Comments on the Comments

"SEMANTIC GYMNASTICS"

by Joseph DeMaio, ©2020

44th President or Second Usurper-in-Chief?

(Jul. 21, 2020) — In the continuing saga of the "natural born citizen" eligibility issue, one of The P&E's fairly regular contributors, one Tom Arnold, recently posted this article. The post revisits the perennial question: was Barack Hussein Obama, Jr. constitutionally-eligible to the presidency, or was he a common usurper? While most P&E articles attract several comments, perhaps even dozens, this post has – thus far – attracted 64 comments. Yikes.

Apart from Jack Maskell at the Congressional Research Service ("CRS") and Messrs. Clement and Katyal contending that Obama was a "natural born citizen," who says the issue of Obama's eligibility has been "settled?"

Given the growing volume of comments to the Arnold post, a case can be made that the question remains *far* from settled, although the better argument points to a conclusion that Obama was, in fact, constitutionally ineligible. Accordingly, he became the Second Usurper-in-Chief ("SUC") of the United States, Chester A. Arthur being the first.

While many of the comments to the Arnold post address various aspects of the question, several commenters – including one Jeff Davis – pose some interesting questions and points in support of the conclusion that the SUC was, purportedly, constitutionally eligible. Many of the multiple comments relate to the U.S. Supreme Court decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) ("*WKA*"), the "holy grail" for those enamored of the opinion's ***dictum*** addressing various other cases mentioning the term "natural born citizen."

That's right, Virginia, all – as in "the totality" – of the discussion of the abstract term "natural born citizen" contained in the *WKA* decision is *obiter dictum* having no precedential weight… at… all. The reason for this comes from the fact that the sole and

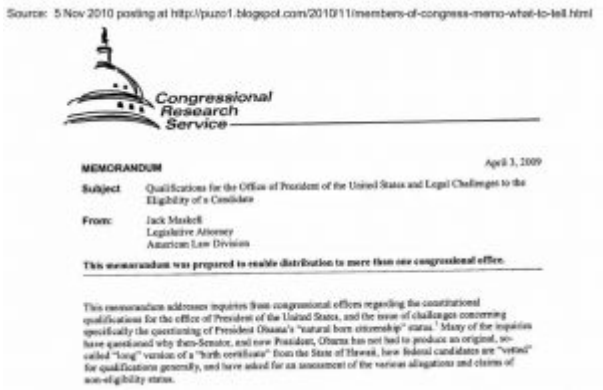
exclusive legal question on appeal presented to the Supreme Court was whether under the 14th Amendment to the Constitution – ***not*** Art. 2, § 1, Cl. 5, the Constitution's "Eligibility Clause" – Wong Kim Ark was a "*native-born* citizen of the United States." (Emphasis added). 169 U.S. at 651.

In fact, all of the discussion by the Court in *WKA* about the term "natural born citizen," and later cases parroting that line of thought – the term "natural born citizen" appearing nowhere in the 14th Amendment, which was the *only* provision under consideration in *WKA* – constitute irrelevant "*dicta, pure and simple*…." (Emphasis added). *See* C. Gordon, "*Who Can Be President of the United States: The Unresolved Enigma*," 28 Md. Law Rev. 1, 19 (1968). At the time he wrote his article, Charles Gordon was the General Counsel, U.S. Immigration and Naturalization Service, and Adjunct Professor of Law, Georgetown University Law Center. And as the Supreme Court has correctly noted: "Dictum settles nothing, *even in the court that utters it.*" (Emphasis added). *See*, *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 351, n. 12. (2005).

Bottom line: a "native-born citizen" under the 14th Amendment – which amendment wasn't even in existence until 1868, some 80 years after the term "natural born citizen" was included in the Constitution – is not…, repeat, ***not*** the same as a "natural born citizen." To conflate the two terms as being purportedly the same under a claim that the *WKA* decision "settled" the question is, to use polite terminology, flat wrong.

Moreover, semantic gymnastics such as that totally disregard the 900-lb. gorilla back in the corner of the room, *i.e.,* the "grandfather" exception for mere "citizens" who were to be deemed eligible during the infancy of the Republic. The Founders realized that no true "natural born citizen" as contemplated under § 212 of Emmerich de Vattel's *The Law of Nations* existed in 1787, so the "grandfather clause" was needed until a true natural born citizen appeared. That person was Democrat Martin van Buren, born in 1782 in Kinderhook, New York to U.S. citizen parents Abraham van Buren and Maria Hoes van Alen. Eligibility "scholars" who ignore 900-lb. gorillas do so at their peril.

Another point made in the comments to the Arnold post by Mr. Davis is that "[i]n Perkins v. Elg it was undisputed that Marie Elg was born in the United States to two U.S. citizen parents." That is an interesting comment meriting further analysis.


Source: 5 Nov 2010 posting at http://puzo1.blogspot.com/2010/11/members-of-congress-memo-what-to-tell.html

Congressional Research Service

MEMORANDUM

April 3, 2009

Subject: Qualifications for the Office of President of the United States and Legal Challenges to the Eligibility of a Candidate

From: Jack Maskell
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This memorandum was prepared to enable distribution to more than one congressional office.

This memorandum addresses inquiries from congressional offices regarding the constitutional qualifications for the office of President of the United States, and the issue of challenges concerning specifically the questioning of President Obama's "natural born citizenship" status.[1] Many of the inquiries have questioned why then-Senator, and now President, Obama has not had to produce an original, so-called "long" version of a "birth certificate" from the State of Hawaii, how federal candidates are "vetted" for qualifications generally, and have asked for an assessment of the various allegations and claims of non-eligibility status.

https://www.scribd.com/doc/41131059/CRS-Congressional-Internal-Memo-What-to-Tell-Your-Constituents-Regarding-Obama-Eligibility-Questions

First, Davis notes – correctly – that there was no *objective* question that Marie Elg's parents were both U.S. citizens at the time of her birth. However, the original 2009 CRS eligibility memo addresses the *Elg* case by engaging in deceptive wordsmithing. Specifically, the memo erases by ellipsis omission certain words from quoted text in the Court's decision and *falsely* suggests that her parents were aliens, rather than U.S. citizens – in order to drive the desired result. That result as to the SUC was, of course, that under *WKA* and *Elg,* as altered, a person born here, "even to alien parents," would be considered to be a natural born citizen.

In the effort to undermine and marginalize § 212 of Emmerich de Vattel's *The Law of Nations*, upon which the Founders relied in drafting the Constitution, the 2009 CRS memo alters, via ellipsis omission, the words of a quote from an old U.S. Attorney General "letter of advice" included by the Supreme Court in its *Elg* opinion. The quote related to the status of one Steinkauler in order to make it appear that, contrary to the truth, his father was not a U.S. citizen when he was born. In fact, Steinkauler the younger was a "natural born citizen" when he was born, but the ellipsis omission facilitated and allowed the argument to be made that, purportedly despite the fact that his father was an "alien," his son could be deemed to be a "natural born citizen." At minimum, this change is highly misleading; at worst, it is deceitful and likely mendacious.

The resulting 2009 CRS memo constituted an official representation to the 535 Members of Congress, nine Justices of the Supreme Court, one president of the nation and anyone else coming into possession of the CRS report that any person born in the United States and subject to its jurisdiction – even if born to alien parents as falsely suggested with regard to Marie Elg – were natural born citizens eligible to the presidency. The term "bamboozle" comes to mind.

The details of the ellipsis omission are far too convoluted for detailed elaboration here, but interested readers – including Mr. Davis – may want to examine this and this and comment on why the CRS linguistic chicanery should not completely decimate the argument that the Founders intended to equate and conflate the terms "native born citizen" and "natural born citizen."

Oh, and while they are at it, readers – including Mr. Davis – may want to offer an opinion as to why, now that the SUC has completed his usurpation, the CRS found it necessary to go back and "undo" its prior "*Elg* ellipsis" omissions from the 2009 memorandum and its 2011 report in 2016. Could it be that, once the SUC's usurpation had been successfully executed, covering and erasing the tracks of how it was accomplished would be prudent? Recall what Sherlock Holmes said: the perfect crime is the one that is never discovered.

Finally, readers need to remember that the "natural born citizen eligibility" question will continue to surface every four years or so as persons with doubtful eligibility *bona fides* vie for the presidency. Those persons include, to name but a few, Senator Ted Cruz; Senator Marco Rubio; Senator Kamala Harris; Senator Tammy Duckworth; Representative Tulsi Gabbard; Nikki Haley; Rick Santorum; Andrew Yang; Barack Hussein Obama, Jr.; oh, wait…, he is already otherwise barred under the 22nd Amendment. Or is he? Hey, he should have been barred originally in 2008 under Art. 2, § 1, Cl. 5 of the Constitution, but everyone ignored that impediment. So why should we believe that the 22nd Amendment must be observed?

https://www.youtube.com/watch?v=Eu6OiTiua08

Unless and until the Supreme Court discovers the courage to directly address the presidential eligibility question in a live "case or controversy" involving persons with "standing" – whatever that term means to the Justices at their whim on any particular conference day at the Court – instead of "evading" the question as in the past, the issue will continue to bubble to the surface to vex those who pay attention to these matters.

Moreover, lower federal court and state court decisions purporting to "correctly" interpret or apply the decisions in *WKA*, *Elg* or any of the other cases bearing upon the issue, while interesting, do not and cannot constitute binding precedent on what Art. 2, § 1, Cl. 5 means. Nor can presidential "executive orders," congressional "resolutions" or "legislation" define or alter the meaning of the original words of the Constitution. Only the U.S. Supreme Court has that power. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

The only other avenue to resolve the question would be a constitutional amendment either (a) abolishing the eligibility clause altogether, or (2) clarifying that only a person born on U.S. soil to two parents who at the time of birth are already U.S. citizens can

qualify as a “natural born citizen.” At the present time, neither option seems likely. So, as usual, it would appear that the tectonic pace of governmental progress and change, including at the Supreme Court, will continue. Sad.