Testimony of

Professor Akhil Amar

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By Akhil Reed Amar

Thank you, Mr. Chair. My name is Akhil Reed Amar. I am the Southmayd Professor of Law and Political Science at Yale University. As my formal testimony draws upon a soon-to-be-published book that I have written about the history of the Constitution, I respectfully request that the relevant pages of that book--pages that I have attached as an appendix to my testimony--be made part of the record.

In a land of immigrants committed to the dream of equality, the Constitution's natural born clause seems, well, unAmerican. Why shouldn't we open our highest office to those who have adopted this country as their own, and have proved their patriotism through decades of devoted citizenship?

Legal traditionalists will doubtless, and with good reason, counsel us to think twice before altering the Founders' system. But the framers themselves created an amendment process as part of their legacy to us. A close look at why they added the natural-born clause can help us decide whether their reasons still make sense today.

As I have documented in greater detail in America's Constitution: A Guided Tour, the 1787 Constitution was, by the standards of its time, hugely pro-immigrant. Under the famous English Act of Settlement of 1701, no naturalized subject in England could ever serve in the House of Commons, or Lords, or the Privy Counsel, or in a wide range of other offices. The Constitution repudiated this tradition across the board, opening the House, Senate, Cabinet, and federal judiciary to naturalized and native alike.

Seven of the thirty-nine signers of the Constitution at Philadelphia were foreign-born, as were countless thousands of the voters who helped ratify the Constitution. Immigrant Americans accounted for eight of America's first eighty-one congressmen, three of our first ten Supreme Court Justices, four of our first six secretaries of the treasury, and one of our first three secretaries of war.

Only the Presidency and Vice Presidency were reserved for birth-citizens and even this reservation was softened to recognize the eligibility of all immigrants who were already American citizens in 1787--men who had proved their loyalty by coming to or remaining in America during the Revolution.

Why, then, did generally pro-immigrant Founders exclude later immigrants from the presidency? If we imagine a poor boy coming to America and rising through the political system by dint of his own sweat and virtue only to find himself barred at the top, the natural-born rule surely looks anti-egalitarian. But in 1787, the more salient scenario involved the possibility that a foreign earl or duke might cross the Atlantic with immense wealth and a vast retinue, and then use his European riches to buy friends on a scale that virtually no homegrown citizen could match. No

such grandees had yet come to our shores. Thus it made republican sense to extend eligibility to existing foreign-born Americans, yet it also made sense to anticipate all the ways that European aristocracy might one day try to pervert American democracy.

Several months before the Constitution was drafted, one prominent American politician had apparently written to Prince Henry of Prussia, brother of Frederick the Great, to inquire whether the Prince might consider coming to the New World to serve as a constitutional monarch. Though few in 1787 knew about this feeler, the summer-long secret constitutional drafting sessions in Philadelphia did fuel widespread speculation that the delegates were working to fasten a monarchy upon America. One leading rumor was that the Bishop of Osnaburgh, the second son of George III, would be invited to become America's king. The natural-born clause gave the lie to such rumors and thereby eased anxieties about foreign nobility.

These anxieties had also been fed by England's 1701 Act, which inclined the Founders to associate the idea of a foreign-born head of state with the larger issue of monarchical government. Though England banned foreigners from all other posts, it imposed no natural-born requirement on the head of state himself. In fact the 1701 Act explicitly contemplated foreign-born future monarchs--the German House of Hanover, in particular. By 1787 this continental royal family had produced three English Kings named George, only the third of whom had been born in England itself.

Thus, in repudiating foreign-born heads of state, the framers meant to reject all vestiges of monarchy. Their general goal was to create an egalitarian republic.

In light of this history, the case for a constitutional amendment today would appear to be a strong one: Modern Americans can best honor the Founders' generally egalitarian vision by repealing the specific natural-born rule that has outlived its original purpose.

Nor would an amendment, if successful, be the first time that Americans have tweaked the Founders' rules of presidential eligibility. Though the Constitution never said in so many words that only men could be President, it did consistently use the words "he" and "his"--and never "she" or "her"--to describe the President. The framing generation debated at length whether Presidents might come to resemble English Kings, but said nary a word about Queens. (The framers of course were intimately familiar with Queens; Virginia was itself named after one; and let's not forget the College of William and Mary.)

Thus, a plausible argument might have been made in the 1800s that only men were eligible to the Presidency. But surely the Nineteenth Amendment, ratified in 1920, ended all debate on that issue by granting women the explicit right to vote and the implicit corresponding right to be voted for. In effect, that Amendment required that the word "he" in the original constitutional clauses dealing with the President would henceforth be read to mean "he or she." What the suffragist movement did for women, America should now do for naturalized citizens. This country should be more than a land where everyone can grow up to be . . . governor.

Thank you.

Appendix: Excerpt from Akhil Reed Amar, America's Constitution: A Guided Tour

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"thirty five Years"

Let's begin by considering the clause excluding candidates "who shall not have attained to the Age of thirty five Years."

At first, it might seem that any limitation whatsoever on the choices of the electorate could never be described as democratic or egalitarian. (From this perspective, it is worth noting how few eligibility rules Article II actually imposed--a handful of modest requirements limited to age, residence, and citizenship.) But from another angle, the age limit also liberated, promoting a broader democratic culture of republican merit and equal opportunity.

In which foreseeable scenarios, after all, might someone less than thirty-five years old command enough continental popularity to win the Presidency, but for the bar of Article II? Perhaps a dashing young military hero might one day charm the nation. To the extent that the Article II age clause required young men in uniform to prove themselves more generally, the clause meshed with many other constitutional rules limiting the professional military.

The more likely scenario underlying the age clause involved favorite sons--young men who sprang from famous fathers but had yet to show their own true colors. Instead of being evaluated based on their individual merits and vices, as revealed by a long track record of personal accomplishment and failure, such favorite sons would unfairly benefit from their high birth status and distinguished family name, thus retarding the growth of a truly republican society equally open to meritorious men of humble and middling origin.

Madison's notes contain nothing directly bearing on the drafting history of this clause, and it generated only modest commentary during the ratification period (making it no different from many other important constitutional clauses). What evidence does exist, however, strongly supports an egalitarian reading of the seemingly bland words "thirty five Years"--words that had no counterpart in English law or state constitutions.*

Anti-Federalist critics worried that American Presidents would come to resemble British Kings. As the "Federal Farmer" put the point, "When a man shall get the chair, who may be re-elected, from time to time, for life, his greatest object will be to keep it; to gain friends and votes, at any rate [i.e., price]; to associate some favourite son with himself, to take the office after him: whenever he shall have any prospect of continuing the office in himself and family, he will spare no artifice, no address, and no exertions . . . ." Anticipating and answering just such anxieties about hereditary succession and "favourite son[s]," Federalists deployed the Article II age clause in a strongly egalitarian fashion. Tench Coxe argued that while Britain's King "is hereditary, and may be an ideot, a knave, or a tyrant by nature," America's President "cannot be an ideot, [and] probably not a knave or tyrant, for those whom nature makes so discover [i.e., reveal] it before the age of thirty-five, until which period he cannot be elected." According to another Federalist pamphlet, a President would be highly unlikely to mutate into a "hereditary sovereign" because no American citizen would have "a fortune sufficiently large" or an official "salary . . . []adequate . . . to the purpose of gaining [i.e., bribing] adherents, or of supporting a military force . . . . Besides, the Constitution has provided, that no person shall be eligible to the office, who is not thirty-five years old; and in the course of nature very few fathers leave a son who has arrived to that age."

By their actions in early presidential elections, the American people showed themselves acutely aware of issues of dynastic succession. Part of the reason that George Washington was "first in war, first in peace, and first in the hearts of his countrymen" was that his countrymen knew that he lacked dynastic ambitions. He became father of his country because he was not father of any potential princely successors. He sired no heirs, and his only stepson died in 1781. American

republicans could breathe easier knowing that their first General and first President would not try to create a throne and a crown to pass on to some namesake (George II?). Interestingly, the man many contemporaries kept the closest watch on was Alexander Hamilton, himself fatherless, who at times played the role of the good son Washington never had, first as Washington's aide-de-camp during the Revolution and later as his leading cabinet minister.

Of the first five Presidents, only one had any (acknowledged) sons. That one was John Adams, whose heir John Quincy Adams did indeed become President--but only in his mid-fifties after a distinguished political career in his own right. A Phi Beta Kappa graduate of Harvard and later a Harvard professor; an accomplished diplomat fluent in several languages, with decades of experience in foreign affairs, including a successful eight-year stint as Secretary of State under a President not closely associated with his father--here was a man with extraordinary credentials of his own. Moreover, John Quincy's entrance onto the presidential stage occurred a quarter-century after his father's exit. In 1801, when his father left office, he was not even old enough to run, thanks to the thirty-five-years clause.*

Washington himself understood the dynasty dynamic. In the first draft of his first Inaugural Address, he wrote that "Divine Providence hath not seen fit, that my blood should be transmitted or my name perpetuated by the endearing, though sometimes seducing channel of immediate offspring. I have no child for whom I could wish to make a provision--no family to build in greatness upon my Country's ruins. . . . [No] earthly consideration beyond the hope of rendering some little service to our parent Country . . . could have persuaded me to accept this appointment." When, seven years later, this childless man announced his retirement, dynastic concerns burst into open view as Americans turned their eyes to other Founding fathers. One Boston paper warned that Adams, if elected, would work to install his "well born" sons as "the Seigneurs or Lords of this country," while Jefferson, with "daughters only," could be trusted.

In many colonies, political power had regularly flowed through dynastic channels. According to Gordon Wood, it was commonplace practice in provincial America for fathers to resign their government positions in favor of their sons. Wood also reports that in the half-century before independence, more than 70 percent of the representatives elected to New Jersey's assembly had family ties to earlier representatives. A similar pattern prevailed in South Carolina. John Adams observed that "every village in New England" had positions that, although filled by "the freest election of the people" nevertheless "generally descended from generation to generation, in three or four families at most." Adams might well have said the same thing about some appointive offices, at least in his home colony. For several months in 1771, two of five Justices on Massachusetts's highest court were the sons of previous Justices, and yet a third was the younger brother of a previous Chief Justice. In turn, one of the sons would soon be followed on the court by his own son. All told, nine of the ten men appointed to the court between 1746 and 1772 had relatives who had served or would serve on the court.

In response, Revolutionary state constitutions condemned the idea of automatic hereditary government service. According to the Virginia Bill of Rights, "the offices of magistrate, legislator, or judge" ought not "be hereditary." Maryland's and North Carolina's Constitutions condemned "hereditary honours," "emoluments," and "privileges," and New Hampshire's Constitution declared that "[n]o office or place whatsoever in government, shall be hereditary--the abilities and integrity requisite in all, not being transmissible to posterity or relations." Perhaps the most emphatic language came from the pen of John Adams himself, as lead draftsman of the Massachusetts Constitution of 1780: "[Public service] being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man

born a magistrate, law-giver, or judge, is absurd and unnatural."
Such state constitutional language prohibited government from creating formally hereditary positions of government power but did nothing to address the special advantages favoring the well-born in democratic elections. Article II's age clause went a step further, creating a clean and easily enforceable rule levelling the playing field somewhat, obliging favorite sons to bide their time and show their stuff, and giving other men a chance to show theirs. Article II did not go so far as to bar capable sons from entering the family business of politics--and with good reason. An absolute prohibition on father-son succession would have eerily resembled the odious old English practice of punishing the children of certain disfavored politicians via "corruption of blood." An absolute bar on favorite sons would also have permanently denied the republic the option of picking someone who might well be the ablest, most distinguished person, such as a mature John Quincy Adams.
The Article II age clause fit snugly into a larger egalitarian pattern. Just as Article II required Presidents to be thirty-five years old, so Article I required House members to be twenty-five and Senators thirty--graduated rules that gave lower-born men a chance to outshine famous favorite sons. (The Article I age clauses additionally addressed possible concerns about an interstate scramble for future federal honors--concerns inapplicable to a continentally elected President.)
The presence or absence of literal favorite sons also illuminates how the Article II phrase, "four Years," played out in the early republic. The "Federal Farmer" had worried that Presidents might seek continued re-election until their sons could succeed them. But beginning with Washington, many early Presidents permanently stepped aside after a term or two. Might these men have been less willing to yield to other leaders (and families) had there been literal favorite sons yearning to fill their fathers' shoes? Interestingly enough, none of the first seven Presidents who ultimately declined to seek re-election had a biological son and heir. Not until Rutherford Hayes, in the early 1880s, would such a father ever permanently walk away from power rather than seek another term. Before Hayes, five of the six childless Presidents had simply walked away, as had both of the Presidents with only daughters, but none of the ten Presidents with sons had followed this lead. Rather, every one of the ten either died in office or finally quit the presidential scene only after losing a bid for more years in power.

"a natural born Citizen"

Early America's evident concerns about presidential dynasties also lurked beneath Article II's most questionable eligibility rule: its requirement that a President be a "natural born Citizen"--that is, a citizen at the time of his birth. By generally prohibiting immigrants-turned-citizens from the Presidency, Article II limited both the electorate's choice set and the career options of would-be candidates. Though seemingly illiberal on this point, the Constitution in fact represented a considerable liberalization of eighteenth-century English practice. Under England's famous 1701 Act of Settlement, naturalized foreigners could never serve in the Privy Council or Parliament, or enjoy any office or place of trust, either civil or military. By contrast, the Constitution opened virtually all federal positions--the Congress, the judiciary, the cabinet and the military--to naturalized citizens. In fact, immigrant Americans would account for roughly one tenth of the membership of the First Congress, a third of the first Supreme Court, four of the nation's first six secretaries of the treasury, and one of its first three secretaries of war. Only the Presidency and Vice Presidency were reserved for birth-citizens.
Even this reservation would not apply so as to exclude any immigrants who were already

American citizens in 1787, men who had proved their loyalty by coming to or remaining in America during the Revolution. Seven of the thirty-nine Philadelphia signers were themselves foreign-born, and during the ratification process, countless naturalized Americans voted on equal terms with their natural-born fellow citizens. If we view the Constitution in deed as well as word, the specific bar of Article II would seem a relatively narrow exception proving the general rule of openness to immigrant Americans.

Why did the Founders create even this narrow exception? If we imagine a poor boy coming to America and rising through the political system by dint of his own sweat and virtue only to find himself barred at the top, the natural-born rule surely looks anti-egalitarian. In 1787, however, the more salient scenario involved the possibility that a foreign earl or duke might cross the Atlantic with immense wealth and a vast retinue, and then use his European riches to buy friends on a scale that virtually no homegrown citizen could match. No such grandee had yet reached America's shores. Thus it made republican sense to extend eligibility to existing foreign-born citizens, yet it also made sense to anticipate all the ways that European aristocracy might one day try to pervert American democracy. Out of an abundance of caution--paranoia, perhaps--the framing generation not only barred European-style titles of nobility, but also barred European noblemen themselves (along with all other future immigrants) from America's most powerful and potentially most dangerous office.

Modern historians have uncovered evidence suggesting that several months before the Philadelphia convention, Confederation President (and later Philadelphia delegate) Nathaniel Gorham had, via Baron Frederick von Steuben, written to Prince Henry of Prussia, brother of Frederick the Great, to inquire whether the Prince might consider coming to America to serve as a constitutional monarch. Though few in 1787 knew of this feeler (if it in fact existed), the summer-long secret sessions in Philadelphia did fuel rampant speculation out of doors that the delegates were working to fasten a monarchy upon America. According to historian Max Farrand, "The common form of the rumor was that the Bishop of Osnaburgh, the second son of George III, was to be invited to become King of the United States." To counter such speculation, some delegates anonymously planted a newspaper item in mid-August, a month before the curtain of official silence was lifted: "tho' we cannot, affirmatively, tell you what we are doing, we can, negatively, tell you what we are not doing--we never once thought of a king." In early September, the convention added the natural-born clause, a provision that, while over-inclusive, would surely lay to rest public anxieties about foreign monarchs.

These anxieties had been fed by England's 1701 Act, which inclined early Americans to associate the very idea of a foreign-born head of state with the larger issue of monarchical government. Though England banned foreigners from all other posts, it imposed no natural-born requirement on the head of state himself. In fact, the 1701 Act explicitly contemplated foreign-born future monarchs--the German House of Hanover, in particular. By 1787 this continental royal family had produced three English Kings named George, only the third of whom had been born in England itself. Article II's natural-born language squarely rejected the 1701 idea of future foreign-born heads of state, in no small part because many republicans had come to link the idea (perhaps more sociologically than logically) with hereditary succession and foreign intrigue. Foreign-born princes might be good enough to rule in the Old World but should be kept out of the New World Order--or at least the New World Presidency.

Having considered the categories of candidates that the Constitution barred from the Presidency, we should also consider the categories that it did not bar. Article II not only omitted property qualifications for would-be Presidents, but also pointedly avoided religious pre-requisites or

disqualifications. Article VI broadened the principle beyond the Presidency and phrased it in emphatic language: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

This formal openness to men of any religion or no religion ran well ahead of contemporary Anglo-American practice. Britain's Act of Settlement required that all future English monarchs join in Anglican communion. Eleven American states--nine in their state constitutions, no less--imposed religious qualifications on government officials, and no state constitution explicitly barred religious tests for public servants. Article VI thus broke new ground, as did early American practice under Article II. Thanks to the broad power they enjoyed under the liberal eligibility rules of the Constitution, early American Electors were free to choose, and did in fact freely choose, Presidents of various denominations and even some men with no explicit religious affiliation, such as Jefferson and Lincoln.

Shortly after Americans ratified the federal Constitution, the state constitutional pattern began to change. Among the original states that revised their constitutions in the decade after 1788, all but one moved towards increased religious openness. Three states eliminated all constitutional language requiring religious tests, and a fourth significantly narrowed the scope of religious exclusion. Delaware moved all the way from requiring belief in the Holy Trinity in 1776 to a flat prohibition on all religious tests in 1792. The influence of the federal Constitution was obvious on the face of the 1792 document, which tracked the Article VI religious test clause virtually verbatim. Here, too, the federal Preamble process helped propel the state bandwagon towards modernity.