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

"DANGEROUS NONSENSE"

by Joseph DeMaio, ©2016

(Apr. 4, 2016) — [**Editor's Note:** The following is a continuation of an in-depth analysis of the meaning of the "natural born Citizen" requirement present in Article II, Section 1, clause 5 of the U.S. Constitution and how a series of Congressional Research Service (CRS) memos dating back to April 3, 2009 through January 11, 2016, appear to purposely ignore historical documentation of the Founders' intent when agreeing to include the term.

In Part 1, legal scholar Joseph DeMaio discussed the invocation of the 1790 and 1795 Naturalization Acts by CRS memoranda author and legislative attorney Jack Maskell as pertinent to determining who is and is not a "natural born Citizen," characterizing Maskell's presentation as "deceptive."

As questions have arisen during Cruz's campaign, now just over a year old, about his eligibility, Cruz has relied upon the 1790 Naturalization Act to assert that he is eligible without divulging to the public that the 1795 Naturalization Act repealed and replaced its predecessor, eliminating the provision that children "born beyond sea" were to be "considered as natural born citizens."

DeMaio also provided his analysis of an editorial published in the Harvard Law Review advocating for the presidential eligibility of Sen. Ted Cruz despite his "birth across the border" in Calgary, Alberta, Canada in December 1970. DeMaio disagrees with the authors' conclusion based on the 1790 Naturalization Act, contending that "The 1790 law (1 Stat. 103) was the sole statute in the naturalization laws of the nation ever to use the words 'natural born citizens,' and those words were jettisoned from the law by 1 Stat.

414 a mere five years after they first appeared. The attempt by the 2016 CRSR to resurrect those words from the dead in an attempt to cobble together a rationale for its reasoning is a futile one, but one which remains appealing to those who prefer expediency over principle."

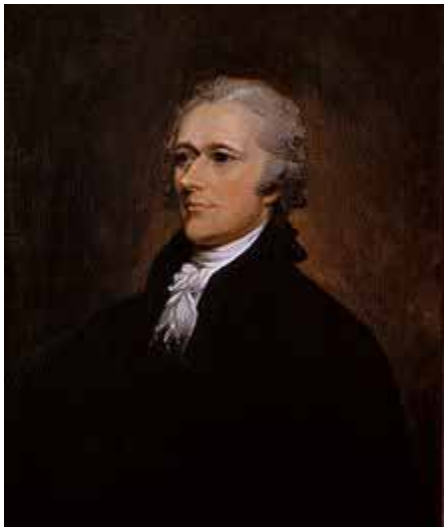
In his continuing analysis, DeMaio contends that the "natural born" status cannot be "legislatively concocted," as Maskell appears to suggest.

Part 2 follows.]

Memo alert to readers: listen up, grab some coffee and pay attention, as this gets even more convoluted. First, as was true with regard to the unprincipled misrepresentations made in footnote 215 of the 2011 CRS Report and in footnote 207 of the present 2016 CRSR as to what, purportedly, the dissenters in the *Wong Kim Ark* case actually said, footnote 96 builds on the deceptions of the others by including, in a single footnote, *two* deceptions.

The first deception is the claim that as to the 1795 act, 1 Stat. 414, "[t]here is no legislative history indicating the reason for the deletion of [the 'natural born' modifier]…."

That is a demonstrably false statement. In fact, there is abundant evidence – at least to anyone desirous of learning the truth underlying the reasons for the elimination of the modifier – in the available recorded legislative history of 1 Stat. 414 (*see* 3 Annals of Congress 1033 – 1058 [http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=004/llac004.db&recNum=432]).



That history suggests that, consistent with the concerns articulated by Alexander Hamilton in Federalist 68 with respect to the goal of erecting the *highest possible* barrier

against "foreign influence" in the office of the "Chief Magistrate," the repeal and removal of the term "natural born" before the word "citizen" was in recognition of the potential that, at some future date, a person who was *not* actually born within the geographic boundaries of the United States to two parents who were, at the time of birth, already U.S. citizens, could claim constitutional eligibility to the presidency as a "natural born Citizen." Such a potential was seen as "*an idea which ought not, explicitly or impliedly, to be admitted*." (Emphasis added) (Remarks of Cong. James Hillhouse, *id.* at 1046).

Earlier in the debate regarding passage of the 1795 act, Cong. Hillhouse stated that "the ground upon which foreigners should be admitted to a share in the administration of our Government *ought to be narrowed in every possible way*, and that if the gentleman would so modify the amendment [relating to renunciation by aliens of hereditary titles as a condition of being eligible for naturalization and admission to citizenship, moved by Cong. Giles] as *wholly to exclude that class of foreigners, or any other, from ever becoming citizens, so far as to elect or be elected to any office*, he would most heartily join in giving his vote for it." (Emphasis added) (Remarks of Cong. Hillhouse, *id.* at 1045).

Moreover, Cong. Hillhouse was noted as taking the position with regard to foreign influence in the newly-formed government that he was unalterably opposed to any law which would "…indirectly establish the principle that [foreign] privileged orders might be introduced and exist among us, *a principle which he wholly rejected and reprobated.*" (Emphasis added). *Id.*

Against this backdrop, the intentional repeal and deletion – after extended debate – of the modifier "natural-born" before the word "citizen" in 1 Stat. 414 cannot under any principled or rational analysis be seen to be "merely a stylistic/grammatical decision." To merely state that proposition is to expose its absurdity. In fact, in the sentence preceding the one at issue in the original 1790 act, Congress stated that if an alien becomes a naturalized citizen, then that new naturalized citizen's minor children (*i.e.*, children under the age of 21) shall also "be considered as ***citizens*** of the United States." (Emphasis added)

Had such children been intended by Congress to be eligible to the presidency, Congress would have – but did not – characterize them as being "considered natural-born citizens of the United States" on a par with those later similarly "considered" as such if born abroad to U.S. citizen parents. However, Congress plainly realized that, in enacting 1 Stat. 103 and enacting 1 Stat. 414 which repealed *in toto* 1 Stat. 103, it was exercising its authority under Art. 1, § 8, Cl. 4 of the Constitution. As noted in the *Schneider* case, that power is confined and jurisdictionally restricted to legislating with regard to "naturalization." It is *not* a license to legislatively concoct "natural-born eligibility" (also a neologism) or to amend the Constitution by statute.

Thus, Congress may be seen to have realized its oversight in 1 Stat. 103 by "correcting" it with the enactment of 1 Stat. 414 and the repeal of 1 Stat. 103 in 1795. Plainly, this

corrective action eliminated – or should have eliminated – any confusion created by its use of the "natural born" modifier in the earlier statute.

The only rational interpretation to be given to these comments recorded in the Annals of Congress (the predecessor to the Congressional Record) is that Congress recognized that in its original statute, 1 Stat. 103, it had improperly and extra-constitutionally broadened the category of persons who might be seen as "natural born citizens" eligible to the presidency beyond that fixed in the Constitution itself. Even in 1795, Congress realized that if the Constitution is to be the "supreme law of the Land" (Art. 6, Constitution), its provisions could not be altered or amended by statute, but only by compliance with the requirements of Art. 5 of the Constitution (which many of the members of that Congress had recently drafted and adopted).

If the Constitution's presidential eligibility clause is to be seen as intended to "narrow" and "wholly exclude" persons who are other than "natural born Citizens," as that concept is articulated in § 212 of de Vattel's work, then the 1795 repeal of the "natural born" modifier of the term "citizen" with reference to children born to U.S. citizen parents elsewhere can be seen only as confirming and ratifying the intent of the Founders to absolutely restrict eligibility to the presidency to those persons born *here* to parents who are already citizens. No other rational explanation exists.

Moreover, this widely-available legislative history – accessible by anyone with a computer and an interest in discovering the truth as opposed to having a predetermined desire to obfuscate and conceal the truth – constitutes far more than a mere "stylistic/grammatical deletion" as posited by Mr. Maskell in fn. 96 of the 2016 CRS Report. On the contrary, it is manifest competent evidence that the Congress intended, in exercising its constitutional powers with respect to "naturalization," to correct its prior mistaken journey into creating another class of people who might be seen as eligible to the presidency, but who were, in fact, not so eligible.

Restricting the office to persons born in this nation to two parents who, at the time of the birth, are also citizens of the nation as contemplated in § 212 of de Vattel's tome presents the highest barrier against improper foreign (*i.e.*, alien) influence. Any standard less than that – such as the one advocated by the 2016 CRS Report – cannot be squared with the clear legislative history of the repeal of 1 Stat. 103 and the enactment of 1 Stat. 414.

At minimum, according to § 212 of Vattel's tome, the child must be born of a ***father*** who is already a citizen, because "in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if he is born there of a foreigner, it will be only the place of his birth, and not his country." *See*, *e.g.*, http://www.thepostemail.com/2015/11/25/of-naturalized-and-natural-born-the-courts-point-of-view/.

The Kettner Citations

The 2016 CRSR cites and relies on numerous sources in going about its circuitous tasks. One such source cited throughout the report is Professor James H. Kettner and his work "*The Development of American Citizenship, 1608 – 1870*" (hereinafter "*Kettner*"). *See* 2016 CRSR at 3, fn. 13; 8, fn. 41; 11, fn. 52; 27, text and fn. 129. While the 2016 CRSR cites many portions of the *Kettner* work in purported support of its narrative, the book also contains some relevant discussion which the report's author would likely prefer be ignored. Perhaps that is why the following discussion does not appear in the 2016 CRSR.

Specifically, Professor Kettner notes (*Id*. at 230) that with regard to the eligibility requirements for the presidency, the Constitutional Convention received, on August 22, 1787, a report from the "Committee of Detail" outlining the qualifications for the chief executive. That report proposed that the chief executive "shall be of the age of thirty-five years, and a *citizen* of the United States, and shall have been an inhabitant thereof for twenty-one years." (Emphasis added). *Idem.*

Professor Kettner then continues: "This [Committee of Detail report] in turn was amended by the Committee of Eleven on September 4 [, 1787] to require that the president be a '*natural born Citizen or a Citizen of the United States at the time of the adoption of this Constitution.*' Persons naturalized before ratification, then, were eligible for the office on basically the same terms as native Americans; *persons adopted thereafter were permanently barred from the presidency* – the only explicit constitutional limitation on their potential rights." (Emphasis added). *Idem.*

Rocket science, this is not: the clear import and meaning of that passage is that, from Professor Kettner's perspective, foreign aliens (*i.e.*, non-U.S. citizens) who were "adopted" (*i.e.*, brought into the national body politic as *naturalized* citizens rather being "born" in the nation) *after* the ratification of the Constitution were to be "permanently barred" from holding the office of the president.

As discussed hereafter, that is why the Founders inserted the "citizen grandfather clause" in Art. 2, § 1, Cl. 5, allowing as an exception to the "natural born Citizen" eligibility restriction those persons who were already merely "citizens" at the time of the nation's birth following the formal severance with Great Britain effectuated in 1776 by the Declaration of Independence. Indeed, without the "citizen/grandfather" exception, 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.

In fact, it is generally recognized that the first chief executive who actually met the natural born citizen criterion – and, ironically enough, regarded as the founder of the Democratic Party – was Martin Van Buren, born in Kinderhook, N.Y. to two parents who were, at the time of his birth, already United States citizens. *See* http://www.thepostemail.com/2016/01/11/why-was-martin-van-buren-the-first-natural-born-citizen-president/

There is general consensus – even in the 2016 CRSR – that the addition of the "natural-born" modifier to the term "Citizen" emanating from the Committee of Eleven was likely the result of John Jay's famous July 25, 1787 letter to George Washington "hinting" that no one other than a "natural-born Citizen" should be allowed to become "Command in chief of the [A]merican army…."

Jay's letter used the phrase "any but a natural *born* Citizen." The Committee of Eleven, and ultimately the Constitution, used the phrase "No person except a natural born Citizen…." Under either phrase, the conclusion is inescapable that through the use of this restrictive, limiting language, the Founders intended to strictly prohibit and exclude from eligibility to the office any person other than a "natural-born Citizen." Under the 2016 CRSR, that could mean, literally, tens of millions of people. Ask yourself this: is that what motivated Hamilton when he wrote Federalist 68?

Finally, against this historical Constitutional Convention factual backdrop, Professor Kettner confirms that "[t]here was an implicit assumption that birth within the United States conferred citizenship – the president was to be a 'natural born citizen' resident in the United States…." *Id.*

Even under the irrational theory espoused by the 2016 CRS Report – *i.e.*, that any person born to a U.S. citizen anywhere in the world or that a person born here without regard to the two parents' citizenship satisfies the eligibility requirements of Art. 2, § 1, Cl. 5 – it is clear that a compelling argument can be made that Professor Kettner recognized that the Founders intended that the birth needed to be, at minimum, actually within the geographic boundaries of the United States. Calgary, Alberta, Canada does not fit that description.

Professor Kettner, the Dred Scott decision and the "Highly Exclusionary" Issue

Quite apart from Professor Kettner's discussion of why persons "adopted" into the nation via statutory naturalization were to be "permanently barred" from eligibility to the presidency, the 2016 CRSR cites Professor Kettner's criticism of the Supreme Court's decision in *Scott v. Sanford*, 60 U.S. 393 (1857). This, of course, is the infamous "Dred Scott" decision, in which Chief Justice Roger Taney (joined by six other Justices, with Justices John McLean, a Harvard-educated Republican, and Benjamin Curtis, also a Harvard-educated Republican, dissenting) held that slaves, and even freed slaves, including their offspring, were not "citizens" of the United States.

The decision, of course, was abrogated – not to be confused with "overruled," which only the Supreme Court can do to its own opinions – by the Fourteenth and Fifteenth Amendments to the Constitution following the Civil War. It is virtually universally condemned as the "worst and most vilified Supreme Court decision in the history of the United States." *See* CRSR at 26-27 text and fn. 126. On this singular point, your faithful servant agrees with the 2016 CRSR.

Dred Scott

However, after first establishing that the "Dred Scott" decision is an abomination, the 2016 CRSR then proceeds to associate it with the beliefs and arguments of certain "birthers." Reprobation by association. Déclassé, of course, but not unexpected.

The 2016 CRSR notes (at 25-26) that "[s]ome of the legal arguments based on American jurisprudence forwarded by those who support an alternate and *highly exclusionary reading* of the term 'natural born' citizen (including reading into the Constitution a requirement for one to have two U.S. citizen parents) often begin with a citation to language in the 1857 *Dred Scott* decision…" (Emphasis added)

In attempting to undermine the reliance on the decision by certain "birthers," the 2016 CRSR quotes Professor Kettner (2016 CRSR at 27): "In seeking to derive *consistent exclusionist principles* from an ambivalent legal tradition, [Chief Justice] Taney could only succeed by *distorting history and making 'bad law'* "… In making national citizenship exclusively the effect of naturalization or pedigree, he disregarded *volumes of judicial precedents emphasizing place of birth without regard to ancestry.* Taney's opinion rested instead on the social fact of prejudice and discrimination."

The patent irony of both Mr. Maskell's "highly exclusionary reading" comment in the 2016 CRSR and the "consistent exclusionist principles" quoted from Professor Kettner's work is that the historical record is replete with proof that this is *precisely what the Founders intended when they changed the eligibility clause* to read "natural born Citizen" from the prior "citizen" language. As much as Messrs. Maskell and Kettner might wish that the federal Equal Employment Opportunity Commission regulated the topic of presidential eligibility, that topic is governed – mercifully – by Art. 2, § 1, Cl. 5 of the Constitution and *not* the EEOC.

Stated otherwise, consistent with § 212 of de Vattel's work, the Founders specifically sought to erect the highest possible, "highly exclusionary" standard for the office of the chief executive rather than an "open-arms-to-anyone" standard.

From the concerns articulated in Federalist 68; to the floor debates surrounding the deletion of the modifier term preceding the word "citizen" in 1 Stat. 414; to the numerous references to de Vattel's "Law of Nations" as being "continually in the hands of the members of our Congress now sitting… " (B. Franklin, Dec. 9, 1775 letter to Charles William Frederic Dumas), the intent of the Founders was to erect the highest possible barrier to foreign influence insinuating itself into the presidency.

Professor Kettner's criticism of Judge Taney's decision in the Dred Scott case must be viewed against the distinguishing backdrop that the *only* issue in the case was whether or not, by virtue of a slave's status as "property" rather than as a "citizen," the suit could be maintained in the first place. The case did ***not*** involve any question involving an analysis of whether Mr. Scott was a "natural born Citizen" within the meaning of the Constitution's eligibility clause.

Professor Kettner's comment, therefore, that Justice Taney could achieve his desired result only by "distorting history and making 'bad law'" has a parallel here: only by distorting history through ellipsis deletion of the words of Supreme Court cases; and/or inserting bracketed and conclusory comments into historical quotes, changing their meanings; and/or failing to reveal the legislative history behind the repeal of the "natural-born" modifier before the term "citizen" in 1 Stat. 414 can the faulty "logic" of the 2016 CRSR be understood.

The Distorting of History

As for Professor Kettner's remarks concerning Justice Taney's "distorting history and making bad law" observation, both the CRS memos in 2009 and 2010, supplemented by the 2011 Report – all authored by Mr. Maskell – take the cake for distorting history and making "bad law."

As discussed in far more detail here, by ellipsis deletion of the words "was naturalized in 1854," in the quote from Attorney General Pierrepont contained in the Supreme Court's decision in *Perkins v. Elg*, 307 U.S. 325, 330 (1939), both the 2009 and the 2011 CRS documents misrepresented the reality that the person whose citizenship was there in question – Steinkauler the younger – was a natural-born citizen *despite* the purported (but false) fact that, at the time of his birth, his father was *not* a U.S. citizen. Under § 212 of de Vattel's tome, of course, if Steinkauler the younger's father was not a citizen at the time the son was born, he would be ineligible to the presidency, because he would be only a "native-born citizen" and not a "natural born citizen."

Thus, in both the 2009 and 2011 documents, Mr. Maskell argued that, based on the language that had been altered by the ellipsis, the Supreme Court purportedly "stated" in *Perkins v. Elg* (carefully avoiding the term "held" or "ruled") that such a person would be a "natural born citizen" *despite* the (false) fact that his parents were "aliens" (as the 2009 document characterized them) or possessed "dual citizenship" (as the 2011 document characterized them).

In fact, the father, Steinkauler the elder, was naturalized as a U.S. citizen in 1854 and his wife was also a U.S. citizen by marriage. Their son was born to these two U.S. citizens in 1855 in St. Louis, Missouri. Thus, the son (Steinkauler the younger) was, in reality, a "natural born citizen" as characterized by Attorney General Pierrepont *because* he was born to two U.S. citizen parents within the geographic boundaries of the United States.

By misrepresenting the status of his father as being either an "alien" (as in the 2009 document) or as possessing "dual citizenship" (as in the 2011 document), both the 2009 and the 2011 CRS documents portray the status of the son as a "natural born citizen" eligible to the presidency *despite* the purported (and false) painting of his father as being an alien or a person with dual citizenship. In fact, the son was a natural born citizen *because* both of his parents were U.S. citizens when he was born here, thereby making Attorney General Pierrepont's "become President of the United States" observation understandable.

But wait… there's *still* more.

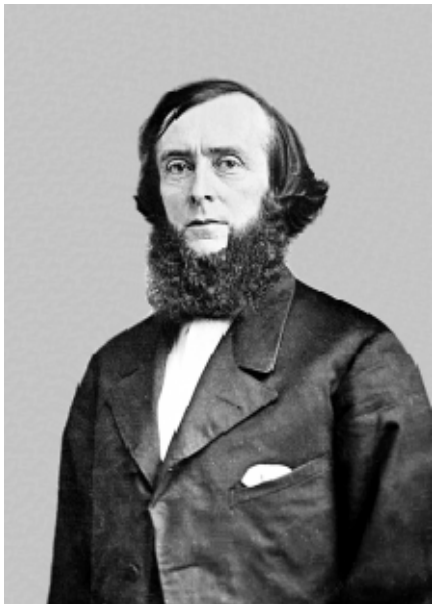
In the 2016 CRSR, once again, the language included by the Supreme Court quoting from Attorney General Pierrepont's "Steinkauler" opinion is set out (*see* 2016 CRSR at 43). But this time, the language which had been deleted by ellipsis in the prior two CRS documents (*i.e.*, "was naturalized in 1854") has… wait for it… wait for it: ***magically re-appeared.*** That is right, ladies and gentlemen, boys and girls, the 2009 and 2011

Congressional Research Service's linguistic manipulation of the decision in *Perkins v. Elg* has been ***reversed*** and the original words of the Supreme Court ***restored.*** Who says a bell cannot be "un-rung?"

Why the previously-missing language has been restored in the 2016 CRSR is at present unclear. Perhaps it was because the linguistic chicanery was first exposed here, but the fact that it has happened at all is noteworthy. Or perhaps it is because now, as opposed to in 2009 and 2011, the question of eligibility arises in the context of a person who may possess dual citizenship as opposed to a person whose father was never a U.S. citizen, thereby transgressing the principles of § 212 of de Vattel's work.

Indeed, the 2016 CRSR alters its "*Perkins*" discussion slightly from the prior versions (*see* 2016 CRSR at 43) such that it references *Perkins v. Elg not* for the proposition that a person "born here" to "alien parents" would purportedly still qualify as a natural born citizen under the Constitution. Instead, the 2016 CRSR frames the issue as one of the "dual citizenship" of the parents and/or Steinkauler the younger being irrelevant to the question of whether Steinkauler the younger remained a natural born citizen. Specifically, continuing its ruse that ***despite*** the purported (false) fact that the father was not a U.S. citizen when his son was born, the author of the document combined an ellipsis omission with a substituted bracketed addition of the words "even though."

So altered, the language is made to appear that the Supreme Court adopted the Attorney General's conclusion that, "even though" the father's renunciation of his American citizenship took place *after* the son's birth, it had no effect on the son's "dual citizenship" nor on the Attorney General's opinion that, if and when the son attained majority and returned to the United States, "in due time, if the people elect, he can become President." *See* 2016 CRSR at 43.



Edwards Pierrepont served as U.S. Attorney General under President Ulysses S. Grant

In fact, Attorney General Pierrepont characterized Steinkauler the younger as a "native-born American citizen" when, in fact, he qualified as a "natural-born citizen" by virtue of the fact (obscured in the 2009 and 2011 CRS products) that when he was born in St. Louis, both his mother and father were, via naturalization and marriage, U.S. citizens.

Thus, under § 212 of de Vattel's Law of Nations, Steinkauler the younger would be constitutionally eligible to the presidency, but *not* "even though" or "despite" the circumstance of his father having renounced his American citizenship *after* the son was born. Instead, he would be eligible *because* his father was naturalized as an American citizen *before* the son was born. The father's renunciation of his own naturalized American citizenship had *zero* effect on the son's continuing status from birth in St. Louis as a "natural born citizen."

Through selective editing via ellipses and bracketed insertions of words not appearing in the Attorney General's opinion, the 2016 CRSR document seeks to make the case that *Perkins v. Elg* stands for the proposition that, even if one is born here to alien parents or parents with dual citizenship, that person, despite the foreign citizenship of the parents, would nonetheless support the conclusion that the person was a "citizen at birth" and thus eligible to the presidency, the logic and principles of de Vattel's § 212 notwithstanding.

In fact, as was the case with Steinkauler the younger, Marie Elg was a natural born citizen *because,* at the moment of her birth in Brooklyn, New York (Oct. 2, 1907), both of her parents were naturalized U.S citizens, her father renouncing his Swedish citizenship and becoming an American citizen in 1906.

To the point relating to "dual citizenship," the Court in *Perkins v. Elg* cited "instructions issued under date of November 24, 1923, by the Department of State to the American Diplomatic and Consular Officers." *Id.* at 344. Among other things, and with particular relevance to the claim by the 2016 CRSR that a "dual national" person would nonetheless be considered eligible to the presidency, those instructions provided:

'The term 'dual nationality' needs exact appreciation. It refers to the fact that *two States make equal claim* to the allegiance of an individual *at the same time*. Thus, one State may claim his allegiance because of his birth within its territory [*jus soli*], and the other because at the time of his birth in foreign territory *his parents were its nationals* [*jus sanguinis*].. The laws of the United States purport to *clothe persons with American citizenship by virtue of both principles.'* (Emphasis added) *Id.*

The use by the U.S. State Department of the terminology "clothe persons with American citizenship by virtue of both principles…," *i.e.*, *jus soli* and *jus sanguinis*, runs exactly counter to the 2016 CRS narrative that only "place of birth" (*jus soli*) matters in determinations of whether one is a "natural born Citizen." Clearly, parentage (*i.e.*, *jus sanguinis*) plays a role as well.

Against the backdrop of this language, and in all candor, there is no way that the 2016 CRSR can reconcile its contention that the Founders intended, through the use of the term

"natural born Citizen" as a restriction on eligibility to the presidency, to include persons with "dual citizenship."

Because of their fundamental concern that the Chief Magistrate possess undivided loyalty and allegiance to the United States *alone*, unencumbered by any foreign influence *whatsoever*, the snake oil being peddled by the 2016 CRSR that the Founders simultaneously intended to adopt a "non-Vatellian" definition of the term – which, by the way, would open up the office to the very persons the Founders wished to exclude – is nonsense. Dangerous nonsense. Witness what exists today at 1600 Pennsylvania Avenue, Washington, D.C.

———————-

Click here to read Part III.