

Of Neologisms, End-Around Runs and Gorillas: The Congressional Research Service 2016 Report on Presidential Eligibility, Final Chapter

“NONSENSE ELEVATED TO AN ART FORM”

by [Joseph DeMaio](#), ©2016



[John Jay](#) held many positions both before and following the American Revolution: President of the Continental Congress; ambassador to Spain; Foreign Affairs Secretary, New York Governor (1795-1801), and first chief justice of the U.S. Supreme Court under President George Washington.

(Apr. 9, 2016) — [**Editor’s Note:** The following is the fourth and final installment of legal scholar Joseph DeMaio’s detailed analysis of the January 11, 2016 Congressional Research Service (CRS) [memo](#) authored by legislative attorney Jack Maskell attempting to make an “end-around run” to Article II, Section 1, clause 5 of the U.S. Constitution, which requires that the president and commander-in-chief be a “[natural born Citizen](#).” Preceded by three other such memoranda in [April 2009](#), [March 2010](#), and [November 2011](#), Maskell in his latest work on the subject introduced and argued in favor of the

concept of a citizen “at birth” equating to a “natural born Citizen,” a [term](#) suggested in a letter from [John Jay](#) to George Washington in July 1787 “to provide a strong check to the admission of Foreigners into the administration of our national Government.”

Sections I, II and III of DeMaio’s treatise can be read [here](#), [here](#), and [here](#), respectively.

The conclusion follows.]

The Grandfather Clause and the 900-Pound Gorilla

As already briefly discussed with respect to The Committee of Eleven’s amendment of the original “citizen” clause regarding presidential eligibility, the language finally adopted by the Founders in Art. 2, § 1, Cl. 5 – not one syllable of which has changed since 1789 – states:

“No Person except a natural born Citizen, *or a Citizen of the United States, at the time of the Adoption of this Constitution*, shall be eligible to the Office of President; (Emphasis added)

The italicized words immediately following the first “Citizen” in the clause, *i.e.*, “or a Citizen of the United States, at the time of the Adoption of this Constitution,” constitute that which has come to be called the “citizen grandfather” clause. Although the 2016 CRSR cites the citizen grandfather clause numerous times throughout the document, it does so always merely in the context of quoting it from either the Constitution or a case decision, without any explanation of why it appears in the Constitution or what its significance might be. No explanation – either documented or manufactured – is offered as the reason for its existence.

Moreover, if each of the CRS memoranda and reports, lower court opinions and Messrs. Clement and Katyal are correct in the proposition that a “native born citizen” or merely a “citizen by birth” or a “citizen at birth” – regardless of the place of birth or citizenship of *both* parents – is “good enough” to meet the “natural born Citizen” standard of Art. 2, § 1, Cl. 5, then the “900-pound-gorilla-in-the-room” question arises: ***why did the Founders find it necessary to include the “citizen grandfather” exception in the eligibility clause in the first place?***

After all, if, under the 2016 CRSR reasoning, mere “citizenship” in the form of “by birth” or “at birth” – other than “naturalized citizenship” – is “American enough” for eligibility purposes, then there would have been no need and no occasion for the Founders to add the “natural born” modifier to the word “Citizen” in the clause. Because the modifier *was* added, however, the only logical conclusion is that the “citizen grandfather” clause needed to be added as well to create an *exception* to the otherwise exclusionary requirements of the rest of the provision.

Indeed, it is clear, as stated above, that the first draft of the Constitution restricted the presidency merely to a “citizen” rather than to the “natural born Citizen” added by the

Committee of Eleven. No one – including the author of the 2016 CRSR, Messrs. Clement and Katyal, Professor Laurence Tribe... even Chris (“Thrill-up-my-leg”) Matthews – has yet ventured an answer to this seemingly simple question which would ratify or support the 2016 CRSR “at birth/by birth” theory. If one exists, your humble servant would be pleased to review it. Post a comment. Contact the P&E editor. Send up a smoke signal.

Very few law review articles (and even fewer Supreme Court decisions) have addressed the question, much less offered any rational explanation for its existence. One law review article addresses the issue, “‘Natural Born’ in the USA: the Unfairness and Dangerous Ambiguity of the Constitution’s Presidential Qualifications [*sic*] Clause and Why we Need to Fix It,” *Duggan and Collins*, 85 Boston University Law Review 55 (2005). Question: how can a single clause in the Constitution be simultaneously “refreshingly clear” (*see* Clement and Katyal, 128 Harv. L. Rev. F. 161, 167) and yet “dangerously ambiguous” (*see* 85 B.U.L. 55 at title page)? And they complain that the “birthers” are inconsistent.

Apart from the length of the Boston Law Review article’s title (and the careless and erroneous use of the term “qualifications clause”), the authors do, in fact, address the “citizen grandfather” clause. They note that “[t]he Committee of Eleven presented its subsequent draft to the Convention on September 4, 1787. In this draft the [p]residential qualifications [*sic*] clause appeared as: (1) the natural born *citizenship* [*sic*] criterion; (2) a grandfather clause exempting those who were citizens at the time of the adoption of the Constitution; and (3) a residency requirement reduced from twenty-one to fourteen years.” *See* 85 B.U.L. Rev at 67.

Putting aside, for the moment, the fact that the law review article commits the same error – presumably unintentionally, unlike the 2016 CRSR – of characterizing the “eligibility clause” as a “natural born citizenship criterion,” it nonetheless confirms that the clause constituted a provision “... *exempting* those who were citizens at the time of the adoption of the Constitution...” (Emphasis added). The condition as to which they were being “exempted,” of course, was that of needing to be a “natural born Citizen” as the Committee of Eleven had specifically required and as the Constitution as adopted provides.



Stated otherwise, one needed only to be a “citizen” of the United States when the Constitution was adopted in order to be president, because one was to be “exempted” from the otherwise *disqualifying* requirement that one needed to be, in fact, a person of a *different status, i.e.*, a “natural born Citizen.” Indeed, the law review article acknowledges that “...[t]ogether with the grandfather clause, the reduced residency term *made all of the fifty-five convention delegates eligible for the [p]residency.*” (Emphasis added). *Id.*, fn. 56. In the absence of that “exemption,” they would have been “ineligible” to the presidency *because* they were *not* “natural born Citizens.” Contrary to the narrative of the 2016 CRSR, the terms “citizen” and “natural born Citizen” are *not* interchangeable synonyms.

In this regard as well, the 2016 CRSR cites and relies upon the work of a widely-recognized constitutional scholar, Professor Edward S. Corwin, entitled “*The President: Office and Powers, 1787 – 1984*” (5th Revised Ed. 1984) (hereinafter “*Corwin*”). While Professor Corwin’s remarks regarding the Supreme Court decision in *Wong Kim Ark* will be addressed later in this post, he also offers some useful insights into the reasons for the citizen grandfather clause not seen elsewhere, and certainly not seen in the 2016 CRSR.

Professor Corwin states, *id.* at 38:

“The words ‘a citizen of the United States at the time of the adoption of this Constitution’ are today of historical interest only. It has been conjectured that it was the purpose of this clause to render [James] Wilson, [Alexander] Hamilton, Robert Morris, and a few others who had been born abroad to be eligible to the presidency. Wilson, a member of the Committee of Detail, seems to have felt the need for such a clause in his own behalf especially keenly. But the fact is that nobody old enough to become President in 1787, or for a long time afterward, was a ‘natural born citizen’ of the United States.; all, like the men just mentioned, had been *born* British subjects, and had become American citizens in consequence of the casting off of allegiance to the British monarch by the Declaration of Independence [in 1776]. The clause may very well have been inserted [by the Committee of Eleven] with that entire generation of Americans in mind, and not merely a half-dozen representatives of it. [fn. 2 omitted]. The first President born under the American flag was Martin Van Buren.” (Emphasis *Corwin’s*)

Plainly, this observation is in all respects consistent with a realization by the Founders that, in the absence of the citizen grandfather clause, all of them, along with all others who were “citizens” of the new nation, but not “natural born citizens,” would be rendered, by definition, ineligible to the office of the president.

Accordingly, faced with the choice of on the one hand (a) adopting the “exclusionary” and highly restrictive “natural born Citizen” standard of § 212 of de Vattel’s *Law of Nations* to guard against foreign influence into the future, but “grandfathering” all those who were, at the time of the adoption of the Constitution, already citizens of the United States, or on the other hand (b) retaining as to the presidency the mere “citizen” criterion offered by the Committee of Detail and abjuring altogether a “natural born Citizen”

restriction – in the process mooted the need for a citizen grandfather clause – the Founders chose the former. A wise choice.



In effect, the 2016 CRSR is advocating that, notwithstanding the Founders’ election of option “(a)” above, they really meant to select option “(b)”. Respectfully, the mere existence of the citizen grandfather clause underscores the distinction recognized and memorialized by the Founders between that circle of persons who can claim citizenship “by birth” or “at birth” and the smaller subset of persons who, in addition, are “natural born Citizens” as contemplated under § 212 of The Law of Nations by de Vattel.

Accordingly, the most logical answer to the question of why the citizen grandfather clause was included as an integral part of the presidential eligibility requirements of the Constitution – and one seemingly eviscerating the contrary “by birth/at birth” and “anyone-born-here-is-a-natural-born-citizen” theories – is that the Founders realized that in 1787, none of them – or for that matter any other “non-Founder” person who was merely a “citizen” of any of the states of the original thirteen colonies – would themselves as individuals constitute a natural born citizen, since all were at the time of the adoption of the Constitution in 1787 the issue of British, Irish, Scottish or other European or “foreign” parents.

Upon independence in 1776, each of them automatically became – by force of *naturalization* via the Declaration of Independence under international law – rather than by force of a nonexistent Constitution, which at that time was but a twinkle in the Founders’ eyes – a “citizen” of the United States, but not a “natural born Citizen” of same.

Thus, since none of them would have satisfied the criteria of § 212 of de Vattel’s treatise, with which, according to Benjamin Franklin in 1775 – well before the Constitution was adopted –, the Founders were intimately familiar and “which had been *continually in the*

hands of the members of our Congress now sitting...” (emphasis added), *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 462, fn. 12, the citizen grandfather clause thus allowed, as a narrow, time-limited exception to the exclusionary and highly restrictive “natural born Citizen” standard, eligibility to the office for persons of mere “citizen” status.

These naturalized “citizens” would be recognized as including the Founders or anyone else who, in 1787, was merely a “citizen” of one of the states of “British America” which would thereafter amalgamate into the United States of America. To reiterate the fact, without the citizen grandfather clause, George Washington – born in Virginia, British America, in 1732 to a mother (Mary Ball) and father (Augustine) who were at the time of his birth both British subjects – could not have served as President after ratification of the Constitution *because* of the “natural born Citizen” restriction.

The same fate would have befallen Presidents John Adams, Thomas Jefferson, James Madison, James Monroe, John Quincy Adams and Andrew Jackson. As heretofore noted, it is generally recognized that the first president who actually met the “natural born Citizen” criterion was the nation’s eighth Chief Executive, Martin Van Buren.

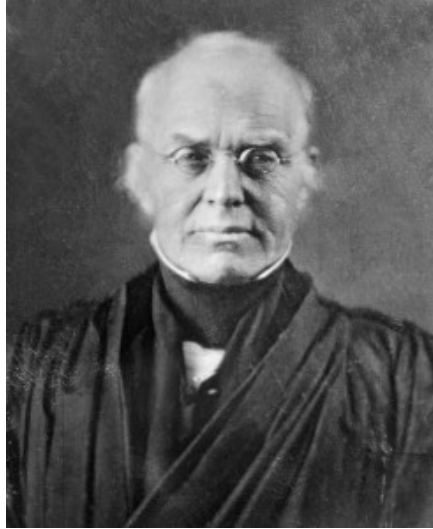
In this regard, the observations of one of the esteemed jurists relied upon in the 2016 CRSR –Supreme Court Justice Joseph Story in his work “Commentaries on the Constitution of the United States – shed useful light on why the 2016 CRSR may well have determined to avoid any discussion of the citizen grandfather clause at all. With apologies for further extending this post, the next section repeats the one of the same title found [here](#) and is included for convenience and ease of reference.

The Reliance on Justice Story’s Commentaries

Both the 2016 CRSR and the Clement/Katyal Commentary (“CKC”) published in the Harvard Law Review Forum cite and rely for their conclusions upon the words of U.S. Supreme Court Associate Justice Joseph Story in his famous “Commentaries on the Constitution of the United States” first published in 1833.

The CKC first notes (128 Harv.L.Rev.F. at 163) the text of John Jay’s famous letter of July 25, 1787 to George Washington. In that letter, Jay “hinted” to Washington that it would be “wise and seasonable to provide a ... strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the [A]merican army shall not be given to, nor devolve on, any but a natural born Citizen....”

The CKC then cites § 1473 of Justice Story’s work (*id.*) for his keen observation that “the purpose of the natural born Citizen clause was thus to ‘cut[] off *all chances* for ambitious foreigners, who might otherwise be intriguing for the office; and interpose[] a barrier against those corrupt interferences of foreign governments in executive elections.” (Emphasis added). The 2016 CRSR makes a similar reference (at 6 – 7 text and fn. 34).



U.S. Supreme Court Associate Justice Joseph Story was nominated by President James Madison in November 1811; he served until 1845.

On the other hand, Justice Story's observation, coupled with the language he uses, plainly underscores the reality that, in adding the "natural born Citizen" requirement to Art. 2, Sec. 1, Cl. 5 of the newly-minted Constitution, the Founders' intent was to "cut off all chances..." that a chief executive with any foreign connections, whether by the soil (*jus soli*) or by blood (*jus sanguinis*), would be eligible to the presidency.

Thus, it is clear that Justice Story was articulating an intent of the Founders which was *not* based on a simple "target" of allowing "some" chance for ambitious foreigners to gain access to the office: the ultimate goal was to "cut off all chances..." of that happening.

Moreover, § 1473 of Justice Story's work, cited with approval by both the 2016 CRSR and the CKC, contains additional useful insight into the intent of the Founders with respect to the citizen grandfather clause. That additional insight, found in the first four sentences of § 1473, but not included in either the 2016 CRSR or the CKC commentary, will be offered here.

As already noted, the citizen grandfather clause created as an exception to the "natural born Citizen" restriction on presidential eligibility the eligibility of persons who were a "Citizen of the United States, at the time of the Adoption of this Constitution..." To reiterate, since none of the Founding Fathers were, in the Founders' understanding of the principles of § 212 of de Vattel's tome, natural born Citizens, none would have been eligible to the presidency in the absence of the clause.

Indeed, to this point, Justice Story noted in the first five sentences of § 1473:

"It is indispensable, too, that the president should be a natural born citizen of the United States; or a citizen at the adoption of the constitution, and for fourteen years before his election. This permission of a *naturalized citizen to become president is an exception*

from the great fundamental policy of all governments, to exclude foreign influence from their executive councils and duties. It was doubtless introduced (for it has now become by lapse of time merely nominal, and will soon become wholly extinct) out of respect to those distinguished revolutionary patriots, who were born in a foreign land, and yet had entitled themselves to high honours in their adopted country. A positive exclusion of them from the office would have been unjust to their merits, and painful to their sensibilities. But the general propriety of the *exclusion* of foreigners, in common cases, will scarcely be doubted by any sound statesman.” (Emphasis added).

Interestingly, Justice Story uses the phrase “to *exclude* foreign influence” from the presidency, exactly the opposite of what Messrs. Maskell and Kettner contend the Founders intended when drafting Art. 2, § 1, Cl. 5. Indeed, the 2016 CRSR seeks to paint the “exclusionary” objective of the Founders with the subtle patina of racism. Bad form and classless, but not unlike the usurper-in-chief (UIC).

Thereafter, Justice Story continues with the “ambitious foreigners” quote in the sixth sentence of the section, the complete text of which reads: “It *cuts off all chances for ambitious foreigners*, who might otherwise be intriguing for the office; and *interposes a barrier* against those corrupt interferences of foreign governments in executive elections, which have inflicted the most serious evils upon the elective monarchies of Europe.” (Emphasis added)

Thus, Justice Story reinforces the notion that even the Founders realized that there was a distinction between a “citizen” – whether denominated a mere “citizen,” a “naturalized citizen” or a “native born citizen” – and a “natural born Citizen.” Again, if there is no etymological distinctions between or among these citizens, then there would have been no need for the citizen grandfather clause at all. The fact that it was instead specifically *included* in Art. 2, § 1, Cl. 5 brings to mind a Latin term used in the law: “*res ipsa loquitur.*” “The thing speaks for itself.” The Founders knew and intended that citizenship “by birth” or “at birth” was *not* the same thing as coming into the world from a mother and father as a “natural born Citizen.”

Plainly, given that the clause actually *does* appear in the Constitution, the only rational explanation for its inclusion is *because* the Founders believed, contrary to the 2016 CRSR and the CKC, that there had always been a distinction between a “citizen” and a “natural born citizen,” consistent with § 212 of de Vattel’s work.

Furthermore, to reiterate, Justice Story’s observation that the intent of the Founders was to “cut off *all* chances for ambitious foreigners...” (emphasis added) seeking to insinuate themselves into the office of the presidency simply cannot be squared with the theory that, instead, they intended only to cut off “some” chances or even “half of the chances” of such attempts by adopting an interpretation of the eligibility clause allowing but one or the other – but not both – of the parents of a child claiming “natural born Citizen” status to suffice.

Distilled to its essence, the citizen grandfather clause “cuts off all chances for ambitious” law professors, attorneys for the Congressional Research Service... and even Chris Matthews to contend with any credibility that mere citizenship “by birth” here or “at birth” elsewhere makes one “American enough” to be deemed a “natural born Citizen” eligible to the presidency. Memo to the Congressional Research Service: Nine-hundred-pound gorillas should not be antagonized, but instead, they should be recognized for what they are, and then obeyed. And don’t make eye contact.

The Suggested “End-Around Run” on the Constitution

Saving the best for nearly last, the 2016 CRSR occasionally strays from the merely deceptive and ventures, safari-like, into the truly wild and bizarre. It concedes (at 36, fn. 167), for example, that presidential “qualifications” [*sic*: that which Mr. Maskell characterizes as “qualifications” for the presidency are, as noted before, instead jurisdictional restrictions on “eligibility”] “are fixed by the Constitution:..”.



It then posits via *ipse dixit* (“it is so because I say it is so”) that “[c]ongress *could indirectly change by statute (by changing ‘at birth’ citizenship requirements) who is eligible to be President*” (Emphasis added). In effect, the 2016 CRSR proposes – with a straight face, no less – that Congress, via its power of naturalization, could accomplish by indirect means that which it is prohibited from accomplishing by direct means. How expedient. How pragmatic. How stupid.

This is truly migraine headache material. The 2016 CRSR argues first that the “weight of authority” demonstrates that the Founders intended that the term “natural born” meant simply one who is entitled to U.S. citizenship “by birth” or “at birth,” the status of the parents aside. *See* 2016 CRSR at “Summary.”

Apart from the fact that the term “citizenship” – let alone “natural born citizenship” – appears *nowhere* in the Constitution, 36 pages and 167 footnotes after the “Summary” later, it argues that Congress – not the Founders – has the power *by statute* to in effect do an “end-around run” on amending the Constitution simply “by changing ‘at birth’ citizenship requirements.” See 2016 CRSR at 36, fn. 167.

As purported authority for that contention, the 2016 CRSR cites the Supreme Court decision in *Rogers v. Bellei*, 401 U.S. 815 (1971). Taking a portion of a quote out of context – imagine that – the 2016 CRSR notes that the Court accepted the rule of *jus soli*, “that is, the place of birth governs citizenship status except as modified by statute.” The 2016 CRSR then seizes upon these words to concoct the fiction that Congress could determine who is eligible to be president simply “... by changing ‘at birth’ citizenship requirements.”

This is, as Justice Antonin Scalia sometimes referred in his dissents to “dumb” majority opinions of the Court – and intellectually speaking, of course – “[pure applesauce](#).” *King v. Burwell*, ___ U.S. ___, 135 S.Ct. 2480, 2501 (Scalia, J., dissenting) (2015) (Parenthetically, the “pure applesauce” in *King v. Burwell* (the upholding of the woefully mislabeled “Affordable Care Act” health exchange subsidies) was bitter, but at least still edible. The rancid applesauce that is the 2016 CRSR was past its shelf life expiration date the moment it was offered up for consumption. Where are the Food and Drug Administration inspectors when you need them?

In fact, the Court in *Bellei* noted, 401 U.S. at 841: “As shown in *Wong Kim Ark*, naturalization when used in its constitutional sense is a generic term describing and including within its meaning all those modes of acquiring American citizenship *other than birth in this country*. All means of obtaining American citizenship which are dependent upon a congressional enactment are forms of naturalization.” (Emphasis added)

If the Supreme Court is correct that “[a]ll means of obtaining American citizenship which are dependent upon a congressional enactment are forms of naturalization” (emphasis added), how possibly can the 2016 CRSR logically argue that Congress can just change the “at birth citizenship requirements” to accomplish the result of statutorily defining “who is eligible to be President?” The answer is simple: logic presents no barrier to the accomplishment by the 2016 CRSR of its end objectives. This is nonsense elevated to an art form.

The 2016 CRSR suggestion that Congress could itself determine “who is eligible to be [p]resident” by manipulating the requirements for “at birth” citizenship (*Id.* at 36, fn. 167), is, to again state the matter politely: pure applesauce. It needs to be removed from the shelf by the FDA inspectors (or the Librarian of Congress) before someone gets sick.

The Deceptive Paraphrasing of Professor Corwin's Words

Perhaps the most troubling, dishonest and seemingly intentionally deceitful passage in the entire 2016 CRSR, however, occurs later in the same footnote suggesting the “end-around run,” *i.e.*, fn. 167. *See* 2016 CRSR at 36, fn. 167. After laying its specious foundation for the proposed “statutory” alteration of the definition of “at birth” citizenship earlier in the footnote, based on a misreading of *Bellei*, the author then states:

“Congress could thus, clearly, in effect, change how such qualification [*sic*] is attached in such circumstances. *See also* Corwin, “*The President: Office and Powers, 1787 – 1984*,” at 38-39, as to the inherent authority and apparent right of the country’s national legislature to determine *who its natural born citizens should be.*” (Emphasis added)

Once again, faithful P&E readers, pay close attention to the italicized words in the foregoing quote. The 2016 CRSR, through the use of the editorial signal “*see also*” (meaning that which follows is direct support for the assertion being made) is intentionally conveying the perception that the cited portion of the *Corwin* treatise (hereinafter “*Corwin*”) is direct authentication and support for the statement that a nation’s legislating body – here, the U.S. Congress – possesses the “inherent authority and apparent right” to legislatively “determine who its natural born citizens should be.” Careful P&E readers will reject that perception, because it, like many other statements in the document, is false.



U.S. Supreme Court Associate Justice Antonin Scalia [passed away](#) on February 13, 2016 at a ranch resort in Texas. It has been reported that no autopsy was performed.

If Justice Antonin Scalia were still here, the likely first thing he might do would be to instruct his law clerk to fetch Professor Corwin’s book. He would then turn to pages 38 and 39, cited by the 2016 CRSR as supporting authority for the proposition being advanced.

Parenthetically, Professor Edward S. Corwin's book "has universally been regarded, ever since the first edition appeared in 1940, as a very great book, and that Corwin himself is generally honored as *our most distinguished living constitutional authority*." See "The President: Office and Powers, by Edward S. Corwin," *Indiana Law Journal*, Vol. 33, Issue 3, Article 10 (1958). Professor Corwin [passed away](#) in 1963.

Justice Scalia would have been horrified at what the 2016 CRSR has done to the actual language used by Professor Corwin regarding the issue of the power of a national legislature to, purportedly, legislatively "determine who its natural born citizens should be." That is because those words appear *nowhere* in the passages from Professor Corwin's treatise cited by the author in fn. 167, p. 36 of the 2016 CRSR. They appear in the 2016 CRSR *only* as a manufactured and misleading paraphrasing of Professor Corwin's actual words, which convey a much different meaning.

Specifically, in addressing the import of the language of the 1790 Naturalization Act (1 Stat. 103) and Congress's power to legislate with respect to the "naturalization of aliens" thereunder, here is what Professor Corwin *actually* states, *id.* at 39:

"The provision [of the 1790 Naturalization Act] must undoubtedly be referred to the proposition that, as the legislative body of a nation sovereign at international law, Congress is entitled to determine who shall and who shall not be *admitted to the body politic*." (Emphasis added)

The generally accepted definition of "[body politic](#)" is a group of persons politically organized under a single governmental authority." That definition regarding the naturalization process is what Professor Corwin meant, *not* what the 2016 CRSR altered his words to purportedly mean.

Whereas the 2016 CRSR purports to paraphrase Professor Corwin as agreeing that the Congress has the power, through legislation, to "determine who its natural born citizens should be...", in reality and fact, Professor Corwin made it clear that the naturalization power of the Congress manifested itself in determinations of "who shall, and who shall not, be admitted to the body politic" and *not* to some extraconstitutional mechanism to determine legislatively who or what a natural born citizen shall be.

Stated otherwise, "admission to the body politic" of aliens who have been naturalized according to statute is decidedly *not* the same thing as legislatively determining "who its natural born citizens should be," as deceptively suggested in the 2016 CRSR. This unprincipled and disingenuous manipulation and morphing of Professor Corwin's words – fifty-plus years after his demise – is intellectually indefensible. It is also just plain mean. Goebbels and Machiavelli, however, would be proud.

In addition, to the extent that one might surmise that the 2016 CRSR was referring to Congress's attempt to declare in 1 Stat. 103 that the children of U.S. citizens born abroad were to be "considered as natural born citizens," it is clear that Professor Corwin was aware that, in 1795 –long before he wrote his book – Congress repealed the language at

issue and substituted the general term “shall be considered as *citizens*...” (emphasis added), without the prior modifier “natural born.”

Thus, Professor Corwin’s comment that Congress “is entitled to determine who shall and who shall not be admitted to the body politic” can be seen only as a confirmation of the restricted power of Congress to bestow citizenship upon and naturalize *aliens*, rather than to define or “determine who its natural born citizens should be.” It is also consistent with the conclusion that Congress’s repeal of the “natural born” modifier in 1 Stat. 414 was a result of its recognition that it could not, by statute, alter the meaning of the term “natural born Citizen” in Art. 2, § 1, Cl. 5.

Accordingly, the suggestion now being marketed by the 2016 CRSR that, despite the repeal by Congress over 220 years ago of statutory language purporting to alter the meaning of the term “natural born Citizen” as appearing in the Constitution, seemingly in recognition of the error, somehow power exists in the Congress to legislatively accomplish by indirect means that which it cannot accomplish directly is absurd.

Moreover, to suggest that, somehow, Professor Corwin’s book supports the “anyone-born-here-can-be-president” narrative is nonsense. The fact that it is nonsense is confirmed by Professor Corwin’s analysis of why the citizen grandfather clause exists, discussed above, which is entirely consistent with the analysis set out earlier in this post.

Parenthetically as well, in eulogizing him after his passing, the editors of the Fifth Revised Edition of his work stated: “This is not a traditional revision or revised edition, for only *Corwin* could revise *Corwin*.” (Emphasis in original.) *Id* at p. xi. It is shameful that the 2016 CRSR did not take note of the eulogy before attempting to improperly revise the professor’s words to fit its narrative.

Professor Corwin on *Wong Kim Ark*

In addition, Professor Corwin makes some salient observations with respect to these issues against the backdrop of the Supreme Court’s decision in *Wong Kim Ark*. These observations, of course, are omitted from the 2016 CRSR because they undermine the party narrative.

For example, in the mal-paraphrased passage here at issue (*i.e.*, “Congress is entitled to determine who shall and who shall not be admitted to the body politic...”), the original statement from Professor Corwin in his book is accompanied by a footnote that he added, that is, footnote 6. *See Corwin* at 39, n. 6 and 376. The text of footnote 6 (*id.* at 376) states:

“In [*Wong Kim Ark*], Justice Gray, speaking for the Court, indicates quite clearly that the above legislation [*i.e.*, the 1790 Naturalization Act, 1 Stat. 103] was passed under the “naturalization” clause, and that children born abroad of American parents are therefore ***naturalized*** citizens; that in short, to be a natural-born citizen of the United States one has to be born ‘within the United States and subject to its jurisdiction.’” (Emphasis *Corwin’s*)

Thus, the “most distinguished living constitutional authority” of the nation (in 1958) has opined that the Court in *Wong Kim Ark* confirms the conclusion that, under 1 Stat. 103 as it existed between 1790 and its repeal in 1795, “children born abroad of American parents are therefore *naturalized* citizens.” Contrary to the words appearing in the statute (*i.e.*, the error which Congress seemingly corrected in 1795), those people became citizens via naturalization and thus could not, by definition, be “natural born citizens.” Significantly, Professor Corwin himself emphasizes the word “naturalized” in the footnote.

Because that statement cannot be reconciled with the argument of 2016 CRSR regarding Congress’s power to, purportedly, pass legislation to “determine who its natural born citizens should be...,” the “natural solution” manufactured by the 2016 CRSR is to simply ignore it altogether and hope no one checks. Your humble servant likes to check.

Although Professor Corwin acknowledges that the point discussed in the footnote was not at issue in the case (and thus by definition, non-precedential dictum), he further notes (*id.*): “Nor does Justice Gray explain why Congress in the Act of 1855 [*i.e.*, the 1855 Naturalization Act, 10 Stat. 604] declares children born abroad of American parents “*to be* citizens of the United States.” (Emphasis *Corwin’s*). While the Court in *Wong Kim Ark* might not have provided an explanation, the prior sections of this post may give some indication.

Finally, Professor Corwin offers useful insight into the interplay between the concepts of “*jus soli*” (place of birth controls) and “*jus sanguinis*” (parentage controls) by acknowledging that *both* doctrines have been recognized by the Congress. He states, *id.* at 38-39:

“But who are ‘natural-born citizens?’ by the so called *jus soli*, which comes from the common law, the term is confined to persons born on the *soil* of a country; and this rule is recognized by the opening clause of the Fourteenth Amendment, which declares to be citizens of the United States ‘all persons born or naturalized within the United States and subject to the jurisdiction thereof.’ *On the other hand, by the so-called jus sanguinis*, which underlay early Germanic law and today prevails on the continent of Europe, *nationality is based on parentage, a principle recognized by the first Congress under the Constitution in the following words:...* [thereafter quoting *verbatim* the language of 1 Stat. 103]. By succeeding legislation, *the general sense of this provision has been continued in force to this day.*” (Emphasis added)

Against the backdrop of these observation from Professor Corwin, the argument of the 2016 CRSR that “*jus soli*” birthplace alone must guide the analysis to the exclusion of the nationality or citizenship of the parents under *jus sanguinis* principles, as articulated in § 212 of de Vattel’s treatise, is absurd. Moreover, even if one assumes that “citizenship” ‘does not pass by descent (*Rogers v. Bellei*, 401 U.S. 815, 830 (1971)), it is neither ‘citizenship’ nor under the neologism “natural born citizenship” that constitutes the question. The question is whether one is a “natural born Citizen” under the Constitution as contemplated by the Founders consistent with the principles articulated in § 212 of de

Vattel's treatise. If de Vattel is the source of the Founders' eligibility restriction, then, by definition, descent under the doctrine of *jus sanguinis* is what results in a "natural born Citizen."

Once again, it is that simple.



"A Republic, madam, if you can keep it"

CONCLUSION

With apologies for the length of this post, the time has come to stop. For now. The foregoing points are but additional examples of the inaccuracies in the 2016 CRSR, similar – and some identical – to those which have characterized each of its predecessors. There are likely many more, but exposing them would take a lot more time and would do little to change the ultimate result in the absence of a definitive decision one day from the Supreme Court.

With the departure from the Court of Justice Scalia, that day now seems to be even farther in the future, and that is too bad, because Benjamin Franklin's admonition to the woman outside Independence Hall in 1787 grows more likely with each passing day.

The upcoming general election, from whatever perspective it is viewed, will be an extremely important one. On the one hand, your humble servant believes that both Democratic candidates, while facially constitutionally "eligible," are unqualified to hold the office, one because she is an inveterate, pathological liar incapable of ever being trusted about anything; the other one because, at bottom, he is a far-left "socialist" who has been [endorsed](#) by the Communist Party USA for the office.

On the GOP side, there is a multi-billionaire who has, to put it mildly, shaken the process to the core... and the core is not happy about that and seems intent on pulling out all the stops and all the long knives to prevent his nomination and/or election. Then there is Senator Cruz, as noted, perhaps the best "qualified" of the remaining candidates to "well

and faithfully execute the nation's laws and preserve, protect and defend the Constitution.”

But if the foregoing analysis and critique of the 2016 CRSR and the Clement/Katyal article are accurate, Mr. Cruz is not a “natural born Citizen” under Art. 2, § 1, Cl. 5 of the Constitution and is therefore ineligible to serve a president. Leaving you, faithful P&E reader, with the difficult choices of voting for (a) an inveterate, pathological liar; (b) a leftist endorsed by the Communist Party USA; (c) a multibillionaire who the public in general lionizes, but the establishment detests and to whom it wants to deny its nomination; and (d) a smart, savvy senator from Texas, who may very well be ineligible to hold the office.

Talk about tough choices and conundrums. The best advice is probably to educate yourself, watch carefully all of the candidates between now and November, and then vote your conscience. And, as noted at the beginning, another post addressing the March 31, 2016 decision of the Pennsylvania Supreme Court affirming a lower court's determination that Senator Cruz is, purportedly, a “natural born Citizen” eligible to the presidency is in the works.

And if by chance the Supreme Court were to find the courage to hand down a decision on these issues before November – perhaps in an expedited determination of an appeal in the recent Pennsylvania case – that would not hurt. It also might not be the “correct” decision in the eyes of many, but at least it would resolve some of the controversy.

In the meantime, remember what Ben Franklin told the lady outside Independence Hall in 1787. And vote carefully in November. Very carefully.