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Sarah Helene Duggin*, Mary Beth Collins**

**THE AMERICAN PRESIDENCY, THE 2008 ELECTION,
AND THE U.S. CONSTITUTION'S NATURAL BORN
CITIZENSHIP PROVISIO**

Who can be president of the United States? This question matters a great deal to 2008 Republican presidential candidate John McCain, who was born in the Panama Canal Zone, as well as to many other American citizens born outside the United States.¹ The United States Constitution declares that “[n]o person except a natural

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¹ If he had been born just two years earlier, the natural born citizenship credentials of Democratic candidate Barack Obama could have been an issue as well. Senator Obama was born in Honolulu on August 4, 1961. Biographical Directory of the United States Congress, *Obama, Barack*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=O000167> (last visited Aug. 31, 2008). Hawaii became the fiftieth state on August 21, 1959. Guide to Government in Hawaii, hawaii.gov/lrb/gd/stategov.pdf. The natural born citizenship issue is also directly relevant to all of those in line for the office of acting president under the Presidential Succession Act of 1947 – i.e., the Speaker of the House of Representatives, the President Pro Tem of the Senate, and the members of the president’s cabinet – because the current succession statute permits only those constitutionally qualified for the presidency to serve as acting president. 3 U.S.C. § 19(e) (2000). The “natural born” requirement would exclude some individuals who been in the line of succession – e.g., former Secretaries of State Henry Kissinger and Madeline Albright – from the office of acting president because they immigrated to the United States from other countries; it also raises questions about the qualifications of those born abroad to United States citizen

born Citizen... shall be eligible to the Office of President.”² Yet, more than two centuries after the Constitution’s adoption, this clause remains one of the most opaque and anti-egalitarian provisions of United States constitutional law.³ There are two principal reasons. First, prior to 1868 the Constitution did not define citizenship in any way.⁴ Even now, one hundred forty years after the Fourteenth Amendment remedied this deficit, the Constitution does not define “natural born” citizenship. Consequently, whether Senator McCain and other Americans born abroad to United States citizen parents qualify as “natural born Citizens” remains an open question.⁵ Second, by excluding Americans naturalized (i.e., who acquired citizenship) after birth from the presidency, the proviso effectively creates two classes of citizens – those who are eligible to the United States presidency and those who are not. While few people from any background will ever have the opportunity to run for the presidency, this restriction smacks of second class status in a nation that prides itself on the ideals of freedom and equality for all.⁶

It remains to be seen what will come of questions raised about Senator McCain’s “natural born” credentials. To date three litigants have filed lawsuits contesting his eligibility to serve as president. Under United States law, however, it co-

parents. See S. H. Duggin, M. B. Collins, ‘Natural Born’ in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution’s Presidential Qualifications Clause and Why We Need to Fix It, 85 B.U.L. Rev. 53, 55, 152–154 (2005).

² U.S. Const. art. II, § 1, cl. 5. The proviso continues: “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.” *Id.*

³ See, e.g., A. Reed Amar, *Natural Born Killjoy, Why the Constitution Won’t Let Immigrants Run for President, and Why that Should Change*, Legal Affairs, Apr. 2004, at 16; J. W. Dean, *A Fresh, Powerful Case for Amending the U.S. Constitution to Remove the “Natural Born” Qualification for the Presidency*, FindLaw, <http://writ.news.findlaw.com/dean/20050311.html>, (last visited Aug. 30, 2008); J. W. Dean, *The Pernicious “Natural Born” Clause of the Constitution: Why Immigrants Like Governors Schwarzenegger and Granholm Ought to Be Able to Become Presidents*, FindLaw, <http://writ.lp.findlaw.com/dean/200410008.html>, (Oct. 8, 2004); S. H. Duggin, M. B. Collins, *supra* note 1; L. Friedman, *An Idea Whose Time Has Come – The Curious History, Uncertain Effect, and Need for Amendment of the Natural Born Citizen Requirement for the Presidency*, 52 St. Louis U.L.J. 137, 154 (2007); Ch. Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1 (1968); J. C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 Const. Comment. 575, 579 (2000); J. A. Pryor, *The Natural-Born Citizenship Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 Yale L.J. 881 (1988); A. Quindlen, *Open to All: The Big Job*, Newsweek, Jan. 9, 2006, available at www.newsweek.com/id/47379. Two well known constitutional scholars have described the natural born citizenship clause as the Constitution’s “worst” provision. See R. Kennedy, *A Natural Aristocracy?*, 12 Const. Comment. 175 (1995); R. Post, *What Is the Constitution’s Worst Provision?*, 12 Const. Comment. 191, 193 (1995).

⁴ It was not until the adoption of the Fourteenth Amendment in 1868 that the Constitution itself defined citizenship. See U.S. Const. amend. XIV.

⁵ See, e.g., M. Dobbs, *McCain’s Birth Abroad Stirs Legal Debate: His Eligibility for Presidency Is Questioned*, Wash. Post, May 2, 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/05/01/AR2008050103224_pf.html; C. Hulse, *McCain’s Canal Zone Birth Prompts Queries About Whether That Rules Him Out*, N.Y. Times, Feb., 28, 2008, available at <http://www.nytimes.com/2008/02/28/us/politics/28mccain.html?pagewanted=print>.

⁶ As commentator James Ho explains, “one way to assess whether an individual is a full and equal member of a community is to ask whether the individual is eligible to serve in the highest office of the community.” Ho, *supra* note 3, at 576.

uld be quite difficult to reach the merits of such challenges. Federal courts adhere to threshold justiciability doctrines that only a plaintiff with a specific, concrete stake in the issue – e.g., a defeated rival – is likely to be able to overcome.⁷

Although the plaintiff in the most recently filed action arguably has a stronger basis for asserting his right to pursue the matter than prior litigants, as of this writing no one who clearly has standing to challenge Senator McCain’s presidential qualifications has come forward. To the contrary, leaders of both major political parties have hastened to proclaim their view that Senator McCain is a “natural born Citizen” within the meaning of Article II.⁸

Senator McCain is certainly not the only person with a major stake in this issue. Many other Americans are, like Senator McCain, the children of United States citizen parents living abroad at the time of their birth. Their number includes several members of Congress and other high-profile political figures.⁹ In our increasingly global society the number of children born to United States citizen parents living, working, and traveling in other countries will undoubtedly continue to increase. Even more strikingly, more than fifteen million Americans, including California Governor Arnold Schwarzenegger and Michigan Governor Jennifer Granholm, are naturalized citizens who immigrated to the United States from other countries.¹⁰

Whatever the outcome with respect to Senator McCain’s presidential aspirations, the natural born citizenship clause is likely to complicate American presidential politics for many years to come. Unfortunately, it will be difficult for the nation to summon the political will to eliminate this constitutional anachronism because the fate of the proviso ties into the much broader, far more bitter, debate over United States immigration policy.

The following discussion describes the historical context of the natural born citizenship clause; explores some of the issues the proviso raises in contemporary American society, particularly its impact on Senator McCain and future presidential hopefuls; and offers a brief reflection on why the United States needs to amend Ar-

⁷ These obstacles are reviewed briefly below in conjunction with a discussion of the legal challenges to Senator McCain’s presidential bid. For a more extensive discussion of justiciability issues, see S. H. Duggin, M. B. Collins, *supra* note 1, at 111–126.

⁸ See, e.g., C. Hulse, *Bill Would Remove Doubt on Presidential Eligibility*, N.Y. Times, Feb. 29, 2008, at A20 (discussing bill proposed by Senator Claire McCaskill (D-Missouri) and several co-sponsors to provide “a legislative declaration that the definition of ‘natural born’ includes children of active military.”). See also, e.g., *Bipartisan Team Says McCain Natural Born*, Associated Press (Mar. 28, 2008) (discussing opinion offered by former Solicitor General Ted Olson and Professor Laurence Tribe).

⁹ Contemporary political leaders born abroad to United States citizen parents include ten members of the 110th Congress. Congressional Research Service, M. Amer, *Membership in the 110th Congress: A Profile, Congressional Research Service*, www.senate.gov/reference/resources/pdf/RS22555.pdf, (last visited Aug. 27, 2008).

¹⁰ See Table S0501. Selected Characteristics of the Native and Foreign-Born Populations (Data Set: 2006 American Community Survey), http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2006_EST_G00_S0501&-ds_name=ACS_2006_EST_G00_&-redoLog=false (setting forth results of 2006 survey). See generally D. Schmidley, U.S. Census Bureau, *The Foreign-Born Population in the United States: March 2002*, in *Current Population Reports* (2003), <http://census.gov/prod/2003pubs/p20-539.pdf> (last visited Aug. 30, 2008) (discussing findings of 2000 census).

title II to eliminate natural born citizenship as a qualification for the presidency and vice presidency.

The historical context of the natural born citizenship proviso

A. *The Origins of the Clause*

The natural born citizenship proviso appears in Article II of the United States Constitution amid provisions pertaining to the election, powers and responsibilities of the executive in the American constitutional framework. Article II, like all of the language of the original Constitution, was the product of the constitutional convention that met in Philadelphia during the summer of 1787. The purpose of the convention was to design a new form of government to replace the Articles of Confederation that established the first government of the United States.¹¹ Almost all of the debate over the provisions ultimately incorporated into Article II focused on the scope of executive power, the selection of the executive, and the ways in which the executive would interact with the legislative and judicial branches of the new government. Although the constitutional convention began meeting in May 1787,¹² there is no record of any mention of the phrase “natural born Citizen” until the term appeared in a July 25th letter from John Jay to George Washington, who presided over the convention.¹³ In his letter, Jay suggested to Washington that “it would 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.”¹⁴

Jay’s remarks reflected fears shared by a number of delegates that European nobility might try to infiltrate the new government and wrest control of it away

¹¹ *The Debates in the Federal Convention of 1787 Reported by James Madison: May 14, 25, 1787*, <http://www.yale.edu/lawweb/avalon/debates/514525.htm>.

¹² *Id.* A month earlier, however, Alexander Hamilton had proposed a plan of government in which he suggested that the chief executive should be a citizen of one of the states as of the time of the adoption of the Constitution or “hereafter born a Citizen of the United States.” J. A. Pryor, *supra* note 3, at 889.

¹³ Letter of John Jay to George Washington, July 25, 1787, U.S. Dept. of State, 4 Documentary History of the Constitution of the United States 237 (1905), also available at www.TeachingAmericanHistory.org/library/index.asp?document=1876. John Jay served as Chief Justice from 1789 to 1795, when he resigned to run successfully for governor of New York. Supreme Court Historical Society, History of the Court, Timeline of the Justices: John Jay, http://www.supremecourthistory.org/02_history/subs_timeline/images_chiefs/001.html. George Washington presided over the Constitutional Convention in 1787 and then served as President of the United States from 1789 to 1797. The White House, Presidents of the United States, Past Presidents: George Washington, <http://www.whitehouse.gov/history/presidents/gw1.html> (last visited Aug. 30, 2008).

¹⁴ Jay’s reference to “Command in Chief of the American army” pertains to the consensus that the executive would have final say over the armed forces of the United States. This role is one of the powers of the president subsequently set forth in Article II, section 2 of the Constitution. In pertinent part section 2 provides that “[t]he president shall be Commander in Chief of the Army and Navy of the United States, and the Militia of the several States, when called into the actual service of the United States.”

from the people. Their concerns focused on the possibility that powerful British and European noble families would finagle the election of kinsmen to the presidency, thereby accomplishing by guile what Britain had been unable to accomplish by force – the continued domination of the thirteen former colonies by foreign powers.¹⁵ Awareness of the political machinations of Austria, Prussia and Russia in Poland during the last part of the eighteenth century also may have influenced Jay, Washington and other framers of the Constitution.¹⁶

Jay's language found its way into the United States Constitution at the eleventh hour and became part of Article II without any significant recorded debate.¹⁷ In its final form, however, the proviso grandfathered in all of those who were citizens of the United States at the time of the adoption of the Constitution, thereby providing an avenue for Alexander Hamilton and other foreign-born convention delegates to seek the new nation's highest office.¹⁸ The delegates also added presidential age and residency requirements analogous to those established for members of both houses of Congress.¹⁹

B. *The Impact of Later Constitutional Developments*

Pursuant to the terms of Article VII,²⁰ the Constitution entered into force in 1788 when New Hampshire became the ninth state to ratify it.²¹ As the new nation gained

¹⁵ See, e.g., Ch. C. Thach, Jr., *The Creation of the Presidency 1775-1789*, 137 (De Capo Press 1969) (1923) (suggesting that Jay was concerned about Prussian Continental Army General Baron von Steuben, although, as an American citizen at the time of the adoption of the Constitution, von Steuben would have been eligible to serve as president pursuant to the final form of the natural born proviso); 149 Cong. Rec. S 9251 (remarks of Sen. Orin Hatch) (pointing to concern over European nobility such as the Duke of York). See generally, S. H. Duggin, M. B. Collins, *supra* note 1, at pp. 69–70; Ch. Gordon, *supra* note 3, at 5 (1968); J. A. Pryor, *supra* note 3, at pp. 888–889.

¹⁶ See, e.g., J. C. Ho, *President Schwarzenegger, or at Least Hughes?*, 7 Green Bag 2d 108 (2004) (noting that Austria, Prussia and Russia “had just rigged the election of their own candidate as the new monarch of Poland.”).

¹⁷ For discussion of the process followed by the Constitutional Convention in finalizing the 1787 Constitution, see S. H. Duggin, M. B. Collins, *supra* note 1, at 63–68.

¹⁸ U.S. Const. art. II, § 1, cl. 5. See *supra* note 11.

¹⁹ The clause requires the president to be at least thirty-five years of age. U.S. Const. art. II, § 1, cl. 5. It mandates a minimum of fourteen years of residency, *id.*, compared with twenty-one years specified in an interim draft. See S. H. Duggin, M. B. Collins, *supra* note 1, at 67, n. 55 & sources cited therein. This change was undoubtedly to avoid excluding some of the convention delegates. *Id.* Analogous provisions pertaining to members of the House and Senate are found in Article I. U.S. Const. art. I §§ 2 & 3.

²⁰ U.S. Const. art. VII. By 1791 all thirteen original colonies had ratified the Constitution. See generally J. Elliott, *The Debates in the Several State Conventions on the adoption of the Federal Constitution as recommended by the General Convention at Philadelphia in 1787 with the Journal of the Federal Convention Luther Martin's Letter, Yates Minutes and Congressional Opinions, Virginia and Kentucky Resolutions of '98-'99 and other illustration of the Constitution* (2d ed. with considerable additions collected and revised from contemporary publications), <http://www.constitution.org/elliott.htm> (last visited Aug. 30, 2008).

²¹ The Avalon Project at Yale Law School offers an on-line collection of documents pertaining to the ratification of the Constitution by the thirteen original states. See <http://www.yale.edu/lawweb/avalon/18th.htm> (last visited Aug. 30, 2008).

practical experience with the political process fashioned by the convention delegates in 1787, systemic flaws in the executive electoral plan became evident. The election of 1800 brought the government to the brink of crisis when the vote of the electoral college resulted in a three-way tie among Thomas Jefferson, John Adams and Aaron Burr. As history records, the House of Representatives eventually broke the deadlock, and Thomas Jefferson emerged as the winner.²² It was apparent, however, that reforms were necessary.²³ In 1804, the Twelfth Amendment was adopted to amend the procedures for electing the president and vice president.²⁴ The Twelfth Amendment also provided that only individuals constitutionally qualified to serve as president could be elected vice president.²⁵

The next significant development with respect to the natural born citizenship proviso occurred after the Civil War when earlier perceptions of the states as guardians of civil liberties that protected individuals against the encroachment of a strong central government were turned upside down. A new era dawned in which the federal government emerged as the primary champion of individual rights. Between 1865 and 1870 the Thirteenth, Fourteenth and Fifteenth Amendments became part of the Constitution, thereby outlawing slavery, providing equal protection and due process safeguards, and protecting the voting rights of citizens.²⁶ The Fourteenth Amendment also established a constitutional definition of citizenship: “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.”²⁷ Unfortunately, while it defined citizenship generally, the amendment did not clarify the meaning of “natural born” citizenship. A number of bills were introduced in Congress during the same time period to amend the Constitution to do just that, but none succeeded.²⁸ Throughout the twentieth century, as well as during the first several years of the new millennium, many legislators offered proposals designed to address the inequities created by the proviso, but all met the same fate.²⁹

²² The White House, Presidents of the United States, Past Presidents: Thomas Jefferson, <http://www.whitehouse.gov/history/presidents/tj3.html> (last visited Aug. 30, 2008).

²³ See S. H. Duggin, M. B. Collins, *supra* note 1, at 84–85 and sources cited therein. For discussion of the impact of the election of 1800 on both the electoral process and the office of vice president, see R. Albert, *The Evolving Vice Presidency*, 78 *Tempel Rev.* 811 (2005).

²⁴ U.S. Const. amend. XII.

²⁵ The language reads as follows: “But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.” *Id.*

²⁶ U.S. Const. amends. XIII, XIV & XV.

²⁷ U.S. Const. amend. XIV.

²⁸ *E.g.*, H.R.J. Res. 269, 40th Cong. (1868); H.R.J. Res. 52, 42nd Cong. (1871). See generally S. H. Duggin, M. B. Collins, *supra* note 1, at 148.

²⁹ See *id.*

The 2008 election and beyond

A. John McCain's Candidacy

Senator John McCain was born in the Panama Canal Zone while his father was serving with the United States Navy. Senator McCain served for more than twenty years in the United States Navy, endured six years as a prisoner of war in North Vietnam, and received numerous military awards, including the Silver Star, Legion of Merit, Purple Heart, and Distinguished Flying Cross. He has been in Congress since 1983, first as a member of the House and then in the Senate.³⁰ Even so, questions have been raised regarding Senator McCain's constitutional qualifications to serve as president. In a very recent article, Professor Gabriel Chin notes that at the time of Senator McCain's birth in 1936, the Canal Zone "fell into a gap in the law, covered neither by the citizenship clause nor Revised Statutes § 1993, the only statute applicable to births to U.S. citizens outside the United States."³¹ He states:

Because the Canal Zone was a 'no man's land,' in 1937 Congress passed a statute granting citizenship to 'any person born in the Canal Zone on or after February 26, 1904' who had at least one U.S. citizen parent. This Act made Senator McCain a United States citizen before his first birthday. But again, to be a natural born citizen, one must be a citizen at birth. Since Senator McCain became a citizen in his eleventh month of life, he does not satisfy this criterion, is not a natural born citizen, and thus is not 'eligible to the Office of President.'³²

Senator McCain's supporters, of course, disagree.³³

While scholars often explore issues pertaining to the presidency, litigation over presidential qualifications is rare. Prior to Senator McCain's presidential bid, there are records of only a few lawsuits filed in connection with the constitutional qualifications of presidential hopefuls. Only one of these lawsuits directly addressed the natural born citizenship issue – a petition filed in the California state court system seeking to exclude Senator Barry Goldwater, who was born the territory of Arizona before Arizona became a state,³⁴ from the state's 1964 presidential ballot. The Supreme Court of California dismissed the petition without opinion.³⁵ The

³⁰ Biographical Directory of the United States Congress, *McCain, John Sydney, III*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=m000303> (last visited, Aug. 27, 2008).

³¹ G. J. Chin, *Why Senator John McCain Cannot be President: Eleven Months and a Hundred Yards Short of Citizenship*, draft, Arizona Legal Studies Discussion Paper no. 08-14, July 2008, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157621.

³² *Id.*, at 5.

³³ See A. Liptak, *A Hint of New Life to McCain Birth Issue*, N.Y. Times, Jul. 11, 2008, at A11, available at <http://www.nytimes.com/2008/07/11/us/politics/11mccain.html>; Opinion of Laurence H. Tribe and Theodore B. Olson (March 19, 2008) (copy on file with authors).

³⁴ Biographical Directory of the United States Congress, Goldwater, Barry Morris, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=g000267>, (last visited, Aug. 27, 2008).

³⁵ *Petition Denied on Candidacy*, L.A. Times (1964) (discussing California Supreme Court's denial of a petition filed by well known attorney Melvin Belli on behalf of a California resident to exclude Senator Goldwater's name from the state's November 1964 presidential ballot) (copy on file with authors).

threat of legal action, however, may have played a role in the decision of former Michigan Governor George Romney, who was born to United States citizen parents working as Mormon missionaries in Mexico,³⁶ to withdraw from the 1968 presidential race.³⁷ Similar concerns also may have deterred other candidates from seeking the office.³⁸ However, Charles Curtis, who was born in Kansas in 1860 – one year before Kansas became a state³⁹ – campaigned briefly for the Republican presidential nomination and then served as Herbert Hoover’s vice president⁴⁰ without any apparent objection to his natural born citizenship credentials.

During the past year three individuals have filed legal actions contending that Senator McCain is not a “natural born Citizen” within the meaning of Article II, section 8 of the Constitution. Andrew Aames brought the first lawsuit against Senator McCain and the Republican National Committee in the Central District of California on March 6, 2008. The complaint sought a declaratory judgment clarifying whether Senator McCain is constitutionally qualified to serve as president,⁴¹ but it appears that Mr. Aames voluntarily withdrew his action several weeks later.

Another case filed in the United States District Court for the District of New Hampshire featured more nuanced arguments. In this action, Fred Hollander, a registered Republican voter, sued Senator McCain and the Republican National Committee. Mr. Hollander alleged that, because Senator McCain is not constitutionally eligible to serve as President, he was disenfranchised as a voter by the inclusion of Senator McCain’s name on the New Hampshire Republican primary ballot. He contended that he would be disenfranchised again in the national election if Senator McCain appeared as the Republican presidential candidate.⁴² On July 25th, however, in response to a motion filed on behalf of Senator McCain, United States District Judge Joseph Laplante dismissed Mr. Hollander’s complaint on justiciability grounds, holding that he lacked standing to challenge Senator McCain’s constitutional qualifications.⁴³ The court took pains to acknowledge the seriousness of the issues, but concluded that it could not reach the merits of Mr. Hollander’s arguments. Judge Laplante stated:

³⁶ 18 American National Biography 826 (1999).

³⁷ See S. H. Duggin, M. B. Collins, *supra* note 1, at 57, n. 15 and sources cited therein (citing 1967 legal opinion of the Honorable Pinckney McElwee concluding that “Mr. George Romney of Michigan is ineligible to become President of the United States because he was born in Mexico, and is, therefore, not a *natural-born* citizen as required by the United States Constitution.”), quoting 113 Cong. Rec. 15,875, 15,880 (1967) [Brief of the Hon. Pinckney G. McElwee introduced by Mr. Dowdy][emphasis in original].

³⁸ See L. Friedman, *supra* note 3, at 138.

³⁹ Kansas became the 34th state of the United States on January 29, 1861. Website of Kansas State Historical Society, <http://www.kshs.org/research/topics/war/civilwarkansas.htm> (last visited Aug. 31, 2008).

⁴⁰ Charles Curtis, 31st Vice President (1929–1933), http://www.senate.gov/artandhistory/history/common/generic/VP_Charles_Curtis.htm (last visited Aug. 30, 2008).

⁴¹ *Inland Empire Voters v. United States of America*, No. 08-cv-00304-SGL-OP (C.D. Cal., filed Mar. 6, 2008).

⁴² *Hollander v. McCain*, First Amended Complaint 9-11, No. 008-cv-99-JL (D.N.H., filed Apr. 1, 2008).

⁴³ *Hollander v. McCain*, 2008 WL 2853250 (D.N.H. July 24, 2008).

This is not to demean the sincerity of Mr. Hollander's challenge to McCain's eligibility for the presidency... that challenge has yet to be definitively settled, and, as a number of commentators have concluded, arguably cannot be without a constitutional amendment. What is settled, however, is that an individual voter like Mr. Hollander lacks standing to raise that challenge in the federal courts.⁴⁴

As of this writing Mr. Hollander had not appealed the District Court's decision. Markham Robinson of California brought a third lawsuit on August 11, 2008 in the United States District Court for the Northern District of California against the Republican National Committee, Senator McCain, and a number of state defendants.⁴⁵ Mr. Robinson filed his action as a California voter, Chairman of California's American Independent Party (AIP), and as a registered elector of the AIP entitled to cast one of the state's electoral votes for party candidate Alan Keyes should the results of the general election permit. On these bases Mr. Robinson claims "a personal and distinct interest in the 2008 presidential election sufficient to establish his standing to challenge the legitimacy of rival campaigns."⁴⁶ Mr. Robinson seeks a declaratory judgment that Senator McCain is ineligible to appear on the California presidential ballot and injunctive relief excluding Senator McCain's name from the ballot.⁴⁷ A motion to dismiss the complaint filed by the defendants was pending at the time of this writing.⁴⁸

Given the timeframe, it would take an extraordinary series of developments to get the Robinson case – or the Hollander action should Mr. Hollander choose to appeal the District Court's decision – to the United States Supreme Court prior to the November election. Moreover, whether the high court would grant review in these highly charged circumstances is impossible to predict. The substantive issue – the interpretation of the standards specified in Article II – is of preeminent importance to the nation, and it is one that the federal courts should be well equipped to address.⁴⁹ Even so, both the jurisprudential considerations of federal standing doctrine – i.e., the notion that federal courts should not "be called upon to decide abstract questions of wide public significance even though other governmental in-

⁴⁴ *Id.* at *7.

⁴⁵ Plaintiff's Complaint for Declaratory and Injunctive Relief, Robinson v. Bowen, No. 3:08-cv-03836-WHA, (No. D. Cal., filed Aug. 11, 2008) [hereinafter "Robinson Complaint"].

⁴⁶ *Id.* 1, 18. Article II, section I, as modified by the Twelfth Amendment, sets forth the mechanisms for electing the president and vice president. U.S. Const. art. II & amend. XII. See generally E. Chemerinsky, Constitutional Law: Principles and Policies § 1.1 (3d ed. 2007).

⁴⁷ Robinson Complaint, *supra* note 45, Prayer for Relief.

⁴⁸ The case docket reflects that the defendants filed a Motion to Dismiss the complaint on August 28, 2008 and that a hearing on the motion is set for mid September. Robinson v. Bowen, *supra* note 45, Docket. [Note: Just as this article was going to press, United States District Judge William Alsup granted the defendants' motion and dismissed the case, primarily on grounds that Mr. Markham lacked standing to bring the action. *Id.*, Order Denying Preliminary injunction and Dismissing Action, Sept. 16, 2008. Mr. Markham has a right to appeal the district court's decision.]

⁴⁹ See S. H. Duggin, M. B. Collins, *supra* note 1, at 118–126 (discussing applicability of political question doctrine, including criterion pertaining to the availability of judicially discoverable and manageable standards for resolution, to natural born citizenship issue).

stitutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights⁵⁰ – and the constitutional overtones arising out of the case or controversy requirement set forth in Article III of the Constitution⁵¹ favor judicial restraint unless a challenge is brought by an individual who clearly has standing to raise the relevant legal issues.⁵² In addition, the courts could also invoke other justiciability doctrines to support judicial restraint on grounds of lack of ripeness and refraining from involving the judiciary in political questions.⁵³

Finally, recent history is certainly relevant. In November 2000 the United States Supreme Court asserted jurisdiction in the controversy over Florida's voting procedures in *Bush v. Gore*.⁵⁴ When the Court handed down its ruling, the justices split precisely along political party lines. The Republican justices took an interventionist position at odds with their usual opposition to “judicial activism” and respect for federalism, while the Democrats uncharacteristically emphasized the need for judicial restraint. In the end, the decision was extremely controversial. Consequently, the Court itself suffered a loss of prestige and credibility, at least in the short run.⁵⁵ Although so far the natural born citizenship issue has not created the same kinds of partisan divisions, it is likely that the current justices will tread carefully before becoming embroiled in a battle that could destroy a major candidate's presidential bid.

If Senator McCain should win the election in November, the specter of the natural born citizenship proviso will continue to hover over him, particularly in the period between the election in early November and the inauguration in late January. Even so, while he would remain theoretically susceptible to a challenge to his constitutional qualifications for the presidency, the likelihood that any plaintiff could successfully mount such a challenge would diminish considerably. It is quite unlikely that the United States Supreme Court would allow itself to be placed in the position of disqualifying a president-elect on the basis of an anachronistic constitutional provision whose actual meaning – if it was ever clear – is now lost in the shadows of history. Absent a ruling on the merits by the United States Supreme Court at some point, however, the question whether the foreign born children of United States citizen parents are constitutionally qualified to serve as president will remain unanswered.

⁵⁰ *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 11–12 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

⁵¹ U.S. Const. art III, § 2.

⁵² *Elk Grove Unified School District v. Newdow*, 542 U.S. at 11.

⁵³ See generally E. Chemerinsky, *supra* note 46, at §§ 2.3–2.8.

⁵⁴ 531 U.S. 98 (2000) (per curiam).

⁵⁵ In his dissenting opinion Justice John Paul Stevens observed: “Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.” 531 U.S. 98, 128–129 (Stevens, J., dissenting). See generally S. H. Duggin, M. B. Collins, *supra* note 1, at 127–134.

B. The Presidential Prospects of Arnold Schwarzenegger, Jennifer Granholm and Other Naturalized Citizens

Whatever the outcome with respect to Senator McCain's presidential bid, as long as the natural born citizenship proviso remains part of the Constitution, millions of American citizens will continue to be excluded from the presidency and vice presidency. Take, for example, Governors Arnold Schwarzenegger of California and Jennifer Granholm of Michigan. Both are well-known, influential political leaders who govern two of the most populous states in the United States. Unless Article II is amended, however, neither has any hope of following the path to the White House blazed by George W. Bush, Bill Clinton, Ronald Reagan, Jimmy Carter and other former governors.

Governor Schwarzenegger, a Republican, emigrated to the United States from Austria in his early twenties and became a naturalized citizen in 1983. He has served as California's chief executive since 2003.⁵⁶ Jennifer Granholm, a Democrat, also has served as governor of Michigan since 2003. She emigrated to the United States from Canada at the age of four and became a naturalized citizen at the age of eighteen.⁵⁷ Although the full and precise meaning of "natural born Citizen" is uncertain, the Supreme Court has made clear in dicta in a number of cases that it does not encompass individuals who were born abroad to non-United States citizen parents.⁵⁸ Consequently, Granholm and Schwarzenegger are ineligible for presidency; by virtue of the Twelfth Amendment, they are also excluded from the vice presidency because they are not constitutionally qualified to serve as president.⁵⁹

The exclusion of two popular governors as presidential or vice-presidential hopefuls is unfair to both the individuals and to the electorate, but there are other egregious examples of the impact of the proviso. As noted earlier, the United States Census Bureau calculates that there are more than fifteen million American citizens who were naturalized after immigrating to the United States.⁶⁰ Many entered this country as infants when their parents immigrated. Still others were brought here

⁵⁶ Office of the Governor, State of California, *About Arnold: Arnold Schwarzenegger, 38th Governor of California*, <http://gov.ca.gov/about/arnold> (last visited Aug. 27, 2008).

⁵⁷ State of Michigan Office of the Governor, Biography, Governor Jennifer M. Granholm, <http://www.michigan.gov/gov/0,1607,7-168--57920--,00.html>, (last visited Aug. 27, 2008); *Michigan Governor Jennifer Granholm (D)*, Almanac, National Journal, <http://www.nationaljournal.com/members/campaign/2006/governor/mi.htm> (last visited Aug. 27, 2008).

⁵⁸ *See, e.g.,* *Schneider v. Rusk*, 377 U.S. 163, 166 (1964) ("the rights of citizenship of the native born and of the naturalized person are of the same dignity, and are coextensive. The only difference drawn by the Constitution is that only the 'natural born' citizen is eligible to be President."); *Knauer v. United States*, 328 U.S. 654, 658 (1946) (quoting *Luria v. United States*, 231 U.S. 9, 22 (1913)) ("citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country 'save that of eligibility to the Presidency'"); *Baumgartner v. United States*, 322 U.S. 665, 673 (1944) (quoting *Luria v. United States*, 231 U.S. 9, 22 (1913)) ("a naturalized citizen stands on an equal footing with the native citizen in all respects save that of eligibility to the Presidency.").

⁵⁹ U.S. Const. amend. XII. *See supra* notes 23-24 and accompanying text.

⁶⁰ *See supra* note 8.

from other countries as babies by United States citizen parents who adopted them. None of these immigrants has known any other home country, yet each is excluded from the American dream that any child can grow up to be president.

Perhaps the most outrageous inequities arise with respect to foreign-born members of the United States armed forces, particularly given the ongoing involvement of the United States in protracted armed conflicts in Afghanistan and Iraq. Although we continue to bar naturalized citizens from the nation's highest offices, the United States government does not scruple to allow them to fight or even die for their adopted nation. Many naturalized Americans, like Senator McCain, have endured great physical and emotional hardship in the course of military service to our country.⁶¹ Unlike Senator McCain, those who were born abroad to non-United States citizen parents will not have even a colorable claim to candidacy for the presidency or vice-presidency as long as the natural born citizenship proviso remains part of the United States Constitution.

Prospects for change through legislative action

Congress began its struggle with the natural born citizenship proviso during the first years of the nation's constitutional history. In the Naturalization Act of 1790, Congress provided that "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."⁶² The purpose of this statute could be critical to understanding the parameters of the natural born citizenship proviso. If Congress intended simply to declare existing rights in the 1790 legislation – a relatively common practice at the time – then there is a strong argument that the framers never intended to exclude children born abroad to United States citizen parents from the presidency. Conversely, if Congress meant to modify the proviso legislatively, the first Naturalization Act would have been unconstitutional.⁶³ As discussed more fully below, the Constitution can be amended only pursuant to the procedures set forth in Article V. Unfortunately, the legislative history of the Act does not reflect any significant discussion of the natural born citizenship proviso, and the phrase "natural-born citizens" disappeared from naturalization laws with the repeal of the 1790 act in 1795.⁶⁴

⁶¹ See 149 Cong. Rec. S9251 (2003) (remarks of Sen. Orin Hatch) (pointing out that "[p]erhaps most disturbing is that the scores of foreign-born men and women who have risked their lives defending the freedoms and liberties of this great nation... remain ineligible for the Office of President... [including] [m]ore than 700 recipients of the Congressional Medal of Honor – our Nation's highest decoration for valor – [who] have been immigrants.").

⁶² Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795).

⁶³ See S. H. Duggin, M. B. Collins, *supra* note 1, at 77.

⁶⁴ See *id.* at 78–79.

During the intervening two centuries, Congress did not enact any legislation meaningfully addressing the subject of natural born citizenship and presidential qualifications, although many Representatives and Senators attempted to do so. Since the Civil War ended in 1865, members of the House and Senate have introduced numerous bills designed to revise or eliminate the natural born citizenship proviso.⁶⁵ These proposals have taken several different forms, including a resolution expressing the sense of the Senate with respect to the meaning of the clause, legislation purporting to clarify or modify the application of the proviso, and resolutions intended to initiate the constitutional amendment process.⁶⁶ Examples range from proposals to eliminate the natural born qualification entirely⁶⁷ to more narrowly drawn proposals seeking to encompass foreign-born children of military personnel or government employees generally.⁶⁸ Still other bills have been introduced to bestow natural born citizenship on children adopted from other countries by United States citizens.⁶⁹ None of these bills has become law.

Most recently, on February 28, 2008, Senator Claire McCaskill, a Democrat from Missouri, introduced a bill proposing the “Children of Military Families Natural Born Citizen Act” cosponsored by Democratic nominee Senator Barack Obama, Democratic presidential contender Senator Hillary Rodham Clinton, and Republican Senator Tom Coburn.⁷⁰ This legislation was intended “[t]o clarify the law and ensure that children born to United States citizens while serving overseas in the military are eligible to become President.”⁷¹ Democrats were clearly anxious to avoid political fallout from any perceived association with challenges to the presidential qualifications of a colleague and decorated war hero, while Republicans were eager to support their presumptive presidential candidate. Even so, the proposal did not become law. In the end, Senators’ concerns about opening up the whole immigration debate undoubtedly cooled their enthusiasm for the proposal. Instead, on April 10, 2008, the bill’s sponsors, along with Democratic Senators Patrick Leahy and James Webb, introduced a resolution expressing the conclusion of the Senate “[t]hat John Sidney McCain, III, is a ‘natural born Citizen’ under Article II, Section 1, of the Constitution of the United States.”⁷² The Senate passed the resolution by unanimous consent on April 30, 2008.⁷³ The resolution is principally

⁶⁵ See *id.* at 141–151.

⁶⁶ See, e.g., H.R.J. Res. 269, 40th Cong. (1868); H.R.J. Res. 52, 42nd Cong. (1871); H.R.J. Res. 205, 86th Cong. (1959); H.R.J. Res. 612, 85th Cong. (1958); H.R.J. Res. 80, 85th Cong. (1957); S.J. Res. 72, 98th Cong. (1983); S.J. Res. 161, 92^d Cong. (1971); H.R.J. Res. 229, 100th Cong. (1987); H.R.J. Res. 88, 106th Cong. (2000); H.R.J. Res. 47, 107th Cong. (2001); H.R.J. Res. 59, 08th Cong. (2003).

⁶⁷ E.g., H.R.J. Res. 269, 40th Cong. (1868).

⁶⁸ E.g., H.R.J. Res. 205, 86th Cong. (1959); H.R.J. Res. 517, 86th Cong. (1959).

⁶⁹ E.g., Natural Born Citizenship Act, S. 2128, 108th Cong. (2004).

⁷⁰ S. 2678, 110th Cong. (2008).

⁷¹ *Id.*

⁷² S. 511, 110th Cong. (2008).

⁷³ See Library of Congress: Thomas, <http://thomas.loc.gov/cgi-bin/thomasm> (last visited Aug. 30, 2008).

significant as an expression of the United States Senate's view that John McCain is constitutionally qualified to serve as president. While it is possible that the federal courts would accord some deference to the constitutional understanding of a coordinate branch of government, the resolution has no binding impact on the judiciary or even on Congress itself.

As noted earlier, any Congressional effort to alter the Constitution through legislation alone would be ineffective as a means of eliminating or revising Article II. Article V specifies that the constitutional amendment process can be initiated only by a proposal of two-thirds of both Houses of Congress or by application of the legislatures of two-thirds of the states. In either event, the proposed amendment must be ratified by three-fourths of the states.⁷⁴ It is highly improbable that the states would initiate the amendment process; this route to constitutional change has never been utilized in the history of the United States.⁷⁵ Consequently, unless and until two-thirds of the members of Congress muster the political will to move forward with the amendment process, the natural born citizenship proviso will remain a stumbling block to anyone naturalized after birth, and it is likely to continue to raise doubts about the qualifications of individuals born abroad to United States citizen parents. The problem is that to succeed in amending the natural born citizenship debate, Congress must either resolve or differentiate the larger debate over United States immigration policy generally.

Natural born citizenship and the immigration debate

A number of political leaders, constitutional scholars, and respected journalists have called for the revision or elimination of the natural born citizenship proviso from the American constitutional framework.⁷⁶ Unfortunately, their voices have gone largely unheeded. One might well ask why. There is little dispute that the proviso is anti-egalitarian and contrary to American ideals. The United States has come a long way from the vulnerable, upstart nation whose leaders fashioned a radical new Constitution in 1787. There is little risk that wily foreign nobles will persuade naïve Americans to vote for individuals loyal to distant sovereigns. Moreover, as a society we have become increasingly aware that place of birth is at best a poor indicator of allegiance. Many of the most notorious traitors in the history of the United States were born in the United States.⁷⁷

⁷⁴ U.S. Const. art. V.

⁷⁵ See E. Chemerinsky, *supra* note 46, at § 1.2

⁷⁶ See, e.g., sources cited *supra* notes 3 and legislative initiatives cited *supra* notes 66–70.

⁷⁷ For example, Benedict Arnold was born in Norwich, Connecticut and served as a general in the Continental Army before switching his allegiance to the British during the Revolutionary War; Robert Hanssen, a former F.B.I. agent who spied for the Russians for more than twenty years in the late twentieth century, was born in Chicago; and American Taliban fighter John Walker Lindh was born in the District of Columbia. See S. H. Duggin, M. B. Collins, *supra* note 1, at 136–137.

Perhaps even more importantly, access to extensive information on local, national and world issues is vastly different than the primitive state of communications in 1787.⁷⁸ As Justice Stevens emphasized in his opinion for the Court in its 1983 decision in *Anderson v. Celebrezze*,⁷⁹ a principal reason why the Constitution's framers disfavored direct election of political leaders was their "concern over the ignorance of the populace as to who would be qualified for the job."⁸⁰ In 1787 "[i]t took days and often weeks for even the most rudimentary information about important events to be transmitted from one part of the country to another... [whereas] today even trivial details about national candidates are instantaneously communicated nationwide in both verbal and visual form."⁸¹ In addition, in the twenty-first century literacy rates are far higher, and the public is generally much better informed about national issues.⁸²

There should be little doubt that the natural born citizenship proviso has outlived its usefulness and that it no longer has any legitimate place in the constitutional law of the United States. Unfortunately, amending the Constitution to eliminate the proviso would involve a headlong collision with the immigration debate that has raged in the United States for the past several years.⁸³ In today's climate, although millions of Americans empathize with immigrants and support immigrant rights, anti-immigrant sentiment also abounds.⁸⁴ The economic downturn and attendant concerns about jobs and livelihoods, fears of terrorist attacks, and the irrational association of these problems with those perceived as foreign often drive this hostility. Unfortunately, the same concerns that fuel the immigration debate may

⁷⁸ See *id.* at 140–143.

⁷⁹ 460 U.S. 780 (1983).

⁸⁰ *Id.* at 796 n. 21 (quoting *Anderson v. Celebrezze*, 664 F.2d 554, 563–564 (6th Cir. 1981)).

⁸¹ 460 U.S. at 796–797.

⁸² *Id.* at 797.

⁸³ The Comprehensive Immigration Reform Act of 2007 was Congress' most recent attempt at a major overhaul of the immigration system, S. 1348, 110th Cong. (2007), but the legislation did not make it beyond the Senate floor. Conservatives characterized the reform effort as an amnesty program, and liberals criticized the creation of a second class of guest workers without benefits. See "Gang of 12" Mulls Over Immigration Bill, Assoc. Press, May 24, 2007, available at www.msnbc.msn.com/id/18842287/. Editorial, *The Immigration Deal*, N.Y. Times, May 27, 2007, available at http://www.nytimes.com/2007/05/20/opinion/20sun1.html?_r=1&ex=1180324800&en=70f1748ede68bfc0&ei=5070&emc=eta1&oref=slogin (opposing bill on grounds that: "It is the nation's duty to welcome immigrants, to treat them decently and give them the opportunity to assimilate. But if it does so according to the outlines of the deal being debated this week, the change will come at too high a price: The radical repudiation of generations of immigration policy, the weakening of families and the creation of a system of modern peonage within our borders.").

⁸⁴ See P. Constable, *Anti-Immigrant Effort Takes Hold in Md.: Grass Roots Movement Expands Beyond Montgomery in Targeting the Undocumented*, Wash. Post, Feb. 23, 2008, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/story/2008/02/22/ST2008022202916.html>. See also, e.g., Editorial, *A Misguided Crackdown: Treating the Symptoms, but Not the Cause, of Illegal Immigration*, Wash. Post, Aug. 15, 2008, at A20, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/14/AR2008081403047.html>; J. Preston, *Employers Fight Tough Measures on Immigration*, N.Y. Times, July 6, 2008, available at <http://www.nytimes.com/2008/07/06/us/06employer.html>; G. Martinez, *Push Needed for Immigration Reform*, Politico, Aug. 6, 2008, available at www.politico.com/news/stories/0808/12321.html; D. Jackson, *McCain Touts Immigration Reform to Hispanic Voters*, USA Today, July 8, 2008, available at http://www.usatoday.com/news/politics/election2008/2008-07-08-mccain-immigration_N.htm.

spill over into the presidential qualifications issue. There is a risk that some voters might fail to comprehend that striking the natural born requirement from Article II would affect only present or future United States citizens. It can be difficult to convey that this subject is quite distinct from the policy debates surrounding which non-citizens are permitted to enter or remain in the United States and eventually apply for citizenship.⁸⁵

Consequently, politicians who spearhead calls for amendment of Article II run a risk that constituents could view their actions negatively, perhaps even as “un-American.” But important advances in civil rights are rarely achieved unless we have the courage to take risks. The natural born citizenship proviso relates primarily to the status of one’s citizenship, not to whether one is a United States citizen in the first place. Eliminating the proviso would open the presidency and the vice presidency to all Americans. No one has a choice where to be born, but everyone who chooses to pledge allegiance to the United States should share in all of the rights and privileges of citizenship. Eliminating the “natural born” citizenship proviso would make it clear that all paths to citizenship are equal; none is “more American” than any other.⁸⁶

Conclusion

Senator John McCain’s presidential bid has brought to light significant issues pertaining to the meaning of the natural born citizenship proviso and its place in contemporary American constitutional law. It is ironic that the first significant legal challenges to the natural born citizenship qualifications of a presidential aspirant have been levied against a decorated war hero born to a member of the United States armed forces serving our country. Whatever one’s politics, it is hard to imagine any legitimate basis for questioning the loyalty of Senator McCain to the United States on the basis of his place of birth. However, the fact that these questions have been raised offers an opportunity to shine a spotlight on a constitutional anachronism that has no place in the United States Constitution in the twenty-first century. Whoever wins the 2008 election, the new President and Congress should seize the opportunity to take the lead in eliminating the natural born citizenship proviso for all Americans.

⁸⁵ See S. P. Herlihy, Note, *Amending the Natural Born Citizenship Requirement: Globalization as the Impetus and the Obstacle*, 81 Ch.-Kent L. Rev. 275, 276 (2006) (highlighting November 2004 USA Today/CNN/Gallup Poll reflecting 67% of respondents opposed to amending natural born citizenship proviso)) (quoting M. Kasindorf, *Should the Constitution Be Amended for Arnold?*, USA Today, Dec. 3, 2004, at 1A).

⁸⁶ For example, amending the natural born clause would guarantee the eligibility of Native Americans to hold the Office. See S. H. Duggin, M. B. Collins, *supra* note 1, at 100–102. Prior to the grant of statutory birthright citizenship by Congress in 1924 – arguably a form of collective naturalization that may not qualify as “natural born” citizenship for purposes of Article II – in certain instances Native Americans could become citizens only through an administrative naturalization process. *Id.*