IS MR. CHARLES EVANS HUGHES A “NATURAL BORN CITIZEN” WITHIN THE MEANING OF THE CONSTITUTION?

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A Legal Examination of the Subject by Breckinridge Long, of the St. Louis Bar.

Whether Mr. Hughes is, or is not, a “natural born” citizen within the meaning of the Constitution, so as to make him eligible or ineligible, to assume the office of President, presents an interesting inquiry.

He was born in this country and is beyond question “native born.” But is there not a distinction between “native born” and “natural born”? At the time he was born his father and mother were subjects of England. His father had not then been naturalized. The day after Mr. Hughes was born his father had a right, as an English subject, to go to the British consul, at New York, and to present his wife and infant and to claim any assistance he might need from the consul as the representative of the English government.

If war had broken out between this government and England this government would have had a right to interne the father, the mother and *the son* as subjects of an enemy power.

The Constitution of the United States puts a particular qualification upon those who shall become President and Vice-President. For all other offices it requires that they be “citizens of the United States,” but for the Presidency and Vice-Presidency it requires that they be “Natural Born citizens.” The word “natural” means “of the nature of”; “naturally a part of”; “by the laws of nature an integral part of” a system. Following that line of thought, a “natural born” citizen would be one who was naturally, at his birth, a member of the political society; naturally, a part of the political system into which he was born; by the laws of nature a citizen of the society into which he was born. It would mean, further, that no other government had any claim upon him; that his sole allegiance was to the government into which he had been born and that that government was solely, at the time, responsible for his protection. “Native born” does not mean quite the same thing. He might be born in a country under conditions similar to the conditions under which Mr. Hughes was born, and subsequently become a citizen of that Country. In that case, after he became a citizen, he would be a “native born” citizen, but he would not have been a “natural born” citizen. From the instant of his birth this government would not be solely responsible for his protection.

Mr. Hughes was born before the adoption of the Fourteenth Amendment to the Constitution, so the status of his citizenship must be considered as under the laws existing prior to the time of the adoption of that Amendment.

The only reference in the Constitution to the subject (except that Section specifying the qualifications for President) is that Congress shall have the power to make uniform laws to provide for naturalization. Congress under that authority enacted the following law: “The children of persons who have been duly naturalized under any law of the United States, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof.” That Statute says that children born of persons who have been duly naturalized become citizens, but become so by virtue of the act of the parent. That is, they become naturalized citizens. They are citizens by operation of law. They were not born so, but, because of the act of their father, are invested with all the rights of citizens. If they are born in this country and their father subsequently becomes naturalized, they then, upon the naturalization of the father, become citizens. After becoming citizens they are “native born” citizens; but they are not “natural born citizens.” That is, they are not born, in the nature of things and by the laws of nature, a citizen of this Republic. If the father becomes naturalized before the birth of the child and is at the time of the birth of the child a citizen of the United States, then the child is a “natural born” citizen. But in the case of Mr. Hughes the father was not naturalized at the time the son was born, and was at that time a subject of England. How could the son be a “natural born” citizen of the United States? If you had been born in England of American parents, would it be necessary for you to be naturalized if you came to this country to reside? No. If he, born in this country of English parents, had returned to England to reside, would it have been necessary for him to be naturalized there? No. If it was not necessary for him to be naturalized in England, would he be a “natural born citizen” of the United States?

The Statute above referred to announced the law of this country to be that the children of persons who should be naturalized became citizens by virtue of the act of their father. And obversely, that they were not to be considered as citizens until their father was naturalized. “…The naturalization of the father operates to confer the municipal right of citizenship upon the minor child…” (Secretary Blaine, February 1st, 1890.)

It is admitted that the legal status of the child, under the circumstances we have to deal with, is not explicitly defined by the Statutes. But any question which the reading of the Statute does not clear up is elucidated and illuminated by the courts (113 U.S. Supreme Court 94 infra) and by official documents written by men in authority and vested with the administration of the law.

In this connection it will be pertinent to make a few illusions to the recommendations made to Congress urging them to clarify the situation. President Arthur, in his Fourth Annual Message, in 1884, said: “Our existing naturalization laws also need revision. * * * Section 2172, recognizing the citizenship of the children of naturalized parents, is ambiguous in its terms* * *.

“An uniform rule of naturalization, such as the Constitution contemplates, should, among other things, clearly define the status of persons born within the United States subject to a foreign power and of minor children of fathers who have declared their intention to become citizens* * *.”

President Cleveland, in his First Annual Message, in 1885, said: “The laws of certain states and territories admit a domiciled alien to the local franchise conferring upon him the rights of

citizenship to a degree which places him in the anomalous condition *of being a citizen of a state and yet not of the United States within the purview of Federal and International law.”*

The United States Supreme Court has said: “The existing provisions leave much to be desired and the attention of Congress has been called to the condition of the laws with reference to the election of nationality; and to the desirability of a clear definition of the status of minor children whose fathers had declared their intention to become citizens * * *.” (143 U.S. 178.)

Again the United States Supreme Court says, in the same case: “clearly minors acquire an inchoate status by the declaration of intention on the part of their parents. If they attain their majority before the parent completes his naturalization, then they have an election to repudiate the status which they find impressed upon them, and determine that they will accept allegiance to some foreign potentate or power rather than hold fast to some citizenship which the act of the parent has initiated for them.”

These opinions indicate where the doubt and uncertainty may be.

On the other hand, Willoughby, in his work on the Constitution (Vol. I, page 283), makes the positive statement that: “The naturalization of a father operates *as a naturalization* of his minor child, if they are dwelling in the United States.

We find the positive declaration of the court that the “citizenship of the father is that of his child.” (1 Ruling Case Law, 796.) There is no dispute on the facts that the father in 1862 was an English subject. There can hardly be, under the law just quoted, any dispute that Mr. Hughes was at the time of his birth an English subject. If he was at that time an English subject, he became a citizen of the United States by a process of naturalization, and is not a “natural born” citizen of the United States. He became a citizen by virtue of the subsequent act of his father. He became a citizen by operation of law, but he was not at the instant of birth, by right and of the nature of things, a “natural born” citizen of the United States.

And, Willoughby, further on, says: “A declaration of a father of an intention to become naturalized gives to his children, who attain their majority before their father’s naturalization is complete, an inchoate citizenship which, upon majority, may be repudiated.”

These point clearly to the fact that the child of un-naturalized parents is an alien and that he becomes a citizen by virtue of the subsequent act of the father. That is, that the child is a naturalized citizen; that he becomes a citizen by operation *of law* and that he is not a “natural born” citizen within the meaning of the Constitution.

It might be supposed that the Statute above quoted applies to children born in foreign countries and brought to the United States by the father. A careful reading of the Statute will permit of no such discrimination and, directly on that point, is a document written by Mr. Fish, when Secretary of State, under date of February 11th , 1874, in answer to an official inquiry. The document reads as follows: “The laws of the United States on the subject of naturalization provide, in relation to persons situated as your sons are ‘that the children of persons duly naturalized under any law of the United States * * * being under the age of twenty-one years, at the time of their parents being so naturalized, or admitted to the rights of citizenship, shall, *if dwelling in the United States,* be considered as citizens of the United States.’ Assuming that your three sons were born in France * * * accompanied you to this

country and have continued to reside here, they, *together with your son born here,* are, under the provisions just cited, *to be considered, when dwelling in the United States,* citizens of the United States. * * *"

It will be noted that the eminent Secretary of State not only drew no distinction between the children born abroad and the child born here, but that he included all together in the same category and as to be considered, when dwelling in the United States, as citizens of the United States. What would happen if they did not dwell within the United States? What would happen if the father took them back to the country from which he emigrated? Under the Statute, and under the opinion just cited interpreting the Statute, they would, in that case, not be citizens of the United States; and if they were not to be considered citizens of the United States, when they left the boundaries of the United States, how could they be "natural born" citizens of the United States who would owe allegiance to no other power and who would have a right to the protection of this Government no matter where they might find themselves?

The Supreme Court of the United States has construed that Statute and the Constitution, and has passed directly on the point in issue. It has said that one born of alien parents in the territorial limits of the United States is not a "natural born citizen" within the meaning of the presidential qualification clause and, further, said that "such (persons) not being citizens can only become citizens * * * by being naturalized in the United States." (Elk *v.* Wilkins, 112 U.S. 94.) Such naturalization can be accomplished by the son on his own account or through the subsequent act of the parent.

Mr. Blaine, as Secretary of State, in an official document to the United States Minister to Germany, again, under date of February 1st, 1890, construed the law pointing out the status of the child if it left the United States. The facts in that case were as follows: A husband and wife, both natives of Prussia, came to the United States. A son was born in the State of Pennsylvania *six months before* the naturalization of the father. Later the father died and the mother returned to Germany, taking her son with her, and they were residing in Germany at the time of the inquiry.

While in Germany, that Government made some claim upon the son for military service, and a ruling was requested from the Secretary of State. Mr. Secretary Blaine wrote as follows: "'The words, 'if dwelling in the United States,' whether meaning residence at a particular moment or contemplating a settled abode, apply to Carl Heisinger, who, being now nineteen years of age, has for about eleven years been dwelling in Germany. It is not known that the government of that country has made any claims upon him. But, if the German Government should, under a provision of law similar to that in force in the United States in relation to the foreign-born children of citizens, seek to exact from him the performance of obligations as a natural-born subject, the Department would be bound to consider the provisions of Section 2172 of the Revised Statutes."

Mr. Blaine's reference to Section 2172 of the Revised Statutes means that this Government would recognize that child as a citizen of the United States if he lived in the United States, but would not recognize him as a citizen of this country if he lived in Germany. Was that boy "a natural born" citizen of the United States? If he was, then why would not the government of the United States recognize him as a citizen of the United States whether he were in Germany, England or China? The only conclusion is that he was not a "natural born" citizen of the United States; that some other government beside that of the United States had some claim

upon his allegiance; that he was not exclusively and by operation of the laws of nature a citizen of the United States.

The boy that Mr. Blaine referred to in the above quotation was not only born in this country but born to a male parent who had not only expressed his desire to become an American citizen, but who had proceeded to perfect his naturalization and who actually was naturalized six months subsequent to the birth of the child. The rulings under the statute hold that the child became a citizen of the United States by virtue of the naturalization of his father, but that his citizenship during his minority, was only inchoate and that if he continued to reside in the United States he would be recognized as a citizen of the United States (not a "natural born" citizen) but that if he went to Germany he would not be, by our Government, considered one of its citizens. How does this case differ from that of Mr. Hughes except in this: that Mr. Hughes and his parents continued to reside in this country? Their domicile affected his citizenship. Had they taken him back to England, he would not have been considered by the government of the United States as a citizen of the United States. The mere circumstances that he continued to live here, and, upon the attainment of his majority, to exercise his political rights perfected the inchoate citizenship which he inherited by the naturalization of his father. Only from the time of the actual naturalization of his father was he considered to be a citizen of the United States, and only upon the adoption of the Fourteenth Amendment did he actually become a citizen of the United States. But what was the status of that boy at the time of his birth, and immediately following his birth? The government of England might have exercised jurisdiction over him. That government had some claim which, under certain conditions, it might have exercised. Had he been a "natural born" citizen of the United States, no government on earth, but that of the United States, would have had any claim upon his allegiance. The law of England at the time of his birth was "once an Englishman, always an Englishman." Not until 1872 did England change that law.

It must be admitted that a man born on this soil, of alien parents, enjoys a dual nationality and owes a double allegiance. A child born under these conditions has a right to elect what nationality he will enjoy and to which of the two conflicting claims of governmental allegiance he will pay obedience. Now if, by any possible construction, a person at the instant of birth, and for any period of time thereafter, owes, or may owe, allegiance to any sovereign but the United States, he is not a "natural born" citizen of the United States. If his sole duty is not to the United States Government, to the exclusion of all other governments, then, he is not a "natural born" citizen of the United States.

The doctrines of dual citizenship and of double allegiance are too well known and too well founded in international law to be doubted or disputed.

"The doctrine of 'Election' necessarily implies the existence of a double allegiance. This condition naturally arises where a person is born in one country to a father who is a citizen of another country. By rules of municipal law, which generally prevail, such a person has citizenships by birth—(1) citizenship by virtue of the place of birth (jure soli) and (2) citizenship by right of blood (jure sanguinis) i.e., by virtue of the father's nationality. Unless this be so, the child on attaining his majority has nothing to elect." (Moore, International Law Digest, III, 524-525.)

The subject of double allegiance and dual citizenship is a well recognized doctrine of international law, and one with which all nations have to deal. The question has been

presented many times and in many different ways to the government of the United States. That it has taken official cognizance of the existence of double allegiance is not only not questioned, but is too well known to need references. It may, however, be elucidated by citing a few of the instances.

An application was made for a passport for a youth of seventeen, whose father desired to send him to Germany as a student. Mr. Freslinghuysen, then Secretary of State, in regard to him, wrote the following: "The young man referred to, under the Constitution of the United States, having been born in this country, is, *while subject to the jurisdiction of the United States*, a citizen of the United States, notwithstanding the fact of his father being an alien. As such citizen he is entitled to a passport. This, of course, would be a sufficient protection to him in every other country but that of his father's origin—Germany. There, of course, as the son of a German subject, it may be claimed that he is subject to German military law, and that, not being then subject to the jurisdiction of the United States, he cannot claim the rights secured to him, etc." (Moore, International Law Digest, III., 532.)

That young man had a divided allegiance. A double allegiance necessarily implies a divided allegiance. His allegiance is not exclusively to one country or to one flag, and a man born with a double allegiance cannot be a "natural born" American.

Again, Mr. Gresham, Secretary of State, held that: "While a person born in the United States, though of alien parents, is by the laws thereof a citizen, yet, should he be taken by his parents while a minor to the country of which they are subjects, he becomes amenable to the laws of that country and subject to a claim of allegiance thereunder jure sanguinis." On this ground the Department of State refused to issue a passport for the protection of a minor, born in the United States, whose parents proposed to return with him "for a brief period" to the country (Russia) of which they were subjects. (March 9th, 1893.)

How could the government of the United States refuse the issuance of a passport to a "natural born" citizen under those circumstances? That child was not considered a "natural born" citizen of this country, and yet his parents proposed to return with him to the country from which they had emigrated only "for a brief period."

In 1866 a son was born in the State of Massachusetts to a father who was a Frenchman. In 1885, he, the parent, went back to France with him family, including his son, then nineteen years of age. Two years later the son was notified to perform military duty and, on failing to respond, was arrested and imprisoned. He appealed to the government of the United States, through the American Ambassador in France. Mr. Bayard, the Secretary of State at that time, instructed the American Embassy to use "its good offices" to obtain the young man's release from military service, but added: "You will, however, advise him that his remaining in France after he becomes of age may be regarded as an election of French nationality and that his only method of electing and maintaining American nationality is by a prompt return to this country." (December 28th, 1887.)

All these young men were born in the United States, but had the right to elect whether they should be a citizen of a foreign country or a citizen of this country. If they had the right to elect to which government they would pay allegiance, they were not exclusively the subjects of this country; they were not "natural born" citizens of this country.

Again, a citizen of Prussia immigrated to the United States and had a son born to him. Later he returned to Germany, with his family, including the son. On reaching the military age, the son was called upon by the German government to perform military duty. The father invoked the intervention of the American Legation at Berlin. In that case it was held that the son, being a minor, acquired, under the laws of Germany, the nationality of his father, but did not thereby lose his right to claim American nationality, and that, upon attaining his majority, the son might, at his own election, return and take the nationality of the place of his birth, or remain in Germany. But that, during his minority and while domiciled with his father in Germany, he must submit himself to the claim of military duty on the part of the German Government. (Edwards Pierrepont, Attorney-General, and U.S. Grant, 15 Op. 15.)

The only difference in the case of Mr. Hughes and in the case of the subject above examined, is that Mr. Hughes' father did not take him back to England. But if he had, the English Government would have had a claim upon him, which they might have exercised, and if the English Government did have a claim upon him, then the United States did not have exclusive jurisdiction over him and he did not owe to the United States exclusive allegiance and he was not a "natural born" citizen within the meaning of the Constitution because he was not naturally a part of the Government under the jurisdiction of which he happened to be born. Particularly is this so in view of the declaration of Mr. Porter, Acting Secretary of State, under date of September 14th, 1885, when he says: "By the law of nations an infant child partakes of his father's nationality and domicile."

It is not disputed that Mr. Hughes is not a citizen of the United States, but if he had the right to elect, he must have had something to choose between. He was *native* born because he was born in this country, and he is now a *native born* citizen because he is now a citizen of this country; but, had he been a "natural born" citizen, he would not have had the right to choose between this country and England; he would have had nothing to choose between; he would have owed his sole allegiance to the government of the United States, and there would have been no possible question, whether he found himself in the United States or in any other country in the world, that he would be called upon to show allegiance to any Government but that of the United States.

That it was the intention of the men who framed the Constitution to provide that no person should be President except those who were *naturally a part* of this government can hardly be doubted by an examination of documents contemporary with the framing of the Constitution.

It was originally proposed in the Constitutional Convention that the presidential qualifications be a "citizen of the United States." It was so reported to the Convention, by the Committee which had it in charge, on the 22nd day of August, 1787. It was again referred to a Committee, and the qualification clause was changed to read *"natural born citizen,"* and was so reported out of Committee on September the 4th, 1787, and adopted in the Constitution. There is no record of debates upon the subject, but the Federalist contains a contemporary comment on it written by Alexander Hamilton. It reads: "Nothing was more to be desired, than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of Republican government, might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a *creature of their own* to the chief magistracy of the Union?" (Federalist, LXVIII.)

The interpretation of their position, as expressed in the Federalist, is corroborated by Mr. Story, in his work on the Constitution, in the following words: “It is indispensable, too, that the president should be a *natural born* citizen of the United States * * * . The general propriety of the exclusion of foreigners, in common cases, will scarcely be doubted by any sound statesman. It cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office; and interposes a barrier against those corrupt interferences of foreign governments in executive elections, which have inflicted the most serious evils upon the elective monarchies of Europe.” (Story on the Constitution, Vol. 2, page 353-54.)

Of course, these articles are not used with the idea of suggesting that Mr. Hughes’ affiliations and sympathies and *present* allegiance are to any government but to that of the United States. Any such idea is disclaimed. They are used, however, to show the reason that underlay the constitutional provision requiring a person to be a “natural born” citizen if he would assume the presidency of the United States. If, with full knowledge of the meaning of the phrase “natural born,” the framers of the Constitution used those words to express a certain idea and to necessitate a certain qualification, then their meaning is the law of the land. That they did use them is undoubted; that they knew what they were writing hardly seems possible to doubt, in view of the contemporary expressions on the subject and the actual change in the phraseology of the proposed constitution.

The records of the Constitutional Convention of 1787, the Federalist, Story, the eminent commentator on the Constitution, all agree that only a “natural born citizen” should ever become President of the United States.

The Supreme Court of the United States, several Presidents of the United States, numerous Secretaries of State and an Attorney-General, each vested with authority in connection with the law, have commented upon and interpreted the only existing statute in such words as to disqualify from the presidency a person born under such circumstances as surround Mr. Hughes’ birth on the ground that he is not a “natural born citizen” of the United States.

Take one more authority. In view of the military draft proposed in 1862, on account of the Civil War, under the head of “*aliens,*” it was declared by the government at Washington that the following persons were exempt from draft for military service in the armies of the United States: (1) All foreign born persons who have not been naturalized; (2) All persons born of foreign parents and who have not become citizens. (Papers relating to foreign affairs, 1862, p. 283.) The very year Mr. Hughes was born, the government to which he *now* pays allegiance officially recognized that it had not the right to call his father to defend the flag and that it had not the right to call him to defend the flag. The government he now aspires to preside over classed him under the general head of “Aliens” the year he was born and drew a line of distinction between him and “natural born citizens”—between him and those to whom it owed protection and from whom it had a right to claim protection.

Is Mr. Hughes a “natural born citizen” of the United States?

About Breckinridge Long (1881-1958)

Breckinridge Long

An affluent Democrat from Missouri whom FDR appointed ambassador to Italy in 1933, Breckenridge Long was born in St. Louis in 1881 and studied at Princeton University and Washington University Law School. After receiving his law degree, Long deepened his involvement in Democratic politics, both in Missouri and elsewhere, and in 1917 he was rewarded with an appointment to the position of third assistant secretary of state.

Long remained with the State Department until 1920 when he resigned his position to run for the U.S. Senate from Missouri. Losing the election, Long was also defeated in a second bid for the Senate in 1922. Notwithstanding his electoral setbacks, Long remained an avid supporter of Democratic candidates and contributed generously to FDR's 1932 campaign, earning himself the Italian ambassadorship in the process.

Long returned to private life after three years at the embassy in Rome, only to rejoin the State Department in 1940 at which time he assumed supervision over the Department's Immigrant Visa Section – a position Long would use to impede the ability of Jews and other victims of Nazi persecution to seek refuge in the United States.

Eleanor Roosevelt, who received an avalanche of petitions from Europeans desperate to flee German occupation, had a tense relationship with Long. ER found him not only unsympathetic but also opposed to the policies she supported and, as much as possible, she tried to work around Long (through working with Sumner Welles or appealing to FDR directly) to respond to the petitioners. Long left the State Department in 1944 and died in 1958.

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About Chicago Legal News, Co.

In 1868, **Myra Colby Bradwell** started the “Chicago Legal News.” In her weekly newspaper, she wrote about Illinois state court decisions, session laws, and legal reforms. Myra also reported on federal court decisions and legislative news. Her paper was a huge success and became the most widely-read legal newspaper in the country.

In 1869, Mrs. Bradwell passed the Illinois Bar Exam with honors. Her qualifications were approved by a prominent judge and a states attorney. With their encouragement, she went on to obtain her law license, yet she never did practice law.

Mrs. Bradwell was well-established in the newspaper industry, and doing quite well, when, in 1880, she was admitted to the Illinois state bar. In 1882, she was also admitted to the United States Supreme Court bar. Despite becoming an attorney, Bradwell died at the age of 63 in 1894 without ever having practiced law in the court system.

The Chicago fires of 1871 destroyed her offices, but she rebuilt her empire. After Myra Bradwell's death, her daughter, Bessie, continued publication of the newspaper until 1925.

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