SEYFARTH SHAW LLP
ATTORNEYS

Republicans' Mexican-American Presidential Candidate: Mitt Romney?

By Ted J. Chiappari and Angelo A. Paparelli*

Four years ago, one of the challenges to President Barack Obama's Constitutional eligibility for the presidency as a "natural born Citizen" was based on his ostensible dual citizenship at birth and the divided loyalties[1] that can result from multiple citizenships. More recently, Mitt Romney's Mexican heritage made it into the news because of Newt Gingrich's claim that Romney was "anti-immigrant."[2] Reports of Mitt Romney's eligibility for Mexican citizenship appeared around the same time.[3]

With the suspension of Rick Santorum's presidential campaign and Newt Gingrich's concession that Mitt Romney will probably be the Republican Party's 2012 candidate, Romney and Obama are beginning in earnest to highlight their differences. Since both candidates are facing the potential liability of having a father born abroad (George Romney in Mexico and Barack Obama Sr. in Kenya) from whom eligibility for dual citizenship may flow, it is unlikely that either candidate will wish to highlight his opponent's transnational ties. If they did, as unlikely as it may be, a brief reflection on the issue could result in a new appreciation of the intricacies of the U.S. citizenship laws.

In the wake of the last presidential election, we explored the complexities of U.S. citizenship law in connection with the candidacies of both Senator John McCain – born in the Panama Canal Zone – and then President-Elect Obama.[4] Given Mitt Romney's birth in Detroit, no one is questioning that he is a "natural born Citizen" eligible to be President pursuant to Article II of the

[1] Competing loyalties have long been a concern in policy and legal arguments against dual citizenship. See, e.g., *Rogers v. Bellei*, 401 U.S. 815, 832 (1971): "The child [with dual citizenship] is reared, at best, in an atmosphere of divided loyalty…. The duality also creates problems for the governments involved."

[2] See, e.g., Huma Khan, "Mitt Romney Hits Newt Gingrich on Anti-Immgrant Line: 'Repulsive' and 'Inexcusable'" (Jan. 26, 2012), at http://abcnews.go.com/Politics/OTUS/mitt-romney-hits-newt-gingrich-anti-immigrant-line/story?id=15452536 (last accessed Apr. 12, 2012).

[3] See, e.g., Gabriel Lerner, "Mitt Romney's Mexican Roots; His Father Was Born in Mexico, Could Choose Dual Citizenship," at http://www.huffingtonpost.com/2012/01/08/mitt-romney-mexican_n_1192694.html (last accessed Apr. 12, 2012).

[4] See Chiappari and Paparelli, "Natural-Born Citizenship - McCain OK for Presidency?", New York Law Journal (Aug. 22, 2008) and Chiappari and Paparelli, President-Elect Obama, Dual Citizenship and the Constitution, New York Law Journal (Dec. 30, 2008).

U.S. Constitution. Article II provides that "No person except a natural born Citizen … shall be eligible to the office of President."[5]

In light of the Romney family's Mexican heritage, we now have occasion to revisit the issues of acquisition of U.S. citizenship to those born outside of the U.S. and of dual citizenship. The acquisition of citizenship follows one of two basic paradigms: by birth or by naturalization. The Immigration and Nationality Act currently in effect defines "naturalization" to mean "the conferring of nationality of a state upon a person after birth, by any means whatsoever."[6] There should therefore be no doubt that a "natural born Citizen" as described in Article II of the Constitution is one who acquired U.S. citizenship at birth, and not through naturalization. George Romney's birth in Mexico in 1907 to a U.S. citizen father born in the United States would have resulted in the acquisition of U.S. citizenship under U.S. citizenship law at the time.[7] So there is little doubt that he would have qualified as a "natural born Citizen" eligible for the U.S. presidency.[8]

Birthright citizenship (i.e., when U.S. citizenship is conferred at birth) has two guiding principles: *jus soli* (citizenship determined by place of birth; literally, rule "of the soil") and *jus sanguinis* (citizenship by descent; literally, rule "of blood," i.e., regardless of place of birth).

In the United States, citizenship by naturalization was the only paradigm explicitly addressed by our Founders in the Constitution, which delegated to Congress the power "To establish an uniform Rule of Naturalization."[9] Citizenship by birth was of course implicitly acknowledged in the provision outlining requirements for presidential eligibility, clause 5 of Article II, section 1 (singling out natural born citizens), but the Constitution as originally drafted was silent as to the principles of *jus soli* and *jus sanguinis*.

---

[5] U.S. Const. art. II, § 1, cl. 5. Interestingly, the Constitutional question of George Romney's eligibility for the Commander in Chief (given his birth in Mexico) might have been explored in more depth in connection with his 1968 presidential campaign had he not withdrawn from the race.

[6] Immigration and Nationality Act [INA] § 101(a)(23), 8 U.S.C. § 1101(a)(23).

[7] Until 1934, a child born abroad whose father was (at the time of his birth) a U.S. citizen, was a U.S. citizen at birth unless his father had never resided in the United States. See 7 U.S. Department of State Foreign Affairs Manual [FAM] 1132.5.

[8] See U.S. Congressional Research Service. "Qualifications for President and the 'Natural Born' Citizenship Eligibility Requirement" (R42097; Nov. 14, 2011), by Jack Maskell (accessible here: http://www.fas.org/sgp/crs/misc/R42097.pdf): "The weight of legal and historical authority indicates that the term 'natural born' citizen would mean a person who is entitled to U.S. citizenship 'by birth' or 'at birth,' either by being born 'in' the United States and under its jurisdiction, even those born to alien parents; by being born abroad to U.S. citizen-parents; or by being born in other situations meeting legal requirements for U.S. citizenship 'at birth.'"

[9] U.S. Const. art. I, § 8, cl. 4.

British common law recognized the principle of *jus soli*,[10] but only the ratification of the Fourteenth Amendment in 1868 explicitly incorporated the principle into our Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States…."[11] *Jus sanguinis* was not part of British common law – it was a statutory creation in Great Britain – and therefore was not incorporated into U.S. common law.[12] Accordingly, in the United States citizenship by descent has always been and remains solely a function of statutes created and regulated by Congress. U.S. citizenship law (independent of the Constitutional question of eligibility for the presidency) has never recognized common law as a separate or independent basis for claiming U.S. citizenship by reason of birth to U.S. citizens abroad (i.e., *jus sanguinis*).

Jus soli

The question of birth "in the United States" is an easy one for those born in one of its States. It is also easy for those like George Romney born in a foreign country: regardless of parentage, by definition, the principle of *jus soli* does not apply. (It gets more complicated for those like Senator McCain born in an outlying territory.) The common law and Constitutional principle of *jus soli* has been codified in the Immigration and Nationality Act,[13] which also defines the "United States" to mean the continental United States, Alaska, Hawaii, Puerto Rico, Guam and the Virgin Islands of the United States.[14]

The geographic scope of *jus soli* in cases of birth in outlying territories has been far from clear. A line of Supreme Court decisions, called the *Insular Cases*,[15] draws the distinction between incorporated territories (like Alaska), to which the reach of the U.S. Constitution was fully extended, and unincorporated ones (like the Philippines) to which it was not. Dating back to the early 20th Century, the *Insular Cases* have never been disavowed or overturned.

Jus sanguinis

[10] Gordon, Mailman, Yale-Loehr & Wada, 7 Immigration Law and Procedure § 92.03[1][a], citing to *Weedin v. Chin Bow*, 274 U.S. 657, 660 (1927); *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898); and Calvin's Case, 7 Coke 8 (1608).

[11] U.S. Const. amend. XIV, § 1.

[12] Gordon, Mailman, Yale-Loehr & Wada, 7 Immigration Law and Procedure § 93.01[2]. See also U.S. v. Wong Kim Ark, 169 U.S. 649, 669-670 (1898).

[13] INA § 301(a), 8 U.S.C. § 1401(a).

[14] INA § 101(a)(38), 8 U.S.C. § 1101(a)(38).

[15] See *Downes v. Bidwell*, 182 U.S. 244 (1901), the first of the *Insular Cases*, discussed in Gordon, Mailman, Yale-Loehr & Wada, 7 Immigration Law and Procedure § 92.04[1][a].

It still surprises some that a child born to a U.S. citizen abroad may not be a U.S. citizen at birth by *jus sanguinis* – an illustration of the statute's complexity. Under current law, in order to transmit U.S. citizenship to his or her child born outside of the United States, a U.S. citizen married to a foreign national, before the birth of the child, must have resided in the United States for a minimum of five years, at least two of which were after turning age 14.[16] If a U.S. citizen does not meet the criteria to transmit U.S. citizenship to the child at birth, the child must qualify for U.S. citizenship under one of the provisions of our naturalization laws: for example, acquiring citizenship automatically if the child, while under the age of 18, enters the U.S. as a lawful permanent resident (green card holder) in the legal and physical custody of the U.S. citizen parent (INA § 320, 8 USC § 1431); acquiring citizenship by application (on Form N-600K) if the child has a U.S. citizen grandparent who resided in the United States for a minimum of five years, at least two of which were after turning age 14, and if, while residing outside of the U.S. in the legal and physical custody of a U.S. citizen parent (or, if the parent is deceased, a grandparent or someone else not opposed to the child's application) and while under the age of 18, the child enters the U.S. in any lawful status (including as a tourist) for a naturalization interview and takes an oath of allegiance upon approval of the application (INA § 322, 8 USC § 1433); or acquiring citizenship through the ordinary naturalization process as an adult 18 years or old (after having held the green card for the requisite number of years and met the other requirements) (INA § 316, 8 USC § 1427, and regulations thereunder at 8 C.F.R. § 316.2).

Where both parents are U.S. citizens, all that is required under the current statute is that one of the parents has resided in the United States (or one of its possessions) before the child's birth.[17] A child born out of wedlock may or may not acquire U.S. citizenship at birth, depending on whether the mother or the father is a U.S. citizen, and whether certain other conditions (such as the establishment of the father's paternity) are met.[18] The factors prerequisite to acquisition of citizenship at birth have changed over the years, generally without retroactive effect, and citizenship is therefore determined by the statute in effect at the time of the child's birth.[19]

Dual Citizenship

We concluded in our 2008 article that the legal arguments made in the challenges to President Obama's Constitutional eligibility for the presidency based on his ostensible dual citizenship were conceptually flawed and did not comport with established principles of U.S. citizenship law,

[16] INA § 301(g), 8 U.S.C. § 1401(g).

[17] INA § 301(c), 8 U.S.C. § 1401(c).

[18] INA § 309, 8 U.S.C. § 1409.

[19] 7 U.S. Department of State Foreign Affairs Manual [FAM] 1131.1-2 ("The law applicable in the case of a person born abroad who claims citizenship is the law in effect when the person was born, unless a later law applies retroactively to persons who had not already become citizens."); see also *Montana v. Kennedy*, 366 US 308, 312 (1961).

discussed below. Unlike President Obama, who appeared to have conceded having had dual citizenship at birth, Mitt Romney has never made that claim, and based on our admittedly limited understanding of Mexican citizenship law, it is not clear that he can. Under the current Mexican constitution of 1917, those born in Mexico, regardless of the nationality of their parents, are Mexican citizens by birth. But George Romney was born in 1907 and left Mexico for the U.S. in 1912, well before the new constitution was adopted. The Mexican constitution of 1857, in effect at the time of George Romney's birth in Mexico, provided only that those born of Mexican parents were Mexican citizens. So George Romney may not have had a claim to Mexican citizenship, thus likewise disqualifying his son, Mitt. A successful constitutional challenge to Mitt Romney's presidential candidacy based on the divided loyalties of dual citizenship would therefore also appear slim.

Citizenship is essentially a function of national laws, not international legal standards,[20] and each country determines who may be one of its citizens. The United States like virtually all other countries has frowned upon dual citizenship, although the U.S. Government has recognized dual citizenship (at least in certain circumstances, typically for minor children) since at least 1875.[21] For example, in its 1898 decision, *United States v. Wong Kim Ark*, the Supreme Court found that a child born on U.S. soil to Chinese parents ineligible of acquiring U.S. citizenship was nonetheless a U.S. citizen at birth by reason of the Fourteenth Amendment: "To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States."[22]

As described above, there are two basic ways to be considered a citizen, by acquisition of nationality at birth, or, after birth through naturalization, alternate avenues which are recognized by most countries, including the United States. Birthright citizenship itself follows one of two principles or a combination of the two: *jus soli* (citizenship determined by place of birth) and *jus sanguinis* (citizenship by descent). Given this patchwork of national laws, dual (or multiple) citizenship generally arises in one of three situations:

1. Birth in a *jus soli* jurisdiction to parents who are citizens of a *jus sanguinis* jurisdiction.
2. Birth to two parents of different nationality who are citizens of *jus sanguinis* jurisdictions.

---

[20] In *United States v. Wong Kim Ark*, 169 U.S. 649, 668 (1898), supra note 8, the Supreme Court recognized "the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship." For a general overview of the citizenship laws of each country, see United States Office of Personnel Management Investigations Service, Citizenship Laws of the World, March 2001, at http://www.opm.gov/EXTRA/INVESTIGATE/is-01.PDF (last accessed on Apr. 12, 2012).

[21] *Steinkauler's Case*, 15 Op. Attys. Gen'l, 15 (1875), an advisory opinion by Attorney General Edwards Pierrepont to Secretary of State Hamilton Fish, discussed in *Perkins v. Elg*, 307 U.S. 325, 330-331 (1939).

[22] 169 U.S. 649, 694 (1898).

3. Naturalization by a citizen of a country that does not recognize naturalization as an expatriating act or imposes legal requirements in order for the naturalization to result in loss of citizenship.[23]

In light of a series of Supreme Court decisions in the 1950s and 1960s striking down statutes that provided for automatic expatriation (loss of nationality), and the liberalization of other countries' laws regarding dual citizenship, dual citizenship has become a more common phenomenon, one that as a practical and legal matter has now become accepted by the United States.[24]

Conclusion

It is unclear whether third-party claims of Romney's potential dual citizenship are politically motivated or not. In any case, we can only hope that, if Romney is nominated the Republican presidential candidate, as seems virtually certain, the roots that Romney has in foreign soil will ultimately foster – in him and among Republican Party policy makers, the media and the electorate – a greater understanding of the complexity of America's immigration and citizenship laws, and more importantly, a greater appreciation of the need for sensible, comprehensive reform of those laws.[25]

_____

* Ted J. Chiappari is a partner at Satterlee Stephens Burke & Burke LLP in New York City. Angelo A. Paparelli is a partner in Seyfarth Shaw in New York and Los Angeles. The authors thank Olivia M. Sanson, an associate with Satterlee Stephens Burke & Burke LLP, for her research and editorial assistance in the preparation of this article.

[23] See Carnegie Endowment for International Peace, "Embracing Dual Nationality," January 1, 1999, available at http://bit.ly/HOuxHz (last accessed on Apr. 12, 2012). For a general overview and critique of birthright citizenship, see Ayelet Shachar , "Children of a Lesser State: Sustaining Global Inequality through Citizenship Laws," NYU School of Law, Jean Monnet Working Paper, February 2003.

[24] See U.S. State Department website at http://travel.state.gov/law/citizenship/citizenship_778.html (last accessed on April 12, 2012): "While recognizing the existence of dual nationality and permitting Americans to have other nationalities, the U.S. Government also recognizes the problems which it may cause."

[25] See Chiappari and Paparelli, "Does Comprehensive Immigration Reform Have a Prayer?", New York Law Journal (Aug. 22, 2008)