Of Presidential Eligibility, Doubling Down and Linguistic Torts, Part 3

"DICTA…PURE AND SIMPLE"

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(Feb. 24, 2012) — [**Editor's Note:** This scholarly essay is Part 3 of 4 by Joseph DeMaio discussing how the CRS memos, authored by Jack Maskell of the Congressional Research Service, and in particular, the third memo (CRSR) obscure information from the reader indicating that jus soli, or birth of the soil, is not the only factor in determining the definition of a "natural born Citizen." Part 1 discusses the right of *jus soli,* upon which Maskell relied to determine that Barack Hussein Obama is eligible for the presidency in all three of his memoranda, as well as the difference between "dicta" and "holding" in regard to case law. Part 2 provides an in-depth historical analysis, using the original French text and English translations, of the Swiss statesman Emmerich de Vattel's work and its influence on the Founders both before and after the U.S. Constitution was written, particularly as it impacted the intention of the "natural born Citizen" requirement contained in Article II, Section 1, clause 5.

In Part 3 below, DeMaio discusses three U.S. Supreme Court cases which decided issues of U.S. citizenship as well as several contemporary cases filed in response to the claim that Barack Hussein Obama II does not meet the definition in order to serve as President of the United States and Commander-in-Chief of the military. The term "dicta" becomes key in DeMaio's analysis of the three U.S. Supreme Court cases and how Maskell's memos attempt to give the reader the impression that "native born" or "citizen" equates to "natural born Citizen."

The Core Cases

Turning to the case law decisions relied upon in the CRSR, although the report cites and discusses dozens of case law decisions – virtually all of them, in one way or another, portrayed as supporting the CRSR conclusions and rejecting any contrary interpretations – the only cases that really matter are those emanating from the United States Supreme

Court. While decisions from federal district and appeals courts, state chancery courts and state courts of appellate jurisdiction may be of anecdotal, passing interest, they do not and *cannot* supplant the controlling, binding holdings, nor the precedential import and weight, of Supreme Court opinions and decisions on the merits interpreting the Constitution. This has been true since the time of *Marbury v. Madison*, 1 Cranch 137 (1803).

Accordingly, it is submitted that there are three, and *only* three U.S. Supreme Court decisions (thus far) to be properly addressed in connection with the issue of presidential eligibility under Art. 2, Sec. 1, Cl. 5 of the Constitution. The author(s) of the CRSR might dispute this, but for present purposes, that dispute is of no moment. The cases are: (1) *Minor v. Happersett*, 88 U.S. 162 (1875); (2) *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); and (3) *Perkins v. Elg*, 307 U.S. 325 (1939). The CRSR and others may be expected to contend that many more than these three enter into the analysis, but few will dispute that these cases are central to a proper analysis of the issues. Let us consider them in chronological order.

A. *Minor v. Happersett*, 88 U.S. 162 (1875)

Minor v. Happersett, 88 U.S. 162 (1875) involved the question of whether a Missouri constitutional provision which limited the right to vote to male citizens denied equal protection of the laws to female citizens otherwise eligible to vote under the 14th Amendment. While nothing in the Constitution precluded females from voting, certain states, including Missouri, determined to limit the right of suffrage to males. Other states did not so restrict the right to vote, thus allowing all qualified citizens, male or female, to vote. The Court in *Happersett* upheld the Missouri constitution and law, finding no violation of the 14th Amendment.

The decision in *Minor* has never been overruled by the Supreme Court and the case stands today for the same proposition it did in 1874. What happened in the meantime, of course, is that the decision was *abrogated* – that is to say, rendered of no further force, effect or precedential weight – through passage and ratification in 1920 of the 19th Amendment, guaranteeing the right to vote to otherwise qualified females throughout the United States. Stated otherwise, between 1874 and 1920 – a period of 46 years – sufficient sentiment developed across the nation to ensure via a constitutional amendment that *all* qualified females nationwide, rather than in just some states, would be eligible to vote. So, there you have it again: that pesky old "amendment" thing.

This is an important point having relevance to the current CRSR imbroglio, because it underscores the fact that, if there is a perceived "wrong" existing in the Constitution or the Amendments to the Constitution, the proper "remedy" is pursuit of an amendment to the Constitution and/or existing Amendment. Indeed, this is precisely what many of the authorities relied upon in the CRSR acknowledge (*see* CRSR at 3, n. 13) and is exactly what happened, for example, when the 21st Amendment repealed, in 1933, the 18th Amendment, adopted in 1919, relating to the sale and transport of alcoholic beverages. While the Constitution recognizes the amendment process to accommodate changing times and needs, the CRSR and those who support its extra-constitutional approach

seemingly prefer a "quicker" solution based on *ipse dixit*. There is, after all, another general election coming up….

Returning to the decision in *Happersett,* in the course of reaching its conclusion upholding Missouri's voting restriction, the Court articulated the now-famous quote frequently cited as proof that the Court (and inferentially, the Founders) have acknowledged that a "natural born Citizen" is one born of two citizen parents, consistent with the teachings of de Vattel in § 212 of *The Law of Nations*.

The Court stated, 88 U.S. at 167-168: "The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common-law, with the nomenclature of which the framers of the Constitution were familiar, *it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also*. These were natives, or *natural-born citizens*, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. *As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts.* It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens." (Emphasis added).

The central point to be remembered, however, is that the antecedent language to the words "these doubts" in the preceding quote is to the doubts surrounding whether, as some would contend (including the CRSR), persons born in the United States of non-U.S. citizen or foreign parents could legitimately be deemed "natural born citizens." The Court acknowledged that there has *never* been any doubt that persons born in the United States to parents who were at the time of birth citizens themselves were "natural born Citizens."

By use of the term "never," it may reasonably be assumed that the Court was including from the time of the inception of the nation and the adoption of the Constitution, 1787, until 1875, the year it decided *Happersett*. And if that be true, there should be little dispute that the Founders also understood that there was no "doubt" as to the proposition that a person born in the United States of citizen parents was known as a "natural born citizen." Any "doubt" that otherwise existed, therefore, related to whether children merely *born* in the United States could nonetheless be deemed "natural born citizens" "… without reference to the citizenship of their parents," a decidedly *different* issue.

It must also be recalled that the Court in *Happersett* did not actually rule that "Mrs. Virginia Minor, a ***native born***, free, white citizen of the United States…." (*see* 88 U.S. at 163, emphasis added) was ***also*** a "natural born citizen," because the issue presented was ***only*** whether she was a "citizen" for 14th Amendment purposes, and ***not*** whether she was also a "natural born citizen" for Art. 2, Sec. 1, Cl. 5 purposes. This, of course, the CRSR labels as "dictum." *See* CRSR at 28-29.

On this point, it must be noted that 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 then being decided before it. *See* Black's Law Dictionary (2009 Ed.). Even the CRSR notes that "dictum" refers to language or discussions by a court in an opinion "…not directly relevant to or part of the holding in the case." *See* CRSR at 29. Thus, "dictum" constitutes no part of the "holding" or "core ruling" of a court and, accordingly, any attempts to portray as binding or precedential this species of discussion irrelevant or immaterial to the holding or ruling of a case are disingenuous. As the Supreme Court has correctly noted: "Dictum settles nothing, *even in the court that utters it.*" (Emphasis added). *See*, *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 351, n. 12. (2005).

Whether or not and to what extent the Court's statement that there has never been a doubt that children born in the United States of U.S. citizens were "natural born citizens" can be deemed "dictum" thus remains the subject of debate. The issue of "dictum" is hereafter addressed in more detail in connection with the Supreme Court's decision in the *Wong Kim Ark* case. While the Court in *Happersett* did state that there were "doubts," those "doubts" related to the issue of whether children born in the United States of foreign or non-U.S. citizen parents could properly be recognized as natural born citizens. The "doubts" identified by the Court did ***not*** relate to the separate recognition that the term "natural born citizen" had ***always*** included persons born in the United States to parents who were at the time of the birth U.S. citizens. As to ***that*** category of citizens, there had "never" been any doubt that they were "natural born citizens."

Accordingly, the CRSR's dismissal of the *entirety* of the Court's statement in this regard as dictum is plainly ill-founded. *See* CRSR at 28-29. While an argument can certainly be made that the Court's statement about the topic of its "doubts" was dictum, an equally persuasive and more rational argument can be made that the *other* portion of the statement – as to which there had "never" been any doubts – was ***not*** dictum.

Accordingly, when the CRSR contends that the Court in *Wong Kim Ark* "answered" the "doubts" identified in *Happersett* (*see* CRSR at 29), it misrepresents what happened. First, as stated, the issue as to which "doubts" existed was that of entitlement to "natural born citizen" status of persons born here to non-U.S. citizen parents. The Court in *Wong Kim Ark* held *only* that the person at issue there – Wong Kim Ark – was a ***native born citizen*** without regard to the citizenship of his parents**.** It did ***not*** hold that he was a "natural born citizen" – wholly apart from the citizenship status of his parents – because the case involved ***only*** whether he was a "citizen" under the 14th Amendment. And the *Wong Kim Ark* Court most certainly did not hold that he was a "natural born citizen" within the meaning of Art. 2, Sec. 1, Cl. 5 of the Constitution.

Thus, by attempting to blur the distinction between a "native born citizen" and a "natural born citizen" and conflating the two into one by contending that *Wong Kim Ark* "answered" – and by way of dictum, no less – the "doubts" surrounding a different issue, the CRSR demonstrates one of two things: (1) its arguments are fatally flawed, or (2) its

deceit has been unmasked. These are the only two alternative interpretations of what we now see in the "product" of "the nation's best thinking."

B. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898)

One of the core U.S. Supreme Court cases consistently relied upon by the CRSR is *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). The reliance is profoundly misplaced. The *sole* question presented in that case was whether a person who was born in San Francisco to parents who, although residing in the United States, were subjects *of* the Emperor of China and citizens *of* China and not the United States, was himself a "citizen" of the United States *by virtue of the 14th Amendment.* That is the *totality* of the question and issue presented to the Supreme Court, notwithstanding the CRSR's attempts to morph the case into the "final say" on the "natural born Citizen" issue.

Indeed, the Court itself circumscribes the parameters of its decision by framing the issue thusly: "The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States *by virtue of the first clause of the [F]ourteenth [A]mendment of the [C]onstitution*." (Emphasis and capitalization added). And while a majority of the Court in the split decision (6-2, with one Justice not participating) held that such a person was, under the 14th Amendment, a U.S. "citizen" at birth, it did *not* – as correctly noted by the dissenting Justices – hold that such a person was a "natural born Citizen" eligible to the presidency.

All…repeat, ***all*** of the remaining discussion by the Court, including 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 CRSR. That is because, to quote one of the prime authorities upon which the 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.

As previously noted, 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 and 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 discussion irrelevant or immaterial to the holding or ruling of a case are disingenuous. To reiterate the Supreme Court's succinct views on the matter in *Jama*: "Dictum settles nothing, *even in the court that utters it.*" (Emphasis added).

Against this backdrop, after noting that both the majority and dissenting opinions in *Wong Kim Ark* constitute dictum with regard to any proper analysis of the presidential eligibility clause, Professor Gordon then states: "[T]he majority's opinion [in *Wong Kim Ark*] *did not discuss the presidential qualification [sic] clause of the Constitution and is not necessarily relevant to its interpretation*, except possibly by inference. (fn. 138)." (Emphasis added) Footnote 138 to that statement provides in elaboration: "All authorities agree that the terms "native" and "natural-born" both refer to citizenship acquired at the time of birth. [citations omitted]." *See* Gordon, *id.*

There is nothing incompatible between positing that *both* a "native born citizen" under the 14th Amendment and a "natural born Citizen" under the presidential eligibility clause – Art. 2, Sec. 1, Cl. 5 – derive their baseline "citizen" status as a result of being born "in" the United States. This is self-evident. However, as pointed out here), natural born citizens, at least under a "de Vattel analysis," constitute a smaller circle of citizens – those born to parents who are *at the time of birth* also U.S. citizens – within the larger circle of *native born* citizens, also born here, but without regard to the U.S. or foreign citizenship status of the parents under *Wong Kim Ark's* interpretation of the 14th Amendment.

Stated otherwise, all natural born citizens are also native born citizens, but not all native born citizens are natural born citizens. Consistent with its prior tactics in the CRS Memos of April 3, 2009 and March 18, 2010, the November 14, 2011 CRSR, not surprisingly, disregards this fact and conflates the two classes – "native born" and "natural born" – into a single, "one-size-fits-all" generic citizen, eligible to the presidency and regardless of the citizenship status of the parents.

Thus, under the "logic" of the CRSR, had Osama bin Laden been born in, say, Honolulu to his vacationing Saudi national parents – Mohammed bin Awad bin Laden and his tenth wife, Hamida al-Attas – the "scholars," "experts" and "relevant case law" upon which the CRSR relies seemingly would concur that, if he had also resided here for 14 years and was at least 35 years old, he would be a "natural born Citizen" as contemplated by the Founders and would thus be eligible to the presidency.

With due respect, a fairly compelling argument can be made – and documented – that this is a result the Founding Fathers decidedly did ***not*** have in mind. Indeed, the record plainly discloses that such a result was one they intended specifically to ***foreclose*** by setting a higher presidential eligibility standard – one recognizing and requiring birth in the United States to U.S. citizen parents as articulated by de Vattel – rather than the lower "common law" standard now advocated by the CRSR. Mercifully, the bin Laden hypothetical never came to pass, however, because he "expired" in 2011 as a result of what Wikipedia euphemistically describes as "ballistic trauma."

But then the CRSR – or Mr. Maskell or whoever else may have contributed in "collaborative assistance" to the end Congressional Research Service "product" – engages in yet another unprincipled deception, tucked away in footnote 215 of the report as if to camouflage its lethality, not unlike a landmine. Moreover, the deception is one

equally, if not more misleading, than the "linguistic tort" committed through the ellipsis weaponry wielded by the CRS in its manipulation of the language in the Supreme Court's *Elg* decision, already mentioned, but discussed hereafter. And while the CRSR preserves the "wiggle room" it needs by describing the language it claims (wrongly) comes from *Elg* as being what the Court "explains" or "states," as opposed to "ruled" or "held," no such similar literary license or "fudging of words" can be claimed in footnote 215 of the CRSR.

The linguistic landmine is this: at footnote 215 of the CRSR (*see* CRSR at 47), and addressing the discussion in the *Wong Kim Ark* dissent, the CRSR states: "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)." (Emphasis added).

The trouble with this statement – and the deception the CRSR embodies therein by characterizing the majority decision as "*controlling*" on the point – is that it is ***not*** what the dissenting opinion 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: "Considering the circumstances surrounding the framing of the [C]onstitution, *I submit that it is unreasonable to conclude that 'naturalborn 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." *See Wong Kim Ark*, 169 U.S. at 715.

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 CRSR 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. Rather, the dissent was merely stating that, given the backdrop and "circumstances surrounding the framing of the [C]onstitution…," it was submitted as being *unreasonable* to conclude that the Founders intended that *any* "citizen" *other* than a "natural born Citizen," 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, were the functional equivalent of acknowledging that the majority opinion was a "controlling decision" on the matter is beyond unprincipled. The *Wong Kim Ark* majority "controlling decision" related *exclusively* to citizenship under the 14th Amendment. It had nothing… repeat, *nothing* to do with the issue of presidential eligibility under Art 2, Sec. 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 authored the November 14, 2011 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 their own or their parental 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.

Accordingly, whether in the CRSR or in legal briefs filed by the de facto president's lawyers or in press releases spewing from the White House, whenever one encounters mention of the Supreme Court's decision in *Wong Kim Ark* or, for that matter, *Elg*, as supporting Mr. Obama's eligibility to the office he now "occupies," one should first suppress the impulse to laugh aloud, and then second, make sure they are registered to vote in November 2012, because the likelihood of a somnambulant Congress and/or judiciary doing anything meaningful about the ongoing usurpation seems to be, as they say, slim to none. This advice will also come in handy in a subsequent section during an examination of the Indiana Court of Appeals decision in *Ankeny v. Governor of State of Indiana,* 916 N.E.2d 678, 688 (Ind. App., 2009).

C. *Perkins v. Elg*, 307 U.S. 325 (1939)

Doubling down on the deception set forth in its prior April 3, 2009 CRS Memo, discussed in detail here (Part 2), the November 14, 2011 CRSR compounds the error of the prior memorandum by repeating the misrepresentation of what the actual holding in the *Elg* case was. As discussed above, the CRS Memo of April 3, 2009 substantively alters – by way of an ellipsis omission – the actual language of a quote set out by the Supreme Court in its decision in *Perkins v. Elg*, 307 U.S. 325 (1939), changing the import and basis of its holding.

As a result, unless one reads the original decision as written by the Supreme Court and printed in the official books, the April 3, 2009 CRS Memo makes it appear that the Court has addressed a fact situation where a person born in New York, "… even of alien parents…," (to use the April 3, 2009 CRS Memo's misrepresentation of the facts) would be a "natural born Citizen" eligible to the presidency. The problem is, however, that both of Marie Elg's parents were U.S. citizens at the time of her birth, thus making her a "natural born Citizen" within the contemplation of § 212 of de Vattel's work above-cited.

And yet, to accomplish the result seemingly sought and make use of the altered language of a U.S. Attorney General's letter elsewhere quoted by the Court, Marie Elg's parents would need to be foreigners and not U.S. citizens. Accordingly, both the prior April 3, 2009 Memo as well as the November 14, 2011 CRSR again resort to the Latin linguistic charade of "*ipse dixit:*" 'It is so because I say it is so." In support of that objective, both

memos offer up a substantively altered quote from a U.S. Attorney General's "letter of advice" (*In re Steinkauler*, 15 Op.Atty.Gen. 15 (1875)).

There, the U.S. Attorney General stated that a person born in New York to a father who had renounced his American citizenship was nonetheless a U.S. citizen eligible to the presidency. The ellipsis alteration, however, made it appear that the son was born at a time when the father was not a U.S. citizen when, in truth and in fact, the father was naturalized as a U.S. citizen one year *before* the son was born. Thus, contrary to the suggestion fashioned through the ellipsis that the son was born at a time when the father was a German citizen, the father at the time of the birth was instead a U.S. citizen, the father having renounced his American citizenship well *after* the birth of his son. Thus, for *that* reason alone, and consistent with a "de Vattel" analysis, Steinkauler the younger was a "natural born Citizen."

There is little question that Marie Elg was also a "natural born Citizen," but not as a consequence of being simply born in New York to "alien parents," as falsely claimed in the 2009 CRS Memo. To the contrary, she was a natural born citizen ***because*** her parents were both, at the time of her birth, naturalized U.S. citizens. These facts placed her squarely within the ambit of § 212 of de Vattel's *Law of Nations.* And yet, in order to take advantage of the "presidential eligibility" language extracted from *In re Steinkauler* and engrafted onto the present-day question as relating to Mr. Obama, Marie Elg's parents would need to be seen as foreigners at the time of her birth, as would need be the father of the son in the *Steinkauler* matter.

These linguistic arabesques as performed in the April 3, 2009 CRS Memo are replicated *verbatim* in the November 14, 2011 CRSR, with the exception that although there is no reference made to the April 3, 2009 CRS Memo, there is also no mention made of the fact that the prior memo erroneously characterized Marie Elg's parents as "aliens." The CRSR "finesses" this prior misrepresentation by simply not addressing it or discussing it, but it still finds time to repeat the alteration of the actual language of the Court in quoting from *In re Steinkauler.* The CRSR thus leaves the impression, as does the April 3, 2009 CRS Memo, that the Supreme Court has already "approved" of the concept that, as with the senior Steinkauler and his son, one's parents need not be themselves citizens for a person born here to be deemed a "natural born citizen" eligible to the presidency.

No such Supreme Court case has so held, and, indeed, only one case – *Minor v. Happersett*, discussed above – seems to have recognized (and whether such be deemed dictum or not) the de Vattel principle to the contrary. That principle, of course, is that for a person to be "of" the country as distinguished from merely being born "in" the country, the person's parents must also be, at the time of birth, citizens of that country. Otherwise, the child is, in de Vattel's words, "un étranger," or, in English, "a foreigner." Neither Marie Elg nor Steinkauler the younger were born to "alien parents," but were nonetheless "natural born citizens" under a de Vattel analysis. The two CRS "products" seeking to claim presidential eligibility for them despite their respective parents being, purportedly, foreigners are, to put the matter bluntly, flat wrong.

And yet, as even the CRSR concedes, no Supreme Court case has yet directly addressed the issue of whether one is a "natural born citizen" in the context of a challenge to the eligibility of one to be president. It would thus seem that the quickest way to settle, once and for all, the question would be for the Court to accept jurisdiction over a case raising the issue. But if, in fact, that is the question, one can only wonder why Mr. Obama has reportedly spent well over $1,000,000.00 on lawyers vigorously resisting even the *potential* for such a case reaching the High Court, at least while he occupies the White House.

More importantly, however, if, as the CRSR posits, the citizenship of one's parents at the time of birth is irrelevant to the "natural born Citizen" status of the person, then why was there a need in the first place to consciously and intentionally alter by ellipsis the *Steinkauler* quote set out in the *Elg* case? And why does the CRSR now double down on that original 2009 misrepresentation? We still await answers to these two simple questions, but are not holding our breath.

The Decisions in *Keyes* and *Ankeny*

To reiterate, only when the United States Supreme Court determines to take jurisdiction over a case directly implicating the issue of presidential eligibility under Art. 2, Sec. 1, Cl. 5 of the Constitution will these issues be finally "settled" or "resolved." Still, the CRSR takes great comfort in a 2009 decision of the Indiana Court of Appeals, *Ankeny v. Governor of State of Indiana,* 916 N.E.2d 678, 688 (Ind.App., 2009), rejecting the argument that Barack Hussein Obama is ineligible to the office he holds because he is, purportedly, not a "natural born Citizen." Because the case was determined on the affirmation of a motion to dismiss, however, the remarks of the court on the issue must also be deemed dictum and/or of no binding precedential weight on the issue, there having been no trial on the merits culminating in a decision on the merits. *See*, *e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

And while not cited in the CRSR, another decision coming after the issuance of the CRSR – *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011) – will likely appear in the next edition of the continuing series of CRS "products" being published as the 2012 presidential election campaign heats up. Like *Ankeny*, the *Drake* opinion was an affirmation of a dismissal of the plaintiffs' claim based on "lack of standing," and thus took place in the absence of a trial or evidentiary hearing culminating in a decision on the merits. To repeat the observations of the Supreme Court: "Dictum settles nothing, even in the court that utters it."

1. ***A. Ankeny v. Governor of State of Indiana,* 916 N.E.2d 678, 688 (Ind. App., 2009)**

In this case, the Indiana Court of Appeals affirmed the dismissal of the plaintiffs' claims, including the claim that Mr. Obama was not a natural born Citizen under Art. 2, Sec. 1, Cl. 5 of the Constitution, on the basis that the complaint "failed to state a claim upon which relief could be granted." Thus, because the matter never proceeded to a trial on the

merits, the court's abstract discussion of the eligibility issue is either dictum or, at minimum, of no precedential weight on the constitutional eligibility topic, even in Indiana. However, some analysis is warranted to put the decision into perspective.

In reaching its result, *i.e.*, that the lower court properly dismissed the complaint, the Indiana court citied and relied on the dictum of *Wong Kim Ark*, characterizing the case as "instructive." The court correctly noted that the Supreme Court there had "…held that Mr. Wong Kim Ark was a citizen of the United States 'at the time of his birth.' (footnote 14)." Footnote 14 in the *Ankeny* case reads as follows: "We note the fact that the Court in *Wong Kim Ark* did not actually pronounce the plaintiff a 'natural born Citizen' using the Constitution's Article II language *is immaterial*. For all but forty-four people in our nation's history (*the forty-four [p]residents*), the dichotomy between who is a natural born citizen and who is a naturalized citizen under the Fourteenth Amendment *is irrelevant.* The issue addressed in *Wong Kim Ark* was whether Mr. Wong Kim Ark was a citizen of the United States on the basis that he was born in the United States. *Wong Kim Ark*, 169 U.S. at 705, 18 S.Ct. at 478." (Emphasis added). *See Ankeny*, 916 N.E.2d at 688, n. 14.

It is difficult to decide where to begin the dissection of this decision and footnote 14, as the errors in it are so basic and perplexing. But let us try.

First, by acknowledging that a dichotomy exists *at all* between a "natural born citizen" and a "naturalized citizen under the Fourteenth Amendment" and that, in any event, the dichotomy *would* matter to the 44 persons who have been elected president, the footnote undercuts its own logic. Of *course* there is a dichotomy between those two species of citizens insofar a presidential eligibility is concerned: that is the crux of the entire question. While the dichotomy might be seen as irrelevant to anyone *other* than a presidential candidate, the distinction lies at the core of who can, and who cannot, properly lay claim to status as a "natural born Citizen" for Art. 2, Sec. 1, Cl. 5 purposes.

Second, and even more importantly, the footnote profoundly misapprehends the nature of the *native* born citizen and the *naturalized* citizen under the 14th Amendment, at least insofar as the decision in *Wong Kim Ark* is concerned. The 14th Amendment does *not* address who is, or is not, a "natural born citizen." It addresses *only* who may be a "citizen" of the United States, expressing the status in terms of either birth or naturalization, with all authorities and case law in agreement that *only* the natural born citizen is eligible to the presidency. *See Schneider v. Rusk*, 377 U.S. 163, 165 (1963). Moreover, all sides agree that no person who has been *naturalized* may ever be eligible. By conflating the dictum in *Wong Kim Ark* into a generalization that any "native born citizen" under the 14th Amendment is, *ipso facto*, a "natural born citizen" eligible to the presidency under Art. 2, Sec. 1, Cl. 5 of the Constitution, the *Ankeny* court inadvertently falls into the same trap which the CRSR seemingly intentionally sets.

Third, footnote 14 in *Ankeny* misstates the issue presented in *Wonk Kim Ark.* The issue was not only whether Wong Kim Ark was merely a "citizen" of the United States. The complete and solitary issue was whether, *under the 14th Amendment to the Constitution*,

Wonk Kim Ark was a citizen. The Court determined that he was, which has absolutely nothing to do with the separate issue of whether Barack Hussein Obama is constitutionally eligible as a natural born citizen. Moreover, any decision, such as *Ankeny*, which finds as "instructive" the dictum of another case stands, at minimum, on a weak intellectual foundation.

Again, since "dictum settles nothing, even in the court that utters it," if a different court utters the same dictum, but characterizes it as "holding," the latter court merely underscores the irrationality of its decision. Stated otherwise, apart from being dictum, the decision in *Ankeny* is simply wrong.

1. **B. *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011)**

On December 22, 2011 – perhaps as an early Christmas gift to the residents at 1600 Pennsylvania Avenue – the Clerk of the U.S. Court of Appeals for the Ninth Circuit filed for publication the decision in *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011). The opinion was written by the Hon. Harry Pregerson, a graduate of the University of California, Berkeley, Boalt Hall Law (1950) and appointed to the U.S. District Court for California by President Lyndon Johnson (1967) and elevated to the Ninth Circuit by President James Carter (1979). The other Ninth Circuit judges hearing the appeal were Judges Raymond Fisher, appointed by President Clinton (1999) and Marsha Berzon, also appointed by President Clinton (2000). It would be difficult, if not impossible (even in the Ninth Circuit) to assemble a more activist, liberal-tilting panel than this one.

Accordingly, one would need read no farther than the list of these judges on the first page of the opinion to form a *wild* guess as to what the decision would be: the dismissal for lack of "standing" in the plaintiffs – including one plaintiff who was a viable candidate for president in 2008, Alan Keyes – who challenged Barack Hussein Obama's eligibility was affirmed. The manner in which it was done, however, merely underscores, once again, why the Ninth Circuit Court of Appeals is by the U.S. Supreme Court the second most frequently reversed circuit in the entire federal Court of Appeals system, exceeded only by the Federal Circuit. As of January 2010, and over the preceding ten Supreme Court terms, the Ninth Circuit had a reversal rate of 80%.

That aside, Judge Pregerson (joined by Judges Fisher and Berzon) ruled that, although Mr. Keyes had at one time "competitive standing" (*i.e.*, standing to be in court as a candidate-competitor of then-Senator Barack Obama and possessed of the "potential loss of an election" to satisfy the "injury in fact" requirements for standing), that standing was lost as soon as Mr. Obama was sworn into office on January 20, 2009. Since Mr. Keyes' amended complaint was not filed until after that time (*i.e.*, July 14, 2009), he was at that time no longer a "candidate for the 2008 general election." Thus, Mr. Keyes was, as we say, "simply out of luck."

Amazing. The original complaint articulating the eligibility issue on behalf of a true candidate with standing – and also, parenthetically, possessed of status as a "natural born Citizen" born in New York to Allison and Gerthina Keyes – was filed on January 20,

2009, but after the swearing in of Mr. Obama. If filed prior to that time, the complaint would likely have been attacked as lacking "ripeness," another judicial mechanism designed to limit cases to actual "cases and controversies."

The court ruled, however, that since at the time the complaint was filed, Mr. Keyes was no longer a "candidate" who was then exposed to the "potential loss of an election," his "competitive standing" evaporated and with it, any hope of reaching the merits of the eligibility challenge. There are terms to describe reliance on such "Catch-22" games, but they are far too colloquial for posting here.

The court also affirmed the district court's determination that, questions of standing aside, the issues sought to be adjudicated and the remedy requested – a determination that Mr. Obama was ineligible to serve and an order requiring his removal from office – were "…beyond the power of the federal courts to grant, and implicate[d] the political question doctrine and separation of powers." If ever there were mechanisms more useful to a court than "standing" to decline to review and adjudicate a matter –or, as some might argue, to "evade the issue," – it is the "political question" and "separation of powers" doctrines. Unless, of course, there is a Republican in the White House. *See*, *e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974).

All of the foregoing aside, the court in *Drake* indulged in the same specious reliance on the dictum of *Wong Kim Ark* in reaching its result, "pure and simple." At footnote 2 of the decision (*see* 664 F.3d at 778), in referencing the Constitution's "natural born Citizen" eligibility clause, the court states: "The Fourteenth Amendment to the Constitution, Section 1 states, 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States….' In *United States v. Wong Kim Ark*, the Supreme Court held that the Citizenship Clause of the 14th Amendment conferred citizenship on anyone born in the United States, regardless of his parents' citizenship. 169 U.S. 649, 650 (1898)."

It is thus apparent that the court, much like the CRSR, was equating the dictum of *Wong Kim Ark* regarding "*native born citizens*" under the 14th Amendment into a "holding" that because *anyone* born in the United States was eligible to the presidency, Mr. Obama was also eligible. No trial; no evidentiary hearing; no testimony. Move along… nothing more to see here. To reiterate the point yet once more: "Dictum settles nothing, even in the court that utters it."

What's Good for the Common Law Goose Should be Good for the Common Law Gander

Independent of, but related to the "natural born Citizen" issue, is the lingering, festering, metastasizing issue of Barack Hussein Obama's original, long-form birth certificate. While Mr. Obama has claimed to have disclosed numerous "versions" of what are claimed to be his birth certificates – leaving unanswered the question: how many "versions" of a single original document can there be? –, the controversy continues to simmer. These questions include, for example, (1) where he was born, Hawaii, Kenya or

somewhere else; (2) if born in Hawaii, at what hospital; (3) if born in Hawaii, why are there "anomalies" between his purported "long-form birth certificate" "released" in April, 2011 and the "Nordyke Twins'" birth certificates; and (4) why has not the original document, presumably in his possession or the possession of his lawyers, been released for independent inspection?

Editor's Note: Part 4 and the conclusion of Mr. DeMaio's treatise on the "natural born Citizen" topic will be published in the near future.