

# NATURAL BORN PRESIDENTS

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**T**he 2012 Presidential campaigns generated more than their fair share of controversies. One particular issue garnered relatively little interest this election cycle, however: Were the two major party candidates for President constitutionally eligible to hold the office?

This stands in stark contrast to four years ago. Remarkably, both major party candidates in 2008 faced persistent questions – and multiple lawsuits – challenging their eligibility to serve as President.

The nature of the challenges differed significantly between the two candidates, however.

For then-Senator Barack Obama, the discussion quickly became fodder for late night comedians and a fixture in our nation’s popular culture. But it turned largely on factual disputes of little interest to the legal academy (not to mention of little merit as well).

By contrast, questions about the eligibility of Senator John McCain implicated genuinely disputed legal issues that scholars have hotly contested for decades.

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**A**rticle II of the Constitution provides that only a “natural born Citizen” shall be eligible to serve as President. But what exactly does that mean?

Must a person actually be born on U.S. soil? Or is any person eligible who was a U.S. citizen at time of birth – whether as a result

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of place of birth, or through the U.S. citizenship of the person's parents? These questions have been debated by constitutional scholars since well before the 2008 election cycle.<sup>1</sup>

Just ask the 2012 Republican candidate for President. His father, former Michigan Governor George Romney, faced questions about his own eligibility when he (unsuccessfully) pursued the Republican nomination for President in 1968. George Romney was born to U.S. citizen parents, and thus entitled to U.S. citizenship at birth – but he was born in Mexico.

Thanks to the 2008 Presidential election cycle, this decades-long debate over the meaning of “natural born Citizen” should now be settled as a practical matter. A major political party nominated an individual for President, and the other major political party accepted that person's constitutional qualifications for the office – even though that person was born outside the United States. As *Pub. L. Misc.* readers well know, constitutional law is not exclusively written by judges. Even “political” precedents can play a significant role in constitutional law.

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**B**ut exactly what “precedent” does the McCain nomination establish? This question has generated some confusion.

One might argue, for example, that McCain was eligible for the Presidency based on the traditionally accepted ground that he was in fact born on U.S. soil – namely, on Coco Solo Naval Air Station, a U.S. military installation in the Panama Canal Zone. Others, however, have raised real doubts about this claim, due to ambiguities concerning whether the United States actually exercised sovereignty over the Panama Canal Zone at the time of his birth.<sup>2</sup>

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<sup>1</sup> See, e.g., Isidor Blum, *Is Gov. George Romney Eligible to Be President?*, N.Y.L.J., Oct. 16 & 17, 1967, at 1; Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1 (1968); Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 Yale L.J. 881 (1988). Indeed, the constitutional debate over McCain's eligibility inspired an entire *Michigan Law Review* symposium devoted to the topic. See *Senator John McCain and Natural Born Citizenship: The Full Symposium*, available at [www.michiganlawreview.org/first-impressions/volume/107](http://www.michiganlawreview.org/first-impressions/volume/107).

<sup>2</sup> See, e.g., *Hollander v. McCain*, 566 F. Supp. 2d 63, 66 (D.N.H. 2008) (noting that “[t]he

So when the United States Senate unanimously approved a resolution deeming Senator McCain eligible for the Presidency, it did not do so because he was born on U.S. soil. Instead, the Senate resolved that McCain was eligible because “previous presidential candidates were *born outside of the United States of America* and were understood to be eligible to be President.”<sup>3</sup> The resolution further pointed out that any other view would be “inconsistent with the purpose and intent of the ‘natural born Citizen’ clause of the Constitution of the United States, as evidenced by the First Congress’s own statute defining the term ‘natural born Citizen’” to cover persons born to U.S. citizens outside U.S. soil.<sup>4</sup>

The Senate resolution came just weeks after the publication of a legal opinion by renowned constitutional scholar Laurence H. Tribe and former U.S. Solicitor General Theodore B. Olson. That letter argued in support of both potential bases for Senator McCain’s eligibility. But it led with McCain’s entitlement to citizenship at birth by virtue of his parents’ citizenship – not place of birth.

To the extent that courts have subsequently weighed in on the issue, they too have sided in favor of the broader conception of Presidential eligibility.<sup>5</sup> But to your humble *Pub. L. Misc.* editors, it is the

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Supreme Court . . . has made contradictory comments in dicta on the status of the Canal Zone” under the Hay-Bunau-Varilla Convention). Mischievously, Congress did not enact legislation conferring citizenship at birth on persons born in the Canal Zone to U.S. citizens until 1937 – a year *after* McCain’s birth. 8 U.S.C. § 1403(a). *See generally* Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, available at [papers.ssrn.com/sol3/papers.cfm?abstract-id=1157621](http://papers.ssrn.com/sol3/papers.cfm?abstract-id=1157621).

<sup>3</sup> S. Res. 511, 110th Cong. (2008), 2 J.L. (2 PUB. L. MISC.) \_\_\_\_ (2012) (emphasis added).

<sup>4</sup> *See* 1 Stat. 103, 104 (1790) (“the children of citizens of the United States that might be born beyond the sea, or out of the limits of the United States, should be considered as natural-born citizens”). It is well established that enactments of the First Congress provide strong context for construing our Constitution. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 790-91 (1983).

<sup>5</sup> *See Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146 (N.D. Cal. 2008) (finding it “highly probable . . . that Senator McCain is a natural born citizen” due to his birth to at least one U.S. citizen parent, before dismissing case for lack of standing); *Hollander v. McCain*, 566 F. Supp. 2d 63, 66 n.3 (D.N.H. 2008) (noting that “the weight of the commentary falls heavily on the side of eligibility” for persons born outside the U.S. to at least one U.S. citizen parent, before dismissing case for lack of standing); *see also Ankeny v. Governor of Indiana*, 916 N.E.2d 678, 684 n. 10 (Ind. Ct. App. 2009) (noting that “[t]he United States Senate passed a resolution on April 30, 2008, which explicitly recognized Senator John McCain as

non-judicial materials that emerged from Senator McCain's 2008 run for the White House that are more interesting – not to mention less accessible. Accordingly, we are pleased to publish them here – for posterity, and for those who study the Presidency.

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a natural born citizen,” and that “Plaintiffs do not cite to any authority or develop any cogent legal argument for the proposition that a person must actually be born within one of the fifty States in order to qualify as a natural born citizen”).