

WHY JOHN MCCAIN WAS A CITIZEN AT BIRTH

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INTRODUCTION

Senator John McCain was born a citizen in 1936. Professor Gabriel J. Chin challenges this view in this Symposium, arguing that McCain’s birth in the Panama Canal Zone (while his father was stationed there by the Navy) fell into a loophole in the governing statute. The best historical evidence, however, suggests that this loophole is an illusion and that McCain is a “natural born Citizen” eligible to be president.

A person need not be born on U.S. soil to be a citizen at birth. Section 1993 of the Revised Statutes, the statute defining foreign-born citizenship at the time of McCain’s birth, made citizens of certain children “born out of the limits and jurisdiction of the United States.” The Canal Zone was “out of the limits” of the United States—i.e., outside its borders and outside the Fourteenth Amendment’s grant of citizenship to those born “in the United States, and subject to the jurisdiction thereof.” But the United States had exclusive control of the Canal Zone at the time, arguably placing it within U.S. “jurisdiction” if not its limits. Thus, Chin claims, McCain was not “born out of the limits *and* jurisdiction of the United States,” falling instead into a “gap in the law.” When Congress changed the law in 1937, it would have been too late for McCain to become a natural born citizen (assuming, with Chin, that this means a citizen at birth).

Chin’s sophisticated analysis deserves to be taken seriously, but history may point in another direction. The key statutory language, “the limits and jurisdiction of the United States,” was first added in 1795. At the time, this language apparently referred to a unitary concept—the United States proper, the area within its borders—rather than two independent concepts of “limits” and “jurisdiction.” Like “metes and bounds” or “cease and desist,” the phrase was a mere repetition—a doublet, or (in the words of Judge Posner) one of the many “form[s] of redundancy in which lawyers delight.” To be born “out of the limits and jurisdiction of the United States,” it seems, was

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historically understood as synonymous—and not just coextensive—with being born outside the United States proper.

The historical usage of the phrase and its continuous construction over the first century after 1795 supports this reading. Early interpreters—including scholars, congressmen, and state and federal courts—repeatedly referred to the “limits and jurisdiction” of the United States to mean the same thing as the nation’s “limits” (i.e., its borders). Indeed, the term “limits and jurisdiction” was frequently used this way in contexts unrelated to citizenship. When separate requirements of limits and jurisdiction might otherwise have conflicted, courts and commentators uniformly adhered to a unitary interpretation of the statute. This interpretation was also consistent with the recognized purposes of the citizenship statutes, avoiding the absurdities of a restrictive reading. Only recently have some questioned this traditional interpretation; but because Congress did not alter the key language between 1795 and 1936, the provision’s original meaning was preserved up to the date of McCain’s birth. Thus, the balance of the evidence favors a view that John McCain—and other children like him—were citizens of the United States from birth.

I. THE TEXT OF THE STATUTES

A. *Origins and Early Readings*

Congress declared in 1790 that “the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens.” Under this 1790 Act, McCain would undoubtedly have become a citizen at birth. But in 1795, in the course of amending the naturalization rules, Congress enacted a revised text that referred instead to children “born out of the limits and jurisdiction of the United States.”

Assuming that McCain’s status at birth rested only on statutory law (i.e., ignoring his potentially strong claim to citizenship at common law), whether he is eligible to be president depends on the meaning of this 1795 language. Congress retained the phrase “limits and jurisdiction” in the 1802 and 1855 versions of the statute, the latter of which was codified as Revised Statutes section 1993. When that section was itself amended in 1934, the language was left unaltered (the House report described it as “[e]xisting law in which no change is proposed”), thus preserving the phrase from 1795 through McCain’s birth in 1936.

On Chin’s account, the words of the 1795 Act applied only to children born outside *both* the limits *and* the jurisdiction of the United States. He reads “out of the . . . jurisdiction” as excluding anyone who might be “subject to [U.S.] jurisdiction” in the language of the Fourteenth Amendment, i.e., anyone born owing allegiance to the United States and obliged to obey U.S. law. A few special groups—such as foreign ambassadors’ families and Native American tribes (prior to a 1924 statute)—were not subject to U.S. jurisdiction even if they resided within its borders, while those born in out-

lying possessions (like the Canal Zone) were subject to U.S. jurisdiction even if outside its limits.

Did the words added to the 1795 Act really effect such a change in meaning? Or did the Act merely paraphrase the earlier law it replaced? While other aspects of the 1795 Act were controversial, there appears to have been no debate over this specific change. The only potential statement in the recorded debates suggests that the new language carried precisely the same meaning as the old. When James Madison reported a draft version of the Act concerning rules for naturalization, he also included “whatever was necessary from the Old Law, so that the latter should be entirely superseded”—including, presumably, the old provision on foreign-born citizens.

Prior to the twentieth century, those who discussed the 1790 and 1795 laws together uniformly identified no difference in their content. For example, the scholar Horace Binney wrote in 1854 that this section “re-enacted the clauses of the [1790 Act] in *the same or precisely equivalent terms*.” In 1860, a New York court in *Ludlam v. Ludlam* noted that “[b]y both these statutes it was enacted that all children of citizens, born *out of the limits* of the United States, should be considered citizens.”

Accordingly, early interpreters of the 1795 Act read that statute, like its predecessor, as applying to all children born outside the United States. In 1798, a House bill listing categories of U.S. citizenship included the “[c]hildren of citizens of the United States . . . born *at any place out of the limits* of the United States.” During the nineteenth century, members of Congress as well as several state courts used similar phrases to describe the statute’s reach. For example, Senator Daniel Webster in 1848 described the language of “limits and jurisdiction” as applying to those “born *out of the limits* of the United States,” and the title of the 1855 Act described it as concerning children of U.S. citizens “Born out of the Limits Thereof.” In a 1907 amendment to the citizenship statute, Congress described its understanding of the prevailing law in these terms: It demanded an oath of allegiance from “all children born *outside the limits* of the United States who are citizens thereof *in accordance with the provisions of [section 1993]* of the Revised Statutes.”

Nineteenth-century interpreters of the citizenship statutes routinely employed phrases such as “out of the limits” or “out of the United States” alone, even when directly referring to the phrase “out of the limits and jurisdiction of the United States.” Apparently, no one objected to this practice. As far as I can discover, not a single court, commentator, or congressman attached any significance to the words “and jurisdiction” for the first century after their enactment.

B. “Limits and Jurisdiction” in Other Contexts

Why did early Americans speak as if “limits” and “limits and jurisdiction” meant the same thing? Perhaps this was error, or a misleading form of shorthand. But a better explanation may be that “limits and jurisdiction” had the same *meaning* as “limits” alone—that the phrase was a particular type of

redundancy known as a “doublet.” As Bryan Garner notes in his manual on legal style, “[t]he doublet and triplet phrasing common in Middle English still survives in legal writing.” Consider the “metes and bounds” of property, or an order to “cease and desist”—or, in the Constitution, the “Aid and Comfort” given to enemies, the “Revision and Control” of customs duties, and the amendments that are valid to all “Intentions and Purposes.” In each case, the “and” of the pairing is merely one component of a larger phrase, rather than a logical operator conjoining two distinct concepts. (The repetition, one might say, is merely “belts and suspenders.”)

The 1795 Act’s use of “limits and jurisdiction” may have illustrated what the Supreme Court in *Marshall v. Lonberger* called the “lawyer’s well-known penchant for redundancy.” For example, in 1789, Pennsylvania banished certain convicts “to some place or places *without the bounds, limits and jurisdiction of the United States.*” This is an obvious triplet: No one could read the words “bounds,” “limits,” and “jurisdiction” as each denoting a distinct area, with convicts to be sent beyond the union of all three. Instead, the words were just component parts of a single colorful phrase.

The same can be said of “limits and jurisdiction” in other contexts. In 1793, Chief Justice John Jay used the phrase in *Henfield’s Case* to indicate the territory in which certain acts could be punished if committed by aliens “while in this country,” in light of America’s “sovereign[ty] within its own dominions”—language indicating a geographic area, rather than a personal status relevant to ambassadors or Native American tribes. Missouri statutes in the mid-1820s used the phrases “beyond the limits of the United States” and “beyond seas or without the limits and jurisdiction of the United States” interchangeably in describing who could benefit from the tolling of statutes of limitations. In 1838, members of Congress discussed war subsidies paid by Great Britain to “Indian tribes within the territorial limits and jurisdiction of the United States”; although these tribes were a paradigm case of not being “subject to the jurisdiction thereof” under the Fourteenth Amendment, they were still located within America’s borders.

The phrase “limits and jurisdiction” need not always have been a redundancy; in some contexts, the two individual terms carried separate and distinct meanings as they do today. But “[j]urisdiction,” the Supreme Court observed in *Steel Co. v. Citizens for a Better Environment*, “is a word of many, too many, meanings”; and at least one of these meanings was historically synonymous with “borders” or “limits.” For example, the Admissions Clause of the Constitution requires that “no new State shall be formed or erected within the Jurisdiction of any other State”; but this would not let Congress form new states within federal forts and arsenals, from which another kind of state jurisdiction is excluded. An early version of the 1790 Act likewise used “jurisdiction” to mean “borders,” referring to lands “within the United States” that might occasionally forfeit to “the State *wherein such lands shall be, or*”—if that condition could not be satisfied—to “the United States, if such lands shall *not be within the jurisdiction of any individual State.*” To be *in* a state and to be within the jurisdiction of that state here meant the same thing.

The territorial uses of “jurisdiction” can be contrasted with phrases such as “under the jurisdiction” or “subject to the jurisdiction,” which typically concerned state authority and protection rather than geographical area. The 1795 Act used “jurisdiction” in both senses: It allowed aliens residing “*within the limits and under the jurisdiction of the United States*” to be naturalized if they had resided “two years, at least, *within and under the jurisdiction of the same,*” and “one year, at least, *within [the same] state or territory.*” Residing “under” U.S. jurisdiction was one thing; residing “within” that jurisdiction was another, and was here treated as synonymous with residing within the nation’s geographic limits. Likewise, members of Congress in 1828 stated that Indians were “within the territorial jurisdiction” of particular states by virtue of being “within [their] limits”; Chancellor Kent used the phrase similarly in his famous *Commentaries*.

This repeated usage—consistent with that of contemporary statutes and official communications—counsels against reading “jurisdiction” as having the same meaning in all contexts. To be born “out of the limits and jurisdiction of the United States” in early America may have meant no more than to be born outside its limits.

C. Application to Actual Cases

If the citizenship statutes used “limits and jurisdiction” to mean something other than “limits,” then presumably contemporary interpreters would have recognized this difference. This is especially true when such a difference could have altered the outcome of concrete cases, with children arguably meeting one requirement but not the other. In the only historical cases I have identified, however, the children in question were uniformly held to be citizens.

1. Native Americans

Before they were granted citizenship in 1924, Native Americans resided in the United States but were not “subject to the jurisdiction thereof.” When citizens and Native Americans bore children together, separate rules about tribal membership—and not the foreign-born citizenship statutes—determined whether those children were citizens, even if they had been born in the United States. Indeed, in 1818, a South Carolina court interpreted the statutes’ reference to “limits and jurisdiction” in solely geographic terms, discussing a birth in Indian lands as if it might have been in a foreign country outside the limits of the United States. The plaintiff in *Davis v. Hall* argued that “a person born within the limits of a territory occupied and claimed by a nation of American Indians, is an alien.” The unanimous Court of Constitutional Appeals did not ask whether the child would be subject to the jurisdiction of the United States, instead noting that the case “has been specifically provided for” by statute. The court found it irrelevant whether “the place of birth were without the jurisdiction or limits of the United States,” for citizenship would descend “whether *that place* be within the

jurisdiction or limits of the United States or not.” This geographic reading of the statute was hardly consistent with independent requirements of “limits” and “jurisdiction,” and the reporter’s headnote summarized the holding in similarly geographic terms: “Where a Father has been a citizen of the United States, his Son is entitled to the privileges of citizenship, although born *without the limits* of the United States.”

2. *Birth Aboard Ships*

Like foreign ambassadors, a foreign government’s ships carried with them a bubble of extraterritorial jurisdiction. But private ships were also subject to a form of jurisdiction abroad. In 1861, a federal circuit court concluded in *United States v. Gordon* that acts within the internal waters of a foreign nation—a place normally outside the jurisdiction of American courts—could still be subject to U.S. jurisdiction if those acts took place on “an American vessel, owned by American citizens.” Nevertheless, the court had no difficulty accepting that a child born aboard a vessel in such circumstances would be a citizen at birth. Justice Samuel Nelson instructed the jury that “even if the defendant was born during one of those voyages . . . he would still be regarded in law as an American citizen, although thus born abroad.” The full court added that “there was no error in this part of the charge,” noting that in context it “clearly referred to a possible birth of the defendant on board of his father’s American vessel, while the latter was in a foreign country.” While those born on such a vessel would, in the court’s view, still be subject to U.S. jurisdiction in one meaning of the term, it read the foreign-born citizenship statutes as concerning nothing more than geography.

3. *Extraterritorial Jurisdiction by Treaty*

Over the nineteenth century, the United States obtained extraterritorial privileges in many foreign nations. In such countries, according to a 1906 State Department report, the “national sovereignty of law [was] transferred bodily into a foreign soil and made applicable to [U.S. citizens] dwelling there.” For example, an 1858 treaty with China provided that “[a]ll questions in regards to rights whether of property or person, arising between citizens of the United States in China shall be subject to the jurisdiction and regulated by the authorities of their own Government.” Yet an 1864 regulation specifically charged the American consul in China with recording “[t]he *birth* and death of every American citizen within the limits of his jurisdiction,” which implies that children “subject to the jurisdiction” of the United States could still obtain their citizenship by birth.

Several contemporaneous opinions by State Department officials made this implication explicit. From 1790 on, the citizenship statutes had sought to prevent the formation of permanent enclaves of U.S. citizens abroad by requiring that the fathers of foreign-born citizens have previously “resided in the United States.” In 1887, the Acting Secretary of State argued that this

limitation “d[id] not apply to the descendants of citizens of the United States” in an extraterritorial community in Turkey; instead, “[s]uch descendants [were] to be regarded, through their inherited extraterritorial rights recognized by Turkey herself, as born and continuing in the jurisdiction of the United States.” This relaxation of the father-residence rule was a stretch; the communities in Turkey were never really “in” the United States. It was *not* controversial, however, that parents in extraterritorial communities were able to pass on their citizenship at all. Even though their children were recognized—in the Acting Secretary’s words—as “born and continuing in the jurisdiction of the United States,” this was no barrier to citizenship when the fathers had truly resided in the United States. In 1902, Secretary of State John Hay asserted that “[i]f the father was a citizen of the United States when the son was born [in Turkey], the son was himself born a citizen of the United States,” even while noting in the same breath that that the son was “born in a country in which the United States exercises extra territorial jurisdiction.” If the 1795 Act’s language had a plain meaning excluding children like McCain from citizenship, this meaning was lost on the courts and officials charged with enforcing it.

II. TEXT AND PURPOSE

In weighing this historical evidence, we should not lose sight of how *odd* a restrictive interpretation would be. Of all children born abroad, why exclude those who already have a close relationship to our government and laws?

Even stranger, Chin’s reading would deny citizenship to children of ambassadors and troops abroad *regardless* of where they were stationed. Like ambassadors, soldiers stationed abroad are traditionally subject to the jurisdiction of their home country; and the children of these soldiers, like those of ambassadors, were recognized at common law as having the same jurisdictional status as their parents. If the statute really imposed separate requirements of “limits” and “jurisdiction,” then the Canal Zone’s status is irrelevant; *any* child born to ambassadors or soldiers abroad would fail the test. In fact, the 1795 Act’s language would have had little contemporary effect *except* to deny citizenship to these children. It is hard to believe that Congress would have taken this measure without debate or even contemporary notice.

There is no evidence that anyone in 1795 wanted to restrict citizenship in this manner. The only relevant discussion in the debates suggests that the Act was meant to replicate, rather than depart from, its predecessor. And while the restrictive reading would have affected few places in early America, this hardly provides a positive reason to enact it. Chin imagines that such places would not have been “considered fit for women and children,” imputing to Congress the view that “births in foreign ports on all-male U.S. Navy ships[] would be sufficiently irregular and unusual” as to exclude the children from citizenship. But the historical record contains no evidence of such concerns. And here a page of history is worth a volume of

speculation: When the courts indeed encountered a child born aboard a U.S.-flagged ship, no such doubts were expressed.

By contrast, there was a great deal of contemporary recognition of another legislative purpose: to make the citizenship of these children independent of their place of birth. The 1790 Act, like its British predecessors, took a general approach; but for certain named exceptions, anyone not a citizen by place of birth could become one by parentage. Chin reads the “limits and jurisdiction” language of the 1795 Act as more restrictive than its predecessor. But the 1802 Act employed the same phrase in a manner strongly suggesting a gapless reading of the statute as a whole, providing that “the children of persons who now are, or have been citizens of the United States, *shall, though* born out of the limits and jurisdiction of the United States, be considered as citizens of the United States.” In other words, the provision referred to the children of U.S. citizens born anywhere in the world, declaring them to be citizens themselves—even if, not having been born within the United States proper, they might not have been citizens otherwise.

Early Americans consistently described the statutes’ purpose in this fashion—as ensuring, as Massachusetts’ high court put it in *Inhabitants of Manchester v. Inhabitants of Boston*, that children of U.S. citizens would enjoy their parents’ status “whether born within the *United States* or not.” When two readings of a text can each be supported linguistically, the one in better accord with a statute’s structure and purpose was more likely the one relied on by those who drafted the law. In the absence of any apparent (much less coherent) motive for Congress to restrict citizenship in this way, these considerations strongly favor a gapless reading of the text.

CONCLUSION

After a century of consistent interpretation, a new reading of “limits and jurisdiction” emerged in the early 1900s. The spread of this new reading, however, should hardly be surprising. If mistaken, it was the *kind* of mistake that no one could have made before America acquired vast unincorporated possessions, subject to U.S. control even as their inhabitants were famously excluded from America’s limits (and the benefits appurtenant thereto). Read alone and out of context, the words “limits” and “jurisdiction” began to pull in different directions. In 1898, the Supreme Court in *United States v. Wong Kim Ark* claimed to construe the words of the Fourteenth Amendment—concerning those born “in the United States and subject to the jurisdiction thereof”—as “the converse” of the limits-and-jurisdiction phrase “habitually used in the naturalization acts.” In the twentieth century, some came to read this dictum as supporting a restrictive reading, importing the Fourteenth Amendment’s separate conditions into the statute’s more unified language.

But this view was hardly unanimous. Others read the Court’s use of “converse” to mean “negation,” meaning that anyone not guaranteed citizenship under the Fourteenth Amendment could potentially obtain it under the statute. For example, the State Department understood the Court’s decision

this way in 1929, when it declared that children like McCain—born to American parents in the Canal Zone—were citizens at birth. In the Department’s view, it was “not proper to consider the word ‘jurisdiction’ as disconnected with the word ‘limits’”; instead, the phrase conveyed “a single idea,” which was “the antithesis” of the Fourteenth Amendment’s test for citizenship and which applied to all those born “outside of the United States proper,” including “those born in the unincorporated territories.”

The State Department had it right. To read the citizenship statutes as imposing separate conditions of “limits” and “jurisdiction,” and as excluding children like McCain, would not only produce bizarre results: It would also be something of an anachronism. The statutory language had been preserved unaltered since 1795, and the Third Congress had no obligation to speak in any other way than would allow it to be understood by its contemporaries. “Limits and jurisdiction” was frequently employed as a doublet in early America, and if it was not one in the 1795 Act, no one seems to have remarked on that fact for more than a hundred years.

Of course, no one in 1795 thought to mention all the absurd consequences the Act would *not* produce. Perhaps the early constructions of the statutes were mistakes or overgeneralizations; perhaps Congress’s true purpose went unrecognized and early courts and officials repeatedly erred in their application of the law. But we must weigh the evidence as we find it, and the balance of that evidence suggests that John McCain was a citizen at birth.