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SCRUTINIZING FEDERAL ELECTORAL QUALIFICATIONS

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ABSTRACT

Candidates for federal office must meet several constitutional qualifications. Sometimes, whether a candidate meets those qualifications is a matter of dispute. Courts and litigants often assume that a state has the power to include or exclude candidates from the ballot on the basis of the state's own scrutiny of candidates' qualifications. Courts and litigants also often assume that the matter is not left to the states but to Congress or another political actor. But those contradictory assumptions have never been examined, until now.

This Article compiles the mandates of the Constitution, the precedents of Congress, the practices of states administering the ballot, and scraps of judicial precedents in litigated cases. It concludes that states have no role in evaluating the qualifications of congressional candidates—the matter is reserved to the people, and to Congress. It then concludes that while states do have the power to scrutinize qualifications for presidential candidates, they are not obligated to do so under the Constitution. If state legislatures choose to exercise that power, it comes at the risk of ceding reviewing power to election officials, partisan litigants, and the judiciary. The Article then offers a framework for future litigation that protects the guarantees of the Constitution, the rights of the voters, and the authorities of the sovereigns.

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INTRODUCTION

Is President Barack Obama a "natural born Citizen"[1] of the United States? Is Senator John McCain? Was Vice President Dick Cheney an "Inhabitant"[2] of Wyoming and not of Texas? The consensus answer to the questions regarding Mr. Obama, Mr. McCain, and Mr. Cheney, on the merits, has been yes,[3] but such answers do not come without dissent (legitimate or not).[4] These and similar questions have been asked before.[5]

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[1] U.S. CONST. art. II, § 1, cl. 4.

[2] U.S. CONST. amend. XXII, § 1.

[3] *See, e.g.*, Dan Pfeiffer, *President Obama's Long Form Birth Certificate*, THE WHITE HOUSE BLOG, *at* http://www.whitehouse.gov/blog/2011/04/27/president-obamas-long-form-birth-certificate (Apr. 27, 2011); *Farrar v. Obama*, OSAH-SECSTATE-CE-1215136-60-MALIHI (Ga. Office of State Admin. Hearings Nov. 12, 2012), *available at* http://libertylegalfoundation.org/wp-content/uploads/2012/01/Decision-of-Judge-Malihi.pdf (relying on *Ankeny v. Governor*, 916 N.E.2d 678, 688 (Ill. App. Ct. 2009) (holding that a person born in the United States is a natural born citizen regardless of citizenship of his parents) to find that President Obama was a natural born citizen and eligible for the 2012 Georgia ballot); S.J. Res. 511, 110th Cong. (2008) (Senate unanimously resolving that Senator McCain is a natural born citizen); Opinion of Laurence H. Tribe & Theodore B. Olson, March 19, 2008 (concluding that Senator McCain is a natural born citizen); *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000) (finding that voters' generalized injury was insufficient for Art. III standing but entering judgment that Vice Presidential candidate Dick Cheney was not an "Inhabitant" of Texas), *aff'd*, 244 F.3d 134 (5th Cir. 2000).

[4] JEROME CORSI, WHERE'S THE BIRTH CERTIFICATE?: THE CASE THAT BARACK OBAMA IS NOT ELIGIBLE TO BE PRESIDENT (WND Books 2011) (no parenthetical needed); Gabriel J. Chen, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1 (2008) (arguing that Congress did not confer citizenship to those born in the Panama Canal Zone prior to Aug. 4, 1937 thus preventing Senator McCain from qualifying as a "natural born" citizen); Jonathan Turley, "The Supreme Redux: Is John McCain Ineligible to Be President?", ROLL CALL, March 6, 2008, *available at* http://jonathanturley.org/2008/03/06/the-supreme-redux-is-john-mccain-ineligible-to-be-president (claiming that whether Mr. McCain is a natural-born citizen is uncertain); Lawrence Friedman, *An Idea Whose Time Has Come: The Curious History, Uncertain Effect, and Need for Amendment of the "Natural Born Citizen" Requirement for the Presidency*, 52 ST. LOUIS U. L.J. 143–49 (2007) (describing uncertainty over the Natural Born Citizen Clause); *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000) ("This is an action by three Texas registered voters who allege that Richard B. Cheney . . . nominee of the Republican Party for Vice President of the United State, is an 'inhabitant' of the state of Texas, and the under the Twelfth Amendment to the United States Constitution, members of the Electoral College from the state of Texas . . . are prohibited from voting for both Governor George W. Bush . . . for the office of President of the United States and for

need to interpret this clause has not yet arisen, the possibility for such a challenge conceivably exists.[11]

Seven years a citizen of the United States. Aliens have often been denied the right to vote or excluded from public office.[12] For a candidate to be eligible for the House of Representatives, the Constitution requires something more than mere citizenship: it requires a minimal period of time as a citizen, but a lower threshold than that required for President.[13]

Inhabitant of that state. An individual must be an inhabitant of the state from which that individual is elected.[14] "Inhabitant" means something less than "resident"[15] and something more than "sojourner."[16] Inhabitancy is measured at the time "when elected" to avoid a lengthy temporal residency qualification.[17]

Not a holder of another civil office, or a recipient of increased emoluments. The Incompatibility and Ineligibility Clauses provide, "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."[18] This prohibition serves more as a disqualification on taking

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646 (1949) (Frankfurter, J., dissenting). ("No provisions of the Constitution, barring only those that draw on arithmetic, as in prescribing the qualifying age for a President and members of a Congress or the length of their tenure of office, are more explicit and specific than those pertaining to courts established under Article III.").

[11] Frank H. Easterbrook, *Statute's Domains*, 50 U. CHI. L. REV. 533, 536 (1983) (suggesting that good reason may support alternative interpretations such as percentage of life expectancy or as the minimum number of years after puberty).

[12] *See* Harisiades v. Shaughnessy, 342 U.S. 580 (1952); *see also* Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1275–76 (2012).

[13] U.S. CONST. art. I, § 2, cl. 2. *Cf.* U.S. CONST. art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . .").

[14] U.S. CONST. art. I, § 2, cl. 2.

[15] *See Schaefer v. Townsend*, 215 F.3d 1031, 1036 (9th Cir. 2000) (examining the Records of the Federal Convention and concluding that the Framers rejected an in-state residency requirement).

[16] See, e.g., 1 HINDS' PRECEDENTS § 369, at 305–06 (reporting the conclusion of a committee of Congress that Jennings Pigott was a "sojourner" and was not an "inhabitant" of North Carolina when elected in 1862).

[17] *See, e.g.*, Texas Democratic Party v. Benkiseri, 459 F.3d 582, 589 (5th Cir. 2006) (examining history of inhabitancy requirement and noting instance when Congress seated elected representatives who had moved into a state two weeks before the election).

[18] Art. I, § 6, cl. 2. *Cf.* THE FEDERALIST NO. 52 (James Madison) ("during the time of his service must be in no office under the United States"). This prohibition may not extend to the President. *See* Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST.

another office or receiving an emolument while serving as a representative. This provision also extends to exclude prospective candidates from holding an office and membership in Congress simultaneously.[19] In 1817, for instance, Elias Earle of South Carolina was elected to the House while serving as a postmaster, but resigned his office before taking his seat and was found entitled to it.[20] Congress extensively considered the definition of "office" in 1898, ultimately finding that four members vacated their seats upon accepting commissions in the Army.[21]

Not disqualified from federal office after impeachment and conviction. A candidate who has been impeached, then disqualified in the discretion of the Senate, is ineligible to serve in Congress.[22]

Not one who engaged in insurrection or rebellion. One of the lesser-known provisions of the Reconstruction Amendments is Section 3 of the Fourteenth Amendment. It disqualifies from office those who previously took an oath under the Constitution of the United States but "engaged in insurrection or rebellion" against the United States "or given aid or comfort to the enemies thereof."[23] The disability works against those who "hold any office, civil or military, under the United States," which presumably includes the office of president.[24] Congress, however, has the power to remove the disability by two-thirds vote.[25]

Elected. A qualification "so basic that it is not often cited as a qualification at all" is the requirement of being elected to office.[26]

Timing of qualifications. A candidate must possess each of these qualifications upon being seated, not necessarily at the time voted into office.

No additional qualifications. Congress's understanding of its power to add qualifications has a checkered history, and the views of its members often divided.[27] For instance, the House determined in 1868 that John

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L. & PUB. POL'Y SIDEBAR 1 (2008).

[19] This may be incorrect. *See* Signorelli v. Evans, 637 F.2d 853, 861 (1980).

[20] 1 HINDS' PRECEDENTS § 498, pp. 623–24.

[21] *See* House Report No. 2205, Third Session, Fifty-Fifth Congress, submitted Feb. 21, 1899; *see* discussion at 1 HINDS' PRECEDENTS §§ 493–94, 604–21.

[22] U.S. CONST. art. I, § 3, cl. 7. For more discussion in the context of presidential candidates, see *infra* notes 48–49and accompanying text.

[23] U.S. CONST. amend. XIV, § 3.

[24] Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 136 n.143 (1995); AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY __ (2005).

[25] U.S. CONST. amend XIV, § 3.

[26] Daniel Hays Lowenstein, *Are Congressional Term Limits Constitutional?*, 18 HARV. J.L. & PUB. POL'Y 1, 22 (1994); *cf.* Roudebush v. Hartke, 405 U.S. 15, 26 n.23 (1972) ("One of those qualifications is that a Senator be elected by the people of his State.").

[27] *See generally* John C. Eastman, *Open to Merit of Every Description? An Historical*

not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States."[48] The presidency is an "Office honor, Trust or Profit," but the decision to disqualify an impeached official is a matter of discretion left to the Senate.[49]

Not one who engaged in insurrection or rebellion. Also similar to the requirements for Congress, a candidate who has engaged in insurrection or rebellion is ineligible, unless Congress removes the disability.[50]

Not an inhabitant of the same state as the vice president. There is one slightly unusual qualification, if it can even be properly called a qualification. A presidential elector may not cast a vote for a presidential candidate and a vice presidential candidate if both candidates are inhabitants of that elector's state.[51] As the Electoral College was originally conceived, electors cast two votes, the votes were tabulated, the candidate with the most votes became president, and the candidate with the second-most votes became vice president.[52] There were a number of early misfires, including vote-throwing to ensure that John Adams would be vice president in 1789 and 1792;[53] miscommunicated strategizing in 1796 that gave Mr. Adams the presidency and his political enemy Thomas Jefferson the vice presidency;[54] and the electoral tie in 1800 between Mr. Jefferson and Aaron Burr, which then prompted a thirty-six round runoff in the House.[55]

The Twelfth Amendment allowed electors to designate one candidate for president and one candidate for vice president.[56] This small change would avoid the problems from these first four presidential elections.

But one element of the original system remained. There was a concern that each state's electors would prefer two candidates from the electors' home state. To avoid excessive provincialism, the Constitution mandated

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[48] U.S. CONST. art. I, § 3, cl. 7; *see* Amar & Amar, *supra* note 24, at __. *But see* Tillman, *supra* note 18.

[49] *Cf.* Waggoner v. Hastings, 816 F. Supp. 716, 719 (S.D. Fla. 1992) (examining the situation concerning Alcee Hastings, elected to the House of Representatives after being impeached and removed from a federal judgeship).

[50] *See supra* notes 23–25 and accompanying text; *see also* 1 HINDS' PRECEDENTS at 462, §454.

[51] U.S. CONST. art. II, § 1, cl. 3 ("The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves."), *superceded by* U.S. CONST. amend. XII ("The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves . . . .").

[52] U.S. CONST. art. II, § 1, cl. 3.

[53] *See* SVEND PETERSEN, A STATISTICAL HISTORY OF THE AMERICAN PRESIDENTIAL ELECTIONS tbls. 3 & 4 (reprint 1981)

[54] *See id.* tbl. 5.

[55] *See id.* tbl. 6.

[56] U.S. CONST. amend. XII.