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MAXIMIZING VOTER CHOICE: OPENING THE PRESIDENCY TO NATURALIZED AMERICANS

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TUESDAY, OCTOBER 5, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 10:08 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Craig, Feinstein, and Durbin.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. We are happy to welcome you to this hearing. We are grateful to have all four of you here, and we hope the others will be here as soon as they can. Here comes John.

Good morning and welcome to the Judiciary Committee's hearing entitled "Maximizing Voter Choice: Opening the Presidency to Naturalized Citizens."

A few days ago, we celebrated Citizenship Day. The purpose of this holiday is to honor those people who have become United States citizens.

Citizenship, whether by birth or naturalization, is the cornerstone of this Nation's values and ideals. Each year, hundreds of thousands of immigrants complete the naturalization application process to become citizens. In 1996 alone, there were over one million new citizens naturalized in America. And according to the Department of Homeland Security, approximately 20 million individuals have become naturalized citizens of this country since 1907.

The United States is known as the land of opportunity, but there is one opportunity that these American citizens will never be able to attain under our current law. They can never hold the office of the President. Article II, Section 1, Clause 5 of our Constitution, which sets forth the eligibility criteria for the Office of the President requires the President to be a natural born citizen.

What is a natural born citizen? Clearly, someone born within the United States or one of its territories is a natural born citizen. But a child who is adopted from a foreign country to American parents in the United States is not eligible for the Presidency. Now, that does not seem fair or right to me.

Similarly, it is unclear whether a child born to a U.S. serviceman overseas would be eligible. Most academics believe that these individuals would be eligible for the Presidency, but I note that some academic scholars disagree. A recent article in Green Bag, a jour-

nal that specializes in constitutional law, quotes an 1898 Supreme Court case that the natural born citizen clause "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."

Now, I have proposed—and Congressman Rohrabacher and others, we have proposed a constitutional amendment, S.J. Res. 15, to address this issue. The Equal Opportunity to Govern Amendment would amend the Constitution to permit any person who has been a United States citizen for at least 20 years to be eligible for the Presidency.

As Boise State University Professor John Freemuth explained, the natural born citizenship requirement is something of an artifact from another time. It is time for us—the elected representatives of this Nation of immigrants, by the way—to begin the process that can result in removing this artificial, outdated, unnecessary, and unfair barrier. While there was scant debate on this provision during the Constitutional Convention, it is apparent that the decision to include the natural born citizen requirement in our Constitution was driven largely by the concern over 200 years ago that a European monarch might be imported to rule the United States. And I do believe that some of them wanted to keep Alexander Hamilton from being President as well.

Now, this restriction has become an anachronism that is decidedly un--American. Consistent with our democratic form of government, our citizens should have every opportunity to choose their leaders free of unreasonablelimitations. Indeed, no similar restriction bars any other critical members of the government from holding office, including the Senate, the House of Representatives, the United States Supreme Court, or the President's most trusted Cabinet officials.

The history of the United States is replete with scores of great and patriotic Americans whose dedication to this country is beyond reproach, but who happen to have been born outside of our borders. Just some that we could talk about include former Secretaries of State Henry Kissinger and Madeleine Albright, the current Secretary of Labor Elaine L. Chao, and former Secretary of Housing and Urban Development Mel Martinez, who is now running for the Senate seat in Florida. As our Constitution reads today, none of these well-qualified, patriotic United States citizens could be lawful candidates for President.

As Congressman David Dreier has stated, the Constitution limits us from having the opportunity of choosing someone who is a bold, dynamic, dedicated leader for our country.

Michigan Governor Jennifer Granholm, who was born in Canada, also supports this amendment. She explained: You cannot choose where you are born, but you can choose where you live and where you swear your allegiance. And I think if she has 20 years of living in this country, she ought to have the privilege of running for President if she so chooses.

This is also true for the more than 700 immigrant recipients of the Congressional Medal of Honor—our Nation's highest decoration for valor—who risked their lives defending the freedoms and liberties of this Nation, many of whom gave their lives. But no matter

how great their sacrifice, leadership, or love for our country, they remain ineligible to be a candidate for President. Now, this amendment would remove this unfounded inequity.

Any proposal to amend the Constitution cannot be taken lightly. But I believe that amending the Constitution in this instance would facilitate the democratic process by giving the American voters more choice in determining who should be elected President of the United States. As Professor John Yoo, from Boalt Hall at the University of California at Berkeley, told the Los Angeles Times, making naturalized citizens eligible to become President would fall within the tradition of amending the Constitution to expand democracy, whether it be expanding the franchise or making elected representatives more directly elected.

Now, our proposal is already garnering bipartisan support. Several Senators have publicly expressed support for a constitutional amendment in statements made to the media over the last several months. In addition, we were fortunate to have with us today a panel of six very distinguished Members of Congress to discuss various proposals in the Senate and the House that would maximize voter choice for the Presidency. I certainly look forward to hearing from them and from our academic experts on panel two.

Let me just say this as someone who got in very late and ran for President for a very short period of time, and learned a lot of lessons in the process. I have to say that that is not an easy thing to do. You have to really, really have an endurance and an ability to motivate people to even have a chance. So we are not turning over here and saying that we want to make it easy for anybody to become President. But we certainly ought to facilitate the opportunity for people who have proven themselves to be good citizens to have this opportunity.

Now, let me just say I am really honored to have all six of you here today. You are six very important people who I happen to respect, each and every one of you. We are honored to have before us today several distinguished Members of Congress who have introduced legislation on this issue.

Let me begin by introducing Senator Don Nickles from Oklahoma. He is an original cosponsor with Senators Landrieu and Inhofe of S. 2128, the Natural Born Citizen Act. As I am sure he will explain in more detail, the bill defines "natural born citizens" as including children of U.S. servicemen and adoptees.

My friend John Conyers, the Ranking Member on the House Judiciary Committee, a friend for a long time, is from Michigan and has introduced H.J. Res. 67, which, like S.J. Res. 15, would amend the Constitution to permit naturalized citizens of 20 years to hold the Presidency.

Congressman Dana Rohrabacher from California has introduced H.J. Res. 104, which is also consistent with the bills introduced by Congressman Conyers and myself.

Congressmen Vic Snyder, Darrell Issa, and Barney Frank have introduced H.J. Res. 59, which would amend the Constitution to permit naturalized citizens of 35 years to hold the Presidency.

I welcome each of you here. I really appreciate your willingness to consider these issues and to help us articulate why they are important. I understand from the Washington Times yesterday that

House Minority Leader Nancy Pelosi has come out in favor of your proposal, and I look forward to hearing these statements and learning more about all of your proposed legislation or amendments to the Constitution.

Let me just again welcome you all, tell you how much I respect each and every one of you, and I look forward to hearing you. Would there be any objection if we just go from Don Nickles right across—is that okay?—rather than worry about anything else?

Don, we will turn to you then. Senator Nickles.

STATEMENT OF HON. DON NICKLES, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator NICKLES. Mr.Chairman one, thank you for having this hearing and, for my colleagues, it is a pleasure to join with you on this very important issue. As you mentioned, I have introduced a bill along with Senator Landrieu and Senator Inhofe—a statute, not a constitutional amendment, but I compliment those of you that have proposed the constitutional amendment. I happen to think that we can get the statute passed rather quickly and that it will help resolve this issue for many.

As you know, our Constitution states that "no person except a natural born citizen" shall be eligible to seek the Office of President. For many years, legal scholars have debated what the Founders meant by that term, "natural born citizen." Does it mean only children born within the boundaries of the United States? Does it include within its scope children born abroad to a U.S. citizen? If so, does it include only children born abroad to a U.S. citizen who is serving in the military or employed by our Government overseas? Or does it also include a child born abroad to a U.S. citizen simply living or working abroad? Could it include a child born abroad but adopted by a U.S. citizen? Mr. Chairman, I think it is time that we put an end to these speculations.

I introduced this bill. This defines the term of "natural born citizen" as used in the Constitution as a child born in the United States, a child born abroad to a U.S. citizen, and a child born abroad and adopted by a U.S. citizen. If passed, this bill would put an end to the speculation and clarify who is eligible to run for President of our great country.

It does not go as far as the constitutional proposal, and I am not against that. I just think that this is something we can get done and that would help solve the problem. It accomplishes it basically by defining by statute the term "natural born."

It is clear that a child born within the physical borders of the United States and subject to the jurisdiction of the United States is eligible to run for President. However, many Americans would probably be surprised to learn that a constitutional question remains as to whether a child born abroad to a U.S. citizen serving in the military or serving at a Government post are not clearly, indisputably eligible to seek the highest office in our land. Nor is it clear whether a child born overseas to a citizen traveling or working abroad is eligible to run for President. There are strong legal arguments that say these children are eligible, but it certainly is not an inarguable point. The Natural Born Citizen Act will make

it clear that these children would be considered natural born citizens within the meaning of the Constitution.

In addition to these children of American citizens being able to run for President, this bill, my bill, would also define "natural born" to include children born abroad and adopted by a U.S. citizen. Such a child would have to be adopted by the age of 18, by a U.S. citizen who is otherwise eligible to transmit citizenship to a biological child pursuant to an Act of Congress. In other words, some citizens are ineligible to transmit citizenship to a biological child born abroad because of a failure to meet certain statutory criteria such as having lived in the United States for 5 years, 2 of which had to be after the age of 14. We do not want to give any special treatment to adopted children over biological children born abroad. We just seek to treat biological and adopted children of American citizens equally.

As many of you may recall, we passed the Child Citizenship Act of 2000, which provided automatic U.S. citizenship to foreign adopted children. Under this Act, which was signed into law on October 20, 2000, the minute these children arrive in the United States, citizenship attaches automatically. There is no naturalization process that these foreign adopted children have to go through. Once they are fully and finally adopted and enter the United States with their parents, they are deemed by law to be U.S. citizens. They should also be able to be President of the United States. This bill would enable us to do that.

Mr. Chairman, I just ask that the balance of my statement be entered into the record. I appreciate your consideration of this legislation. I would hope that at a minimum we could pass this bill and open the opportunity for hundreds of thousands of young people, whether they are born abroad and adopted or born abroad to U.S. citizens, that they would clearly know that, yes, they too could be eligible to be considered and have the opportunity to achieve a the highest office in the land.

I thank you very much for your leadership on this important issue, and I thank my colleagues for their patience.

Chairman HATCH. Thank you, Senator. Your full statement will be placed in the record. I understand you have to leave, and we appreciate you coming very much. Thank you.

[The prepared statement of Senator Nickles appears as a submission for the record.]

Chairman HATCH. Representative Conyers, welcome over here. We have enjoyed a long relationship.

STATEMENT OF HON. JOHN CONYERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Representative CONYERS. Chairman Hatch, I am honored to be with you and my colleagues and the distinguished gentleman from Oklahoma.

I just want to tell you how I came about this. I started attending the swearing-in ceremonies of naturalized citizens in the courthouse in Detroit, downtown Detroit. And the enthusiasm and the families and the children, they were outside, there were voter registration booths where they could register to become voters right after they raised their right hand and were sworn in as naturalized

citizens. And there was a young lady there named Ms. Muntaz Haq from India who herself was a naturalized citizen, that got me going around the country in these sort of things.

And then there was another factor that impressed me. It was the tremendous Governor of the State of Michigan, who I did not know until after she had become Governor that she was actually born in Canada.

And so without too much consultation with all of the distinguished Congressmen at this table, I said this ought to be changed. And I think you gave some good reasons why in 1789 they thought that this might be preferable, and I do not disagree with that decision in 1789. But, you know, to make a person almost a full citizen except for one little tiny thing, and that is, you can never be President. And I presume that means you cannot be Vice President either.

So I thought that we ought to do something about it, and so I wrote this amendment, and without any consultation, I began to find that 10 percent of the citizens in Oakland County, right next to my own county of Wayne, are people who are naturalized citizens because of the engineering requirements of many of the automobile plants. And so I came over here today to join—I had no idea that this was growing as fast as it is, and I think we are onto something good.

Finally, I wanted to point out that we have 30,000 members of the armed forces who are naturalized citizens. And so for you and our colleague, Senator Craig, I want to thank you for holding this hearing. I also wanted to get a picture of you and me at your last hearing as Chairman so that it will be celebrated in two different ways by different people in Detroit, depending on how they feel about it.

Chairman HATCH. I fully understand.

Representative CONYERS. But I want them to know that you and I have worked together on more issues on the Judiciary Committee than most people realize. And I appreciate that so much, and I want to thank you for your tenure here as Chairman.

Chairman HATCH. Well, thank you, Congressman Conyers. I certainly appreciate our relationship. I respect you greatly, admire you, and we have worked on a lot of issues together over the years. So I appreciate those kind remarks.

[The prepared statement of Representative Conyers appears as a submission for the record.]

Chairman HATCH. Representative Snyder, we will turn to you. We appreciate having you here.

STATEMENT OF HON. VIC SNYDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARKANSAS

Representative SNYDER. Thank you, Senator Hatch, and thank you for the invitation to be with you today. I was in church this past Sunday, the church at which my wife is the senior pastor, and I was approached by a woman in the stairway. She said, "I want to tell you a story about my son, Alexander." This is her son, Alexander Clurgett. He was adopted a few years ago from Russia. And the story she told me is that just recently she had overheard Alexander talking with one of his friends from his school in Arkansas.

And Alexander asked him, "Where were you born?" And he said, "I was born in Little Rock." And Alexander came back and said, "That means you can run for President."

These kids are aware of the differences between them and other kids, and I think it is very important that the work you are doing here today, Senator, calls attention to this very important issue.

I assume that I was invited here today because our bill has a little different perspective than yours does, Senator. It has a 35-year requirement for citizenship, and yours has a 20-year requirement. Let me just run through quickly three reasons why, when I had the bill drafted, I ended on the 35 years.

First, it is just this, I guess, legal philosophy of the smallest change necessary to the Constitution to effect the change. The constitutional requirement is that a person be 35 years old to be President, I suspect because of the age, maturity, the life experience of a 35-year-old as opposed to a 21- or a 26-year-old. And so I chose 35 years. If someone like Alexander is adopted when he is 3 years old, then that would mean that he would have to be 38. Or if someone is adopted when they are 1 month old, then they would have to be 35 years and 1 month. But 35 years of citizenship.

Second is what I call the Manchurian candidate argument. My guess is that you have heard this one, too, Senator, that somehow someone is going to at age 40 become a U.S. citizen, they are going to come over here committed to becoming President of the United States, and then somehow unleash the forces of our military against us. I have heard people come to me personally and espouse those arguments. Well, by having the length of time be 35 years, obviously what we are focusing on is youngsters, is kids at a young age.

And, third, to me this is about children. A few years ago, I was doing some legal research on a law review article I wrote on the congressional oath of office. It was probably read by tens of people throughout the country, but, anyway—

Chairman HATCH. I understand that. [Laughter.]

Representative SNYDER. I ran into some discussion about this amendment. I have some other pictures I want to show you. This is my niece, Sara Doty, at age 10 months. She has a pretty impressive hairdo at age 10 months.

Chairman HATCH. She is beautiful.

Representative SNYDER. She was adopted at around age 10 months. This is her much more recent photo. We think her hair is lovely in both photos. But it brought home to me, the reading that I did, that my niece, who has been raised here—the only life she knows is as an American—is not eligible to be President.

Some of these other children, this is Luke and Adam who were adopted from China. Their parents are Lisa Farrell and Jimmy Jackson back home. And as Lisa said to us in an e-mail, she said, "How can you not look at these boys and not want them to be President? It is the dream of a parent in America."

And then the last one is a young girl, Miriam. Her parents are Cynthia Ross and Dr. Martin Howard Jensen back home in Little Rock, and just riding a merry-go-round.

Well, to me this amendment and what you are trying to do and what we are trying to do is to talk about the dreams of kids. And

so to me it comes down to two reasons. You very appropriately identified this hearing today as maximizing voter choice, and so it increases the pool of prospective candidates. But it also maximizes the dreams for all Americans, including these children. And I think that is very, very important.

Just a couple of detail points. First, Senator Nickles was talking about the clarification of "natural born." One specific issue that I think would come from getting this resolved, when a Presidential nominee selects their Vice President, it is perceived as being their first big decision and they are judged on it. And I fear that if we have children who perhaps, asSenator Nickles was talking about, are born to, say, missionaries overseas, or Congresswoman Diana DeGette, born on a military base to U.S. citizens, my guess is there would be no question about her. But you could foresee a scenario in which a nominee would say, "I cannot have my first big decision, selecting my Vice Presidential nominee, being judged as, well, maybe they are not quite legally eligible." And as you know, a whole lot of our Vice Presidents have gone on to become President.

Finally, with regard to the 20 versus 35 years, I certainly will be supportive of a 20-year amendment if that is what comes to the floor of the House and what comes out of this Congress. There are some issues. Does that get into discussion about personalities? I personally think both Governor Granholm and Governor Schwarzenegger ought to be eligible to be President. Some people may decide that it would be better to have a longer period of time so we eliminate individuals. But I applaud you for your efforts here today, and I appreciate the opportunity to testify.

Chairman HATCH. Well, thank you, Vic. We appreciate you coming over here. Of course, if you have to leave, any of you, we fully understand.

You know, I guess the President could pick a non-native born citizen for Vice President. And what happens if that President passes on for some reason or other? See, these are problems that we really do need to solve.

Representative SNYDER. That is right. And you may recall from our young days, there were previous discussions about—and both of them were resolved—you know, Senator Goldwater was born in Arizona at the time it was still a territory. Governor Romney had been born in Mexico to U.S. citizens, and that was becoming an issue. But then he decided not to run.

So these things do flare up. The point I was making about the Vice President is that it may well be if there was someone like that, you know, the advisers would say, you know, this is your first big decision, we do not need that to be the story for the next 2 or 3 weeks. Thank you.

Chairman HATCH. Thank you. I sure appreciate having you here.

Representative Frank, we are honored to have you here, and we look forward to hearing your always lucid comments.

STATEMENT OF HON. BARNEY FRANK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Representative FRANK. Thank you, Senator. I appreciate the way you framed this as increasing the choice for voters. Obviously, there is an element here of fairness to individuals. My colleague

from Arkansas has pointed that out. And I was first asked to do this—I did this a few years ago. I filed one version. I actually had a hearing when Representative Kennedy from Florida was the Chair of the Constitutional Rights Subcommittee. Four or five years ago we had a hearing. And it was brought to my attention by an immigrant, who is an American citizen, who has been active in politics in the city of New Bedford, Massachusetts, and he was troubled, as I was, by the invidious discrimination of it. It basically says to people who have chosen to come to America in many cases, or who have been brought here, who have gone through the process of citizenship, have been very loyal, very law-abiding citizens, that they are somehow flawed.

The notion that people who come here and become naturalized are any less entitled to be here and to exercise privileges and rights and responsibilities than anybody else is offensive. And for that reason alone, we ought to get rid of it.

Beyond that, though, there is a fundamental principle here, and it is the one you touch on with your phrasing of this. I believe in the right of the people to choose as they wish.

Now, people say, well, you are amending the Constitution. The fact is that in 1789, the notion of direct democracy was not the one that governed. Clearly, in terms of world history, the people who came to the American Constitutional Convention, they went for the first time to self-governance, but they did not go all the way. They had a Senate which was indirectly elected, a House directly elected, a President that was not supposed to be even indirectly elected. Remember, the original notion of the Electoral College was they would vote for a lot of smart guys, and the smart guys would sit around and decide who should be President. Remember, in the Electoral College, you did not pick President or Vice President. You just voted for President, and whoever got the most votes was the President, and whoever got the second most votes was the Vice President.

We have evolved substantially since that time, I think in a good direction. Unfortunately, the evolution has not yet reached a point where we got rid of that foolish Electoral College, but that is something for a later day. But we do have now this major obstacle in the way of the voters, and we say to them: We don't trust you. You could get fooled. I mean, they might—some foreign country might sucker you by getting some slick person mole him into the United States, or her, and get that person citizenship, and then years later have that person get elected President, and you will be too dumb to notice. I don't think that is accurate, and I don't think that ought to be the governing principle. I really believe that the people of the United States ought to have the right to elect as President of the United States someone they wish.

I understand the prudential argument about some time limitation. I originally said 20 years. Mr. Snyder said 35. The fewer the better, as far as I am concerned. I will be honest with you. If you look at the principle of it, in my view an hour and a half is probably about enough time, because I trust the voters. This is up to them. Obviously, for practical reasons it will have to be a little bit longer.

But that is the issue. Should we tell the American people that we do not trust them to decide that someone—and, remember, nobody parachutes into the Presidency.

Chairman HATCH. That is a tough process.

Representative FRANK. Yes, it is hard work, as we have learned. I understand that. I heard that last week, that it is very hard work to be President.

[Laughter.]

Representative FRANK. In fact, I understand they do not play "Hail to the Chief" anymore at the White House. They play "A Hard Day's Night." But nobody comes in without being subject to a lot of scrutiny. Presidential candidates are people who the public has a chance to see. They have been in lower offices. They have been in the private sector. They have been prominent. And I don't think we should say that the American people don't have the mental acuity and political judgment to look at someone who has been around for a while and who has achieved the kind of prominence that you have to achieve to be a Presidential candidate, but we cannot trust them to pick someone who happened to have been born in another country because of some flaw on their part.

So I think this is really a further step in bringing democracy as it should truly be understood to the electoral process, and I am for it, and it would also have, I think, a very useful time. You know, this is a world in which our country has been, I think, unfairly accused of a lot of things, misinterpreted. I think for this country at this point to take a step towards enhancing the rights of immigrants, even in this particular way would be—this is a good time to do it.

Chairman HATCH. Well, thank you. There is no question that you have made a lot of good points there, some of which have been too humorous, I think.

[Laughter.]

Chairman HATCH. Congressman Rohrabacher?

STATEMENT OF HON. DANA ROHRABACHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative ROHRABACHER. Thank you very much. Thank you, Senator, and it is a great opportunity to testify before you because your Senate Joint Resolution 15 is exactly as my House Joint Resolution104.

Chairman HATCH. There is some genius in there for sure.

Representative ROHRABACHER. We mirror each other on this subject. And many of the arguments have already been presented, but let me just note that the reasons our Founding Fathers added a natural born citizen requirement to the Constitution's qualification for being President, those reasons may have seemed like they were real back then, but they are archaic, and technologically they have been dealt with in the meantime. The main rationale seems to be that our Founding Fathers had was to protect future generations from undue foreign influence which would happen through the election of a foreign-born leader to the Executive office.

This mind-set prevailed among our Founding Fathers because, of course, they had just freed themselves from foreign domination. And that may have made a lot of sense back then.

Interestingly enough—and I will call this the Hamilton loophole because I believe that your analysis is incorrect about Hamilton not being eligible. They exempted their own generation from the burden of the natural born citizenship requirement. Seven of the 39 signers of the Constitution in Philadelphia in 1787 were foreign born as well as eight of America's original 81 Senators and Representatives. Three out of our first ten Supreme Court Justices and four of our first six Secretaries of the Treasury and one of our first Secretaries of War were all foreign born. Most, if not all, of these immigrants were eligible to serve as President since the Constitution exempted all those who were citizens at the time of its adoption from the natural born citizen requirement.

Today, of course, the office of President and Vice President are the only offices where a person who is not born in the United States is disqualified from serving. Is this still appropriate when we have seen great leaders after a lifetime of service thus be ineligible to represent this country as President?

Today we have many significant political leaders who cannot be President or Vice President simply because they were not born here. And, of course, this hearing would certainly not be complete unless the name of Governor Arnold Schwarzenegger was not mentioned at least once. But, of course, he is just one famous example that has been pointed out here today. We have the Governor of Michigan, of course, who came from Canada at age 4. Pete Hoekstra came to this country when he was 3 years old from the Netherlands and has now been given the responsibility as being Chairman of the House Permanent Select Committee on Intelligence. So Congressman Hoekstra oversees the Intelligence Committee in a post-9/11 America yet, regardless of his lifetime of service, is disqualified from serving in the highest office.

There are many others who are similarly unfairly excluded or whose eligibility is in doubt. For the record, I am attaching to my written testimony a list of Americans who have spent a career of service to this country who are now ineligible for President because they are not U.S. citizens of birth, along with a list of those who are U.S. citizens from birth, but whose eligibility to be President has been questioned because they were born outside the borders of the United States.

So I appreciate your leadership, Mr. Hatch, and I would ask my colleagues to join me in this very important step, which sends a message to the legal immigrants in the United States today and the legal immigrants who have become citizens in particular. And I agree with Mr. Frank that this is a very important time to send such a message.

While we may have major disagreements on what to do and what positions we should take about illegal immigration and about what to do with illegal immigrants who are in the United States, it behooves all of us to underscore that we are not talking about those who legally come to our country, and especially those who are now naturalized citizens. Naturalized citizens and legal immigrants should have the rights of all Americans, and I think that this small change in our Constitution underscores that commitment among all of us here in elected office.

So I thank you very much for your leadership, and I hope to work with my colleagues, and Representative Conyers I know has already endorsed my bill, and I hope that we could put this through.

Thank you very much.

[The prepared statement of Representative Rohrabacher appears as a submission for the record.]

Chairman HATCH. It would be great if we could, and you are right about that on Alexander Hamilton. Some did not want him to be President, but they did make that exception. But if they made it then, why can't we do it today, and especially after better than 200 years of this process, and especially when we have a time limitation in there that should satisfy those who—

Representative ROHRABACHER. Senator, there is one aspect of this as well, that when our Founding Fathers put this into the Constitution, it was impossible for people who were voting for a Presidential candidate to actually try to get to know that Presidential candidate. I mean, they read about him in a newspaper, maybe. I don't even think you could put photographs in newspapers in those days.

Today, when you are voting for a President of the United States, you—

Chairman HATCH. You are going to know a lot more than you even want to know.

[Laughter.]

Representative ROHRABACHER. That is correct.

Representative FRANK. Would the gentleman yield for a second?

Representative ROHRABACHER. Television has brought that, has brought us into a personal relationship, and one other note. Naturalized citizens and people who immigrate here legally to the United States and become part of our society, I find them to be generally more patriotic rather than Manchurian candidates. They are more patriotic than even most of our fellow Americans who take their freedom and liberty for granted.

Chairman HATCH. That is a good point.

Representative Issa?

Representative ROHRABACHER. I would be happy to yield to Barney.

Representative FRANK. Just to make the point that, given the Electoral College, in fact—and this was certainly the intention—you did not even vote for a candidate. You voted for wise men who were going to pick the candidate. Now, the public soon demanded the right to do that, but in the original conception—and the theory that, you know, a small band of people, the electors, might have been unduly influence had at least some plausibility. But the point was that you were not in the original Constitution envisioning a public vote directly for President. It was for electors who were envisioned as having the ultimate choice.

Chairman HATCH. Barney, for what it is worth, I led the fight against the so-called direct election of the President. It was one of the few times in my whole time of 28 years in the Senate where I think the debate was won on the floor, where people really paid attention to it, because it is not just a bunch of—I do not want to get into a debate on that today, but the fact of the matter is that

we have basically a direct election by 50 States. And it is a very interesting process, and it is one that has served this country well. I think I could rebut every—

Representative FRANK. Well, Senator, I don't mean to—you know, I don't want to introduce undue elements of controversy here, but I am still addicted to the view that the person who gets more votes than the other guy ought to be the winner.

Chairman HATCH. Well, and as a general rule, that has always worked that way. And in the cases where it has not, there have been real questions of fraud and other problems.

Representative FRANK. Not last year. There was no question of fraud in the overall total.

Chairman HATCH. Only in six States, Barney.

Representative Issa? There were six States that—

Senator CRAIG. Could we have order, please?

Chairman HATCH. I would be happy to debate that in the future. I would be more than happy.

Representative Issa?

STATEMENT OF HON. DARRELL ISSA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative ISSA. Thank you. I was wondering when Mr. Rohrabacher was going to reclaim his time.

Senator CRAIG. I am reclaiming it for him.

Representative ISSA. Thank you, Senator. Thank you for holding this hearing, Senator, and all of the Senators here. Obviously, our senior Senator from California, I really appreciate your being here.

Often in these hearings when you are the last person, everything that can be said has been said, and I think that is not the case here, but I will dispense with my prepared comments so that I can go only to those areas that perhaps have been touched on lightly or not at all.

Certainly, like each of the previous speakers, I have a member of my staff who was adopted from Korea at age 2, and 27 years later he knows no other country but America. And yet he is not eligible to be President.

In California, we are often faced with the interesting anomaly that people who come to our State illegally and have a child, perhaps even come legally and have a child during a short visa stay, that child is eligible to be President. And yet somebody who waits in line and perhaps does not arrive in America until their child is 2 or 3 years old, that child is ineligible. So we penalize those who wait, who wait in line. And I think that goes to my first and most important point.

This piece of constitutional amendment—and unlike the Senator I very much believe that we have to have a constitutional amendment—is about fairness. The Framers of the Constitution were fair to the people of their time. At that time they felt it was fair to grant Native Americans less than full citizenship. They felt a compromise that granted African Americans less than full citizenship, in fact, less than freedom, was acceptable. They felt that granting men full freedom and rights but women less than full freedom was acceptable.

That does not make those people bad men. It makes them men and leaders of their time. But we are the men and women that are the leaders of our time. And just as the Native Americans now enjoy full rights, including Presidency, including the right to vote, including the right to be counted in a census fully, as do African Americans, as do women, we have one group that has been left out. And I think that is where fairness is the most important part of your proposal for this constitutional amendment, Senator.

However, to Senator Nickles, in contrasting the two major differences between his legislation and your constitutional legislation, I disagree with the Senator's theory that we can take care of this by legislation. We live in an era—it was mentioned perhaps slightly a minute ago—in which anything can be challenged and taken to nine men and women on the Supreme Court. Any law that we pass here is open to challenge at the Supreme Court. So we could pass a law today allowing someone to be President that previously was in doubt. That would include, obviously, those born abroad of U.S. citizens, such as Senator McCain, who was born in an area that is no longer the United States. It was the United States when he was born, the Panama Canal District; today it is not.

That doubt certainly could be challenged after an election, challenged to the U.S. Supreme Court. And the U.S. Supreme Court would not have the ability to say: Do we go with the will of the people? They would have to say: What is the Constitution and what does it say?

So I think that as much as we could envelop for feel-good purposes more and more people into the system of being defined as natural born, I do not believe that it would exempt a Presidential candidate, if elected, from being open to that challenge. And the possibility certainly exists that someone could be elected President and their Vice President could be sworn in because the men and women of the Supreme Court would have to interpret the Constitution as unamended rather than amended by simple legislation or statute. And I think that is the most important reason that this constitutional amendment is necessary.

Each and every one of the points brought to us here today of uncertainty—uncertainty, even the question of Hamilton's exemption, certainly no longer germane today. But Senator McCain, who is to say that Senator McCain, if he had been the Republican nominee for President in 2000, if he had won by a narrow margin in so few States with hundreds or a few thousand votes, who is to say that the Supreme Court would not have been faced with two questions—one question about whether or not he won the election, and a second one about whether he was eligible to be President.

Certainly in this day and age, anyone can bring a case, and the Supreme Court would have an obligation to hear it.

So since that has not been previously decided, each and every one of the people that we want to include has not been decided, I believe that we should decide it in clear and definitive language that will be unambiguous for the future for all those we want to be eligible.

Lastly, because people have talked about the period of time, I am a cosponsor of both pieces of legislation in the House. I will add that if I were going to pick times—and since Congressman Frank

said an hour and a half might be too short—I would only say that as this legislation goes through the House and the Senate, the truth of the matter is, the simple statement is we needed a President by the Founding Fathers to be 14 years a resident. And if I were going to pick a single date, 35 years old should stand, but also, realistically, with all due respect, Senator, I might suggest that even 14 years a citizen and a resident would be a fairly understandable requirement, because we are going to let stand the fact that you have to not just be a citizen but that you cannot have essentially left the country for years and then be—what do they say?—parachuted back in.

So whether you use an hour and a half, 14 years, 20 years, or 35 years I think is less important than the two guiding principles—one of fairness, the other of clarity—and your legislation brings both. So I want to thank you, and thank you for holding this hearing.

Representative FRANK. We have 10 minutes to vote.

Chairman HATCH. We are grateful that all of you would come. We are grateful to have your testimony, and we appreciate it, and it has been very enlightening. Thanks so much. We will excuse you at this time. Thank you.

Chairman HATCH. Let me introduce our distinguish witnesses for panel two.

Professor Akhil Reed Amar is the Southmayd Professor of Law at Yale Law School. He has also received his undergraduate degree from Yale, where he graduated with a perfect grade point average and his law degree. He has been teaching at Yale for almost 20 years, so we welcome you, Professor. We are very happy to have you with us once again.

Dr. Matthew Spalding is an expert on American political history, constitutionalism, religious liberty, and civic renewal. He is also the director of the B. Kenneth Simon Center of American Studies at the Heritage Foundation. An adjunct fellow with the Claremont Institute, Dr. Spalding is the author of "A Sacred Union of Citizens: George Washington's Farewell Address and the American Character," and the editor of the Founders' Almanac. He also holds a Ph.D. in government from Claremont Graduate School, so we welcome you as well, Dr. Spalding. Good to see you again.

Next we have Professor John Yinger, who is Trustee Professor of Public Administration and Economics for the Maxwell School at Syracuse University. He has also taught at the Harvard JFK School of Government, Princeton University, the University of Michigan, and the University of Wisconsin. So we are very grateful to have you here as well.

Now, I have to explain. I am on the conference committee that is meeting over in the House on the FSC/ETI bill, and so I have asked Senator Craig if he would finish this hearing. But I will read everything that you folks say, and I have read a number of things anyway, and I will pay very strict attention to what you have to say. We appreciate your being here.

Senator DURBIN. Mr. Chairman?

Chairman HATCH. Yes, Senator?

Senator DURBIN. May I ask unanimous consent that a statement by Senator Leahy be entered into the record?

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 law. 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 wrong 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

checks, no multiplicity of interests that would override the possibility of foreign intrigue or influence, or mitigate any lingering favoritism—or hatred—for another homeland.

The attachment of the President must be absolute, and absolute attachment comes most often from being born and raised in—and educated and formed by—this country, unalloyed by other native allegiances. The natural born citizen requirement for the Presidency seeks to guarantee, as much as possible, this outcome where it matters most.

While the practical circumstances have changed—there is no threat of a foreign takeover—the underlying concerns about attachment and allegiance still make sense. The question is whether you can expand the eligibility to non-native-born citizens without undermining the wisdom and caution inherent in the Framers' design.

One proxy would be a significant citizenship requirement, along with a significantly increased residency requirement. How much? The question is enough to approximate the attachment that comes with having lived in America for almost all of one's life, thus fundamentally shaped by this regime, its history, institutions, and way of life. The average of 20th century Presidents is 54. A 35-year citizenship requirement, combined with a residency requirement increase, would assure that most would-be Presidents are citizens before they are 18 years old and residents for much of the time thereafter.

Four very brief caveats:

One, opening the question of the Presidency to naturalized citizens raises the issue of dual citizenship. This is a significant issue that must be addressed and could be a particularly thorny problem.

Secondly, in order to have the intended effect, this effort must be part of a renewed effort, a deliberate and self-confident policy to assimilate and Americanize immigrants and teach them about the country's political principles and civic traditions.

Thirdly, I am concerned about the politics of this question. It should not be resolved based on immediate calculations to advance or hinder the political aspirations of any particular individual or party. I am tempted to suggest that any amendment should include language that it would not take effect for 10 years or so, when the current candidates are not on the scene.

And, fourth, I must say that the more I have looked at it, the more I am intrigued by the legislative approach. Recognizing the difficulty of amending the Constitution, the possibility of closing key loopholes by legislation is attractive. Looking at the legislation of the 1st Congress, the Naturalization Act of 1790, it seems that Congress does have authority in this matter. I won't speculate what the court would say, but these questions seem to accord well with court precedents and court's deference to allow Congress latitude in exercising its plenary powers over naturalization.

Let me end very briefly on a personal note. Last year, my wife and I adopted two Russian orphans, age 3-1/2 and 1. They both hold birth certificates in our name and are American citizens. Joseph knew some broken Russian, but one of the first English phrases he learned as "God bless America." He actually knows that George Washington is the Father of his Country. Yet he cannot grow up to be President of the United States. What is worse, in

reading stories of our Nation's heroes and in emulating their patriotism, he cannot dream, as little boys do, of serving his country in its highest office, "one a level with the First Citizens."

Nevertheless, these children—our children—will be as natural born citizens, not because of where they were born, but because they will be raised and educated to know, as Lincoln said of those who did not themselves descend from the Founders but came to understand the truths of the American creed, that they are "blood of the blood, and flesh of the flesh, of those who made the Revolution."

Thank you.

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

Senator CRAIG. Doctor, thank you.

Professor, please proceed.

STATEMENT OF JOHN YINGER, TRUSTEE PROFESSOR OF PUBLIC ADMINISTRATION AND ECONOMICS, THE MAXWELL SCHOOL OF CITIZENSHIP AND PUBLIC AFFAIRS, SYRACUSE UNIVERSITY, SYRACUSE, NEW YORK

Mr. YINGER. Good morning, Senator Craig, and other distinguished members of this Committee. I would like to thank you very much for inviting me to testify today.

I am a professor of public administration and economics at the Maxwell School of Citizenship and Public Affairs at Syracuse University. The topic of this hearing, the clause limiting Presidential eligibility to natural born citizens, is of great interest to me both professionally and personally, and I have been studying it for the past several years.

My research on civil rights and the nature of our Federal system helped to spur my interest in this clause. In addition, I am the proud father of two adopted children, one of whom—my son, Jonah—will not be eligible to run for President when he grows because he was born in another country. Two of my nieces, Sara and Julia Grace, also are not eligible to run for President.

The principle that all citizens should have equal rights is one of the cornerstones of American democracy. The U.S. Constitution made historic contributions, of course, to the establishment of this principle, but the Founding Fathers did not fully implement it, and the Nation has struggled ever since to try to complete the task.

The Constitution's most important limitations on this score obviously were that it allowed the States to disenfranchise people on the basis of sex and race. The 14th, 15th, and 19th Amendments to the Constitution, along with extensive civil rights legislation, have been passed to remove these limitations.

This hearing is about the next step on the path toward equal rights, which is to ensure that naturalized American citizens have exactly the same rights as natural born citizens. The constitutional provision prohibiting naturalized citizens from running for President violates the equal rights principle and serves no useful purpose. It should be removed from the Constitution.

At the Constitutional Convention in 1787, the final Presidential eligibility clause with the natural born citizen requirement in it was accepted unanimously with no record of debate. But earlier

versions of the clause did mention nativity, and the Founders provided at least three types of evidence that they had serious doubts about the natural born citizen requirement.

The first source of evidence is the Presidential eligibility clause itself, which grants eligibility to any citizen of the United States at the time of the adoption of this Constitution. This grandfather clause gave Presidential eligibility to roughly 60,000 naturalized citizens in the elections of 1796 and 1800. By including this clause, the Founders rejected the view that naturalized citizens are inherently more likely than natural born citizens to be subject to foreign influence.

Second, extensive evidence comes from the debates concerning the time of citizenship requirements for the Senate and the House of Representatives. The key issue in these debates was whether to set long time-of-citizenship requirements and thereby to place an extra burden on naturalized citizens.

Numerous delegates spoke out against such requirements and, thus, against even stronger restrictions, such as making naturalized citizens ineligible altogether. James Madison declared that a severe restriction on the rights of naturalized citizens would be "improper: because it will give a tincture of illiberality to the Constitution." He was seconded by Benjamin Franklin "who should be very sorry to see any thing like illiberality inserted in the Constitution." The word "illiberal" was their way of saying that such a restriction would violate the equal rights principle.

Madison also said he "wished to maintain the character of liberality which had been professed in all the Constitutions and publications of America." This position was seconded by several other delegates. Madison is referring to the Constitutions passed by virtually all the States at the time of Independence, not one of which restricted the rights of naturalized citizens.

Madison reiterated his view several years later when he said, "Equal laws, protecting equal rights, are found, as they ought to be presumed, the best guarantee of loyalty and love of country."

Third, in 1798, the U.S. Senate, composed of men who had participated in the founding of the United States, demonstrated its ambivalence toward the natural born citizen requirement by electing a naturalized citizen, John Laurance of New York, to be President Pro Tempore of the Senate.

This action is significant because Laurance was eligible to be President, thanks to the grandfather clause, and because at that time the President Pro Tempore was second in the line of succession. Despite fears of foreign intrigue, therefore, a naturalized citizen briefly stood only behind Vice President Thomas Jefferson in the sequence of succession.

With the Founders' doubts in mind, consider the relevance of this issue today. The natural born citizen requirement is the only provision in the Constitution that explicitly denies rights to an American citizen based on one of that citizen's indelible characteristics. By embracing one exception to the equal rights principle, we leave open the door to other exceptions. We can strengthen our democracy and our reputation around the world by closing this door.

The 14th Amendment, which is one of the crowning achievements in this Nation's struggle to promote equal rights, says, in

part, "All persons born or naturalized in the United States...are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

This amendment prohibits the States from treating naturalized citizens any differently from natural born citizens. The Federal Government should face the same prohibition. As the U.S. Supreme Court said in another context, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

Despite all the protections built into our constitutional system, some people insist that the natural born citizen requirement makes us safer. If naturalized citizens were allowed to run for President, these people argue, foreign powers might scheme to have their citizens elected here. This Manchurian candidate imagery has two major flaws. The first was articulated by Benjamin Franklin. He "reminded the Convention that it did not follow from an omission to insert the restriction...in the Constitution that the persons in question would actually be chosen into the Legislature." This fits, of course, with earlier comments that it is very difficult to run for President.

Moreover, any naturalized citizen running for President would have a hard time convincing a majority of the American people that he or she is the best candidate for President. This point was made by Madison. "For the same reason that [men with foreign predilections] would be attached to their native Country, our own people would prefer natives of this Country to them."

The second flaw was also exposed by Madison. He said, "If bribery was to be practised by foreign powers," it would be attempted "among natives having full confidence of the people not among strangers who would be regarded with a jealous eye."

Restricting the rights of all naturalized citizens out of the fear that one of them might try to undermine our Government by running for President is an extreme form of profiling with no basic in logic or history. Does it make sense to discriminate against 12.8 million naturalized citizens, including 250,000 foreign-born adoptees, because one of them with disloyal thoughts might decide to run for President? Of course not. It makes no sense at all. The natural born citizen requirement adds nothing of substance to the extensive protection provided by our constitutional election procedures and the judgment of the American people.

Most people never run for President, but the right to run for President has enormous symbolic importance. The power of this symbolism was brought home to me just a few days ago. On September 22nd, the Syracuse Post-Standard wrote an editorial in support of the amendments introduced by Senator Hatch and Representative Rohrabacher. This editorial quoted me and mentioned my son, Jonah. The next day I received a letter from Ms. Cathy Fedrizzi, one of Jonah's second-grade teachers, which said, "Dear Dr. Yinger, As I read this morning's editorial about Jonah, I had a feeling this would be a hard. I was scheduled to visit Jonah's class to teach about the upcoming election. Part of my lesson involves teaching about who is eligible to become President..."

"...As we worked our way through the lesson, I noticed Jonah sitting on the edge of the group. That's unusual for Jonah...whenever I've taught guest lessons before, he's been front and center, so I had a feeling he wasn't happy. Before I got to the rules for becoming President, he told me the rule about being born a citizen. I explained that some laws are made a long time ago and seem like a good idea at the time, but I didn't like the law the way it was either. He didn't seem satisfied with my answer, and neither was I."

"I feel sad every time this situation occurs...I hope that some day, before I stop teaching, I can tell eight year old students that anyone sitting on the floor at my feet could one day be President of the United States."

My son should not have to feel this way. No American second grader should have to feel this way. No American citizens should have to feel this way. I urge the members of this Committee, and indeed all Members of Congress, to support Senator Hatch's Equal Opportunity to Govern Amendment or one of the comparable amendments introduced in the House. Let us renew our commitment to the equal rights principle by giving naturalized citizens the right to run for President.

Thank you very much.

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

Senator CRAIG. Well, gentlemen, thank you all very much for very valuable and well-done testimony. I am one who has not yet decided on a course of action that we should take, but one who is an activist in the area of adoption and believe I have helped bring literally thousands of children into a permanent loving environment, both domestic and foreign, struggle with many of your arguments. Last year, this Nation's parents adopted 25,000 foreign-born young people, many of them babes in arms. And to suggest that once they have lived here for a period of time, educated here, become Americans, without question every bit the American that I am, that they would be denied this right is a tough one. And it is one that the Congress is obviously struggling with.

Let me ask a couple of questions and then turn to my colleagues, and I am going to ask questions that all three of you might choose to respond to. Senator Hatch's amendment and other amendments choose a time of so many years having been a naturalized citizen before one could serve as or be eligible to seek the office of the Presidency. Is there a magic time in years?

Mr. AMAR. The 35-year-old clause has been used as a springboard to say, well, maybe it should be 35 years after one becomes a citizen. There is a sort of plausibility to that. It does not quite achieve equality for babes in arms. If a kid comes here at age 3, he or she would only then be eligible at 38 where his classmates are at 35. But that may be a small thing.

My thought is that actually the 35-year-old clause had a rather different purpose, and it was actually an anti-dynastic, anti-monarchical purpose. The concern was who would have name recognition to be elected President at 30 or 33, and it is the son of a famous father. And they were reacting against dynasty, and so they wanted to make sure that lower-born people would have a chance to

show their stuff and well-born people would have a chance to make their own mistakes and achieve their own successes. And I am not sure that that reasoning—so John Quincy Adams does become President, but not before he got a track record of his own. I am not sure that that actually is the same cluster of reasons that would be sensible.

But 14 years of continuous residence was suggested, and that has a certain naturalness. It borrows directly from the eligibility clause itself. Twenty is a kind of intermediate compromise. Fourteen actually builds on the Constitution itself.

Senator CRAIG. Mr. Spalding?

Mr. SPALDING. In my testimony, I actually mentioned this question. I think it is important that you look at this and judge it according to the right standards. The issue here does not seem to be paralleling existing numbers in the Constitution. The question you need to address is what level of citizenship and residency in your mind is required for the unique office of the Presidency. In amending the Constitution, you are open to amend it as you choose. The reason I came up with the 35 number is actually it is in the Constitution, but more importantly, if you look at the average age of current Presidents, all Presidents, especially in the 20th century, minus 35, that gets you down to the possibility of making sure that someone emigrates here when they are still at an age where they will be formed in their character and ideas by this country. And that is what we need to assure. The question here is about the unique nature of the Presidency, not about—comparisons are very important, but there is something—all these comparisons are very important, but there is something different about the Presidency that I think you have an obligation to think through very seriously. It is very clear. A child, a babe, can clearly become attached to this country and has no obligations or connections. The flip side is that someone who comes over here that is 40 or 50, that might present some sort of problems. They have clear allegiances to another country. Where do you draw the line?

The issue, I think, is attachment, and that is what you have to think through.

Senator CRAIG. Mr. Yinger?

Mr. YINGER. I would only add that I think that the key issue here is the one of eliminating a situation in which someone is disenfranchised because of an indelible characteristic in some important way. And I do not think that you need to have in this clause any guarantee of particular characteristics of an individual. That is what voting procedures are for. That is what the judgment of the American people is for.

So I think that there needs to be a debate and people need to decide what they are comfortable with. I think anything in the 14- to 35-year range would be reasonable.

Senator CRAIG. Well, I think, Dr. Spalding, you have mentioned something that is important in the numbers determination, and that is, a period of time long enough for that individual to become imbued with the general beliefs, appreciation for this country, its constitutional system, and all of that.

At the same time, I will tell you that, like Congressman Conyers, I have attended a good many naturalization ceremonies, and I find

naturalized citizens sometimes having studied us better than our own native born citizens, knowing more about us, being more excited about this country, and more fervently American in many instances. So it is an energy and a chemistry that I think those who come here seeking citizenship, wanting to become one of us, if you will, that in itself is a phenomenal challenge and in itself is a qualifier.

Mr. SPALDING. If I could make just one brief comment, I completely agree with you. That is why I am so interested in this question.

But you have to remember that in making a change to the U.S. Constitution, you are making a rule not an exception. The rule you make has to last for the foreseeable future in a Constitution that lasts forever.

And, secondly, remember, this is the Presidency. The key question you have to concern yourself with is: At the end of the day, when the President, a single executive, makes a key decision, they must be absolutely loyal to this country and not either hesitate perhaps in a military decision or a security decision, they cannot hesitate in making a decision which favors this country and is not shaped by allegiances or hatred of other countries. That was a key concern of the Founders, and especially Washington's Farewell Address.

Senator CRAIG. You and I have no dispute there whatsoever. I think that is part of an important consideration in choosing to change our Constitution.

Now, I will say in conclusion, because I am also very intrigued—and I will come back to ask a question of you about Senator Nickles' approach. I am one who has attempted to convince the American people to pass a constitutional amendment. I have traveled to 40 States with a single amendment in mind and visited with those legislatures. It is a near impossible task. It is a hurdle so high that it is near impossible. And it must be an issue that is overwhelmingly popular and obvious on its face to the American people, or it will not happen.

So I am going to come back to you. My time is up. So think about, if you would, Senator Nickles' amendment that deals with the definition of and what is believed to be a responsibility that could be assumed here in making that adjustment.

Let me turn to Senator Durbin—I believe you were here next—for any questions you might have.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you, Mr. Chairman, and thank you to the witnesses.

When it comes to amending the Constitution, I am a skeptic, a proud skeptic. In 22 years on Capitol Hill, I have seen more attempts, scores if not hundreds of attempts, to amend this Constitution. Some of them are offered in good faith, and some just reflect the politics du jour. If someone burns a flag at a political convention in Texas, another person says, "Let's amend the Bill of Rights for the first time in our history." I think that shows a readiness

to change a document that we should be very reluctant to ever change.

I am prepared to make an exception because I think this is a good change, for two reasons:

First, I don't think there is any other way to achieve this. I may disagree with Dr. Spalding on this. I don't think you can do this legislatively. I think the Constitution is very explicit, and our change should be explicit within the Constitution.

And, second, I believe it corrects an anachronism, and there are anachronisms in that Constitution. Witness Article I, Section 2, where we count those who are not free persons as three-fifths of a citizen for the purpose of apportionment in Congress. What was that all about? We did not view African Americans as real, whole Americans. They were only counted as three-fifths of a citizen. Well, thank God we came to the realization that was wrong, as we came to the realization it was wrong to deny women or those who did not have property an opportunity to vote. So some change is necessary. The Founding Fathers got most of it right, but not everything.

There are two observations I would make, one leading to a question. And the first is consider what is driving this debate: the fundamental inequity and unfairness of the way we are treating naturalized citizens in America. 30,000 naturalized citizens are today risking their lives, putting their lives on the line for America, as members of the armed forces, We cannot ask anything more of a person than to give their lives for this country.

Now we are talking about the same naturalized citizens being recognized as having an opportunity to run for the highest office of the land. I think that is a question of equity and fairness. But I will say to my colleagues on the Judiciary Committee, many of whom are not here today, the immigration laws of this country are rife with inequity and unfairness. We see it every day in our offices. We are focusing on the Presidency. We should be focusing on the body of laws and how we treat immigrants who come to this country. We have not done because it is politically volatile.

The second issue is one that has been historic, and that is the question of dual loyalties. I am Catholic. There was a time in the 19th century when being Catholic virtually disqualified you from being seriously considered for the highest office in the land. Why? Because they believed these papists would listen to advice from the Vatican before the American people. Well, thank goodness that came to an end in 1960 with the election of President Kennedy. It appears not to be an issue—and perhaps it will not be—on November 2nd. But the point is that is no longer a debate topic.

Some raise the question about dual loyalty of Jewish-Americans. Can they be loyal to America and to Israel? Now we come into another aspect of this dual loyalty question, which we have talked about in general terms, but Dr. Spalding has raised in specific terms. And this is where I come to my question. A friend of mine by the name of Val Adamkus was born in Lithuania. He as a young boy fought the Nazis when they occupied Lithuania, then fought the Soviets when they occupied Lithuania, and left that country to come to the United States to become a naturalized citizen. He received the highest award in civil service in America for his service

to our Government. And then after his retirement from our Federal Government and after the liberation of Lithuania from the Soviet Union, he returned to Lithuania and was elected President of that country. An amazing story.

But there is one footnote most people don't realize. In the closing moments before he was sworn in as President of Lithuania, he surrendered his American citizenship. He didn't feel that he could serve the people of Lithuania if there was ever any question about his loyalty.

Dr. Spalding, you raised that point. We live in a world where people can be dual citizens. Is that an important part of this discussion? Should we in some way or another make it clear that you have to renounce other citizenships to be considered as President, even as a naturalized citizen? Or should we trust the crucible of the campaign, let the people decide as to whether a person's first loyalty will be America?

Mr. SPALDING. It is a very good question. Just a very brief clarification so that we do not confuse my earlier point. When I said I was interested in the legislative approach, I was—I am fascinated by what his legislation proposes to do, namely, to correct some specific things. One thing that is clear is that natural born does not equal naturalized. That would require an amendment. So I am not saying you can solve that problem through legislation.

I think the question I have raised and you alluded to is extremely important. My children have dual passports, dual citizenship. They hold Russian passports and have U.S. passports. Holding dual passports is not the issue. There are many people that have dual connections to countries. What I am concerned about is, at the end of the day, where their number one allegiance is. And I think that is a legitimate question. And I think the example you gave is a very good example of precisely that.

Now, having said that, there is only so much you can do in an amendment like this or in law, but you have an obligation to do what you can to try to clarify that. And as I understand it, the law currently is very ambiguous on this question.

There will be a lot of cases here and there that are either problematic or not problematic, but the law cannot be silent on it. And to the extent that you cannot solve every question, I think you are absolutely correct—and I agree with the example you gave about John F. Kennedy—that at the end of day, let's let the big questions be solved in the political realm. But what I think you cannot do is just leave it unsaid because it is a thorny issue there, and it has to be thought through. And there is a connection with this issue that points to larger questions of immigration reform. And I agree with you there, too. That should be part of a larger set of things that we do.

Senator DURBIN. I would invite the other two witnesses, if there is time, to respond to my question. Professor Amar? Professor Yinger? You have to turn your microphone on.

Mr. YINGER. First of all, I think Dr. Spalding and I have a fundamental disagreement. To me, it is an illusion to think that you can protect this country by the way you define these eligibility rules. Again, we have 12.8 million naturalized citizens, and most of them will never want to run for President. If they were allowed to run

for President and did, most of them would never get anywhere. And the idea that we can protect ourselves by keeping this barrier there or by manipulating it in some way I think is an illusion.

Mr. SPALDING. That is not my position.

Mr. YINGER. It is just as likely that somebody who was a natural born citizen could cause us trouble, and we have to have a system that is good enough to protect this country from candidates who will not serve us well, regardless of where they come from. So to me, the key principle here is that we should have—once somebody becomes a citizen, they should be treated like every other citizen. And it just doesn't make any sense to me to make a distinction.

Senator DURBIN. What about dual citizenship?

Mr. YINGER. Well, I think if somebody is a dual citizen, they would have a very tough time running for President. I do not see any reason to make that—

Senator DURBIN. You would trust the campaign, let the voters decide?

Mr. YINGER. Absolutely, I would.

Senator DURBIN. Professor—

Mr. YINGER. Also, just one other point to make. I think questions of immigration are obviously extremely important for this country. It is an enormous issue. But I think it is a totally separate issue. I think the issue here is we will have a debate about what rules are required for somebody to immigrate and to become a citizen, and that is a very important debate. But once we allow somebody to become a citizen, then we should treat them exactly equally with other citizens.

Senator DURBIN. Could Professor Amar response?

Senator CRAIG. Please.

Mr. AMAR. On the dual citizenship point, of course, that could be true even if someone was born in the United States who, because of his or her parents, is eligible for dual citizenship, just as someone born in the United States could move at a very early age, be educated abroad, not quite socialized into the American way of life, but under the existing rules be eligible so long as he or she then had 14 years continuous residence thereafter. So, one, the idea of 14 is it really achieves a certain kind of fundamental equality between naturalized and native born, and the dual citizenship, you see, can arise whether one is naturalized or native born.

Here is a great test, I think, because I share your general anxiety about just amending the Constitution willy-nilly. The more I study it and teach it, the more I respect it, even as I acknowledge and see its flaws.

There is a grand constitutional tradition that we are part of today, and it is best seen by seeing what the rules were before. The Constitution is a tremendous liberalization of what the immigration rules and the naturalization rules were before. Then we added a Bill of Rights. We freed the slaves and then made people equal citizens by birth, and then enfranchised black men and women and got rid of poll taxes and extended the franchise. So you would be, I think, with this amendment part of a grand—to use Madison's phrase—"liberalizing tradition," moving us toward greater freedom and equality in a way that some of these other proposals you see I think are actually counter to that extraordinary tradition.

Here is one other feature of the rules of eligibility. So 35 wasn't illiberal. It was actually about a quality and anti-dynasty. And look at what is not there. There is no religious qualification, since you mentioned the cap. At the time of the Constitution, 12 States have religious qualifications for office-holding. Twelve of the State constitutions have religious qualifications.

Senator DURBIN. It is an express prohibition against a religious rest.

Mr. AMAR. And no State constitution has that. That is a new idea, an amazing idea that is going to grow with the Establishment Clause and thereafter. Two of the guys up there on Mount Rushmore, two of the four, are members of no formal religious denomination, in a very religious country.

So this idea of general openness—that was actually really their idea and the natural-born thing was a particular concern about European monarchy and aristocracy, but theirs was an egalitarian republic.

Senator DURBIN. Thank you.

Senator CRAIG. Thank you very much.

Now, let us turn to the Senator from California, Senator Feinstein.

STATEMENT OF DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, and I want to thank that came to testify. I appreciate it very much. I am one that approaches this issue very reluctantly, and I want to spell it out, like Dr. Spalding to some extent. My mother was born in Russia. My father's parents were born in Poland and Lithuania, respectively. So I have the seeds of immigrants in my blood and in my being.

Essentially, what the Constitution means today is that my mother could not have run for President, but as improbable as it may seem, I can. So it essentially means that you skip a generation for an immigrant.

A while ago, I read a treatise by James Schlesinger entitled "The Disuniting of America," and from that I came to believe that there is this basic reserved right of birth as a major qualification for the presidency. It may not be a bad thing; it may be a strengthening thing. Dr. Spalding, I think in your paper you quote Alexander Hamilton, who makes that argument under the moniker of the safety of a republic, and he goes on to say that it depends essentially on the energy of a common national settlement, on a uniformity of principles and habits, on the exemption of the citizens from foreign bias and prejudice, and on the love of country, which will almost invariably be found to be closely connected with birth, education and family. To a great extent, I agree with that.

I think this amendment, if it receives two-thirds, will have a very hard time being adopted by three-quarters of the legislatures of the States. The Constitution here is very dispositive. Despite the arguments about concern at the time of a takeover by a foreign power, or that a member of the clergy be designated to come here and be, quote, "a king," end quote, they wrote the Constitution in a very specific way: "No person, except a natural-born citizen or a citizen of the United States, at the time of the adoption of this Constitu-

tion 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 35 years and been 14 years a resident within the United States."

Senator Craig and I go back and forth about the interpretation of the Second Amendment to the Constitution as it affects guns, and it has produced a lot of debate as to what it means. Here, in the text of the Constitution, there is no doubt about what it means.

Now, the question is does the fact that this is today a much more diverse country mean that we should remove that reserved right of birth to aspire to the presidency, a right of which very few people take hold. A minuscule number of people really want to aspire to the presidency. Does the right really serve some basic confirmation of American leadership as being related in the highest office to birth? I think those are worthy questions and I think we should not move precipitously.

Interestingly enough, coming from the State of the person that is now governor who is generally at least accorded the popularity of this, I have never had anybody approach me and say, oh, you must do this, you know, it is so important.

So I have read your papers and I have read your examples and I appreciate it. I am just reluctant. I suppose I am reluctant because I am not sure it is damaging to go through that first generation of missing that right of aspiration to the highest office of the land, to which so few really aspire, and that in terms of the common good of the general electorate, that right doesn't create a burden which is a healthy burden because it connotes with it a deeper responsibility.

The diaspora of immigrants is a very broad one now, as you know. In my State, we have a lot of immigrants and many do not aspire to learn English; many do not aspire to want to be anything other than what they are, which is fine. They can do that. But in the event of the presidency, that reserved right in the Constitution of birth I don't think we can easily dispense with because it is so dispositively written in the Constitution.

So I would like you to come back at me with arguments, and let's begin with Dr. Amar.

Mr. AMAR. Thank you very much, Senator. I grew up in Walnut Creek and remember well from the very beginning admiring your courage and leadership on so many issues.

Senator FEINSTEIN. Thank you.

Mr. AMAR. I think that Professor Yinger put his finger on a very interesting word in the Constitution that isn't much emphasized in the amendments. It is in the 14th Amendment, it is the first sentence, and it is that all persons born or naturalized in the United States are citizens.

So there is this deep idea—we tend to focus on later words in the 14th Amendment about equal protection, but even before we get to those later words, there is a very powerful idea of birthright equality in the document. And for me, that idea of everyone born is born equally helps explain why the 14th Amendment isn't just about race. It is about people, male and female, being born equal, and rich and poor being born equal, and Jew, Gentile and Catholic and everything else being born equal.

So I think there is a certain kind of unenlightenment aspect to assigning people a fixed status by dint of their birth; you can't do it just by the conditions of your birth. And the 14th Amendment which Professor Yinger invoked-I think that word "born" is underattended to. I want to emphasize it because I explain to my students it helps show why the 14th Amendment way before the 19th was all about women's equality.

Way before the Supreme Court had begun to talk about equal protection applying to women, which wasn't until I graduated from high school that the Supreme Court started to talk that way, that word "born" actually suggests that it is more than just about race. It is about a much bigger idea.

The only other thing I might mention is, as Congressman Frank, I think, mentioned in his remarks, we might not want to think about not just the aspirations and the interests and the inclinations of a few people who might run or even what kids think about on the playground and how they understand themselves, but the rights of the voters themselves to make ultimately the decision. Congressman Frank said why don't we trust the voters to weigh that birth situation along with many other factors in making a decision about who we trust most.

Senator FEINSTEIN. Thank you.

Anybody else want to take a crack at it? Dr. Spalding.

Mr. SPALDING. Yes, thank you, Senator. I am actually from the Central Valley of California, so I am actually very interested in experience with these issues.

Senator FEINSTEIN. Two out of three. That is pretty good.

Mr. SPALDING. This question is an anomaly. Just read the Declaration of Independence: "All men are created equal." This idea of a starting point of equality, I think, is extremely important, but I want to emphasize that if you decide to pursue this change, which is extremely difficult, I believe it is necessary to at least consider and replicate what is a legitimate concern that the Founders talked about, which is that it is not the physical notion of being born here, but it is the idea that you are attached from birth, you know no other allegiance, that has a natural effect.

An immigrant comes here. This means, obviously, no disrespect, and there are cases where this is not the case, but the presidency, I think—I want to say this differently. It wasn't just about monarchy; it was about this attachment issue.

Lastly, I think in the earlier panel this clause was referred to as invidious discrimination. That is not the case. They had a very reasonable and rational reason for thinking this through, and you have got an obligation to do that now. This is not an easy question, but again I think that the presidency—in this day and age, given the power and the authority especially in security affairs, you have got to think this through.

When it comes down to it, when that decision has to be made, you have got to have that confidence in the person. The natural sense of elections can play a lot of this out. I am very confident in that, but if you take this notion of equality too far, then you have got to get rid of age requirements. What about some guy who is 35 who is really sharp? What about this, what about that?

Your job as legislators is to make reasonable rules of a framework that allows republican government to flourish. That is what this is about. You are defining the standard, the bar, if you will, and you have got a responsibility to make sure that bar is set correctly.

Senator FEINSTEIN. Thank you.

Mr. YINGER. I, too, am someone who is a fervent admirer of our Constitution and does not believe in amending it lightly. I would like to point out several things about this case.

The first one is that the historical record on this particular clause is incredibly thin. There is not a word in the records of the Constitutional Convention about why they added the natural-born citizen clause. In fact, there is a lot of evidence, as I have in my longer testimony, that they were very nervous about that kind of restriction. And it is true that skilled historians, including other people on this panel, can explain that there are themes floating around that this is very consistent with and that it makes sense that this was linked to that.

But the Founders did not have a clear argument that this provision does "x" for us. From my reading of the records of the Constitutional Convention, it seems much more likely that it was a last-minute compromise and a whole series of compromises that was designed to assuage some of the people who had the strongest fears about foreign influence. But there is certainly nothing in the historical record that makes a clear argument, here is what this provision does.

The second point I would make is, again, I think it is not really the case that we can protect ourselves through provisions like this. There are all kinds of ways that Presidents might not serve the interests of this country, and most of the ways don't have anything to do with where they are born. We have to have a very strong system, which the Founders gave us and has been improved over time, a very strong system for trying to identify people who will act in the Nation's best interest.

The idea that somehow we can take one subset of them and come up with a criteria for eliminating people who would be disloyal, I think, is really an illusion. Again, there are 12.8 million naturalized citizens, and the idea that some rule or other to identify which ones of those might be loyal and which not is, I think, just not going to work.

To me, I think a much clearer way to think about it is to say we have been struggling to get a principle of equal rights for our citizens. Here is an example where, for complicated and hard-to-pin-down historical reasons we have an exception. We can't find any reason to support the exception today. It doesn't serve any purpose, it doesn't give us any protection. It may make us feel good, but it doesn't really give us any substantive protection, and let's just get rid of it. It is a very small change in the Constitution. It makes the Constitution consistent.

The 14th Amendment doesn't just say "born"; it says "burn and naturalized in the United States." It says very clearly we should not treat people who are naturalized any differently. It is right in the Constitution. It contradicts this provision, and yet we allow the Federal Government to maintain this one discrimination against

naturalized citizens when we have rejected it for the States and we reject it in every other case. It is much more consistent to just get rid of it.

Senator FEINSTEIN. Thank you, all of you. Thank you very much.

Senator CRAIG. Thank you.

I have one last question to ask of you, and I think it is appropriate to say for those of us who have attempted to be students of the Constitution and the period of time in which it was created, it has grown to be viewed as a very principled document with contradictions. But at the time, it was also a very political document; it had to be to be ratified. Oftentimes, we forget the politics that spiraled around it during its time of creation and ratification.

My good friend from Oklahoma, Don Nickles, has suggested an alternative approach to this issue. As you know, Senator Nickles has offered legislation that would statutorily define "native-born citizen" to include anyone who receives citizenship or birth by virtue of their parents' citizenship or was adopted by the age of 18 by American parents who are otherwise able to transmit citizenship.

So my question to all of you would be what is your view of this approach? Do you believe it is constitutionally sound? Is there any reason not to pursue both approaches, both statutorily to resolve or to define, and then constitutionally to take the ultimate question away that is so clearly put within the Constitution?

Gentlemen?

Mr. AMAR. It is an extraordinarily generous provision. One side might call it a liberal provision,another side might call it a compassionate provision, but it is an idea with a very big heart. There are some real questions about whether it might ever get litigated or it might be non-justiciable, and if it were litigated, the argument would be you are reading out of the Constitution the word "born." You are supposed to be born a citizen and some people aren't on the day of their birth citizens, and this creates sort of a retroactive citizenship.

The counter would be that, yes, it is a kind of a legal fiction to treat adopted kids as legally identical to natural-born, to biological offspring, but we do it in other parts of the law. We try to treat them equally. And it is a legal fiction again that is motivated by a spirit of generosity, and courts should accord some deference to Congress when it is defining ambiguous provisions.

If I were trying to defend it in court, one could even make a formalistic argument that, well, perhaps actually the statute confers on everyone in the world an imperfect or inchoate American citizenship at the time of their birth that is only perfected if and when they happen to be adopted.

So I can imagine clever lawyerly arguments, and I might feel comfortable making some of those because I think it is such a generous provision. But who knows what some future five out of nine Justices would do with it? You could have both approaches, though, going together, and one idea might be that the statute helps create a public face, a reason for generosity that people see and that might actually also help them see how the statute doesn't fully fix the problem. It is a partial fix only for certain adopted kids, so maybe we need the constitutional amendment to fully fix it.

But the two might actually synergistically go together to help because the Constitution is so difficult to amend, give it a public and innocent, rather than, oh, this is to help some existing politician right now who wants to be President or something.

Senator CRAIG. Comments, Dr. Spalding?

Mr. SPALDING. I agree with everything Professor Amar said. Two things I would add to that. One is I would go back and look at the Naturalization Act of 1790 that included the Framers. They passed legislation there that said children of citizens of the United States beyond the sea. They seemed to think that this was within their powers in Congress and this was needed to be addressed. So there clearly is something there, and I don't think it has been fully fleshed out yet and I think that that is something that ought to be done.

Secondly, I think there is this notion coming out of the Child Citizenship Act of 2000 about adoptees. The law already does that. I think if you want to address these problems, one thing you do is to see whether it can be done legislatively, and given the difficulty of amending the Constitution, you should go down that avenue. These things aren't contradictory. You could do both. A legislative approach would help the constitutional approach.

One thing I would add is I am a general proponent of Congress asserting its authority to the court; that is to say that the one way you will not have any authority in this matter is if you do nothing. The one way you might have authority is if you assert it, and there is a precedent, I think, to look at the court giving deference to Congress. Congress has plenary authority over naturalization and there is something called *Chevron* deference by which the court gives deference to the body that clearly has authority, and I think it could be applied in this case.

Senator CRAIG. Thank you.

Mr. YINGER. I would like to second the remarks of the other people on the panel. I would just like to add, when I started this I was motivated in part because of my personal interest and I thought that trying to fix the situation—

Senator CRAIG. There is nothing wrong with that passion.

Mr. YINGER. Well, that is an important part of many public policy debates, I know.

I was at first concerned with adopted orphans, particularly, but I have come to believe that the issue is a broader one, and so I think that this is an issue where many approaches should be tried. Because of the difficulty with a constitutional amendment, I think the legislative approach is a very good one to try. But I also believe that it is only a partial fix to the broader problem of equal rights.

Senator CRAIG. Well, gentlemen, we thank you very much for your participation and your contribution to what is a fascinating debate and a very poignant issue that I think future Congresses are going to ultimately want to address for many of the reasons you have spoken to.

I would like to submit for the record an article referenced in Senator Hatch's opening statement, as well as some additional articles on this topic. We will keep the record open for a week for any written questions or additional information.

With that, the Committee will stand adjourned.

[Whereupon, at 11:58 a.m., the Committee was adjourned.]
[Submissions for the record follow.]
[Additional material is being retained in the Committee files.]

SUBMISSIONS FOR THE RECORD

Testimony Before the Senate Committee on the Judiciary
October 5, 2004
By Akhil Reed 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 about the history of the Constitution, I respectfully request that the relevant pages of that book—pages that 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, unAmerican. 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 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, 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.

Seven of the thirty-nine signers of the Constitution at Philadelphia were foreign-born, as

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

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 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. 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.

STATEMENT OF REP. JOHN CONYERS, JR.
Senate Committee on the Judiciary
Hearing on Foreign Born President Amendments
226 Dirksen Senate Office Building
10 AM, Tuesday, October 5, 2004

I am here to support amending the Constitution to permit foreign born citizens to seek the presidency. I believe that no citizen should be denied the opportunity to seek the nation's highest office. I have spent my entire life fighting for equal rights, and I think there is no reason that we should differentiate between our citizens when it comes to the ability to seek elected office.

As you know, Article II of the Constitution provides that only natural-born citizens are entitled to hold the Office of President. I believe this limitation now contradicts the principles for which this country stands. This nation prides itself on its diversity of culture, experience, and opinion. This quality is achieved only by welcoming immigrants to this country, allowing them to become citizens, and enabling them make full contributions to society.

I believe that it is the American dream to have the ability to run for president. Every citizen of this country would like to be able to look in their child's room at night and believe that one day they too can grow up to be president.

It is important to point out that the distinction between natural born and foreign born citizens is unique, unwarranted, and antiquated in our country. In every other respect, the United States treats its citizens, those natural-born and foreign-born, the same. By having this one limitation, we are denying ourselves exemplary leaders. In fact, some foreign-born citizens are our country's greatest public servants, including two sitting governors, two current cabinet members, and two recent secretaries of state.

There also are 700 foreign-born citizens who have received the Medal

of Honor and more than 12.5 million foreign borne citizens who are ineligible to seek the presidency. A 2002 Pentagon study reports that more than 30,000 foreign-born citizens are currently serving in the U.S. military. Allowing the United States to be a better country because of the contributions that foreign-born citizens make, and then not allowing them to fully participate in all aspects of society, is un-American.

I realize that constitutional amendments are rare and that those proposed should be subject to great scrutiny. I, for one, truly respect our Constitution and am hesitant to see it amended. Therefore, it is after great consideration and with the utmost gravity that I introduced my own amendment.

I am hopeful that my colleagues in Congress will properly consider the amendment and realize that every citizen of the United States should be entitled to dream of becoming President.

Statement of Senator Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on

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

Good morning and welcome to the Senate Judiciary Committee's hearing entitled Maximizing Voter Choice: Opening the Presidency to Naturalized Americans.

A few weeks ago, we celebrated Citizenship Day. The purpose of this holiday is to honor those people who have become United States citizens.

Citizenship, whether by birth or naturalization, is the cornerstone of this nation's values and ideals. Each year, hundreds of thousands of immigrants complete the naturalization application process to become citizens. In 1996 alone, there were over one million new citizens naturalized in America. And according to the Department of Homeland Security, approximately 20 million individuals have become naturalized citizens in this country since 1907.

The United States is known as the land of opportunity, but there is one opportunity that these American citizens will never be able to attain under current law. They can never hold the office of the President. Article 2, Section 1, Clause 5 of our Constitution, which sets forth the eligibility criteria for the Office of the President, requires a President to be a natural born citizen.

What is a natural born citizen? Clearly, someone born in the United States or one of its territories is a natural born citizen. But a child who is adopted from a foreign country to American parents in the United States is not eligible for the presidency. That does not seem fair or right to me.

Similarly, it is unclear whether a child born to U.S. servicemen overseas would be eligible. Most academics believe that these individuals would be eligible for the Presidency, but I note that some academic scholars disagree. A recent article in Green Bag, a journal that specializes in Constitutional law, quotes an 1898 Supreme Court case that the natural born citizen clause "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."

I have proposed a constitutional amendment, S.J. Res. 15, to address this issue. The Equal Opportunity to Govern Amendment would amend the Constitution to permit any person who has been a United States citizen for at least 20 years to be eligible for the Presidency.

As Boise State University Professor John Freemuth explained, the natural born citizenship requirement is something of an artifact from another time. It is time for us – the elected representatives of this nation of immigrants -- to begin the process that can result in removing this artificial, outdated, unnecessary and unfair barrier. While there was scant debate on this provision during the Constitutional Convention, it is apparent that the decision to include the natural born citizen requirement in our Constitution was driven largely by the concern over 200 years ago that a European monarch might be imported to rule the United States.

This restriction has become an anachronism that is decidedly un-American. Consistent with our democratic form of government, our citizens should have every opportunity to choose their leaders free of unreasonable limitations. Indeed, no similar restriction bars other critical members of the government from holding office, including the Senate, the House of Representatives, the United States Supreme Court, or the President's most trusted cabinet officials.

The history of the United States is replete with scores of great and patriotic Americans whose dedication to this country is beyond reproach, but who happen to have been born outside of our borders. These include former secretaries of state Henry Kissinger and Madeline Albright, the current Secretary of Labor Elaine L. Chao, and former Secretary of Housing and Urban Development Mel Martinez, who is now running for a Senate seat in Florida. As our Constitution reads today, none of these well-qualified, patriotic United States citizens could be a lawful candidate for President.

As Congressman David Dreier has stated: The Constitution limits us from having the opportunity of choosing someone who's a bold, dynamic, dedicated leader for our country.

Michigan Governor Jennifer Granholm, who was born in Canada, also supports this amendment. She explained: You can't choose where you are born, but you can choose where you live and where you swear your allegiance.

This is also true for the more than 700 immigrant recipients of the Congressional Medal of Honor – our nation's highest decoration for valor – who risked their lives defending the freedoms and liberties of this great nation. But no matter how great their sacrifice, leadership, or love for this country, they remain ineligible to be a candidate for President. This amendment would remove this unfounded inequity.

Any proposal to amend the Constitution is not one I take lightly. But I believe that amending the Constitution in this instance would facilitate the democratic process by giving the American voters more choice in determining who should be elected as President of the United States. As Professor John Yoo, from Boalt Hall, told the Los Angeles Times: Making naturalized citizens eligible to become president would fall within the tradition of amending the Constitution to expand democracy, whether it be expanding the franchise or making elected representatives more directly elected.

My proposal is already garnering bipartisan support. Several senators have publicly expressed support for a constitutional amendment in statements made to the media over the last several months. In addition, we are fortunate to have with us today, a panel of six distinguished members of Congress to discuss various proposals in the Senate and the House that would maximize voter choice for the Presidency. I look forward to hearing from them and from our academic experts on Panel 2.

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Hearing on "Maximizing Voter Choice: Opening the Presidency to Naturalized Americans"
October 5, 2004

This hearing addresses a topic that future Congresses may well consider seriously. Whether it continues to make sense in 21st century America to allow only "natural born citizens" to be elected President is certainly open to serious debate, and I welcome the views of the witnesses who will be testifying today, particularly my House counterpart John Conyers. Indeed, I believe this amendment is far worthier of consideration than the amendments the Chairman has made a priority during this Congress – the Federal Marriage Amendment and the Flag Desecration Amendment.

At this late date in the 108th Congress, however, it is clear that we will not be adopting any Constitutional changes that we are only now beginning to discuss and debate. Meanwhile, this Committee has completely ignored the pressing matter of voter access in the elections that will be held just four weeks from today. I had suggested to the Chairman that we use this hearing date to examine the allegations of voter suppression that have been raised from Florida to South Dakota to Michigan. That would have proved a more useful endeavor by allowing this Committee to exercise its oversight over the Justice Department's Civil Rights Division to ensure that its commitment to ensuring free access to the polls has not been eroded by partisan calculation. That suggestion was ignored, and we will instead focus on an issue that at the earliest would affect the Presidential election of 2008.

Since there will apparently not be an opportunity in this Committee to address voting issues before the election, I would like to take this opportunity to state some of my concerns for the record. Sadly, this Committee has done nothing during this Congress to protect the voting rights of all Americans. In this Congress and the last, we have seen the Chairman of the Committee and the Majority Leader offer floor amendments to extend the Voting Rights Act, which is slated to expire in 2007. On both occasions, those amendments were withdrawn after I and others argued that it would be deeply irresponsible to extend the VRA without building a record to support that step. Indeed, such cursory treatment of the VRA would practically invite the Supreme Court to invalidate the law.

One might think that after Republican VRA extension amendments twice had to be withdrawn on the same grounds, this Committee might at least have held hearings on the issue. Despite my repeated requests, however, such a hearing was never held.

It is thus hard to avoid the conclusion that the amendments offered by Senators Hatch and Frist were anything more than an empty gesture offered as political show.

Meanwhile, we have done nothing to investigate whether conditions for the upcoming election are fair, despite this Committee's clear interest in and oversight of compliance

with the Voting Rights Act. We see almost daily press reports about questionable activities by both Federal and State law enforcement officials that threaten the ability of minority group members to participate fully on November 2. People for the American Way has released an excellent report entitled "The Long Shadow of Jim Crow," detailing the curtailment of voting rights across the country in recent years. (I would like to place a copy of this report in the Record.) We have read that the Justice Department has placed a great and unprecedented emphasis on "voter integrity," which has all too often in the past been a euphemism for suppressing the votes of your opponent.

At the same time, the *New Yorker* has reported that a leading official at the Civil Rights Division, traditionally the protector of voting rights, has publicly suggested that the Justice Department should leave its voter access mission to volunteers and concentrate on "integrity" instead. I suppose this should come as no surprise, since that official – Hans von Spakovsky – came to the Justice Department with a lengthy background in the "voting integrity" movement. In addition to membership in the Federalist Society, a virtual requirement for lawyers holding senior positions in the Bush Administration, von Spakovsky served on the board of directors for the so-called Voting Integrity Project. He also wrote an article for the Georgia Public Policy Foundation urging the sort of aggressive approach to purging felons from the voting rolls that worked so disastrously in Florida in 2000. Indeed, the Voting Integrity Project worked on the design of Florida's 2000 effort. It should probably go without saying that Mr. von Spakovsky also worked for the Bush campaign as a volunteer during the Florida recount.

While the Justice Department increases its focus on "voting integrity," President Carter publicly expressed his fear last week in *The Washington Post* "that a repetition of the problems of 2000 [in Florida] now seems likely." He decried the "highly partisan" Florida voting officials, the absence of paper ballot printouts for voters, and the lack of uniformity in voting procedures throughout the State. Of course, this last problem provided the justification for the Supreme Court's 5-4 ruling in *Bush v. Gore* awarding Florida's electoral votes, and thus the election, to President Bush. One wonders whether the Court's concern about this issue continues.

There is an explicit racial element to the problems in Florida that cries out for this Committee's attention. First, even after the felon purge in 2000, Florida election officials developed a purge list this year that included as alleged felons 22,000 African Americans, who generally vote for Democratic candidates, but only 61 Hispanics, a much friendlier ethnic group for Republicans in Florida. The list was discarded only after a judge ordered it to be made public at the request of CNN, Senator Bill Nelson, and others.

Second, according to *The New York Times*, Florida state troopers launched an investigation of alleged absentee ballot irregularities among elderly black voters in a March 2003 Orlando election. Armed officers visited the homes of dozens of voters, many of whom are members of the Orlando League of Voters, an African-American group encouraging civic participation. The investigation continued into August even though the Florida Department of Law Enforcement found in May that "there was no basis to support the allegations of election fraud." These reports have led many to

conclude that voter intimidation may be occurring in the state that decided the 2000 election and may well decide this one as well.

The problems facing minority voters are not limited to Florida. In Michigan, a Republican state legislator has spoken openly about the need to suppress the vote in Detroit, a city that is more than 80 percent African American. In South Dakota in June, Native Americans were not allowed to vote because they did not have photo identification, which was required under neither state nor Federal law.

There are so many issues that could give rise to a divisive and harmful national dispute following the election that it only makes sense to give them full airing now. Instead, we are devoting one of the year's final hearings to a topic that, however worthy, could as easily and valuably be held next year.

Today the Senate Judiciary Committee, in conjunction with the Secretary of the Senate's office, is providing closed-caption coverage of this hearing, under a pilot program that uses voice recognition technology, which is new to the Senate. The Judiciary Committee is proud of its groundbreaking role in testing this technology for the Senate. This pilot program will help the Committee and the Senate in reaching conclusions about the effectiveness of voice recognition technology and the feasibility of its use for our and for other committees, in ways that can expand access to our proceedings to those who are hearing impaired, as well as to others.

To help the Secretary of the Senate evaluate this project and its possible extension throughout the Senate, we invite all Senators and their staff to watch this hearing on Senate Channel 13 and to email their comments about the usefulness of this voice recognition technology us at this address: ccpilot@sec.senate.gov. The address again is: ccpilot@sec.senate.gov. Thank you.

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TESTIMONY OF SENATOR DON NICKLES
Before the Senate Committee on the Judiciary
October 5, 2004

Thank you Mr. Chairman for holding this hearing today on the topic of who should be eligible to run for president of our country. This topic is very timely and appropriate in the midst of a presidential election. As you know, our Constitution states that "no person except a "natural born citizen" shall be eligible to seek the Office of the President. For years legal scholars have debated what the founders meant by the term "natural born citizen". Does it mean only children born within the boundaries of the United States? Does the term include within its scope children born abroad to a U.S. citizen? If so, does it include only children born abroad to a U.S. citizen who is serving in the military or employed by our government overseas? Or does it also include a child born abroad to a U.S. citizen simply living or working abroad? Could it include a child born abroad but adopted by a U.S. citizen? It is time that we put an end to these speculations.

On February 25, 2004, I introduced The Natural Born Citizen Act along with my colleagues Senator Landrieu and Senator Inhofe. This bill defines the term "natural born citizen" as used in the Constitution as a child born in the United States, a child born abroad to a U.S. citizen, and a child born abroad and adopted by a U.S. citizen. If passed, this bill would put an end to the speculation and clarify who is eligible to run for president of our great country.

I know this bill does not go as far as some on this Committee would like. I know Mr. Chairman that you have a bill that proposes to amend the Constitution to allow any person who has been a citizen for 20 years to run for President. Amending the Constitution is a long and arduous process. Those who wish to pursue a constitutional amendment should do so, but in the mean time, we should at minimum make clear who is eligible to run for President under the current language of the Constitution. My bill accomplishes this by simply defining by statute the term "natural born."

It is clear that a child born within the physical borders of the United States and subject to the jurisdiction of the United States is eligible to run for President. However, many Americans would probably be surprised to learn that a constitutional question remains as to whether children born abroad to a U.S. citizen serving in the military or serving at a Government post are not

clearly, indisputably, eligible to seek the highest office in our land. Nor is it clear whether a child born overseas to a citizen traveling or working abroad is eligible to run for President. There are strong legal arguments that say these children are eligible to run for President, but it is certainly not an inarguable point. The Natural Born Citizen Act would make it clear that these children would be considered "natural born" citizens within the meaning of the Constitution.

In addition to these children of American citizens being eligible to run for President, my bill also defines "natural born" to include children born abroad and adopted by a U.S. citizen. Such a child would have to be adopted by the age of 18, by a U.S. citizen who is otherwise eligible to transmit citizenship to a biological child pursuant to an Act of Congress. In other words, some citizens are ineligible to transmit citizenship to a biological child born abroad because of a failure to meet certain statutory criteria such as having lived in the U.S. for 5 years, two of which had to be after the age of 14. My bill does not seek to give any special treatment to adopted children over biological children born abroad. It simply seeks to treat biological and adopted children of American citizens equally.

As many of you will recall, we passed the Child Citizenship Act of 2000, which provided automatic U.S. citizenship to foreign adopted children. Under this Act which was signed into law on October 30, 2000, the minute these children arrive in the United States, citizenship attaches automatically. There is no naturalization process that these foreign adopted children have to go through. Once they are fully and finally adopted and enter the U.S. with their parents, they are deemed by law, to be U.S. citizens.

It can be argued that this citizenship is retroactive to birth. But regardless, under adoption law, once a child is fully and finally adopted they are entitled to all the same rights, duties and responsibilities of a biological child born to the same parent. They are to be treated as "natural issue" of their adoptive parents. All blood ties are severed from their biological families. In fact, the adopted child is issued a new birth certificate with the adoptive parents listed as the birth parents of that child. If we are to ensure true equality to children born or adopted abroad by U.S. citizens then it is imperative that foreign adopted children be fully eligible to seek the American dream – to grow up to do or be whatever they want to be including President of the United States.

It only makes sense that children born abroad and adopted by a U.S. citizen parent or parents be eligible to run for President. They are raised in America by American parents. They are as much a product of American culture and values as a biological child born to such parents. These children are no less loyal to America. They are not any less of a citizen than any other American. And they should be no less eligible to be president than any other American child. It is the last inequality left in the treatment of our foreign adopted children. This inequality needs to be removed permanently.

The Constitution also requires that the president have resided in the United States for fourteen years. This provision shows us that the framers believed that the president need not spend his whole life in the United States. It is possible for a person to reside in another country for a time and still be eligible to be President of the United States. So it follows that an American child born or adopted abroad should be just as eligible to be president as any child born in the United States that happens to reside abroad for a time.

Over my years as a senator, my office has received letters and inquiries from many foreign adopted children and their families seeking a change in the law to allow them to pursue the office of President of the United States. The Natural Born Citizen Act would accomplish this goal as well as remove any doubt that biological children born abroad to a U.S. citizen is eligible to run for President. This bill ensures that children born to or adopted by American parents abroad have claim to the full meaning of the American dream. That not only can they have the freedom to speak, the freedom to worship in any style they wish, the freedom to own a home and pursue happiness, but that they can also have the freedom to choose to serve our country as Commander in Chief.

Again, I thank the Chairman for having this hearing and I ask my Colleagues here today to join with me in support of this bill to make America truly the land of opportunity for all its citizens' children whether born here, born abroad or adopted abroad.

SPECIAL REPORT

THE LONG SHADOW OF JIM CROW

Voter Intimidation and Suppression in America Today

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The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today

Overview

In a nation where children are taught in grade school that every citizen has the right to vote, it would be comforting to think that the last vestiges of voter intimidation, oppression and suppression were swept away by the passage and subsequent enforcement of the historic Voting Rights Act of 1965. It would be good to know that voters are no longer turned away from the polls based on their race, never knowingly misdirected, misinformed, deceived or threatened.

Unfortunately, it would be a grave mistake to believe it.

In every national American election since Reconstruction, every election since the Voting Rights Act passed in 1965, voters - particularly African American voters and other minorities - have faced calculated and determined efforts at intimidation and suppression. The bloody days of violence and retribution following the Civil War and Reconstruction are gone. The poll taxes, literacy tests and physical violence of the Jim Crow era have disappeared. Today, more subtle, cynical and creative tactics have taken their place.

Race-Based Targeting

Here are a few examples of recent incidents in which groups of voters have been singled out on the basis of race.

- Most recently, controversy has erupted over the use in the Orlando area of armed, plainclothes officers from the Florida Department of Law Enforcement (FDLE) to question elderly black voters in their homes. The incidents were part of a state investigation of voting irregularities in the city's March 2003 mayoral election. Critics have charged that the tactics used by the FDLE have intimidated black voters, which could suppress their turnout in this year's elections. Six members of Congress recently called on Attorney General John Ashcroft to investigate potential civil rights violations in the matter.

- This year in Florida, the state ordered the implementation of a "potential felon" purge list to remove voters from the rolls, in a disturbing echo of the infamous 2000 purge, which removed thousands of eligible voters, primarily African-Americans, from the rolls. The state abandoned the plan after news media investigations revealed that the

2004 list also included thousands of people who were eligible to vote, and heavily targeted African-Americans while virtually ignoring Hispanic voters.

- This summer, Michigan state Rep. John Pappageorge (R-Troy) was quoted in the *Detroit Free Press* as saying, "If we do not suppress the Detroit vote, we're going to have a tough time in this election." African Americans comprise 83% of Detroit's population.

- In South Dakota's June 2004 primary, Native American voters were prevented from voting after they were challenged to provide photo IDs, which they were not required to present under state or federal law.

- In Kentucky in July 2004, Black Republican officials joined to ask their State GOP party chairman to renounce plans to place "vote challengers" in African-American precincts during the coming elections.

- Earlier this year in Texas, a local district attorney claimed that students at a majority black college were not eligible to vote in the county where the school is located. It happened in Waller County - the same county where 26 years earlier, a federal court order was required to prevent discrimination against the students.

- In 2003 in Philadelphia, voters in African American areas were systematically challenged by men carrying clipboards, driving a fleet of some 300 sedans with magnetic signs designed to look like law enforcement insignia.

- In 2002 in Louisiana, flyers were distributed in African American communities telling voters they could go to the polls on Tuesday, December 10th - three days *after* a Senate runoff election was actually held.

- In 1998 in South Carolina, a state representative mailed 3,000 brochures to African American neighborhoods, claiming that law enforcement agents would be "working" the election, and warning voters that "this election is not worth going to jail."

Recent Strategies

As this report details, voter intimidation and suppression is not a problem limited to the southern United States. It takes place from California to New York, Texas to Illinois. It is not the province of a single political party, although patterns of intimidation have changed as the party allegiances of minority communities have changed over the years.

In recent years, many minority communities have tended to align with the Democratic Party. Over the past two decades, the Republican Party has launched a series of "ballot security" and "voter integrity" initiatives which have targeted minority communities. At least three times, these initiatives were successfully challenged in federal courts as illegal attempts to suppress voter participation based on race.

The first was a 1981 case in New Jersey which protested the use of armed guards to challenge Hispanic and African-American voters, and exposed a scheme to disqualify voters using mass mailings of outdated voter lists. The case resulted in a consent decree prohibiting efforts to target voters by race.

Six years later, similar "ballot security" efforts were launched against minority voters in Louisiana, Georgia, Missouri, Pennsylvania, Michigan and Indiana. Republican National Committee documents said the Louisiana program alone would "eliminate at least 60- 80,000 folks from the rolls," again drawing a court settlement.

And just three years later in North Carolina, the state Republican Party, the Helms for Senate Committee and others sent postcards to 125,000 voters, 97 percent of whom were African American, giving them false information about voter eligibility and warning of criminal penalties for voter fraud - again resulting in a decree against the use of race to target voters.

Historical Perspective

This report includes detailed accounts of the recent incidents listed above, and additional incidents from the past few decades. The report also lays out a historical review of more than a hundred years of efforts to suppress and intimidate minority voters following emancipation, through Reconstruction and the "Second Reconstruction," the years immediately following the passage of the Voting Rights Act.

The 1965 Voting Rights Act was among the crowning achievements of the civil rights era, and a defining moment for social justice and equality. The stories of the men and women who were willing to lay down their lives for the full rights of citizenship, including first and foremost the right to vote, are the stuff of history.

Their accomplishments can never be erased. Yet as this report details, attempts to erode and undermine those victories have never ceased. Voter intimidation is not a relic of the past, but a pervasive strategy used with disturbing frequency in recent years. Sustaining the bright promise of the civil rights era, and maintaining the dream of equal voting rights for every citizen requires constant vigilance, courageous leadership, and an active, committed and well-informed citizenry.

The Challenges of the 2004 Election and Beyond

The election problems in Florida and elsewhere that led to the disenfranchisement of some four million American voters in 2000 elections cast a harsh spotlight on flaws in our voting system, problems that involved both illegal actions and incompetence by public officials, as well as outdated machines and inadequate voter education. As

election officials nationwide struggle to put new voting technology into place, redesign confusing ballots and educate voters, the opportunities for voter intimidation and suppression have proliferated along with opportunities for disenfranchisement caused by voter confusion and technical problems.

With widespread predictions of a close national election, and an unprecedented wave of new voter registration, unscrupulous political operatives will look for any advantage, including suppression and intimidation efforts. As in the past, minority voters and low-income populations will be the most likely targets of dirty tricks at the polls.

Voter Intimidation in Recent Years

Voter intimidation and suppression efforts have not been limited to a single party, but have in fact shifted over time as voting allegiances have shifted. In recent decades, African American voters have largely been loyal to the Democratic Party, resulting in the prevalence of Republican efforts to suppress minority turnout. Those efforts have also been extended in recent years to Latino communities.

During the 2003 mayoral election in Philadelphia, fully seven percent of a poll of 1000 African American voters described troubling experiences at the polls. Men with clipboards bearing official-looking insignia were reported at many precincts in African American neighborhoods.

Tom Lindenfeld, who ran the counter-intimidation campaign for Democratic candidate John Street, said this deployment included a fleet of 300 cars that featured decals closely resembling those of federal law enforcement agencies, such as the Drug Enforcement Agency and the Bureau of Alcohol, Tobacco and Firearms. Many prospective voters reported being challenged for identification by such workers. Lindenfeld told reporters from the *American Prospect* that "What occurred in Philadelphia was much more expansive and expensive than anything I'd seen before, and I'd seen a lot."[1]

In fact, the scope of such efforts during the past two decades is startling. Based primarily on reports gleaned from newspapers across the nation, there have been documented instances of the following:

- Challenges and threats against individual voters at the polls by armed private guards, off-duty law enforcement officers, local creditors, fake poll monitors, and poll workers and managers.
- Signs posted at the polling place warning of penalties for "voter fraud" or "non-citizen" voting, or illegally urging support for a candidate.
- Poll workers "helping" voters fill out their ballots, and instructing them on how to vote.

- Criminal tampering with voter registration rolls and records.
- Flyers and radio ads containing false information about where, when and how to vote, voter eligibility, and the false threat of penalties.
- Internal memos from party officials in which the explicit goal of suppressing black voter turnout is outlined.

A Republican effort in New Jersey in 1981 provided a model that was repeated across the country in the last two decades. The Republican National Committee and the New Jersey Republican State Committee engaged in a "concerted effort to threaten and harass black and Hispanic voters"[2] via a "ballot security" effort. It involved widespread challenging of individual voters and an Election Day presence at African American and Latino precincts featuring armed guards and dire warnings of criminal penalties for voting offenses. A legal challenge eventually led to a court order and an agreement by the GOP groups not to employ such intimidation tactics.

But such tactics persist, as the incidents cited below, most recent first, attest:

2004

In **Kentucky**, Jefferson County Republican chair Jack Richardson[§] announced plans to put challengers in predominantly Democratic precincts for the November elections. The party had executed a similar plan in 2003, drawing protests from civil rights leaders and local Democrats who claimed that African American precincts were being targeted.[3]

In 2004, the move also sparked protests from a group of Republicans, who described the challenger plan as "rogue and racist behavior" and called for Richardson to resign. The group included many African American Republicans. State Senate candidate Ron Burrell explained that he felt his outreach efforts to young African American voters had been harmed. Mary Hardin, a veteran GOP poll worker, expressed anger that, in 2003, she had been replaced by a white Republican who did not live in the area. Hardin said she had visited several precincts that day in western Louisville and was surprised to find white Republicans in almost all of them. A campaign spokesman for Louisville Republican Rep. Anne Northrup did not call for Richardson's resignation, but did respond to the issue of challengers in a statement: "In every precinct we need two good Democrats and two good Republicans to work the polls as the law prescribes. We do not need challengers."[4]

In Detroit, **Michigan**, state Rep. John Pappageorge (R-Troy) was quoted in the *Detroit Free Press* as saying, "If we do not suppress the Detroit vote, we're going to have a tough

[§] Less than two weeks before the challenger plan was announced, Richardson garnered national attention for his defense of a bumper sticker that read "Kerry is bin Laden's Man/Bush is Mine." (Bruce Schreiner, "Sticker: 'Kerry is bin Laden's Man,'" *Associated Press*, 7/17/04.)

time in this election." State Sen. Buzz Thomas (D-Detroit) reacted to the comment by alleging: "That's quite clearly code that they don't want black people to vote in this election." African Americans comprise 83% of Detroit's population. Pappageorge attempted to clarify his remarks by saying: "In the context that we were talking about, I said we've got to get the vote up in Oakland (County) and the vote down in Detroit. You get it down with a good message. I don't know how we got them from there to 'racist.'" [5]

In **Texas**, students at the predominantly African-American Prairie View A&M University challenged a local district attorney's claim that they were not eligible to vote in the county. Waller County district attorney Oliver Kitzman wrote a letter to the local election administrator, later published in the local newspaper, threatening to prosecute persons who failed to meet his definition of having a legal voting address.[6] In fact, an earlier controversy had led to a lawsuit and a 1978 federal court order prohibiting the local registrar from treating Prairie View students differently from other county voters.

Texas' secretary of state and attorney general both affirmed the well-established right of students to vote in their university towns if they designate their campus address as their residence.[7] In view of the controversy and the court order, the Justice Department is investigating whether Waller County is complying with the terms of the federal order. The students and the local NAACP have taken legal action to ensure that students will not face prosecution and have also filed a lawsuit seeking to extend the time for early voting and require local authorities to obtain Justice Department permission before making such changes.[8]

2003

In Louisville, **Kentucky**, Jefferson County Republicans planned to place Election Day challengers at 59 voting precincts in predominantly black neighborhoods. Though party officials claimed the precincts were chosen without regard to race, the flyer recruiting volunteers specifically mentioned black labor unions as a "militant" force allegedly encouraging voter fraud.[9]

In Philadelphia, **Pennsylvania**, men with clipboards bearing official-looking insignias were reportedly dispatched to African American neighborhoods. Tom Lindenfeld, who ran a counter-intimidation campaign for Democratic candidate John Street, said there were 300 cars with the decals resembling such federal agencies as the DEA and ATF and that the men were asking prospective voters for identification. In a post-election poll of 1000 African-American voters, seven percent said they had encountered such efforts.[10]

2002

In Pine Bluff, **Arkansas**, five Republican poll watchers - including two staff members of Senator Tim Hutchinson's office - allegedly focused exclusively on African Americans, asking them for identification and taking photographs during the first day of early voting. The chair of the county Democratic Party and Election Commission said the tactics caused some frustrated black voters to not vote. "They are trying to intimidate African American voters into not voting," said the Democrat coordinating national efforts with Arkansas' campaigns. "They were literally going up to them and saying, 'Before you vote, I want to see your identification.'" Local law enforcement officials escorted the poll watchers out, but they later returned.[11]

In **Louisiana**, flyers were distributed in African American communities stating, "'Vote!!! Bad Weather? No problem!!! If the weather is uncomfortable on election day [Saturday, December 7th], remember you can wait and cast your ballot on Tuesday, December 10th."[12] In a separate incident, apparently targeting potential supporters of Democratic Senator Mary Landrieu, the Louisiana Republican Party admitted to paying African American youths $75 to hold signs aloft on street comers in black neighborhoods that appeared to discourage African-Americans from voting. The signs said: "Mary, if you don't respect us, don't expect us."[13]

In **Pennsylvania**, GOP Rep. George Gekas reportedly put together a systematic effort to "challenge" voters in counties favorable to his Democratic opponent, Rep. Tim Holden. The *Lebanon Daily News* wrote: "Gekas...has distributed among county officials and volunteers an 18-page manual that includes a section about 'challenging a voter.' That's right: Gekas volunteers aren't just going to challenge absentee ballots, but are going to try to block some people who show up at the polls from casting votes." A Gekas campaign spokesman who said the manual "had been drafted by Republican authorities at the national level and had not been tailored to Pennsylvania law."[14]

In Baltimore, **Maryland**, anonymous fliers were posted in some African-American neighborhoods with the heading "URGENT NOTICE." The flier listed the wrong date for Election Day and warned that parking tickets and overdue rent should be paid before voting.[15]

In **South Dakota**, the state attorney general announced a voter fraud initiative in coordination with the Justice Department, which had just announced a "Voting Integrity Initiative." In this case, that involved working with the FBI to send state and federal agents to question almost 2,000 newly registered Native American voters. No probe was announced to investigate new registrants in counties without significant Native American populations, despite the fact that those counties contained most of the new registrations in the state. [16]

As the election approached, specific allegations of voter registration fraud led to the filing of criminal charges against a Native American woman registering voters on reservations for the Democratic Party.[17] It was also the topic of a Republican direct mail

piece. Democrats charged the piece was inaccurate and the GOP later apologized for its use of a newspaper headline that did not relate to the subject.[18] Eventually, the GOP attorney general found some of the affidavits alleging the fraud to be false themselves, and described the search for wrongdoing to have been "fueled by vapor and fumes."[19] Charges against the woman were dropped in 2004.[20]

In **Tennessee**, a state Republican Party plan to challenge would-be voters at polling places drew the scrutiny of elections officials and the Justice Department just a few days before the general election. The state's Election Coordinator accused state Republicans of spreading "misinformation" about voter eligibility to GOP poll workers and urged county election officials to reject inappropriate challenges at the polls. The warning was prompted by an internal GOP e-mail, obtained by Justice Department lawyers, which encouraged party poll watchers to "Challenge voters who concern you."[21]

In the wake of the incident, the Tennessee Democratic Party sued the Tennessee Republican Party in federal court, accusing the GOP of routinely trying to illegally depress voter participation and asking the judge to enforce the state election coordinator's instructions to counties.[22] The lawsuit was settled in 2003, with neither political party admitting to any prior wrongdoing, but agreeing to a memorandum of understanding listing legal and illegal activities for party poll watchers, polling staff and volunteers.

Unlawful activities included: directly confronting voters, intimidating legitimate voters, giving voters misleading information, dressing to look like law enforcement officials, photographing voters with the intent of intimidating them, and interfering with voters as they prepare to and cast their ballots.[23]

2000

In **Florida,** there were a number of troubling instances of voter intimidation in addition to the myriad of technical problems with Florida's 2000 election. On Election Day, the NAACP national office in Baltimore reported receiving "scores of calls from Floridians all across the state" reporting intimidation and other irregularities.[24]

Immigrant communities are often vulnerable to intimidation efforts, and Miami's Haitian-American communities reported many instances in 2000. Marleine Bastien, founder of Haitian Women of Miami, Inc. recalled getting many calls from people who were prevented from voting due to intimidation and complained of being insulted.[25] §

§ These were only a few of the problems Bastien encountered. According to the summary of her testimony: "phone calls came from first time voters who needed help; phone calls came from people who were prevented from securing someone who would go to the booth with them; calls came from people who were in line, who were turned around and prevented from voting even though they were in line before seven o'clock; phone calls from people whose precincts were closed early which is against the law; phone calls from people who were told because they did not have identification they could not vote even though they were registered to vote, and they didn't know they could

Then-Secretary of State Katherine Harris ordered local elections supervisors to purge 57,700 voters from voter registration lists, based on a highly flawed list of felons alleged to be ineligible to vote. The "scrub" list was about 54% African-American and Latino and overwhelmingly Democratic. It resulted in a number of eligible voters being turned away from the polls.[26]

In **North Carolina**, the Duplin County Board of Elections staff was removed due to a number of allegations of fraudulent and criminal behavior. The allegations included altered signatures, unauthorized voter address changes, and voter intimidation at the polls. The local district attorney refused to prosecute in spite of overwhelming evidence of criminal behavior, according to the civil rights watchdog group Democracy South. The director of the elections board was the aunt of the largest corporate hog farm owner in the state and many corporate farm owners were campaigning against a Republican state representative who was one of their main critics in the legislature. [27]

1998

In **North Carolina**, GOP officials in Mecklenburg and Cumberland counties planned to videotape people in some heavily Democratic precincts, saying it was to prevent voting fraud. State GOP spokesman Richard Hudson said poll-watching programs targeted heavily Democratic voter registration precincts, not racial groups. However, as a result of complaints about the plans, the Justice Department sent out letters making clear that videotaping minority voters at or near the polls violates the 1965 Voting Rights Act.

Despite the GOP spokesman's claim, the *Associated Press* reported that a Justice Department official, speaking on grounds of anonymity, described such monitoring of voters as a phenomenon of the last 10 years. The official noted that it started in 1988 with uniformed security guards being placed in mostly Latino precincts in Orange County, California. "All of these moves are called ballot security moves, moves by plain citizens to keep illegal voters from the polls," the official said, "but none targeted illegal voters. They all targeted minority voters and specifically threatened them with some dire consequence if there are problems with voter records."[28]

In Dillon County, **South Carolina**, several days before Election Day, GOP state Rep. Son Kinon mailed more than 3,000 brochures to black voters. The outside of the brochure read, "You have always been my friend, so don't chance GOING TO JAIL on Election Day!" ... "SLED agents, FBI agents, people from the Justice Department and undercover agents will be in Dillon County working this election. People who you think are your

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insist to vote, they didn't know they had the right to do that and these people were turned away. "I had a man who was crying on the phone. He was telling me, 'Marleine, I spent so many years before I could become a U.S. citizen. I went through so much. This is the first time in my life that I have a chance to vote...first time in my life. And I was turned away and I couldn't vote.'"

friends, and even your neighbors, could be the very ones that turn you in. THIS ELECTION IS NOT WORTH GOING TO JAIL!!!!!!"[29]

1996

In Charleston County, **South Carolina**, a longtime pattern of voter intimidation was observed during another election cycle. Election Commission member Carolyn Collins testified in a subsequent voting rights case about her observations of inappropriate behavior by white poll managers in majority African American precincts. One such manager had reportedly intimidated a number of voters and, when approached by Collins, replied that he did not have to follow her instruction.[30] According to court papers, Collins also "testified that she had received complaints from African-American voters concerning rude or inappropriate behavior by white poll officials in every election between 1992 and 2002.[31] (See also 1986, 1990)

1994

Under the guise of investigating a series of church arsons in **Alabama**, the FBI approached 1000 people and interrogated voters about possible fraud. Many were asked to submit handwriting samples. There were few convictions, but voter turnout was down, even though the number of registered voters was up.[32]

1993

In **New York City**, signs in English and Spanish were posted at subway entrances, on lamp posts, on phone booths and other locations in Latino areas in Manhattan, Brooklyn and the Bronx. The signs misinformed voters about the role of federal officials in the election, incorrectly stating that federal authorities, including immigration officials, would be at the polls. The signs also threatened illegal voters with prosecution, severance of benefits and deportation.[33]

In **Philadelphia**, prior to Election Day, campaign workers walked door-to-door in Latino neighborhoods to convince or coerce voters to cast absentee ballots. According to the Justice Department, the workers were "allegedly misleading the voters about the documents they were signing, or steering or intimidating the voters into voting for the Democratic candidate." Voters reported that they were misled about the state's absentee voting laws and told they could vote at home as a "new way of voting."[34]

1990

In **North Carolina**, the North Carolina Republican Party, the Helms for Senate Committee and others sent postcards to 125,000 voters, 97% of whom were African American, giving them false information about voter eligibility and combining this information with a warning concerning criminal penalties for voter fraud. A lawsuit

was filed and, in 1992, the various defendants and the Justice Department signed a consent decree. Among other things, the decree enjoined the defendants from intimidation of voters, as well as engaging in any ballot security program "directed at qualified voters in which the racial minority status of some or all of the voters is one of the factors in the decision to target those voters."[35]

In Charleston County, **South Carolina**, a member of the election commission and others participated in a Ballot Security Group that sought to prevent African American voters from seeking voting assistance.[36] One Republican poll manager became so aggressive in his voter intimidation efforts that he was physically removed from the precinct by the police.[37] (See also 1986)

In **Texas**, postcards were sent to elderly voters in Gregg County who had requested absentee ballots. The cards urged them to "throw that mail ballot in the trash" and "walk proudly into the voting place ... in honor of the many who fought and died for your right to walk into the polls." Once someone requests an absentee ballot in Texas, however, they cannot vote in person without going through a complicated procedure to cancel the absentee ballot.[38]

1988

In **Texas**, Republican-sponsored radio ads targeted Latino voters in Hidalgo County. The ads mentioned possible prison sentences for non-citizens who vote and twice reminded listeners that election officials "will be watching." Rep. Jack Brooks (D-TX) successfully requested Justice Department monitors as a result of the ads. He told U.S. Attorney General Dick Thornburgh: "It should be clear that this advertising campaign, accompanied by the repeated 'Big Brother' warning that 'election officials are watching,' was not motivated by the benign goal of discouraging illegal voting, but rather is an obvious attempt to hold down overall voter turnout among Spanish-speaking citizens by injecting an element of fear into the voting process."[39]

In **California**, the Orange County Republican Party hired uniformed security guards to be posted at polling places in heavily Latino precincts. The guards displayed bilingual signs warning non-citizens not to vote, and such signs were also posted in Latino neighborhoods days before the election.[40] The guards, wearing blue uniforms and badges, were removed from the polling places after the chief deputy secretary of state said their presence was "unlawful intimidation of voters."[41]

The GOP officials involved in the plan, working on the campaign of GOP state assembly candidate Curt Pringle, claimed they acted on rumors that there was illegal registration of voters. However, according to the *Orange County Register*, they admitted they had no evidence of such activity and were concerned because of a sudden surge in voter registration in some Latino neighborhoods.[42] Many local Latino Republican officials were outraged. GOP Santa Ana councilman John Acosta said: "This has to be

the most blatant method of intimidating that I have ever seen. ... It's un-American and I would say it borders on Nazism."[43]

As the controversy grew, the county registrar of voters said that he had warned Republican officials four weeks before the election not to challenge voters at the polls.[44]

In 1989, the Orange County GOP paid $400,000 to settle a lawsuit stemming from the program. The plaintiffs donated $150,000 of the settlement to nonpartisan Latino voter registration efforts in the area. They also released some evidence gathered during the trial, including a map given to a sign-making company by the GOP campaign that indicated intended sign placement. Signs reading "Thank You Curt Pringle" were to go in predominantly white areas and bilingual signs saying "Non Citizens Can't Vote" were to be placed in largely Latino areas.[45]

1986

In **Louisiana**, state Republicans piloted a "ballot security" effort that targeted African American voters. The program backfired during the 1986 Senate race between Republican Rep. W. Henson Moore and Democratic Rep. John B. Breaux. Before the runoff, documents were released showing that a Republican National Committee official said the Louisiana "ballot security" program would "eliminate at least 60- 80,000 folks from the rolls. . . . (T)his could keep the black vote down considerably." Breaux won by 77,000 votes.[46]

In the same year, the RNC planned a similar mass mail campaign to identify potential voters to challenge, sending the mailing to black and rural precincts in **Georgia, Missouri, Pennsylvania, Michigan and Indiana**. The letters, stamped "do not forward" would be returned to the post office if not deliverable and form the basis of a list to challenge voters qualifications.[47] In July 1987, the RNC settled a lawsuit concerning the program based on the 1982 consent decree. DNC official Jane Harmon said the settlement would effectively end such efforts to "target and disfranchise minority programs with so-called 'ballot security' programs."[48] Unfortunately, this prediction was not fulfilled, as such intimidation efforts continued.

In Charleston County, **South Carolina**, a member of the county election commission and the chairwoman of the county Democratic Party obtained a restraining order prohibiting election officials from interfering with the right to vote and requiring them to provide voters with assistance upon request. Truet Nettles, a former state magistrate judge and a member of the county election commission throughout the 1980s and 1990s, explained that white poll managers would "give the third degree" to African American voters who sought assistance.[49] According to Nettles, the poll managers who were nominated by the Republican Party in the African-American precincts would ask questions like this: "Why do you need assistance? Why can't -- can't you read and write? And didn't you just sign in? And you know how to spell your name, why can't

you just vote by yourself?"[50] However, the local Ballot Security Group organized by local Republicans largely ignored the order according to voting rights expert Laughlin McDonald.[51]

1985

In **Alabama**, then-U.S. Attorney Jeff Sessions probed three veteran civil rights activists for voter fraud in the Mobile area. In what became a national story, Albert Turner, a former aide to Rev. Martin Luther King Jr., Evelyn Turner and Spencer Houge Jr. all denied the charges that they had illegally obtained absentee ballots and forged voters' signatures. The defendants, known as the Marion Three, were acquitted on all counts[52] with less than three hours of deliberation.[53] A year later Sessions revealed some of his motivations and attitudes during his controversial nomination for a federal district judgeship.[§] Among other things, he admitted saying he thought the NAACP was "un-American."[54]

At the same time, the U.S. Attorney in Birmingham, Frank Donaldson, was trying to pursue a voter fraud case against SCLC activist Spiver Gordon. Gordon was found guilty, but an appeals court overturned his conviction. The court ruled that Gordon was denied equal protection because the government struck every potential black juror from his trial.[55]

Author David Burnham noted the selective nature of the prosecutions, writing that the "aggressive approach to election fraud does not appear to have been pursued when it came to white Republicans."[56] Furthermore, Burnham argued: "There is a wide range of evidence, some direct, some circumstantial, showing that the vast enforcement powers of the Justice Department were specifically harnessed to combat the lawful political gains of black Americans in Alabama during the Reagan and Bush administrations. There were several levels in this campaign. National enforcement policies were altered in such a way that the perceived enemies of the white Republicans in Alabama were subject to investigation. Federal prosecutors persuaded grand juries to bring numerous cases, most of them flawed, as a result of the changed policy."[57]

1982

In **Texas**, a group of Dallas Republicans, including a state judicial candidate, posted signs outside polling places in predominantly African American neighborhoods in South Dallas. The 24-foot signs warned against influencing voters or violating election law in large red letters, saying: "You Can Be Imprisoned. Don't Risk It. Obey the Law." The Legislature later banned posting signs within 100 feet of polls unless authorized by the Secretary of State.[58]

[§] Sessions' nomination was ultimately rejected by the Senate Judiciary Committee, though he went on to be elected to the Senate and now serves on that very committee.

In Burke County, **Georgia**, it was reportedly "still the custom for white creditors to stand prominently near the polls on election day." This continuing form of economic intimidation was observed by Alex Willingham in the pages of the Southern Regional Council's journal, *Southern Changes*.[59]

1981

In **New Jersey**, the Republican National Committee's National Ballot Security Task Force (BSTF) hired armed, off-duty police officers wearing armbands to patrol polling sites in black and Hispanic neighborhoods of Newark and Trenton.[60] The BSTF started by mailing letters, using an outdated voter registration list, to largely African-American and Latino districts. The letters were to be returned if they were not deliverable and the 45,000 returned letters were converted directly into a list of voters to be challenged. The RNC requested that election supervisors use the list to strike the voters from the rolls, but the Commissioners of Registration refused when they discovered that the RNC had used outdated information.

On Election Day, the RNC posted large signs, without identification and with an official appearance, reading:

"WARNING
THIS AREA IS BEING PATROLLED BY THE
NATIONAL BALLOT
SECURITY TASK FORCE
IT IS A CRIME TO FALSIFY A BALLOT OR
TO VIOLATE ELECTION LAWS"

The armed officers were drawn from the ranks of off-duty county deputy sheriffs and local police and prominently displayed revolvers, two-way radios and BSTF armbands. BSTF patrols challenged and questioned voters at the polls and blocked the way of some prospective voters.[61]

A civil lawsuit was filed after the election charging the RNC with illegal harassment and intimidation. The suit was settled in 1982, when the state and national Republican parties signed a pledge in U.S. District Court that they would not allow tactics that could intimidate Democratic voters, though they did not admit any wrongdoing. Democrat James J. Florio lost to Republican Thomas H. Kean by 1,797 votes in the gubernatorial election.[62] The court order that resulted was invoked in a number of similar incidents throughout the 1980s and early 1990s. And the pattern of sending mailings and creating questionable challenge lists was a model that endured as well.

The Historical Roots of Voter Intimidation and Suppression

Recent efforts to obstruct, suppress, and intimidate voters have long historical roots. These efforts have precedents in the reactionary violence and abandonment of constitutional principle in the wake of Reconstruction and the massive resistance to the federal Voting Rights Act of 1965.

Reconstruction and Jim Crow

After the Civil War and passage of the 14th and 15th Amendments - and rigorous military enforcement by the victorious North - Mississippi had two African American senators, and 20 black representatives were elected to Congress from the South during Reconstruction. Hundreds of former slaves served in Southern state legislatures.[63] In his defining history of the era, Eric Foner noted the radicalism of Reconstruction: "[P]rodded by the demands of four million men and women just emerging from slavery, Americans made their first attempt to live up to the noble professions of their political creed - something few societies have ever done."[64]

Only a tremendous wave of violence could transform these revolutionary gains into the Jim Crow perversion of democracy that dominated the South in the early 20th century. South Carolina's Senator "Pitchfork" Ben Tillman, who led one of the bloodiest campaigns against black enfranchisement, expressed what happened after Reconstruction most clearly. Said Tillman: "We have done our level best. We have scratched our heads to find out how we could eliminate every last one of them. We stuffed ballot boxes. We shot them. We are not ashamed of it."[65]

This violence was accompanied by the federal government's abandonment of Reconstruction. In 1877, Southern Democrats struck a deal with GOP presidential candidate Rutherford B. Hayes to help Hayes win the contested election of 1876. In exchange, the military force that had enforced the radical political gains in the South was withdrawn. For supporting Hayes, the Southern Democrats were able to ensure white political supremacy for decades to come. The notorious laws of the Jim Crow era followed.

It is hard to overemphasize the magnitude of what happened after the Compromise of 1877. Historian Michael Perman studied the process of disfranchisement in every Southern state and argues that it was "quite possibly one of the most dramatic and decisive episodes in American history." He observed that these "ruthless acts of political surgery" dominated political life in the South as states called constitutional conventions and passed amendments.[66] Eric Foner points out that America was the only major country in which former slaves enjoyed "a real measure of political power" after emancipation, though it only lasted for just over a decade.[67]

When federal troops were withdrawn from the South in 1877, violence, intimidation and corruption were powerful tools the Southern white elite used to put itself back in

power. Once seats in government were obtained, legalistic barriers like poll taxes and literacy tests were put into place to ensure that African Americans would not regain political power. By the middle of the 20th century, much of the violence and intimidation meant to deny African Americans the right to vote happened long before Election Day. Simply registering to vote was the most dangerous step, so intimidation at the polls was not as important as it would become in later decades. Most people would never get that far.

The Second Reconstruction: The 1965 Voting Rights Act

The Voting Rights Act of 1965 stands today as one of the signal legislative achievements of modern democracy. Without the passage of this act along with intense and sustained federal involvement and enforcement, no meaningful and lasting rights for African Americans could have been secured.

A number of laws targeting voting rights were passed in 1957, 1960 and 1964, but they relied primarily on lawsuits for enforcement.[§] The 1965 Act not only strengthened the ability to bring legal challenges, it also added other enforcement mechanisms, such as federal registrars and observers and preclearance requirements for areas with poor voting rights records. Prior to the Voting Rights Act, minority voting rights were protected in word, but not in deed.

Even with these positive changes, enforcing the law was a struggle against a deeply ingrained system of racism and repression. It is no accident that historians call this period the Second Reconstruction.

But what happened after the initial focus faded? Though many of the oppressive methods of segregation were successfully eradicated, new ways to curtail minority political power evolved. The Voting Rights Act and federal enforcement methods provided newly empowered voting rights activists with powerful tools to combat these efforts, but they persisted nonetheless. Strong organizing and a commitment to change patterns of social injustice were needed, but so was continued federal presence and more legislation and litigation. Expansions of the Voting Rights Act in 1970, 1975 and 1982 gave the government and civil rights groups additional tools to ensure that the voting rights of previously disfranchised groups were protected. And not just in the South.

The VRA outlawed discriminatory tests like poll taxes and literacy tests in many Southern states in 1965. However, such limits also existed in other regions and were

[§] The ACLU's Laughlin McDonald observed, these earlier laws "did not result in the enfranchisement of any appreciable number of people." In fact, to a certain extent, the litigation required "merely played into the hands of recalcitrant officials and gave them further opportunity to evade their obligations under the law." *Voting Rights in the South*, Laughlin McDonald, January 1982, p. 15.

not outlawed nationwide until 1970. This 1970 extension of the Voting Rights Act dealt with exclusionary tests in 20 other states, including New York, Illinois and California.[68]

In 1968 the U.S. Commission on Civil Rights published *Political Participation*, a study evaluating the effect of the VRA on African Americans in 10 Southern states. In the report's introductory letter to the President and Congress, the Commission noted the successes of the VRA were "a great upsurge in voter registration, voting, and other forms of political participation by Negroes in the South." However, the main finding of the report was that many new barriers had been developed in the first few years following the VRA.[69] The Commission described a number of incidents and grouped them into the following categories.

- *Diluting the African-American vote* - Switching to at-large elections (e.g. selecting legislative representatives through county-wide voting rather than through smaller legislative districts) was one method used to prevent African Americans from being elected in smaller areas in which they were a majority of the voting population. Consolidating counties and redrawing legislative districts served a similar purpose, making African Americans a minority in a larger county when they once were a majority in previous districts.
- *Preventing African Americans from becoming candidates or obtaining office* - After the VRA some of the tactics to avoid allowing African Americans into political office involved changing the actual office. These included abolishing an office once an African-American candidate filed to run, extending the term of white incumbents to put off elections, and changing an elected office to an appointed office. Other discriminatory devices included increasing fees to run for office, adding requirements for getting on the ballot, not telling prospective African American candidates about information they would need to run for office, delaying paperwork of African Americans who wanted to run for office and trying to keep African Americans from taking office once they had won an election.
- *Discrimination against African Americans in voting* - After the VRA, some African Americans were excluded from precinct meetings where many key decisions were made. They were also improperly kept off of voting lists, given inadequate or wrong instructions at the polls, had their ballots wrongly disqualified and denied the equal opportunity to vote by absentee ballot. The Commission also found discrimination in the location of polling places and a failure to provide sufficient voting facilities. Racially segregated voter lists and polling places were also found.
- *Exclusion of and interference with African-American poll workers* - Poll watchers were "considered to be the only resource through which Negro candidates can monitor the election process to deter irregularities and to identify instances of racial discrimination and vote fraud." In this area too, African Americans in Southern states examined by the Commission suffered discriminatory treatment, harassment and outright exclusion.[70]

- *Vote Fraud* - Voter fraud was also reported as one of the tactics used to defeat African American candidates.[71]
- *Discriminatory selection of election officials* - Just as poll workers serve as observers that secured the voting rights of African Americans, poll managers, inspectors, judges and clerical workers were a key to safe and secure elections. Though African Americans served in many areas without incident, there was discrimination in the selection in many other areas, no doubt opening the door to intimidation in such areas.[72]
- *Intimidation and Economic Dependence* - As was common before the VRA, African Americans who were known to be politically active were subjected to threats of physical and economic harm in the first few years after the VRA.[73]

The following are among the incidents of harassment, intimidation and suppression documented by the Civil Rights Commission; they provide a telling look at the flawed institution of voting and at Deep South states in transition from 1965-68:

1966

In **Alabama**, many instances of harassment and intimidation were reported surrounding the candidacy of Rev. Linton Spears, an African American running for the Democratic nomination for Chocktaw county commissioner. The types of intimidation directed at African American voters included white election officials using abusive language, not allowing the voters to talk in line, and making the voters hand the ballot to them, a practice many voters feared would compromise the secrecy of their ballot. Based on the complaints, the Justice Department sent observers to the runoff election and greatly reduced the intimidation.[74]

In **Mississippi**, the Commission received reports that, in certain areas, polling places were located in plantation stores "where Negro plantation workers could be intimidated easily by the plantation owner and where they were afraid to vote for fear that a principal source of credit would be withdrawn."[75]

In **South Carolina**, a man with a pistol threatened African American poll watchers and voters at one precinct. The poll manager in another precinct threatened to hit a poll worker who attempted to enter the polling place. Other precincts had instances of poll worker intimidation that had the effect of intimidating African American voters.[76]

In **Alabama**, a number of poll watchers in Dallas County were chased away from polling places, and threatened with a shotgun in one.[77]

In **Louisiana**, three examples of political intimidation were reported. A NAACP secretary in Concordia Parish was shot and wounded in her home a few months after she began coordinating a voter registration drive. In West Feliciana, a carpenter

suffered an economic boycott by former white customers after his successful candidacy for a seat on the school board. In Madison Parish, a white plantation owner "threatened to evict her Negro workers and close a Negro church on the plantation if they supported" an African American candidate for the school board.[78]

In Clay County, **Mississippi**, the manager of a plantation store that was also the location of a polling place reportedly said he would shoot any African American voters who showed up at the store.[79]

In Dallas County, **Alabama**, the arrests and prosecutions of three campaign workers was allegedly designed to intimidate candidates and interfere with their campaigns.[80]

In Americus, **Georgia**, an African American candidate for alderman reported that police officers did not stop harassment of his poll workers by local white teenagers.[81]

1967

In **Mississippi**, three precincts in Holmes County reported that white election managers "[a]sked questions calculated to intimidate or embarrass illiterate Negro voters, such as "You can read, now, can't you?"[82]

In Neshoba County, **Mississippi**, an African American minister faced harassment, fines and arrest after announcing his candidacy for Congress. He was reportedly given tickets for fictitious traffic violations, arrested and jailed, and had his car impounded.[83]

In Bolivar County, **Mississippi**, the day for distributing food stamps was reportedly changed from its usual day to Election Day, making it difficult or impossible in some cases for African American voters to get to the polls.[84]

In Nansemond County, **Virginia**, the Ku Klux Klan burned a cross in front of the home of an African American candidate for the board of supervisors. The candidate said the Klan also sought to confuse African American voters by sending two Klan groups into the community, one with signs supporting candidates supported by the local civil rights political organization and one with signs for the opposing candidates.[85]

"More Subtle and Subterranean Tactics" – 1968-1980

During the years immediately following the passage of the 1965 Voting Rights Act and subsequent voting rights legislation, new patterns of intimidation against black voters emerged. Academic studies covering the 1970s demonstrate that the success of the civil rights movement created a backlash of political resistance at the polls.

James Loewen published a 1981 study on the continuing obstacles to African-American electoral success in Mississippi, covering much of the 1970s. He described the factors that contributed to the overall atmosphere of voting intimidation, noting that such repression "begins in the community, before would-be voters ever reach the polls."[86] An interlocking web of economic dependence and segregation etiquette held sway at the voting booth long after the formal vestiges of Jim Crow were dissembled. Further, the operation of the polls remained largely under white control, perpetuating the system on a local level.

Loewen estimated that: "for blacks to have an even chance of winning in rural black-majority counties requires that they must begin with about 70%" of the population." He concluded by observing: "The federal election presence, never strong, has withered away, which has negative effects on black morale and permits the subtle practices of intimidation and 'assistance' to reappear. The obstacles to black electoral effectiveness continue, and the chance for blacks to share power meaningfully and equally seems as remote today as at any time since the passage of the Voting Rights Act."[87]

A 1981 study of election practices in Georgia also drew useful conclusions about the development of voter intimidation and suppression after the 1965 Voting Rights Act. Researcher Brian Sherman found that: "Because the VRA [Voting Rights Act] has outlawed the most blatant measures, those who have wanted to limit black participation in politics have had to resort to more subtle and subterranean tactics."[88] Sherman surveyed civic leaders in sixty Georgia counties and his results reveal the specific tactics limiting African American voting at the time.[89] In addition to continuing discrimination in voter registration, Sherman found a myriad of discriminatory practices in the actual voting procedures, including:

- *Inadequate protection and discrimination in poll-watching.* Almost half of the counties reported discrimination against African Americans in selecting poll-watchers or actual intimidation or irregularities by poll-watchers against African American voters.[90]
- *Discrimination in supervising elections.* This included the refusal to appoint African American registrars and poll-watchers, excessive purging of African Americans from voting lists and refusal to open easily accessible registration sites. Also reported were allowing whites-only private clubs to supervise elections, allowing white intimidation of African American voters and deliberately giving confusing information about election information.[91]
- *Miscellaneous intimidation.* This includes accounts of "whites entering voting booths with blacks, whites buying black votes, tampering with voting lists, blacks being removed from voting lists without notification, and blacks living and working on large plantation-like estates being unable to leave and vote." Over a third of the counties surveyed reported instances of "whites telling blacks how to vote, with five counties reporting that this happens in virtually all elections."[92]

Resistance to the Voting Rights Act was also felt by Latinos. Rolando Rios examined the VRA's effect on Latinos in Texas and the modes of disfranchisement in that community. As with African Americans, intimidation played a significant role.

- Language was a frequent tool, wielded at the polls by hostile election judges. For example, Rios cited a case where an election judge told a "bilingual clerk who was trying to assist a voter that if Chicanos cannot speak English, they should not be permitted to vote."[93]
- Rios also documented that methods used against Southern African Americans were employed against Latino voters as well. In McAllen, Texas, the incumbent mayor, who was being challenged by a Latino candidate, hired photographers to take pictures of people voting. Rios reported: "Since he is a multimillionaire with a considerable labor force, many potential voters would not go to the polls for fear of losing their jobs."[94]

Brian Sherman, regional analyst at the Southern Regional Council's Voting Rights Project, observed that "the legacy of terror and oppression to which blacks have been subjected is perpetuated by intimidation, threats and other abuses." Furthermore, he wrote, many familiar devices remained: "Inaccessible registration sites and polling places, uncooperative registrars, menacing poll-watchers, discriminatory purges of the voting rolls and absentee ballot abuse are some of the most frequent obstacles faced by blacks."[95]

A number of studies documented how methods of disfranchisement evolved in the years following the 1965 act. Since most available studies focus on Southern states covered by the Voting Rights Act, evidence from other regions is scarce. That does not mean that intimidation was limited to that region. In fact, there is every reason to assume that many of the methods of disfranchisement existed outside the South. While clearly not an exhaustive list, these examples show how subtle forms of intimidation developed even in the face of federal scrutiny.

1970

In West Point, **Mississippi**, an African American candidate for mayor placed second in the primary despite receiving numerous threats. During the runoff, a key campaign worker was murdered while sitting in the campaign van. A white man disarmed at the scene was tried and acquitted by an all-white jury. After that, some campaign workers quit and security concerns seriously hampered the campaign. The candidate lost the runoff, but as the U.S. Civil Rights Commission noted, "the long-lasting deterrent effect" against political participation was more important.[96]

1971

James Loewen described the widespread economic dependence that intimidated African American voters in **Mississippi** via the example of a white planter reported in 1971. He wrote: "K.C. Peters, who employs twenty black farmhands, told a visitor, 'I feel free to ask the ones working for me to vote for who [sic] I want them to vote for. The older ones do, but you cannot tell about the young ones." Fourteen of Peters' employees are registered to vote, and he said 'I can rely on eight votes.' He was asked if he thought voter intimidation existed in Tallahatchie County. "It is just as free as you want to see. I manage the polls for the Northwest precinct. I'm there when they open until they close. I see everything.'"[97]

Loewen also described how widespread segregation "etiquette" led to disfranchisement with the example of a composite "55 year-old black woman with four years of education forty years ago" who hesitantly lines up to vote. She is assisted by the white poll worker with the curtain lever, who offers assistance with the ballot as well. Loewen writes: "[S]he is 'assisted' to vote white for some local positions, black for others. The next voter will be 'assisted' toward a different mix of white and black selections." He estimated that, over the course of Election Day, "an astute poll worker can shave 5% to 20% off the black vote totals.[98]

Regarding white election control, Loewen writes that almost all local election commissioners were white and they "appoint whites disproportionately to work at the polls." He adds: "Black pollworkers are often assigned to noncritical positions like helping to oversee the check-in book. I once saw one black woman assigned to watch all day the envelope in which the absentee ballots were placed when the polls opened!" He also observed that whites were commonly places to attend the voting machines and the polls were in "white" places, e.g. a white-owned barn, American Legion hall, or county courthouse and jail.[99]

In Humphreys County, **Mississippi**, physical violence against African American voters and poll watchers occurred at a number of precincts. The irregularities led some to file a suit asking that the election be set aside in a federal district court. The court declined to order a new election. One of the plaintiffs, who was a candidate for county supervisor in the contested election, said that the incidents kept many African Americans away from the polls in the 1972 election.[100]

1972

In Monroe County, **Alabama**, the school superintendent reportedly told African American school employees that he would not hire them again for the next school year if they did not vote for him. The Assistant Superintendent reportedly reinforced the message, saying that he had people watching them in case they voted the wrong way.[101]

1974

In Monterey County, **California**, the mayor and police chief of Soledad described the practices on farms that created intimidation for Latino voters. At one farm, workers were reportedly given more work than normal on Election Day. At another, two workers declined to register, saying that their boss would not give them time off to vote anyway. It was also reported that Mexican Americans who worked in voter registration drives sometimes lost their jobs and were blacklisted from alternative employment.[102]

In Tallulah, **Louisiana**, the head of a city department reportedly told all of his African American employees to vote for white candidates in a municipal election or lose their jobs.[103]

In a **South Carolina** state house race, economic intimidation by a white candidate was reported. The candidate, who was running against an African American, provided most people in the district with gas for heating and cooking. Some people were apparently told that if they did not vote for the candidate they would not have gas for the winter. The African American candidate, who lost, charged that her opponent and others "took photographic pictures inside and outside of the Sheldon precinct polling building....of cars, license tags, voters and other persons at the poll in general. This produced an atmosphere of fear, frustration, coercion and tyranny."[104]

1979

A well-known incident in **Alabama** also illustrates the extent to which old political structures continued to suppress African-American political involvement more than a decade after the implementation of the 1965 VRA. In 1979, more than 100 influential white citizens of Sumter County, including both of Alabama's senators, met to plan an investigation into the voter registration activities of the Federation of Southern Cooperatives (FSC), a group that helped African American farmers. Although an effort to get the U.S. General Accounting Office to investigate went nowhere, the group managed to get the local U.S. Attorney's office to investigate. In 1981, after examining FSC records for over a year and questioning hundreds, the U.S. Attorney declined to prosecute.[105]

Conclusion

People For the American Way Foundation, National Association for the Advancement of Colored People (NAACP) and a number of national organizations are combining forces to carry out the Election Protection program across the country in 2004. Election Protection is working now with election officials to identify and resolve potential problems. Closer to Election Day, Election Protection staff and volunteers will distribute state-specific Voters' Bills of Rights in more than 30 states. On Election Day, thousands of volunteers will monitor polling places and offer assistance to voters who

run into problems. Voters, volunteers, and election officials will have access to a nationwide toll-free number to report problems, including voter intimidation efforts, to a team of specially trained volunteer attorneys and law students.

Robbing voters of their right to vote and to have their vote counted undermines the very foundations of our democratic society. Politicians, political strategists, and party officials who may consider voter intimidation and suppression efforts as part of their tactical arsenal should prepare to be exposed and prosecuted. State and federal officials, including Justice Department and national political party officials, should publicly repudiate such tactics and make clear that those who engage in them will be face severe punishment.

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Statement by Congressman Dana Rohrabacher

Hearing on "Maximizing Voter Choice:

Opening the Presidency to Naturalized Americans"

Senate Judiciary Committee

October 5, 2004

Thank you, Mr. Chairman for providing this opportunity to testify. On September 15th, I introduced House Joint Resolution 104, allowing those who were not born in the United States, but have been citizens of the United States for at least 20 years to serve as President and Vice President. Mr. Chairman, my bill is the House counterpart to your S.J.Res. 15. As with your proposal, the text of H.J.Res. 104 makes clear that the other constitutional qualifications for being President (being at least 35 years old and being a U.S. resident for at least 14

years) are not affected by this amendment. My proposal has now been co-sponsored by John Conyers, the ranking minority member of the House Judiciary Committee, who authored a previous proposal on this subject.

The reasons the founding fathers added the "natural born citizen" requirement to the Constitution's qualifications for being President are archaic at best. The main rationale seemed to be to protect future generations undue foreign influence from

the election of a foreign leader in the executive office. This mindset prevailed not long after the founders were freed the country from the control of a foreign body. Interestingly, however, in what I call "the Hamilton loophole," they exempted their own generation from the burdens of the "natural born citizen" requirement. Seven of the 39 signers of the Constitution in Philadelphia in 1787 were foreign born, as well as 8 of America's original 81 Senators and Representatives, 3 of our first 10 Supreme Court justices, 4 of our first 6

secretaries of the treasury, and one of our first 3 secretaries of war. Most, if not all, of these immigrants were eligible to serve as President, since the Constitution exempted all those who were citizens at the time of its adoption from the "natural born citizen" requirement.

Today, the offices of President and Vice President are the only offices where a person who is not U.S. born is disqualified from serving. Is this still appropriate when we have seen great leaders, after a lifetime

of service to this country, be unable to represent the citizens of this country?

Today we have many significant political leaders who cannot be President or Vice President simply because they were not born here. California Governor Arnold Schwarzenegger is the most famous example, but Michigan's Governor, Jennifer Granholm came to the United States from Canada at the age of four. Congressman Pete Hoekstra came to this country when he was a mere three years old and has been

given the responsibility of being Chairman of the House Permanent Select Committee on Intelligence. Congressman Hoekstra oversees the intelligence community in a post-9/11 United States and yet regardless of his lifetime of service, is disqualified from our nation's highest offices.

There are many others who are similarly unfairly excluded or whose eligibility is in doubt. For the record, I am attaching to my written testimony a list of Americans who have spent a career of service to this

country who are ineligible to be President because they were not U.S. citizens at birth, along with a list of those who were U.S. citizens from birth, but whose eligibility to be President has been questioned because they were born outside the borders of the United States.

I hope my colleagues will agree with me that it is long past time for the "natural born citizen" requirement to change. Respect for the many legal immigrants who have made our country great should lead us to

conclude that once they have been U.S. citizens for 20 years they should no longer be constitutionally disqualified from serving in our nation's highest offices.

Naturalized U.S. citizens

Madeleine Albright (Czech Republic)
Henry Kissinger (Germany)
Gov. Arnold Schwarzenegger (Austria)
Rep. Pete Hoekstra (Netherlands)
Gov. Jennifer Granholm (Canada)
Rep. Tom Lantos (Hungary)
Rep. David Wu (Taiwan)
John Shalikashvili (Poland)
Secretary Elaine Chao (Taiwan)
Secretary Mel Martinez (Cuba
Zbigniew Brzezinski (Poland)
Rep. Ciro D. Rodriguez (Mexico)
Rep. Lincoln Diaz-Balart (Cuba)
Rep. Ileana Ros-Lehtinen (Cuba)

U.S. citizens at birth, born outside U.S.

Rep. Nydia M. Velázquez (Puerto Rico)
Rep. Jose Serrano (Puerto Rico)
George Romney (Mexico)
John McCain (Panama Canal Zone)
Rep. Chris Van Hollen (Pakistan)

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CONGRESSIONAL TESTIMONY

The Constitution, the Presidency and Natural Born Citizens

Testimony before the
Committee on the Judiciary
United States Senate

October 5, 2004

Matthew Spalding, Ph.D.
Director, B. Kenneth Simon
Center for American Studies
The Heritage Foundation

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—indeed, all those "yearning to breathe free"—but also 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—welcoming newcomers while insisting on their learning and embracing America's civic culture and political institutions, thereby forming one nation from many peoples.

"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 on the potential rights of immigrants: only those who are native born can become president of the United States. Why the exception to this otherwise universal principle? The immediate answer seems to be clear: Poland, where in 1772, as the historian Forrest McDonald explains, "the secret services of Austria, Prussia and Russia had connived to engineer the election of their own choice for king, whereupon the entirety of Poland was partitioned and divided among those three powers." Indeed, South Carolina delegate Charles Pinckney worried that "in not many years the fate of Poland may be that of the United States."

Perhaps with this in mind, John Jay, then Superintendent of Foreign Affairs wrote to Washington, as president of the Convention, urging that it would be "wise & seasonable 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." Thus the phrase, as Justice Joseph Story later explained in his *Commentaries on the Constitution*, "cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office."

But there is something more going on here as well, that points back to the Founders' general views about immigration. The purpose of immigration policy, as Hamilton put it succinctly, was for immigrants "to get rid of foreign and acquire American attachments; to learn the principles and imbibe the spirit of our government." The immediate fear was a foreign *takeover*, but the larger concern was foreign *influence*.

At the Constitutional Convention there was a lively and illuminating debate about the eligibility of foreign immigrants for federal office. Elbridge Gerry wanted to restrict membership to those born in the United States, while Gouverneur Morris and Charles Pinckney advocated a qualifying period of at least 14 years before eligibility. George Mason was all for "opening a wide door for emigrants; but did not choose to let foreigners and adventurers make law for and govern us." Indeed, were it not for the many immigrants who had acquired great merit in the Revolution, he, too, would be "for restraining the eligibility into the Senate to natives."

Other, more numerous delegates vigorously attacked this position. Scottish-born James Wilson knew from experience "the discouragement and mortification [immigrants] must feel from the degrading discrimination now proposed." Benjamin Franklin opposed such illiberality and argued that when a foreigner gives a preference to America "it is a proof of attachment which ought to excite our confidence and affection." James Madison wanted to maintain the "character of liberality" of the state governments and "to invite foreigners of merit and republican principles among us," while West Indies-born Alexander Hamilton spoke of attracting respectable 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 the federal legislature: seven years for the House and nine years for the Senate. This was long enough, Madison later wrote in *The Federalist,* to assure that legislators are "thoroughly weaned from the prepossessions and habits incident to foreign birth and education."

But again, why the natural born citizenship requirement for the presidency? In the House of Representatives and the Senate, members check each other and diffuse the influence of any one individual. Not so in the case of the president. With a single executive, at the end of the day, there are no checks, no multiplicity of interests that

might override the possibility of foreign intrigue or influence, or mitigate any lingering favoritism—or hatred—for another homeland.

The attachment of the president must be absolute, and absolute attachment comes most often from being born and raised in—and educated and formed by—this nation, unalloyed by other native allegiances. "The safety of a republic," Hamilton observed, "depends essentially on the energy of a common national sentiment; on a uniformity of principles and habits; on the exemption of the citizens from foreign bias, and prejudice; and on that love of country which will almost invariably be found to be closely connected with birth, education, and family." The natural born citizen requirement for the presidency seeks to guarantee, as much as possible, this outcome where it matters most.

And while the practical circumstances have changed—there is no threat of a foreign royal taking the reins of power—the underlying concerns about foreign attachments and favoritism, and the need for absolute allegiance and loyalty in the executive, still make sense. The question is whether you can expand the eligibility to non-native born citizens without undermining the wisdom and caution inherent in the Framers' design.

One possible proxy is a significant citizenship requirement, along with a significantly increased residency requirement. How much? Enough to approximate the attachment that comes with having been born here, raised here, and educated here; in short, having lived in America for almost all of one's life and thus fundamentally shaped by this regime, its history, institutions, and way of life. The average age of twentieth century presidents is 54. A thirty-five year citizenship requirement (combined with a substantial residency requirement) would assure that most would-be presidents are citizens before they are eighteen years old and residents thereafter.

Let me add four brief caveats:

1. Opening the presidency to naturalized citizens, who in theory but often not in practice have renounced their past allegiances, compels us to consider the question of Dual Citizenship. This is a significant question and, unless addressed, could be a particularly thorny problem. If the natural born citizen requirement violates the idea that anyone can become an American, so the reality of multiple citizenships violates the idea that becoming an American really matters.

2. In order to have the intended effect, this effort should be part of a renewed, deliberate and self-confident policy of patriotic assimilation that seeks to Americanize immigrants and educate them about this country's political principles, civic traditions and cultural heritage. If we remove the barrier to our highest office, let's make a better effort to get new citizens started on the right path.

3. I am concerned about the politicization of this question. We are trying to square an important principle of our Constitution with the legitimate concerns of national unity. It should not be resolved based on immediate calculations to advance or hinder the political aspirations of any particular individual or party. I am tempted to suggest that any amendment should include language that it would not take effect for ten years or so, when the current candidates are not on the scene.

4. I must say that the more I have looked into the matter, the more I am intrigued by the legislative approach. Recognizing the difficulty in amending the Constitution, and noting Madison's advice that we should change the document only on "certain great and extraordinary occasions," the possibility of correcting the more obvious loopholes of the clause by legislation is attractive. The First Congress, which included a number of the Framers, provided in the Naturalization Act of 1790 that "the children of citizens of the United States, that may be born beyond the sea, . . .shall be considered as natural born citizens." This suggests that the phrase could include those who are citizens at birth by statute because of their citizen parents. I won't speculate about how the Supreme Court might rule on this question, but it seems compatible with Court precedents (and the Court's deference) to allow Congress this latitude in its plenary powers over naturalization. It is also not clear that Congress could not include foreign-born children adopted by US citizens. Current law, after all, treats those adopted children as if, from the time of their birth, they were born to United States citizens abroad. As long as there is any ambiguity, Congress should pursue these legislative options.

Let me end, very briefly, on a personal note. Last year, my wife and I adopted two Russian orphans, age three and a half and one. They hold birth certificates in our name, and are American citizens. Joseph knew some broken Russian, but one of the first English phrases he learned was "God bless America." He knows that George Washington is the Father of *his* Country. Yet, he can never grow up to be president of

the United States. What is worse, in reading stories of our nation's heroes and in emulating their patriotism, he can't dream, as little boys do, of serving his country in its highest office, "on a level with the First Citizens."

Nevertheless, these children—our children—will be as natural born citizens. Not because of where they were born, but because they will be raised and educated to know, as Lincoln said of those who did not themselves descend from the Founders but came to understand the truths of the American creed, that they are "blood of the blood, and flesh of the flesh, of those who made the Revolution." And so they will be.

Thank you.

The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

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A Simple Matter of Equal Rights: Let Naturalized Citizens Run for President

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Written Statement
Presented to the U.S. Senate Judiciary Committee
Hearings on "Maximizing Voter Choice:
Opening the Presidency to Naturalized Americans"
October 5, 2004

1. Introduction

One of the cornerstones of American democracy is the "self-evident truth" in the Declaration of Independence that "all men are created equal." This truth leads directly to the principle that all citizens should have equal rights. The U.S. Constitution made historic contributions, of course, to the establishment of this principle, by, among other things, setting up the popular election of members of the House of Representatives and by allowing even naturalized citizens, after a waiting period of a few years, to run for the Senate or the House of Representatives.

It is equally true, of course, that the Founding Fathers did not fully implement the equal-rights principle, and throughout its history, this nation has moved toward completing this task. The Constitution's most important limitations on this score obviously were that it allowed the states to disenfranchise people on the basis of sex and race. The Fourteenth, Fifteenth, and Nineteenth Amendments to the Constitution, along with extensive civil rights legislation, have been passed to remove these limitations. The vast majority of American citizens now embrace

the principle that all citizens should have equal rights, and our equal-rights legislation has made us a beacon of hope for people around the world striving for freedom and justice.

This hearing is about the next step on the path toward equal rights, namely, ensuring that naturalized American citizens have exactly the same rights as natural-born American citizens. The only difference in rights between these two groups is that naturalized citizens cannot run for President or Vice-President. This difference comes from the clause in the Constitution that limits the presidency to natural-born citizens, along with the Twelfth Amendment to the Constitution, which implicitly extends this limitation to the office of Vice President. Thus, the quintessential dream of our democracy, the dream of being able to grow up to be President, is withheld, for no good reason, from millions of naturalized American citizens, including my son, Jonah, who came to the United States when he was only 4 months old.

The provision in the Constitution that limits presidential eligibility to natural-born citizens grew out of the Founders' fear of foreign influence. As I will show in this statement, however, the Founders expressed serious doubts about this provision, and, as the Founders' own arguments make clear, this provision is both unwise and unnecessary. We should not let a misplaced fear of foreigners prevent us from removing this anachronistic provision from the Constitution and thereby reaffirming the principle of equal rights for all American citizens.

2. The Founders' Doubts About the Natural-Born Citizen Requirement

The issue of presidential eligibility was first raised at the Constitutional Convention fairly early in the deliberations. On July 26, 1787, George Mason of Virginia moved that a committee "be instructed to receive a clause requiring certain qualifications of landed property and

citizenship of the United States in members of the legislature."[1] Two other delegates, Charles Pinckney and Charles Cotesworth Pinckney of South Carolina, then "moved to insert by way of amendm[t] the words Judiciary & Executive so as to extend the qualifications to those departments." This motion carried unanimously. Hence, the Founders' first instinct was to allow all citizens, naturalized and natural-born, to run for President. Moreover, the first draft of the presidential eligibility clause, which appeared on August 22, includes only a time-of citizenship requirement.

The version of the presidential eligibility clause that excludes naturalized citizens did not appear until the final grand compromise on September 4, less than two weeks before the Constitution was signed by most of the delegates. This version was accepted unanimously with no record of any debate. In fact, however, the Founders provided considerable evidence concerning their feelings about restricting the rights of naturalized citizens, and most of these feelings were negative. In this section, I discuss three examples of this evidence: the grandfather clause concerning presidential eligibility, the Founders' recognition that second-class citizenship for naturalized citizens violates the equal-rights principle, and the Founders' demonstrated trust in naturalized citizens.

The Grandfather Clause

The first source of evidence about the Founders' views concerning the treatment of naturalized citizens comes from the presidential eligibility clause itself, which reveals that the Founders did really not want to prevent all naturalized citizens from running for President. To

[1] All quotations in this statement from the Constitutional Convention are from James Madison's notes and are referenced by date. These notes can be found in Max Farrand, *The Records of the Federal Convention of 1787* (originally published in 1911), 2004, available at **http://memory.loc.gov/ammem/amlaw/lwfr.html**.

be specific, this clause grants presidential eligibility to any "Citizen of the United States at the time of the Adoption of this Constitution."

This "grandfather" clause gave presidential eligibility to tens of thousands of naturalized citizens, included seven of the people who signed the Constitution.[2] If the Founders thought that, among people meeting the fourteen-year residency requirement, naturalized citizens were inherently unqualified to be President or that naturalized citizens were inherently more likely than natural-born citizens to be subject to foreign influence, then they would not have included this provision.

According to this clause, presidential eligibility was granted to all naturalized citizens at the time the Constitution was adopted in 1789. Based on information available from the U.S. Census, I estimate that roughly 60,000 foreign-born American citizens were eligible to run for President in the elections of 1796 and 1800.[3] Moreover, about 1,500 of these people were born in France and about 10,000 were born in Great Britain, countries that were at odds with the United States in those years.

Thus, the grandfather clause granted presidential eligibility to about 60,000 foreign-born citizens, including citizens from countries in conflict with the United States. The Founders'

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[2] The seven foreign-born signers were James Wilson, Robert Morris and Thomas Fitzsimons of Pennsylvania, Alexander Hamilton of New York, William Paterson of New Jersey, James McHenry of Maryland, and Pierce Butler of South Carolina. Another delegate, William R. Davie of North Carolina, was also foreign-born but did not sign the Constitution. See National Archives and Records Administration (NARA), "America's Founding Fathers: Delegates to the Constitutional Convention," 2004, **http://www.archives.gov/national_archives_experience/charters/constitution_founding_fathers.html**.

[3] Presidential eligibility also requires 14 years of residence in the United States. Any person who came to the country and became naturalized after 1789 could not have met the fourteen-year residency requirement by 1800 even if naturalized citizens had been allowed to run. Hence, the natural-born citizen requirement was essentially irrelevant to the elections of 1796 and 1800.

ambivalence about limiting presidential eligibility to natural-born citizens is evident in the presidential eligibility clause itself for anyone to see.

Statements that Second-Class Citizenship for Naturalized Citizens Violates the Equal-Rights Principle

Although the records of the Constitutional Convention contain no mention of a debate about the presidential eligibility clause itself, they contain evidence about the Founders' views concerning second-class citizenship for naturalized citizens.

This evidence comes from the debates concerning the time-of-citizenship requirements for the Senate and the House of Representatives. These debates took place on August 9 and August 13, respectively. The key issue in these debates was whether to set long or short time-of-citizenship requirements. The delegates all agreed that long requirements placed an extra burden on naturalized citizens, but some delegates thought this extra burden was appropriate and others did not. A few of the delegates raised the issue of restricting eligibility to natural-born citizens,[4] but no delegate moved to include such a restriction in the Constitution, and only one delegate, Elbridge Gerry of Massachusetts, made a statement in support of such a restriction.[5]

In contrast, numerous delegates spoke out against long time-of-citizenship requirements and, implicitly, against stronger restrictions on naturalized citizens, such as making them

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[4] On August 9, for example, George Mason of Virginia said that "Were it not that many not natives of this Country had acquired great merit during the revolution, he should be for restraining the eligibility into the Senate, to natives." During a debate about limiting voting privileges to freeholders on August 7, Mason made a less ambiguous statement: "The true idea in his opinion was that every man having evidence of attachment to & permanent common interest with the Society ought to share in all its rights & privileges."

[5] Specifically, Gerry "wished that in future the eligibility might be confined to Natives." Gerry's positions at the Convention were often contradictory and he ultimately "refused to sign the Constitution because it lacked a bill of rights and because he deemed it a threat to republicanism" (NARA, 2004, op. cit.).

ineligible altogether. The most eloquent statements on this matter come from James Madison, who is often called the father of the Constitution.[6] On August 9, Madison declared that a severe restriction on the rights of naturalized citizens would be "Improper: because it will give a tincture of illiberality to the Constitution." He was seconded by Benjamin Franklin "who was not agst. a reasonable time [that is, a reasonable time-of-citizenship requirement], but should be very sorry to see any thing like illiberality inserted in the Constitution." Further endorsement was provided by James Wilson of Pennsylvania who "remarked the illiberal complexion which the motion [to lengthen the time-of-citizenship requirement] would give to the System." As the delegates used the term, "illiberal" means lacking in individual liberty.[7]

Another important argument about naturalized citizens was then made by Edmond Randolph of Virginia,[8] who "could never agree to the motion for disabling them for 14 years to participate in the public honours. He reminded the Convention of the language held by our patriots during the Revolution, and the principles laid down in all our American Constitutions." Randolph is referring to the state constitutions passed shortly after the Declaration of Independence, none of which placed limits on the rights of naturalized citizens.

Madison blended these two issues in another eloquent statement on August 13. "He wished to maintain the character of liberality which had been professed in all the Constitutions & publications of America." This endorsement of the principles in existing "Constitutions and

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[6] As one of his biographers puts it, " In attending to every detail of this structure, and in being sensitive at every point to the effect of blending the various parts, Madison played his most critical role, and earned the title later bestowed upon him, Father of the Constitution" (Ralph Ketcham, 1990, *James Madison: A Biography*, Paperback Edition. Charlottesville, VA: University of Virginia Press, p. 229).

[7] For a discussion of the philosophical tradition on which the delegates were drawing, see Ketcham, 1990, op. cit.

[8] Randolph did not sign the Constitution. According to NARA, 2004, op. cit., he did not think it was "sufficiently republican" and he preferred a "three-man council" to a "one-man executive."

publications" was then seconded by several other delegates. James Wilson "read the clause in the Constitution of Pena. giving to foreigners after two years residence all the rights whatsoever of Citizens, combined it with the Article of Confederation making the Citizens of one State Citizens of all, inferred the obligation Pena. was under to maintain the faith thus pledged to her citizens of foreign birth." John Mercer of Maryland[9] wanted to "prevent a disfranchisement of persons who had become Citizens under the faith & according to—the laws & Constitution from being on a level in all respects with natives." Nathaniel Gorham of Massachusetts also seems to be referring to existing constitutions in saying "When foreigners are naturalized it wd. seem as if they stand on an equal footing with natives. He doubted then the propriety of giving a retrospective force to the restriction."

At the time of independence, eleven of the thirteen original colonies adopted new state constitutions.[10] Not one of these constitutions restricted the rights of naturalized citizens.[11] Two cases are particularly instructive. In Virginia, a draft constitution was written by Thomas Jefferson in June, 1776. This document has special historical significance because it contains a preliminary version of the grievances that would appear in the Declaration of Independence the next month. In addition, this draft includes the following naturalization clause:

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[9] Mercer left the convention early and did not sign the Constitution. According to NARA, 2004, op. cit. he was opposed to a strong federal government.

[10] State constitutions were passed just after the Declaration of Independence for Delaware, Georgia, Maryland, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Vermont, Virginia. They can be found at the website of Yale University's Avalon Project: **http://www.yale.edu/lawweb/avalon/18th.htm**.

[11] The Articles of Confederation among the states were passed by the Continental Congress in November 1777 and ratified in March 1781. These Articles said that "the free inhabitants of each of these States… shall be entitled to all privileges and immunities of free citizens in the several States," and thereby accepted the citizenship definitions in the existing state constitutions, none of which restricted the rights of naturalized citizens. See **http://www.ourdocuments.gov/doc.php?doc=3**.

> All persons who by their own oath or affirmation, or by other testimony shall give satisfactory proof to any court of record in this colony that they propose to reside in the same 7 years at the least and who shall subscribe the fundamental laws, *shall be considered as residents and entitled to all the rights of persons natural born.*[12]

The draft goes on to say that "every person so qualified to elect shall be capable of being elected" and thereby explicitly makes naturalized citizens eligible for all statewide offices. Although this specific wording was edited out of the final version of the Virginia Constitution, its spirit remained, and this constitution does not place any restrictions on the rights of naturalized citizens.

In the case of New York, the constitution of 1776, which was drafted by John Jay, gives the right of suffrage to "every male inhabitant of full age, who shall have personally resided within one of the counties of this State for six months" and who is a "freeholder," that is, a person who owns property. This constitution also says that the "freeholders" must elect the governor, with no explicit statement about the governor's qualification. Among other powers, the governor was declared to "be general and commander-in-chief of all the militia, and admiral of the navy of this State." Finally, this constitution gives the state legislature the power to naturalize foreigners and to make them "subjects of this State," with no qualifications concerning their rights.

John Jay's role in drafting this constitution is intriguing because many historians believe that Jay is responsible for the natural-born citizen requirement in the U.S. Constitution thanks to a letter he wrote George Washington, who presided over the Constitutional Convention. Jay, who was well known but not a delegate to the Convention, suggested that foreign influence could

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[12] This draft can be found at **http://www.yale.edu/lawweb/avalon/jeffcons.htm** (emphasis added).

be minimized by limiting the "Command in chief of the american army" to "a natural *born* Citizen."[13] Thus, John Jay's own position appears to be contradictory: he saw no need for a natural-born citizen requirement for New York's governor and commander in chief, but then, a decade later, called for such a requirement for the nation as a whole.[14]

In short, speaking though the state constitutions and the debate at the Constitutional Convention, many of our Founding Fathers considered restrictions on the rights of naturalized citizens to be violations of the fundamental principle of equal rights for all citizens. As Madison put it many years later, "Equal laws, protecting equal rights, are found, as they ought to be presumed, the best guarantee of loyalty and love of country."[15]

Demonstrated Trust in Naturalized Citizens

Presidents George Washington, John Adams, and James Madison revealed their lack of concern about nativity by, among other things, offering high-level federal positions to some of the foreign-born delegates to the Constitutional Convention.[16] Washington appointed William Paterson and James Wilson to the U.S. Supreme Court; he made James McHenry Secretary of the Army; he offered to make Robert Morris Secretary of the Treasury and then gave the job to Alexander Hamilton when Morris turned him down. Adams kept McHenry and Hamilton in his

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[13] Farrand, 2004, op. cit., Appendix A, LXVII.

[14] It is worth pointing out that Jay's letter refers only to the "Command in chief" not to the President. The proceedings of the Constitutional Convention were secret and Jay had no way of knowing that the delegates would create a one-person presidency or that they would make the President the commander in chief.

[15] For the complete letter, written in 1820, see James Madison, *Letters and Other Writings of James Madison, Fourth President of the United States, Vol. III, 1816-1828.* (New York: R. Worthington, 1884), pp. 178-179.

[16] Although he was not a delegate to the Constitutional Convention, Adams was, of course, a member of the Continental Congress and a leader in the movement for independence. See **http://www.whitehouse.gov/history/presidents/ja2.html**. The careers of all the delegates are described at NARA, 2004, op. cit.

cabinet, later appointed Hamilton as Inspector-General of the Army, and made William Davie first a brigadier general and then Peace Commissioner to France. Finally, Madison offered Davie an appointment as a major-general, but this offer was declined.

An even more dramatic declaration of the Founders' ambivalence, if not outright hostility, toward the natural-born-citizen requirement came out of the U.S. Senate in 1798. In this year, the Senate was full of men who had participated in the founding of the United States. Two senators (John Langdon of New Hampshire and Charles Pinckney of South Carolina) had been delegates to the Constitutional Convention. All but three of the remaining senators had served in at least one of the following: the American Army during the Revolutionary War, the Continental Congress, a state convention to ratify the U.S. Constitution, and the House of Representatives.[17] In December, these men elected a naturalized citizen, John Laurance of New York, to be President Pro Tempore of the Senate.[18]

This action is particularly significant for two reasons. First, the grandfather clause applied to Laurance. He was born in England in 1750, sailed to America in 1767, and was admitted to the bar in 1772—all well before the adoption date of 1789.[19] Second, the

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[17] The Senators serving in 1798 can be found at **http://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf**; the careers of all Senators can be found at **http://bioguide.congress.gov/biosearch/biosearch.asp**.

[18] In the early years of the U.S. Senate, the Vice President usually presided, and a President Pro Tempore was elected to preside only for periods when the Vice President was absent. This post did not automatically go to the most senior member of the majority party, as it does today; before Laurance was elected, nine men had served as President Pro Tempore. Laurance's term lasted from December 6 to 27, 1798. See **http://www.senate.gov/artandhistory/history/common/briefing/President_Pro_Tempore.htm#5**

[19] Laurance served as a commissioned officer in the Revolutionary War, was a delegate to the Continental Congress, was elected to the House of Representatives in the first and second Congresses, and was appointed a U.S. District Judge by President Washington. See **http://bioguide.congress.gov/biosearch/biosearch.asp**. Laurance must have become a citizen before 1783, because he was elected to Congress in 1789, which could not have happened unless at that time he met the 7-years-of-citizenship requirement in the Constitution.

Presidential Succession Act of 1792 placed the President Pro Tempore second in the line of succession to the presidency.[20] For a brief period in 1798, therefore, a naturalized citizen, John Laurance, stood behind only Vice President Thomas Jefferson in the sequence of succession.

During this year, the notorious XYZ affair stirred up American patriotism, and tensions between the United States and both Great Britain and France were very high.[21] In the summer of 1798, the Senate responded by passing the infamous Alien and Sedition Acts, which authorized the President to deport "dangerous" aliens and also imposed penalties for "malicious writing."[22] Moreover, the year before, William Blount, a natural-born citizen who had been a delegate to the Constitutional Convention, was expelled from the Senate for the "high misdemeanor" of conspiring with the British.[23]

Despite the turbulence of the times, however, the Senate clearly believed that a man with a distinguished record of service to the United States, namely Laurance, should not be disqualified for the presidency simply because he was born in another country, even a country at odds with the United States.

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[20] See *United States Statutes at Large*, vol. 1, p. 240, available at **http://memory.loc.gov/ammem/amlaw/lwsllink.html**.

[21] The XYZ affair involved an American mission to negotiate peace with France in which Tallyrand, the French foreign minister, attempted, unsuccessfully, to extract a bribe from the American delegation. This delegation had arrived in France in the fall of 1797, after their ship was boarded several times by the British navy while it passed through a British naval blockade of Amsterdam. See Jean Edward Smith, *John Marshall: Definer of a Nation*. New York: Henry Holt, 1996.

[22] See *United States Statutes at Large*, vol. 1, pp. 577-578 for the Alien Act and pp. 596-598 for the Sedition Act, available at **http://memory.loc.gov/ammem/amlaw/lwsllink.html**.

[23] See the biography of Blount at **http://bioguide.congress.gov/biosearch/biosearch.asp**.

3. The Case for Removing the Natural-born Citizen Requirement

Thanks to 9/11, this country once again finds itself in a time characterized by concern about the influence of foreigners in the United States. Why is this a good time to eliminate the natural-born citizen requirement? In this section, I evaluate key argument for and against such a change.

Arguments for Removing the Natural-Born Citizen Requirement

The natural-born citizen requirement (including its implicit extension to the Vice President in the Twelfth Amendment) is the only provision in the Constitution, or in our laws, for that matter, that explicitly denies rights to an American citizen based on one of that citizen's indelible characteristics. The equal-rights principle is fundamental to our democracy, and throughout our history we have struggled to extend it. By sanctioning one exception to this principle, we leave open the door to other exceptions. We will strengthen out democracy by closing this door.

The Fourteenth Amendment, which is one of the crowning achievements in this nation's struggle to promote equal rights, says, in part,

> 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This amendment prohibits the states from treating naturalized citizens any differently from natural-born citizens. The same prohibition should apply to the federal government. As the U.S. Supreme Court said in another context, "it would be unthinkable that the same Constitution

would impose a lesser duty on the Federal Government."[24] In the case of the natural-born citizen requirement, however, the Constitution does impose a lesser duty on the Federal Government than the duty imposed on the states by the Fourteenth Amendment. This "unthinkable" contradiction should be removed.

Eliminating the natural-born citizen requirement from the Constitution would also send a powerful message to people around the world about this nation's commitment to equal rights. We will judge all or our citizens on their merits, this change would say, not on their place of birth.[25] In these troubled times, a statement of this type can only serve to enhance our reputation as the world's standard bearer for democratic values.

Arguments against Removing the Natural-Born Citizen Requirement

Some people have argued recently that we need to keep the natural-born citizen requirement because it makes this country safer. This argument is simply not true.

The delegates to the Constitutional Convention obviously wanted to protect the United States from foreign influence. This concern played an important role in many of their decisions, including the creation of a strong central government, the design of the Electoral College, and the system of checks and balances.

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[24] This quotation comes from a case in which the Supreme Court rejected racial segregation in Washington, D.C.'s schools. The full quotation is "In view of this Court's decision in *Brown v. Board of Education* that the Constitution prohibits the States from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" (Bolling v. Sharpe, 347 U.S. 497 (1954), p. 500; citation omitted).

[25] It is worth pointing out that decisions about the requirements for citizenship have nothing to do with the natural-born citizen clause. We do not violate the equal-rights principle by imposing stringent citizenship requirements (so long as the standards are applied fairly), and the debate about these requirements raises totally different issues.

The relationship between foreign influence and the provisions in the Constitution is discussed at length in the *Federalist Papers*, which are, of course, key documents in interpreting the Founders intentions.[26] Essays 2 through 5, which were written by John Jay, were titled "Concerning Dangers from Foreign Force and Influence." Although the main focus of these essays is on the need for a strong central government to protect a nation from foreign military action, they also suggest that a strong central government can help protect a nation from "foreign influence." Concern about foreign influence also appears in essay 20, written by Hamilton and Madison; essay 43 by Madison; and essays 66, 68, and 75 by Hamilton.

The role of the presidential selection mechanism, and in particular of the Electoral College, in limiting foreign influence is explicitly discussed by Hamilton in essay 68. Neither this essay, however, nor any of the others, refers to the natural-born citizen requirement. To these three influential Founders, this requirement is not important enough to mention. Even John Jay, whose letter may have inspired the requirement, does not bring it up.

Despite all the protections built into the governmental system created by the Constitution, some people still insist that we gain additional protection from the natural-born citizen requirement. If naturalized citizens were allowed to run for President, these people argue, foreign powers might scheme to have their citizens elected here. In fact, however, this Manchurian Candidate imagery has two major flaws. The first flaw was articulated by Benjamin Franklin at the Constitutional Convention on August 9. He "reminded the Convention that it did not follow from an omission to insert the restriction [in the form of a long time-of-citizenship requirement for naturalized citizens] in the Constitution that the persons in question wd. be

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[26] The Federalist Papers, along with commentary on them, are provided by the Library of Congress at **http://thomas.loc.gov/home/histdox/fedpapers.html**

actually chosen into the Legislature." Representative Charles T. Canady echoed this point during hearings he convened on this issue in 2000.[27] According to Canady, eliminating the natural-born citizen requirement would not give naturalized citizens "a right to be President"—only a right to run for President.

Moreover, any naturalized citizen running for President would face an extremely high burden convincing a majority of the American people that he or she is the best candidate for President. This point was made by Madison on August 13. "For the same reason that they [men with foreign predilections] would be attached to their native Country, our own people wd. prefer natives of this Country to them. Experience proved this to be the case. Instances were rare of a foreigner being elected by the people within any short space after his coming among us."

The second flaw in the Manchurian Candidate image is that any foreign power wishing to undermine our government is more likely to use a natural-born citizen than a naturalized one, precisely because of the suspicion falling on naturalized citizens. This argument was forcefully made by Madison at the Constitutional Convention. On August 9 he said that "He was not apprehensive ... that foreign powers would make use of strangers as instruments for their purposes. Their bribes would be expended on men whose circumstances would rather stifle than excite jealousy & watchfulness in the public." He repeated this argument on August 13. "If bribery was to be practised by foreign powers," he said, it would be attempted "among natives having full Confidence of the people not among strangers who would be regarded with a jealous eye."

Restricting the rights of all naturalized citizens out of the fear than one of them might try to undermine our government by running for President is an extreme form of profiling with no

[27] See **http://commdocs.house.gov/committees/judiciary/hju67306.000/hju67306_0.HTM**.

basis in logic or history. Does it make sense to discriminate against 12.8 million naturalized citizens, including over 250,000 foreign-born adoptees, because one of them might both harbor negative attitudes toward this country and decide to run for President?[28] Of course not: It makes no sense at all. The natural-born citizen requirement may make some people feel better, but it adds nothing of substance to the extensive protection provided by our constitutional election procedures, by our checks and balances, and by the judgment of the American people.

Another argument against changing the natural-born citizen requirement is that it is a poor subject for a constitutional amendment, either because it is tied to the political fortunes of a particular person or because it is just not important enough to justify altering the Constitution.

A constitutional amendment to eliminate the natural-born citizen requirement might, depending on its time-of-citizenship requirement, enable two current governors, Arnold Schwarzenegger of California and Jennifer Granholm of Michigan to run for President. Both of these governors are naturalized citizens. Some people have argued for or against an amendment because of their feelings about one of these governors. In my view, however, this amendment is about principle, not politics.

We do not disqualify other potential presidential candidates on the basis of their experience or their stands on substantive issues, and we should not disqualify Governors Schwarzenegger or Granholm, either. The principle of equal rights for all American citizens should not have an exception based on nativity—or on any other indelible characteristic—and these two governors should be allowed to run for President if they choose to do so.

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[28] This 12.8 million is the 2003 Census figure for the number of naturalized citizens. See **http://www.census.gov/population/socdemo/foreign/ppl-174/tab01-01.pdf**. The number of foreign-born adoptees, 257,792 (199,136 of whom are under 18), comes from Rose M. Kreider *Adopted Children and Step Children 2000*, Washington, D.C.: U.S. Census Bureau, 2003 (available at **http://www.census.gov/prod/2003pubs/censr-6.pdf**).

This principle does not imply, of course, that voters would have to ignore a candidate's nativity, and, as Madison said long ago, it might be more difficult for Governors Schwarzenegger and Granholm than for a natural-born candidate to convince voters that they would act in our country's best interests. Instead, the principle of equal rights simply requires than neither of these governors nor any other citizen be automatically disqualified from the presidency because of their place of birth.

The argument that presidential eligibility is not substantive enough for a constitutional amendment also does not hold up under scrutiny. The distinguished, non-partisan organization called the Constitution Project has developed a series of guidelines for constitutional amendments.[29] According to these guidelines, a constitutional amendment "should address matters ... that are likely to be recognized as of abiding importance by subsequent generations," "should be utilized only when there are significant practical or legal obstacles to the achievement of the same objectives by other means;" "should not be adopted when they would damage the cohesiveness of constitutional doctrine as a whole;" and "should embody enforceable, and not purely aspirational, guidelines."

An amendment to eliminate the natural-born citizen requirement clearly meets all of these tests. The equal-rights principal is a matter of "abiding importance." Because the natural-born citizen requirement is in the Constitution, there are significant legal obstacles to obtaining equal rights through other means. As pointed out earlier, this requirement contradicts the Fourteenth Amendment, so eliminating it would actually enhance constitutional doctrine as a whole. And an amendment to eliminate this requirement would obviously be easy to enforce.

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[29] The Constitution Project and its Constitutional Amendments Initiative (formerly known as Citizens for the Constitution) is described on **http://www.constitutionproject.org/cai/index.html**.

Although elimination of second-class citizenship for all naturalized citizens would require a constitutional amendment, full citizenship for foreign-born adoptees, a subset of naturalized citizens, might be achieved through the Natural Born Citizen Act, S. 2128, introduced by Senators Nickles, Landrieu, and Inhofe.[30] This bill provides a definition of a natural-born citizen that includes foreign-born adoptees. If it were passed and upheld by the U.S. Supreme Court, therefore, it would allow foreign-born adoptees, but not other naturalized citizens, to run for President.

4. A Simple Matter of Equal Rights

The principles on which our democracy is founded need to be protected, extended, and reaffirmed. The Equal Opportunity to Govern Amendment (with a 20-year time-of-citizenship requirement) introduced by Senator Hatch and Representative Rohrabacher and the President and Vice President Eligibility for Office Bill (with a 35-year time-of-citizenship requirement) introduced by Representatives Snyder, Issa, and Frank provide an opportunity to protect, extend, and reaffirm one of our most fundamental principles, namely, the principle that all American citizens should have equal rights.[31] The Natural Born Citizen Act moves move toward equal rights without a constitutional amendment; it creates equal rights for foreign-born adoptees, like my son, but not for most naturalized citizens.

In practical terms, the right to run for President is not the most important right a citizen can have. After all, the vast majority of American citizens will never attempt to run for President.

[30] Under the Child Citizenship Act of 2000 (Public Law No: 106-395), foreign-born adoptees become citizens as soon as their adoptions are final, with no need for a separate naturalization process. As a result, it is not clear that they are naturalized citizens. S.2128 resolves this ambiguity by defining them as natural-born citizens.

[31] These amendments are S.J. Res. 15 and H. J. Res. 59, respectively. Another proposed amendment by Representative Conyers, H. J. Res. 67, has flawed wording because its 20-year time-of-citizenship requirement appears to override 35-year age requirement currently in the Constitution.

In symbolic terms, however, the right to run for President is vitally important. Commentators, politicians, and teachers are fond of saying that the United States is a country where anyone can grow up to be President, because this expression conveys the essence of our democracy. This expression clearly sends the signal that political offices in this country are not inherited or restricted to a select few, but instead are open to anyone who can convince the voters of his or her merit. This message gets through. In an ABC News poll taken earlier this year, 54 percent of Americans between the ages of 12 and 17 believe they could grow up to be President.[32]

The power of this symbolism was brought home to me just a few days ago. On September 22, the Syracuse *Post-Standard* wrote an editorial in support of the amendments to eliminate the natural-born citizen requirement that were introduced by Senator Hatch and Representative Rohrabacher. The author of this editorial knew about me and my work because of my testimony before a House Committee in 2000, and the editorial contained a quote from me and mentioned by son, Jonah. The next day I received a letter in the mail from Ms. Cathy Fedrizzi, one of my son's second-grade teachers. Here is some of what this letter said:

> Dear Dr. Yinger,
>
> As I read this morning's editorial about Jonah, I had a feeling this would be a hard day. I was scheduled to visit Jonah's class to teach about the upcoming election. Part of my lesson involves teaching about who is eligible to become president…
>
> ….As we worked our way through the lesson, I noticed Jonah sitting on the edge of the group. That's unusual for Jonah…whenever I've taught guest lessons before, he's been front and center, so I had a feeling he wasn't happy. Before I got to the rules for becoming President, he told me the rule about being born a citizen. I explained that some laws are made a long time ago and seem like a good idea at the time, but I didn't like the law the way it was either. He didn't seem satisfied with my answer, and neither was I.

[32] **http://abcnews.go.com/images/pdf/943a1TeensandthePresidency.pdf.**

> I feel sad every time this situation occurs. .... I hope that some day, before I stop teaching, I can tell eight year old students that anyone sitting on the floor at my feet could one day be president of the United States.

My son should not have to feel this way. No American second grader should have to feel this way. No American citizen should have to feel this way.[33] I urge the members of this committee, and indeed all members of Congress, to support Senator Hatch's Equal Opportunity to Govern Amendment, one of the comparable amendments introduced in the House, or, as a second-best solution, the bill proposed by Senator Nickles. Let us renew our commitment to the equal-rights principle, one of the cornerstones of our democracy, by giving naturalized citizens the right to run for President.

[33] The Founders even anticipated this point. On August 9, Madison said that all naturalized citizens "would feel the mortification of being marked with suspicious incapacitations though they sd. not covet the public honors." Later the same day, Wilson talked about "the discouragement & mortification they [foreign-born citizens] must feel from the degrading discrimination."