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WHO CAN BE PRESIDENT OF THE UNITED STATES: THE UNRESOLVED ENIGMA

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The approach of our 45th presidential election evokes once again the question of constitutional eligibility. Under the presidential qualification clause of the Constitution, only "natural-born" citizens are qualified for this highest office. It is clear enough that native-born citizens are eligible and that naturalized citizens are not.¹ The recurring doubts relate to those who have acquired United States citizenship through birth abroad to American parents. Can they be regarded as "natural-born" within the contemplation of the Constitution?

In the early stages of the 1968 presidential campaign this question became increasingly urgent, because Governor George Romney of Michigan was a leading contender for the Republican nomination. Governor Romney was born to American citizens in a Mormon colony in Chihuahua, Mexico, and came to the United States with his parents when he was five. Oddly enough, other Republican candidates in recent years have confronted similar difficulties. Barry Goldwater was born in the Territory of Arizona, before it became a state. Governor Christian D. Herter of Massachusetts, a potential candidate in 1952 and 1960, and also Secretary of State during the latter years of the Eisenhower administration, was born to American parents who were studying art in France. Of course, this problem has also faced Democratic candidates. For example, Franklin D. Roosevelt, Jr., once discussed as a possible candidate, was born at the summer home of his parents on Campobello Island, New Brunswick, Canada.

Speculations concerning the presidential qualification clause have thus arisen from time to time. The problem has occasionally been mentioned by the courts. It has also provoked discussion of school-boys and scholars and inquiries to various government agencies.

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1. The naturalized citizen's ineligibility for the Presidency is mentioned in *Schneider v. Rusk*, 377 U.S. 163, 165, 177 (1964); *Knauer v. United States*, 328 U.S. 654, 658 (1946); *Baumgartner v. United States*, 322 U.S. 665, 673 (1944); *Luria v. United States*, 231 U.S. 9, 22 (1913).

But until now no direct confrontation has materialized, and there has never been a definitive judicial decision. Therefore, the doubts have persevered and unquestionably will continue until some way to end them is found. Because of the continuing, and doubtless increasing, public interest in this problem, I believe a reexamination at this time may be helpful.

I. THE CONSTITUTIONAL SETTING

The constitutional provisions prescribing the President's qualifications appear in Article II, Section 1, clause 5 of the United States Constitution, which declares:

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.

From today's vantage point in history, 180 years after the Constitution was adopted, several aspects of this formulation are puzzling. In the first place, the Framers here and at other points in the Constitution referred to citizens of the United States, but nowhere specified who were to be regarded as citizens.² This silence may perhaps be explained by a desire to bypass troublesome issues, such as the status of the Negro slaves and the distinction between state and national citizenship.³ In any event, as originally adopted, the Constitution's only oblique and inconclusive reference to the acquisition of citizenship was its grant of authority to Congress "to establish an uniform rule of naturalization."⁴ This omission to define citizenship persevered until 1868, when the fourteenth amendment was adopted. We shall examine that amendment later.

A second puzzling aspect of the constitutional prescription is its naked, again undefined, reference to the "natural-born." The presidential qualification clause is the sole instance of this term's appearance in the Constitution.⁵ The only explanation for the use of this term is the apparent belief of the Framers that its connotation was clear. With the passage of the years this has proved a mistaken assumption. However, any reading of this language must take into account the

2. U.S. Consr. art. I, § 2, cl. 2 (qualifications for members of House of Representatives — citizen of the United States); U.S. Consr. art. I, § 3, cl. 3 (qualifications for Senators — citizen of the United States); U.S. Consr. art. III, § 2, cl. 1 (judicial power extends to controversies involving citizens of different states). In *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 165 (1874), Chief Justice Waite observed that . . . "[T]he Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several States, yet there were necessarily such citizens without such provision. There cannot be a nation without a people."

3. See Gordon, *The Citizen and the State*, 53 *Geo. L.J.* 315, 318, 334 (1965).

4. U.S. Consr. art. I, § 8, cl. 4. The original colonies had naturalization laws. The Articles of Confederation made no provision for naturalization, and left citizenship to the various States. See *Lynch v. Clarke*, 1 *Sandf. Ch.* 583, 645-46 (N.Y. 1844).

5. The twelfth amendment in effect adopted this language by disqualifying for the Vice Presidency any person "constitutionally ineligible to the office of President."

admonition that an "isolated phrase in the United States Constitution [cannot be] rigidly interpreted without regard to other relevant provisions and to time and circumstance."⁶

A third puzzling element of the constitutional declaration is its specification that the presidential aspirant must have "been fourteen years a resident of the United States." If the Framers were speaking only of the native-born, this limitation would hardly have been necessary. It can doubtless be urged that this residence qualification was intended to relate only to the portion of the qualification clause dealing with citizens of the United States at the time the Constitution was adopted. But while the language of the qualification clause obviously includes this group, it is not in context limited to them. Indeed, it seems consistent with a supposition that the "natural-born" qualification was intended to include those who had acquired United States citizenship at birth abroad.⁷

The deliberations of the Constitutional Convention of 1787 furnish no clues to the underlying purpose. The Convention was writing on a clear slate, since the Articles of Confederation made no provision for a Chief Executive.⁸ Proposals for the establishment of a national executive were advanced at the outset of the Convention.⁹ None of these prescribed qualifications. The Convention soon resolved in principle to adopt a government with three branches: legislative, executive, and judicial.¹⁰ The discussions regarding the executive concerned his title,¹¹ powers,¹² term of office,¹³ and manner of selection.¹⁴ There was virtually no discussion of qualifications.¹⁵

6. Goldberg, *Law and the United Nations*, 52 A.B.A.J. 813, 814 (1966).

7. For a discussion of the 14 year residence requirement, as contemplating establishment of an identification with the United States see 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1479 (5th ed. 1891). See also E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 33, 330 (4th rev. ed. 1957), which discusses questions raised regarding whether President Hoover satisfied the 14 year residence requirement.

8. Despite the silence of the Articles of Confederation, the Congress elected an officer known as President of the Congress. He was a presiding officer who had no executive power. See 5 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 1, 572 (2d ed. 1845) [hereinafter cited as 5 ELLIOT'S DEBATES]. The Constitutional provisions regarding the Presidency generally were patterned after the New York constitution of 1777, which, however, had no "natural-born" qualifications. CONSTITUTION OF THE UNITED STATES OF AMERICA (rev. & ann. 1963), S. Doc. No. 39, 88th Cong., 1st Sess. 425 (1963).

9. These were comprehensive proposals for matters to be considered by the Convention, and included those of Randolph (1 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 143, 144 (2d ed. 1836)) [hereinafter cited as 1 ELLIOT'S DEBATES]; Pinckney (*Id.* at 145, 148) and Hamilton (*Id.* at 179). Another omnibus proposal by Paterson made no provision for an executive, but was quickly discarded (*Id.* at 180, 181).

10. *Id.* at 150-51.

11. Hamilton would have designated him governor. *Id.* at 179. Other proposals were to designate him as President, with the title "His Excellency." *E.g., id.* at 145, 148, 228, 283.

12. See *id.* at 144, 182, 214, 219, 228.

13. Until the final stages of the Convention most proposals were for a single 7 year term, without eligibility for reelection. *Id.* at 182, 212, 219. Indeed this was provided in one of the latest drafts approved by the Convention. *Id.* at 228. Hamilton favored service by the executive during good behavior, without time limitation. *Id.* at 179.

14. There were several proposals for selection of the executive by the national legislature. *Id.* at 144, 222, 228.

15. The first mention of qualifications was a proposal by Delegate Mason, after the Convention's proceedings were well under way, to instruct the Committee on Detail

During its deliberations, the Constitutional Convention referred to a five man committee, known as the Committee on Detail, various resolutions including those for the establishment of a national executive.¹⁶ Thereafter, the Committee on Detail reported to the Convention and presented a document described as, "Draft of a Constitution."¹⁷ This draft included provision for an executive, but did not initially prescribe his qualifications.¹⁸ The Convention then debated and substantially approved the proposals for the national executive.¹⁹ However, this and other portions of the proposed Constitution were then referred to a Committee of Eleven, one member from each state, which revised the draft, presumably to conform with the sentiments expressed by the delegates.²⁰ However, their proposal included for the first time the requirements now incorporated in the presidential qualification clause, including the requirement that the President be a "natural-born" citizen.²¹ The Committee of Eleven did not explain why this new language had been added. The Convention approved this portion of the proposals without debate.²² The draft Constitution was then referred to a second Committee of Five, known as the Committee on Style and Arrangement or the Committee on Revision.²³ That Committee retained the presidential qualification clause without comment, and without substantial change.²⁴ It was adopted in this form, and without any debate, by the Convention.²⁵ Indeed, no explanation of the origin or purpose of the presidential qualification clause appears anywhere in the recorded deliberations of the Convention.²⁶

to consider for all executive, judicial and legislative offices under the new government "qualifications of landed property and citizenship," and for disqualifying persons indebted to the United States. *Id.* at 219-20. Mason explained that this provision was necessary because undesirable persons had been elected to state legislatures. 5 ELLIOT'S DEBATES 370. The debate centered on the proposed disqualification of debtors. *Id.* 371. Of course, the property and debt qualifications ultimately were rejected by the Convention. See 1 ELLIOT'S DEBATES at 223.

16. The members of the Committee on Detail were Rutledge, Randolph, Gorham, Ellsworth, and Wilson. 1 ELLIOT'S DEBATES at 217.

17. *Id.* at 224-30.

18. *Id.* at 228.

19. *Id.* at 267.

20. *Id.* at 280.

21. In a partial report on Aug. 22, 1787, the Committee of Eleven provided that the President "shall be of the age of thirty-five years, and a citizen of the United States, and shall have been an inhabitant thereof for twenty-one years." 1 ELLIOT'S DEBATES 256-57; 5 ELLIOT'S DEBATES 462. However, in a later report on Sept. 4, 1787, the Committee presented, without explanation, a revised presidential qualification clause, substantially in the form it now appears in the Constitution, including the reference to "a natural born citizen." 1 ELLIOT'S DEBATES 289; 5 ELLIOT'S DEBATES 507.

22. 1 ELLIOT'S DEBATES 289; 5 ELLIOT'S DEBATES 507.

23. 1 ELLIOT'S DEBATES 295; 5 ELLIOT'S DEBATES 530. This Committee consisted of Johnson, Hamilton, Gouverneur Morris, Madison and King.

24. 1 ELLIOT'S DEBATES 302; 5 ELLIOT'S DEBATES 536.

25. 1 ELLIOT'S DEBATES 297-317; 5 ELLIOT'S DEBATES 535-53.

26. See note 20 *supra*. One author declares that the "natural-born" qualification was intended to exclude aliens "by birth and blood." Morse, *Natural-Born Citizen of the United States*, 66 ALBANY L.J. 99, 100 (1904). A similar purpose is found by Story in his 2 COMMENTARIES ON THE CONSTITUTION §§ 1479-80 (1891), that is, to exclude "ambitious foreigners." A similar expression appears in 1 J. KENT, COMMENTARIES ON AMERICAN LAW * 274. None of these comments cites any supporting evidence. See also 2 G. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES 193 (1882).

It has been suggested,²⁷ quite plausibly, that this language was inserted in response to a letter sent by John Jay to George Washington, and probably to other delegates, on July 25, 1787, which stated:

Permit me to hint, whether 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.²⁸

Possibly this letter was motivated by distrust of Baron Von Steuben, who had served valiantly in the Revolutionary forces, but whose subsequent loyalty was suspected by Jay.²⁹ Another theory is that the Jay letter, and the resulting constitutional provision, responded to rumors that the Convention was concocting a monarchy to be ruled by a foreign monarch.³⁰ In any event, the Committee of Eleven shortly thereafter proposed, and the Convention adopted, the language restricting the Presidency to "natural-born" citizens.³¹ This language appears nowhere else in the Constitution.³²

II. THE BRITISH ANTECEDENTS

We are left therefore with the conviction that the Framers were referring to the natural-born within the contemporary frame of understanding in 1787. There were no conspicuous colonial precedents. Therefore it seems patent that those who uttered this term were influenced by the usage in the mother country.³³

In 1787, the Colonies had just won their independence. But they had retained the language, the culture, and the traditions of Great Britain. And their legal system was grounded in the English common law. This was not infallibly true, since some of the common law precepts did not flourish in the more liberal climate of the new country. Thus, the common law doctrine of indissoluble allegiance to the Crown

27. Thach, *The Creation of the Presidency, 1775-1789*, 40 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE No. 4, p. 137 (1922). The Thach work is a scholarly and comprehensive discussion of the formulation of the constitutional provisions dealing with the Presidency. Another illuminating, but regrettably unannotated, discussion of the proceedings of the Constitutional Convention will be found in Means, *Is Presidency Barred to Americans Born Abroad?*, U.S. NEWS & WORLD REP., Vol. 39, No. 26, at 26-30, Dec. 23, 1955, reprinted in 113 CONG. REC. H5776-H5779 (daily ed. May 18, 1967).

28. U.S. DEPT. OF STATE, 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 237 (1905).

29. See note 27 *supra*.

30. Means, *supra* note 27, at 26, 28, 113 CONG. REC. at H5777-H5778.

31. One author has suggested, without any supporting citation, that in the light of the expected immigration from foreign countries, the purpose of the language was "to provide that the President should at least be the child of citizens owing allegiance to the United States at the time of his birth." Morse, *Natural-Born Citizen of the United States*, 66 ALBANY L.J. 99-100 (1904). See also note 26 *supra*.

32. See note 5 *supra*.

33. *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Weedin v. Chin Bow*, 274 U.S. 657, 660 (1927); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 167 (1874); *Ludlam v. Ludlam*, 26 N.Y. 356, 361 (1863); *Lynch v. Clarke*, 1 Sandf. Ch. 583, 645-47, 660 (N.Y. 1844); Means, *supra* note 27, at 27, 113 CONG. REC. at H5777.

eventually was not followed in the United States.³⁴ But this deviation developed in the absence of any specific provision in the Constitution. It seems reasonable to assume, on the other hand, that when the Framers used an undefined common law term, *e.g.*, "natural-born," they must have intended to accept the connotation of the common law, as it had developed in 1787.³⁵ Indeed, in passing on the status of a person born in the United States, the Supreme Court remarked on the absence of a constitutional definition of citizenship, and observed:³⁶

In this, as in other respects, it 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.

The British legal system had indeed long known of natural-born subjects. It is indisputable that the *jus soli*, under which nationality is determined by the place of birth, was always the basic tenet of the English common law.³⁷ This was a principle which emerged out of feudal concepts of allegiance and was peculiarly fitted to the isolated society of England in the early days of the common law.³⁸ It has always been true that a person born in the realm was a natural-born subject.

There has been some debate whether the common law also encompassed the *jus sanguinis*, a product of the civil law and followed in most European countries, under which nationality could be transmitted by descent at the moment of birth.³⁹ The fact is that the issue did not arise in the static feudal society, since there was little or no travel to foreign nations and children were not being born to British parents abroad. But the problem provoked discussions as mobility and foreign trade increased.⁴⁰

In 1343, the situation of the foreign-born children of British subjects was discussed in Parliament. There was general agreement that the status of such children should be clarified in order to eliminate any doubts as to their rights of inheritance as Englishmen. The enactment of legislation was delayed by the ravages of the plague in England.⁴¹ However, in 1350, Parliament did enact a law for the express purpose of resolving existing doubts, which declared that the children born

34. See Gordon, *The Citizen and the State*, 53 GEO. L.J. 315, 317 *et seq.* (1965).

35. See note 33 *supra*.

36. *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898). See also A. COCKBURN, NATIONALITY 12 (1869); F. VAN DYNE, CITIZENSHIP OF THE UNITED STATES 32 (1904); *Lynch v. Clarke*, 1 Sandf. Ch. 583, 645-52 (N.Y. 1844); *Ludlam v. Ludlam*, 26 N.Y. 356, 361 (1863). In the latter case, the court noted that the constitution of the State of New York also referred to citizens of the state without defining that term.

37. *Weedin v. Chin Bow*, 274 U.S. 657, 660 (1927); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). BLACKSTONE, COMMENTARIES 154 (Dean Gavit ed. 1941); A. COCKBURN, NATIONALITY 6 (1869) [hereinafter cited as A. COCKBURN].

38. See *United States v. Wong Kim Ark*, 169 U.S. 649, 707 (1898) (dissenting opinion); A. COCKBURN 7 (1869).

39. *United States v. Wong Kim Ark*, 169 U.S. 649, 666 (1898); *Ludlam v. Ludlam*, 26 N.Y. 356, 362 (1863); *Lynch v. Clarke*, 1 Sandf. Ch. 583, 645-52 (N.Y. 1844); A. COCKBURN 7.

40. A. COCKBURN 7.

41. *United States v. Wong Kim Ark*, 169 U.S. 649, 668 (1898); A. COCKBURN 708.

beyond the sea to British subjects "shall have and enjoy the same benefits and advantages" as their parents in regard to the right of inheritance.⁴² The first reference to such children as natural-born subjects apparently was in a 1677 law, which dealt with the children of persons who had fled to foreign countries during the Cromwell era, and declared such persons to be natural-born subjects.⁴³ More general legislation was enacted in 1708,⁴⁴ and it provided that the foreign-born children of natural-born British subjects "shall be deemed, adjudged and taken to be natural-born subjects of this kingdom, to all intents, constructions and purposes whatsoever." This legislation was further extended in 1773 to grant status as natural-born subjects to the grandchildren of natural-born subjects, thus precluding the transmission of British nationality by descent or inheritance beyond the second generation.⁴⁵

In viewing this development, the leading British authorities agree that under the early common law, status as a natural-born subject probably was acquired only by those born within the realm, but that the statutes described above enabled natural-born subjects to transmit equivalent status at birth to the children born to them outside of the kingdom. These are the views expressed in Coke on Littleton,⁴⁶ Blackstone,⁴⁷ Cockburn,⁴⁸ and Dicey.⁴⁹ The latter is most explicit in stating that a natural-born subject "means a British subject who became a British subject at the time of his birth" and that this designation includes a person born abroad whose father or paternal grandfather was born in British dominions.⁵⁰

III. CONSTITUTIONAL AND LEGISLATIVE PROVISIONS AFTER ADOPTION OF THE CONSTITUTION

If the constitutional reference to natural-born citizens were assessed only in the light of the previous British usage, it would present little difficulty. "Natural-born citizen" doubtless was regarded as equivalent to "natural-born subject," adjusted for the transition from monarchy to republic.⁵¹ The Framers certainly were aware of the long-settled British practice, reaffirmed in recent legislation in England,⁵² which unquestionably "applied to the colonies before the War of Independence,"⁵³ to grant full status of natural-born subjects

42. 25 Edw. III, c. 2 (1350).

43. 29 Car. II, c. 6, § 1 (1677).

44. 7 Anne, c. 5, § 3 (1708). This legislation was substantially reenacted by 4 Geo. II, c. 21 (1731).

45. 13 Geo. III, c. 21 (1773).

46. 1 COKE ON LITTLETON 8a, 129a (F. Hargrave & C. Butler ed. 1853).

47. W. BLACKSTONE, COMMENTARIES 154-57 (Dean Gavit ed. 1941).

48. A. COCKBURN 9. Lord Cockburn observes that if the 1350 statute "had only been declaratory of the common law, the subsequent legislation on the subject would have been unnecessary."

49. A. DICEY, THE CONFLICT OF LAWS 173-78 (1896 ed. with Moore's Notes of American Cases).

50. *Id.* at 173. For modern English rule, see also 1 HALSBURY, LAWS OF ENGLAND 548 *et seq.* (3d ed. 1952).

51. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 166 (1874).

52. See notes 44 & 45 *supra*.

53. *Weedin v. Chin Bow*, 274 U.S. 657, 660 (1927); A. COCKBURN 12.

to the children born overseas to British subjects.⁵⁴ There was no warrant for supposing that the Framers wished to deal less generously with their own children.⁵⁵ Therefore, in the absence of other factors, it would have been relatively easy to find such children "natural-born" within the contemplation of the Constitution.⁵⁶

A. THE NATURALIZATION ACT OF 1790

However, complications were produced by subsequent developments. The first such complication arose in the First Congress, elected immediately after the adoption of the Constitution. The proceedings of this body, which met so soon after the Constitutional Convention and included some of the delegates to that Convention, manifestly are significant in disclosing the intent of the Framers.⁵⁷ During the early discussions of the First Congress, a Mr. Burke observed that "The case of children of American parents born abroad ought to be provided for, as was done in the case of English parents, in the 12th year of William III."⁵⁸ Thereafter, the Second Session of the First Congress adopted the Act of March 26, 1790, which dealt with this and other aspects of citizenship.⁵⁹ The 1790 act, believed by some to have been a product of Jefferson's fertile mind,⁶⁰ provided for the acquisition of United States citizenship in three situations: (1) The naturalization of qualified aliens;⁶¹ (2) the derivative naturalization of the minor children of such naturalized citizens;⁶² and (3) the transmission of citizenship to children born abroad to American citizens.⁶³ The latter provision of the 1790 act was stated in the following language:

And the children of citizens of the United States, that may be born beyond the 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.⁶⁴

54. See notes 41-50 *supra*. Means, *supra* note 27, at 27, 113 CONG. REC. at H5777, points out that the delegates to the Constitutional Convention included 22 laymen and 33 lawyers.

55. Means points out that John Jay, who originally suggested the natural-born qualification (see note 28 *supra*), had children who had been born abroad while he was on diplomatic missions. Means, *supra* note 27, at 27, 113 CONG. REC. at H5777.

56. See A. COCKBURN 12, in which this leading British author stated "The Law of the United States of America agrees with our own."

57. Twenty members of the First Congress had been delegates to the Constitutional Convention, and included eight members of the Committee of Eleven, which drafted the presidential qualification clause. Means, *supra* note 27, at 28, 113 CONG. REC. at H5778.

58. 1 ANNALS OF CONGRESS 1121 (1790). See also *Weedin v. Chin Bow*, 274 U.S. 657, 661 (1927).

59. Act of March 26, 1790, ch. 3, 1 Stat. 103, 104.

60. See Morse, *Natural-Born Citizen of the United States*, 66 ALBANY L.J. 90, 100 (1904).

61. For comparable provisions of the current statute, see Immigration and Nationality Act of 1952, ch. 447, § 310 *et seq.*, 66 Stat. 239-45, as amended, 8 U.S.C. § 1421 *et seq.* (1964).

62. For comparable provisions of the current statute, see *id.*, §§ 320, 321, 66 Stat. 245, 8 U.S.C. §§ 1431, 1432 (1964).

63. For comparable provisions of the current statute, see *id.*, § 301, 66 Stat. 235, as amended, 8 U.S.C. § 1401 (1964), as amended, (Supp. II, 1965-66).

64. Act of March 26, 1790, ch. 3, 1 Stat. 103, 104.

There are a number of interesting considerations in connection with the 1790 act. In the first place, there is no record of any debate in Congress on the provisions dealing with the acquisition of citizenship by descent, at birth abroad to American citizen parents.⁶⁵ Second, the statute was captioned "An Act to establish an uniform Rule of Naturalization." While the caption of a statute does not always fully describe its content,⁶⁶ this language would seem to indicate that Congress believed it was legislating under its constitutional mandate "to establish an uniform rule of naturalization."⁶⁷ Such an assumption is debatable, as I shall show later. It seems equally valid to suggest that this provision of the statute, largely patterned after the English statutory precedents,⁶⁸ was enacted to remove any doubt that status as a natural-born citizen was acquired by a child born abroad to American citizen parents.⁶⁹ And the issue of presidential eligibility is not necessarily settled, even if we were to accept the thesis that the 1790 act was entirely a naturalization statute. The Constitution does not speak of naturalized citizens but rather qualifies only "a natural-born citizen." It is possible that a person who was regarded in 1790 as a naturalized citizen could also be deemed natural-born, if he acquired his United States citizenship at birth. Under the direct mandate of the 1790 act, such a person was given the rights of a natural-born citizen, whether or not one believes that his citizenship status resulted from naturalization.⁷⁰ However, such a hypothesis might still leave open the question of whether Congress can enlarge or modify the categories of eligible citizens encompassed within the presidential qualification clause.⁷¹

65. See *Weedin v. Chin Bow*, 274 U.S. 657, 661 (1927).

66. See *United States v. Minker*, 350 U.S. 179, 185 (1956); 2 J. SUTHERLAND, STATUTORY CONSTRUCTION § 4802 (3d ed. 1943).

67. Similar captions appeared in the successor legislation of Jan. 29, 1795, ch. 20, 1 Stat. 414; and April 14, 1802, ch. 28, 2 Stat. 153. In *Weedin v. Chin Bow*, 274 U.S. 657, 665 (1927), the Supreme Court observed that in these early statutes "Congress must have thought that the questions of naturalization and of the conferring of citizenship on sons of American citizens born abroad were related." The Court's language, it will be observed, differentiates between naturalization and citizenship by descent. One author urges that the 1790 act's reference to citizens by descent as natural-born resulted from error in adopting the language of an English statute. P. McElwee, *Natural Born Citizen*, unpublished article reprinted in 113 CONG. REC. H7255, H7258 (daily ed. June 14, 1967).

68. See notes 42-45 *supra*. However, in limiting the citizen's power to transmit to a single generation, the 1790 act did not go as far as the latest English statute (enacted in 1733), which allowed transmission to two generations. See *Weedin v. Chin Bow*, 274 U.S. 657, 661 (1927), which suggests that the 1790 act did not go as far as the British precedent, "because of the divided allegiance of many during and after the Revolution."

69. This thesis is supported by Chief Justice Fuller's dissenting opinion in *United States v. Wong Kim Ark*, 169 U.S. 649, 714 (1898), in which he stated that the statute was "clearly declaratory, passed out of abundant caution to obviate misunderstandings." The same position is urged in *Ludlam v. Ludlam*, 26 N.Y. 356 (1863) and *Lynch v. Clarke*, 1 Sandf. Ch. 583, 660 (N.Y. 1844) (statute "a superabundant caution").

70. This concept is strongly urged in Means, *supra* note 27, at 26-27, 113 CONG. REC. at H5777.

71. For a contention that a qualified citizenship would not satisfy the presidential qualification clause, see 1 W. WILLOUGHBY, CONSTITUTIONAL LAW 354 (2d ed. 1929). Professor Willoughby's thesis is discussed in the text accompanying notes 174-77 *infra*. It has been suggested, however, that legislation disqualifying from public office those convicted of certain serious criminal offenses (18 U.S.C. §§ 202, 205, 206, 207, 216, 281, 282, 592, 593, 1901, 2071, 2381, 2383, 2385, 2387) adds to the disqualifications prescribed by the Constitution. E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 33-34,

Also noteworthy is the 1790 act's omission to deal with the citizenship status of persons born in the United States. It can be argued that Congress may have regarded this subject as beyond its competence, and this argument would support the theory that the 1790 act was exclusively a naturalization statute. But Congress has not been reluctant, in later statutes, to record its adherence to the *jus soli*, even after that principle was specifically confirmed in the fourteenth amendment.⁷² As I have indicated, it seems more likely that this omission to define the status of the native-born was attributable to a reluctance to face controversial issues, such as the status of the Negro slaves and the relation between state and national citizenship.⁷³

It can also be argued that if the legislation dealing with citizens by descent does not derive from the naturalization clause, then Congress may have exceeded its power in 1790, and in subsequent legislation, in conferring citizenship status on such persons. But such a contention overlooks the inherent power of a state to define its citizenship.⁷⁴ The undefined constitutional references to citizens, the unquestionable recognition of the *jus soli* in the absence of statute, the experience of the mother country, and the practice in the United States all confirm the power of Congress to legislate in this area.

Finally, the 1790 act stated that citizens by descent "shall be considered as" natural-born citizens. It can perhaps be argued that this language conferred an inferior status, which would be insufficient for the purposes of constitutional qualifications.⁷⁵ But this argument would hardly be sound, since the statutory language merely reflected the contemporary usage, which often declared that persons were "considered" or "deemed" to be citizens.⁷⁶ Indeed, the other provisions of

331 (4th rev. ed. 1957); E. FINCHER, *THE PRESIDENT OF THE UNITED STATES* 4-5 (1955). Of course, the application of these statutes to the Presidency has never been tested.

72. The first statutory recognition of citizenship by birth in the United States appeared in section 1 of the Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27 (later REV. STAT. 1992), which "declared" all persons born in this country to be citizens of the United States. This statute preceded the fourteenth amendment and, like the amendment, was enacted to confirm and safeguard the citizenship status of the liberated Negroes. Modern nationality legislation, enacted long after the fourteenth amendment, likewise confirms the citizenship status of persons born in the United States. See Nationality Act of 1940, ch. 876, § 201(a), 54 Stat. 1138; Immigration and Nationality Act of 1952, ch. 447, § 301(a), 66 Stat. 235, 8 U.S.C. § 1401(a) (1964), *as amended*, (Supp. II, 1965-66). The fourteenth amendment is discussed in the text accompanying notes 96 *et seq.*, *infra*.

73. See text accompanying note 3 *supra*.

74. Mackenzie v. Hare, 239 U.S. 299, 310-12 (1915); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 167 (1874); E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 33, 330 (4th rev. ed. 1957); H.R. COMM. ON IMMIGRATION & NATURALIZATION, 76th Cong., 1st Sess.; 1 NATIONALITY LAWS OF THE UNITED STATES 10 (Comm. Print 1939) [hereinafter cited as NATIONALITY LAWS OF THE UNITED STATES]. (This document was prepared by a committee consisting of the Secretary of State, the Secretary of Labor and the Attorney General, appointed by President Roosevelt in 1933 to study the nationality laws of the United States and to propose a codification of those laws. The efforts of the committee culminated in the enactment of the Nationality Act of 1940, ch. 876, 54 Stat. 1137. See note 105 *infra* and accompanying text.) See notes 72 *supra*, and 101, 156 & 158 *infra*.

75. See note 71 *supra*.

76. Similar language appeared in the Acts of Jan. 29, 1795, ch. 20, 1 Stat. 414 and April 14, 1802, ch. 28, 2 Stat. 153. As will appear hereafter, the Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, sought to clear up doubts as to the citizenship status of persons

the same statute likewise state that persons who acquire citizenship by their own naturalization or the naturalization of their parents "shall be considered as" citizens.⁷⁷

On balance, therefore, it seems likely that the virtually contemporaneous coloration provided by the 1790 act lends support to the view that the constitutional reference to natural-born citizens was intended to include those who acquired United States citizenship by descent, at birth abroad.

B. THE ACTS OF 1795 AND 1802 AND THE BINNEY HYPOTHESIS

The 1790 act was repealed in 1795 and was replaced by legislation making substantially the same provisions for the foreign-born children of American citizens.⁷⁸ The only significant change was the statement that such children "shall be considered as citizens of the United States," omitting their characterization as "natural-born." The reason for this change does not appear in the legislative proceedings. Possibly the characterization was deemed archaic or superfluous. Perhaps the legislators wished to avoid any attempt to define the constitutional phrase.⁷⁹ But these are simply speculations, in the absence of evidence. The fact is that the "natural-born" designation was eliminated in the 1795 statute and has not since reappeared in any legislation dealing with citizenship. Indeed, the only American uses of this term are in the constitutional qualification and the 1790 act. Modern nationality usage, in the United States and elsewhere, does not include any provision for natural-born citizens.⁸⁰ The accepted modern designations, which will be discussed later, refer only to citizenship at birth and by naturalization, with the former group divided into native-born citizens and citizens at birth abroad.⁸¹ Therefore the designation of natural-born citizens is virtually obsolete and is relevant only because this antiquated term is inscribed in our Constitution.

previously born abroad, and it therefore "declared" such persons to be citizens of the United States. See notes 92 & 93 *infra*.

77. Even as late as the Act of March 2, 1907, ch. 2534, § 5, 34 Stat. 1228, a comprehensive citizenship statute provided that a child who acquired citizenship derivatively through the naturalization of his parents "shall be deemed a citizen of the United States." This loose terminology finally was ended by section 201 of the Nationality Act of 1940, ch. 876, 54 Stat. 1138, which declared that specified persons "shall be" citizens of the United States at birth. The same formulation appears in section 301 (a) of the Immigration and Nationality Act of 1952, ch. 447, 66 Stat. 235, 8 U.S.C. § 1401 (a) (1964), *as amended*, (Supp. II, 1965-66).

78. Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415.

79. Means points out that Madison, who was chairman of the House committee which drafted the 1795 act, had become a believer in states' rights, which included a belief that citizenship should be defined by the states. Means, *supra* note 27, at 29-30, 113 CONG. REC. at H5778. Another author argues that in the modified language of the 1795 act, Madison sought to correct an error in the 1790 statute. McElwee, *supra* note 67.

80. See NATIONALITY LAWS OF THE UNITED STATES 7 *et seq.*; Harvard Law School Research in International Law, *Draft of Convention on Nationality*, 23 AM. J. INT'L L. 13, 27 *et seq.* (spec. supp. 1929).

81. NATIONALITY LAWS OF THE UNITED STATES 7 *et seq.*; Harvard Law School Research in International Law, *supra* note 80, at 23. See also notes 104-13 *infra* and accompanying text.

The 1795 act was repealed in 1802 and was replaced by legislation which substantially reaffirmed the prior dispensations regarding the foreign-born children of American citizens.⁸² However, a rearrangement of language created an unfortunate ambiguity. The 1802 law stated that "the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits or jurisdiction of the United States, be considered as citizens of the United States." This ambiguity apparently aroused little public concern⁸³ until 1854, when Mr. Horace Binney called attention to it in a celebrated article, which expressed the view that in speaking of "persons who are or have been citizens" the 1802 act was not prospective, and that children born abroad to American citizens after the enactment of that statute did not acquire American citizenship.⁸⁴ Mr. Binney was a distinguished lawyer and scholar,⁸⁵ and the views expressed in his article were endorsed by at least one dictum of the Supreme Court.⁸⁶ Nevertheless, with deference to Mr. Binney, I find his position unpersuasive.⁸⁷ There is not the slightest evidence of a Congressional wish to repudiate the consistent practice extending over several centuries, in England and the United States, to recognize citizenship status by descent. In the absence of such evidence, it seems to me quite likely that, although the Binney hypothesis appears consistent with the naked language of the 1802 act, the less rigid and more realistic modern criteria of interpretation would read the 1802 act as meaning "who are now or hereafter" rather than finding it limited to the children of persons who were citizens in 1802.⁸⁸

For the purposes of the present discussion, the chief significance of Mr. Binney's article is his thesis that the common law recognized only the *jus soli* — citizenship determined by place of birth — and that the *jus sanguinis* — citizenship by descent — was relevant only to the extent that it was adopted by statute. Again, this is a debatable premise.⁸⁹ Concededly, as I have shown, there were doubts concerning the applicability of the *jus sanguinis* under the early common law.⁹⁰ But those doubts were eliminated by statutes enacted in England before the American Revolution, which became part of the body of law followed in England and passed on to this country.⁹¹ It can be argued,

82. Act of April 14, 1802, ch. 28, § 4, 2 Stat. 153, 155.

83. However, as I point out in the text accompanying notes 185-96 *infra*, the same position was first expounded by Chancellor Kent and was reiterated in all 14 editions of his *Commentaries*, from 1827 to 1896.

84. Mr. Binney's article first appeared, unsigned by him and titled *The Alienigenae of the United States*, in 2 AM. L. REGISTER 193 (1854). It was later published as a separate pamphlet, under the author's name. See *Weedin v. Chin Bow*, 274 U.S. 657, 663 (1927); *United States v. Wong Kim Ark*, 169 U.S. 649, 665 (1898).

85. See 4 W. LEWIS, GREAT AMERICAN LAWYERS 197 (1907-1909). Mr. Binney's life span was 1780-1875.

86. *United States v. Wong Kim Ark*, 169 U.S. at 673. The Binney thesis was also mentioned, but not specifically endorsed, in *Weedin v. Chin Bow*, 274 U.S. 657 (1927).

87. Mr. Binney's hypothesis was thoroughly examined and rejected in *Ludlam v. Ludlam*, 26 N.Y. 356, 369-70 (1863).

88. See text accompanying notes 185-96 *infra*.

89. See notes 39-50 *supra* and accompanying text.

90. See notes 38-42 *supra* and accompanying text.

91. See notes 38-56 *supra* and accompanying text.

I believe, that this total corpus was the common law which this country inherited, and that it persevered unless specifically modified.⁹²

C. THE ACT OF 1855

In any event, Mr. Binney's article brought a quick response from Congress, which passed a new statute in 1855,⁹³ making an explicit statement:

That persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and *are hereby declared to be* citizens of the United States . . . (Emphasis added.)

This legislation became Section 1993 of the Revised Statutes and continued without substantial change, except to confer upon American women equal right to transmit citizenship,⁹⁴ until 1940.⁹⁵

D. THE FOURTEENTH AMENDMENT

We come now to another major complication. The first sentence of the fourteenth amendment, which was approved in 1868,⁹⁶ declares:

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.

On its face, this language seems to indicate that there are only two methods of acquiring United States citizenship, by birth in the United States and by naturalization in the United States. It has been argued that this is a comprehensive definition of the methods of acquiring United States citizenship, and that the amendment "contemplates two sources of citizenship, and two only: birth and naturalization."⁹⁷

There is no evidence that this amendment sought to provide an exclusive definition of citizenship. On the contrary, as I have said on another occasion, "The fourteenth amendment was an aftermath of the Civil War and the language in question was fashioned to safe-

92. See notes 36-38 *supra* and accompanying text.

93. Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604.

94. Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797. This legislation continued the emancipation of women in regard to citizenship status, which had been commenced by the Cable Act of Sept. 22, 1922, 42 Stat. 1021. For an expression of the earlier view see *Mackenzie v. Hare*, 239 U.S. 299 (1915). Before 1934 American women could not transmit citizenship by descent. *Montana v. Kennedy*, 366 U.S. 308 (1961).

95. *Cf.* Act of March 2, 1907, ch. 2534, § 6, 34 Stat. 1228-1229, which required citizens by descent who continued to reside outside the United States to take an oath of allegiance on their 18th birthday in order to retain the protection of the United States. See notes 115 & 116 *infra*.

96. See note 98 *infra*.

97. *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898). For similar expressions, see notes 159 & 162 *infra*. Compare however, Mr. Justice Frankfurter's dictum in *Perez v. Brownell*, 356 U.S. 44, 58 n. 3 (1958), declaring that the fourteenth amendment "sets forth the two principal modes (but by no means the only ones) for acquiring citizenship."

guard the citizenship rights of Negroes which previously had been questioned," particularly in the widely condemned *Dred Scott* decision.⁹⁸ The purpose was to protect existing citizenship rights, not to curtail benefits which previously were recognized.⁹⁹

This purpose was confirmed by the Civil Rights Act of 1866, which merely "declared" all persons born in the United States to be citizens of the United States.¹⁰⁰ In launching the fourteenth amendment almost immediately thereafter, Congress obviously intended only to give greater force to the same declaration.¹⁰¹ As pointed out by Mr. Justice Gray in *United States v. Wong Kim Ark*:¹⁰²

The same Congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress, framed the Fourteenth Amendment of the Constitution. . . . As appears from the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions on citizenship. . . . It is declaratory in form, and enabling and extending in effect.

The dissenting opinion of Chief Justice Fuller in the same case makes another telling argument against the theory that the fourteenth amendment was intended as an exclusive definition of citizenship by pointing out that the amendment refers only to "persons born or naturalized in the United States." The Chief Justice found it incongruous to suppose that in omitting reference to the status of persons born outside the United States, the amendment was intended to bar them from citizenship benefits.¹⁰³

On its face, the fourteenth amendment did not purport to define or limit the presidential qualification or the naturalization clauses

98. Gordon, *The Citizen and the State*, 53 *Geo. L.J.* 315, 336 (1965). For discussions of the background and purpose of the fourteenth amendment see *United States v. Wong Kim Ark*, 169 U.S. 649, 676, 688 (1898); *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 72 (1873); F. Van Dyne, *CITIZENSHIP OF THE UNITED STATES 7 et seq.*; *CONSTITUTION OF THE UNITED STATES OF AMERICA* (1964 ed.), prepared by Legislative Reference Service, Library of Congress and issued as S. Doc. No. 39, 88th Cong., 1st Sess. 1073 (1964).

99. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). Cf. *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967), which found an expatriation statute unconstitutional and declared that in safeguarding the citizenship of the emancipated Negroes, the framers of the amendment "wanted to put citizenship beyond the power of any governmental unit to destroy."

100. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, later codified as *REV. STAT.* § 1992.

101. However, the fourteenth amendment differed from the Civil Rights Act in several respects: (1) It substituted "born or naturalized" for "born"; (2) it substituted "subject to the jurisdiction thereof" for "not subject to any foreign power"; (3) as indicated in the text, it said that such persons "are" citizens, while the Act "declared" them citizens; (4) it specified that those born or naturalized in the United States were not only citizens of the United States, but also "of the State wherein they reside"; (5) it eliminated the Act's exclusion of "Indians not taxed." The congressional declaration in the Civil Rights Act, in the absence of direct constitutional authorization, is of interest in considering possible questions concerning the authority to pass laws regarding the transmission of citizenship by descent. See notes 72 & 74 *supra*.

102. 169 U.S. 649, 675-76 (1898).

103. *Id.* at 714.

of the Constitution. I believe that even if transmission of citizenship by descent at birth abroad were regarded as a form of naturalization, the reasonable and generally accepted view, in the light of the ancient tradition and the contemporary indicia of purpose, is that in speaking of citizenship acquired by birth or naturalization in the United States, the fourteenth amendment did not seek to exclude acquisition at birth outside the United States. Nor did the amendment attempt to address the status of such citizens by descent under the presidential qualification clause of the Constitution. Moreover, since the presidential qualification clause does not, as we have noted, refer to naturalization, there may still be room for qualification as a natural-born citizen, even though the process of acquisition at birth abroad was characterized as naturalization.

It seems to me, therefore, that the fourteenth amendment has little significant relevance to the appraisal of the presidential qualification clause, and that the amendment's specification of birth or naturalization in the United States does not exclude other methods of acquiring United States citizenship.

E. RECENT LEGISLATION

The latter assumption appears to be shared by Congress in its recent enactments governing the acquisition of United States citizenship. The most important recent milestone is the Nationality Act of 1940,¹⁰⁴ enacted as a codification of the nationality laws of the United States. This legislation resulted from a five year study by a Cabinet Committee, comprised of the Secretary of State, the Attorney General, and the Secretary of Labor.¹⁰⁵ The 1940 Code defined naturalization as the acquisition of nationality after birth.¹⁰⁶ In proposing this definition, the Cabinet Committee took note of the question "still a subject of debate" whether in referring to "natural-born citizens" the Constitution includes persons born abroad to American citizens.¹⁰⁷ Although noting that the discussions in the Convention seemed to indicate that the naturalization clause in the Constitution was designed to promote uniformity in conferring American citizenship on aliens, the Cabinet Committee also acknowledged the possibility, endorsed by some authorities, that the Framers might have contemplated a broader connotation of "naturalization," which would include the acquisition of citizenship at birth by children born abroad to American citizens.¹⁰⁸ However, the Cabinet Committee stated that this possibility did not outlaw the narrower definition of naturalization (acquisition of citizenship after birth) proclaimed by the 1940 act, "especially as this meaning is now universally attributed to the word," and since at least in recent years, persons who acquired United States citizenship

104. Act of Oct. 14, 1940, ch. 876, 54 Stat. 1137.

105. NATIONALITY LAWS OF THE UNITED STATES vii.

106. Nationality Act of 1940, § 101(c), ch. 876, 54 Stat. 1137. A similar definition appears in Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a)(23) (1964).

107. NATIONALITY LAWS OF THE UNITED STATES 3.

108. *Id.*

at birth abroad had never been regarded as naturalized.¹⁰⁹ The declarations of the Cabinet Committee regarding the common understanding and usage were unquestionably correct.¹¹⁰

Pursuant to the recommendations of the Cabinet Committee, the 1940 codification then went on to spell out three major methods of acquiring United States citizenship: (a) Birth in the United States, by those subject to the jurisdiction thereof.¹¹¹ This reiterated the mandate of the fourteenth amendment and the traditional adherence to the principle of *jus soli*.¹¹² (b) Birth outside the United States to American parents.¹¹³ This provision followed another traditional course — limited acceptance of the principle of *jus sanguinis*.¹¹⁴ Where both parents were American citizens at the time of birth and had previously resided in the United States, citizenship was transmitted unconditionally.¹¹⁵ Where at the time of the child's birth abroad only one parent was an American citizen who had previously resided in the United States for specified periods, citizenship was transmitted but was subject to loss if the child did not reside in the United States for specified periods prior to attaining maturity.¹¹⁶ (c) Naturalization of aliens, usually through familiar judicial processes.¹¹⁷

Of the three major classes of citizens provided for by the 1940 act, the first two acquired United States citizenship at birth, in the United States or abroad.¹¹⁸ The third class acquired citizenship through naturalization after birth.¹¹⁹ This formulation was continued, with some changes in the prescribed conditions, in the 1952 recodification which is now the controlling legislation.¹²⁰ The congressional prescrip-

109. *Id.* at 4.

110. See Harvard Law School Research in International Law, *supra* note 80, at 21, 24.

111. Nationality Act of 1940, ch. 876, § 201(a), 54 Stat. 1138.

112. See notes 37 & 38 *supra*.

113. Nationality Act of 1940, ch. 876, § 201(c), (g), 54 Stat. 1138, 1139.

114. See notes 58 *et seq.*, *supra* and accompanying text.

115. Nationality Act of 1940, ch. 876, § 201(c), 54 Stat. 1138.

116. Nationality Act of 1940, ch. 876, §§ 201(g) & 201(h), 54 Stat. 1139. This condition subsequent first appeared, in somewhat ambiguous language, in the Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797. See *Lee Chuck Ngow v. Brownell*, 152 F. Supp. 426 (E.D. Wisc. 1957). An earlier version, relating only to possible loss of diplomatic protection, was Act of March 2, 1907, ch. 2534, § 6, 34 Stat. 1228. *Rueff v. Brownell*, 116 F. Supp. 298 (D.N.J. 1953).

117. Nationality Act of 1940, ch. 867, § 301 *et seq.*, 54 Stat. 1140.

118. The introductory clause of section 201 of the Nationality Act of 1940, ch. 867, 54 Stat. 1138, said that: "The following shall be nationals and citizens of the United States at birth." A child who acquires citizenship at birth, whether in the United States or abroad, sometimes is also invested with another citizenship, and thus becomes a dual national. For problems of election in such situations see *Mandoli v. Acheson*, 344 U.S. 133 (1952); *Kawakita v. United States*, 343 U.S. 717 (1952); *Perkins v. Elg*, 307 U.S. 325 (1939).

119. See note 106 *supra*.

120. Immigration and Nationality Act of 1952, ch. 447, § 301, 66 Stat. 235-36, as amended, 8 U.S.C. § 1401 (1964), likewise starts with the declaration that: "The following shall be nationals and citizens of the United States at birth." Clause (1) of § 1401(a) deals with persons born in the United States. Clauses (3) and (7) deal respectively with persons born abroad to two citizen parents and to a single citizen parent. The provisions for loss of citizenship by the latter group upon failure to establish residence in the United States upon attaining maturity are found in § 1401(b) and (c). The provisions for naturalization appear in Immigration and Nationality Act of 1952, §§ 310-48, 66 Stat. 239-67, as amended, 8 U.S.C. 1421-59 (1964).

tion of three methods of acquiring United States citizenship should be compared with the fourteenth amendment's recitation of two methods, and unquestionably expressed the congressional view that the language of the fourteenth amendment does not forbid provision for acquisition of citizenship, *jus sanguinis*, at birth abroad, through a process not described as naturalization.¹²¹

IV. JUDICIAL AND SCHOLARLY EXPRESSIONS IN THE UNITED STATES

The enigma of the natural-born has evoked occasional comment in this country and has produced divergent opinions. Since there has not yet been a need to face this problem directly, much of the comment is somewhat casual and speculative. However, a survey of these expressions will be of interest.

Judicial dicta. An obvious starting point is the United States Supreme Court's 1898 decision in *United States v. Wong Kim Ark*,¹²² which held that a child born in the United States to alien parents acquired United States citizenship at birth. The decision turned on the fourteenth amendment's declaration that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."¹²³ The only question for decision was whether "subject to the jurisdiction thereof" excluded the children of aliens. In answering that question negatively, the Court found that in recognizing the citizenship of all native-born "subject to the jurisdiction of the United States," the fourteenth amendment had adopted the common law precept of *jus soli*, which conferred nationality upon all persons born in the realm except children born to foreign monarchs or ambassadors, or to alien enemies in hostile occupation, or on foreign public vessels.¹²⁴

Wong Kim Ark was truly a landmark in American constitutional law, and its basic holding was unquestionably correct. Moreover, its recognition of universal citizenship conferred on those born in this land, although adopting a doctrine developed as an adjunct of feudalism, was eminently suited to — perhaps even demanded by — the needs of a homogeneous nation, which has welcomed millions of immigrants who sought a life of freedom and opportunity. But in reaching this salutary conclusion for the Court's majority, Mr. Justice Gray belabored the issues in a long and amazingly discursive opinion. In the course of his fifty-three page dissertation, Mr. Justice Gray uttered many pronouncements. Some of these are sound; others are question-

121. See notes 72, 74 and 101, *supra*, and accompanying text. See also dictum of Mr. Justice Frankfurter in *Perez v. Brownell*, 356 U.S. 44, 58 n. 3 (1958), that the fourteenth amendment "sets forth the two principal modes (but by no means the only ones) for acquiring citizenship" and *Fee v. Dulles*, 236 F.2d 885 (7th Cir. 1956), *revid on other grounds*, 355 U.S. 61 (1957). Special problems of possible lack of "a uniform rule" of naturalization evoked by private legislation purporting to confer citizenship on designated individuals are discussed in Bookford, *Honorary Citizenship*, 12 I.N. REPORTER 1 (1963).

122. 169 U.S. 649 (1898).

123. For further discussion of the fourteenth amendment, see notes 96 *et seq.*, *supra*, and accompanying text.

124. See *United States v. Wong Kim Ark*, 169 U.S. at 657-60 (1898).

able; still others are wrong. Small wonder that this verbose opinion still befuddles courts and students.¹²⁵

In projecting his argument, Mr. Justice Gray urged that the common law recognized *only* the *jus soli*-citizenship determined by place of birth. This was a debatable but probably correct estimation of the early common law,¹²⁶ but did not take into account the changes made by the statutes we have discussed.¹²⁷ The Justice characterized those statutes as outside the common law. As I have indicated, in my view it is more accurate to regard those statutes as changing the common law.¹²⁸ In any event, they were part of the corpus of the English law in existence at the time of the Revolution, which was substantially recognized and adopted by our forefathers.¹²⁹ The dissenting opinion of Chief Justice Fuller, in which Mr. Justice Harlan joined, argued that the *jus sanguinis* — citizenship through parentage or descent — was the controlling principle of the common law.¹³⁰ This too was wrong. The common law, as it had developed through the years, recognized a combination of the *jus soli* and the *jus sanguinis*.¹³¹ A similar combination has always been embraced by the laws of the United States, except for the possibility of an inadvertent hiatus between 1802 and 1855.¹³² And like combinations of both historic principles are today reflected in the laws of most nations of the world.¹³³

Proceeding from his initial thesis, Mr. Justice Gray then stated that the fourteenth amendment, declaratory of the common law,

has not touched the acquisition of citizenship by being born abroad of American parents; and has left this subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization.¹³⁴

Moreover, in the view of the Justice, the fourteenth amendment contemplates two sources of citizenship, and two only: birth and naturalization. . . . A person born out of the jurisdiction of the United States can only become a citizen by being naturalized . . . by authority of Congress . . . either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship

125. See Gordon, *The Citizen and the State*, 53 *Geo. L.J.* 315, 335 (1965).

126. See notes 39–50 *supra* and accompanying text.

127. See notes 42–45 *supra* and accompanying text.

128. See notes 46–50 *supra* and accompanying text.

129. See note 53 *supra* and accompanying text.

130. 169 U.S. at 705.

131. See notes 36–49 *supra* and accompanying text. However, the majority opinion in *Wong Kim Ark* makes the point that the limitations prescribed in the various statutes in this country indicate that *jus sanguinis* was not regarded as the general rule in this country, in the absence of statute. 169 U.S. at 674. For the opposing view that these statutes merely declared or modified the common law principle, see note 130 *supra* and notes 136, 147–56 *infra* and accompanying text.

132. See notes 51–95 *supra* and accompanying text, and *Weedin v. Chin Bow*, 274 U.S. 657, 660, 666 (1927).

133. See *Laws Concerning Nationality*, U.N. Doc. No. ST/LEG/SER.B 14 (1954) with Supplements; Harvard Law School Research in International Law, *supra* note 80, at 27–32.

134. *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898).

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 acts.¹³⁵

Chief Justice Fuller's dissenting opinion,¹³⁶ on the other hand, believed the statutes regarding the acquisition of citizenship through descent, by children born abroad to American citizens,

are clearly declaratory, passed out of abundant caution to obviate misunderstandings. . . . In my judgment, the children of our citizens born abroad were always natural-born citizens from the standpoint of this Government.¹³⁷

It is manifest that these statements of the majority and dissenters in *Wong Kim Ark* were dicta, pure and simple. The question before the Court concerned children born in the United States, and it was not asked to pass on the status of children born abroad. Several of the propositions expounded by the majority are, as I have suggested, debatable. In any event, the majority's opinion did not discuss the presidential qualification clause of the Constitution and is not necessarily relevant to its interpretation, except possibly by inference.¹³⁸

In *Wong Kim Ark*, the Supreme Court found some comfort in its earlier decision in *Minor v. Happersett*.¹³⁹ The only question in the latter case was whether a state could validly restrict voting to male citizens of the United States. The answer, since expunged by the nineteenth amendment,¹⁴⁰ was that women could be denied the vote. In his generalized discussion, Chief Justice Waite observed that "new citizens may be born or they may be created by naturalization."¹⁴¹ The court mentioned the presidential qualification clause and stated that it unquestionably included children born in this country of citizen parents, who "were natives, or natural-born citizens, as distinguished from aliens or foreigners."¹⁴² While this language appears to equate natives and natural-born, the Court specified that it was not purporting to resolve any issues not before it.¹⁴³

Also mentioned in *Wong Kim Ark* was the Supreme Court's famous (perhaps notorious is a better description) decision in the *Dred Scott* case.¹⁴⁴ *Dred Scott* actually involved only the citizenship

135. *Id.* at 702-03.

136. *Id.* at 705.

137. *Id.* at 714.

138. All authorities agree that the terms "native" and "natural-born" both refer to citizenship acquired at the time of birth. *Weedin v. Chin Bow*, 274 U.S. 657, 666, 667 (1927); *Lynch v. Clarke*, 1 Sandf. Ch. 583, 665 (N.Y. 1844) ("both expressions assume that birth is a test of citizenship . . ."); Morse, *Natural Born Citizen of the United States*, 66 ALBANY L.J. 99, 100 (1904).

139. 88 U.S. (21 Wall.) 162 (1874).

140. For historical background of nineteenth amendment, see CONSTITUTION OF THE UNITED STATES OF AMERICA (1964 ed.), prepared by Legislative Reference Service, Library of Congress, and issued as S. Doc. No. 39, 88th Cong., 1st Sess. 1365 (1964).

141. 88 U.S. at 167.

142. *Id.*

143. *Id.* at 168.

144. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

of a runaway Negro slave. Again any generalized expressions affecting the status of foreign-born citizens would patently be dicta. Moreover, the *Dred Scott* holding was one of the factors leading to the Civil War, and it was directly repudiated by the Civil Rights Act of 1866 and the fourteenth amendment.¹⁴⁵ In any event, *Dred Scott* can hardly be cited as credible authority today.¹⁴⁶

I note next two scholarly opinions of the New York courts which were also mentioned in *Wong Kim Ark. Lynch v. Clarke*¹⁴⁷ was decided in 1844, long before the fourteenth amendment. Since aliens then could not inherit real property under New York law, United States citizenship was directly in issue. The court ruled that a child born in the United States to British parents during their temporary sojourn acquired United States citizenship at birth under the "original and ancient" common law rule, which was known to the Framers of the Constitution and implicitly adopted by them.¹⁴⁸ Although not involved in the case before it, the court discussed the status of children born abroad to American parents. It believed that under the common law such children had always been recognized as British subjects and that the English statutes were declaratory of the common law.¹⁴⁹ It regarded the American legislation on this subject as unnecessary and adopted out of "a superabundant caution," in order to eliminate doubts which had existed even under the common law.¹⁵⁰ And it noted the presidential qualification clause of the Constitution, compared usages of "natural-born" and "native-born," and concluded that: "Both expressions assume that birth is a test of citizenship. . . ."¹⁵¹

The later New York case of *Ludlam v. Ludlam*¹⁵² was decided in 1863, likewise, before the adoption of the fourteenth amendment. Here the court actually was confronted with the citizenship status, also for inheritance purposes, of a child born abroad to an American citizen father. This was during the period of supposed hiatus in the citizenship statutes, 1802-1855, of which Horace Binney had written only a few years earlier.¹⁵³ The court noted Mr. Binney's "able" and "useful" article, but disagreed with his conclusions.¹⁵⁴ It agreed that the question was debatable, but concluded that under the common law children born abroad to British subjects had been regarded as natural-born subjects and that the English statutes were declaratory of the common law.¹⁵⁵ It found that this common law principle had been adopted in the United States and that children born abroad to Ameri-

145. *United States v. Wong Kim Ark*, 169 U.S. at 676 (1898); CONSTITUTION OF THE UNITED STATES OF AMERICA (1964 ed.), prepared by Legislative Reference Service, Library of Congress, and issued as S. Doc. No. 39, 88th Cong., 1st Sess. 1073-74 (1964); F. VAN DYNE, CITIZENSHIP 7 *et seq.* (1904).

146. *United States v. Wong Kim Ark*, 169 U.S. at 676.

147. 1 Sandf. Ch. 583 (N.Y. 1844). The opinion was written by Assistant Vice Chancellor Lewis H. Sandford.

148. *Id.* at 639.

149. *Id.* at 659.

150. *Id.* at 660.

151. *Id.* at 665.

152. 26 N.Y. 356 (1863). The court's opinion was by Judge Selden.

153. See notes 83-92 *supra* and accompanying text.

154. 26 N.Y. at 369.

155. *Id.* at 362-66.

can fathers acquired United States citizenship at birth, even in the absence of statute.¹⁵⁶ The court's opinion did not discuss the presidential qualification clause.

Of interest, also, is the Supreme Court's 1927 decision in *Weedin v. Chin Bow*,¹⁵⁷ which did pass upon the citizenship status of a child born abroad to an American parent. The Court, speaking through Chief Justice Taft, held that in order to transmit American citizenship the American parent must have resided in the United States *prior* to the child's birth. The English and American history was extensively reviewed, and the Court found that the basic common law rule of *jus soli* had been modified in England by statutes and that: "These statutes applied to the colonies before the War of Independence."¹⁵⁸ The Court also reviewed the statutes in the United States, referred to the apparent hiatus in the 1802 law, the Horace Binney article, and the 1855 act enacted pursuant to his suggestion.¹⁵⁹ It stated that these statutes had adopted the *jus sanguinis*, which "emphasizes the fact and time of birth as the basis of" citizenship, and that under them citizenship is determined at the time of birth.¹⁶⁰ The Court also referred to the possibility, supported by the dissenting opinion in *Wong Kim Ark*, "that at common law the children of our citizens born abroad were always natural-born citizens from the standpoint of this Government, and that to that extent the *jus sanguinis* obtained here. . . ."¹⁶¹

Finally, I note the more venerable decision of the Supreme Court in *Elk v. Wilkins*,¹⁶² which found that members of the Indian tribes were not subject to the jurisdiction of the United States and did not acquire United States citizenship at birth. The Court, speaking through Mr. Justice Gray, observed that the "main object" of the first sentence of the fourteenth amendment was to settle beyond doubt the question raised in the *Dred Scott* case regarding the citizenship of Negroes born in the United States.¹⁶³ Mr. Justice Gray also noted the presidential qualification and the naturalization clauses of the Constitution and stated that under their terms, "The distinction between citizenship by birth and citizenship by naturalization is clearly marked. . . ."¹⁶⁴ Mr. Justice Gray also declared, in a dictum he later repeated in *Wong Kim Ark*,¹⁶⁵ that the fourteenth amendment "contemplates two sources of citizenship, and two sources only: birth and naturalization."¹⁶⁶ The

156. The court agreed with Binney's thesis of statutory hiatus after 1802 but found that citizenship by descent was acquired in the absence of statute. 26 N.Y. at 369-71. See also notes 72, 74, 101 & 112 *supra*. Of particular interest is the court's discussion of the well known, but somewhat obscure, holding in Calvin's Case, 7 Rep. 1, 2 S.T. 559 (1608). See 26 N.Y. at 363-64.

157. 274 U.S. 657 (1927).

158. *Id.* at 660.

159. *Id.* at 662-64.

160. *Id.* at 666-67.

161. *Id.* at 670.

162. 112 U.S. 94 (1884).

163. *Id.* at 101.

164. *Id.*

165. See notes 134-38 *supra*.

166. 112 U.S. at 101.

only holding of *Elk v. Wilkins*, of course, was that American Indians did not acquire United States citizenship by birth in this country. This holding has since been expunged by direct statutory mandates conferring citizenship status.¹⁶⁷ These statutes, parenthetically, supply an additional confirmation of the belief of Congress that the Constitution does not limit its authority to define citizenship status.¹⁶⁸

Patently there is little aid in these judicial expressions.¹⁶⁹ None of them directly addresses the presidential qualification clause of the Constitution. Their discussions generally concern the historical antecedents of citizenship by descent and the extent of that doctrine's acceptance in the United States before and after the adoption of the fourteenth amendment.

Scholarly views. The scholarly expressions approach the problem more directly, but are equally inconclusive. Professor Corwin, in his definitive book on the Presidency,¹⁷⁰ takes the position that the naturalization clause of the Constitution relates only to the award of citizenship to aliens and that the presidential qualification clause refers to those who became citizens at birth. He finds that the authority to grant citizenship to the latter group is inherent in the sovereign national power to determine who shall be members of the society, but does not consider the effect of the fourteenth amendment. He then observes:¹⁷¹

Should then, the American people ever choose for President a person born abroad of American parents, it is highly improbable that any other constitutional agency would venture to challenge their decision.

Similar views are expressed by Professor Fincher in an undocumented and less authoritative book on the Presidency.¹⁷² He notes the uncertainty regarding the eligibility of foreign-born children of American citizens, and states:¹⁷³

It is generally assumed, however, that should such a person become a candidate for the Presidency, few would question his eligibility. . . . Moreover, any doubts on that score would be settled by American voters, should he ever be nominated for the Presidency.

167. Immigration and Nationality Act of 1952, ch. 447, § 301(a) (2), 66 Stat. 235, 8 U.S.C. 1401(a) (2) (1964); Nationality Act of 1940, ch. 876, § 201(b), 54 Stat. 1138.

168. See notes 72, 74, 101 & 156 *supra*.

169. Among the lower court expressions are *Zimmer v. Acheson*, 191 F.2d 209 (10th Cir. 1951) (repeated the language regarding the two exclusive methods of acquiring citizenship, and found that a citizen by descent is a naturalized citizen); *Schaufus v. Attorney General*, 45 F. Supp. 61, 66-67 (D. Md. 1942) (dictum quoted *Wong Kim Ark* on two exclusive methods of acquiring citizenship); *United States ex rel. Guest v. Perkins*, 17 F. Supp. 177, 179 (D.D.C. 1936) (dictum that child born overseas to American mother is not natural born citizen).

170. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 32-34 (4th rev. ed. 1957).

171. *Id.* at 33.

172. E. FINCHER, *THE PRESIDENT OF THE UNITED STATES* 3-5 (1955).

173. *Id.* at 4, 5.

Professor Willoughby, in his somewhat ponderous tome on constitutional law,¹⁷⁴ acknowledges the uncertainty regarding the span of the presidential qualification clause. He would regard as natural-born those entitled to claim United States citizenship without any prior declaration on their part. Since the statute then in effect required the foreign-born citizen to take an oath of allegiance upon attaining majority, he would not deem them natural-born. Willoughby's thesis is questionable for a number of reasons. First, his theory regarding qualified citizenship, although not inherently unreasonable, has no support whatever in the language or antecedents of the Constitution. Second, he is wrong in his reading of the 1907 citizenship act.¹⁷⁵ That statute conferred citizenship absolutely upon children born abroad to American fathers and provided that their failure to take an oath of allegiance at majority would deprive them of diplomatic protection, not of citizenship.¹⁷⁶ Later statutes have confirmed the absolute acquisition of citizenship at birth by children born abroad to American parents, but have provided for *loss* of such citizenship under specified circumstances if only one of the parents is a United States citizen when the child is born.¹⁷⁷ Finally, Willoughby likewise does not consider the possible effect of the fourteenth amendment.

The natural-born qualification is also discussed by Justice Story in his well known *Commentaries on the Constitution*, as follows:¹⁷⁸

This permission of a natural citizen to become President is an exception from the great fundamental policy of all governments, to exclude foreign influence from their executive councils and duties. It was doubtless introduced (for it has now become by lapse of time merely nominal, and will soon become wholly extinct) out of respect to those distinguished revolutionary patriots who were born in a foreign land, and yet had entitled themselves to high honors in their adopted country. A positive exclusion of them from the office would have been unjust to their merits and painful to their sensibilities. But the general propriety of the exclusion of foreigners, in common cases, will scarcely be doubted by any sound statesman. It cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office; and interposes a barrier against those corrupt interferences of foreign governments in executive elections, which have inflicted the most serious evils upon the elective monarchies of Europe. Germany, Poland, and even the pontificate of Rome, are sad but instructive examples of the enduring mischiefs arising from this source.

It is difficult to follow Story's reasoning. The second and third sentences of the above quotation are addressed to the natural-born

174. W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 353-54 (2d ed. 1929).

175. Act of March 2, 1907, ch. 2534, § 6, 34 Stat. 1228.

176. *Lee Chuck Ngow v. Brownell*, 152 F. Supp. 426 (E.D. Wis. 1957); *Rueff v. Brownell*, 116 F. Supp. 298 (D.N.J. 1953).

177. See note 116 *supra* and accompanying text.

178. J. STORY, *COMMENTARIES ON THE CONSTITUTION* § 1479 (5th ed. 1891).

qualification but relate only to those who were citizens at the adoption of the Constitution. However, the first sentence, at least inferentially, seems to regard citizens by descent as qualified under the natural-born qualification. Also of interest is Story's dictum regarding the need to exclude "ambitious foreigners, who otherwise might be intriguing for the office." This observation seems consistent with the views of John Jay, which probably resulted in the adoption of the natural-born qualification.¹⁷⁹ Of course, Story, first writing in 1833, likewise does not take into account any possible effect of the fourteenth amendment.

I note also Bancroft's *History of the Constitutional Convention*. Bancroft comprehensively explores the development of the Convention's edicts regarding the Presidency.¹⁸⁰ He notes the Committee on Detail's insertion, almost at the last hour, of the presidential qualification clause, which was accepted by the Convention without any explanation or debate.¹⁸¹ Curiously enough, Bancroft does not mention the natural-born qualification and thus sheds no light on its proper interpretation.¹⁸²

Next, I turn to Chancellor Kent's famous *Commentaries*. At one point Kent seemed to equate natural-born with native-born and believed (like Story)¹⁸³ that the purpose of the presidential qualification clause was to exclude "ambitious foreigners."¹⁸⁴ At another point, Kent reviewed the development in England of the rule that foreign-born children of British subjects were regarded as natural-born. However, he deemed their rights in this country dependent on statute and declared that there was a regrettable hiatus after 1802 in conferring citizenship benefits on children born abroad to American parents.¹⁸⁵ We have seen that Horace Binney later expounded the same hypothesis and doubtless led to the clarification of the statute in 1855.¹⁸⁶ The Kent-Binney theory of hiatus in providing for such children was positively endorsed by Mr. Justice Gray in *Wong Kim Ark*¹⁸⁷ and mentioned by Chief Justice Taft in *Chin Bow*,¹⁸⁸ but neither case involved the status of children born abroad during the period of the alleged hiatus. The Kent-Binney theory was repudiated by the New York courts in *Lynch v. Clarke*¹⁸⁹ and *Ludlam v. Ludlam*,¹⁹⁰ the latter of which did involve the status of a child born abroad during the period of the alleged hiatus.

179. See notes 27 & 28 *supra*.

180. 2 G. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES 165 *et seq.* (1882).

181. *Id.* at 192-93.

182. *Id.*

183. See notes 178 & 179 *supra* and accompanying text.

184. 1 J. KENT, COMMENTARIES 273 (1st ed. 1826).

185. 2 J. KENT, COMMENTARIES 52 (1st ed. 1827). Kent asserted that the 1802 act "is clearly not prospective in its operation." Writing in 1827, Kent did not have the benefit of the later and more thorough examinations in *Lynch v. Clarke*, *Ludlam v. Ludlam*, and by Horace Binney. See notes 147-56 *supra* and accompanying text. Note 150 *supra* indicates that later editions of Kent largely ignored these and other developments.

186. See notes 84-92 *supra* and accompanying text.

187. See notes 122-46 *supra* and accompanying text. Citing Kent and Binney, Mr. Justice Gray also asserted that the 1802 act "clearly did not include foreign-born children of any person who became a citizen since its enactment." 169 U.S. at 673.

188. See notes 157-61 *supra* and accompanying text.

189. See note 147 *supra* and accompanying text.

190. See note 152 *supra* and accompanying text. As indicated there, Judge Selden of the New York Court of Appeals, writing a few years after the Binney article and

Kent and Binney were towering figures in American law¹⁹¹ and one hesitates to dispute them. But Kent was wrong in his support, through all fourteen editions, of the doctrine of indissoluble allegiance,¹⁹² and I believe he was also wrong in finding that there was a hiatus in providing for the citizenship of foreign-born children. It does not, in my view, seem reasonable to suppose that Congress intended to deny benefits to children born abroad between 1802 and 1855 to American parents who were not citizens in 1802. As I have indicated, I believe the 1802 act can reasonably be read as extending to children born abroad after its enactment.¹⁹³ And the theory of hiatus seems inconsistent with the language of the 1855 act, enacted to remove the ambiguity pointed out by Binney, which stated that children previously born abroad to American parents "are hereby declared to be citizens of the United States."¹⁹⁴ The thrust of this language seems declaratory, apparently designed to recognize existing citizenship status.¹⁹⁵ It is interesting to note that later editions of Kent, including the 12th edition by O. W. Holmes, Jr., in 1873, continued to deplore the hiatus even though Congress had removed all doubts by the 1855 statute.¹⁹⁶ In any event, this controversy as to the alleged hiatus is relevant to our discussion only insofar as it may demonstrate whether there was an unbroken national policy to confer citizenship on children born abroad to American citizens.

Another well known authority on American citizenship is Van Dyne, who recognized the "debatable question" whether the presidential qualification clause was intended to declare the common law doctrine. However, he took the position that a child who acquired United States citizenship at birth abroad to American parents "is a natural-born citizen of the United States."¹⁹⁷

Gettys, author of another well-regarded treatise, takes note of the prevailing uncertainty and states:

While there has yet been no occasion to obtain official opinion or decision on this point it is very probable that such opinion would

the 1855 act, found Binney's article "able" and "useful," but stated that after examining the authorities cited by Binney, "I am satisfied they do not sustain his conclusion."

191. See note 85 *supra*.

192. 2 J. KENT, COMMENTARIES 49 (1st ed. 1827). Later editions modified a flat endorsement of perpetual allegiance to describe it as the "better view" (7th ed.) and the "better opinion" (11th ed.). For description of the early doubts and ultimate rejection of the doctrine of indissoluble allegiance in the United States see Gordon, *The Citizen and the State*, 53 GEO. L.J. 315, 318 *et seq.* (1965).

193. See note 88 *supra* and accompanying text.

194. Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604. See notes 82-88 *supra* and accompanying text.

195. The view that the 1855 act was declaratory is also expressed in E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 33, 330 n. 6 (4th rev. ed. 1957). It is also possible to accept the hiatus theory and to find that a common law principle of *jus sanguinis* persevered in the absence of statute. See CORWIN, *id.* and *Ludlam v. Ludlam*, notes 152-56 *supra* and accompanying text.

196. 2 J. KENT, COMMENTARIES 53 (1st ed. 1827). Although the alleged hiatus is deplored in all editions of Kent, the 11th Edition has a footnote reference to the 1855 act. Later editions (including the 12th by O. W. Holmes, Jr.) omitted even this footnote reference.

197. F. VAN DYNE, CITIZENSHIP OF THE UNITED STATES 50 (1904).

be in harmony with the early law, which attributes the status of 'natural-born' to those persons acquiring United States citizenship *jure sanguinis*.¹⁹⁸

The excellent treatise on the Constitution prepared by the Legislative Reference Service of the Library of Congress remarks that the question "has been frequently mooted" and declares that the answer depends on whether the first sentence of the fourteenth amendment "is to be given an inclusive or exclusive interpretation."¹⁹⁹ At another point, the treatise states that there are three categories of citizens under the fourteenth amendment, the first being "those who are born citizens, of whom there are two classes, those who were born in the United States and those who were born abroad of American parentage."²⁰⁰

There have also been two widely-separated law review discussions. The first was by Alexander Porter Morse,²⁰¹ who had earlier been author of a text on citizenship.²⁰² Mr. Morse's discussion is brief and unannotated and somewhat pontifical in its assertions, although it displays familiarity with the subject matter. It was his view that the purpose of the presidential qualification clause was to prescribe that anyone who was born a citizen would be eligible, and that a person who acquired United States citizenship at birth abroad to American parents satisfies the constitutional qualification.

A later and more carefully prepared comment in the *Cornell Law Quarterly* also took the position that persons who acquired United States citizenship at birth abroad are "natural-born" within the meaning of the constitutional requirement.²⁰³

I note also several recent expressions. Thus, two studies reaching conflicting conclusions have appeared in the *Congressional Record*. The first is an article by Cyril C. Means, Jr., reprinted from *U.S. News and World Report*. Regrettably undocumented, this paper shows considerable awareness of the deliberations of the 1787 Constitutional Convention. It is the author's conclusion that the Framers intended to exclude only persons who had not been born citizens and that those who acquired United States citizenship at birth abroad are eligible for the Presidency.²⁰⁴ A contrary view is adopted in a previously

198. C. GETTYS, *THE LAW OF CITIZENSHIP OF THE UNITED STATES* 176 (1934).

199. *CONSTITUTION OF THE UNITED STATES OF AMERICA* (1964 ed.), issued as S. Doc. No. 39, 88th Cong., 1st Sess. 435 (1964). The original 1952 edition of this work was edited for the Legislative Reference Service by Edward S. Corwin. The 1964 edition was edited by Norman J. Small and Lester S. Jayson.

200. *Id.* at 1073.

201. Morse, *Natural-Born Citizen of the United States — Eligibility for the Office of President*, 66 *ALBANY L.J.* 99 (1904).

202. A. MORSE, *CITIZENSHIP* (1881). This treatise did not discuss the presidential qualification clause. However, in his preface (p. 1), the author equates natural-born with native-born, in language somewhat inconsistent with his later article. A fairly contemporaneous treatise, P. WEBSTER, *LAW OF CITIZENSHIP* (1891), does not discuss the presidential qualification clause or the designation of "natural-born." However, he regards *jus sanguinis* as the natural rule and finds that residence abroad by American citizens does not change the right of descent of their children.

203. Freedman, *Presidential Timber: Foreign Born Children of American Parents*, 35 *CORNELL L.Q.* 357 (1950).

204. Means, *supra* note 27, at 30, 113 *CONG. REC.* at H5779.

unpublished study by Pinckney G. McElwee appearing in the *Congressional Record*. Although the author's research is fairly extensive, his conclusions are dogmatic and somewhat rigid. It is his view that citizenship of a child born abroad to American parents can be acquired only through naturalization and that such a naturalized citizen cannot become President.²⁰⁵

Divergent opinions are also expressed in two articles recently appearing in the *New York Law Journal*. The first, by Isidor Blum, is extensively documented, but its approach is somewhat disorganized and unperceptive. It is the author's view that "natural-born" is synonymous with "native-born" and that a child born abroad to American parents is unqualified.²⁰⁶ This view is rebutted in a second article in the same journal by Eustace Seligman. This is a rather superficial study by a partisan of Governor Romney. It concludes that foreign-born children of American citizens do not acquire their citizenship through naturalization and that they qualify for the Presidency as "natural-born" citizens.²⁰⁷

Dictionary definitions of "natural-born" are also conflicting. Some regard it as status acquired by birth,²⁰⁸ some as status by birth within the dominion or allegiance,²⁰⁹ and some are silent.²¹⁰ Of course, a problem of this dimension will be resolved only by an understanding of the constitutional purpose, "rather than by reliance upon dictionary definitions."²¹¹

V. HOW THE DILEMMA CAN BE RESOLVED

Manifestly, the best way to remove the doubts is to amend the Constitution. However, this is a slow process and is seldom invoked. The tendency has been to postpone the resolution of difficult problems and to resort to the amendment process only when a feeling of urgency has developed. In recent years, there have been several proposals for a constitutional amendment, but none of these has received active consideration.²¹²

Possibly Congress might pass a clarifying statute, but the value of such a statute seems dubious. At most, it would express the opinion of the present Congress concerning the proper construction of the Constitution and would not be binding on the other two branches of our Government.²¹³

205. McElwee, *supra* note 67, 113 CONG. REC. at H7260.

206. Blum, *Is Gov. George Romney Eligible to Be President?*, N.Y.L.J., Oct. 16, 1967, at 1, col. 7; Oct. 17, 1967, at 1, col. 7.

207. Seligman, *A Brief for Gov. Romney's Eligibility for Presidency*, N.Y.L.J., Nov. 15, 1967, at 1, col. 7, reprinted in 113 CONG. REC. at S17875 (daily ed. Dec. 5, 1967).

208. WEBSTER, THIRD NEW INTERNATIONAL DICTIONARY 1630 (1961). See also 14 C.J.S. *Citizens* § 1, at 1128 n. 22 (1939).

209. BLACK'S LAW DICTIONARY 1177 (4th ed. 1951); CYCLOPEDIA LAW DICTIONARY 681 (2d ed. 1922).

210. 3 BOUVIER, LAW DICTIONARY 2297 (Rawle's third rev. 1914).

211. *Mitchell v. Cohen*, 333 U.S. 411, 418 (1948).

212. H.J. RES. 259, 80th Cong., 1st Sess. (1947); H.J. RES. 28, 81st Cong., 1st Sess. (1949); H.J. RES. 214, 205, 517, 86th Cong., 1st Sess. (1959); H.J. RES. 571, 87th Cong., 1st Sess. (1961); H.J. RES. 397, 88th Cong., 1st Sess. (1963).

213. However, as Professor Corwin points out, Congress may apparently add to the eligibility requirements of the presidential qualification clause, *e.g.*, by its dis-

There remains the traditional method of construing the Constitution through a ruling of the federal courts. Under the Constitution, those courts exercise judicial power which extends "to all Cases, in Law and Equity, arising under this Constitution."²¹⁴ However, until an actual controversy develops there is no possibility of obtaining a ruling by the federal courts.²¹⁵ Those courts have always interpreted their constitutional mandate as precluding the rendering of advisory opinions.²¹⁶ And they have not regarded this limitation as modified by the statutory authority for declaratory judgments. The statute restricts such declaratory judgments to cases of "actual controversy."²¹⁷ This authorization has been read somewhat restrictively, and declaratory relief has usually been granted only to one actually threatened with sanctions or with imminent impairment of status or of personal or property rights.²¹⁸

Thus, the alternative has been for those who aspire to the Presidency to press their candidacy in the belief that citizenship acquired at birth abroad qualifies them as natural-born citizens. Since no such candidacy has until now developed beyond the speculative stage, there has not yet been any occasion to test this belief.²¹⁹ Such a test could have developed when the candidacy of Governor Romney was being actively pressed. Now that he has withdrawn from the presidential contest, a test will be deferred until some future candidate in a similar situation pursues his candidacy to the advanced stage of a preference primary or an election ballot. I shall not attempt to chart in detail all the possible avenues which could be explored in seeking such a test. However, a few major routes are readily apparent.

The election mechanisms established by the various states may provide the initial opportunity for obtaining a judicial ruling. Every state has an election board or officer to supervise the election process.²²⁰ Contests could develop at two stages in that process. In the first place, some states now provide for a presidential preference primary to select delegates to the national nominating conventions of the major political parties.²²¹ Often, it is necessary to file petitions for delegates committed to a particular candidate. A state election board usually

qualification from public office of those convicted for certain criminal offenses. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 33-34 (4th rev. ed. 1957). See also 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION* § 1479 (5th ed. 1891). See note 66 *supra*.

214. U.S. CONST. art. 3, § 2.

215. See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Muskrat v. United States*, 219 U.S. 346 (1911).

216. See *International Longshoremen's Union v. Boyd*, 347 U.S. 222 (1954); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); Cf. *Baker v. Carr*, 369 U.S. 186 (1962); *Nukk v. Shaughnessy*, 350 U.S. 869 (1955).

217. 28 U.S.C. § 2201 (1964).

218. See notes 215 & 216 *supra*.

219. According to contemporaneous newspaper accounts, a state court suit challenging the qualification of Barry Goldwater on the ground that he was not a natural-born citizen was dismissed.

220. See *In re Application of Andersen*, 264 Minn. 157, 119 N.W.2d 1 (1962). *E.g.*, 29 C.J.S. *Elections* § 55 (1965).

221. For description of presidential preference primaries in the 1960 and 1964 presidential elections, see T. WHITE, *THE MAKING OF THE PRESIDENT* (1960), *THE MAKING OF THE PRESIDENT* (1964).

can pass on the eligibility of one who seeks to appear on the ballot.²²² Its ruling for or against the qualifications of a particular candidate can be challenged in the state's courts. The books are full of state cases involving disputes as to various aspects of primary elections.²²³ And in recent years the federal courts have underscored their interest in the federal constitutional aspects of state elections, even when they only concern party primaries.²²⁴ Indeed, a number of statutes implement the authority of federal courts to intervene in election disputes where deprivation of rights is alleged.²²⁵

Since interpretation of the presidential qualification clause involves a federal constitutional question, such an issue would unquestionably wind up in the federal courts, either by an initial suit in such courts,²²⁶ by removal of actions commenced in state courts,²²⁷ or by Supreme Court review of a state court's decision.²²⁸ And it is not inconceivable that a candidate, as well as the party apparatus itself, might encourage an administrative ruling at the state level in order to justify a "friendly" suit seeking a judicial pronouncement.²²⁹ Indeed, an adverse ruling would be an obvious predicate for a declaratory judgment suit in the federal courts.²³⁰

If a judicial determination can be obtained, an early presentation of the issue in connection with a primary election would be desirable. If there is no judicial intervention at that level, the likelihood of a judicial ruling doubtlessly would diminish. It would still be possible, of course, to challenge the qualifications of a party's nominee through various state remedies seeking to strike his name from the ballot in par-

222. See 29 C.J.S. *Elections* §§ 55, 130 (1965).

223. See 29 C.J.S. *Elections* §§ 111-29 (1965).

224. *Louisiana v. United States*, 380 U.S. 145 (1965) (discriminatory tests); *Reynolds v. Sims*, 377 U.S. 533 (1964) (declaratory judgment and injunction, state legislature); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (same, congressional redistricting); *Gray v. Sanders*, 372 U.S. 368 (1963) (same, county unit vote for legislature); *Baker v. Carr*, 369 U.S. 186 (1962) (declaratory judgment, reapportionment); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (declaratory judgment and injunction, gerrymandering); *Terry v. Adams*, 345 U.S. 461 (1953) (declaratory judgment, alleged discrimination in state primary); *Smith v. Allwright*, 321 U.S. 649 (1944) (suit for damages, alleged discrimination in state primary); *Nixon v. Condon*, 286 U.S. 73 (1932) (same). Cf. *Fortson v. Morris*, 385 U.S. 231 (1966) (state process for electing governor held not to violate due process); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (federal restrictions on state voting practices upheld); *McDougall v. Green*, 335 U.S. 281 (1948) (state petition requirement held constitutional).

225. 28 U.S.C. § 1344 (1964) gives United States district courts original jurisdiction of any civil action to recover any office, "except that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature;" Voting Rights Act of 1965, Pub. L. 89-110, § 3, 79 Stat. 437, 42 U.S.C. § 1973a (Supp. I, 1965), authorizes certain remedies in actions brought by the Attorney General to enforce guarantees of the fifteenth amendment; 28 U.S.C. § 1343 (1964) gives United States district courts original jurisdiction of actions to vindicate constitutional rights; 42 U.S.C. § 1988 (1964) creates remedy for enforcement of constitutional rights where other remedies are inadequate.

226. See notes 219 & 225 *supra*.

227. See 28 U.S.C. § 1446 (1964); F. FERRIS, *EXTRAORDINARY LEGAL REMEDIES* 135-36 (1926).

228. 28 U.S.C. § 1257(3) (1964).

229. The New York Times of November 1, 1967, at 28, noted the possibility that a court test of Governor Romney's eligibility might be presented by a friendly or adverse suit in connection with the New Hampshire primary, early in 1968. However, no such court test had developed before Mr. Romney's withdrawal on February 29, 1968.

230. See *Bond v. Floyd*, 385 U.S. 116 (1966).

ticular states.²³¹ But once a major party becomes committed to a Presidential candidate, the stakes become so momentous that the courts might hesitate to intervene. Nevertheless the possibility of a judicial contest at this stage of the election process cannot be discounted. There is no certainty that the Supreme Court, in its present activist mood, would shrink from entering what some may regard as a "political thicket" to decide any controversy, merely because the decision will have far-reaching consequences.²³² Therefore it is conceivable that a judicial holding might be obtained, particularly if it is favorable to the candidate.

Finally, it may develop that there has been no judicial determination and that a person with the disputed qualifications is actually elected President. Some ingenious soul might resort to judicial proceedings to restrain the electoral college from voting or to block the new President's induction, but it hardly seems likely that such an effort would be seriously regarded. More significant is the possibility that after the new President takes office someone may seek to oust him through the ancient writ of *quo warranto* — challenging an office holder's right to his office — or its modern equivalents.²³³ Although it has no specific statutory sanction, such a writ is still recognized in federal practice.²³⁴ But at this stage of the election process, the possibility of a judicial expression is so remote as to be virtually nonexistent. In the first place, a person seeking to launch such a contest would have to overcome the seemingly insuperable hurdle of legal standing to sue. In the federal practice his lack of direct interest would seem fatal.²³⁵ More importantly, an effort to vitiate the free choice of the American people in electing a President would entail the gravest consequences to the national security and order and to the balance of authority in our scheme of government. Although courts have adjudicated controversies involving titles to governorships and other high offices,²³⁶ it seems likely that at

231. See notes 220-25 *supra*.

232. Mr. Justice Frankfurter first used the famous "political thicket" phrase as a talisman of restraint in *Colegrove v. Green*, 328 U.S. 549, 556 (1946). As I have indicated in note 224 *supra*, the Supreme Court thereafter did not shrink from entering many thickets. See also Means, *supra* note 27, at 30, 113 CONG. REC. at H5779.

233. See F. FERRIS, EXTRAORDINARY LEGAL REMEDIES 125-27 (1926); G. McCRARY, ELECTIONS 280-94 (4th ed. 1897); F. MEHEM, PUBLIC OFFICERS 139, 304-06 (1890); H. PAINÉ, ELECTIONS 709-12 (1890). As the foregoing authorities indicate, excessively technical requirements caused the ancient writ to fall into disuse and it has been generally supplanted by an information in the nature of *quo warranto*.

234. See FED. R. CIV. P. 81(a)(2); 7 J. MOORE, FEDERAL PRACTICE ¶ 81.05(5), at 4438 (2d ed. 1966); Cf. 28 U.S.C. § 1344 (1964), which gives the U.S. district courts original jurisdiction over actions to recover an office, "except that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature," where discriminatory denial of the right to vote is alleged. Of course, authority for invocation of *quo warranto* could also be premised on the All Writs Act, 28 U.S.C. § 1651 (1964). See F. FERRIS, EXTRAORDINARY LEGAL REMEDIES 135 (1926).

235. The rule is expressed in the leading case of *Frothingham v. Mellon*, 262 U.S. 447 (1923). For criticisms of this limitation of judicial inquiry, see 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.09, at 243 (1958). Cf. *Flast v. Gardner*, now awaiting decision in the United States Supreme Court, No. 416, October Term, 1967.

236. See G. McCRARY, ELECTIONS 288-89 (4th ed. 1897), which expresses the view that the courts have authority to determine the title to the highest offices. In *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135 (1892), the Supreme Court, in holding that an elected Governor was a citizen of the United States and thus entitled to his office, reversed a state court judgment ousting him from the office. A recent and widely

this stage the federal courts would regard it as the type of political controversy²³⁷ in which they should not intercede.²³⁸ Another possible, but far-fetched, line of attack might seek to challenge the validity of laws enacted over such a President's signature.²³⁹

It is quite possible, of course, that the courts might find the issue political and nonjusticiable at any milestone of consideration. However, the climate for obtaining judicial guidance would be infinitely better if such a ruling is solicited at the earliest stages of the electoral process, before an overpowering national interest for stability has developed.²⁴⁰

SUMMARY AND CONCLUSIONS

My study of this 180 year enigma leads me to the following conclusions.

1. The reference to "natural-born" in the presidential qualification clause must be considered in the light of the English usage, well known to the Framers of the Constitution. The English common law, particularly as it had been declared or modified by statute, accorded full status as natural-born subjects to persons born abroad to British subjects.

2. Although the evidence of intent is slender, it seems likely that the natural-born qualification was intended only to exclude those who were not born American citizens, but acquired citizenship by naturalization. The Framers were well aware of the need to assure full citizenship rights to the children born to American citizens in foreign countries. Their English forebears had made certain that the rights of such children were protected, and it is hardly likely that the Framers intended to deal less generously with their own children. The evidence, although not overwhelming, unquestionably points in the direction of such generosity.

3. This gloss of prior history and usage is not dulled, I believe, by the Naturalization Act of 1790 or by the fourteenth amendment. The 1790 act, enacted soon after the Constitutional Convention, recognized such persons as natural-born citizens. The fourteenth amendment, adopted primarily to confirm the full citizenship denied to Negroes by the *Dred Scott* decision, did not refer to "natural-born" citizens, did not purport to limit or define the presidential qualification clause of

publicized election contest involving an election for governor was *In re Andersen*, 264 Minn. 257, 119 N.W.2d 1 (1962).

237. Comprehensive recent discussions of the political controversy doctrine will be found in *Baker v. Carr*, 369 U.S. 186, 210-37, 267-318 (1962); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-37 (1964) (act of state doctrine).

238. See the observations of Professor Corwin and Fincher quoted in text accompanying notes 171 & 173 *supra*; F. MECHEM, *PUBLIC OFFICES AND OFFICERS* 312-14 (1890) (remedy discretionary, and court may withhold relief if disastrous consequences would result. However, the Supreme Court's direct confrontation with the President in the *Steel Seizure Case* (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

239. See Means, *supra* note 27, at 30, 113 CONG. REC. at H5779.

240. Even if an elected official is disqualified by the courts, it does not follow that the office can be claimed by his defeated opponent. See G. McCRARY, *ELECTIONS* 248 (4th ed. 1897).

the Constitution, and did not, in my estimation, bar a construction of that clause to include children born abroad to American parents.

4. Nor is such a construction foreclosed by questionable dicta in *United States v. Wong Kim Ark* and other Supreme Court decisions. These dicta are not addressed to the presidential qualification clause and cannot control its construction.

Having endorsed these conclusions, I must concede that the picture is clouded by elements of doubt. These doubts will unquestionably persist until they are eliminated by a constitutional amendment, a definitive judicial decision, or the election and accession of a President who was "natural-born" outside the United States.²⁴¹ The withdrawal of Governor Romney has ended the possibility that clarification would emerge as a result of his candidacy. Perhaps such clarification will develop from some future candidacy of another citizen in the same situation. On the other hand, it may eventually be necessary to amend the Constitution in order to remove the ambiguity.

It is unfortunate that doubts remain on an issue of such vital importance to many Americans. We live in a fluid and ever diminishing world. The interests of our nation and its people are constantly expanding, and millions of Americans reside for short or long periods in foreign countries.²⁴² They are there in pursuit of inspiration, enlightenment, profit, pleasure, repose or escape. Indeed, the vast majority of the overseas Americans are there in the service of their government or of American concerns or organizations.²⁴³ All of these have a right to retain their status as American citizens while they live abroad. One can perceive no sound reason for shutting off aspiration to the Presidency for the children born to them while they are temporarily sojourning in foreign countries.²⁴⁴

241. Of interest are the questions raised concerning Mr. Hoover's eligibility, since he had not resided in the United States for fourteen years prior to his accession to the Presidency. However, no legal challenge to Mr. Hoover's title to office ever developed. See E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 33, 330 n. 7 (4th rev. ed. 1957).

242. *NEWSWEEK*, Nov. 28, 1966, at 43-44.

243. Our nationality laws presently confer various benefits on those abroad in the service of the United States or American organizations. Thus a person abroad in the United States Army or as an employee of the United States Government or an international organization thereby satisfies the requirement for physical presence in the United States prerequisite to transmission of citizenship by descent where only one parent is a citizen. Immigration and Nationality Act of 1952, ch. 447, § 301(a)(7), 66 Stat. 236, as amended, 8 U.S.C. § 1401(a)(7) (Supp. II, 1965-66). An alien absent abroad in the service of the United States Government or specified American organizations, or an international organization is exempt from certain residency requirement prerequisite to naturalization. Immigration and Nationality Act of 1952, ch. 447, § 316(b), 66 Stat. 242, 8 U.S.C. § 1427(b) (1964). The alien wife of an American citizen regularly stationed abroad in similar employments can obtain expeditious naturalization. Immigration and Nationality Act of 1952, ch. 447, § 319(b), 66 Stat. 244, as amended, 8 U.S.C. § 1430(b) (1964); see also Immigration and Nationality Act of 1952, ch. 447, §§ 353, 354, 66 Stat. 270, 271, as amended, 8 U.S.C. §§ 1485, 1486 (1964), which exempts from loss of nationality resulting from residence abroad in similar employments. However, the latter provisions are now irrelevant since the Supreme Court declared unconstitutional the basic statute for expatriation through residence abroad. *Schneider v. Rusk*, 377 U.S. 163 (1964).

244. It was estimated in 1955 that one out of every two hundred born Americans acquired his citizenship at birth abroad to American parents. Means, *supra* note 27, at 26, 113 CONG. REC. at H5777.