

Marquette Mondays

March 8, 2021 – Constitutional Law

Despite the fact that the Constitution was adopted well over two centuries ago, it contains many provisions that the Supreme Court has never had occasion to interpret, and thus there are many constitutional questions as to which there are no clear answers. Impeachment, as we have recently learned, presents one set of examples. Another is Article II, Section 1, Clause 5, which provides: “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; 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 of the United States.”

There are, without question, situations that present easy applications of the clause. On the one hand, no one suggested that the clause disqualified Presidents Clinton, Trump, Biden, or either Bush. And on the other, none have suggested that the clause does not disqualify actor and former California governor Arnold Schwarzenegger (who was born in Austria to Austrian parents).

Before we move on from the easy cases, pause to think about this: Why does it not matter whether all of the listed presidents were born with medical assistance, or that one or more of them may have been delivered by Caesarian section? (Perhaps the word “presumably” should be added somewhere in the preceding sentence. So far as I am aware the question is regarded as unremarkable enough that it’s never been addressed.) Is there not a sense in which medically assisted childbirth is not “natural”? No doubt your intuition is that the clause is about something else. But how do you know that? What underlies your intuition?

Turning to the more difficult cases: the 2008 Republican presidential nominee, Senator John McCain, was born in 1936 in the then-American controlled Panama Canal Zone (to parents who were both US citizens). If Senator McCain had been elected, would his taking the office of President have been in violation of the Constitution?

Or consider 2016 presidential candidate Senator Ted Cruz. Cruz was born in Canada to a mother who was a US citizen and a father who was born in Cuba and who was not a US citizen at the time of Cruz’s birth. Is Cruz eligible to be President? (You may recall that one of the so-called “birther” claims was that President Obama was actually born to his American mother in Kenya, and that he was therefore ineligible to be President.)

How should we go about the process of determining what the phrase “natural born citizen” means? Is this a question for the Supreme Court, or is it for others (who?) to decide?

We can push things further. Suppose that a clear majority of the people of the United States (which was also arrayed in such a way as to create a majority in the electoral college) were to conclude that Arnold Schwarzenegger is the best person for the job of President. Would his taking office after having been elected be in violation of the Constitution? If so, why should the will of the people be thwarted in such a circumstance? Would or should the Supreme Court entertain a claim that he is not eligible for the office?