Natural Born Citizen (The Meaning of the term "Natural born citizen" as used in clause 4, section 1 of Article II of the Constitution of the United States relating to eligibility for the Office of President, by Pinckney G. McElwee of the D. C. Bar.)

Mr. George Romney, present Governor of the State of Michigan, has been frequently mentioned in recent news media as a prospective candidate for the Office of President of the United States in 1968. According to "Who's Who" he was born in Chihuahua, Mexico, on July 8, 1907. A question exists whether he would be eligible to be inaugurated, if he should be elected to the Presidency because of a specific requirement of the Constitution of the United States that the President be "a natural born citizen". The answer to this question should be found in advance of the party nomination conventions, not only in respect to his ability to serve if elected, but also because of the effect that the existence of such question would have on the outcome of an election, if he became the nominee of a party.

The Constitution of the United States was adopted in 1789. In the 4th clause of section 1 of Article II it provides:

"No person, except a *natural born citizen*, or citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years and been fourteen years a resident within the United States."

The language used in the Constitution must be construed with reference to the English Common Law. As stated in I Kent's Commentaries, par. 336:

"It is not to be doubted that the Constitution and laws of the United States were made in reference to the existence of the common law.... In many cases, the language of the Constitution and laws would be inexplicable without reference to the common law; and the existence of the common law is not only supported by the Constitution, but it is appealed to for the construction and interpretation of its powers."

It has been frequently held by the U. S. Supreme Court that the language of the Constitution cannot be properly understood without reference to the common law. *Moore v. United States*, 91 US 270 (274), *United States v. Wong Kim Ark*, 169 US 649 (654), *Smith v. Alabama*, 124 US 478. It was stated in Moore v. United States by Justice Bradley in a unanimous opinion, page 274:

"The language of the Constitution and of many acts of Congress could not be understood without reference to the common law."

It was stated in United States v. Wong Kim Ark at page 654:

"The Constitution of the United States, as originally adopted, uses the words 'citizen of the United States' and 'natural born citizen of the United States'. By the original Constitution, every representative in Congress is required to have been 'seven years a *citizen* of the United States' and every Senator to have been 'nine years a *citizen* of the United States' and 'no person except a *natural born citizen* or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the Office of President'. The Fourteenth Article of Amendment, besides declaring the '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'…. The Constitution nowhere defines the meaning of these words, either by way of inclusion nor of exclusion, except insofar as this is done by the affirmative declaration that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States'. In this, as in other respects, it must be interpreted in the light of the common law, the principles of history of which were familiarly known to the framers of the Constitution. *Minor v. Happersett*, 21 Wall 162, *Exparte Wilson*, 114 US 417, 422, *Boyd v. United States*, 116 US 616, 624, 625, *Smith v. Alabama*, 124 US 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent Com. 336, Bradley, Jr. in *Moore v. United States,* 91 US 270, 274."

The cited provisions of the 14th Amendment had a purpose to enfranchise the recently freed negro slaves, whether they were native born or naturalized. The purpose was to make non-citizens citizens. It did no more than establish *citizenship* where none previously existed. It did not even purport to make a *foreign born citizen* a *natural born* one.

In *Smith v. Alabama*, 124 US 465, at page 478 Justice Matthews stated:

"There is, however, one clear exception to the statement that *there is no national common law*. The interpretation of the Constitution of the United States is necessarily influenced by the fact that *its provisions are framed in the language of the English Common law*, and are to be read in the light of its history."

According to information furnished to me, which I have no reason to doubt, facts regarding the birth and citizenship of Mr. Romney are as follows. His grandfather

was Miles Park Romney. In 1885 he left his family in Arizona and moved to Chihuahua, Mexico. One of his children was Gaskel R. Romney, born in the United States in 1871. He did not accompany his father to Mexico, but followed and with the family joined him in 1887. Gaskel R. Romney being then 16 years old. Gaskel R. Romney was married to Anna Aurelia Pratt in Mexico about 1898. They had 4 children, born in the State of Chihuahua, Mexico: George, the 4th child, being born there on July 8, 1907. This family then moved to El Paso, Texas, where the 5th, 6th and 7th children were born.

It will be seen from the foregoing that Mr. George Romney was born in Chihuahua, Mexico of an American born father and by virtue of the birth and citizenship of his father in the United States, George was born with dual citizenship, being a citizen of Mexico by birth and becoming a citizen of the United States at birth *automatically by naturalization* pursuant to the Act of Congress granting automatic naturalization in such circumstances. This type of American citizenship is a qualified one and requires an election on his part upon arriving at his majority, or within a reasonable time thereafter. *In re Reed*, 6 F S 800, *State v. Jackson*, 65 A 661, *Ludlam v. Ludlam*, 26 NY 371, Van Dyne on Cit. 38. Mr. Romney appears probably to be a *citizen* of the United States. But, the question under consideration is not one of simple *citizenship* but rather, whether he is a *"natural born citizen"* as prescribed in the Constitution of the United States for the Presidency.

The Constitution itself does not define the term natural-born citizen. At the time of the adoption of the U.S. Constitution, under the common law, the terms native born citizen and natural born citizen were synonymous, but, the customary usage was to refer to such type of citizenship as "natural born" instead of "native born."

The words "natural" and "native" are both derived from the latin word "natus" meaning birth. Blackstone's Commentaries, Chapter X, defines natural born subject as:

"Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligence, or, as it is generally called, the allegiance of the king; and aliens, such as are born out of it."

The first definition of the word "natural" in Webster's Dictionary is "of, from, or by, birth." Literally translated both "natural-born citizen" and "native-born citizen" means citizen by and from birth. Black's Law Dictionary defines "native" as "a natural-born subject or citizen by birth; one who owes his domicile or citizenship to the fact of his birth within the country referred to." Black defines "natural born" as

"In English law one born within the dominion of the King." Black defines "naturalize" as "to confer citizenship upon an alien; to make a foreigner the same, in regard to rights and privileges, as if he were a native citizen or subject." Bancroft's History of the U.S. (1876) VI, xxvi, 27, states, "Every one who first saw the light on the American soil was a natural-born American citizen."

There were several naturalization statutes enacted by Parliament which "declared" or "deemed" persons born outside of the dominions of the King, whose parents were subjects, to be subjects. 29 Car II Cap. 6 (1676) related to children of subjects born during "the late trouble" in foreign countries between June 15, 1641 and March 24, 1660 and required such person to receive the sacrament and take an oath of allegiance and file a certificate with a court. 7 Anne Cap V, par. 31 (1708) naturalized foreign born protestants of *natural-born* subjects by providing they shall be "deemed" natural born subjects, 4 George II Cap XXI (1731) repeats the Act of 1708 in 7 Anne; and again in 13 George III Cap 21 (1773) repeats the same naturalization act. All of these statutes of naturalization demonstrated that the citizen by birth was the genuine "natural born citizen." As states in Van Dyne on Citizenship of the United States, pp. 32:

"It was almost universally conceded that citizenship by birth in the United States was governed by the principles of the English common law. It is very doubtful whether the common law covered the case of children born abroad to subjects of England. Statutes were enacted in England to supply their deficiency. Hence, it was deemed necessary to enact a similar law in the United States to extend citizenship to children born to American parents out of the United States."

Statutes 11 and 12 of William III, Cap 6 (1700-1707) was a statute to permit inheritance of children born outside of the King's realm and dominion of his majesty's natural born subjects as though such children "had been naturalized or natural-born subjects." (Se McCreary v. Sommerville, 22 U.S. 354 l.c. 356, 357).

Generally, when we speak of the English Common Law we mean the lex non scripta or unwritten law as defined by Blackstone, that portion of the law of England which is based, not on legislative enactment, but on immemorial usage and the general consent of the people. *Levy v. McCartee*, 31 US (6 Pet) 102. As stated in the latter case, "It is too plain for argument, that the common law is here spoken of, in its appropriate sense, as the 'unwritten law of the land, independent of statutory enactments.'" In Bouvier Law Dictionary it is stated in respect to common law, "Those principles, usage, and rules of action applicable to the government and security of persons and of property, which do not rest for their authority upon any

express or positive declaration of the will of the legislature." Citing 1 Kent Com. 429. It should be borne in mind that the English common law did not become the common law of the United States. But, the English common law is referred to in explaining the meaning of the language used by the framers of the Constitution who were familiar with its terminology. Thus, in determining the meaning of the term "natural-born citizen," as used in the Constitution, we should inquire what the language meant to the members of the English common law and statutory law was in all of its ramifications relating to the subject of citizenship. It is clear that under the English common law this term "natural born" meant "native born", i.e. within the realm and dominion of the King. While naturalization and other acts of Parliament had afforded to foreign born alien children of English parentage certain rights to citizenship and inheritance by being "deemed" to be "natural born" (i.e. "deemed" native born when not so born), still, the fact remains that the genuine "natural-born" citizens were the "native born" citizens. It was this genuine "native-born" citizen (rather than one who was not, but by act of Parliament was "deemed" to be) to which the framers of the Constitution referred when they used the term "natural-born citizens" as one of the qualifications for the President. The English common law is explained in detail in Calvins case, 7 Coke 1.

In *Wong Foong v. U.S.*, 69 F 2d 681, the court said: "Under the common law of England a child born abroad of a father who is a subject of England does not become a citizen of England." And in *Weedin v. Chin Bow*, 274 US 657, l.c. 663, the court said "under the common law which applied in this country, the children of citizens born abroad were *not* citizens, but aliens."

In Doe v. Jones, 4 T.R. 300, 308, 100 Reprint 1031, Lord Kenyon stated:

"The character of a natural-born subject, anterior to any of the statutes, was incidental to birth only; whatever were the situations of his parents, the being born in the allegiance of the King, constituted a natural-born subject."

Sheddins v. Patrick, 1 Macg 535, l.c. 611 (House of Lords) The Lord Chancellor stated:

"I need not state to your Lordship that, independently of statute, everyone born abroad is an alien. I state the proposition too generally, because the children of Ambassadors and some other persons were excepted; but as a general proposition, all persons born abroad were aliens. That state of law was interfered with first by a very early statute….In the reign of Queen Anne it was enacted by statute, passed for 'naturalizing foreign protestants' that children of all natural-born subjects born

out of the ligence of his majesty should be 'deemed,' 'adjudged' and 'taken' to be natural-born subjects of his Kingdom."

The case *In re Guerin* (Queen's Bench), 37 Weekly Reporter 269, (Feb. 2, 1889) dealt with the term "natural-born" in the Extradition Act of Parliament and the term "native-born" in an extradition treaty with France. It was contended by Guerin that a person born abroad of British parents was a "natural-born" British subject within the meaning of the extradition treaty with France. Sir Alfred Wills, Judge, speaking for the Court stated:

"The first question in this case in logical order is whether Guerin is a person to whom the extradition treaty with France applies; and that depends on whether he can bring himself within the exception which says that "native-born or naturalized subjects" are exempt from the operations of the treaty. The onus of proving that he comes within the exception lies on the prisoner. Now there are only two methods in which a person, other than a temporary resident in the kingdom, can acquire status as a British subject; viz, by *naturalization or by reason of the circumstance of his birth. I am unable to draw any distinction between the expression 'natural-born' used in the Extradition Act and 'native born' used in the treaty. It means a person who is a native by reason of the circumstances of his birth."*

In Dicey's Conflicts of Law "(1896) it is stated: (pp. 173).

"Natural-born subject" means a British subject who has become a British subject at the moment of birth.

"A naturalized British subject means any British subject who is not a natural-born British subject. (pp 175) Rule 22. Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions is a natural-born British Subject."

In the "comment" which followed it was stated:

"This rule contains the leading principle of English law on the subject of British nationality. 'Allegiance is the tie, or ligamen, which binds the subject to the King, in return for that protection which the King affords the subject'. But every person born within British dominions does, with rare exception, enjoy at birth, the protection of the Crown. Hence, subject to such exceptions, *every* child born within the British dominions is born 'under the ligence' as the expression goes, of the Crown, and is at and from the moment of his birth a British subject; he is, in other words, a natural-born subject."

The exceptions mentioned are those whose fathers are alien enemies or ambassadors or diplomatic agents.

In the case of *Lynch v. Clarke*, 1 Sandf. 583, N.Y.), the Vice-Chancellor stated that he entertained no doubt "that every person born within the dominion and allegiance of the United States, whatever the situation of his parents, was a *natural born citizen*." He added that "this was the general understanding of the legal profession, and the universal impression of the public mind."

In the case on Minor v. Happersett in the U.S. Supreme Court, 88 US (21 Wall) 162, the court said:

"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 and foreigners.* Some authorities go further and include as citizens children born within the jurisdiction without references to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purpose of this class it is not necessary to solve these doubts. It is sufficient for everything we now have to consider that all children born of citizen parents within the jurisdiction are themselves citizens.

In the Dred Scott case, 60 U.S. 393, l.c. 576 in his separate opinion, Justice Curtis stated:

"The first section of the second Article of the Constitution used language *"a natural born citizen*." It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which *referred citizenship to the place of birth*.

The fourth clause of section 8 of Article I of the Constitution of the United States gives to Congress authority "to establish an uniform Rule of Naturalization….", and Congress has established and frequently amended uniform rules for the naturalization of children born outside of the jurisdiction of the United States (i.e. aliens) in Section 1401 et seq. of Title 8, U.S. Code. To many it has granted automatic naturalization, provided timely advantage is taken of the rights by the person concerned. Examples of these were persons whose fathers were citizens, later (1934) persons of whom either of the parents were citizens (not including

illegitimates), and still later (1952) illegitimate children whose mothers were citizens. To other aliens having no citizen parents the process of naturalization required an application to and order of a federal court. But, whether the naturalization be automatic due to citizen parentage or by court decree for others, *the fact remained that for all persons born outside of the jurisdiction of the United States a naturalization by authority of Congress has been required in order to become a citizen*. Native born citizens hold citizenship by birth. U.S. v. Wong Kim Ark, Supra.

In a recent case of the Supreme Court (Montana v. Kennedy, Attorney General, 366 U.S. 308) it was held that the petitioner was *not* a citizen of the United States despite the fact that his mother was a native born citizen of the United States. The reason for the holding was that at the time of the birth of the petitioner in England the Act of Congress only authorized automatic naturalization for a person whose father was a native born citizen, but not a person whose mother had been a native born citizen. The Act of Congress was amended to include children of a mother *who had lost* her citizenship on March 2, 1907 (Montana v. Kennedy, supra) and again in 1934 (48 Stat 797) to include children of any *native born* mothers.

In U.S. v. Wong Kim Ark, 169 U.S. at page 655, the court said:

"The *fundamental principle* of the common law with regard to English nationality was birth within the allegiance, also calling 'ligealty,' obedience,' 'faith,' or 'power' of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual—as expressed in the maxim, protecti trahit subjectionem, et subjectio protectionem—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, *so long as they were within the kingdom*. Children, *born in England*, of such aliens, were therefore *natural-born* subjects. But the children, born within the realm of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were *not* natural-born subjects, *because not born within the allegiance, the obedience or the power, or, as would be said to this day, within the jurisdiction of the King*." (Thus, a child born in Mexico of English parents was not a natural-born subject, despite his automatic naturalization by Act of Parliament). Later in the same opinion "(l.c. 658) the court said: "It thus clearly appears that by law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the Crown of England, were within the allegiance, the obedience, the faith or loyalty, the

protection, the power, the jurisdiction of the English Sovereign: and therefore every child *born in England* of alien parents, was a *natural born subject*, unless the child of an ambassador or other diplomatic agent of a foreign state, or an alien enemy in hostile occupation of the place where the child was born.

"The same rule was in force in all of the English Colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterward, and continues to prevail under the Constitution as originally established."

The same ruling upholding American citizenship of children born in the United States are found in 9 Op Atty Gen 373, and 10 Op Atty Gen 328, 394, 396.

The Act of March 26, 1790 (1 Stat 103) provides in pp 104: "And the children of citizens of the United States that may be born beyond the seas, or out of the limits of the United States *shall be considered as natural-born citizens*."

In *Osborn v. Bank*, 22 US (9 Wheat) 738, l.c. 827, Chief Justice Marshall said:

"A naturalized citizen is indeed made a citizen under an Act of Congress, but the Act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. *The Constitution does not authorize Congress to enlarge or abridge those rights.* The simple power of the national legislature, is to prescribe a uniform rule of naturalization, and *the exercise of this power exhausts it*, so far as regards the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the Courts of the United States, precisely under the same circumstance under which a native might sue. *He is distinguishable in nothing from a native citizen, except so far as the Constitution makes the distinction*. The law makes none."

Thus the Act of March 26, 1790 would be unconstitutional if it attempted to enlarge the rights of a naturalized citizen to be equal to those of natural-born citizens under the Constitution.

Although it is not within the power of Congress to change or amend the Constitution by means of definitions of languages used in the Constitution so as to mean something different than intended by the framers (amendments being governed by Article V) an argument might be advanced to the effect that the use of identical language by Congress substantially contemporaneously might be

considered in later years by a court to reflect the same meaning of the same words by the framers of the Constitution; and under this argument to attach importance to the Act of Congress of March 26, 1790 (1 Stat 103).

This argument fades away when it is found that this act used the term "natural-born" through inadvertence which resulted from the use of the English Naturalization Act (13 Geo. III, Cap 21 (1773) as a pattern when it was deemed necessary (as stated by Van Dyne) to enact a similar law in the United States to extend citizenship to foreign-born children of American parents. In the discussion on the floor of the House of Representatives in respect to the proposed naturalization bill of a committee composed of Thomas Hartley of Pennsylvania, Thomas Tudor Tucker of South Carolina and Andrew Moore of Virginia, Mr. Edamus Burke of South Carolina stated, "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." (See pp 1121, Vol 1 (Feb. 4, 1790) of Annals of Congress.) The proposed bill was then recommitted to the Committee of Hartley, Tucker and Moore, and a new bill containing the provision in respect to foreign-born children of American parentage was included, using the Anglican phrase "shall be considered as natural born citizens." Manifestly, Mr. Burke had given the wrong reference to the Act of Parliament of the 12th year of William III which was an inheritance law. But, it was a naturalization bill and the reference to the English acts shows the origin of the inadvertent error in using the term natural-born citizen instead of plain "citizen" came from copying the English Naturalization Act.

Mr. James Madison, who had been a member of the Constitutional Convention and had participated in the drafting of the terms of eligibility for the President, was a member of the Committee of the House, together with Samuel Dexter of Massachusetts and Thomas A. Carnes of Georgia when the matter of the uniform naturalization act was considered in 1795. Here the false inference which such language might suggest with regard to the President was noted, and the Committee sponsored a new naturalization bill which deleted the term "natural-born" from the Act of 1795. (1 Stat 414) The same error was never repeated in any subsequent naturalization act.

The Act of 1795 provides:

"The *children of citizens* born outside of the limits and jurisdiction of the United States, shall be *considered as citizens of the United States*."

In 1802, when Congress repealed entirely the law of 1790, it enacted that *"the children of persons who now are, or have been citizens* of the United States, shall,

although born outside the limits and jurisdiction of the United States, *be considered as citizens of the United States*" (2 stat 153). (R.S. 1993) This was followed by the Act of 1855 (10 Stat 604) which repealed the Act of 1802.

Congress, in its exclusive control of naturalization, could make any person born outside of the limits of the United States a citizen, either automatically or by pursuit of a proper court proceeding; but, it is not within the power of Congress in its control of naturalization to alter the fact of place of birth to make a foreign born child a "natural-born" citizen as described in clause 4, section 1 of Article II of the Constitution so as to become thereby eligible to become the President.

In United States v. Perkins, 17 F S 117, the syllabus reads:

"Child born in England of mother who had been born in United States, and had married Englishman in England, held not a 'natural born citizen,' within the provisions of Federal Constitution, whether child became citizen at birth by reason of mother's citizenship or by her subsequent repatriation (Cable Act. 8 U.S.C.A. sections 9, 10, 367-370; 8 U.S.C.A. sections 6 and note, 7, 8, 399c(a); Rev. St section 1993; Convention with Great Britain May 13, 1870, art. 1, 16 Stat. 775)."

And the text of the opinion on page 179 reads:

"But I think it is immaterial, for the purpose of the instant suit, whether petitioner became an American citizen at his birth by reason of his mother's citizenship or later by means of the repatriation of his mother. I do not think the authorities sustain his claim that he is a natural-born citizen within the meaning of the provisions of the Constitution, either of section 1, clause 4, or article 2, that 'No person except a natural born citizen or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the Office of President,' or of the Fourteenth Amendment, 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."

In the case of *United States v. Wong Kim Ark*, 169 U.S. 649 at page 688; 18 S. Ct. 456, 472, 42 L ed 89, it was said: "This sentence of the Fourteenth amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed—'born in the United States,' 'naturalized in the United States' and 'subject to the jurisdiction thereof"—in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. *But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had*

always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization." And again on page 702, "Citizenship by naturalization can only by acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by mere fact of birth under the circumstances defined in the Constitution. *Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory, or by authority of Congress, exercised by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens,* or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts." Petitioner claims that these statements are mere dicta as applied to his claim and not entitled to consideration. But the Supreme Court in that case went fully into the whole question of citizenship in all of its aspects and this court could not ignore the carefully expressed opinions of the Supreme Court, even if this court should differ from that opinion. Also see Schautus v. Attorney General 45 F S 61, l.c. 67.

In State v. Rhodes (C.C. Ky.) 27 Fed. Cas 785, 879 (1866), Justice Swayne of the Supreme Court said:

"All persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance go together. Such is the rule of the common law of this country, as well as of England."

In Rawie's view on the Constitution of the United States, page 86, it is stated:

"Every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen within the sense of the Constitution, and entitled to all rights and privileges appertaining to that capacity."

In Luria v. United States, 231 US 9, in a unanimous decision Justice Van Deventer, speaking for the court, at page 22, stated:

"Under our Constitution, a *naturalized citizen* stands on an equal footing with the *native citizen in all respects, save that of eligibility to the Presidency."* Cited with approval by Justice Frankfurter in Blumgartner vs. U.S. 322 U.S. 673.

In *Knauer v. United States*, 323 U.S. 654, in a separate opinion, at page 677, Justice Rutledge stated:

"I do not find warrant in the Constitution for believing that it contemplates *two classes of citizen, excepting only for two purposes*. One is to provide how citizenship shall be acquired. Const. Art. 1, p. 8; Amend XIV, p. 1, *the other to determine the eligibility for the presidency. The latter is the only instance in which the charter expressly excludes the naturalized citizen from any right or privilege the native born possess."*

In *Husar v. United States,* 26 F 2d 847, in the Circuit Court of Appeals of the 9th Circuit the court stated:

"True, there is no express requirement that the United States District Attorney for China shall be a citizen of the United States. Nor, so far as we have been able to discover, is there such express requirement respecting any other officer of the United States*, excepting only the President and members of Congress*. (Const. US Art 2, par 1, subd 5): and these constitutional provisions were for the apparent purpose, not of insuring against alien office holding, but *requiring American birth in the one case and prescribed periods of citizenship in the other two."*

A child born in a foreign country of American parents may claim United States citizenship at majority. *In Re Reed*, 6 FS 800—It required an election on his part when he attained his majority. *State v. Jackson*, 79 Vt. 504, 65 A 657.

In 1854 an article appeared in 2 Am Law Reg. P 193, which pointed out among other things that, due to the language of the Act of 1802, *all children of American families "born in a foreign country" are aliens.* This article resulted in the passage of the Act of Congress of 1855 (10 Stat 604) which repealed the act of 1802 (2 Stat 153). Had Mr. Romney been born between 1802 and 1855 he would not even be a citizen through his father.

In the case of Ludlow v. Ludlow, 26 NY 356, 84 Am. D 193, the sole issue was one of citizenship in order to be able to inherit real estate in New York state. In the opinion Judge Selden uses the term "natural born citizen" on two occasions. A careful reading in the second instance shows that he was using the word "natural" in the sense of "native" wherein he said "among the facts found by the court are the following, viz: "That Richard L. Ludlow, the father of said Maximo M. Ludlow and of the plaintiff, in the latter part of the year 1822, voluntarily expatriated himself from the United States, where he was a *natural born citizen* for the purpose of becoming a permanent resident of Lima, in Peru, South America, and of

establishing his permanent domicile there." As the case shows that Richard L. Ludlow was born in the United States in 1804 the use of the term "natural born" meant native born.

In *U.S. v. Fisher*, 48 F S 7, the court said:

"A naturalized citizen, broadly speaking, enjoys all the rights of the *native* citizen, except so far as the Constitution makes the distinction, Const. rt. 2, par 1, cl 4 and this constitutional exception is limited alone to the occupancy of the office of President of the United States.":

In *Elk v. Wilkins*, 112 US at page 101, Justice Gray said:

"The distinction between *citizenship by birth* and *citizenship by naturalization* is clearly marked in the provisions of the Constitution by which 'no person, except a "natural born" citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President;' and 'the Congress shall have power to establish a uniform rule of "naturalization' ".

In 2 Bancroft's History of the U.S Constitution 192, reference is made to the fourth clause of the 1st section of article II. In the Constitutional Convention, says Mr. Bancroft:

"One question on the qualifications of the president was among the last decided. On the twenty-second of August, the Committee of Detail, fixing the requisite age of the president at thirty-five, on their own motion, and for the first time required only that the president should be a *citizen* of the United States, and should have been an *inhabitant* of them for *twenty-one years*. On the fourth of September, the Committee of States, who were charged with all unfinished business, limited the *years of residence to fourteen*. It was then *objected that no number of years could properly prepare a foreigner for that place;* but, as men of other lands had spilled their blood in the cause of the United States, and had assisted at every stage of the formation of their institutions, on the seventh of September, it was unanimously settled that *foreign-born residents of fourteen years who shall be citizens at the time of the formation of the Constitution are eligible* to the Office of the President." (Corroboration for the statements of Bancroft are to be found in Vol. 5 of Johathan Elliott's "Madison Papers," page 462, 507, 512 and 521, and in Vol. 3 of Henry D. Gilpin's "Madison Papers" pages 1398 , 1437 and 1516)

It will be seen from the foregoing that a distinction was made between *natural-born citizens* and *foreign-born citizens.* The very exception made as to *foreign-born*

citizens who were citizens at the time of the adoption of the Constitution proves conclusively the intent of the framers of the Constitution to limit eligibility for all others to *native born citizens*. *There was no Act then making a foreign born child a citizen.*

The word inhabitant means "a permanent resident." The substitution of natural-born citizens took the place of a permanent residence for 21 years. Manifestly, the meaning of the Committee of States that "*no number of years* could properly prepare a *foreigner* for that place" may properly be translated to mean that being an inhabitant in the United States *for all of the years of the life* of the individual concerned *was not sufficient*. What then is to be concluded that they meant to say when they used the language that the President shall be a "natural-born citizen." *Is not the proper conclusion that if a lifetime of inhabitance is insufficient, native birth was contemplated?* Suppose a candidate for President be 60 years old. Could this provision of the Constitution contemplate a foreign birth of a German mother and American father and continuous foreign residence for 46 years so long as the last 14 years were in residence of the United States, merely because a parent of the foreign-born candidate happened to be an American citizen, if a lifetime of inhabitance was not sufficient? It seems apparent that the Committee was trying to establish an eligibility requirement of a far greater degree than 21 years inhabitance—and at the same time reducing the residence requirement to 14 years. Could this increased requirement be satisfied by a foreign birth and foreign rearing until the character, patriotism and loyalty qualities were firmly fixed by the 46 years-foreign residence to be followed by only 14 years' residence in the United States from a mere American parentage? It seems to me that the question answers itself—that "natural born citizen" meant "native born citizen." The framers of the Constitution could not have attached such importance to American parentage of a foreign born and reared person when a lifetime of inhabitance (permanent residence) was considered insufficient.

I do not find in court decisions and legal literature of the time of adoption of the Constitution of the United States any reference to "native-born", when reference is made to a native born citizen or subject. The word invariably used was "natural-born." As an example, a "denizen" was an "alien-born person who had obtained a denizenation by gift of the King, (i.e. letters patent to make him an English subject). This patent was the exercise of a high royal prerogative. Naturalization could only be accomplished by Parliament. A denizen could take and hold lands by purchase or devise—which an alien could not do; but could not take title by inheritance. The children born before denizenation could not inherit from him, but those born

afterwards could inherit. It is interesting to note in book 1 Blackstone Comm. 374 in commenting on the denizen he says, "A denizen is a kind of middle state, *between an alien and a natural-born subject,* and partakes of both." Note that he does not use native-born subject, as this term is now used. The distinction was drawn between an alien and a natural born citizen, not native-born citizens. See Fries Case 9 Fed Case 126, Case No. 5126 and Collingwood v. Pace, 1 Ventries (Eng.) 419.

Mr. Binney, in the second edition of a paper on the Alienigenae of the United States, printed in pamphlet at Philadelphia with a preface bearing his signature and the date of December 1, 1853, on page 22, said:

"The right of *citizenship* never descends in a legal sense, either by the common law, or under the common naturalization acts. *It is incident to birth in the country,* or *it is given personally by statute. The child of an alien*, if born in the county, is as much a *citizen* as the *natural-born* child of a citizen, and by operation of the same principle. See Amer. Law Register for Feb. 1854 2 Amer. Law Reg. 193, 203, 204."

The comparison was made to alien and natural born, not native born.

To a letter written in New York by John Jay to George Washington, President of the Federal Convention, on July 25, 1787 has been attributed the provision in the Constitution requiring that the President shall be a "natural born citizen." This letter said:

"Permit me to hint whether it would not be wise and reasonable to provide a strong check to the admission of foreigners into the Administration of our National Government, *and to declare expressly that the command in chief of the American Army shall not be given to, nor devolve on, any but a natural-born citizen."*

The "hint" of John Jay that the Command in Chief of the American Army should not be given to, nor devolve on, any but a *natural-born citizen* bore fruit, and it was accordingly provided that the President shall be a natural-born citizen. Note that his "hint" distinguished natural-born citizens for foreigners. Every one of the 55 persons constituting the Federal Convention had been born on English soil and was a natural-born citizen.

Three articles have appeared in Journals on the same general subject as this article. The first was in the Albany, New York Bar Journal (66 Albany Law Journal 99) in 1904, both of which concluded that a foreign-born child of American parentage came within the tern natural-born and was eligible to become President. The second in 1950 was 35 Cornell Law Quarterly 357. The first was so

inadequately considered and lacking in citation as not to deserve mention. The only reference was to the inadvertent use of the term natural born in the Act of 1790 (1 Stat. 103). He did not seem to know that it was Mr. Madison who had participated in the drafting of the Constitution who had discovered the error and authorized the bill to correct it by deleting the term from the act of 1795 (1 Stat. 445). This first article did, however, apparently serve to encourage the author of the article in the Cornell Law Quarterly which was apparently inspired by a desire to accomplish a desired result, namely, to urge eligibility for the Presidency on behalf of Mr. Franklin Delano Roosevelt, Jr. who was born at the family summer home at Campobello, New Brunswick, Canada. His article attached great importance to the naturalization acts of the English Parliament which had "deemed" the children of English parentage born abroad to be natural born. The author seemed to have lost sight of the fact that the English common law in respect to citizenship did not become the common law of the United States and that the framers of the Constitution in making one qualification for the Presidency that the person be a "natural born citizen" referred to the *genuine* natural born citizen rather than one who by legislative act was "deemed" to be. A great weakness of his argument was later revealed by the decision of the U.S Supreme Court in 1961 in Montana v. Kennedy, Attorney General, 366 US 308, holding that his subject would not even have been an American citizen if his citizenship had depended on the citizenship of his mother, Eleanor Roosevelt, and that he only had dual citizenship because Congress in the exercise of its constitutional authority to establish uniform rules of *naturalization* had seen fit to grant to him automatic American citizenship due to the citizenship of his father.

Both articles assume that the restriction to natural-born citizens was based upon the law of blood of parentage, Jus Sanguinis, rather than the place of birth, Jus Soli; and without legal basis, claim that the former was of a higher order than the latter. Based upon such assumption they conclude that it is not the *place* in the United States which controls, but the *American parentage* of the child that complies with the requirement of the Constitution. The *fact* is, however, that the blood relationship had nothing whatsoever to do with the requirement, and the *sole basis* for the requirement was *place of birth*. This is demonstrated from the notes of Mr. James Madison, made on the spot, at the Constitutional Convention and reported in Bancroft's History of the Constitution showing that the initial proposal of the Committee of Detail called for 21 years of inhabitance (permanent residence) which relates solely to *place* and is entirely unrelated to blood. But, objection was made that "*no number of years* could properly prepare a *foreigner* for that place, i.e., a life time of residence could not properly prepare *one of* foreign birth. (*place again*)" It

was then that the Committee of States changed the requirement to call for native birth, as "natural-born" was meant by Blackstone, et al. (place again), but exception was made to those *foreigners* who were *residents* at the time of the adoption of the constitution—*again place*! Indeed, the claim of citizenship by blood or descent was expressly overruled in favor of the rule of citizenship by place of birth, in U.S. v. Wong Kim Ark, 169 US 649, l.c. 674 in which the court stated:

"There is nothing to countenance the theory that a general rule of *citizenship by blood or descent* has displaced in this country the fundamental rule of citizenship by birth within the sovereignty. So far as we are informed there is no authority, legislative, executive, or judicial, in England or America, which maintains or intimates that the statutes (whether considered as declaratory, or as mere prospective), conferring citizenship on foreign-born children of citizens, have superseded or restricted, in any respect, the established rule of *citizenship by birth within the dominion."*

The 1904 article said "a forced or restricted construction of the constitutional phrases under consideration would be out of harmony with modern conceptions of political status, and might produce startling results," (i.e. the Constitution is to be amended by judicial fiat to achieve desired results). Continuing, it says, "it remains to be decided whether a child of domiciled Chinese parents, born in the United States, is eligible, if otherwise qualified, to the Office of President and to all privileges of the Constitution." (This had already been decided in the affirmative in U.S. v. Wong Kim Ark, 169 US 649), "and it would be a strange conclusion, in another aspect, the child of American parents, born in China, should be denied corresponding rights and privileges in the United States." It would seem that the "strange aspect" was that a person whose skin was yellow could be President because of being born in the United States, whereas, a person whose skin was white could not if born in China. If racial prejudice is disregarded, there is nothing strange about the fact that the Constitution requires that the President be a native-born citizen.

The author of the 1950 article in the Cornell Law Quarterly argues that since under British statutory naturalization law children born to British parents outside of the dominions of the King became citizens at birth, such child was a "natural-born" British citizen, and our constitution should be so interpreted. Not only is this argument contrary to the cited decisions of the British appellate courts, and not a part of the British common law, as pointed out in Levy vs. McCartee, 31 U.S. 102, but, as pointed out in Hawle's View of the Constitution, the early Congress found it

necessary to adopt similar naturalization law otherwise the foreign born children of American parents would not even be American citizens.

There have been two periods since the creation of the United States during which there has been no Act of Congress which naturalized the foreign-born children of American citizens. These were (1) after June 21, 1789 (the effective date of the Constitution) and the Act of March 26, 1790, and (2) between the Act of April 14, 1802 and the act of February 10, 1855. What was the meaning of the words "natural-born citizen" during these periods? Manifestly, the only meaning that these words could have had, during these periods, was what we now call "native-born citizens," since *birth within the United States* was the *only* way a child could then be "born" a citizen. During those periods all foreign-born children were aliens. The meaning of the language used in the Constitution has not changed either before or after these acts of Congress. It was the *Acts of Congress* governing naturalization *which changed* from time to time—it being beyond the power of Congress to change the Constitution by legislative enactments. Thus, if prior to the first naturalization act of March 26, 1790, and again during the period from April 14, 1802 to February 10, 1855, the term "natural-born citizen" meant born within the dominion of the United States—which is the only meaning it could have had—then that meaning could not be altered by any Act of Congress naturalizing foreign-born children of American parents, and it remains the meaning today.

The third article appeared in December 23rd, 1955 issue of U.S. News and World Report in relation to the eligibility of Herbert Hoover, Jr., Franklin D. Roosevelt, Jr., and Christian A. Herter, who were born in England, Canada and France, respectively. The main point advanced by the author was that children born to American parents outside of the United States became citizens *at birth*, whom he called "born citizens." From this conclusion he takes another step to call them "natural-born citizens," although recognizing that the U.S. Supreme Court in the case of *U.S. v. Wong Kim Ark* 169 US 655 had held that they were naturalized citizens rather than natural-born citizens. When he says that they were "born citizens" his statement was erroneous. They were naturalized citizens. Born citizens are those who acquire their citizenship solely by birth within the United States. All persons born outside of the United States are born aliens and acquire citizenship by naturalization by compliance with an act of Congress naturalizing children born outside of the United States to American citizen parents. The Article contains some false conclusions of the author reading as if they were statements of fact. For example, he states, "This leads one to focus attention on the difference in legal meaning between the two terms—as they were understood by minds steeped

in the English legal tradition in 1787—and the only difference which such scrutiny reveals is that, whereas all "natives" (except the children of foreign diplomats and invading armies) were "natural-born subjects," the converse of this proposition was not true. Some natural-born subjects were not "natives" and these were none other than the foreign-born children of native parentage." This converse proposition is a false conclusion of the author and not the correct statement of fact or law. No child born outside of the dominion of the King was ever a true "natural-born subject." They were naturalized subjects. It is true that by the naturalization acts under which they had become naturalized subjects had "deemed" them to be natural-born subjects (despite the fact that they were not so in fact), and the very fact that these were "deemed" to be natural-born by the naturalization act reveals that the true" natural-born" subjects were those born within the dominion of the King without the necessity of a naturalization law to "deem" them to be in law what they were not in fact.

This subject was considered by Weston W. Willoughby in his 3-volume treaties on "United States Constitutional Law." In Vol. 1, page 354 (par. 199), he stated:

"*Natural-born citizen not yet defined*. So far as the author knows, no fully satisfactory definition of the term "natural-born citizen" has yet been given by the Supreme Court. Thus, it is not certain whether a person born abroad of American citizens who have themselves resided in the United States is to be deemed a natural-born citizen or a citizen naturalized by the Act of Congress which provides that such persons shall be deemed to be citizens of the United States. To the author it would seem reasonable to hold that anyone who is able to claim United States citizenship without prior declaration upon his part of a desire to obtain such status should be deemed a natural-born citizen. If this doctrine should be accepted, persons born abroad of parents themselves citizens would not be regarded as natural-born citizens, because, in fact, it is provided by Act of Congress of March 2, 1907 (34 Stat 1229) that such persons, in order to receive the protection of the United States are required, upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States, and, moreover, are required to take the oath of allegiance to the United States upon attaining their majority. It is also to be observed that for many years there existed no statutory provision whatever for the citizenship of persons born abroad of American parents who had not become American citizens prior to the Act of 1802."

There were but two types of English citizenship—natural-born (native-born) and naturalized. The same is true of American citizenship. A citizen is either one or the

other. Mr. Romney was born an alien and was naturalized automatically by Act of Congress. The U.S. Naturalization Law as it existed at the birth of Mr. Romney did not even purport to "deem" him to be a natural-born citizen as did the British. It merely declared him to be a citizen. He is, therefore, not a native-born citizen, but is a naturalized citizen. He is, therefore not a "natural-born citizen" according to the English common law, nor an American natural-born citizen under the Constitution of the United States. *Luria v. U.S.*, 311 US 9.

It has been suggested that the provision calling for the President to be "a natural-born citizen" is a "mere technicality". In the same sense, so are the requirements that the President shall be 35 years old and a resident of 14 years. One is just as valid and binding as the others, and all three were purposeful, deliberately and intentionally made. Thirty-five years of age was to insure maturity; 14 years of residence was to insure familiarity with the Government, its institutions and people, and native birth was to insure loyalty and freedom from foreign sympathy and ideologies. The members of the convention knew that some might be more mature at 34 than others at 35; and some might have a better knowledge of the Government, its institutions and people in 12 or 13 years than others at 14 years; and some might possess a higher degree of loyalty and greater freedom from foreign sympathy and ideologies by residence from childhood than others of native birth. Most people are known to have a soft spot in their hearts for the country of their birth, and birth in the United States saves this soft spot for the United States. I doubt that Sir Walter Scott would approve of paraphrasing of his famous question, "Breathes there a man with soul so dead who never to himself has said *that* is my own, my native land—Mexico!" In making rules, the line must be drawn somewhere that is reasonably calculated to accomplish the desired purpose. Individual fact cases, standing alone, can always make the wisdom of rules seem dubious. Reasonable rules are made for general good, even though hardship may ensue in individual cases from their application. Their reason for these rules is just as valid now as when made.

To summarize; a natural-born citizen of the United States, as that term is used in the Constitution of the United States, means a citizen born within the territorial limits of the United States and subject to the laws of the United States at the time of such birth. This does not include children born within the territorial limits of the United States to alien parents who, although present with the consent of the United States, enjoy diplomatic immunity from the laws of the United States, and, as a consequence are not subject to the laws of the United States. Nor would this include children born within the territorial limits of the United States to alien

enemy parents in time of War as a part of a hostile military force, and, as a consequence not present with the consent of the United States, and not subject to the laws of the United States. But, this *does* include children born to alien parents who are present within the territorial limits of the United States "in amity" i.e. with the consent of the United States, and subject to its laws at the time of birth. *U.S. v. Wong Kim Ark* 169 US 649, *Luria v. U.S.*, 231 US 9, *Minor v. Happersett* 88 US 162.

I find no proper legal or historical basis on which to conclude that a person born outside of the Uinted States could ever be eligible to occupy the Office of the President of the United States. In other words, in my opinion, Mr. George Romney of Michigan is ineligible to become President of the United States because he was born in Mexico and is, therefore, not a *natural-born citizen* as required by the United States Constitution.