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## Why Senator John McCain Cannot be President: Eleven Months and a Hundred Yards Short of Citizenship

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# WHY SENATOR JOHN MCCAIN CANNOT BE PRESIDENT: ELEVEN MONTHS AND A HUNDRED YARDS SHORT OF CITIZENSHIP

*Gabriel J. Chin*\* †

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## INTRODUCTION

Article II, section 1 of the Constitution provides that “No Person except a natural born Citizen . . . shall be eligible to the Office of President . . .” A person must be a citizen at birth to be a natural born citizen. Senator

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McCain was born in the Canal Zone in 1936. Although he is now a U.S. citizen, the law in effect in 1936 did not grant him citizenship at birth. Because he was not born a citizen, he is not eligible to the office of president.

The citizenship of those born in the Canal Zone in 1936 is a legal question, not a question about one's views of Senator McCain's candidacy. U.S. citizenship law is not simple or intuitive. As the child of two U.S. citizens, and because his father was on active duty in the U.S. Navy, it might seem obvious and logical that he must have been a citizen at birth. However, neither in 1936 nor at any other time did Congress confer citizenship based on these facts alone—the law always required additional circumstances.

The Supreme Court has held that there are only two ways to become a citizen: 1) birth in the United States, thus becoming a citizen under the citizenship clause of the Fourteenth Amendment or 2) satisfaction of every requirement of a statute enacted by Congress granting citizenship to a class of people. The second category includes naturalization of individual adults or children already born; collective naturalization of groups, such as natives of territory acquired by the United States; and naturalization at birth of certain classes of children born abroad to citizens. Those born in the United States are uncontroversially natural born citizens. There is also a strong argument that those obtaining citizenship at birth by statute are natural born citizens, well articulated by Charles Gordon in *Who Can be President of the United States: The Unresolved Enigma*. However, natural born citizenship can be acquired only at the moment of birth. As stated by the leading Supreme Court case, *United States v. Wong Kim Ark*, “‘British subject’ means any person who owes permanent allegiance to the crown. . . . ‘Natural-born British subject’ means a British subject who has become a British subject at the moment of his birth.”

In 1936, the Canal Zone fell into a gap in the law, covered neither by the citizenship clause nor Revised Statutes section 1993 (passed as the Act of May 24, 1934), the only statute applicable to births to U.S. citizens outside the United States. As then-Representative John Sparkman explained in 1937: “the Canal Zone is not such foreign territory as to come under the law of 1855 [Revised Statutes section 1993] and, on the other hand, it is not part of the United States which would bring it within the fourteenth amendment.” The problem was well known; Richard W. Flournoy's 1934 *American Bar Association Journal* article, *Proposed Codification of Our Chaotic Nationality Laws*, explained “we have no statutory provisions defining the nationality status of persons born in the Canal Zone . . . .”

Because the Canal Zone was a “no man's land,” in the words of Representative Sparkman, in 1937 Congress passed a statute, the Act of Aug. 4, 1937 (now codified at 8 U.S.C. § 1403(a)) granting citizenship to “[a]ny person born in the Canal Zone on or after February 26, 1904” who had at least one U.S. citizen parent. This Act made Senator McCain a U.S. citizen before his first birthday. But again, to be a natural born citizen, one must be a citizen at the moment of birth. Since Senator McCain became a citizen in his eleventh month of life, he does not satisfy this criterion, is not a natural born citizen, and thus is not “eligible to the Office of President.”

The Senator's citizenship cannot be ignored. Indeed, the McCain campaign itself made an issue of it, requesting Harvard Law Professor Laurence H. Tribe and former Solicitor General Theodore B. Olson to offer an opinion

about Senator McCain's citizenship (included here as Appendix A). These distinguished constitutional lawyers issued a detailed legal analysis of why Senator McCain was a natural born citizen. This opinion was publicly released and made part of the *Congressional Record* on April 30, 2008. At least in partial reliance on the opinion, the Senate resolved on the same day that Senator McCain was a natural born citizen. Senator McCain apparently adopted the opinion's reasoning by having his lawyers use the arguments in support of a motion to dismiss in *Hollander v. McCain*, a lawsuit filed in the District of New Hampshire challenging his eligibility. Not surprisingly, the Senate, constitutional scholars, and the campaign itself consider the issue of constitutional eligibility to be important.

Of course, McCain's lack of citizenship at birth is a technicality *ne plus ultra*. Presidential candidates who obtained their citizenship after birth are no more likely to be disloyal than those born citizens, and the people of the United States should be allowed to elect whomever they choose. Therefore, as a policy matter, Senator McCain should be eligible to be president. Yet the text of the Constitution forbids it. The rule of law would be mortally wounded if courts, Congress, or the executive could legitimately ignore provisions of law they deemed obsolete under the circumstances. It would be a grim moment in history if the very oath to "preserve, protect and defend the Constitution" that made a person president were also a falsehood that defied the document.

This commentary responds to the Tribe-Olson Opinion. Part I responds to the argument that if the United States were "sovereign" over the Canal Zone, "that fact alone would make him a 'natural born' citizen under the well-established principle that 'natural born' citizenship includes birth within the territory and allegiance of the United States." It contends that all courts considering the issue, including the Supreme Court (albeit in dicta), hold that persons born in unincorporated territories like the Canal Zone are not, for that reason alone, U.S. citizens. A number of individuals born in the Canal Zone under U.S. jurisdiction have been deported from the United States, even one claiming to be a birthright citizen under the Fourteenth Amendment.

Part II examines the argument that Senator McCain was a citizen by birth under an Act of Congress. By its text, Revised Statutes section 1993, cited by the Tribe-Olson Opinion and the only such statute in effect in 1936, did not apply to the Canal Zone, which was outside the "limits" of the United States as an unincorporated territory but within the "jurisdiction" of the United States as land over which the nation exercised permanent exclusive control. Accordingly, in 1937, Congress legislated for the Canal Zone specifically, granting citizenship to children born there. This was too late to make children already born citizens at birth.

As Part III explains, the Tribe-Olson Opinion suggests possibilities for restructuring harsh doctrines of the contemporary constitutional law of immigration, naturalization, and citizenship, in ways making Senator McCain eligible to the office of president. However, in a government of laws, constitutional principles apply to all, not just particular individuals. If President McCain believed that the Constitution, correctly interpreted, made him a citizen at birth, he would have the power to implement some of these views by executive order and regulation and urge Congress to adopt others

into statutory law. Part III explains how the legal changes necessary to make a person born in the Canal Zone in 1936 a citizen at birth would grant citizenship to thousands or millions of people now legally aliens.

### I. WAS THE CANAL ZONE “THE UNITED STATES” FOR PURPOSES OF THE CITIZENSHIP CLAUSE?

The first sentence of section 1 of the Fourteenth Amendment provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . .” Persons born in the United States and subject to the jurisdiction thereof are natural born citizens as, for example, the Supreme Court held in *Rogers v. Bellei*. But the Fourteenth Amendment does not define the “United States.” Surely it includes the states, but it does not say what else, if anything, it covers.

The Tribe-Olson Opinion suggests that the Canal Zone was part of the United States for constitutional purposes and, therefore, that the citizenship clause of the Fourteenth Amendment applied of its own force. However, in a body of decisions called the *Insular Cases*, the Court extensively explored the constitutional status of places like the Canal Zone and held that the Constitution did not apply in full.

#### A. *The Canal Zone and Other Unincorporated Territories Are Not “the United States”*

The *Insular Cases* arose after the United States acquired overseas possessions following the Spanish American War. The Court held in 1905 in *Rasmussen v. United States* that the Constitution’s application turned on whether a particular territory “has been incorporated into the United States as a part thereof, or is simply held . . . under the sovereignty of the United States as a possession or dependency.” If incorporated, the full Constitution applied. But, as the Court stated in 1901 in *Downes v. Bidwell*, an unincorporated territory was “not a part of the United States” for constitutional purposes, so only a limited set of fundamental rights restricted congressional authority. The law is summarized in the remarkable amicus brief in *Boumediene v. Bush*, authored by Gerald L. Neuman, Harold Hongju Koh, Sarah H. Cleveland, and Margaret L. Sanner and joined by other major constitutional scholars including Professor Tribe. The brief explained that under the *Insular Cases*, “only ‘fundamental’ constitutional rights extended by their own force to ‘unincorporated’ territories. . . . The *Insular Cases* struck a compromise between the forces of constitutionalism and the forces of empire by guaranteeing that the Constitution’s most fundamental rights would be honored wherever the United States possesses governing authority.”

Federal courts, like the Fifth Circuit Court of Appeals in *United States v. Husband R. (Roach)*, have held that during the period of U.S. jurisdiction “[t]he Canal Zone is an unincorporated territory of the United States.”

#### B. *Natives of Unincorporated Territories Are Not Citizens*

The *Boumediene* opinion confirms that the *Insular Cases* remain good law. *Downes*, the first *Insular Case*, explained that the lesser privileges

permissibly denied in unincorporated territories include “the right[] to citizenship.” Accordingly, persons born in the Canal Zone are not citizens under the citizenship clause of the Fourteenth Amendment because they were not born in “the United States.”

Most cases about citizenship by birth in an unincorporated territory address the Philippines. Courts, including the Board of Immigration Appeals (“BIA”) and the U.S. Supreme Court, agree with the Ninth Circuit’s statement in *Rabang v. I.N.S* that “birth in the Philippines during the territorial period does not constitute birth ‘in the United States’ under the Citizenship Clause of the Fourteenth Amendment, and thus does not give rise to United States citizenship.” Thus, individuals born in the Canal Zone under U.S. jurisdiction have been deported or convicted of unlawful presence in the United States—for example, the BIA case *In re Martiza Ellis A.K.A. Maritza M. Ellis* held that the party did not gain U.S. nationality by birth in Canal Zone. Contrary to the Tribe-Olson Opinion, under existing Supreme Court decisions, Senator McCain’s birth in the Canal Zone, by itself, cannot make him a natural born citizen; it did not make him a citizen at all.

## II. NATURAL BORN CITIZENSHIP AS A CHILD OF CITIZENS

If Senator McCain was not born in the United States for purposes of the Fourteenth Amendment, under the traditional view of citizenship law, if he is to be a citizen it is necessary to find a statute making him one. In 1936, no statute granted citizenship to children of U.S. citizens born in the Canal Zone.

### A. Citizenship and Natural Born Citizenship by Statute

According to the Supreme Court in *United States v. Wong Kim Ark*, the Constitution “contemplates two sources of citizenship, and two only: birth and naturalization.” Unless born in the United States, a person “can only become a citizen by being naturalized . . . by authority of congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens . . .” A person granted citizenship by birth outside the United States to citizen parents is naturalized at birth; he or she is both a citizen by birth and a naturalized citizen. This last point is discussed thoroughly in Jill A. Pryor’s 1988 note in the *Yale Law Journal*, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*.

The Supreme Court holds that the citizenship statutes are exclusive; there is no residual common-law or natural-law citizenship. Citizens have no constitutional right to transmit their citizenship to children. In *Rogers*, the Supreme Court upheld a statute requiring children born overseas to citizen parents to reside in the United States to retain their citizenship. Since “Congress may withhold citizenship from persons” born overseas to citizen parents or “deny [them] citizenship outright,” it could impose the lesser burden of requiring U.S. residence to retain citizenship.

Congressional power to withhold citizenship from children of U.S. citizens is not hypothetical; for decades, it was law, and to some extent still is.

The Tribe-Olson Opinion proposes that “[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 . . . .” However, the Seventh Congress, which included Framers Gouverneur Morris and Abraham Baldwin among others, did precisely that. In 1961 in *Montana v. Kennedy*, the Supreme Court construed an 1802 statute to mean that “[f]oreign-born children of persons who became American citizens between April 14, 1802 and 1854, were aliens . . . .” Thus, children of members of the armed forces serving overseas, and diplomats and civil servants in foreign posts, were not only not natural born citizens eligible to be president, they were not citizens at all.

Denial of automatic citizenship had very different implications than it would now because until the late nineteenth century, there was little federal immigration law. There were no general federal restrictions on who could enter the country, no provisions for deportation of residents who became undesirable, and immigration officials to deport them. Of course, these children could become citizens by individual naturalization. But even if the child suffered based on lack of citizenship, according to the 1907 Supreme Court decision in *Zartarian v. Billings*, “[a]s this subject is entirely within congressional control, the matter must rest there; it is only for the courts to apply the law as they find it.”

B. *Citizenship by Descent in 1936: “The Canal Zone  
Is a ‘No Man’s Land’ ”*

In 1936, when Senator McCain was born, Revised Statutes section 1993 governed citizenship of children born overseas to U.S. citizen parents. It did not grant citizenship to those born in the Canal Zone. Although the original version of section 1993 dated to 1855 (passed to reverse the policy described in *Montana v. Kennedy*), the version in force in 1936 became law two years earlier with the passage of the Act of May 24, 1934. It granted citizenship to “[a]ny child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States . . . .”

By its terms, section 1993 applied if the Canal Zone is “out of the limits and jurisdiction of the United States.” By the rule of the *Insular Cases*, the Canal Zone was not the “United States,” so the first criterion is satisfied. However, given exclusive U.S. control of the Canal Zone, it was not out of the “jurisdiction” of the United States. The 1926 version of 8 U.S.C. § 173 made U.S. jurisdiction clear. Similarly, the 2007 amicus brief of constitutional law professors in *Boumediene*, joined by Professor Tribe, refers to “territory outside U.S. territorial borders and sovereignty, but still under the complete jurisdiction and control of the United States: most prominently, the Canal Zone in Panama . . . .”

Because the Canal Zone was neither the United States nor foreign, Congress recognized a problem with the citizenship of Zone-born children. In 1937, Congress passed a specific statute granting citizenship to children of U.S. citizens born in the Canal Zone. Still in force, the Act of August 4, 1937 (codified at 8 U.S.C. § 1403(a)) provides:

Any person born in the Canal Zone on or after February 26, 1904, and whether before or after the effective date of this chapter, whose father or mother or both at the time of the birth of such person was or is a citizen of the United States, is declared to be a citizen of the United States.

The legislative history explains the basis for the law. In 1937, the Immigration and Naturalization Service was part of the Department of Labor. As noted in Senate Report Number 75-678, Labor Secretary Frances Perkins explained that children born to U.S. citizens in the Canal Zone “are citizens in every sense except as a matter of law.” Because “the Canal Zone is not an incorporated territory of the United States, hence not ‘a part of’ or ‘in’ the United States, there is doubt that any of the persons described in the bill are citizens of the United States under the Constitution or any existing statutes even though the Canal Zone is under the jurisdiction of the United States.”

The House Report, Number 75-1303, observed that “the citizenship of persons born in the Canal Zone of American parents, has never been defined either by the Constitution, treaty or congressional enactment.” Canal-Zone-born children are not covered by the “statutes on citizenship” because they “are not outside the jurisdiction of the United States, neither are they within the limits of the United States.” Thus, “[e]ven children born within the limits of the Zone which is under the jurisdiction of the United States are not citizens.”

In the brief Senate debate on the bill (appearing in Volume 81 of the Congressional Record), Senator Bennett Champ Clark said that “existing law is changed” in that citizenship would be granted to children of U.S. citizens born in the Canal Zone. In the House, John Sparkman explained:

It has been held that the Canal Zone is not such foreign territory as to come under the law of 1855 [Revised Statutes section 1993] and, on the other hand, it is not part of the United States which would bring it within the fourteenth amendment; consequently there has been great doubt about the citizenship status of children born in the Canal Zone.

Sparkman concluded: “The Canal Zone is a ‘no man’s land.’ Every place in the world except the Canal Zone has been covered either by the law of 1855, which applies to foreign countries, or by the fourteenth amendment, which applies to the United States and its possessions.”

Of course, doubts about section 1993’s application might be mistaken. If Senator McCain was born a citizen in 1936 by virtue of section 1993, Congress in 1937 cannot reverse that, even by legislation. Conceivably, the 1937 statute was somehow redundant of section 1993, just as part of the citizenship clause of the Fourteenth Amendment is now repeated verbatim in 8 U.S.C. § 1401(a). However, the concern of Congress was justified because persons born in the Canal Zone were not covered by the Supreme Court’s interpretation of the text of section 1993 or the statute’s original public meaning.

The Constitution’s text itself demonstrates that United States “jurisdiction” and “the United States” in a territorial sense are distinct concepts. As the *Downes* Court stated, “The 13th Amendment to the Constitution, prohibiting slavery and involuntary servitude ‘within the United States, or in any place subject to their jurisdiction,’ . . . show[s] that there may be places within the jurisdiction of the United States that are no part of the Union.”



The Constitution is consistent with American citizenship law generally, which has always been concerned with both national limits and national jurisdiction in granting citizenship or subjectship. *Calvin's Case*, decided in 1608, was the primary basis of citizenship law in England and the United States at least until its principles were embodied in the Fourteenth Amendment. In it, Lord Coke explained that a person was a natural born subject if “the parents be under the actual obedience of the King” and that “the place of his birth be within the King’s dominion.” The 1802 Act where the “limits and jurisdiction” language first appeared in another section made clear that it contemplated that the words indicated distinct things; it provided for naturalization for certain people “residing within the limits, and under the jurisdiction of the United States.” Section 1 of the Fourteenth Amendment requires both birth in the United States and being subject to its jurisdiction. The Immigration and Nationality Act now distinguishes between the United States proper and U.S. territory for purposes of granting citizenship. Thus, American citizenship law from the common-law era to the present ascribes distinct meaning to the “limits” and “jurisdiction” of the United States. It should not be surprising if section 1993 did as well.

And so the Supreme Court determined. In *Wong Kim Ark*, the Court construed a passage of the 1855 version of what became section 1993; that language remained unchanged in the 1934 revision. The Court held that the phrases “in the United States, and subject to the jurisdiction thereof” in the citizenship clause of the Fourteenth Amendment “must be presumed to have been understood and intended by [Congress and the States as] . . . the converse of the words ‘out of the limits and jurisdiction of the United States’ as habitually used in the naturalization acts.” That is, jurisdiction in section 1993 means the same thing as it does in the Fourteenth Amendment.

*Wong Kim Ark* held that natives and citizens of China living in the United States were subject to the jurisdiction of the United States because they “are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here, and are ‘subject to the jurisdiction thereof’ in the same sense as all other aliens residing in the United States.” Based on *The Schooner Exchange v. McFaddon*, an 1812 decision by Chief Justice Marshall, *Wong Kim Ark* found persons not subject to the jurisdiction of the United States to include “children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory . . . .” Accordingly, in a territorial sense, individuals are within a country’s jurisdiction if they are in a place that obligates them to that nation. In this context, jurisdiction cannot have meant a nation’s worldwide authority to regulate its citizens because so construed, the statute would never apply to anyone. *Wong Kim Ark* thus recognizes four categories. A person can be: 1) both in the United States and subject to its jurisdiction, like a Chinese immigrant in California; 2) neither in the United States nor subject to its jurisdiction, like a Brazilian citizen in São Paulo; 3) in the United States but not subject to its jurisdiction, like a British soldier occupying Washington, D.C. during the War of 1812; or 4) out of the United States but subject to its jurisdiction, like a U.S. merchant on a guano island—one of the unclaimed, commercially valuable islands that Congress provided could be made U.S. territory upon application of a U.S. petitioner. Only persons born in the first

category are citizens by birth under the Fourteenth Amendment; only those born in the second category to U.S. citizens are covered by section 1993.

The Canal Zone is in the fourth category. Under the doctrine of the *Insular Cases*, the House Committee on Immigration and Naturalization's conclusion that "Children of American parents in the Canal Zone are not outside the jurisdiction of the United States, neither are they within the limits of the United States" is inescapable. As an unincorporated territory, the Canal Zone is not "the United States." At the same time, if, as *Wong Kim Ark* held, Chinese living in the United States owed at least temporary allegiance and were entitled to protection, then children of U.S. citizens born in the Canal Zone also could be expected to receive the protection of law and not to violate its laws. A 1907 Attorney General opinion so held.

### C. Should Section 1993 Be Re-drafted to Fix Congressional Error?

Section 1993 could be construed based on what we imagine to be its spirit rather than its language and the "and jurisdiction" requirement read out. Alternatively, perhaps Congress meant to grant citizenship when the parents were outside the "limits or jurisdiction," of the United States and not, as they wrote, "limits and jurisdiction." If so, perhaps the apparent statutory requirement that the birth be outside U.S. "jurisdiction" should be ignored. Indeed, there was testimony at the July 21, 1937 hearing before the House Committee on Immigration and Naturalization on the 1937 Act indicating that the State Department held that view. The Department thus regarded children of U.S. citizens born in outlying possessions as citizens, although there was also testimony that other agencies disagreed. Reading "and jurisdiction" out of section 1993 would mean persons born in the Canal Zone in 1936 are citizens at birth because they would meet the requirements of the statute as revised.

This reading would not be a fair reading, at least under conservative principles of construction, because the plain meaning is perfectly sensible. Like the natural born citizen clause itself, the language of section 1993 was not intended to correlate with the citizenship clause of the Fourteenth Amendment, which had not yet been imagined when the earlier provisions became law. Stephen Sachs plausibly argues that Congress likely imagined that it created a "gapless" system, granting citizenship by one means or another to children of U.S. citizens wherever born. Even assuming that this could be conclusively shown, the unenacted intent could not override the text. As the Court said in *Lamie v. U.S. Trustee*, "[i]f Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. 'It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result'" (quoting *United States v. Granderson*).

In 1855, the statute probably did operate gaplessly because the limits of the United States were identical (or nearly so) to its jurisdiction, so anywhere the Fourteenth Amendment did not grant citizenship, section 1993 would, and vice-versa. For this reason, the terms could be used interchangeably. The problem was not created by legal or technological developments beyond the control of Congress, but because Congress itself created areas within U.S. jurisdiction but outside its limits. Congress decided the terms should no

longer be identical, but did not revise all of the laws potentially affected by its decision. As Justice Holmes stated, in *McBoyle v. United States*, the passage of time and unanticipated factual developments do not give courts free rein to rewrite statutes; a “statute should not be extended . . . simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.”

The conservative result—application of the original public meaning of the plain language—is what obtains under existing law. First, ambiguous citizenship statutes are construed against the grant of citizenship. The courts and the executive agree (here, in a 1935 Attorney General opinion quoting *United States v. Manzi*) that “[c]itizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant.” Congress has apparently never rejected this approach.

Nor can the plain meaning of the statute be disregarded through application of the canon of avoiding absurd results. Absurdity or lack thereof must be measured at the time of enactment because the canon is a method of evaluating meaning. In 1855, when section 1993 first became law, there might have been no places outside the territory but within the jurisdiction, so no absurdity was created by requiring both. Perhaps the first zones out of the U.S. but within its jurisdiction were the guano islands created by statute in 1856, in provisions codified at 48 U.S.C. §§ 1411–1419. It would not have been absurd for Congress to leave citizenship on these mostly unpopulated islands to the general naturalization laws or to more specific future regulation as knowledge of actual conditions developed.

Leaving the problem to Congress is particularly justified here. Of course, in 1855, Congress could not have foreseen that decades hence it would create the Canal Zone, so it could not have consciously legislated for it or any place like it. But if we conclude that Congress in the mid-nineteenth century would have wanted to grant citizenship to those born in the Canal Zone had they anticipated its creation, we must determine which statute will be extended. The Canal Zone could be covered by section 1993, on the assumption that Congress would have wanted to treat U.S. territory as if it were the same as foreign territory. Alternatively, the Canal Zone could be covered by section 1992, the citizenship provision of the Civil Rights Act of 1866, on the assumption that Congress would have wanted to treat U.S. territory as part of the United States. But this construction would also grant citizenship to all children born in the territories, even if their parents were not U.S. citizens. A dynamic statutory interpreter applying the spirit of the laws might attempt to close the gap; a conservative would say that the only way to identify whether a gap arising decades after enactment is, in fact, unintentional is for courts to do nothing and allow Congress to exercise its constitutional power of legislation.

As it happened, Congress found neither section 1992 nor section 1993 to be the proper model for the territories. The current version of the Immigration and Nationality Act, codified at 8 U.S.C. § 1401, has distinct rules for citizenship by descent for those born in the United States, those born outside of both the United States and its outlying possessions, and those born outside the United States but in its outlying possessions. That is, the law still

treats U.S. jurisdiction and the United States proper as two related but different things, just as the plain language of section 1993 suggests.

The plain language, prior judicial construction, actions of Congress, and use of the words in related law all point in the same direction. Because persons born in unincorporated territories such as the Canal Zone were out of the United States but within its jurisdiction, section 1993 did not apply. Since there was no other law granting citizenship in effect, children of citizens born before 1937 in the Canal Zone were not citizens at birth.

#### D. *The Politics of Canal Zone Citizenship*

In the era of Senator McCain's birth, the Canal Zone citizenship problem had not been overlooked; nationality law was in notorious disarray. A State Department official wrote in the *ABA Journal* in 1934 that "[p]robably no branch of the law in this country is more open to criticism upon the grounds of instability, inconsistency and ambiguity than that governing nationality, or citizenship." However, for a variety of reasons, Congress legislated slowly.

Congress was informed about the gap in the law with regard to the unincorporated territories no later than 1932. Commissioner of Naturalization Raymond F. Crist testified before the House Committee on Immigration and Naturalization on a bill, H.R. 5489, proposing to grant citizenship to foreign-born children with U.S. citizen mothers.

The Commissioner's testimony reflected the precise nature of the problem. He insisted that "[t]here are cases left out which should be included in this bill," specifically "children born of American parents who are not citizens by section 1992, [and] children born in the Philippine Islands, as to whom neither the Constitution nor any statute declares affirmatively that they are citizens of the United States." The problem was that "those born within the jurisdiction of the United States are not declared citizens of the United States." The gap was "not limited to the Philippines" but extended to "any place under the jurisdiction of the United States."

This testimony did not persuade the Seventy-Second Congress to act with respect to either children born in the unincorporated territories or to those born to U.S. citizen mothers; both groups were left aliens. However, in April 1933, President Roosevelt issued Executive Order No. 6115 directing the Departments of State, Labor, and Justice to prepare a report on the nationality laws of the United States and to recommend revisions to Congress.

Commenting in March 1933 on the bill pending in the Seventy-Third Congress that later became section 1993, Secretary of State Cordell Hull urged delay. But if Congress could not wait, he offered a draft with separate nationality provisions for those born in the United States, those born out of the United States and its outlying possessions, and those born in the outlying possessions, thus fixing the gap that Commissioner Crist identified in section 1993. Despite Secretary Hull's entreaties, Congress did not act. Mere equalization of the rights of male and female U.S. citizens to give their children citizenship generated substantial political opposition. While women's groups were the driving force behind reform, other important constituencies opposed the law, including the State Department; Lieutenant Colonel Ulysses S. Grant III, representing the American Coalition of

Patriotic Societies; and the American Federation of Labor, which argued that “the real and proper way to equalize the status of men and women . . . would be to amend the bill by denying automatic citizenship to any children born in foreign countries, unless both the father and the mother are citizens . . . .” Because passage of the bill at all was precarious, Congress resolved only discrimination against mothers.

The inter-department committee that President Roosevelt directed to review the nationality laws in 1933 issued a monumental report in 1938 that formed the basis for the comprehensive Nationality Act of 1940. While those born in limbo or without citizenship had reason to complain that Congress should have acted sooner, it is not surprising, unconstitutional, nor an invitation to judicial re-drafting that Congress delayed revision until the completion of an expert study.

Children born in outlying possessions left aliens under the 1934 law were in good company. All foreign-born children were aliens if born between 1802 and 1855 to parents who became citizens after 1802, as were all children of U.S. citizen mothers and alien fathers until 1934. Foreign-born adopted children of naturalized citizens were made citizens by statute, 8 U.S.C. § 1431(a), but such adopted children of “native born” U.S. citizens were aliens until 2001 under The Child Citizenship Act of 2000 (codified at 8 U.S.C. § 1431(b)). Children of U.S. citizen fathers born out of wedlock are not automatically citizens under current law, according to 8 U.S.C. § 1409(a). An apologist for the piecemeal legislative tradition of the past two centuries could say that none of these classes of alien children of U.S. citizen parents were exiled or outlawed. Certainly, it is hardly unprecedented for complex statutory regimes to fail to solve all related problems at once (or to offer incomplete, contradictory, and inconsistent coverage) and yet accurately reflect what Congress was able to agree to enact into law. If particular children did not want to be U.S. citizens—and surely the class of those born outside of the United States are less likely to want to live in the United States than those born in the United States—no harm was done by failing to grant that status automatically. If they did want U.S. citizenship, they might well be able to become citizens through individual application under general naturalization statutes or other law with the advantage of having U.S. citizen relatives.

The demographics of the Canal Zone presented an additional political complication explaining delay. From 1790 to 1965, federal law restricted immigration and naturalization of non-whites. Bill Ong Hing describes some such restrictions in his book *Making and Remaking Asian America Through Immigration Policy*: The immigration of Africans and Asians was prohibited or discouraged until 1965; from 1790 until 1952, Congress restricted naturalization by race, limiting it first to “free white persons;” for a period, female citizens who married Asian aliens were automatically expatriated. Informed policymakers were aware of the centrality of racial restriction in the era of Senator McCain’s birth. For example, a unanimous 1922 Supreme Court decision—*Ozawa v. United States*—holding Japanese persons racially ineligible to naturalize, called the racial bar a “rule in force from the beginning of the Government, a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions.”

Because of the paramount concern of some in Congress about the racial composition of the immigrant stream, it legislated cautiously with respect to the Canal Zone, as it had with the 1934 revision of section 1993. Indeed, admitting more whites was a prominent argument in favor of the 1934 revision. As reported in volume seventy eight of the Congressional Record, Representative Samuel Dickstein, chair of the House Committee on Immigration explained this reasoning:

To illustrate the inequality of the present law, let us consider on the one hand the case of children born out of the United States to a couple, the man being of Chinese ancestry but a native-born American citizen and the woman ineligible to citizenship, and on the other hand the case of children born out of the United States of the union between a native-born white woman and a Britisher. . . . In the case of the Chinaman, the children arriving at the port of entry . . . are admitted as American citizens, whereas the white child of the native born American woman married to the Britisher is held back and is called an "alien." Because of the inequality of the present law, that child derives the citizenship of the alien father, even though the mother is a native-born white American citizen.

Representatives grilled witnesses on racial risks at the 1937 hearing on the Canal Zone citizenship bill before the House Committee on Immigration and Naturalization. During hearings on the bill, witnesses such as H.A.A. Smith, Chief of General Purchasing Office for the Panama Canal Zone, reassured legislators that the bill offered no benefits to ethnic Panamanians or "Negroes," arguing that it was "no attempt to bring in half-breeds or anyone else like that."

Representative Charles Kramer of California observed, "Now, you are going to run into a situation where American men come down there and marry one of those Koreans, Japanese, or Chinese, and perhaps after a short time abandon the wife and there will be a child born, and you are going to bring these children in as American citizens." H.A.A. Smith assured the Committee that such children "would not come under this bill at all."

The Committee apparently wished to avoid granting citizenship to the children of African Americans. Illinois Representative Noah Mason observed that "there are very few colored American citizens down there." After Chairman Samuel Dickstein agreed that "[p]ractically 90 per cent or more of those affected would be of white American stock," Representative Mason concluded that he did "not see that there is very much to fear from the passage of this bill in that respect." When Representative William Poage of Texas noted that "[y]ou are going to make these children born of Negro and Indian women with American fathers, going to make American citizens out of every one of them," Representative John Lesinki, Sr. of Michigan asked, "Why not make this bill apply only to the white race?"

There was no need to limit the bill to whites in the text because it would be limited in effect. H.A.A. Smith assured the committee that the bill had been carefully drafted to avoid unfortunate racial consequences. After Representative Poage noted that "You have got about 22,000 Negroes employed there," Smith explained that as non-U.S. citizens, "they are not covered by this bill. . . . we do not want to give them by this bill any rights whatever as American citizens. That is why we have drafted this in this way."

Surprisingly, Smith testified that racial considerations led the Canal to oppose an earlier proposal that would have made citizens of all children born in the Canal Zone, including, of course, those black or brown. “We do not want to bring in all the children that are born in the Canal Zone,” Smith explained. “Two or three years ago we had up the proposition that was advanced to make all children born in the Canal Zone American citizens. We have fought that consistently, the Canal has.” The Canal Zone authorities thought that it was more important to exclude children of native Panamanians and other alien workers than to ensure that the children of U.S. citizens were birthright citizens. This makes perfect sense, in a way; sooner or later white children were likely to be made citizens. But a hastily drafted bill benefiting Panamanians or “Negroes” would have irreversible consequences.

The careful drafting succeeded. The House Report assured Members of Congress that the bill was:

[E]ntirely different from legislation that would confer citizenship on residents of territories of the United States of different blood. The bill . . . would not confer citizenship on any alien employee or the children of such alien employee, even though such alien children were born within the limits of the Canal Zone.

Not every Representative was persuaded; the Congressional Record notes that one well-traveled member objected that “there are more nationalities and more cross-breeds of all kinds in the Isthmus of Panama than any other place in the world.” The vote reflected the anti-immigration sentiment of many in Congress. After several Representatives on both sides switched their votes, the final tally was 146 aye to 144 nay; a single vote prevented failure through a tie. Even for a bill benefiting the children of “our men in the Army in the Canal Zone,” the House nearly decided to leave them in a “no man’s land.” The support most Americans now believe members of the armed forces deserve should not be imagined a consistent feature of our law or culture. Just short of half voted to leave such children without U.S. citizenship, at least until, as Representative Tarver suggested, they made “some form of application.”

### III. SENATOR MCCAIN’S PATHS TO NATURAL BORN CITIZENSHIP

Senator McCain’s conservative jurisprudence leaves him little room to criticize the discrimination that affected him; his view is that the courts should not change congressional decisions whether well founded or otherwise. His legal philosophy also demands that judges should not make legal decisions simply to achieve outcomes they prefer, as described on the [“Strict Constructionist Philosophy” entry on his website](#). “When applying the law,” he believes, “the role of judges is not to impose their own view as to the best policy choices for society but to faithfully and accurately determine the policy choices already made by the people and embodied in the law.” Since Congress determined that only children outside both the limits and jurisdiction of the United States would be citizens, under Senator McCain’s approach, the question is closed.

While some may think that Congress should have granted citizenship to children of U.S. citizen military personnel in the Canal Zone earlier, Senator McCain's view is that section 1993 cannot be judicially improved; judges should "faithfully apply the law as written, not impose their opinions through judicial fiat." Whether Congress kept Senator McCain from being a citizen at birth because it was sloppy and slow, or merely careful and deliberate, judicial intervention is not justified. According to McCain, judges should "respect the lawmaking powers of Congress."

However, several more rights-protective doctrines, if accepted, would make him a citizen by birth. Those theories, implied in the analysis of the Tribe-Olson Opinion, represent the dreams of liberal jurists, lawyers, and scholars, who believe the courts have given Congress too much power over unincorporated territories, immigration, and citizenship. For Senator McCain to be a natural born citizen, the law must abandon a century of restrictive doctrines developed by conservative justices.

#### A. Restricting Congressional Power by Overruling the *Insular Cases*

Senator McCain would be a citizen at birth if the *Insular Cases* were overruled or limited to the extent that all persons born in U.S. sovereign territory would be deemed citizens. There are good reasons to rethink the area. The Court's determination that Congress can withhold the full protections of the Constitution from those in the territories rested on racial notions. As Justice Brown explained in *Downes*:

[I]n the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people . . . which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race.

The problem was that, according to the Court, some races were not suited to constitutional democracy:

[Because the territories] are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

As was his wont, Justice Harlan disagreed, asserting in the 1904 case *Dorr v. United States* that constitutional protections "are for the benefit of all, of whatever race or nativity, in the States composing the Union, or in any territory . . . over the inhabitants of which the Government of the United States may exercise the powers conferred upon it by the Constitution."

If Justice Harlan's view prevailed, the Canal Zone would have been "the United States," subject to the citizenship clause of the Fourteenth Amendment—and John McCain would be a natural born citizen. However, if Senator McCain were a citizen at birth because of the *Insular Cases*'



invalidity, so too would millions of others, born in unincorporated territories under U.S. jurisdiction, be. All persons born in the Philippines between 1898 and 1946 and all persons born in the Canal Zone between 1904 and 1979 would apparently be Fourteenth Amendment birthright citizens. By statute—8 U.S.C. § 1401(c) and 8 U.S.C. § 1401(g)—most of their children and some of their grandchildren would be also be citizens.

*B. Restricting Congressional Power by Recognizing  
Common Law Citizenship*

The Tribe-Olson Opinion also alludes to principles of citizenship extant at the Founding, implying a potentially profound basis to reform U.S. nationality law. The very existence of the natural born citizen clause—the argument goes—demonstrates that some people are citizens by birth in the United States. Yet, before the Civil Rights Act of 1866 and the Fourteenth Amendment, no law granted or recognized citizenship by birth in the United States. Accordingly, the Constitution necessarily recognized citizenship based on law other than federal statute or constitutional provision, and the courts so held. The inevitable source is the common law in effect when the Constitution was drafted and ratified. Perhaps Congress may, under its naturalization authority, grant citizenship to those who do not obtain it under common law, but Congress may not deny citizenship to those entitled to it under the original Constitution. While the First Congress passed a statute granting citizenship to children born abroad, perhaps the statute was declaratory of the common law, not a determination that the common law of citizenship had been supplanted.

If the Constitution preserved citizenship under common law, Senator McCain would likely be a birthright citizen. Of course, overruling this aspect of *Wong Kim Ark* and *Rogers* would open up a world of challenges to current nationality laws. There would be in effect two constitutional citizenship clauses—that in the Fourteenth Amendment and the natural born citizen clause—to be elaborated by the courts. Many of the Supreme Court cases in this area have been decisions upholding denial of citizenship to foreign-born children of U.S. citizen military personnel who did not satisfy requirements imposed by Congress. Perhaps the Court was wrong to defer to Congress, and the Constitution should have been read more expansively to uphold individual rights in this area.

*C. Restricting Congressional Power by Overruling the  
Plenary Power Doctrine*

Senator McCain could be a citizen if courts applied equal protection review to the law in effect in 1936. At least as to the children of citizens, there are strong arguments that citizenship by descent is worthy of protection, perhaps in the way that voting rights are. While, as explained in *Rogers*, “the Court has specifically recognized the power of Congress not to grant a U.S. citizen the right to transmit citizenship by descent,” once Congress acts, the right to live in the same country as one’s family should not be withheld for insubstantial reasons. Senator McCain’s mother could have, as many Americans did, delivered in Colon Hospital in Colon: a facility built, owned, and

located in a town owned by the Panama Railroad, a U.S. company, but under Panamanian sovereignty. In that case, he would have been a citizen at birth under section 1993 because he would have been born out of both the territory and jurisdiction of the United States. It is irrational that he should be denied citizenship based on that geographic triviality.

However, under a principle called the “plenary power doctrine,” judicial challenges to immigration and citizenship policies are strictly limited. The reverse of strict scrutiny, plenary power review is deferential in theory, virtually non-existent in fact. To this day, no person denied immigration or citizenship based on race, political belief, sex, out-of-wedlock birth, or sexual orientation has persuaded the Supreme Court that such discrimination is unconstitutional. As stated in the 1889 case *Chae Chan Ping v. United States*, exclusion of undesirables might well be “essential . . . to the preservation of our civilization.” On that basis, the Court held in *Fiallo v. Bell* that “‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens” and that it is unobjectionable that “‘in the exercise of its broad power over immigration and naturalization, ‘Congress regularly makes rules that would be unacceptable if applied to citizens.’” Thus, to give one example of judicial respect for congressional policymaking in this context, in the face of a statute apparently advantaging naturalized citizens, the Court unanimously upheld in *Chong Fook v. White* the exclusion of the wife of a natural born U.S. citizen: “The words of the statute being clear, if it unjustly discriminates against the native-born citizen, or is cruel and inhuman in its results, as forcefully contended, the remedy lies with Congress and not with the courts.”

The Tribe-Olson Opinion’s claim that the Framers cannot have intended a child born to U.S. citizens to be a non-citizen was a claim about the common law and the meaning of the Constitution, but it also sounds in equal protection. Other foreign-born children of U.S. citizens became U.S. citizens at birth, as Senator McCain would have had his mother elected to deliver a hundred yards over the border in the Republic of Panama. Birth in the Canal Zone is justifiably treated differently from birth in other parts of the world, but those differences probably warrant more favorable treatment, not less, as Congress determined in the 1937 Act. Arguably, a well-functioning Congress would not have left those born in the Canal Zone in limbo for years after the problem became clear in 1932.

A determination that Senator McCain was born a citizen because others with less claim to citizenship received it at birth would be path breaking both procedurally and substantively. Procedurally, it would be a rejection of the principle that only Congress can make citizens. Substantively, it would hold up a legal regime historically full of contradictions, ironies, and lacunae to standards of logic, consistency, and fairness. Although the full consequences of those changes are unknown, they would be substantial.

#### CONCLUSION

From Mark Twain’s *Pudd’nhead Wilson* to Gregory Howard Williams’ *Life on the Color Line*, American letters are filled with stories of people whose identity rested on the idea that they were one thing but were shocked to find that they were another. Undoubtedly, Senator McCain has believed

that he was a citizen from the moment he was born. However, under the law as it existed in 1936, he was not. To learn that one was not a citizen when born might well be as stunning as learning that one was adopted.

For a number of reasons, it is a bitter irony that McCain should find himself in this legal gap. He has a reputation for advocating moderate policies with regard to immigration. In addition, it is preposterous that in 2008, a presidential candidate—a Caucasian no less—should be caught up in antique technicalities of the legal regulation of race.

In the 2000 Republican primary, while leading in the polls, McCain became the subject of a smear campaign. McCain and his wife had adopted a daughter with dark skin. According to an article his campaign manager, Richard H. Davis, wrote in the *Boston Globe*, before the South Carolina primary, “[a]nonymous opponents used ‘push polling’ to suggest that McCain’s Bangladeshi-born daughter was his own, illegitimate black child.” McCain was defeated; George Bush became the Republican nominee and president. Race baiting may well have cost McCain the presidency in 2000.

And now, it appears, racial considerations have frustrated his legal ability to be president by keeping him from being deemed a citizen at birth. First, the doctrines of the *Insular Cases*, predicated on race, kept the Canal Zone from being part of the United States for purposes of the citizenship clause of the Fourteenth Amendment. In addition, the plenary power doctrine, predicated on race, now precludes successful challenges to irrational citizenship laws. Finally, Congress and the Canal Zone authorities delayed legislation for years, the former because of government inertia and anti-immigrant sentiment, the latter until they could ensure the law would not benefit non-whites. These decisions left McCain a non-citizen at birth.

The legacy that led to his lack of citizenship at birth, however, may give him an avenue that would make him eligible to the office of president and be faithful to his strict constructionism. Some Caucasian families would not adopt a dark-skinned child; that the McCains do not have that attitude suggests the absence of strong racial antipathies. McCain’s sensitivity to race is also suggested by his April 2008 speech in Selma honoring the forty-third anniversary of the Selma-to-Montgomery march. In his speech, he praised Democratic Representative John Lewis, whose skull was fractured in the march. For all that appears, McCain disapproves of race discrimination in addition to not being a race baiter. Of course, that choices made by the people and their representatives and embodied in law are motivated by discrimination has justified judicial intervention even among judges regarded as conservative. Thus, perhaps unreasonable immigration and citizenship policies should not be protected by old doctrines rooted in racism, even if in other areas courts should carefully defer to the legislature.

## APPENDIX A

OPINION OF LAURENCE H. TRIBE AND THEODORE B. OLSON  
DATED MARCH 19, 2008

March 19, 2008

We have analyzed whether Senator John McCain is eligible for the U.S. Presidency, in light of the requirement under Article II of the U.S. Constitution that only “natural born Citizen[s] . . . shall be eligible to the Office of President.” U.S. Const. art. II, § 1, cl. 5. We conclude that Senator McCain is a “natural born Citizen” by virtue of his birth in 1936 to U.S. citizen parents who were serving their country on a U.S. military base in the Panama Canal Zone. The circumstances of Senator McCain’s birth satisfy the original meaning and intent of the Natural Born Citizen Clause, as confirmed by subsequent legal precedent and historical practice.

The Constitution does not define the meaning of “natural born Citizen.” The U.S. Supreme Court gives meaning to terms that are not expressly defined in the Constitution by looking to the context in which those terms are used; to statutes enacted by the First Congress, *Marsh v. Chambers*, 463 U.S. 783, 790-91 (1983); and to the common law at the time of the Founding. *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898). These sources all confirm that the phrase “natural born” includes both birth abroad to parents who were citizens, and birth within a nation’s territory and allegiance. Thus, regardless of the sovereign status of the Panama Canal Zone at the time of Senator McCain’s birth, he is a “natural born” citizen because he was born to parents who were U.S. citizens.

Congress has recognized in successive federal statutes since the Nation’s Founding that children born abroad to U.S. citizens are themselves U.S. citizens. 8 U.S.C. § 1401(c); *see also* Act of May 24, 1934, Pub. L. No. 73-250, § 1, 48 Stat. 797, 797. Indeed, the statute that the First Congress enacted on this subject not only established that such children are U.S. citizens, but also expressly referred to them as “natural born citizens.” Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104.

Senator McCain’s status as a “natural born” citizen by virtue of his birth to U.S. citizen parents is consistent with British statutes in force when the Constitution was drafted, which undoubtedly informed the Framers’ understanding of the Natural Born Citizen Clause. Those statutes provided, for example, that children born abroad to parents who were “natural-born Subjects” were also “natural-born Subjects . . . to all Intents, Constructions and Purposes whatsoever.” British Nationality Act, 1730, 4 Geo. 2, c. 21. The Framers substituted the word “citizen” for “subject” to reflect the shift from monarchy to democracy, but the Supreme Court has recognized that the two terms are otherwise identical. *See, e.g., Hennessy v. Richardson Drug Co.*, 189 U.S. 25, 34-35 (1903). Thus, the First Congress’s statutory recognition that persons born abroad to U.S. citizens were “natural born” citizens fully conformed to British tradition, whereby citizenship conferred by statute based on the circumstances of one’s *birth* made one *natural born*.

There is a second and independent basis for concluding that Senator McCain is a “natural born” citizen within the meaning of the Constitution. If the Panama Canal Zone was sovereign U.S. territory at the time of Senator McCain’s birth, then that fact alone would make him a “natural born” citizen under the well-established principle that “natural born” citizenship includes birth within the territory and allegiance of the United States. *See, e.g., Wong Kim Ark*, 169 U.S. at 655-66. The Fourteenth Amendment expressly enshrines this connection between birthplace and citizenship in the text of the Constitution. U.S. Const. amend. XIV, § 1 (“All persons *born* or naturalized *in the United States*, and subject to the jurisdiction thereof, are


citizens of the United States . . .”) (emphases added). Premising “natural born” citizenship on the character of the territory in which one is born is rooted in the common-law understanding that persons born within the British kingdom and under loyalty to the British Crown—including most of the Framers themselves, who were born in the American colonies—were deemed “natural born subjects.” See, e.g., 1 William Blackstone, *Commentaries on the Laws of England* 354 (Legal Classics Library 1983) (1765) (“Natural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king . . .”).

There is substantial legal support for the proposition that the Panama Canal Zone was indeed sovereign U.S. territory when Senator McCain was born there in 1936. The U.S. Supreme Court has explained that, “[f]rom 1904 to 1979, the United States exercised sovereignty over the Panama Canal and the surrounding 10-mile-wide Panama Canal Zone.” *O’Connor v. United States*, 479 U.S. 27, 28 (1986). Congress and the executive branch similarly suggested that the Canal Zone was subject to the sovereignty of the United States. See, e.g., *The President—Government of the Canal Zone*, 26 Op. Att’y Gen. 113, 116 (1907) (recognizing that the 1904 treaty between the United States and Panama “imposed upon the United States the obligations as well as the powers of a sovereign within the [Canal Zone]”); Panama Canal Act of 1912, Pub. L. No. 62-337, § 1, 37 Stat. 560, 560 (recognizing that “the use, occupancy, or control” of the Canal Zone had been “granted to the United States by the treaty between the United States and the Republic of Panama”). Thus, although Senator McCain was not born within a State, there is a significant body of legal authority indicating that he was nevertheless born within the sovereign territory of the United States.

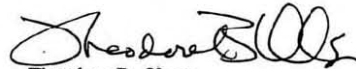
Historical practice confirms that birth on soil that is under the sovereignty of the United States, but not within a State, satisfies the Natural Born Citizen Clause. For example, Vice President Charles Curtis was born in the territory of Kansas on January 25, 1860—one year before Kansas became a State. Because the Twelfth Amendment requires that Vice Presidents possess the same qualifications as Presidents, the service of Vice President Curtis verifies that the phrase “natural born Citizen” includes birth outside of any State but within U.S. territory. Similarly, Senator Barry Goldwater was born in Arizona before its statehood, yet attained the Republican Party’s presidential nomination in 1964. And Senator Barack Obama was born in Hawaii on August 4, 1961—not long after its admission to the Union on August 21, 1959. We find it inconceivable that Senator Obama would have been ineligible for the Presidency had he been born two years earlier.

Senator McCain’s candidacy for the Presidency is consistent not only with the accepted meaning of “natural born Citizen,” but also with the Framers’ intentions when adopting that language. The Natural Born Citizen Clause was added to the Constitution shortly after John Jay sent a letter to George Washington expressing concern about “Foreigners” attaining the position of Commander in Chief. 3 Max Farrand, *The Records of the Federal Convention of 1787*, at 61 (1911). It 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; Senator McCain is certainly not the hypothetical “Foreigner” who John Jay and George Washington were concerned might usurp the role of Commander in Chief.

Therefore, based on the original meaning of the Constitution, the Framers' intentions, and subsequent legal and historical precedent, Senator McCain's birth to parents who were U.S. citizens, serving on a U.S. military base in the Panama Canal Zone in 1936, makes him a "natural born Citizen" within the meaning of the Constitution.



Laurence H. Tribe



Theodore B. Olson