Of Presidential Eligibility, Doubling Down and Linguistic Torts, Part 1

WHY DOES "NATIVE BORN" NOW EQUATE TO "NATURAL BORN?"

by Joseph DeMaio, ©2012


LE DROIT
DES GENS.
OU
PRINCIPES DE LA
LOI NATURELLE,
Appliqués à la conduite & aux affaires des Nations & des Souverains.
PAR M. DE VATTEL.
TOME I.
A LONDRES.
M. DCC. LVIII.

The publisher of "The Law of Nations" sent Benjamin Franklin three copies Vattel's work, which Franklin stated in 1775 was consulted frequently by the Congress

(Feb. 20, 2012) — So many issues, so little time.

Introduction

With apologies to readers, of necessity this presentation is lengthy. It is composed in response to an even longer November 14, 2011 formal "Report" issued by the Congressional Research Service ("CRS") purporting to buttress (again) Barack Hussein Obama's claim of eligibility to the presidency as a "natural born Citizen" under the Constitution.

Moreover, why, after having issued two other CRS "Memoranda" reports to Congress in 2009 and 2010, and why at this juncture after the incessant drumbeat of the mainstream media that anyone who would dare even *hint* (more on "hints" later…) that the Emperor has no clothes must be lampooned as a "birther," the CRS – or someone – deemed yet another report necessary remains a mystery. Who asked for this report? Who authored or contributed to it? Time and other constraints preclude the dissection of all the errors

and misrepresentations presented in the November 14, 2011 CRS Report or a review of the original quotes therein where an ellipsis omission appears, but the more prominent and egregious ones mandate a response.

As a preliminary matter, it must be noted that the CRS is an appendage of the Library of Congress. It states as its mission the providing to Congress of access to "the nation's best thinking" and the production of "product" aimed at answering important questions in the form of papers which are "authoritative, confidential, objective and nonpartisan."

On all points, lamentably, the November 14, 2011 CRS formal Report (hereinafter "CRSR") not only falls far short of meeting the CRS mission statement; it "doubles down" on the deceptions of its prior "products" on the issue.

Chief among those deceptions is the still unexplained manipulation by ellipsis of the language – and thus the meaning – of the U.S. Supreme Court's decision in *Perkins v. Elg*, 307 U.S. 325 (1939). That decision was first included in a CRS Memo to Congress dated April 3, 2009 and resided at the core of the memo's suggestion that the eligibility issue as to Mr. Obama has already been essentially settled. That linguistic tort committed in the first CRS Memo is addressed here. There has been no explanation for the ellipsis manipulation yet forthcoming. And as for the claim that the constitutional eligibility issue as to the president is settled: respectfully, no, it isn't.

Similarly, the CRSR's disingenuous blurring of the distinction between that which constitutes the controlling "holding" of a case, and that which constitutes mere "dictum" in a case, is elevated to an art form in its discussion of another Supreme Court decision, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). In so doing, the CRSR seeks to paint the dissenting opinion in that case as actually acknowledging that the *holding* of the majority's opinion – further mischaracterized as being "controlling" – stands for the proposition that anyone born "in" the United States and "subject to its jurisdiction" is constitutionally eligible to the presidency. And the dismissive treatment of the Supreme Court's decision in *Minor v. Happersett*, 88 U.S. 162 (1874) as dictum on the issue, while lionizing *Wong Kim Ark*, is beyond hypocritical.

On the other hand, it must be acknowledged by anyone objectively analyzing the issue that there exists a body of opinion out there – and not to be confused with specific controlling court "holdings" or undisputed, competent evidence – actually supporting the notion advocated by the November 14, 2011 CRS Report. The contention is that the term "natural born Citizen," as used and understood by the Founding Fathers when they included it in the Constitution, was intended to include in the category of people as being eligible candidates for the presidency not only Mr. Obama, but virtually anyone born in the United States, without regard to the citizenship status of the parents and whether they were here lawfully or not. This claim is based, improperly, on dictum in the *Wong Kim Ark* case, a decision having absolutely *nothing* to do with presidential eligibility under the Constitution.

Unless and until there is either a final decision of the U.S. Supreme Court directly on the issue or there is an amendment of some sort to Article 2, Section 1, Clause 5 of the Constitution, the proffering of a seemingly reverse-engineered Congressional Research Service report claiming to put the dispute "to rest" will not suffice to end the controversy. Instead, it will merely add fuel to the bonfire. However, since that which might actually end the controversy – transparency and candor from Mr. Obama – has neither been in the past forthcoming nor anticipated to emerge in the future, the debate will only continue, at least until November 6, 2012.

These issues have previously been addressed – again, not to be confused with "answered" or "resolved" – in two prior Congressional Research Service "memoranda." Each of these three CRS "products," all purportedly authored by the same lawyer, arrives at the same conclusion, *i.e.*, that one who is merely born "in" the United States, and "subject to" its jurisdiction (thereby excluding children born of diplomats or hostile occupying forces) is a "natural born Citizen" eligible to the presidency under Art. 2, Sec. 1, Cl. 5 of the Constitution.

Moreover, since under the party line, Mr. Obama was born, purportedly, in Honolulu, Hawaii, in 1961 – a fact not yet established by competent evidence, discussed *post* – it matters not that his father, Barack Obama, Sr., was never an American or U.S citizen, but was instead a "Kenyan" or, more precisely, a natural born British subject and citizen of the British East African Protectorate, as that geographic region was known prior to 1963. Under British law then in effect when the senior Obama was born in Kenya Colony, British East African Protectorate (1936), he was, at minimum, a "natural born British subject" under the British Status of Aliens Act of 1914.

That being the case, and since his status as such continued to obtain in 1961, children born to him were also, under the law as amended by the British Nationality and Status of Aliens Act of 1943, natural born British subjects if their births were "registered at a consulate of His Majesty." Whether such a registration ever took place is a matter beyond the scope of this essay, yet the question continues to cloud the legitimacy of the claim that Mr. Obama is a natural born Citizen *of the United States* eligible under the Constitution.

Utilizing an extrapolation of dicta in one U.S. Supreme Court case and the actual alteration of the words of another U.S. Supreme Court case, the CRSR concludes and posits that Mr. Obama, purportedly being a *native* born citizen, is thereby also a natural born Citizen within the contemplation of the Founding Fathers and conflates the two terms into one. Thus, so goes the CRSR argument, he is eligible to the presidency within the meaning of Art. 2, Sec. 1, Cl. 5 of the Constitution.

Respectfully, the jury – and in addition, by the way, the United States Supreme Court – is still out on that claim. Not only has no U.S. Supreme Court case directly addressed the issue of the "natural born Citizen" eligibility clause in the context of a sitting president, despite a variety of cases seeking to bring the issue before the Court as to Mr. Obama and

many of which are chronicled in the CRSR, the Court has not yet accepted jurisdiction over a case directly raising the issue.

The conclusions of the first two CRS "Memos" noted above have been questioned in Post & Email articles here, Part 1; here, Part 2; and here, Part 3, with follow-up posts here, here, and here.

Clearly, this is a ***lot*** of reading and, at times, extremely convoluted reading at that. However, in order to fully understand what is going on here and what the stakes are – not to mention being better briefed for what follows in this article – readers are strongly encouraged to read each of these prior posts, including the posts of the CRS memos and the more recent CRS Report, before continuing to read this article.

With any luck, an answer will emerge well before November 6, 2012, when apparently Mr. Obama will again ask the nation to install him as president for another term. We shall then see whether, in fact, this remains a nation of laws and not men or whether the inverse rule will prevail for another four years… assuming, of course, the nation survives that long.

Executive Summary

This summary too is long, but for the same reasons, necessary.

Although the November 14, 2011 CRSR makes the best case it can – in 37,000 words, 233 footnotes and 80 some-odd ellipses from quoted materials – to advocate that Mr. Obama is constitutionally eligible to the presidency, it misleads and fails to persuade. Unsurprisingly, the CRSR reprises the arguments – as well as the deceptions – of two prior CRS documents on the issue, one dated April 3, 2009, and a second one dated March 18, 2010. Both memos were authored by one Jack Maskell, an attorney within the American Law Division of the CRS, and also identified as the author of the new, November 14, 2011 CRSR.

All three of these CRS "products" posit that Barack Hussein Obama was and is eligible to the presidency under Art. 2, Sec. 1, Cl. 5 of the Constitution as being, purportedly, a "natural born Citizen" as that term was understood by the Founders when they inserted it into the Constitution. The CRSR reiterates the rather simplistic argument that if a person is merely born "in" the United States and "subject to its jurisdiction," (*i.e.*, not the child of a foreign diplomat or a member of a hostile occupying force), that fact alone, regardless of the citizenship status of the person's parents, renders him/her not only a "native born citizen" under the 14th Amendment, but also a "natural born Citizen" under Art. 2, Sec. 1, Cl. 5 of the Constitution eligible to the presidency. Respectfully, the CRSR's reasoning is flawed.

Bolstering its case law citations from the prior memoranda, the CRSR adds several more, but none of which are decisions of the United States Supreme Court on the precise two questions presented. Those questions are: (1) what was the intent – not merely the

"understanding" – of the Founders when they added the "natural born Citizen" eligibility requirement to the Constitution; and (2) is that understanding of the Founders consistent with an intent to extend the "natural born Citizen" clause to include persons who only may be "native born Citizens" under the 14th Amendment, regardless of the citizenship status of the parents at the time of their birth?

By repeating, without explanation or apology, the altered version of the Supreme Court's decision in the *Elg* case it previously offered up in support of its conclusions; by intimating that the Court's discussion in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) of what constituted a "natural born citizen" in the context of a case addressing the 14th Amendment and ***wholly*** unrelated to Art. 2, Sec. 1, Cl. 5 is anything other than dictum; and by dismissing with clever lexicography the language of Chapter 19, § 212 of Emmerich de Vattel's *Law of Nations* as related to the Founding Fathers' intent when including in the Constitution the "natural born Citizen" clause, the CRSR does a disservice to the Congress, as well as to the nation.

With respect to the repeated deception embodied in the CRSR regarding the *Elg* decision and as described in detail here (Part 2), by altering the words of the opinion and then passing them off as an accurate quote, the CRSR compounds the deception of the prior CRS Memo of April 3, 2009. It does this cleverly, by intimation, stating that the Supreme Court had "explained," rather than via a "holding" – thus preserving for itself and its author a small measure of "wiggle room" – that persons born here, even of alien parents and/or possessed of "dual citizenship" could "… become President of the United States." That portrayal of *Elg* by the CRSR is, to vastly and wildly understate the matter, inaccurate.

In addition to the debate over Mr. Obama's eligibility – or lack thereof – under Art. 2, Sec. 1, Cl. 5 of the Constitution, the "natural born Citizen" clause, there remains the completely separate and independent question of the authenticity of the document which he claims is a certified copy of his original Hawaiian birth certificate. Although he and his enablers on April 27, 2011 posted to the Internet – including on the official White House website – an image of what is claimed to be his "original birth certificate," many computer forensic experts who have examined the image have concluded that it is a fraud, and a poorly concocted one at that.

Moreover, while the CRSR attempts to ratify this action as proving his eligibility, citing (again) another woefully flawed federal district court case in support, *Liacakos v. Kennedy*, 195 F. Supp. 630 (D.D.C. 1961), the fact remains that the two (2) certified copies of what is claimed to be his "original birth certificate" from the Hawaii Department of Health have not been produced for independent forensic examination. The originals of the two certified copies which Mr. Obama directed his lawyers at the law firm Perkins Coie to obtain in April 2011, remain secreted from public view and examination. Why? A telling commentary on these circumstances was posted at The Post & Email last June. The CRSR ignores these facts.

In addition, it is both ironic and fatal to the logic of the CRSR to contend, on the one hand, that the "common law of England" as articulated by the English jurist and politician, Sir William Blackstone, must control the determination of what the Founding Fathers understood the term "natural born Citizen" to mean, while simultaneously ignoring altogether another of Blackstone's bedrock "common law" principles, the "Best Evidence Rule." The best evidence of the original of a written document is the document itself, not a paper copy of the document or a manipulated image of it posted to the Internet.

Finally, the timing of the release of the CRSR merits examination, as does the audience to which it may have been disseminated. Specifically, the release comes at a time when it is unlikely that the U.S. Supreme Court – even if otherwise inclined, which Justice Clarence Thomas suggests it is not – would have time to accept jurisdiction over and render a decision on the constitutional eligibility issue before November 6, 2012, now less than 9 months away.

In addition, to the extent that other individuals having presidential aspirations or being "rumored" as being possessed of "presidential or vice-presidential timber" may also have eligibility issues impacting them – including Florida Senator Marco Rubio and/or Louisiana Governor Bobby Jindal – the release of the report might well have the effect of fortifying in those persons' minds their belief that, in fact, they are constitutionally eligible as "natural born Citizens," chilling any complaint by them as to the issue of Mr. Obama's eligibility.

The Starting Point

The starting point for the discussion, of course, must be the original words of Article 2, Section 1, Clause 5 (not "4," as some revisionist courts have attempted to tutor us, the ill-informed) of the Constitution:

"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; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been Fourteen Years a Resident within the United States."

Not a word of this provision has changed since 1787, and yet the debate over what it means continues to rage. The CRSR, of course, represents the latest effort to shore up the claim – despite mounting evidence to the contrary – that the term "natural born Citizen" under Art. 2, Sec. 1, Cl. 5 of the Constitution was by the Founders intended to mean the same thing as "citizen" under the 14th Amendment, not enacted until 1868, and thus no further examination, inquiry or recourse in the courts or by way of constitutional amendment is needed. Thus far, that tactic has been amazingly successful.

This is simply another way of asserting that no constitutional amendment is needed or warranted and that no decision of the U.S. Supreme Court on the merits of the issue is required to either cement into place Mr. Obama's purported eligibility in the past or to lay

the groundwork for intimidating any U.S. Senator to challenge the counting of the Electoral College votes in the event that the electorate in November 2012 is, once again, asleep at the switch. Stated otherwise, according to the CRSR, the matter is "settled." Respectfully, no, it is not.

The flaw in the CRSR's argument that it is "all over but the shouting" is that scores of authorities upon which the CRSR relies for its conclusion concede that *because* the matter is *not* definitively "settled" either by a Supreme Court ruling on the merits or by an amendment of the Constitution, the issue remains alive and *unresolved*. One need look no further than footnote 13 of the CRSR (*see* CRSR at 3) and examine a few of the titles of various periodical entries and law review articles to confirm the continued doubt: Jill Pryor, *The Natural Born Citizen Clause and Presidential Eligibility: An Approach to Resolving* ***Two Hundred Years of Uncertainty***, 97 YALE L.J. 881 (1988); Charles Gordon, *Who Can Be President of the United States:* ***The Unresolved Enigma***, 28 Md. L. Rev. 1 (1968).

Titles such as these do not convey a sense of "finality," "resolution" or "certainty." And while many of these articles would support the conclusion reached by the CRSR, there is among them a consensus that the way to "fix" the perceived problem is to either (1) await a dispositive Supreme Court opinion on the issue or, (2) as has happened 27 times since 1787, enact an amendment to the Constitution.

Indeed, some sources cited in the CRSR advocate allowing naturalized citizens to be eligible by eliminating the natural born Citizen eligibility clause altogether: J. Michael Medina, *The Presidential Qualification Clause in the Bicentennial Year:* ***The Need to Eliminate the Natural Born Citizen Requirement***, XII OKLA. CITY UNIV. L. R. 253, 268 (1987); Akil Amar, *Natural Born Killjoy,* ***Why the Constitution Won't Let Immigrants Run for President, and Why That Should Change***, LEGAL AFFAIRS, 16, 17 (Mar.-Apr. 2004). This last source posits the interesting notion that those of the "enlightened" and "politically correct" 21st century know better than the Founders what the governing principles of the nation at its inception were and what they should be interpreted to mean today.

Unlike the Founders, however, who contemplated the process of amendments to the Constitution as time and exigencies demanded, today's elitist law professors, non-judicial "constitutional law experts" and Obama sycophants simply contend that the Founders could not *possibly* have intended what Monsieur de Vattel argued regarding what, exactly, constituted a "natural born Citizen." Thus, only *their* different views, purportedly grounded in the "common law" of England as pronounced by Sir William Blackstone, could possibly be correct or what could possibly have motivated the Founders. That aside, all of these "learned authorities" acknowledge that the question remains and that the only sure way of resolving the issue is through a binding U.S. Supreme Court decision or a constitutional amendment.

Even if one accepts the premise that the "natural born Citizen" eligibility clause is "bad" and has outlived it usefulness because it perpetuates a now-unacceptable and

discriminatory impediment to access to the presidency, the proper mode of changing a "bad" provision in the Constitution, at least while the rule of law prevails, is to repeal it or amend it, not vilify it or ignore it or argue that is says one thing when it was intended by the Founders to mean another thing. The true peril presented by the CRSR lies in its thinly-concealed objective of convincing those who read it without *analyzing* it will conclude that the issue of Mr. Obama's eligibility has already been all but confirmed and that any further discussion of the issue would be futile. And with Senators and Representatives alike admitting that they don't even read the legislation upon which they vote, the CRSR's objective may have already been met. With respect, however, the CRSR's objective is disingenuous.

The CRSR takes these ideas and turns them on their head by contending that, since the clear weight of authority, "controlling decisions" and consensus of the "experts" is that the definition of "natural born citizen" it favors, based on the "common law" of England, *must* have been what the Founders had in mind, there should be no need for a Supreme Court decision on the point or constitutional amendment. Just agree with the *ipse dixit* ("it is so because I say it is so") pronouncements of the CRSR and all will be well. Move along… nothing more to see here.

Respectfully, there is a *lot* more to be seen and analyzed.