of birth alone (*jus soli*), if born within the borders of the United States. The source of this citizenship is the common law. Additionally, a child born outside the United States may become a natural born citizen, if authorized by federal statute (*jus sanguinis*), if one or both parents are United States citizens.

VATTEL'S "THE LAW OF NATIONS"

Some claim that the definition of the natural born citizen clause was derived from Emer de Vattel's "Law of Nations," a treatise on international law published in French in 1758. They say that §212 of Book 1 of The Law of Nations is correctly translated as follows:

> The natives, or natural-born citizens, are those born in the country, of parents who are citizens.

This would appear to require both *jus soli* and *jus sanguinis*. However, there are four main objections to considering this the law of the United States of America:

1. Vattel did not refer to any English statute. To the extent his formulation is an expression of common law, it did not comport with the English common law definition of natural born subjects. Indeed, in §214, Vattel expressly stated that the law of England differed.

2. There is some authority for claiming that that there are other, more accurate translations of §212. In French, the sentence read:

   Les Naturels ou indigènes font ceux qui font nés dans le pays de Parens Citoyens.

   In fact, there was no English edition of Law of Nations that translated the word *indigènes* as 'natural born citizens' until 1797, ten years after the Constitution was written.[2] A French attorney has suggested that the word *indigènes* is not properly translated as 'natural born citizens' but rather 'natives' (*indigènes,* of course, is the root of our word 'indigenous'), and also that "*Parens*" does not translate to "parents," but to "blood relatives".[3]

3. In any event, since the phrase "natural born subjects" was a common law term of art which was clearly defined in the English common law, it makes no sense that the Framers would adopt a definition of that term from a Swiss citizen that contradicted that common law.

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[2] Obama Conspiracy Theories, "*De Vattel: Revisited*" (2009) http://www.obamaconspiracy.org/2009/05/de-vattel-revisited/

[3] Obama Conspiracy Theories, "*The Translation of Vattel from the French*" (2011) http://www.obamaconspiracy.org/bookmarks/fact-checking-and-debunking/the-translation-of-vattel-from-the-french/

4. No American court decision has ever relied upon Vattel in construing the natural born citizen clause. Vattel's definition is mentioned in passing by the dissent in *Wong Kim Ark* as we shall see below, but that definition was rejected by the majority.

Thus, there is no evidence to support the idea that the Framers of the Constitution adopted a definition of the phrase "natural born citizens" that directly contradicted the English common law, when all the rest of the Constitution was written in conformance with English common law concepts.

ARTICLE II OF THE U.S. CONSTITUTION

The Constitutional Convention ran from May 25 to Sept. 17, 1787; almost four full months. There were many contentious issues discussed during those months, all of which were fully documented by James Madison in his *Journals of the Constitutional Convention*.[4] However, the wording of Section 1 of Article II, describing the qualifications to serve as President, was not an issue recorded in the *Journals*.

> "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 to the Age of thirty-five Years, and been fourteen Years a Resident within the United States."

We know little about any discussion of the "natural born Citizen" clause, compared with other, more controversial clauses in the Constitution. Our only real source of information is a letter written by John Jay to George Washington on July 27, 1787, while the Convention was proceeding. Jay wrote:

> "Permit me to hint, whether it would not be wise and seasonable 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."

Of the various committees within the Convention, the Committee on Detail had proposed that the President should be required to be a citizen (and a resident of the country for at least 21 years), but after receiving Jay's letter the Committee of Eleven changed "citizen" to "natural born citizen" without further recorded explanation.[5] However, the lawyers at the Convention (35 of the 55 delegates were lawyers or had legal training) would have instantly recognized the formulation as

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[4] Madison, James, The Journals of the Constitutional Convention, 1787.

[5] Han, William. "Beyond Presidential Eligibility: The Natural Born Citizen Clause as a Source of Birthright Citizenship", *Drake Law Review*, Vol. 58, No. 2, 2010, pp. 462–463.

being identical to “natural born subject” except that the members of the new republic were to be citizens, not subjects of any monarch.

JOHN CHARLES FRÉMONT

The very first presidential nominee of the Republican Party, in the election of 1856, was John Charles Frémont. His father was a French immigrant who never became a naturalized U.S. citizen. It was widely known that his father was a Frenchman (Frémont was famous as "The Pathfinder" due to his explorations of the Southwest U.S.), but no one argued that he was ineligible for the office of the presidency, and no state refused to put him on the ballot.

His opponent in the Republican primary was John McLean, a justice of the Supreme Court, and presumably knowledgeable regarding the natural born citizen clause. McLean never claimed that Frémont was ineligible because his father was not a U.S. citizen.

Thus, just 67 years after the Constitution was ratified, and before the 14th Amendment was enacted, the American people – including Supreme Court justices – understood that all persons born in this country are eligible to be president, and their parents' citizenship is irrelevant.

COURT DECISIONS AND LAWS BEFORE BARACK OBAMA WAS ELECTED PRESIDENT

For purposes of brevity, I discuss only three cases: *Lynch v. Clarke*, *Minor v. Happersett*, and *U.S. v. Wong Kim Ark*.

LYNCH V. CLARKE

The first major case to examine the citizenship of a child born in the United States to alien parents was *Lynch v. Clarke,* New York, 1 Sandf.Ch. 583 (1844) (the case can be found here and a more full explanation of the case can be found here.

Thomas Lynch owned a half interest in some immensely valuable land in and around Saratoga Springs, New York. He died without children in 1833, leaving a brother (Bernard Lynch) and a niece by another brother (Julia Lynch) as potential heirs. At that time, under the law only a citizen could inherit land.

Bernard was a citizen of Ireland at the time of Thomas’ death. Julia, however, had been born in the state of New York during a visit to the U.S. by her parents. Less than six months after her birth, she moved to Ireland with her parents; she had lived in Ireland continuously since that time.

A year after Thomas died, in 1834, Bernard moved to the U.S. He became naturalized in 1839, obtained “special permission” to inherit land, and then sued to claim the entire inheritance of Thomas Lynch. He wanted to cut Julia out entirely. The firm of Clarke & Lynch (which owned the

other half of the land in question) answered that Julia was entitled to it, since she was a citizen of the United States at the time of Thomas' death. Since Bernard was not a citizen when Thomas died, he was prohibited from inheriting at that time. So the whole case turned on the question, was Julia a citizen of the U.S. by virtue of her birth here, even though her parents were clearly aliens?

The court ruled that:

1. No New York law or prior decision resolved the issue, so resort must be had to federal common law (the court used the phrase "national unwritten law").

2. "It is an indisputable proposition, that by the rule of the common law of England, if applied to these facts, Julia Lynch was a natural born citizen of the United States."

3. "The Constitution of the United States contains no clause declaring who shall be citizens, nor is there any act of Congress which applies to the case of Julia Lynch."

4. After the Revolution, "… the law [i.e., the common law] which had prevailed on this subject, in all the states, became the governing principle or common law of the United States."

5. "And *the Constitution itself contains a direct recognition of the subsisting common law principle, in the section that defines the qualification of the President. "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," &c. " (emphasis added).

Thus, Julia was found to be an American citizen. She inherited the entire estate of Thomas, and Bernard got nothing. More importantly, the phrase "natural born citizen" was found to be derived from English common law, as set forth in *Blackstone's Commentaries*.

14TH AMENDMENT TO THE CONSTITUTION

In 1868, the Fourteenth Amendment to the Constitution became law. In Section 1, the key sentence 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.

As we shall see, that sentence did no more than codify the common law that had controlled in this country since its inception.

MINOR V. HAPPERSETT

I include *Minor v. Happersett,* 88 U.S. 162 (1875), not because it further defines the term natural born citizen, but because *dicta* in that case has been used to argue against the English common law

principle that has existed, according to *Lynch v. Clarke*, since at least 1482, before Columbus' discovery of the New World.

In *Minor*, the Supreme Court ruled that a woman had no constitutional right to vote in elections, even if she was a natural born citizen and presumably eligible to serve as president. Chief Justice Waite wrote:

> "The Constitution does not in words say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives or natural-born citizens, as distinguished from aliens or foreigners. *Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case, it is not necessary to solve these doubts."* (emphasis added).

In other words, if you are both *jus soli* AND *jus sanguinis*, there can be no question you're a natural born citizen. Chief Justice Waite said there were "doubts" as to whether the same was true if you are *jus soli* but not *jus sanguinis,* but he explicitly refused to rule on that issue, because there was no such issue before the court; all agreed that Virginia Minor was both. Some claim that the case expressly ruled that if you are *jus soli* only, you're not a natural born citizen, but the plain language of the court said that it was refusing to "solve these doubts".

U.S. V. WONG KIM ARK

The doubts expressed by Chief Justice Waite were solved 23 years later. All the legal concepts regarding the natural born citizen clause were crystallized into settled law in the case of *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

Mr. Wong was born in San Francisco to Chinese citizen parents. He made a brief visit to China in 1890 and returned without incident. He visited China again in 1894 and returned the following year. He was denied entry on the ground that he was not a citizen of the United States. He appealed this ruling, and the Supreme Court took up the case for decision. The Court ruled that Mr. Wong was indeed a citizen, having acquired citizenship at birth under the 14th Amendment and *jus soli*. The ruling appears in several sections: First, a discussion of the common law of England which controlled from the formation of the colonies until the Revolution. Next, a discussion of the decisions in American courts which confirmed the common law rule of *jus soli*. Finally, a discussion of whether the 14th Amendment modified the common law.

The case turned on the phrase "subject to the jurisdiction thereof". Mr. Wong contended that his parents were subject to American jurisdiction while living in the United States, and that he likewise was born subject to that jurisdiction. The government argued that since his parents also owed allegiance to the emperor of China, they were not subject to, or not solely subject to, the

jurisdiction of the United States. The court ruled that the phrase encompassed the usual English common law exceptions to the rule of *jus soli*, i.e., that the children of foreign ambassadors or the children of foreign soldiers occupying any portion of the country were not natural born subjects.

The government's brief made clear that the import of a decision in Mr. Wong's favor would mean he was eligible to the presidency:

> "For the most persuasive reasons we have refused citizenship to Chinese subjects; and yet, as to their offspring, who are just as obnoxious, and to whom the same reasons for exclusion apply with equal force, we are told that we must accept them as fellow-citizens, and that, too, because of the mere accident of birth. There certainly should be some honor and dignity in American citizenship that would be sacred from the foul and corrupting taint of a debasing alienage. *Are Chinese children born in this country to share with the descendants of the patriots of the American Revolution the exalted qualification of being eligible to the Presidency of the nation, conferred by the Constitution in recognition of the importance aud dignity of citizenship by birth?* If so, then verily there has been a most degenerate departure from the patriotic ideals of our forefathers; and surely in that case American citizenship is not worth having." (emphasis added)

Justice Fuller, in dissent, also confirmed that the decision would mean that Mr. Wong was eligible to become president:

> Considering the circumstances surrounding the framing of the constitution, I submit that it is unreasonable to conclude that 'natural born citizen' applied to everybody born within the geographical tract known as the United States, irrespective of circumstances; and that the children of foreigners, happening to be born to them while passing through the country, whether of royal parentage or not, or whether of the Mongolian, Malay, or other race, were eligible to the presidency, while children of our citizens, born abroad, were not.

He didn't like it that a person born in the country to Chinese parents was eligible to the presidency, but children born abroad to American citizens were not eligible. However, that is exactly what the majority ruled.

The court did not specifically mention the natural born citizen clause in Article II, because Mr. Wong was not running for president. But the import of the decision was clear to all. In fact, one of the leading legal scholars of the day, William Guthrie, reviewed *Wong Kim Ark* as follows:

> The effect of this decision is to make citizens of the United States, by virtue of the Fourteenth Amendment, all persons born in United States of alien parents and permanently domiciled here, except the children of the diplomatic representatives of foreign powers; and *therefore, a male child*

born here of alien Chinese subjects is now eligible to the office of President, altho his parents could not be naturalized under our laws.[6] (emphasis added)

ANKENY & PROGENY (LIVE TOGETHER IN PERFECT HARMONY)

Cases defining natural born citizenship since President Obama took office:

ANKENY V. GOVERNOR OF INDIANA

"Thus, the Court [*Minor v. Happersett*] left open the issue of whether a person who is born within the United States of alien parents is considered a natural born citizen… The Court in *Wong Kim Ark* reaffirmed *Minor* in that the meaning of the words "citizen of the United States" and "natural-born citizen of the United States" "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution.' They noted that "[t]he 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……Based upon the language of Article II, Section 1, Clause 4 and the guidance provided by *Wong Kim Ark*, we conclude that persons born within the borders of the United States are "natural born Citizens" for Article II, Section 1 purposes, regardless of the citizenship of their parents."
Ankeny v. Governor of Indiana, 916 N.E.2d 678 (Ind. Ct. App. 2009), transfer denied, 929 N.E.2d 789 (Ind. 2010)

ALLEN V. OBAMA

"Most importantly, Arizona courts are bound by United States Supreme Court precedent in construing the United States Constitution, *Arizona v. Jay J. Garfield Bldg. Co.* , 39 Ariz. 45, 54, 3 P.2d 983, 986 (1931), and this precedent fully supports that President Obama is a natural born citizen under the Constitution and thus qualified to hold the office of President. … Contrary to Plaintiff's assertion, *Minor v. Happersett*, 88 U.S. 162 (1874), does not hold otherwise."
Allen v. Obama et al., No. C20121046 (Ariz. Pima County Super. Ct. Feb. 24, 2012)

TISDALE V. OBAMA

"It is well settled that those born in the United States are considered natural born citizens."
Tisdale v. Obama, No. 3:12-cv-00036-JAG (E.D. Va. Jan. 23, 2012), aff'd, No. 12-1124 (4th Cir. Jun 5, 2012) (per curiam)

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[6] The Literary Digest, Vol. XVIII, "Citizenship in the United States", pp. 185-86.

PURPURA V. OBAMA

"No court, federal, state or administrative, has accepted the challengers' position that Mr. Obama is not a "natural born Citizen" due to the acknowledged fact that his father was born in Kenya and was a British citizen by virtue of the then applicable British Nationality Act. Nor has the fact that Obama had, or may have had, dual citizenship at the time of his birth and thereafter been held to deny him the status of natural born. It is unnecessary to reinvent the wheel here. … The petitioners' legal position on this issue, however well intentioned, has no merit in law. Thus, accepting for the point of this issue that Mr. Obama was born in Hawaii, he is a 'natural born Citizen' regardless of the status of his father."
Purpura v. Obama, No. STE 04534-12, 2012 WL 1369003 (N.J. Adm. Apr. 10, 2012) (initial decision), decision adopted as final (NJ Secy of State Apr. 12, 2012), aff'd, No. A-004478-11-T03, 2012 WL 1949041 (N.J. Super. Ct. App. Div. May 31, 2012) (per curiam).

FARRAR V. OBAMA

"In 2009, the Indiana Court of Appeals ("Indiana Court") addressed facts and issues similar to those before this court. [*Ankeny v. Governor of Indiana*, 916 N.E.2d (Ind. Ct. App. 2009). … The Indiana Court rejected the argument that Mr. Obama was ineligible, stating that children born within the United States are natural born citizens, regardless of the citizenship of their parents. … This Court finds the decision and analysis of [*Ankeny*] persuasive."
Farrar v. Obama, No. OSAH-SECSTATE-CE-1215136-60-MALlHI (Ga. Office of St. Admin. Hrg. Feb. 3, 2012), decision adopted as final (Ga. Sec'y State Feb. 7, 2012).

PAIGE V. OBAMA

"While the court has no doubt at this point that Emmerich de Vattel's treatise The Law of Nations was a work of significant value to the founding fathers, the court does not conclude that his phrase–"The natives, or natural born citizens, are those born in the country, of parents who are citizens."–has constitutional significance or that his use of "parents" in the plural has particular significance. This far, no judicial decision has adopted such logic in connection with this or any related issues. In fact, the most comprehensive decision on the topic, *Ankeny v. Governor of Indiana*, examines the historical basis of the use of the phrase, including the English common law in effect at the time of independence, and concludes that the expression "natural born Citizen" is not dependent on the nationality of the parents but reflects the status of a person born into citizenship instead of having citizenship subsequently bestowed. The distinction is eminently logical."
Paige v. Obama, No. 611-8-12 WNCV (Vt. Super. Ct. Nov. 14, 2012).

VOELTZ V. OBAMA (I & II)

"However, the United States Supreme Court has concluded that '[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States. 'Other courts that have considered the issue in the context of challenges to the qualifications of candidates

for the office of President of the United States have come to the same conclusion."
Voeltz v. Obama ("Voeltz I"), No. 37 2012 CA 000467, 2012 WL 2524874 (Fla. Cir. Ct. June 29, 2012).

"In addition, to the extent that the complaint alleges that President Obama is not a "natural born citizen" even though born int he United States, the Court is in agreement with other courts that have considered this issue, namely, that persons born within the borders of the United States are "natural born citizens" for Article II, Section 1 purpose, regardless of the citizenship of their parents."
Voeltz v. Obama ("Voeltz II"), No. 37 2012 CA 002063, 2012 WL 4117478 (Fla. Cir. Ct. Sept. 6, 2012).

FAIR V. OBAMA

"The issue of the definition of "natural born citizen" is thus firmly resolved by the United States Supreme Court in a prior opinion [*U.S. v. Wong Kim Ark*], and as this court sees it, that holding is binding on the ultimate issue in this case."
Fair v. Obama, No. 06C12060692 (Md. Carroll Cty. Cir. Ct., Aug. 27, 2012).

HOLLANDER V. MCCAIN

"Those born "in the United States, and subject to the jurisdiction thereof," U.S. Const., amend. XIV, have been considered American citizens under American law in effect since the time of the founding, *United States v. Wong Kim Ark*, 169 U.S. 649, 674-75 (1898), and thus eligible for the presidency…"
Hollander v. McCain, 566 F. Supp. 2d 63 (D.N.H. 2008).