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# UNNATURAL BORN CITIZENS AND ACTING PRESIDENTS

*James C. Ho\**

No Person except a *natural born Citizen* . . . shall be eligible to the Office of President.<sup>1</sup>

No matter who wins the White House this November, I—and millions of other Americans like me<sup>2</sup>—once again will have suffered a certain measure of exclusion from the selection process. We have the right to vote, to be sure. But we cannot serve as President.

Some might say that this is of little consequence. After all, it is not as if there are currently any credible candidates for the presidency who are barred from the office by virtue of their citizenship status.<sup>3</sup> But the current absence of such candidates can

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1. U.S. Const., Art. II, § 1, cl. 5 (emphasis added). The text replaced by the ellipsis simply grandfathers-in individuals who were citizens of the United States “at the time of the Adoption of this Constitution” and is therefore a dead letter today. But see Jordan Steiker, Sanford Levinson & J.M. Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 *Tex. L. Rev.* 237, 243-52 (1995) (arguing that the “at the time of the Adoption of this Constitution” requirement applies to *all* would-be Presidents and embodies the founders’ understanding that the Constitution would be amended regularly).

2. According to the U.S. Census Bureau, there were over 9 million naturalized citizens and 16.7 million non-citizens in the United States in March 1997. See March 1997 Current Population Survey, U.S. Census Bureau, available at <[http://www.bls.census.gov/cps/pub/1997/for\\_born.htm](http://www.bls.census.gov/cps/pub/1997/for_born.htm)>.

3. But see Frederick Schauer, *Constitutional Invocations*, 65 *Fordham L. Rev.* 1295, 1302 (1997) (“In recent years individuals holding among the most security-sensitive of high government positions—three Secretaries of State, Christian Herter, Henry Kissinger, and Madeleine Albright, and the current Chairman of the Joint Chiefs of Staff, John Shalikashvili—would have been barred by the constitutional requirement”); Lino A. Graglia, *Was the Constitution a Good Idea?*, 36 *Nat’l Rev.* 34, 37 (1984) (noting that “Felix Frankfurter and Albert Einstein were ineligible . . . as is Henry Kissinger”).

be blamed on the prohibition itself,<sup>4</sup> and in any case may only be a temporary condition.

More importantly, eligibility for office alone promotes democratic values separate and apart from actual service in office. For one way to assess whether an individual is a full and equal member of a community is to ask whether the individual is eligible to serve in the highest office in that community. As Randall Kennedy has noted, “[i]t is important that a formal proposition of American life is that every native-born American child could conceivably grow up to become president.”<sup>5</sup> Indeed, Article II, Section 1, Clause 5 of the Constitution guarantees every native-born child that right. George W. Bush, Albert Gore, and Ralph Nader are all natural born citizens. So is Pat Buchanan (no kidding!). Thus, whichever one of them wins, the others can take some comfort in the knowledge that they at least had the opportunity to represent their fellow citizens in the Oval Office. But although a citizen too, I was not born here. The Constitution forbids someone like me from serving as President of the United States.

Of course, the Constitution also imposes the additional requirements of age (“thirty five Years”) and residency (“fourteen Years a Resident within the United States”).<sup>6</sup> Thus, eighteen year-old voters, like non-natural born citizens, are not members of the class of individuals eligible to be President. But at least they can be someday (so long as they are natural born citizens) because the age and residency requirements are within their reach. Lack of natural born citizenship, by contrast, permanently prohibits an individual from ever becoming President.

Perhaps this business of distinguishing between natural born citizens and merely naturalized (unnatural?) citizens for purposes of Presidential eligibility makes sense;<sup>7</sup> perhaps not.<sup>8</sup> Per-

4. See, e.g., Schauer, 65 *Fordham L. Rev.* at 1302 n.28 (cited in note 3) (“Those who are fond of extremely counter-factual speculation might wish to contemplate whether the comedian Bob Hope, whose shows for American troops stationed abroad made him enormously popular and widely-respected in the 1940s, 1950s, and 1960s, might have entertained Presidential aspirations were it not for the fact that his having been born in Great Britain (in 1903) made him constitutionally ineligible”).

5. Randall Kennedy, *A Natural Aristocracy?*, 12 *Const. Comm.* 175, 176 (1995) (emphasis added), reprinted in William N. Eskridge, Jr. and Sanford Levinson eds., *Constitutional Stupidities, Constitutional Tragedies* 55 (New York U. Press, 1998).

6. U.S. Const., Art. II, § 1, cl. 5.

7. See, e.g., *Miller v. Albright*, 523 U.S. 420, 439 (1998) (“It is of course possible that any child born in a foreign country may ultimately fail to establish ties . . . with this country, even though the child’s citizen parent has engaged in the conduct that qualifies the child for citizenship”); *Trop v. Dulles*, 356 U.S. 86, 126 n.6 (1958) (Frankfurter, J.,

haps it's a matter that Congress ought to debate. After all, Congress has recently contemplated restoring the suffrage to convicted felons.<sup>9</sup> If *convicted felons* should enjoy the right to vote—indeed, a felon's right to the Presidency is *constitutionally guaranteed* (barring, of course, disqualification following conviction by a court of Impeachment)—why shouldn't law-abiding, non-natural American citizens have those rights, too—not only to vote, but to serve as President as well?

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dissenting) ("the laws of many countries mak[e] naturalized citizens subject to expatriation for grounds not applicable to natural-born citizens"); Joseph Story, 3 *Commentaries on the Constitution of the United States* at 541, § 759 (Carolina Academic Press, 1987) ("[T]he 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"). Cf. *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920) ("It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.").

8. See, e.g., *Schneider v. Rusk*, 377 U.S. 163, 165-66 (1964) ("We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive"); *Oyama v. California*, 332 U.S. 633, 666 (1948) (Murphy, J., concurring) ("Loyalty and the desire to work for the welfare of the state, in short, are individual rather than group characteristics. An [] alien may or may not be loyal; he may or may not wish to work for the success and welfare of the state or nation. But the same can be said of . . . a natural born citizen"); John Randolph Prince, *Forgetting the Lyrics and Changing the Tune: The Eleventh Amendment and Textual Infidelity*, 104 *Dick. L. Rev.* 1, 94 (1999) ("It is entirely conceivable that the best person for the position of President might be some highly prominent public servant whose parents brought her here from another country as immigrants"); Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 *N.Y.U. L. Rev.* 54, 93-94 (1997) ("If any of the states were to put a similar restriction upon state or local offices, it would certainly be unconstitutional under the Equal Protection Clause"); Kennedy, 12 *Const. Comm.* at 176 (cited in note 5) ("Formerly barred from the Presidency . . . are people who may have invested their all, even risked their lives, on behalf of the nation . . . . This idolatry of mere place of birth seems . . . an instance of rank superstition. Place of birth indicates nothing about a person's willed attachment to a country, a polity, a way of life. It only describes an accident of fate over which an individual had no control. It is a truly 'immutable' aspect of one's biography, in today's world more so even than ethnicity or gender"); Robert Post, *What is the Constitution's Worst Provision?*, 12 *Const. Comm.* 191, 192 (1995) ("Our constitutional order does not ordinarily distribute the prerogatives of citizenship on the basis of where or how one is born").

9. See Civic Participation and Rehabilitation Act of 1999, H.R. 906 (1999); Constitutional Protection of the Right to Vote Act, H.R. 1957 (1999). It is far from plain, however, that Congress has the power to allow felons to vote, even in federal elections. Congress is, after all, a legislature of enumerated powers. See Roger Clegg, *Congressional Testimony, Right of Ex-Prisoners to Vote in Federal Elections* (Oct. 21, 1999), available at 1999 WL 27596077; Viet D. Dinh, *Congressional Testimony, Right of Ex-Prisoners to Vote in Federal Elections* (Oct. 21, 1999), available at 1999 WL 27596079; Todd Gaziano, *Congressional Testimony* (Oct. 21, 1999), available at <<http://www.house.gov/judiciary/gazi1021.htm>>.

Of course, any such debate would be futile, you say—a waste of time, because Congress can't do it alone. The law could not be more clear, nor more daunting: a constitutional amendment is necessary (and how often does that happen!<sup>10</sup>) before we will ever see a non-natural born citizen in the Oval Office.<sup>11</sup> Or is it?<sup>12</sup>

## I

We begin, of course, with the text of the Constitution. The text expressly states that “no Person except a natural born Citizen . . . shall be eligible to the Office of President.”<sup>13</sup> As the Supreme Court has explained, “[t]he Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that.”<sup>14</sup> That is, we look to the common law at the time of the founding<sup>15</sup> (as opposed to, say, an act of Congress).<sup>16</sup> At common law, children born within the sover-

10. Only in the movies. See *Demolition Man* (Warner Bros., 1993) (Sylvester Stallone: “Hold it! The Schwarzenegger Library?” Sandra Bullock: “Yes, the Schwarzenegger Presidential Library. Wasn't he an actor . . .?” Stallone: “Stop! He was President?” Bullock: “Yes. Even though he was not born in this country, his popularity at the time caused the 61st Amendment, which states that . . .”). But see *Amend Discriminative Article 6*, Jakarta Post, (Mar. 4, 2000), available at 2000 WL 4786504 (discussing campaign to amend Indonesian Constitution to allow non-native born citizens to serve as president).

11. See, e.g., Mark Tushnet, *Resolving the Paradox of Democratic Constitutionalism?*, 3 Green Bag 2d 225, 226 (2000) (stating about foreign-born Secretary of State Madeline Albright that, “if anything is clear about the Constitution, it is [Madeline] Albright's ineligibility for the presidency”).

12. See id. at 226 n.1 (“Actually, if you want to be picky about it, Albright is clearly ineligible for election to the office of the Presidency. It is arguable that she may ‘act as President’ . . . if both the President and Vice-President are unable to serve”).

13. U.S. Const., Art. II, § 1, cl. 5.

14. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 167 (1874).

15. See *Minor*, 88 U.S. at 167; *United States v. Wong Kim Ark*, 169 U.S. 649, 654-55 (1898).

16. Congress has, to be sure, the power “to establish a uniform Rule of Naturalization.” U.S. Const., Art. I, § 8, cl. 4. And it has exercised that power in order to confer citizenship at time of birth under certain circumstances. See 8 U.S.C. § 1401. It would be quite something if Congress could determine who constitutes a “natural born Citizen” for purposes of presidential eligibility through its naturalization power, simply by granting or denying citizenship at birth to a particular class of individuals. Indeed, Congress could effectively eliminate the natural born citizenship requirement altogether by heretofore conferring citizenship to all humans at birth, wherever born. But we do not read the Constitution to so empower Congress. See *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 103-6 at 434 (Gov't Printing Office, 1996) (“Whatever the term ‘natural born’ means, it no doubt does not include a person who is ‘naturalized’”). But see Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 Yale L.J. 881 (1988) (arguing for such Congressional power).

eign's territorial jurisdiction were citizens at birth, and were so whether or not their parents were citizens<sup>17</sup>—a principle of territoriality later codified by the Fourteenth Amendment.<sup>18</sup> In addition, children born outside of the territory, but to citizen parents, also enjoyed citizenship at birth.<sup>19</sup> (One presumes, of course, that the natural born citizen requirement does not additionally exclude otherwise eligible individuals born by Caesarean section.)<sup>20</sup>

Thus, although Senator John McCain, who was born in the Panama Canal Zone to American parents, falls within the common law definition of "natural born citizen,"<sup>21</sup> millions of immi-

17. See *Minor*, 88 U.S. at 167; *Wong Kim Ark*, 169 U.S. at 693. The common law rule is not without exceptions, however. For example, the common law did not grant citizenship at birth to "the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born." *Wong Kim Ark*, 169 U.S. at 658.

18. See U.S. Const., Amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.").

19. See *Weedin v. Chin Bow*, 274 U.S. 657, 670 (1927) ("at common law the children of our citizens born abroad were always natural-born citizens from the standpoint of this government"); *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 103-6 at 434. But see *Wong Kim Ark*, 169 U.S. at 702-3 ("A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory, or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts"); Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 Nw. U. L. Rev. 250, 252 (1989) (stating that a child born of American parents but outside of the United States is not a natural born Citizen). Congress has traditionally granted citizenship at birth solely on the basis of American parentage. See Act of Mar. 26, 1790, ch. 3, § 1 Stat. 103, 104; 8 U.S.C. § 1401(c); supra note 16.

20. This is because we assume that the terms "natural born" and "native born" are synonymous. See *Schneider*, 377 U.S. 163, 165 (1964); *Minor*, 88 U.S. at 167. But see M.B.W. Sinclair, *Postmodern Argumentation: Deconstructing the Presidential Age Limitation*, 43 N.Y.L. Sch. L. Rev. 451, 457 n.30 (1999) ("In this era in which 'natural childbirth' is distinguished from 'childbirth,' it should be rather easy to argue that this provision precludes those born by Caesarean section. The word 'natural' makes this an easier case than it was for Shakespeare to interpret 'none of woman born / Shall harm Macbeth,' William Shakespeare, *Macbeth* act 4, sc. 1, 80 (Alfred Harbage ed., Penguin Books 1984), as allowing Macduff, who 'was from his mother's womb / Untimely ripped[.],' to lop off Macbeth's head. Id. act 5, sc. 8. The point is not that this would be a wise or reasonable or even plausible interpretation, just that it is possible"); Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 Colum. L. Rev. 133, 170 (1997) (same); Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 Harv. J.L. & Pub. Pol. 9, 24 (1995) (same).

21. Senator McCain actually has two arguments: first, that he was born to American parents, and second, that his birth within U.S. territory triggers the core, territoriality-based source of common law natural born citizenship. Thus, the McCain candidacy might not test the outer boundaries of the natural born citizenship requirement. For a candidacy that unambiguously did, see Sinclair, 43 N.Y.L. Sch. L. Rev. at 457 & n.29

grant American citizens who were born outside of the United States and to non-U.S. citizens do not.

But our story does not end there. For although non-natural born citizens are quite unambiguously ineligible “to the Office of President,” the Constitution distinguishes between actually *holding* the office of President and merely *acting* as President. Article II, Section 1, Clause 5 of the Constitution states that “[n]o Person except a *natural born Citizen* . . . shall be eligible to the Office of President.”<sup>22</sup> The text is clear: only natural born citizens may be President. But what if the individual elected to the Office of President is removed from office, resigns, dies, or is otherwise unable to discharge the powers and duties of the office? Two separate and distinct questions must be answered. *First*, to whom do the powers and duties of the office of President fall? *Second*, does that individual actually “become President,” or does he or she serve in some different, temporary, “acting” capacity?

Every schoolchild can answer the first question. When the President is unable to do the job for any reason, the Vice President fills the breach.<sup>23</sup> And if the Vice President is also unavailable, further succession is determined by an act of Congress.<sup>24</sup> Congress has thus designated for presidential succession, first, the Speaker of the House of Representatives, followed by the

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(cited in note 20) (noting that “1968 Republican presidential contender George Romney” was “born in a Mormon colony in Mexico . . . [to] United States citizens”); D’Amato, 84 Nw. U. L. Rev. at 252-53 (cited in note 19) (describing Romney controversy).

22. U.S. Const., Art. II, § 1, cl. 5.

23. See U.S. Const., Art. II, § 1, cl. 6, *as amended* by U.S. Const., Amend. XXV.

24. See U.S. Const., Art. II, § 1, cl. 6 (“the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected”).

Eligibility for presidential succession by Congressional designation is thus limited to “Officer[s].” Cf. *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976) (“any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States’”). Does the term “Officer” include members of Congress? Quite arguably not, and thus the presidential succession statute is quite arguably unconstitutional. For one might argue that members of Congress are not “officers,” at least for Article II purposes (that is, for presidential succession or for impeachment), or that allowing members of Congress to serve as acting President violates the Incompatibility Clause, U.S. Const., Art. I, § 6, cl. 2, or separation of powers principles. See David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801* at 139-44, 275-81 (U. of Chicago Press, 1997); Akhil Reed Amar and Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113 (1995); Americo R. Cinquegrana, *Presidential Succession Under 3 U.S.C. § 19 and the Separation of Powers: “If At First You Don’t Succeed, Try, Try Again,”* 20 Hastings Const. L.Q. 105 (1992). But see *infra* note 25.

President pro tempore of the Senate, and then an orderly progression through the Cabinet.<sup>25</sup>

Simple enough. But on to the second question: what is the nature of that succession? What role does the successor play? The answer is: it depends. It depends on the reason why the President cannot serve, and it depends who is called upon to serve in his place.

Under the Twenty-Fifth Amendment, ratified in 1967, the Vice President “shall become President”—but only if the President is removed, resigns, or dies.<sup>26</sup> That is, only when a President *permanently vacates* office because of removal, resignation, or death does the Vice President actually *become* President. Under these circumstances, the office of Vice President is vacated, and the former Vice President (as President) “nominate[s] a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.”<sup>27</sup>

What if the President is removed, resigns, or dies, thereby permanently vacating office, but the Vice President is not a natural born citizen (or is not yet 35 years old, or hasn’t been a U.S. resident for 14 years)? Under these circumstances, but for the Twelfth Amendment, the locus of Presidential power would be uncertain and ambiguous, and we would have a *true* constitutional crisis on our hands, because presumably a Vice President who hopes to serve *as President* must be constitutionally eligible to do so. So what then? (Contrast the so-called constitutional crisis that purportedly arose from the impeachment proceedings against President Clinton, during which the path of anticipated devolution of Presidential power was never truly in doubt). Fortunately, the Twelfth Amendment rescues us from such a crisis. Ratified in 1804, that Amendment extends the same eligibility requirements for Presidents to Vice Presidents.<sup>28</sup> Thankfully, we will never have to worry about uncertainty as to who “shall be-

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25. See 3 U.S.C. § 19 (providing for further presidential succession by the Speaker of the House of Representatives, followed by the President pro tempore of the Senate, Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, and, finally, Secretary of Veterans Affairs).

26. U.S. Const., Amend. XXV, § 1.

27. U.S. Const., Amend. XXV, §§ 1-2.

28. See U.S. Const., Amend. XII (“no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States”).

come President” when a sitting President is removed, resigns, or dies.

But what if the President is only *temporarily incapacitated*—that is, if he has not died, resigned, or been removed, but is merely “unable to discharge the powers and duties of his office”?<sup>29</sup> Or if *both* the President and the Vice President are for whatever reason unavailable to head the executive branch, and the country has to turn to one of the officers designated by the presidential succession statute—individuals the Twelfth Amendment does *not* address—to take over as its Commander in Chief?

Under these circumstances, we need not concern ourselves with the constitutional requirements for presidential eligibility *at all*. Nor need we worry about a crisis of uncertainty regarding who exercises presidential power. For when the President is merely unable to discharge his powers and duties, the Twenty-Fifth Amendment does not designate *anyone* to “become President.”<sup>30</sup> Instead, the President remains the President (albeit in name only), and the powers and duties of his office simply devolve to, and are discharged by, either the Vice President or the statutory successor. That individual serves not as “President,” but as “Acting President”<sup>31</sup>—a position for which the Constitu-

29. U.S. Const., Amend. XXV, § 3.

30. It is, however, a matter of debate whether *prior* to the Twenty-Fifth Amendment’s ratification in 1967, Vice Presidents ever became President or served merely as Acting President during times of presidential incapacity. See Richard H. Hansen, *The Year We Had No President* 9-20 (Nebraska, 1962); William F. Brown and Americo R. Cinquegrana, *The Realities of Presidential Succession: “The Emperor Has No Clones”*, 75 Geo. L.J. 1389, 1397-98 & nn.29-30 (1987); Cinquegrana, 20 Hastings Const. L.Q. at 109-10 nn.15 & 21 (cited in note 24); Currie, *The Constitution in Congress: The Federalist Period 1789-1801* at 143 n.100 (cited in note 24). The text of Article II itself is ambiguous. See U.S. Const., Art. II, § 1, cl. 6 (“In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President”). The drafting history of the Constitution, however, strongly suggests an Acting President. See Hansen, *supra*, at 15-20. And two of the constitutional amendments preceding the Twenty-Fifth expressly contemplate a distinction between actual and Acting Presidents. See note 34. The historical practice, however, has been otherwise. See, e.g., *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 103-6 at 435 (“when President Harrison died in 1841, Vice President Tyler, after initial hesitation, took the position that he was automatically President, a precedent which has been followed subsequently and which is now permanently settled by § 1 of the Twenty-Fifth Amendment”); Hansen, *supra*, at 9-20 (criticizing unconstitutional usurpation of the title of President by Vice Presidents John Tyler, Millard Fillmore, and Andrew Johnson).

31. U.S. Const., Amend. XXV, § 3; see also Scott E. Gant and Bruce G. Peabody, *Musings on a Constitutional Mystery: Missing Presidents and ‘Headless Monsters’?*, 14 Const. Comm. 83, 87-89 & nn. 11 & 14 (1997) (noting the distinction); Cinquegrana, 20 Hastings Const. L.Q. at 108-10, 112-13 & nn.21 & 35 (cited in note 24) (same); Currie,

tion imposes *no citizenship related eligibility requirements whatsoever*<sup>32</sup>—and so serves even if the disability of the President happens to endure until the inauguration of the next President. Similarly, if the President dies (or resigns or is removed) but the Vice President is for whatever reason unable to carry out his duties as President, the statutory successor merely “acts as President.”

To summarize, the Constitution leaves room for the possibility of a non-natural born citizen to exercise presidential power, albeit merely in an acting capacity. The Twelfth Amendment requires the Vice President to be a natural born citizen, to be sure. But although Congress has *statutorily* imposed the constitutional eligibility requirements for the office of President upon its designates for presidential succession,<sup>33</sup> nothing in the Constitution requires it. A simple statutory amendment is thus all that is necessary for a foreign-born House Speaker, Senate President pro tempore, or Cabinet secretary to become (acting) President of the United States.

## II

The distinction between actual Presidents and acting Presidents is recognized throughout the text of the Constitution<sup>34</sup> as

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*The Constitution in Congress: The Federalist Period 1789-1801* at 143 n.100 (cited in note 24) (same).

32. But see *supra* note 24 (regarding the limitation of Congressional power to designate presidential successors to “Officer[s]”).

On the other hand, the Constitution explicitly provides that an acting President assumes all the duties and powers of the office of President. See U.S. Const., Art. II, § 1, cl. 6, *as amended by* U.S. Const., Amend. XXV, § 3. And thankfully so, for individuals serving in an “acting” capacity in other positions of the executive branch have not always been so lucky. See Steven J. Duffield and James C. Ho, *The Illegal Appointment of Bill Lann Lee*, 2 *Tex. Rev. L. & Pol.* 335, 359-60 & n.140 (1998).

33. See 3 U.S.C. § 19(c) (providing that presidential succession statute shall “apply only to such officers as are eligible to the office of President under the Constitution”). One wonders whether this provision constitutes impermissible discrimination on the basis of national origin, in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. See *supra* note 8. But see *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that the Equal Protection Clause is implicated only when a state actor “select[s] or reaffirm[s] a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”).

34. See U.S. Const., Amend. XX, § 3 (providing that, at the beginning of a new Presidential term, the Vice President elect shall “become President” if the President elect is dead, but that the Vice President elect shall merely “act as President” if the President has not yet been chosen or has failed to qualify); U.S. Const., Amend. XXII, § 1 (forbidding election to the Presidency (as opposed to presidential service by succession) for any individual who has either “held the office of President” or “acted as President” for a specified period of time); see also *Federal Farmer*, No. 14, Jan. 17, 1788, reprinted in

well as the United States Code.<sup>35</sup> Thus, whatever we might have thought of such a distinction as an original matter, fidelity to text requires us to distinguish between actually *becoming* President and mere service as an *acting* President, and to apply the Presidential eligibility requirements only to the former and not the latter.

Is this an absurd or dangerous interpretation, even if one mandated by the plain meaning of the text? Hardly. Concededly, not only could a foreign-born citizen—or even non-citizen—serve as acting President; even a two-year old could (so long as he is an “Officer”). For acting Presidents are unrestricted by age and residency considerations no less than the natural born citizenship requirement. But the blame for any parade of horrors properly belongs not to the theory of presidential eligibility urged here, but rather to Congress. For it is Congress who has the authority to decide who may serve as acting President, and for now Congress has elected to apply all of the constitutional requirements for the office of President to acting Presidents as well. Indeed, the current statute gives Congress a *second* chance to review candidates for acting President, by limiting the field to only those officers who have been individually approved by either the House (that is, the Speaker) or the Senate (that is, the President pro tempore of the Senate and the Senate-confirmed Cabinet officers).<sup>36</sup>

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Philip B. Kurland and Ralph Lerner, eds., 3 *The Founders' Constitution* 566 (Chicago, 1987) (distinguishing between elected and acting presidents).

35. See 18 U.S.C. § 1751(a) (providing criminal liability for the assassination of “the President . . . or any person who is acting as President”); 18 U.S.C. § 3592(c)(14)(A) (providing that homicide against “the President . . . or any person who is acting as President” constitutes an aggravating factor justifying imposition of the death penalty).

36. See 3 U.S.C. § 19(e) (limiting presidential succession by Cabinet officers “only to officers appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, inability, or failure to qualify, of the President pro tempore, and only to officers not under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon them”). Presumably, there can be no such thing as a Cabinet officer who was *not* confirmed by the Senate, because Cabinet officers, as heads of departments who report directly to the President, are principal officers, rather than inferior officers. See U.S. Const., Art. II, § 2, cl. 2 (requiring Senate confirmation for principal officers and allowing Congressional delegation of appointment authority only with respect to inferior officers); *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam) (same); *Edmond v. United States*, 520 U.S. 651, 663 (1997) (“inferior officers” are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate”). But see Federal Vacancies Reform Act, Pub. L. No. 105-277, § 151(b), 112 Stat. 3292 (to be codified at 5 U.S.C. §§ 3345-3349) (allowing acting officials to serve, *inter alia*, in Cabinet posts without the requirement of Senate confirmation). Respecting the constitutionality of the Vacancies Act as applied to principal officers, cf. *Williams v. Phillips*, 360 F. Supp. 1363, 1369 (D.D.C. 1973) (“If the President

We are thus only a single act of Congress away from allowing a foreign-born but otherwise qualified individual to discharge the duties and powers of the presidency. Of course, without an unlikely constitutional amendment, such service could be given only in a temporary, "acting" capacity. Even such an incremental step, however, would at least allow the members of a previously excluded class of individuals some opportunity to prove that loyalty to the United States, the Constitution, and our founding principles of freedom and democracy is not the exclusive province of the native-born, by devolving presidential power to foreign-born citizens under relatively controlled conditions, rather than wide-open elections.<sup>37</sup>

But perhaps more importantly, we are only a single act of Congress away from bringing millions of American citizens just one step closer to full representation by their President. It's one very small step, to be sure, given the calamity of circumstances necessary to put a foreign-born citizen into the Oval Office (that is, the simultaneous incapacity of both the President and the Vice President).<sup>38</sup> But it is a step that would extend to millions of current and future mothers and fathers the distinctively American dream that their children might someday grow up to be (acting) President.

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has a constitutional power to make temporary appointments, then Congress cannot limit the exercise of that power as it has through the [Vacancies] Act"); *Olympic Fed. Sav. and Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183, 1200 (D.D.C. 1990) ("Moreover, if the court were to find that the President had the inherent authority to designate Mr. Martoche Acting Director of OTS, then the Vacancies Act would be an unconstitutional limitation on the President's constitutional powers"), appeal vacated as moot, 903 F.2d 837 (D.C. Cir. 1990)

37. See *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (upholding internment of American citizens of Japanese descent after deferring to military's judgment that "it was impossible to bring about an immediate segregation of the disloyal from the loyal" among such citizens); Eisgruber, 72 N.Y.U. L. Rev. at 94 (cited in note 8) ("Of course, things might have seemed different in 1787. Americans living in a freshly minted polity might have worried that a dazzling foreign-born politician could seduce them—or, more likely, Virginians might worry that New Yorkers would be seduced, and vice-versa").

38. See, Schauer, 65 Fordham L. Rev. at 1302 (cited in note 3) (noting that, "[i]n recent years . . . three Secretaries of State, Christian Herter, Henry Kissinger, and Madeleine Albright . . . would have been barred by the constitutional requirement"); supra note 25.