

**A Response to the Note of Paul Clement and Neal Katyal:
“On the Meaning of Natural Born Citizen”**

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The political-driven, factually inaccurate and intellectual vacant Note¹ by Paul Clement and Neal Katyal demands a retort. Given my extensive litigation experience in this area, I am compelled by my civic duty to give that reply. In sum, Messrs. Clement and Katyal conclude that: “All the sources routinely used to interpret the Constitution confirm that the phrase “natural born Citizen” has a specific meaning: namely, someone who was a U.S. citizen at birth with no need to go through a naturalization proceeding at some later time. . . . the original meaning of the phrase “natural born Citizen” includes persons born abroad who are citizens from birth based on the citizenship of a parent.” *Id.* at 161. As I will demonstrate below, such a conclusion fails to be true to the facts and ignores the substantial legal precedent to the contrary presumably as both are inconsistent with the political objective Messrs. Clement and Katyal sought to achieve in their purported *ex cathedra*, Harvard Law Review Note.

First, Messrs. Clement and Katyal turn to British common law to guide their conclusions regarding the meaning ascribed by the Founding Fathers to the phrase “natural born Citizen” when employed in Article II. From the Note: “The Framers, of course, would have been intimately familiar with these statutes and the way they used terms like “natural born,” since the statutes were binding law in the colonies before the Revolutionary War. They were also well documented in Blackstone's Commentaries, a text widely circulated and read by the Framers and routinely invoked in interpreting the Constitution.”

In response, I note the importance of observing that the referenced British statutes all referred to “natural-born Subjects” – not “natural born Citizens”. The first encompasses a class quite different from the second which seeks to include only those envisioned to be President of the United States under Article II. Simply stated, “subjects” are not “natural born Citizens”. Hence, to analogize between the two is fatuous. Indeed, routinely ignored by Messrs. Clement and Katyal, is that those British Statutes required both parents to be “natural born” for their foreign born children to be “natural born subjects.” *Viz:* 25 Edw. III. st. 2. which stated that all children born abroad were Natural-born subjects, provided both their parents were at the time of the birth in allegiance to the king.

Moreover, the Note's reference to Blackstone's Commentaries is likewise specious. Blackstone explicitly stated: “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; and aliens, such as are born out of it.”² Hence to claim that Blackstone supports the Note's conclusion that if only one parent is a U.S. Citizen the child is automatically a “natural born Citizen” simply doesn't withstand scrutiny. Finally, conveniently ignored by the Note is the express 18th Century legal authority which contradicts the Note's conclusion. *Viz:* “The natives, or natural-born citizens, are those born in the country, of parents who are citizens.”³ (Emphasis added).

¹“On the Meaning of Natural Born Citizen” by Paul Clement and Neal Katyal, 128 Harv. L. Rev. F. 161, March 2015.

²William Blackstone, Commentaries 1:354, 357 – 358)

³ The Law of Nations, Emerich de Vattel, 1758, Chapter 19, § 212.

Second, the Note turns to the “enactments of the First Congress” and completely misrepresents those enactments in an attempt to conflate non-naturalized “citizen” with “natural born Citizen”. The Note correctly cites The Naturalization Act of 1790⁴ which held: “the children of **citizens** of the United States, that may be born beyond sea, or out of the limits of the United States, **shall be considered as natural born citizens**: Provided, That the right of **citizenship** shall not descend to persons whose fathers have never been resident in the United States”⁵ (Emphasis added). Of dispositive significance is the 1790 Act’s employing of the plural noun “citizens” in defining who shall be “natural born citizens.” and the singular noun as to whom are only to gain “citizenship”.

Therefore, it is simply intellectually dishonest for the Note to conclude that: “. . . in the relevant time period, and subject to certain residency requirements, children born abroad of a citizen parent were citizens from the moment of birth, and thus are "natural born Citizens." Under the Naturalization Act of 1790, such children were “citizens” but not “natural born Citizens”” as they were not the “children of citizens of the United States”, but only children of a citizen of the United States. Thus to argue as the Note does that one can be a “natural born citizen” if only one parent is a United States citizen is legerdemain at best – or more properly presented as purposeful political dissimulation.

Third, the Notes seeks to buttress its questionable conclusion by stating: “The original meaning of "natural born Citizen" also comports with what we know of the Framers' purpose in including this language in the Constitution.” To that end, the Note quotes John Jay's July 25, 1787 letter⁶ to George Washington which concluded that the Constitution should: “declare expressly that the Command in chief of the american [sic] army shall not be given to, nor devolve on, any but a natural born Citizen.” What the Notes fails to report is that subsequent to John Jay's July 25, 1787, letter, on August 22, 1787, it was proposed at the Constitutional Convention that the presidential qualifications were to be a “citizen of the United States.”⁷ Upon objection to so broad a definition, the language was referred back to a Committee, and the qualification clause was changed to read “natural born Citizen,”⁸ and was so reported out of Committee on September 4, 1787, and thereafter adopted in the Constitution. Plainly, the drafters of the Constitution wanted the more limited scope of citizens who were “natural born Citizens” to be eligible to be President.

All this brings me to the most glaring omission in the Note: the failure to cite the relevant Supreme Court case on the term “natural born Citizen”. The only Supreme Court decision which has directly construed the “natural-born citizen” clause from Article 2, §1, is *Minor v. Happersett*, 88 U.S. 162 (1874). In that case, the Supreme Court held: “The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born **in a country of parents who were its citizens** became themselves, upon their birth, citizens also. These were natives, or **natural-born citizens**, as distinguished from aliens or foreigners.

4 Ch. 3, 1 Stat. 103 (repealed 1795).

5 Notably, Congress has removed the legal-term-of-art “natural born Citizen” from all citizenship statutes post-1790 and now only confers “citizenship”. See: 8 U.S.C. §1401 “Nationals and citizens of the United States at birth: The following shall be nationals and citizens of the United States at birth”.

6 Letter from John Jay to George Washington (July 25, 1787), in 3 The Records of the Federal Convention of 1787, at 61 (Max Farrand ed., 1911).

7 Farrand's Records, Journal, Wednesday August 22, 1787.

8 Farrand's Records, Journal, Tuesday September 4, 1787.

Minor v. Happersett at 168 (Emphasis added). Again, the plural noun “parents” is dispositive of the issue of who is a “natural born Citizen”.

Chief Justice John Marshall said, in delivering the opinion of the Court in *Marbury v. Madison* (1803): “It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it.” Notably, the phrase “natural born Citizen” appears just once in the Constitution and the phrase “citizen” appears twenty-one (21) times. Plainly, something more than just citizenship is required in order to be President.

Thus, I must maintain that the manipulation of the framingera sources and law by Messrs. Clement and Katyal to conclude that Senator Ted Cruz is eligible to be President cannot stand. They conclude: “Thus, an individual born to a U.S. citizen parent -- whether in California or Canada or the Canal Zone -- is a U.S. citizen from birth and is fully eligible to serve as President if the people so choose.” The British statutes, Blackstone, de Vattel, The Naturalization Act of 1790 and the holding in *Minor v. Happersett* are all consistent: “natural born Citizen” is a privilege bestowed upon a special class of U.S. Citizen, to wit, a child born of two U.S. Citizen parents.

Thus, the parental circumstances of the births of declared Presidential candidates Senators Marco Rubio and Ted Cruz, and soon-to-be declared Presidential candidate Governor Bobby Jindal implicate whether or not they are in fact “natural born Citizens” eligible under Article II to be President. Marco Rubio and Bobby Jindal were born in the United States to parents neither of whom were United States citizens at the time of their respective births. Ted Cruz was born in Canada to parents only one of whom (his mother) was a United States citizen. Under the law existing at the time of their birth, each became a “citizen” of the United States at birth. Marco Rubio and Bobby Jindal by the 14th Amendment, Ted Cruz by statute. But none of them are “natural born Citizens” eligible to be President as their respective parents were not U.S. Citizens at the time of these eminent politicians respective births.

Therefore, this issue is not, as the Note claims, a “specious objections to candidate eligibility” but instead goes to the very fundamental question of whether we are governed by the rule of law as embodied in our organic document or instead, the whim and caprice of the ruling class which bends the law to its pre-determined ends. I hold the former is the most important question of this next election cycle and I will continue to raise the hue and cry as best I can.

In conclusion, the attempt of Messrs. Clement and Katyal⁹ to conflate non-naturalized “citizen” with “natural born Citizen” simply cannot withstand the most basic legal analysis and thus Senators Marco Rubio and Ted Cruz, and Governor Bobby Jindal are all ineligible to be President of the United States.

⁹ Mr. Katyal served as Acting Solicitor General of the United States from May 2010 until June 2011. During that time, he had the opportunity – but expressly declined – to urge the United States Supreme Court to finally decide the issue of the definition of “natural born Citizen” in *Charles Kerchner, Jr., et al., v. Barack H. Obama, President of the United States, et al.*, Case No.: 09-4209, Decision Date: July 2, 2010. Thus I find it curious that My Katyal is now so certain in his opinion when now it is of no legal effect. Legal indeterminacy is very convenient to tyrants as it allows the law to mean whatever is politically expedient to the tyrant at the moment.