Written by **Joe Wolverton, II, J.D.** on December 13, 2013

Birther Controversy Renewed by Death of Hawaii Official

The Hawaiian vital records official who vouched for the legitimacy of President Barack Obama's birth certificate was the lone fatality of a plane crash Wednesday.

USA Today reports:

> The plane, carrying a pilot and eight passengers, went down Wednesday in the water a half mile off the Hawaiian island of Molokai, the Maui Fire Department said. The lone fatality was Loretta Fuddy, who has served as state health director since January 2011. Tom Matsuda, the interim executive director of Hawaii's health insurance exchange, confirmed Fuddy's death.

Readers might remember Fuddy's role in the scandal surrounding the site of the president's nativity. In response to increasing demand for production of a legal record of his birth, in April 2011, President Obama ordered Fuddy to verify a birth certificate he insisted proved he was a natural born citizen of the United States, thus constitutionally qualified to be president.

The discomforting facts surrounding the tragedy are reported in the *USA Today* story:

> Makani Kai Air President Richard Schuman told Honolulu-based KITV that he spoke with the pilot of the single-engine turboprop Cessna Grand Caravan after the crash.
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> "What he reported is after takeoff … there was catastrophic engine failure," Schuman said. "He did the best he can to bring the aircraft down safely and he got everybody out of the aircraft."
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> Schuman said the cause of the engine failure had not yet been determined. The National Transportation Safety Board was investigating the crash; NTSB spokesman Eric Weiss said that based on the location of the crash it was unlikely the plane will be recovered.

Wednesday's accident seems to have fanned the still-smoldering flames of the so-called birther controversy. Several online news sites have reported on the conspiracy theories being offered up to explain the plane crash. For example, some people felt it was curious that Fuddy was the only one to die in the plane crash, while others are hypothesizing that she may have been killed to keep her quiet because she was about to release evidence that Obama's birth certificate was a forgery.

Whether or not there was a "conspiracy" behind the plane crash and Fuddy's death, and whether or not the birth certificate was a forgery may be of little consequence. While it would certainly be disconcerting if a president perpetrated a fraud on the American people on the scale of the "birther" scandal, constitutionally speaking, Barack Obama may not qualify under Article II's "natural born citizen" requirement, regardless of whether he was born in Kenya, Hawaii, or Kansas, for that matter.

An important step in the inquiry is to identify the source of our Founders' concept of "natural born citizen." It is almost certain that the men who drafted our Constitution accepted Swiss legal philosopher

Emerich de Vattel as the authority on the definition of that vital concept.

In his seminal treatise, *The Law of Nations or the Principles of Natural Law*, Vattel wrote, "Natural born citizens are those born in a country to parents who are also citizens of that country. Particularly, if the father of the person is not a citizen then the child is not a citizen either. Children cannot inherit from parents rights not enjoyed by them."

Apart from an appeal to Vattel, there is the definition of "natural born citizen" given in the decision of an English lawsuit from 1608 — *Calvin's Case*.

In that case, the British court held that natural born subjects were those who owed allegiance to the king at birth under the "law of nature." The court concluded that under natural law, certain people owed duties to the king, and were entitled to his protection, even in the absence of a law passed by Parliament.

Next, the inquiry moves to the possible sources and appropriate interpretations of the "natural born citizen" qualification.

At the time of the drafting of the Constitution, a person born subject to the British Crown could hold "double allegiance," a concept similar to "dual citizenship" as understood today.

Our own Founding Fathers, nearly every one of whom was born in some outpost of the British Empire, feared the damage that could come from such divided loyalty.

They instituted the "natural born citizen" qualification in order to avoid what Gouverneur Morris described during the Constitutional Convention as "the danger of admitting strangers into our public councils."

As famed jurist of the early Republic St. George Tucker, a contemporary of Morris, explained:

> That provision in the constitution which requires that the president shall be a native-born citizen (unless he were a citizen of the United States when the constitution was adopted) is a happy means of security against foreign influence, which, wherever it is capable of being exerted, is to be dreaded more than the plague. The admission of foreigners into our councils, consequently, cannot be too much guarded against; their total exclusion from a station to which foreign nations have been accustomed to attach ideas of sovereign power, sacredness of character, and hereditary right, is a measure of the most consummate policy and wisdom.

In fact, as indicated in early records of the naturalization process, men applying for American citizenship were required to make two renunciations of all fealty to foreign powers before swearing allegiance to the Republic of the United States.

As a matter of fact, the possibility of any legal acceptance of divided allegiance was explicitly rejected in a report issued by the House of Representatives in 1874: "The United States have not recognized a 'double allegiance.' By our law a citizen is bound to be 'true and faithful' alone to our government."

The practical effect of that proclamation is that in order to be a "natural born citizen" of the United States, one would have to be free from a competing claim for allegiance from another nation.

That such a schizophrenic situation was not only anticipated but accepted by His Majesty's government during the time of the American founding can be inferred from the impressment of American sailors into the service of the Crown. During the War for Independence, British ships would block American ships from sailing and then the seamen on the British vessels would board the American ships and force

the Americans to serve the side of the Empire.

The insistence on the part of the British that anyone born within the realm was a British subject regardless of any voluntary severance thereof and subsequent vow of allegiance to another prince was a significant factor in the hostilities known as the War of 1812.

Finally, in this regard, the British required no process of naturalization as such. Simply being born within the dominions of the monarchy of Great Britain was sufficient to endow one with the rights and privileges granted to any British subject.

Nothing such a person did later in life (including becoming a citizen of another country) would ever alter his status as subject.

Obviously, in the United States that concept is neither the law now, nor was it the law at the time of the founding.

The analysis moves, therefore, to the 14th Amendment to the Constitution. The relevant clause of the 14th Amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the States wherein they reside."

The principal architect of the citizenship clause of the 14th Amendment was Michigan Senator Jacob Merritt Howard, a Republican representing Detroit. Senator Howard crafted much of the language that was eventually ratified as part of the 14th Amendment.

During the debates that embroiled the Senate in the years following the Civil War, Senator Howard insisted that the qualifying phrase "subject to the jurisdiction thereof" be inserted into Section 1 of the 14th Amendment being considered by his colleagues.

In the speech with which he proposed the alteration, Howard declared:

> This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, [or] who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.

This brings up a critical question in the discovery of whether a person qualifies under Article II to be president: How could a person "born in the United States" be simultaneously a citizen and a "foreigner" or "alien" if the mere fact of nativity settled the question of citizenship?

Another legislator commenting at the time of the ratification of the 14th Amendment, Representative John Bingham, provided the following clarification of the meaning behind the "subject to the jurisdiction thereof" clause: "Every human being born within the United States of parents not owing allegiance to any foreign sovereignty is, in the language of your Constitution itself, a natural born citizen."

So, although Loretta Fuddy's mysterious death may cause some to continue questioning the actual location of the president's birth, the answer to that question — constitutionally speaking — is not all that important.

The most relevant fact is that Obama's father was not an American citizen at the time of his son's birth — and thus the president is the child of a person with legal allegiance to a foreign sovereignty and therefore does not conform to the accepted legal definition of "natural born citizen" and is thus not

constitutionally qualified to be president.

Photo of memorial for Loretta Fuddy: AP Images

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