Natural Born Citizens and the Presidency

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The recent controversy over the eligibility of Ted Cruz for the office of the Presidency is one of those conundrums embedded in the U.S. Constitution. That august document is full of ambiguous words and phrases that challenge even the strictest and most principled interpreters. The phrase “natural born citizen” could mean any number of things. For example, at the time of birth:

1. At least one parent is a U.S. citizen.
2. Both parents are U.S. citizens.
3. The birth occurs in a state of the United States.
4. The birth occurs in a state of the United States or in a territory thereof.

There is truly unanimous agreement that if both 2 and 3 are satisfied, there is no question that the child is a “natural born” citizen. In the early days of the Republic, the parental requirement was interpreted as patrimonial. Of course at that time, citizenship was restricted to “free white persons,” but a combination of the Fourteenth Amendment and various statutes have eliminated the gender issue and nowadays. I have never heard anyone try to distinguish between 1 and 2, so let us stipulate that 1 and 3 together are enough. It is nearly universally accepted that 4 is as good as 3.

That leaves us with 1 and 4 together as being sufficient for “natural born” citizenship. Beyond that, if neither parent is a citizen nor does the birth occur inside American territory, nobody would suggest that the person is a “natural born” citizen. I apologize for the preceding rather pedantic discussion, but I want to have absolute clarity on the key question. That question is:

Does either having one American parent or suitable geographic location by itself qualify?

In the current instance, liberal hack (my opinion) law professors like Laurence Tribe argue that an American parent by itself is not enough. I have not heard his opinion on the companion question, but it is my guess that he would deem a baby born on American soil to illegal aliens to be “natural born” citizens because that is part of the current politically correct agenda. Ironies abound. What is the principle by which one chooses one criterion over the other? Liberal law professors generally are willing to disregard the actual language of the Constitution to find new features in the “penumbra” of the document. But here they become strict interpreters of ambiguous language. When it suits them, they ignore the plain meaning of words in the Constitution to let it be a “living document.” How adorable!

Conservatives have no cause for smugness. There is some mildly ambiguous language in the 14th Amendment concerning the citizenship of babies born on American soil. Recently, a lot of conservative legal scholars have adopted the opinion that those babies are not American citizens at all, let alone “natural born” citizens. I call that sophistry, unworthy of principled interpretive standards. When it comes to free speech and press, conservatives say that “no” means “no.” Liberals attacking the decision in “Citizens United” argue that free speech and press adhere to individuals and not to corporations. Yet they do not deny freedom of the press to corporations like newspapers. Conservatives correctly read the Second Amendment as guaranteeing a right to bear arms to individuals, while liberals seize on an ambiguous reference to a “well-regulated militia.” The most obvious way to interpret the plain language of the Constitution is to protect speech both by individuals and groups of individuals like corporations. Similarly,

the plain language of the Second Amendment guarantees an individual right to bear arms. Also similarly, the language of the Fourteenth Amendment seems to give citizenship to anyone lucky enough to be born on American soil. Can you wiggle around the words to negate these interpretations? Of course you can, but it seems strained and disingenuous. Perhaps the authors meant to include only those born on American soil to a mother who is here legally. If so, they should have written it that way.

Getting back to the main discussion, either location or one American parent is enough to grant to a baby American citizenship from birth on, perhaps even from conception (hint to conservatives: think abortion).

The entire controversy boils down to whether “citizen at birth” and “natural born citizen” mean two different things. I can only say that I have heard no principled argument based in the Constitution for that distinction. Absent such an argument, anyone conceived by an American parent or who is born on American soil is a natural born citizen. Is it really plausible that the founders really meant to create three categories of citizenship, natural born, citizen from birth but not natural, and non-citizen at birth but acquired later in life via “naturalization”? Yet they did not actually say so? The only principled conclusion is that “citizen at birth” and “natural born citizen” are synonymous.

Aside from the merits of the case, by what mechanism can one interpretation or another actually be enforced? Donald Trump seems to think the courts should have a decisive role. Does he really think the Supreme Court would give a “declaratory judgment”? Would anything from a lesser court carry any weight? I would argue that the courts should have no role. The Constitution prescribes the method of electing Presidents. The voters in each state choose (literally “chuse”) electors in a manner prescribed by state legislatures. Those electors vote and the result must be certified by Congress. By this mechanism, the Constitution effectively cedes to Congress the sole power to judge the eligibility of a presidential candidate. Congress must interpret the words of Article II, Section 1 of the Constitution. There is no hint in the Constitution that any other branch of government or institution can reverse a Congressional decision on this point. Once Congress certifies the election, any constitutional challenge to eligibility is moot. No court would try to remove a sitting president from office. The only remaining Constitutional remedy is impeachment by the House and removal from office by the Senate as prescribed in the Constitution.

In the current instance, there is no realistic chance that Congress would annul the result of an election by refusing to certify a candidate over the supposed ambiguity of the term “natural born.” But it is only Congress that could enforce any eligibility requirement. That should put this whole silly thing to rest. Ted Cruz can be elected President. So can the child of an American mother born in Kenya, even if such an improbable event were to occur!

One scenario remains. The courts are so out of control that surely some liberal judge will agree to hear a challenge to Ted Cruz and rule against him. That could happen anytime between now and the election or beyond. It is far from clear that any federal court even has the power to enjoin a state from allowing a slate of electors to be on the ballot. One can only hope that a quickly facilitated appeal to the Supreme Court would resolve the matter correctly. That is what happened in the Bush-Gore lawsuit in 2000, where a 5-4 decision saved the nation from a constitutional crisis.

Our highly politicized courts remain a ticking time bomb for our Republic. Maybe SOTUS needs to step up and break with tradition by issuing an unsolicited opinion now. Will they? No way. Instead, precedent will triumph over justice as it usually seems to.

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