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

"A FALSE IMPRESSION"

by Joseph DeMaio, ©2016

Wong Kim Ark in 1904

(Apr. 7, 2016) — **[Editor's Note:** The following is a continuation of an in-depth analysis by legal scholar Joseph DeMaio of the January 11, 2016 Congressional Research Service (CRS) memo as it addresses, or fails by omission to address, the meaning and intent of the term "natural born Citizen" found in Article II, Section 1, clause 5 of the U.S. Constitution relating to presidential eligibility. Parts I and II can be read here and here, respectively.]

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The Deceptions Continue in the Discussion of *Wong Kim Ark*

There is asserted in the first textual section of the 2016 CRSR (p. 2 text and fn. 5), as was the case in the prior Maskell CRS documents, that in the decision *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the U.S. Supreme Court recognized and adopted the view that the English common law rule of *jus soli* ("law of the soil") applied under the Fourteenth Amendment to render a person born in California to two Chinese foreign nationals domiciled there a "natural born" citizen. The "*jus soli*" rule, making the "place" of birth paramount, is claimed by the 2016 CRSR to trump the "*jus sanguinis*" rule, which focuses instead on the citizenship status and bloodline parentage of the birth parents.

It is also important to note at the outset that the *sole* question presented in the case – and the only one ruled upon by the Court – was whether Wong Kim Ark was a "*native-born* citizen of the United States" (emphasis added) by virtue of the Fourteenth Amendment. *See Wong Kim Ark* at 653. Although the Court used the term "natural born citizen" in the case, it was usually against the backdrop of the historical relationship of "natural born subjects" under the laws of Great Britain before the American Revolution.

Thus, since the case involved *only* the issue of whether under the Fourteenth Amendment the person was a "native-born citizen of the United States" and *not* whether he was, in addition, a "natural-born citizen" for presidential eligibility purposes, all of the discussion in the case relied upon in the 2016 CRSR (and others) including in the dissent, regarding the meaning of the term "natural born Citizen" under Art. 2, Sec. 1, Cl. 5 of the Constitution, the presidential "eligibility clause," had then, has now and will have in the future *zero* precedential import as to the issues claimed to be "settled" in the 2016 CRSR.

That is because, to quote one of the prime authorities upon which the 2016 CRSR relies for its conclusions, those unrelated and irrelevant discussions are "… dicta, pure and simple." *See* "*Who Can be President of the United States: The Unresolved Enigma,*" 28 Maryland Law Review 1, 19 (1968). The Maryland Law Review article's author was one Charles Gordon, at that time General Counsel, U.S. Immigration and Naturalization service and Adjunct Professor of Law, Georgetown University Law Center.

The Latin terms "dictum" or "dicta*"* refer to statements or observations made by a court having no direct bearing or relevance to the issues presented in the case under examination. Accordingly, a court's offering of dictum constitutes no part of the "holding" or "core ruling" of a court. Thus, any efforts expended to portray as binding or precedential this species of irrelevant or immaterial discussion are disingenuous. To reiterate the Supreme Court's succinct views on the matter in *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 351, n. 12. (2005): "Dictum settles nothing, *even in the court that utters it.*" (Emphasis added).

The decision in the *Wong Kim Ark* case is relied upon by the CRS in each of its "Maskell" products as being the *sine qua non* or foundational Supreme Court decision supporting their theories. Those theories posit that if a person is born "in" the United

States to parents who are neither in the diplomatic service of a foreign nation nor members of a hostile occupying force, and regardless of their foreign alien citizenship status, that offspring is a "natural born citizen" who can become president.

It can safely be asserted that, quite apart from the "dictum, pure and simple" nature of the decision *vis à vis* the presidential eligibility issue, if the *Wong Kim Ark* case was wrongly decided or otherwise shown to be immaterial to the presidential eligibility issue, then, much like a house of cards, not only do the prior CRS products fall, but so do all of the other lower court cases where the issue has been decided consistent with the CRS narrative.

Specifically, the 2016 CRSR claims (2016 CRSR at 2): "As noted [by the Court in *Wong Kim Ark*], this 'same rule' [*i.e.*, the *jus soli* rule] was applicable in the colonies and 'in the United States afterwards, and continued to prevail under the Constitution' with respect to 'natural born' citizenship [*sic*]." Note that in the Report, the internal quotation marks around the phrase "in the United States and continued to prevail under the Constitution" ends with the word "Constitution," but completes the sentence with the words "with respect to 'natural born' U.S. citizenship [*sic*].''

To the casual reader – including 535 members of Congress, 9 Supreme Court Justices and 1 Chief Executive – there may be a temptation to conclude that the Supreme Court has, through that sentence, recognized that the rule of *jus soli* applies to the exclusion of the rule of *jus sanguinis* to determine which persons enjoy "natural born citizenship" [*sic*] and/or whether one can be a natural born citizen for Art. 2, § 1, Cl. 5 presidential eligibility purposes.

Casual readers should resist that temptation, as it would be wrong. First, the actual language used by the Supreme Court in that passage from the *Wong Kim Ark* decision ended the sentence thusly: "…, and continued to prevail under the constitution *as originally established*." (Emphasis added). *See Wong Kim Ark*, 169 U.S. at 658. True to form, the 2016 CRSR fails to alert the reader with an ellipsis omission that it has omitted from the Court's language the three words "as originally established." This ellipsis omission, of course, has occurred before: (http://www.thepostemail.com/2011/05/31/presidential-eligibility-part-2/).

Instead, the only clue that the reader is given (including the 545 persons mentioned above) is the "close quote" following the word "Constitution." In fact, the phrase "natural born citizenship" appears *nowhere* in the *Wong Kim Ark* decision; *nowhere* in the U.S. Constitution; and *nowhere* in any reported U.S. Supreme Court decision… ever. As heretofore noted, it is a neologism, a synthetic phrase concocted to dovetail with the false narrative that has been peddled by the Congressional Research Service (and bought, "hook, line and sinker," by most of the electorate) since its first product on the topic in 2009. And it appears seven times in the 2016 CRSR.

Josef Goebbels giving a political speech in 1932

At this point, studious P&E reader, go back to the Introduction portion of this post and read again what Third Reich Minister of Propaganda Josef Goebbels observed about lies. Oddly, however, the 2016 CRSR later includes the full quote (2016 CRSR at 13).

Second, however, one may ask: "What difference does it make?" The bottom line, at least from the perspective of the 2016 CRSR, is to leave the apparent impression that the Supreme Court has stated in its decision that Mr. Wong Kim Ark was to be recognized as a "natural born" citizen eligible to the presidency, despite the fact that neither of his parents were U.S. citizens at the time of his birth. Why else discuss it at all in the product?

However, by cleverly manipulating words, positioning punctuation marks and failing to signal ellipsis omissions of words used by the Supreme Court in its decision, the report leaves the impression that even the *dissenting* Justices Fuller and Harlan in the case had acknowledged that, under the "controlling" majority opinion, the Supreme Court has already strongly suggested – the Report is very careful to avoid using the word "held" – that persons born here to non-diplomatic or non-military alien parents are "natural born citizens" within the meaning of the presidential eligibility clause.

And yet, the 2016 CRSR deceptions continue to compound as it seeks to bolster its "natural born citizenship" neologism by misrepresenting what the dissenting Justices in *Wong Kim Ark* actually said. The 2016 CRSR asserts as follows (at p. 45, fn. 207): "Note that the dissent in *Wong Kim Ark* stated that under the majority's controlling decision, a child born to alien parents in the United States 'whether of the Mongolian, Malay or other race, were eligible to the Presidency….' 169 U.S. at 715 (Fuller, C.J., and Harlan, J. dissenting)." As revealed here, precisely the same claim first appeared in the November 14, 2011 CRS Report – also authored by Mr. Maskell – at p. 47, fn. 215.

Stated otherwise, now, nearly four and one-half years later, after having had the deceptive misrepresentation exposed, it is repeated, yet again. Tucked away in footnote 215 of the 2011 CRS Report and in footnote 207 of the 2016 Report is the same language purporting to paint the dissenting Justices in the case as acknowledging that, under the majority's "controlling opinion," and regardless of the citizenship of a person's parents, if the person is born here, the person would be "eligible to the Presidency…."

This is a flat and reprehensible misrepresentation of what the dissent actually said. If a first-year law firm associate knowingly made such a misrepresentation in a brief to a judge, he/she would be subject to professional ethics discipline. And yet the author of the 2011 CRSR and the 2016 CRSR makes the assertion not once, but twice, and remains employed by a federal entity which, according to its website, is "well-known for analysis that is authoritative, confidential, objective and nonpartisan…" and whose "… highest priority is to ensure that Congress has 24/7 access to the nation's best thinking." Not so much.

The trouble with the assertions in the two reports' footnotes – and the deception the 2016 CRSR embodies therein by characterizing the majority decision as "*controlling*" on the point – is that it is ***not*** what the dissenting Justices in *Wong Kim Ark* stated.

After relating some of the history of the Constitutional Convention's discussion of the term "natural born citizen," here is what Chief Justice Fuller, with Associate Justice Harlan concurring, *actually* stated in the dissent, 169 U.S. at 715:

"Considering the circumstances surrounding the framing of the [C]onstitution, *I submit that it is unreasonable to conclude that 'natural born citizen' applied to everybody born within the geographical tract known as the United States, irrespective of circumstances;* and that the children of foreigners, happening to be born to them while passing through the country, whether of royal parentage or not, or whether of the Mongolian, Malay, or other race, were eligible to the presidency, while children of our citizens, born abroad, were not." (Fuller, C.J., dissenting) (Emphasis added).

Even if one recognizes and accepts that this statement – like the statements in the majority opinion – constituted dictum, the dissent was *not* parroting or acknowledging what the CRS reports would have the casual reader believe, *i.e.*, that the majority's "*controlling*" holding was that anyone born in the United States, whether "… of the Mongolian, Malay, or other race…" was eligible to the presidency.

Instead, the dissent was merely stating that, given the backdrop and "circumstances surrounding the framing of the [C]onstitution…," the dissenters thought it was *unreasonable* to conclude that the Founders intended that *any* "citizen" *other* than a "natural born Citizen" (Ed.: as contemplated by de Vattel), was to be eligible to the presidency.

By deceptively suggesting that the dissent's comments as to presidential eligibility, articulated as a general proposition and whether characterized as dictum or not, were the functional equivalent of an acknowledgment that the majority opinion was a "controlling decision" on the matter, is beyond unprincipled. The *Wong Kim Ark* majority "controlling decision" related *exclusively* to the citizenship status of Mr. Wong Kim Ark under the 14th Amendment. It had nothing… repeat, *nothing* to do with the issue of presidential eligibility under Art 2, § 1, Cl. 5 of the Constitution.

In the law, there are "controlling *authorities*," "controlling *holdings*" and "controlling *opinions*," but there is no such thing as "controlling *dictum*" anywhere, save in the minds of those who may have authored (perhaps Mr. Maskell had some outside assistance: http://www.thepostemail.com/2012/02/24/of-presidential-eligibility-doubling-down-and-linguistic-torts-part-3/?) the November 14, 2011 CRSR and the January 11, 2016 CRSR.

The CRSR's mischaracterization of the majority holding on citizenship under the 14th Amendment as a "controlling decision" in order to create the perception that even those ill-informed dissenters recognized and conceded that any citizen, regardless of his own or his parents' citizenship, could, under the majority "decision" in the case, be eligible to the presidency, is reprehensible. And yet, given the biased and decidedly anything ***but*** "objective and non-partisan" "product" heretofore produced by the Congressional Research Service on this topic, it should come as no surprise.

Was Chester A. Arthur a "natural born Citizen?"

Finally, with respect to the "conspiratorial" theory that the majority opinion in the *Wong Kim Ark* case was "reverse-engineered" by Justice Horace Gray to "reach a desired result" in order to fortify the argument that the president who appointed Gray to the Supreme Court, President Chester A. Arthur, was himself a "natural born citizen" eligible to the presidency, despite substantial evidence that, because his father was not a U.S citizen at his birth, thus making him a "naturalized citizen" when his father was ***thereafter*** naturalized, *see* the Tonchen Presidential Eligibility Tutorial at 8-9.

The Erroneous Citation of *McCreery's Lessee v. Somerville*

As if one needed any additional proof of the proper application of the "*falsus in uno, falsus in omnibus*" principle to the overall weight to be accorded to the 2016 CRSR, one would need only to examine the text accompanying footnote 61 in the document. *See* 2016 CRSR at 13. There, in discussing the *majority* opinion in *Wong Kim Ark*, the 2016 CRSR, in text, states:

"Citing an earlier precedent, the Court [in *Wong Kim Ark*] noted Justice Story's opinion that the principles of common law 'treated it as unquestionable that by that law a child born in England of alien parents was a natural born subject." (fn. 61).

That footnote, *i.e.*, fn. 61, then states:

"169 U.S. at 661-662, discussing *McCreery* [*sic*: should be "*McCreery's Lessee*] *v. Somerville*, 9 Wheat. 354 [22 U.S. 354] (1824), where, the [C]ourt noted, that such rule of natural born citizenship [*sic*] by birth within the country 'of course extended to the Colonies, and, not having been repealed in Maryland, was in force there.'"

There are several problems with this "quote." First, the citation to the *Somerville* case is wrong. The correct case from whence the 2016 CRSR document and fn. 61 derived the "unquestionable that…" verbiage in the text accompanying the footnote comes from a different case, *Levy v. McCartee*, 6 Pet. 102, 31 U.S. 102 (1832). That erroneous citation may be seen as a simple, non-substantive one, since the quote itself is correctly reproduced, but simply erroneously attributed. It does, however, suggest a certain inattention to detail.

Second, however, as is true with regard to the misrepresentation of what the dissenters actually said in *Wong Kim Ark*, discussed above, by mixing and matching, cutting and pasting, bobbing and weaving through the words from three different cases – *Wong Kim Ark*; *Somerville*; and *McCartee* – the 2016 CRSR footnote 61 concocts a sentence that appears nowhere in *any* of the decisions. That sentence, suggesting that the Court in *Wong Kim Ark* had recognized it as being "unquestionable that" (*McCartee*) such rule of "natural born citizenship [*sic*]" purportedly "of course "extended to the Colonies…." (*Somerville and McCartee*), creates a false impression.

Specifically, the impression left – after the dizziness passes – is that the Supreme Court, in its decisions in both *Wong Kim Ark* and *Somerville* (not to mention *McCartee*), has

somehow, *sub silentio* (*i.e.*, silently, "between-the-lines," and without notice), adopted the neologism "natural born citizenship" as being the equivalent of a "natural born Citizen" as the term was intended to be understood by the Founders in Art. 2, § 1, Cl. 5 of the Constitution.

Rest assured, P&E readers, this has not happened. Again, there is not a single U.S. Supreme Court case that recognizes the term "natural born citizenship" and, indeed, not a single one that even mentions the term in the text of an opinion, a quote or a footnote. Nor does the term appear anywhere in the Constitution or in any of the 27 Amendments to the Constitution.

And while there is but a single federal Court of Appeals decision using the term (*see In re Ballentine*, 611 Fed. Appx. 64 at 64 (3rd Cir. 2015)), the term is merely noted in a quote of what a petitioner was seeking in a mandamus action (which petition was denied). Other district court cases similarly mention the term in reference to a plaintiff's claims or allegations, but never in a substantive context. *See*, *e.g.*, *Liberty Legal Foundation v. National Democratic Party of the USA, Inc.*, 868 F.Supp.2d 734, 741 (D. Tenn. 2012).

Recalling the dictionary definition of a "neologism," it may have meaning in the mind of the author of the 2016 CRSR, but as a substantive term capable of being properly used as a synonym for the actual words of the Constitution, it is "Greek" to the Justices of the Supreme Court and, apparently, all judges of the United States Court of Appeals and most judges of the U.S. District Courts. Accordingly, suffice it to say that the 2016 CRSR's misrepresentations regarding both the majority and dissenting opinions in the *Wong Kim Ark* case render its reliance on the case for its conclusions – to vastly understate the matter – problematic. Stated otherwise, *Falsus in uno, falsus in omnibus.*

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