The Elg Ellipsis, the Maskell Myth and Pi

"BUT NEVER AS TO THE FIRST"

by Joseph DeMaio, ©2013

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(Aug. 26, 2013) — In a recent Bruce Willis movie, one of the best lines is uttered by John Malkovich's character. In describing how a female spy (Catherine Zeta-Jones) was going to try to bamboozle Willis over some chardonnay, he notes: "She's gonna play him like a banjo at an Ozark hoedown." And so it is now that Jack Maskell, lawyer at the Congressional Research Service, continues to play the Congress and the mainstream media like a banjo at an outdoor bluegrass festival.

Here we are, a year and a half after the anomalies of the November 14, 2011 Congressional Research Service Report entitled "Qualifications for President and the 'Natural Born' Citizenship [*sic*] Eligibility Requirement" were revealed at The P&E, and still no plausible explanation for the "Elg ellipsis" has been forthcoming from the author, Mr. Maskell.

Through the ellipsis, the wording, and thus the purported holding of the Supreme Court decision in *Perkins v. Elg*, 307 U.S. 325 (1875), was substantively changed to support the conclusion that a person born here, even to alien parents, is constitutionally eligible to the presidency. Not so much.

In fact, the linguistic fog that has been generated to conceal the ellipsis, much less the overall eligibility issue, continues to thicken as rumors of certain Republican presidential candidates appear in the mainstream media and other Democrat propaganda outlets such as CNN http://www.cnn.com/2013/08/13/politics/natural-born-president/index.html

[**Editor's Note:** The above link no longer works in a general internet search, although the article was referenced on a blog on August 14, 2013. The Post & Email had referenced the same article and is able to access it by clicking the link in its own article.]

The CNN piece, penned by one Z. Byron Wolf and "analyzing" the constitutional eligibility of Senator Ted Cruz, is especially disingenuous. It begins by noting that the

issue of the "birth" of Monsieur obama (lower case "o" intentional) has "long been settled," thus perpetuating the Maskell Myth that birth situs here alone, regardless of parental citizen status, translates into constitutional eligibility. The piece ends after laying a foundation of doubt as to Cruz's eligibility – naturally… he is, after all, a Republican… – by parroting the 2011 CRS Report authored by Mr. Maskell to suggest that Cruz can run for president…. but adding at the end of the story, cryptically: "probably."

Interestingly, Senator Cruz has now intimated that his purported "dual citizenship" status (born in Canada to an American mother and a Cuban father) could interfere with his status as an "American," apparently believing that renunciation now of his Canadian citizenship would retroactively fix the "problem" of his other than "natural born citizen" status.

While that might fit into the Maskell Myth template, it would not correspond to the likely intent of the Founders, who sought to institute the highest standard of allegiance to the new nation in its "Chief Magistrate." That standard, of course, would necessitate that the leader would have no "shared" or "split" allegiances and thus, no "dual citizenship." The path to that status, in turn, was to require that the Chief Magistrate be born here to two parents, both of whom were, at the time of birth, also citizens.

The only exception would be for persons who, at the time of the adoption of the Constitution in 1787, were already citizens of the United States, and which persons would be "grandfathered" as being eligible, *despite* the circumstance that they were not "natural born citizens" within the contemplation of that term. Parenthetically as well, if the Maskell Myth were true (*i.e.*, anyone born here regardless of parental citizenship is constitutionally eligible), there would have been no need for the Founders to inset the "grandfather clause" into Art. 2, Sec. 1, Cl. 5 as an exception to the proscription of all others than a "natural born citizen" to the office of the president.

It is amazing the amount of disinformation that poorly-informed folks with access to computer keyboards and the Internet can propagate. The analogy of banjos at a hoedown again comes to mind. Moreover, since the CNN piece specifically cites the 2011 Maskell document as its authority for the conclusions it reaches – even providing a link in the Internet image of the piece to a copy of the CRS Report (posted, ironically, on the website of the "sky-is-falling-due-to-global-warming" Federation of American Scientists) – perhaps a brief refresher course as to the eligibility issue as it relates to both the clown at 1600 as well as Senator Cruz would be in order.

Notepads out? Pencils sharpened? Attention focused? Coffee nearby (this is long)? Good. Let us begin.

First, even today, there has been no U.S. Supreme Court decision directly addressing and deciding the question of whether Monsieur obama, or any other sitting president, is eligible as a "natural born citizen" as required under Art. 2, Sec. 1, Cl. 5 of the Constitution. As Supreme Court Justice Thomas has confirmed, the Court (or at least six out of the nine Justices) has determined that, for now, the better course of action will be

to "evade" the issue. Thus, the CNN claim that obama's constitutional eligibility has "long been settled" is – to use clinically polite language – wrong.

Second, the closest that the Court has come to articulating the intent of the Founders with regard to what was intended through the inclusion of the "natural born citizen" clause in the Constitution is found in *Minor v. Happersett*, 88 U.S. 162 (1875). A more detailed discussion of the impact and meaning of the *Minor* decision may be found here, but for present purposes, only the highlights are necessary.

In *Minor*, the Court stated (88 U.S. at 167-168) that at the time the Constitution was drafted and ratified, the nomenclature with which the Founders were familiar defined a "natural born citizen" as being a child "born in a country of parents who were its citizens…." The Court noted further that "[T]hese 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.*"(Emphasis added).

The significance of the Court's statement is that it underscores the fact that, at the inception of the republic, the Founders had the choice of selecting and setting an eligibility standard as to which there has "never" been a doubt, or a standard as to which "there have been doubts." Presented with those two alternatives, and seeking to set the most rigorous standard of fidelity and sole allegiance to the Nation, ask yourself this: which one would have made more sense to John Jay? Or Alexander Hamilton? Or James Madison? Or any of the other Founding Fathers?

The Maskell Myth postulates that the Founders favored and intended to adopt the standard as to which "there have been doubts." On the other hand, logic and reason compel the conclusion that the Founders – who sought to erect the highest barriers to "foreigners" and "aliens" seeking ascendancy to the Chief Magistrate's Office – favored and intended to adopt the one as to which there has "never" been a doubt.

Under the Maskell Myth, anyone born "in" the United States and subject to its jurisdiction, and regardless of the citizen, foreign or alien status of the parents, would be a "citizen by birth," and thus, consistent with the Myth, a "natural born citizen" eligible under Art. 2, Sec. 1, Cl. 5 of the Constitution to hold the office of president. In this post, it was hypothesized that, under the Myth, if Osama bin Laden had been born in Honolulu, while his Saudi mother and father were on vacation, the Maskell logic would welcome the son into the legions of folks who are eligible to the presidency.

Now, tragically, we have an even more graphic and actual example of who could be president under the Maskell Myth: Major Nidal Malik Hasan. Hasan, you will recall, is the person now convicted of murder for the "workplace violence" he visited upon 13 American soldiers at Ft. Hood, Texas on November 9, 2005. After shouting "allahu akbar" (Islamist-speak for "kill all infidels"), Hasan gunned down 13 soldiers in the Soldier Readiness Center at Ft. Hood. Thanks to the PC-dominated Department of

Defense, particularly under the current regime, all of the soldiers in the center ware unarmed…. all except one.

Hasan was born in Arlington, Virginia to Palestinian parents who immigrated to the U.S. from al-Bireh, a city near Ramallah in the West Bank. It is unclear whether his parents ever became naturalized U.S. citizens prior to Hasan's birth in 1970, but under the Maskell Myth, that condition is immaterial: Major Hasan is constitutionally eligible to hold the office of the presidency, although he might now have some difficulty running for the office due to his recent conviction.

Ask yourself this: is that what the Founders intended when they sought to "remove all doubt" as to sole allegiance to the United States and absence of split allegiances or dual citizenship when they inserted into the Constitution the provision that only a "natural born Citizen" would be eligible to serve as president?

With regard to the statement of the Supreme Court in *Minor* that there has never been a doubt that children born in the U.S. of parents who are citizens are themselves "natural born citizens," the Maskell Myth (also known as the CRS November 14, 2011 Report) dismisses the statement as dictum, that is, an irrelevant "aside" not directly germane to the analysis and decision of the issue then before the Court. The fact is that a legitimate debate may be held as to whether the Court's statement in *Minor* was irrelevant dictum or, instead, a material component of the Court's holding. While *Minor* has been abrogated by the 19th Amendment, it still stands as a non-overruled decision of the Court.

However, even if the statement be deemed "dictum," that is, irrelevant or immaterial to the issue immediately before the Court (*i.e.*, whether the State of Missouri Constitution could deny the right of suffrage to females), the intrinsic truth and vitality of the statement remains unchanged. By analogy, if in a criminal case opinion addressing the prosecution's evidentiary burden of proof of "beyond a reasonable doubt" and the defendant's Fifth Amendment right to refuse to self-incriminate, the Court happens to use an example of axiomatic truths, dictum might come into play.

For example, in making the point that, ever since the decision in the *Miranda* case, so-called "Miranda" warnings had to be given to those suspected of a crime, the Court might state: "Just as it is axiomatic that the mathematical ratio of the circumference of a circle to its diameter is the number we call 'pi,' so too is it axiomatic here that the defendant's right against self-incrimination must be observed, and we so hold."

In the preceding hypothetical quote, the holding of the Court is that the defendant's right against self-incrimination is axiomatic. A defendant can voluntarily waive the right against self-incrimination, but it cannot be involuntarily taken away. That is "axiomatic."

But what about the clause with the "pi" comparison? Clearly, there is zero relevance of the mathematical number "pi" to a defendant's right against self-incrimination. That fact, however, has absolutely *zero* effect on the accuracy and vitality of the mathematical truth expressed. Stated otherwise, the fact that the axiomatic truth of "pi" may have no bearing

on the Court's immediate *holding* has nothing to do with the innate truth of the statement made by the Court, *i.e.*, that the mathematical ratio of the circumference of a circle to its diameter is the number we call "pi."

Applying this reasoning to the *Minor* statement – whether it be deemed a relevant and essential component of the Court's "holding" or whether it be deemed irrelevant and unnecessary "dictum" – the fact remains: it is true. The fact that the "no doubt" statement was articulated in a case that has been abrogated (*not*, as some would erroneously contend, "overruled" by the Court) does exactly *nothing* to change the fact that the Court acknowledged the truth of what the Founders understood the term "natural born Citizen" to mean.

Stated otherwise, the Supreme Court clearly noted nearly 140 years ago that the Founders understood, consistent with the nomenclature of the times, that there was "never" any doubt that the term "natural born citizen" meant a child born here to citizen parents. And that is an inconvenient "fact" which the Maskell Myth completely fails to address.

But what about the "Elg ellipsis?" What possible reason could explain why it was executed? One possibility lies in the Myth's infatuation with the excising of words which it deems to be "irrelevant dictum." If, indeed, words (and, as with the Elg ellipsis, numbers) are deemed to be "irrelevant dictum," then it becomes much easier to simply delete them and claim that, because they are, purportedly, irrelevant to the issue being discussed, they can be eliminated.

In the case of the November 14, 2011 CRS Report, for example, the placement of the paragraphs describing the Supreme Court's decision in *Elg* occurs in that part of the report addressing the "Dual Citizenship" issue, rather than the "Citizenship of Parents" portion. Assuming for the sake of argument that this makes any difference, since the *Elg* decision (with the Maskell created ellipsis) occurs in the "dual citizenship" section rather than the "citizenship of parents" section, somehow that legitimizes the deletion, since the citizenship status of the father was purportedly irrelevant to the "citizenship of parents" question addressed in the following section.

There are, however, deficiencies with this explanation. First, it does not explain why, in the first Maskell document (the CRS "Memorandum" of April 3, 2009, addressed here, no such differentiation between "dual citizenship" and "citizenship of patents" is made, yet the same ellipsis of language appears (confirming that Steinkauler the elder was, at the time of his son's birth, a U.S. citizen, and thus making his son a "natural born citizen" in any event, rather than a "dual citizen").

Interestingly, in the second CRS "Report" of November 14, 2011, missing from the report is language that Maskell used in the prior document asserting that "The Supreme Court in *Perkins v. Elg* thus found that one born "in" the U.S., even of *alien* [Maskell's emphasis] parentage is a U.S. citizen 'at birth,' and in *dicta* in the case indicated that such person is eligible to be President of the United States." The myriad fallacies and

misrepresentations of this statement are nearly beyond comprehension, but are addressed here.

Second, this theory underlying a possible rationale for the ellipsis is diametrically opposed to the intent of the Founders. Not only did they *not* intend to allow into the office of the Chief Magistrate "aliens" and/or "foreigners," they were determined to preclude from admission anyone with even the potential for "split" or "dual allegiances," thereby excluding those possessed of "dual citizenship."

Specifically, the *Elg* ellipsis allows Maskell to argue (some would say "misrepresent") that the Court had acknowledged that Marie Elg (or for that matter, Steinkauler the Younger) were eligible to the presidency *despite* the fact that their respective parents were not U.S. citizens. In fact, *both* Marie Elg and Steinkauler the Younger were U.S. natural born citizens. *because* their parents (and in particular, their fathers) were at the time of the birth U.S. citizens.

The only reason the Court acknowledged that Steinkauler the Younger could become President was because, if he returned to the U.S. from Germany (where his parents had taken him as a child) and *reclaimed* as an adult his U.S. citizenship and thereby divesting himself of the German citizenship bestowed upon him when his father moved him to Germany, *then* he would be eligible. Maskell conveniently ignores this part of the *Elg* decision and Attorney General Pierrepont's "letter of advice" upon which the statements in *Elg are* based.

Accordingly, the foregoing hypothetical "rationale" for justifying the "Elg ellipsis" simply does not hold water. And until some other plausible explanation is forthcoming, either from Mr. Maskell or from others at the Congressional Research Service who may have participated in the production of both the 2009 and 2011 documents, the matter will remain as it is: unresolved.

Moreover, as P&E subscribers by now should know, the only definitive resolution of the question must come from the United States Supreme Court. But again, as Justice Thomas has noted, at least six of the Justices think the issue should continue to be "evaded," because it takes four Justices to vote to accept *certiorari* in a case.

It is a sad, sad day in the history of this once great nation that the one body with the power to definitively answer the question lacks the courage to do so. The excuse that the "stature" and "legacy" of the Court or its members would be diminished by addressing the issue is pathetic. Even more pathetic and sad is the message that this judicial insouciance sends to the people: we are now perilously close (if not already there) to actually becoming a nation of men and not laws.