

ON THE MEANING OF “CONSIDERED AS NATURAL BORN”

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INTRODUCTION

[I]t shall be understood that the two Countries shall always be mutually naturalized, that every person born in either Country shall be considered as a natural born Subject throughout Great Britain and America as before the troubles.

— Proposed Anglo-American peace terms, 1777¹

Scholars have long debated what to make of the provision in the Naturalization Act of 1790 that foreign-born children of American parents “shall be considered as natural born citizens . . .”² Did the Founders who sat in the First Congress use that phrase to tell us something important about the presidential eligibility of foreign-born citizens like Senator Ted Cruz?³ Did they intend to declare that foreign-born children of American parents are natural born citizens under the substantive constitutional meaning of the term?⁴ Alternatively, did they mean to tell us that anyone who is born a citizen is a natural born citizen, so that the Constitution they drafted and ratified gives Congress the power to define “natural born” status by granting statutory citizenship at birth?⁵ Or did they merely intend to naturalize the children without declaring or defining presidential eligibility?⁶

Most scholars examine earlier uses of “natural born subject” to illuminate the meaning of “natural born citizen.” None, however,

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1. *Letter from David Hartley to Benjamin Franklin*, NATIONAL ARCHIVES (Dec. 25, 1777), <http://franklinpapers.org/franklin/framedVolumes.jsp?vol=25&page=349b>.

2. An Act to Establish an Uniform Rule of Naturalization, ch. 3, 2 Stat. 103, 104 (1790) (repealed 1795).

3. See, e.g., Eugene D. Mazo, *Rethinking Presidential Eligibility*, 85 FORDHAM L. REV. 1045, 1051 (2016).

4. See, e.g., Alexander Porter Morse, *Natural-born Citizen*, 31 WASH. L. REP. 823, 823 (1903).

5. See, e.g., Paul Clement & Neal Katyal, *On the Meaning of “Natural Born Citizen,”* 128 HARV. L. REV. F. 161, 161–62 (2015).

6. See, e.g., Rob Natelson, *Claims That Senator Cruz Is Not “Natural Born” Need to be Taken Seriously*, ORIGINALISM BLOG (Jan. 11, 2016), <http://originalismblog.typepad.com/the-originalism-blog/2016/01/claims-that-sen-cruz-is-not-natural-born-need-to-be-taken-seriouslyrob-natelson.html>.

have examined earlier uses of the phrase “considered as natural born” in order to understand its meaning in the final terms of the Naturalization Act of 1790. This Article does. It concludes that prescriptive uses like that in the Act merely naturalized persons or granted them limited rights enjoyed by the natural born, and that descriptive uses reflect an important feature of the controversy over colonial subject status prior to Independence. Members of the First Congress did not use the phrase to mean someone who is a citizen at birth or eligible to the presidency.

PRESCRIPTIVE USES

There were two prescriptive uses of the phrase “considered as natural born” prior to 1790. The first was to grant foreigners limited rights of a natural born subject. A royal license published in 1763 provided that alien printers employed by Oxford University “shall in all respects be considered as natural born subjects, except as to customs and subsidies.”⁷ A Massachusetts magazine reported in 1787 that “[t]he Parliament of Paris entered on their Journals on the 31st of March the letters patent which abolish the Droitt d’Aubaine; and by which English subjects, dying in France, are to be considered as natural born subjects.”⁸ That action relinquished the sovereign right to claim all of the local property of a foreigner who died in France.⁹ The use of the phrase “considered as natural born subjects” did not make one a natural born subject of France by dying there. Nor did it make an alien the king’s natural born subject through university employment.¹⁰ Considering someone as natural born in this context only conferred limited rights enjoyed by the natural born such as the right to security of property against the sovereign.

The second prescriptive use was to naturalize someone, illustrated by proposed terms to reconcile Britain and America after Independence. David Hartley, a sympathetic member of Parliament and the principal British peace negotiator, proposed in a 1783 draft supplemental peace treaty that America’s independence would be “absolute & unlimited in Matters of Government as well as Commerce” but not as to “Alienation”; on that point “the Subjects of his Britannick Majesty & the citizens of the united States shall mutually be considered as Natural born Subjects, & enjoy all rights & privileges as such, in the respective Dominions and territories, in

7. 1 RICHARD BURN, ECCLESIASTICAL LAW 374 (1763), <https://hdl.handle.net/2027/nvp.33433003000712>.

8. *Summary of Late Intelligence*, 3 WORCESTER MAGAZINE 204, 204 (1787), <https://books.google.com/books?id=omoAAAAAYAAJ>.

9. *Cf. Zschernig v. Miller*, 389 U.S. 429, 451–52 (1968).

10. The king did not even have the power to naturalize aliens; he could only grant the intermediate status of denizen. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 362 (1765), <https://archive.org/details/lawsofenglandc01blacuoft>.

the Manner heretofore accustomed.”¹¹ As he had explained the proposal to Ben Franklin six years earlier, “it shall be understood that the two Countries shall allways be mutually naturalized, that every person born in either Country shall be considered as a natural born Subject throughout Great Britain and America as before the troubles.”¹²

John Adams told his fellow American peace negotiators that he “would agree at once to a mutual Naturalization” as Hartley proposed.¹³ Considering the British as natural born subjects of the United States did not mean granting political rights to every person born in Britain. American governmental independence was to be absolute.¹⁴ It only meant granting them private rights by naturalization—removing the disabilities of alienage. Among the most important rights of the natural born and those considered to be natural born were rights to own, bequeath, and inherit property.¹⁵ Absent a change of law, Independence would make Britons and Americans aliens to each other, eliminating rights to property that each owned in the other’s dominions and precluding future property rights for them and for their fellow nationals.¹⁶

Hartley’s proposal had long been public. He had urged Britain to abandon the war and reconcile with America in 1778, proposing in Parliament that Britain agree “that all persons, born either in Great Britain, Ireland, or the colonies, provinces and plantations of North America, shall be considered as natural-born subjects, and enjoy all rights and privileges as such, throughout all the said dominions in common, in the manner heretofore accustomed.”¹⁷

In its prescriptive use, to consider someone as natural born meant only to naturalize them or to grant them limited rights enjoyed by the natural born. It did not make them natural born in fact, and it did not necessarily confer political rights. Given this

11. *Letter and Two Memoranda from David Hartley to Benjamin Franklin*, NATIONAL ARCHIVES (Mar. 31, 1783), <http://founders.archives.gov/documents/Franklin/01-39-02-0251>.

12. *Letter from David Hartley to Benjamin Franklin*, *supra* note 1.

13. John Adams, *April 28. Monday.*, NATIONAL ARCHIVES (Apr. 28, 1783), <http://founders.archives.gov/documents/Adams/01-03-02-0002-0004-0002>. Cf. John Adams, *Draft Articles to Supplement the Preliminary Anglo-American Peace Treaty*, NATIONAL ARCHIVES (Apr. 27, 1783), <http://founders.archives.gov/documents/Adams/06-14-02-0278> (draft response that would have imposed obligations within the other’s territories in addition to granting rights and privileges).

14. See *Letter and Two Memoranda from David Hartley to Benjamin Franklin*, *supra* note 11 (stating that U.S. independence would be “absolute & unlimited in Matters of Government”).

15. See, e.g., Thomas Jefferson, *Bill Concerning Escheats and Forfeitures from British Subjects*, NATIONAL ARCHIVES (Jun. 4, 1779), <https://founders.archives.gov/documents/Jefferson/01-02-02-0115>.

16. *Id.*

17. 9 Parl. Reg. HC 134 (1778) (Gr. Brit.), <https://books.google.com/books?id=9v02AQAAMAJ>.

prior usage, particularly in proposed terms of peace from 1777 to 1783, one might expect members of the First Congress to use the phrase with that same prescriptive meaning in 1790. And in fact they did.

Legislative history shows that members of Congress understood the phrase “shall be considered as natural born” to naturalize persons, not to mean a citizen at birth, to confer presidential eligibility, or to declare existing constitutional law.¹⁸ Variants of the phrase appear in four other proposals in the drafting of and debates over H.R. 40, the bill that became the Naturalization Act of 1790.¹⁹ Three of the four provide that persons shall be considered as natural born citizens after their births—including offspring of alien parents as well as those of citizen parents.²⁰ The fourth provides that persons will be considered as natural born only until they reach the age of twenty-two, when their citizenship would expire to prevent the inconvenience of dual nationality—thirteen years before they could satisfy the thirty-five year minimum age required for presidential eligibility.²¹ Members of the First Congress used the phrase “considered as natural born” consistent with its prescriptive meaning, to naturalize.

Without looking at earlier uses of the phrase, one cannot tell whether congressional usage reflected only a technical meaning understood by the relevant group of federal legislators or a meaning understood by broader groups.²² The cited legislative history of H.R. 40 was not fully reported at the time, and scholars and courts have overlooked it ever since. The debates occurred at the same time as those over Hamilton’s proposal to assume state war debts, which proved far more noteworthy. Fortunately, there is prior usage that reveals the generally understood meaning of the phrase in 1790.

DESCRIPTIVE USES IN THE COLONIES

Descriptive uses of the phrase “considered as natural born” in the colonies reflect an important feature of the controversy over colonial subject status prior to Independence. Thomas Pownall, a British colonial administrator, explained in published reports that the colonies were originally outside of the realm; colonists were entitled to the rights of natural subjects by royal charters “as if they

18. John Vlahoplus, *Toward Natural Born Derivative Citizenship*, 7 BRIT. J. AM. LEGAL STUD. (forthcoming 2018) (manuscript at 36–37), <https://ssrn.com/abstract=2915556>.

19. *Id.*

20. *Id.*

21. *Id.*

22. For reliance on smaller linguistic groups to interpret technical terms, see, e.g., Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22, 25 (2008).

had been abiding and born within the realm.”²³ Consequently, “[s]o long as they were considered as natural born English subjects” they possessed the rights of one.²⁴ The colonists were not born within the realm and therefore were not in fact natural born subjects under the common law; they were only considered as natural born. Their status derived from royal charters and did not, of course, include political rights such as representation in Parliament.²⁵

Some colonists cited grounds outside the common law to describe their subject status even in the second half of the eighteenth century. James Otis wrote in 1765 that the colonists were “considered as natural born Subjects” by reference to an eighteenth century British naturalization statute and therefore were “intitled to all the essential Rights of” natural born subjects.²⁶ The Massachusetts House of Representatives also claimed in 1765 that the province’s inhabitants were entitled to the rights of natural subjects by royal charter, common justice, and the same British naturalization statute.²⁷

It might seem strange that some colonists relied on charters, common justice, and reference to an eighteenth century British naturalization statute rather than the common law so long after the establishment of the colonies. But the source of their subject status was controversial during the struggle for political autonomy. John Adams wrote in 1775 that colonization was “[c]asus omissus at common law.”²⁸ Against the claim that America was annexed to the realm, he asked defiantly “[t]o what realm? When New-England was settled, there was a realm of England, a realm of Scotland, and a

23. 1 THOMAS POWNALL, *THE ADMINISTRATION OF THE BRITISH COLONIES* 50–51 (1774), <https://hdl.handle.net/2027/mdp.39015016779681>.

24. *Id.* at 51.

25. The author has found one broader descriptive use before 1790 outside of the colonies, from an anonymous writer who opposed a British proposal to naturalize members of a religious minority. See *AN ANSWER TO A PAMPHLET, ENTITLED, CONSIDERATIONS ON THE BILL TO PERMIT PERSONS PROFESSING THE JEWISH RELIGION TO BE NATURALIZED* 3 (1753), <https://books.google.com/books?id=LddbAAAAQAAJ> (arguing categorically that none of them had ever before been “considered in the Eye of the Law as a natural-born Subject . . .”). Cf. 1 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 166–67 (1795), <https://books.google.com/books?id=dBE4AAAAIAAJ> (broader descriptive uses in the United States after 1790).

26. *THE SEVENTY-SIX SOCIETY, PAPERS RELATING TO PUBLIC EVENTS IN MASSACHUSETTS PRECEDING THE AMERICAN REVOLUTION* 9 (1856), <https://babel.hathitrust.org/cgi/pt?id=hyd.32044010124246;view=1up;seq=1>. Otis referred to the 1740 British statute naturalizing those who resided in the American colonies for seven years. See *An Act for Naturalizing such Foreign Protestants, and Others Therein Mentioned, as are Settled, or shall Settle, in any of His Majesty’s Colonies in America* 1740, 13 Geo. 2 c. 7 (Gr. Brit.), <http://hdl.handle.net/2027/mdp.39015035134090>.

27. *THE SEVENTY-SIX SOCIETY*, *supra* note 26, at 2.

28. *Letter from John Adams to the Inhabitants of the Colony of Massachusetts-Bay*, NATIONAL ARCHIVES (Mar. 13, 1775), <http://founders.archives.gov/documents/Adams/06-02-02-0072-0009>.

realm of Ireland. To which of these three realms was New England annexed?"²⁹ Adams denied that America was annexed to any of them.³⁰

CONCLUSION

In 1790, the phrase "shall be considered as natural born" was prescriptive and merely naturalized persons or granted them limited rights enjoyed by the natural born. It did not make them natural born in fact. It did not necessarily grant political rights or mean that they were subjects or citizens at birth. The fact that the First Congress used the phrase does not tell us that the children were eligible to the presidency—or, on the other hand, that they were necessarily ineligible. It tells us only that those who receive citizenship at birth abroad are naturalized citizens even if their parents are American.³¹ The question remains whether naturalized citizens can be eligible to the presidency—whether someone can be both naturalized and natural born. Scholars may assert that case³² but not because the Naturalization Act of 1790 considered the children as natural born.

29. *Id.*

30. *Id.*

31. *See, e.g.*, *United States v. Wong Kim Ark*, 169 U.S. 649, 702–03 (1898). This controverts the Second Circuit's recent ruling that the statutory grant of derivative citizenship at birth "does not implicate Congress's 'power to admit or exclude foreigners . . .'" *See Morales-Santana v. Lynch*, 804 F.3d 520, 528 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (June 28, 2016).

32. *See, e.g.*, Michael D. Ramsey, *The Original Meaning of "Natural Born"* 2–3 (Jan. 7, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712485. *But see* Vlahoplus, *supra* note 18, at 3–4 (ineligible regardless of parentage and age at naturalization).