McCain – Opinion of Laurence H. Tribe and Theodore B. Olson

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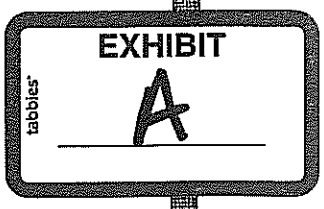
Opinion of Laurence H. Tribe and Theodore B. Olson

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



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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.

Jus Sanguinis

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 Suites v. Wong Kim Ark, 169 U.S. 649, 655 (1898).

[**NBC**:

Ironic that the authors fail to mention [t] he court in Smith v. Alabama, 124 U. S. 465,478(1888)

> clearly stated the common law's influence on the Constitution:The interpretation of the Constitution of the United States is necessarily influenced by the fact that its

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> provisions are framed in the language of the English common law, and are to be read in the light of its history.

Furthemore, in the case or Marsh v Chambers, it was the fact that the practice continued which was important in their findings.

An act which is repealed a few years later and rewritten without a reference to natural born should not be considered as overwhelming evidence of the intent of Congress. If inclusion is argued to be such evidence, then removal also has a similar effect. The discussion during the passage of the 1790 Act shows how congress was worried about the status of those born outside the United States and offered to copy a British Act. The inclusion of the term natural born may very well have been accidental, explaining its removal several years later as a statute could never change our Constitution. The act was clearly a naturalization act and provided citizenship for those born abroad to citizen fathers.

In Weedin v. Chin Bow, 274 US 657 – Supreme Court 1927, the court observes

> The Act of March 26, **1790**, entitled "An Act to establish an uniform Rule

of Naturalization," 1 Stat. 103, c. 3, came under discussion in February, **1790**, in the House, but the discussion was chiefly directed to naturalization and not to the status of children of American citizens born abroad. Annals of First Congress, 1109, 1110, *et seq.* The only reference is made by Mr. Burke (p. 1121), in which he says:

> "The case of the children of American parents born abroad ought to be provided for, as was done in the case of English parents in the 12th year of William III. There are several other cases that ought to be likewise attended to."

Mr. Hartley said (p. 1125) that he had another clause ready to present providing for the children of American citizens born out of the United States. A select committee of ten was then appointed to which the bill was recommitted and from which it was reported. But no subsequent reference to the provision of the bill which we are now considering appears.

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This Act was repealed by the Act of January 29, 1795, 1 Stat. 414, § 4, but the third section of that act reenacted the provisions of the Act of **1790** as to children of citizens born beyond the sea, in equivalent terms. The clauses were not repealed by the next Naturalization Act of June 18, 1798, 1 Stat. 566, but continued in force until the 14th of April, 1802, when an act of Congress of that date, 2 Stat. 153, repealed all preceding acts respecting naturalization. After its provision as to naturalization, it contained in its fourth section the following:

...

Mr. Binney demonstrates that, under the law then existing, the children of citizens of the United States born abroad, and whose parents were not citizens of the United States on or before the 14th of April, 1802, were aliens, because the Act of 1802 only applied to such parents, and because, u**nder the common law which applied in this country, the children of citizens born abroad were not citizens but were aliens.**]

These sources all confirm that the phrase "natural born" includes both birth abroad to

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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.

> [**NBC**: Tribe and Olson reference US v Wong Kim Ark but fail to admit that the Court found that such children born abroad become naturalized citizens through statute only.]

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.

> [**NBC**: Confusing citizenship and natural born citizenship. The spurious reference in 1790, was never used in later statutes.]

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

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undoubtedly informed the Framers' understanding of the Natural Born Citizen Clause.

> [**NBC**: Confusing statutes with common law. Furthermore, the use of the term natural born in British Statutes ignore that its meaning is not constrained by a Constitution.]

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.

Birth on soil

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

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Bad Fiction Birther Headlines Docket (at ObamaConspiracy) Natural Born Citizenship compendium of cases and legal scholarship on meaning of "natural born citizenship" – in light of claims that a native-born US citizen who has "dual

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.

[**NBC**: The authors overlook the Supreme Court's rulings in the Insular Cases, where the court rejected this conclusion. In Downes v. Bidwell, 182 US 244 – Supreme Court 1901, the Supreme Court rejected the argument:

> Upon the other hand, the Fourteenth Amendment, upon the subject of citizenship, declares only that "all persons born or naturalized *in the United States,* and subject to the jurisdiction thereof, are citizens of the United States, and of the *State* wherein they reside." Here there is a limitation to persons born or naturalized in the United States which is not extended to persons born in any place "subject to their jurisdiction."

In fact in several rulings since then, undermine this position:

Valmonte v. INS, 136 F. 3d 914 – Court of Appeals, 2nd Circuit 1998

citizenship" at birth does not qualify as a "natural born" citizen under Article II.
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Citizenship under the Fourteenth Amendment, however, "*is not extended to persons born in any place `subject to* [*the United States*'] *jurisdiction,*'" but is limited to persons born or naturalized in the states of the Union. *Downes,* 182 U.S. at 251, 21 S.Ct. at 773 (emphasis added); *see also id.* at 263, 21 S.Ct. at 777 ("[I]n dealing with foreign sovereignties, the term `United States' has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located.").[9]

Following the decisions in the *Insular Cases,* the Supreme Court confirmed that the Philippines, during its status as a United States territory, was not a part of the United States. *See Hooven & Allison Co. v. Evatt,* 324 U.S. 652, 678, 65 S.Ct. 870, 883, 89 L.Ed. 1252 (1945) ("As we have seen, [the Philippines] are not a part of the United States in the sense that they are subject to and enjoy the benefits or protection of the Constitution, as do the states which are united by and under it."); *see id.* at 673-74, 65 S.Ct. at 881 (Philippines "are territories belonging to, but not a part of, the Union of states under the Constitution," and

therefore imports "brought from the Philippines into the United States ... are brought from territory, which is not a part of the United States, into the territory of the United States.").

Accordingly, the Supreme Court has observed, without deciding, that persons born in the Philippines prior to its independence in 1946 are not citizens of the United States. *See Barber v. Gonzales*, 347 U.S. 637, 639 n. 1, 74 S.Ct. 822, 823 n. 1, 98 L.Ed. 1009 (1954) (stating that although the inhabitants of the Philippines during the territorial period were "nationals" of the United States, they were not "United States citizens"); *Rabang v. Boyd,* 353 U.S. 427, 432 n. 12, 77 S.Ct. 985, 988 n. 12, 1 L.Ed.2d 956 (1957) ("The inhabitants of the Islands acquired by the United States during the late war with Spain, *not being citizens of the United States,* do not possess right of free entry into the United States." (emphasis added) (citation and internal quotation marks omitted)).

...

Rabang v. INS, 35 F.3d 1449, 1452 (9th Cir.1994) ("No court has addressed whether persons born in

> a United States territory are born "in the United States,' within the meaning of the Fourteenth Amendment."), *cert. denied sub nom. Sanidad v. INS,* 515 U.S. 1130, 115 S.Ct. 2554, 132 L.Ed.2d 809 (1995). In a split decision, the Ninth Circuit held 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." *Rabang,* 35 F.3d at 1452. We agree. [7]

]

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

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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, "[from 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, § I. 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.

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Therefore, based on 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.

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