Dictum Settles Nothing, Even in the Court That Utters It

"OFF THE MARK"

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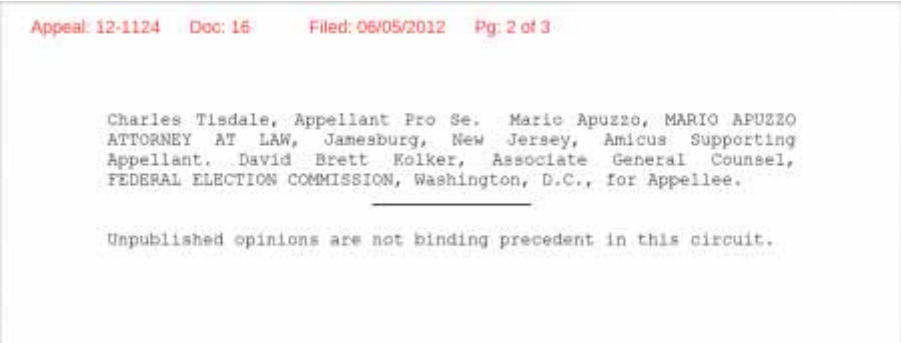

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https://www.fec.gov/resources/legal-resources/litigation/tisdale_ac_order.pdf

(Jun. 22, 2021) — Your humble servant's post here seems to have touched multiple Wilson, Becker and perhaps Fremick nerves with regard to the discussion therein (and in the related comments) of several cases on the presidential eligibility issue. Your servant will attempt to address and soothe those frayed nerves.

General Observations

First, the *Mirage* post's discussion of the *Tisdale* "order" and its non-precedential nature is here incorporated and reiterated. This "non-precedential" status appears to be accepted by Wilson…, not sure about Becker or Fremick. In addition, the comments by Mario Apuzzo regarding *Tisdale* and the analysis of same in his post of Feb. 16, 2012 are a welcome addition to the conversation.

Second, Wilson comments that your servant "[w]anted federal rulings; [and] received federal rulings," referencing presumably both the district trial court ruling in *Tisdale* as well as the Fourth Circuit's affirmation of same.

Actually, your servant never articulated a "request" for federal "rulings" on the issue of "standing," but instead has merely pointed out that federal opinions on standing do not properly address or answer the substantive eligibility question. That is why, for example, all of the "eligibility" discussions in the *Tisdale* district court and appellate court rulings – premised, as they are, on *Hollander v. McCain*, 566 F. Supp. 2d 63 (D.N.H. 2003) – are immaterial, non-binding, non-precedential… dictum.

By the *Hollander* court's own terms – *i.e.,* "[T]he court rules that Hollander lacks standing to bring this action. The court does not reach the rest of the parties' arguments,

including, most notably, the question of [Senator] McCain's constitutional eligibility to serve as President." (Emphasis added) – *Hollander* constitutes *zero* precedent for the substantive proposition that anyone born in the United States is a "natural born Citizen" for presidential eligibility analysis purposes, notwithstanding the decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), hereinafter "*WKA*." It is that simple.

Nonetheless, Wilson comments: "Some state courts have ruled on the meaning of natural-born citizen. Which is fine, as state courts may interpret the U.S. Constitution, provided their interpretations are not contrary to the U.S. Supreme Court's interpretations. Still, if one desires federal authority, there is always Tisdale v. Obama, No. 12-00036 (E.D. Va. 2012), aff'd, 473 F. App'x 203 (4th Cir. 2012)."

Read in context, the third sentence of Wilson's comment above seems clearly to reference as its conceptual antecedent the first sentence dealing with state court "rul[ings] on the meaning of natural-born citizen." While there is no immediate citation thereafter to, for example, *Ankeny v. Governor of Indiana*, 916 N.E.2d 678 (2009), discussed hereafter, that decision is the most likely primary "usual suspect."

The point, however, is that the Wilson comment seems plainly to convey the suggestion that, if one is seeking federal "authority" on "the meaning of natural born citizen…," one should look to the *Tisdale* rulings. With due respect, as already noted, those suggestions are off the mark. It is an intellectual *non sequitur* to claim that a trial court "order" having zero binding precedential weight beyond the parties it directly affects – even if adopted and affirmed on appeal – constitutes "authority" on any particular point for everyone else. Yet this conclusion is what the *Tisdale* trial court and Fourth Circuit decisions are seemingly claimed by Wilson to be.

Furthermore, in support of the *Tisdale* rulings, Wilson adds: "The Tisdale rulings add to the mosaic; they give insight into how other courts might rule in the future; they are part of the constellation of court rulings that all have come to the same conclusion: those born in the United States are natural-born citizens."

Really? A "constellation of court rulings" establishing that persons born here are natural-born citizens is accurate only when referring to those born here to parents who are both, at the time of birth, already U.S. citizens, and not members of the diplomacy corps or a hostile occupying force.. *Minor v. Happersett* comes close, but that is only one case, not a "constellation." From an astronomical perspective, the "constellation or rulings" being referenced is more like a black hole.

Wilson continues: "And, under some circumstances, these federal cases may be cited in other courts as persuasive authority. The Tisdale rulings, along with Ankeny, were cited in *Neal v. Harris* (S.D. Ohio No. 20-840), which challenged Harris' eligibility. Neal is not a published decision (in case DeMaio may have any further confusion), but it grants even further insight into how the federal bench views these issues. The citations in Neal were in dicta, of course, because Neal's case was dismissed due to lack of standing. The

Ohio federal court merely was saying, even if Neal had standing, Neal would still lose because Harris is a natural-born citizen."

Your humble servant appreciates the Wilson effort to eliminate "confusion" over the unpublished decision in *Neal* and its discussion of both *Tisdale* and *Ankeny* confined to footnote 4 of the opinion. Despite the dicta of *Neal*,at least district trial court judge Michael Barrett recognized and corrected, via bracketed edit, the *Ankeny* manifestly erroneous citation to the Eligibility Clause, as discussed hereafter. *See Neal*, slip op. at 3, n. 4.

Once more, like dictum in a Supreme Court case, a non-precedential order of a trial court – even if adopted and affirmed by an appellate court specifying that its opinion is unpublished and not binding precedent – does not constitute "authority" for anyone beyond the parties to the case. Instead, it is irrelevant noise. Moreover, while unpublished federal district court opinions are citable, they do not constitute binding authority. *See, e.g., Gong v. City of Rosemead*, 226 Cal. App. 4th 363, 375 (Cal. CA 2014). Just as there is no such thing as "precedential dictum," there is no such thing as "precedential non-precedent."

As noted by Charles Gordon when commenting on the pontifications over the term "natural born citizen" in *Wong Kim Ark*, those remarks are "dicta, pure and simple." *See* C. Gordon, "*Who Can Be President of the United States: The Unresolved Enigma*," 28 Md. Law Rev. 1, 19 (1968). Moreover, district court dictum adopted and affirmed on appellate review, as occurred in *Tisdale*, remains …, let us say it together… slowly…: dictum.

The *Ankeny* Opinion

As for the Wilson comments directly relating to the Indiana Court of Appeals decision in the *Ankeny* case, faithful P&E readers, including Wilson, are again directed to the brief dissection of that decision offered here for background. A more detailed examination of the Indiana Court of Appeals decision follows.

Briefly, and in summary, the Indiana Court of Appeals concluded that, based on the interpretation of the 14th Amendment it found in *Wong Kim Ark* – and citing *WKA* at pp. 662-663, but omitting the citations found there – "persons born within the borders of the United States are 'natural born citizens' for Article II, section 1 purposes, regardless of the citizenship of their parents." *See Ankeny*, 916 N.E.2d at 688. This conclusion, of course, came despite the admitted fact that the *WKA* Court "did not actually pronounce the plaintiff [*i.e.*, the person named Wong Kim Ark] a 'natural born citizen' using the Constitution's Article II language…," *See WKA* at 688, n. 14.

Let us examine the conceptual and intellectual bases for the *Ankeny* "conclusion" more closely. While some of the anomalies of the opinion are merely stylistic and careless or non-substantive, others are not.

First, on the "careless" front, the *Ankeny* court prefaces its "conclusion" thusly: "Based upon the language of Article II, Section 1, Clause 4…" *See Ankeny*, 916 N.E.2d at 684. Wait. Clause "4?" Ummmm…, Clause 4 of Article 2, § 1 of the Constitution relates to the Electors and the gatherings in the states for the counting of Electoral College votes, *not* to the "natural born Citizen" clause. While "superseded" in application by the 12th Amendment, Art. 2, § 1, Cl. 5 still appears in the Constitution.

The *Ankeny* court explains – and haughtily chastises the Plaintiffs in footnote 9 of the opinion – thusly: "The Plaintiffs cite the 'natural born Citizen' clause as Article II, Section 1, Clause 5 of the U.S. Constitution, but it is properly cited as Article II, Section 1, Clause 4. *See also* Ind. Code § 3-8-1-6." Section 3-8-1-6 of the Indiana Code makes the same mistake. Seriously? The *Ankeny* court (and apparently the Indiana Legislature) seems to believe that if a constitutional provision is "superseded," that also means that it disappears, evaporating without a trace into the ether and requiring a re-numbering of any remaining subsequent sections or clauses.

Nonsense. By that logic, when the 14th Amendment was passed and ratified, the decision in *Scott v. Sandford,* 60 U.S. 393 (1857) (the "Dred Scott" case) should have also evaporated. That did not happen. Same thing when the 19th amendment abrogated the holding in *Minor v. Happersett*, 88 U.S. 162 (1875) or when the 18th Amendment regarding alcoholic beverage prohibition was repealed by the 21st Amendment, with no need or compulsion to renumber subsequent amendments. The *Ankeny* court's attempted schooling of the plaintiffs therein is both unavailing and dumb.

Both *Sandford* and *Minor* still exist, as does the inoperative 18th Amendment, albeit each has been superseded and/or abrogated. Again, as is true with regard to the inattention to detail on display in the *Tisdale* district court order, the *Ankeny* anomalies are bothersome and atypical of the thorough research normally expected from a state appellate court, particularly when that state court purports to be competently interpreting provisions of the U.S. Constitution.

When sources as disparate as the Library of Congress and Wikipedia can still correctly identify the source of the natural born citizen eligibility restriction in the Constitution, but the Indiana Court of Appeals cannot, you know (or should know) there is a problem. Recall the legal maxim: "*falsus in uno, falsus in omnibus*: false in one thing, false in all things." A softer description might be: "Blunder in one place, blunder everywhere."

Second, the "meat" of the *Ankeny* decision comes at p. 688 of the reported opinion. There, the court states: "The [U.S. Supreme] Court in *Wong Kim Ark* also cited authority which notes that: '[a]ll persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural-born citizens."

Oddly, after finishing the quote, the *Ankeny* court signals the reader that the "quotations and citations" to the source of the quote excerpted from *WKA* are "omitted." One must go to the *WKA* decision itself to discover that the source of the purportedly

"authoritative" quote is *United States v. Rhodes*, 1 Abb. (U.S.) 28 (1866), a criminal case involving a burglary.

Rhodes, in turn, lifted its quote from dictum in yet another case frequently cited by the "citizen-and-natural-born-citizen-are-synonymous-for-eligibility-purposes" crowd, *Lynch v. Clarke*, 1 Sandford Ch. 583 (1844). *Lynch* is a New York Chancery Court decision addressing the sole and exclusive question of whether one Julia Lynch was a "citizen" of the United States entitled to inherit following the death of her father, a foreign alien, or whether she was instead herself an "alien" subject of Great Britain to be denied the right of inheritance. The case did not – repeat, ***did not***– address or decide the question of whether, for constitutional eligibility purposes, she was also a natural born Citizen within the meaning of Art. 2, § 1, Cl. 5.

While Vice Chancellor Lewis Sandford actually held that she was, in fact, a U.S. citizen thus entitled to inherit following her father's death, all of his other pontifications, suspicions, ruminations, speculations and predictions with regard to the issue of whether she was also a "natural born citizen" eligible to be president constitute – once again, let us say it together –: dicta. Interesting, perhaps, to the *Ankeny* court, but no part of the "holding" in *Lynch.*

The *Rhodes* case, in turn, involved a petition in arrest of judgment upon a criminal jury verdict against unnamed "white" defendants who were convicted of entering and burglarizing the home of one Nancy Talbot, a resident of Kentucky and member of the "African race" in the words of the decision. Under Kentucky law at the time, Talbot was denied the right to testify in court against the defendants. However, the 1866 federal "Civil Rights Act," passed by Congress following ratification of the 13th Amendment, removed the Kentucky prohibition on Talbot's right to testify.

Significantly, Talbot was conceded to be a "citizen" of the United States for purposes of that Act, but the case had absolutely nothing – as in "zero" – to do with the issue of presidential eligibility as a "natural born citizen" under the Constitution.

That being the case, it is not surprising that the *Ankeny* court would omit the actual citation to *Rhodes* – hoping readers would accept at face value or further question the words offered – as one could then easily determine that the excerpted *WKA* quote from the case was – and remains to this day – dictum. Stated otherwise, the *Ankeny* opinion offers up dicta from a case cited by the *WKA* Court, but without providing additional information confirming that the words themselves constituted dictum, not only in *Rhodes* and *Lynch*, but in *WKA* itself.

To his credit, at least Wilson acknowledges that dicta is at work: "The citations in Neal [to *Tisdale, Ankeny* and *WKA*] were in dicta, of course, because Neal's case was dismissed due to lack of standing. The Ohio federal court merely was saying, even if Neal had standing, Neal would still lose because Harris is a natural-born citizen."

Furthermore, the *Ankeny* court also attempts to buttress its "conclusion" with a citation to *Diaz-Salazar v. I.N.S.*, 700 F.2d 1156, 1160 (7th Cir. 1983), *cert. denied* 462 U.S. 1132 (1983), an immigration and deportation case where, again, in dicta, the court casually states that the alien being deported had fathered two children who were (purportedly) "natural-born citizens of the United States."

To state the obvious, when without analysis a court makes a conclusory utterance propelled by *ipse dixit* ("it is so because I say it is so") and which is included as a side-comment having nothing to do with the issue being litigated or reviewed in the case in chief, once again it constitutes – to quote Charles Gordon – "dicta, pure and simple."

Reduced to its essence, the *Ankeny* court attempts through judicial linguistic alchemy to convert the dicta of *WKA*, *Tisdale, Rhodes, Lynch and Diaz-Salazar*, to mention but a few cases, into binding precedent regarding the proper interpretation of Art. 2, § 1, Cl. 5 of the Constitution. Respectfully, that task is a job for the U.S. Supreme Court, not a state court which cannot even identify the correct citation to the Constitution's "natural born Citizen" clause.

And the fact that the U.S. Supreme Court continues to "evade" the issue – most recently by denying without comment or dissent a petition for certiorari in *Laity v. Harris*, USSC Doc. No. 20-1503 – does not alter the reality that, unless and until (a) that Court actually accepts jurisdiction and squarely analyzes the issue, or (b) a constitutional amendment either clarifying the Eligibility Clause or repealing it altogether is ratified and takes effect, the question will remain "unresolved" as opposed to "settled." Recall the insightful comment of Justice Scalia in *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 351, n. 12: "Dictum settles nothing, even in the court that utters it."

The *Ankeny* decision, in effect, attempts to "settle" the "natural born citizen" eligibility issue, for both the presidency and the vice-presidency, by taking a bit of dictum from here; a bit of dictum from there; adding a pinch of carelessness, mixing everything together in a linguistic blender, and then announcing: *voil*à…, anyone born in the United States, regardless of parental citizenship, is a natural born citizen for presidential eligibility purposes.

Boldly – and ominously – the *Ankeny* court also even intimates that there may be more to come by warning: "nothing in our opinion today should be understood to hold that being born within the fifty United States is the ***only*** way one can receive natural born citizen status." (Emphasis *Ankeny* court's). *See Ankeny*, 916 N.E.2d 678, 689, n. 15.

Seriously? Is the Indiana Court of Appeals actually suggesting that there are additional, as yet unidentified or dormant, yet-to-be concocted ways that the natural born Citizen clause might be converted from the restriction envisioned by the Founders into a license for virtually anyone born anywhere to become president or vice-president? Today Indiana, tomorrow the world!

Finally, the content of footnote 14 of the opinion – perhaps better described as nonsense masquerading as logic – undercuts the entire thesis of the decision, its nature as dicta aside.

As explained here, footnote 14 in the *Ankeny* case reads as follows: "We note the fact that the Court in *Wong Kim Ark* did not actually pronounce the plaintiff a 'natural born Citizen' using the Constitution's Article II language *is immaterial*. For all but forty-four people in our nation's history (*the forty-four [p]residents)*, the dichotomy between who is a natural born citizen and who is a naturalized citizen under the Fourteenth Amendment *is irrelevant.* The issue addressed in *Wong Kim Ark* was whether Mr. Wong Kim Ark was a citizen of the United States on the basis that he was born in the United States. *Wong Kim Ark*, 169 U.S. at 705, 18 S.Ct. at 478." (Emphasis added). *See Ankeny*, 916 N.E.2d at 688, n. 14."

It is difficult to decide where to begin the dissection of the *Ankeny* footnote 14, as the errors in it are so basic and perplexing. But for the benefit of Wilson, Becker (and perhaps Fremick), let us try.

First, by acknowledging that a dichotomy exists *at all* between a "natural born citizen" and a "naturalized citizen under the Fourteenth Amendment" and that, in any event, the dichotomy *would* matter to the 44 persons (now, in 2021, the 45 presidents and the current Goofball) who have been elected president, the footnote undercuts its own "logic." Of *course* there is a dichotomy between those two categories of citizens insofar as presidential eligibility is concerned: that is why at the inception of the Republic the Founders inserted the "citizen grandfather" exception clause into Art. 2, § 1, Cl. 5.

Indeed, the dichotomy is the *crux* of the entire question. While the dichotomy might be seen as irrelevant to anyone *other* than a presidential candidate, the distinction lies at the core of who can, and who cannot, properly lay claim to status as a "natural born Citizen" for Art. 2, Sec. 1, Cl. 5 purposes, the content of the 14th Amendment aside. Stated otherwise, as an intellectual matter, *ipse dixit* will not suffice.

Second, of even greater importance – and recalling that while all natural-born citizens are also native-born citizens, not all native-born citizens are natural-born citizens – the footnote profoundly misapprehends and confuses the nature of the *native* born citizen and the *naturalized* citizen under the 14th Amendment, at least insofar as the decision in *Wong Kim Ark* is concerned. The 14th Amendment does *not* address who is, or who is not, a "natural born citizen." It addresses *only* who may be a "citizen" of the United States, expressing the status in terms of either birth or naturalization, with all authorities and case law in agreement that *only* the natural born citizen is eligible to the presidency. *See Schneider v. Rusk*, 377 U.S. 163, 165 (1963).

Moreover, all sides agree that no person who has been *naturalized* may ever be eligible. By conflating the dictum in *Wong Kim Ark* into a generalization that any "native born citizen" under the 14th Amendment is, *ipso facto*, a "natural born citizen" eligible to the presidency under Art. 2, § 1, Cl. 5 of the Constitution, the *Ankeny* court erroneously falls

into the same trap which the Congressional Research Service seemingly intentionally set here, here and here.

Finally, footnote 14 in *Ankeny* misstates the issue presented in *Wong Kim Ark.* The issue was not only whether Wong Kim Ark was merely a "citizen" of the United States. The complete and solitary issue was whether, *under the 14th Amendment to the Constitution*, Wong Kim Ark was a citizen. The Court determined that he was, which conclusion has absolutely nothing to do with the separate issue of whether Barack Hussein Obama, Kamala Harris or Ted Cruz is constitutionally eligible as a natural born citizen.

And, to reiterate the error discussed here, Justice Horace Gray, the author of *WKA*, was profoundly wrong when he stated in his opinion that the 1795 Naturalization Act (1 Stat. 414) re-enacted "in the same words" the "beyond-sea-considered-natural-born-citizens" language of the 1790 Naturalization Act (1 Stat. 103). Congress did just the opposite, but if you read and accepted at face value only *WKA*…, you would be misinformed and thus, wrong.

Accordingly, any decision, such as *Ankeny*, which finds as "instructive" the dictum of another case – or even the dictum of a "constellation of cases" – stands, at minimum, on an extraordinarily weak intellectual foundation.

Conclusion

This post is already too long, for which your humble servant apologizes. But if the reader has gotten this far, at least the assumption is that enough caffeinated beverage was handy. The next step in the continuing saga will be to await a ruling by the Supreme Court regarding the "Petition for Rehearing" filed in the *Laity v. Harris* matter. That ruling may come soon, but it may not come until next October.

As Confucius is rumored to have commented: "May you live in interesting times."