

**MAXIMIZING VOTER CHOICE: OPENING THE
PRESIDENCY TO NATURALIZED AMERICANS**

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Chairman HATCH. Without objection, we will put that at the beginning of the hearing immediately following my own statement.

So if we can, we will turn to you, Professor Amar first, then Dr. Spalding, then Professor Yinger.

STATEMENT OF AKHIL REED AMAR, SOUTHMAYD PROFESSOR OF LAW AND POLITICAL SCIENCE, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT

Mr. AMAR. Thank you, Mr. Chair. My name is Akhil Reed Amar. I am the Southmayd Professor of Law and Political Science at Yale University. As my formal testimony draws upon a soon-to-be published book that I have written on the history of the Constitution, I respectfully request that the relevant pages of that book, which I have attached as an appendix to my testimony, be made part of the record.

In a land of immigrants committed to the dream of equality, the Constitution's natural born clause seems, well, un-American. Why shouldn't we open our highest office to those who have adopted this country as their own and have proved their patriotism through decades of devoted citizenship?

Legal traditionalists will doubtless, and with good reason, counsel us to think twice before altering the Founders' system. But the Framers themselves created an amendment process as part of their legacy to us. A close look at why they added the natural born citizen clause can help us decide whether their reasons still make sense today.

As I have documented in greater detail in "America's Constitution: A Guided Tour," the 1787 Constitution was, by the standards of its time, hugely pro-immigrant. Under the famous English Act of Settlement of 1701—and this is what you need to understand is the baseline against which they are acting—no naturalized subject in England could ever serve in the House of Commons, or Lords, or the Privy Counsel, or in a wide range of other offices. The Constitution repudiated this tradition across the board, opening the House, the Senate, the Cabinet, and the Federal judiciary to naturalized and native alike.

As you have just heard, seven of the 39 signers of the Constitution at Philadelphia were foreign-born, as were countless thousands of the voters who helped ratify the Constitution and made it the supreme law of the land. Immigrant Americans accounted for eight of America's first 81 Congressmen—actually, nine of the first 91, if you count the later ones in the first 2 years—three of our first ten Supreme Court Justices, four of the first six Secretaries of the Treasury, one of the first three Secretaries of War.

Only the Presidency and the Vice Presidency were reserved for birth-citizens, and even this reservation was softened to recognize the eligibility of all immigrants who were already American citizens in 1787—men, like Hamilton, who had proved their loyalty by coming to or remaining in America during the Revolution.

Why, then, did generally pro-immigrant Founders exclude later immigrants from the Presidency? If we imagine a poor boy coming to America and rising through the political system by dint of his own sweat and virtue only to find himself barred at the top, the rule surely looks anti-egalitarian. But in 1787, the more salient

scenario involved the possibility that a foreign earl or duke might cross the Atlantic with immense wealth and a vast retinue, and then use his European riches to buy friends on a scale that virtually no homegrown citizen could match. There were no campaign finance rules in place then.

[Laughter.]

Mr. AMAR. No such grandees had yet come to our shores. Thus, it made good republican sense to extend eligibility to existing foreign-born Americans, yet it also made sense to anticipate all the ways that European aristocracy might one day try to pervert American democracy.

Several months before the Constitution was drafted, one prominent American politician had apparently written to Prince Henry of Prussia, brother of Frederick the Great, to inquire whether the prince might consider coming to the New World to serve as a constitutional monarch. Though few in 1787 knew of this feeler, the summer-long secret constitutional drafting sessions in Philadelphia did fuel widespread speculation that the delegates were working to fasten a monarchy upon America. One leading rumor was that the Bishop of Osnaburgh, the second son of George III, would be invited to become America's king. The natural-born clause gave the lie to such rumors and thereby eased anxieties about foreign nobility.

These anxieties had also been fed by England's 1701 Act, which inclined the Founders to associate the very idea of a foreign-born head of state with the larger issue of monarchical government. Though England banned foreigners from all other posts, it imposed no natural-born requirement on the head of state himself. In fact, the 1701 Act explicitly contemplated foreign-born future monarchs—the German House of Hanover, in particular. By 1787, this continental royal family had produced three English Kings named George, only the third of whom had been born in England itself.

Thus, in repudiating foreign-born heads of state, the Framers meant to reject all vestiges of monarchy. Theirs was ultimately an egalitarian idea. Their general goal was to create an egalitarian republic.

In light of this history, the case for a constitutional amendment today would appear to be a strong one, and we can best honor the Framers' egalitarian vision by repealing the specific rule that has outlived its original purposes.

Now would this be the first time we have tweaked the Founders' rules of Presidential eligibility. The Constitution says "he" and "his," when it comes to the President, and they were thinking about kings, not queens. They never talked about—and they knew about queens. Virginia was named after one, William and Mary another.

So a plausible argument could be made that the original Constitution envisioned only men would be eligible. But after the 19th Amendment, it is clear that women have a right not just to vote but to be voted for, to hold office. So we have already in effect changed the rules of Presidential eligibility. "He" now means "he or she." What the suffragist movement did for women, America should now do for naturalized citizens. America should be more than a land where every boy or girl can grow up to be...Governor.

Thank you.

[The prepared statement of Mr. Amar appears as a submission for the record.]

Senator CRAIG. Thank you very much.

Dr. Spalding, please proceed.

STATEMENT OF MATTHEW SPALDING, DIRECTOR, B. KENNETH SIMON CENTER FOR AMERICAN STUDIES, THE HERITAGE FOUNDATION

Mr. SPALDING. Thank you, Senator. More than any other nation in history, this country and its system of equal justice and economic freedom beckons not only the downtrodden and the persecuted, but those who seek opportunity and a better future for themselves and their posterity.

By the very nature of the principles upon which it is established, the United States encourages immigration and promotes the transformation of those immigrants into Americans.

"The bosom of America is open to receive not only the opulent and respectable stranger," George Washington wrote, "but the oppressed and persecuted of all Nations and Religions; whom we shall welcome to a participation of all our rights and privileges if, by decency and propriety of conduct, they appear to merit the enjoyment."

Yet there is one legal limitation of those potential rights: only those who are native born can become President of the United States. Why the exception? In addition to what Professor Amar has already pointed out, I would add one: Poland, where in 1772, as Forrest McDonald has pointed out and argued, "the secret services of Austria, Prussia and Russia had connived to engineer the election of their own choice for king" and then divided the country.

Perhaps with this in mind, John Jay wrote George Washington at the Convention, urging that the Commander-in-Chief be only given to or devolve on a natural born citizen. Thus, the phrase, as Justice Joseph Story later explained, "cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office."

But there is something more going on here, I believe, that points to the general views of the Founders about immigration. The immediate fear was a foreign takeover, but the larger fear was the influence of foreign ideas.

At the Constitutional Convention, there was a lively and illuminating debate about the eligibility of foreign immigrants for Federal office. Some wanted to restrict membership to those born in the United States. Other more numerous delegates vigorously criticized this position. James Madison wanted to invite "foreigners of American republican principles among us," and West Indies-born Alexander Hamilton spoke of attracting immigrants who would "be on a level with the First Citizens."

These views prevailed and the Constitution required relatively modest residency periods for immigrant citizens who aspired to office. This was long enough, Madison later wrote in the *Federalist Papers*, to assure that legislators are "thoroughly weaned from the prepossessions and habits incident to foreign birth and education."

So why the nature born citizenship requirement for the Presidency? With a single executive, at the end of the day there are no

SUBMISSIONS FOR THE RECORD

Testimony Before the Senate Committee on the Judiciary
October 5, 2004
By Akhil Reed Amar

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As I have documented in greater detail in *America's Constitution: A Guided Tour*, the 1787 Constitution was, by the standards of its time, hugely pro-immigrant. Under the famous English Act of Settlement of 1701, no naturalized subject in England could ever serve in the House of Commons, or Lords, or the Privy Counsel, or in a wide range of other offices. The Constitution repudiated this tradition across the board, opening the House, Senate, Cabinet, and federal judiciary to naturalized and native alike.

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were countless thousands of the voters who helped ratify the Constitution. Immigrant Americans accounted for eight of America's first eighty-one congressmen, three of our first ten Supreme Court Justices, four of our first six secretaries of the treasury, and one of our first three secretaries of war.

Only the Presidency and Vice Presidency were reserved for birth-citizens and even this reservation was softened to recognize the eligibility of all immigrants who were already American citizens in 1787—men who had proved their loyalty by coming to or remaining in America during the Revolution.

Why, then, did generally pro-immigrant Founders exclude later immigrants from the presidency? If we imagine a poor boy coming to America and rising through the political system by dint of his own sweat and virtue only to find himself barred at the top, the natural-born rule surely looks anti-egalitarian. But in 1787, the more salient scenario involved the possibility that a foreign earl or duke might cross the Atlantic with immense wealth and a vast retinue, and then use his European riches to buy friends on a scale that virtually no homegrown citizen could match. No such grandees had yet come to our shores. Thus it made republican sense to extend eligibility to existing foreign-born Americans, yet it also made sense to anticipate all the ways that European aristocracy might one day try to pervert American democracy.

Several months before the Constitution was drafted, one prominent American politician had apparently written to Prince Henry of Prussia, brother of Frederick the Great, to inquire whether the Prince might consider coming to the New World to serve as a constitutional monarch. Though few in 1787 knew about this feeler, the summer-long secret constitutional drafting sessions in Philadelphia did fuel widespread speculation that the delegates were working to fasten a monarchy upon America. One leading rumor was that the Bishop of Osnaburgh, the second son of George III, would be invited to become America's king. The natural-born clause

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Thus, in repudiating foreign-born heads of state, the framers meant to reject all vestiges of monarchy. Their general goal was to create an egalitarian republic.

In light of this history, the case for a constitutional amendment today would appear to be a strong one: Modern Americans can best honor the Founders' generally egalitarian vision by repealing the specific natural-born rule that has outlived its original purpose.

Nor would an amendment, if successful, be the first time that Americans have tweaked the Founders' rules of presidential eligibility. Though the Constitution never said in so many words that only men could be President, it did consistently use the words "he" and "his"—and never "she" or "her"—to describe the President. The framing generation debated at length whether Presidents might come to resemble English Kings, but said nary a word about Queens. (The framers of course were intimately familiar with Queens; Virginia was itself named after one; and let's not forget the College of William and Mary.)

Thus, a plausible argument might have been made in the 1800s that only men were eligible to the Presidency. But surely the Nineteenth Amendment, ratified in 1920, ended all debate on that issue by granting women the explicit right to vote and the implicit corresponding

right to be voted for. In effect, that Amendment required that the word “he” in the original constitutional clauses dealing with the President would henceforth be read to mean “he or she.” What the suffragist movement did for women, America should now do for naturalized citizens. This country should be more than a land where everyone can grow up to be . . . governor.

Thank you.