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MCCAIN'S CITIZENSHIP AND CONSTITUTIONAL METHOD

Peter J. Spiro*†

INTRODUCTION

Many things may obstruct John McCain's path to the White House, but his citizenship status is not among them. The question of his eligibility, given the circumstances of his birth, has already been resolved. That outcome has been produced by actors outside the courts. Judicial validation would be at best an afterthought. The episode thus supplies an interesting case study in constitutional method. Constitutional questions do not require constitutional decisions. If non-judicial actors—including Congress, editorialists, leading members of the bar, and the People themselves—manage to generate a constitutional consensus, there isn't much that the courts can do about it. In cases such as this one, at least, that seems to be an acceptable method of constitutional determination.

There are two levels to the question of McCain's eligibility under the Article II requirement that the president be a "natural born citizen." First, there is the possibility that the condition restricts eligibility to those born in the territory of the United States—in Justice Blackmun's rather inelegant characterization from *Rogers v. Bellei*, "'Fourteenth Amendment first sentence' citizens." Alternatively, "natural born" could also include some or all of those to whom citizenship is extended at birth on a statutory, non-constitutional basis. That would resolve McCain's eligibility as a person born in the U.S. Canal Zone to U.S. citizen parents but for an additional layer of complication unearthed by Jack Chin. In *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, Chin persuasively argues that children born to U.S. citizen parents in the Zone before 1937 were not granted citizenship at birth. McCain, who was born in 1936, did not become a citizen until the following year, with the enactment of a statutory fix extending citizenship to any child with a U.S. citizen parent born in the Canal Zone at any time after the assumption of U.S. control in 1904. With respect to McCain, then, the question is whether he qualifies as a natural born citizen even though he was not born a citizen at all.

On the question of restricting presidential eligibility only to those born within the territorial United States, most observers now seem to consider it

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settled that a presidential candidate can qualify as a natural born citizen even if born outside the United States proper. As Chin describes, that result has support in the English legal tradition and the 1790 statute first extending citizenship to the children born abroad to U.S. citizen fathers. But the genesis doesn't require the result. On the one hand, as Chin points out, even naturalized subjects in England were considered "natural born," which usage would read out any meaning from the eligibility condition. On the other hand, where those born abroad were deemed "natural born" in the 1790 statute, the descriptor was dropped from subsequent measures granting citizenship to the children of citizens born abroad, which might imply an intention to render them ineligible for the presidency. The most prominent episode posing the issue involved George Romney's run for the White House in 1968. Romney was born a U.S. citizen in Chihuahua, Mexico (in circumstances rather less dignified than McCain's—his U.S. citizen parents had moved there to practice polygamy). Romney's eligibility for the presidency was challenged by some on the basis of his foreign birth, but his campaign faltered before the emergence of a clear consensus on the matter.

I. DEFINING "NATURAL BORN" OUTSIDE THE COURTS

McCain's nomination, however, surely confirms that "natural born" citizens can include those extended citizenship at birth by statute in addition to those enjoying it under the Fourteenth Amendment. Constitutional actors of every description have accepted McCain's eligibility—bracketing, for a moment, the Canal Zone complication. A unanimously adopted resolution of the U.S. Senate, co-sponsored by then-leading Democratic candidates Barack Obama and Hillary Clinton, declares him to be natural born. Editorialists of various political stripes support his eligibility. A memo from two leading members of the legal-policy elite, Laurence Tribe and Theodore Olson—one Democrat, one Republican—reaches the same result. For all the venom of this presidential contest, there has been little effort by McCain's opponents—either in the Republican primaries or now in the general election—to press the case that, if elected, McCain would be constitutionally barred from serving.

That all adds up to a precedent of constitutional magnitude, even in the absence of a judicial pronouncement on the question. There might yet be some ambiguity as to the precedent's contours. Most analyses supporting his eligibility highlight the fact that McCain was born to U.S. citizen parents stationed abroad on active military duty. As Tribe and Olson conclude, "[i]t goes without saying that the Framers did not intend to exclude a person from the office of the President simply because he or she was born to U.S. citizens serving in the U.S. military outside of the continental United States" The episode might be narrowly construed to establish eligibility only in that context, and not in the case of individuals born to civilian Americans outside the United States. One can readily construct a justification for the distinction, insofar as those born to U.S. service personnel

abroad are born in American enclaves that for practical purposes might as well be U.S. territory.

This justification plays, of course, to elide the fact that John McCain wasn't a citizen of any description at birth. Chin's analysis in that regard is compelling as a matter of positive law. And yet his argument shows no signs of achieving any traction with salient constitutional actors, some excellent media coverage—including a feature piece in the *New York Times*—notwithstanding. The Canal Zone twist makes the McCain case even more intriguing as constitutional precedent.

Many prominent jurists and legal scholars have accepted the possibility of constitutional custom beyond the Founding era, Justice Frankfurter's "gloss which life has written upon" the words of the Constitution. Accepting the possibility of natural born citizens beyond those covered by the Fourteenth Amendment comfortably fits within this paradigm of constitutional interpretation, albeit in a context lacking multiple examples—perhaps excused by the limiting circumstances of infrequent presidential elections. The term "natural born" lends itself to plausible competing readings, one of which has been validated by practice.

But it is another matter altogether to find that practice trumps text. Those ascribing constitutional significance to historical practice carefully subordinate it to the text; in the interpretive hierarchy, practice is a secondary source. The text supplies a sort of anchor, the absence of which would permit unacceptable constitutional drift. This instinct runs deeply in our constitutional culture. And yet assuming the validity of Chin's analysis, the episode supplies an example of constitutional desuetude. If McCain was not in fact a citizen at birth, it takes some contortion to characterize him as a "natural born citizen" under any ordinary meaning of the words themselves.

Chin's response is to deplore, in constitutional terms, the prospect of McCain's taking office. "[T]o inaugurate a President in January, 2009 in open violation of the Constitution's terms risks a national trauma," he writes. "It would be a grim moment in history if the very oath to 'preserve, protect and defend the Constitution' that made a person President was also a falsehood that defied the document."

I doubt things would play out that way. Although some would consider McCain's inauguration a grim moment, it would be for reasons other than the circumstances of his birth. It's unlikely that there would be much more than passing reference to the citizenship question in the context of a McCain inauguration. That acceptance—especially by actors, such as his Democratic opponents, who have incentives to press the challenge—would confirm the terms of a constitutional rule on the question. McCain's inauguration in the absence of substantial constitutional objection would not be in defiance of the Constitution. On the contrary, it would define the Constitution. The episode would supply an authoritative source for the determination of constitutional meaning, circa 2009. The presidential eligibility of those with similar citizenship pedigrees would be conclusively established.

This constitutional determination could well materialize without a pronouncement from the courts. Courts are uncomfortable—if not ill-

equipped—beyond the realm of positive law, especially when positive law and other sources conflict. One might imagine a court affirming McCain's eligibility. But that would pose its own cost, if we assume Chin's argument to be the correct one, for the result would require deforming written law. On the other hand, it is difficult to imagine a court finding McCain ineligible. It would upset the cart of the political process in too dramatic a fashion; whatever the reasoning, the judicial result would surely be thought illegitimate. Better to leave the resolution to other actors capable of generating constitutional consensus.

The consensus on McCain's eligibility makes sense from any normative angle. As Chin himself concedes, the Canal Zone complication is "a technicality *ne plus ultra*." No matter how one defines the identity, McCain is patently American; there isn't even a whiff of a competing foreign tie. As Tribe and Olson conclude, "Senator McCain is certainly not the hypothetical 'Foreigner' who John Jay and George Washington were concerned might usurp the role of Commander in Chief." Nor would any other person similarly situated. Given that reality, it makes little sense to exact the theoretically steep price of the eligibility threshold: depriving the American people of a candidate that they would otherwise select as their chief executive. Assuming the democratic process reflects aggregate preferences, the eligibility criterion leads to second-best results. Of course, that is true of all eligibility criteria, but with respect to McCain and those like him (in citizenship terms), there is nothing gained by imposing the qualification—or at least no intended purpose of the qualification is served by its application.

II. EXTENDING THE MCCAIN PRECEDENT

So we now know that children born abroad to active duty U.S. military personnel, including those born in the Canal Zone before 1937, qualify as "natural born" for purposes of presidential eligibility. As noted above, however, McCain's case does not supply a necessarily definitive precedent for other scenarios implicating the citizenship condition. The Barry Goldwater precedent established the eligibility of those born in incorporated territories, who were extended citizenship under the Fourteenth Amendment. That probably also evidences the eligibility of individuals born in the unincorporated territory of Puerto Rico and of Native Americans, to whom birthright citizenship extends by statute.

There are other permutations. Take, for starters, a twist on the birth circumstances of McCain's opponent, Barack Obama. If Obama had been born in Nairobi instead of Honolulu—not at all implausible, given his family circumstances—would he be eligible for the presidency? Obama would have been born a U.S. citizen under section 301(g) of the Nationality Act, as the child of an alien and a citizen who was resident in the United States for a period of five years prior to the birth. (Democratic candidate Bill Richardson's life suggests a similar counterfactual. His parents were living in Mexico City at the time of his mother's pregnancy, and he spent his early years there, but his father sent his mother to California to deliver him with

the intention of securing his citizenship.) The resolution of Obama's case on those facts would be both more and less straightforward. On the one hand, the constitutional text would pose less of an obstacle; unlike McCain, Obama would have been born a citizen. On the other hand, his birth wouldn't have been in the hyper-American context of an overseas American military installation, and the refusal to recognize Obama's eligibility would not risk penalizing military personnel. On balance, Obama's hypothetical case would probably come out the same way as McCain's, even at a higher risk of campaign sloganeering (if only by way of highlighting Obama's cosmopolitan roots). His life story—as with McCain's, clearly “American” in any sense of the word—would sharply cut in favor of establishing eligibility. And with the McCain episode in the history books, the case for candidates born abroad as U.S. citizens to U.S. citizen parents would be more easily made, insofar as McCain has breached any putative territorial parameter.

To the extent McCain's case has also breached the temporal barrier, it would also help establish the eligibility of foreign-born children adopted by U.S. citizens. Under legislation enacted in 2000, these children automatically become U.S. citizens by virtue of their adoption and residence in the United States with the adoptive U.S. citizen parent. Many thousands of such children acquire citizenship on this basis, and it is not at all hard to imagine one of them growing up to launch a credible run at the White House. The normative basis for the eligibility of such individuals is strong, although they are not citizens by birth. Taken to the United States at a young age and raised in citizen families, these individuals should be considered as American as any native born citizen.

Beyond those cases, extension of the McCain precedent will present higher hurdles, and (as in all controversies, in or out of court) particular circumstances will be crucial. Along the lines of the foreign adopted child, there might be room to argue for the eligibility of an individual born outside the United States to noncitizen parents who derivatively naturalizes on the basis of a parent's naturalization. When an immigrant parent naturalizes, that parent's children automatically acquire citizenship on a derivative basis if they are under eighteen and in the legal and physical custody of the parent. This extension of eligibility would be something of a leap from the case of an adopted child, whose citizenship—by virtue of the relationship to the adopting parents—can be conceived as relating back to birth, and whose arrival in the United States will typically be in infancy (although any adopted child under the age of eighteen qualifies under the provision). On the other hand, one can imagine the case where the fact of foreign birth as a noncitizen seems irrelevant to presidential eligibility, especially where the individual came to the United States at an early age.

All of this points to the possible evisceration of the natural born qualification through practice. That prospect might seem far-fetched. Part of the challenge here is that presidential elections supply few data points for the evolution of practice; there simply aren't that many people who credibly run for president, inhibiting the accretion of constitutional increments on the

way to transformed constitutional meanings. But as those born after the advent of globalization mature, there will be more candidates participating in U.S. politics who are something other than native-born citizens. The endpoint of the evolution away from the qualification would be eligibility of all naturalized citizens as natural born. There is even a historical hook in English practice—a concededly thin one—on which to hang the conclusion: the convention (noted above) under which naturalization itself rendered new subjects natural born to the realm.

Of course, the same result could be accomplished through constitutional amendment under Article V, and one could imagine a push to formally remove the condition in the face of an overwhelmingly attractive prospective candidate for the presidency. But amendment requires such institutional energy that nothing less would suffice. Recent proposals sponsored by Republicans—with an eye to Austrian-born Arnold Schwarzenegger—have not made it out of committee, much less out to the States. In the face of legislative inertia, perhaps a politically popular naturalized citizen could simply make a run for it. And if the People and other actors fell into line, that would be that.

CONCLUSION: THE FADING SIGNIFICANCE OF CITIZENSHIP

The significance of citizenship is fading, as well it should. The circumstances of birth say nothing about the quality of an individual's tie to the national community. The threats motivating the natural born requirement have evaporated. There is no danger of a Trojan-horse candidate usurping the presidency and serving the interest of a foreign power. Once considered indissoluble, birth allegiance is now easily cast off. Political and security processes (in addition to vigorous journalistic vetting) would pick up any suspect foreign connections. It is improbable that a major presidential candidate would be in a position to do the bidding of foreign actors.

Indeed, a candidate might conceivably want to flaunt rather than conceal a foreign affiliation. Something that's not prohibited by the Constitution: a president holding another citizenship in addition to her citizenship in the United States. There is nothing in the Constitution that would bar the dual-citizen president. Assume an American born in the United States—and thus natural born—who subsequently acquires citizenship in, say, Ireland or Italy, alternate nationalities that Americans are garnering in large numbers. That person would clearly be eligible for the presidency. In the past, a dual-citizen president would have been a nonstarter as a matter of politics. Today, it's not quite so implausible. Indeed, in the case of the Irish or Italian dual citizen, the status might fit comfortably with the tradition of proud ethnic affiliation. Nationality is no longer a jealous, exclusive master. It's an identity more in line with the many associational attachments that we all collect, in infinite combination, some of which are put to political advantage.

The prospect of a dual-citizen president proves the obsolescence of requiring our chief executives to be natural born citizens. There may well

come a day when the qualification no longer applies. The McCain episode supplies an incremental step in that direction.