Without Partisan Bias

INTRODUCTION AND BACKGROUND

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Who and what prompted the writing of the CRS memos relating to Obama's eligibility or lack thereof to serve as president?

(Jun. 27, 2011) — In the first series of The Post & Email essays addressing the issue of the role of the Congressional Research Service ("CRS") and its examination of whether the individual now occupying the residence at 1600 Pennsylvania Avenue in Washington, D.C. is, in fact, even constitutionally eligible to do so, an effort was made to identify and analyze a series of problems discovered in three CRS documents, which collectively, in the CRS lexicon, constitute a part of its "product." Those essays – accessible here, Part 1; here, Part 2; and here, Part 3 – sought to address certain specific irregularities and anomalies in three "products" issued by the CRS which seem strongly to suggest that, on this eligibility issue, the CRS was – and is – functioning more like an appendage of the Democrat National Committee than as a nonpartisan, independent advisor to the Congress.

To briefly recap that series, although the CRS portrays itself as being objective, unbiased and nonpartisan, insofar as the issue of Mr. Obama's constitutional eligibility to hold the office of president is concerned, the three (at minimum) documents – consisting of two memoranda and one "transmittal"– strongly suggest that the CRS or those in charge at the CRS are addressing this issue in anything ***but*** an objective, unbiased and nonpartisan manner. Specifically, the CRS Memo of April 3, 2009, the "Bilbray Transmittal" of June 5, 2009 and the CRS Memo of March 18, 2010 each, in its respective way, seems plainly calculated to first reach and thereafter fortify the predetermined conclusion that Mr. Obama is factually and legally eligible to the office he occupies rather than to examine objectively and in a nonpartisan way and from all sides of the issue whether he is – or he is not – so eligible. The two memoranda were authored by one Jack Maskell, a staff lawyer long-employed at the CRS, while the "Bilbray Transmittal" was authored by one Jerry Mansfield, a CRS "Information Research Specialist."

Unless and until the CRS itself or those in charge at the CRS "come clean" with specific answers to the problematic questions raised by the three "products" in question, lingering and festering doubts will persist with regard to its claim that its "…highest priority is to ensure that Congress has 24/7 access to the nation's best thinking." As discussed hereafter, the notion that the CRS should function as an objective, independent and

nonpartisan resource to the Congress is not only sound from an intellectual perspective, it is also a requirement of federal statute.

THE FEDERAL STATUTE

2 U.S.C. § 166(d)(1) mandates that the CRS perform its statutory duties "…without partisan bias." Unless there are specific explanations forthcoming from Messrs. Maskell and Mansfield and/or their superiors in the CRS management hierarchy, the drafting and dissemination of the documents in question may constitute not only a deception of the Congress, it may also well constitute a violation of that statutory mandate as well as the rationale of a case interpreting and applying the statute, *Keeffe v. Library of Congress*, 777 F.2d 1573 (C.A.D.C. 1985). Parenthetically, only two reported cases have addressed the operation of 2 U.S.C. § 166(d) since its original enactment in 1946: *Webster v. Sun Co., Inc.*, 731 F.2d 1 (C.A.D.C 1984), and the *Keeffe* case, and the *Webster* case involved only a question of legislative immunities and not "partisan bias."

The *Keeffe* case involved the direct application of 2 U.S.C. § 166(d) to the question of whether a CRS employee (Mary Ann Keeffe) violated a Library of Congress regulation (LCR 2023-7) intended to regulate and limit employees' political activities which tended to create an "…appearance of conflicts of interests…" under 2 U.S.C. § 166(d)(1). Ms. Keeffe ignored a CRS Legal Counsel warning that her attendance at the 1980 Democrat National Convention in New York – as a named delegate – could create such an appearance of conflict with her CRS duties and result in disciplinary action. When disciplinary action was taken following her attendance at the convention in New York and return to work, the Congressional Research Employees Association ("CREA," described by the lower trial court as her "union") joined Ms. Keeffe as a co-plaintiff in a lawsuit filed to challenge the action on several grounds, including the purported unconstitutionality of the regulation.

And who, you may ask, was the representative of the CREA "union" opposing LCR 2023-7 and supporting her argument that her political rights to attend the 1980 Democrat National Convention trumped the Library of Congress conflict of interest regulation based on 2 U.S.C. § 166(d)(1)? That's right: Mr. Jack Maskell. *See* 777 F.2d at 1582. For those who may be interested in the rationale of the decision for siding with the employee on the discipline issue, but ruling against her on her claim that the regulation was unconstitutional (a claim in which she was joined by CREA), the opinion can be accessed here. Interestingly, one of the federal Court of Appeals Circuit judges then sitting on that case was now Supreme Court Justice Ruth Bader Ginsburg, one of three Circuit Court Judges rejecting Ms. Keeffe's and CREA's arguments that the CRS regulation she had ignored was unconstitutional.

Viewing these anecdotal facts in their most favorable light, the fact that Mr. Maskell and the CREA union came to the defense of a registered Democrat CRS employee wishing to exercise her political rights as a delegate to the 1980 Democrat National Convention can, on one hand, be viewed as commendable. Yet on the other hand, the question remains: would Mr. Maskell have come to the defense of a similarly-situated Republican CRS

employee who was a named delegate to the 1980 Republican National Convention? For purposes of this discussion, the rebuttable presumption should be in the affirmative, but tempered with the recognition that, as noted in Essay Part 3, presumptions have been called "…the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts." *Mockowick v. Kansas City, etc., Ry. Co.*, 196 Mo. 550, 94 S.W. 256, 262 (1906). So, let us see if there are any "actual facts," anecdotal or otherwise, suggesting a different answer.

Returning to the CRS April 3, 2009 document authored by Mr. Maskell, and against the backdrop of 2 U.S.C. § 166(d)(1), the seemingly deliberate and unexplained alteration of the language of a 1939 U.S. Supreme Court decision in order to reverse-engineer a conclusion that Mr. Obama, as a "native born citizen" is properly deemed also to be a "natural born citizen" eligible to the presidency under the Constitution – when no Supreme Court decision has so held and many decisions suggest to the contrary – does not seem to be a model of unbiased or nonpartisan legal scholarship.

Nor does it seem to be a CRS "product" consistent with the *Keeffe* court's analysis of 2 U.S.C. § 166(d)(1), a statute with which Mr. Maskell, through his role as the co-plaintiff CREA representative there, should be quite familiar. Nor can there be any credible claim that the language of the April 3, 2009 CRS Memo actually changes the wording of *Perkins v. Elg*, 307 U.S. 325 at 330 (1939), by deleting through the ellipsis editing mechanism certain factual matters which would otherwise preclude Mr. Maskell's novel – and likely erroneous – conclusion that a "native born citizen," including Mr. Obama, is the same thing as a "natural born citizen." They are not.

All of these facts – as opposed to presumptions – strongly suggest, if not compel, the conclusion that the CRS April 3, 2009 Memo, showing Mr. Maskell to be its author, violates not only the specific language but the spirit and intent of 2 U.S.C. § 166(d)(1). And Mr. Maskell cannot claim ignorance of 2 U.S.C. § 166(d)(1) since his union, CREA, tapped him to represent Ms. Keeffe as its representative in her fight to declare the statute not only inapplicable to her, but unconstitutional as well. If Mr. Maskell or his supervisors (if any) at the CRS have a logical, rational explanation for the intentional use of the ellipsis as described, they should produce that explanation now. If the ellipsis was of their design, they should so state; if the ellipsis came from another source, they should explain that too. They should also explain why 2 U.S.C. § 166(d)(1) has not been violated. And those explanations should come sooner rather than later. Not tomorrow, or next week or next month… or as an "October Surprise" in 2012. They should come now.

"…WITHOUT PARTISAN BIAS…"

As noted, 2 U.S.C. § 166(d)(1) requires the CRS to perform its statutory duties for Congress "…without partisan bias…" To begin with, *Black's Law Dictionary* defines the term "partisan" as pertaining to ideas or persons which or who constitute an "abettor or supporter" of a particular position on an important issue, much like a member of a "caucus" composed of all the known or admitted advocates of such a position, as, for example, persons "…in a convention or any other deliberative assembly…who meet to

plan strategy toward a desired result within the assembly." *Black's* also defines the term "bias" as "inclination; prejudice; predilection…" adding that an "advocate's bias" is one "…that attorneys often develop in favor of a client involved in a dispute and that may potentially cause such missteps as overlooking certain arguments or misjudging the way facts or cases may appear to a dispassionate outsider." Sound familiar?

Moreover, the CRS website itself – without citing 2 U.S.C. § 166 – attempts to articulate its independent and nonpartisan mission by noting that "[t]he CRS approaches complex topics from a variety of perspectives and *examines all sides of an issue*." (Emphasis added) Really? If that were in practice true with regard to the CRS "Maskell Memo" products at issue, then one would have expected, at minimum, an "examination" of § 212 of Emmerich de Vattel's tome, *The Law of Nations*, addressing who can – and more importantly, who *cannot* – properly be defined as a "natural born citizen," and thereafter either distinguishing or dismissing the same by Mr. Maskell as discussed in the prior series of essays here.

Mr. Maskell, and/or those who contributed to the text of the memoranda or reviewed and approved the products at issue before their release, seem to interpret the assurance of the CRS website that it "…examines all sides of an issue…" as meaning, instead, that it examines those sides of an issue supporting its ultimate conclusion, while ignoring altogether (or altering) those sides of the issue undercutting its position. To again paraphrase Napoleon the Pig in Orwell's *Animal Farm*: "All sides of an issue are equal, but some sides are more equal than others."

The CRS sub-website captioned "Values" also assures us that the CRS maintains "…an outstanding reputation for objective and nonpartisan analysis. Our experts are vigilant in evaluating issues without bias. *A multi-layered review process also helps ensure that CRS products present issues and analysis in a manner that is fair, considered and reliable*." (Emphasis added) It is thus clear that any CRS product which is ultimately released has presumably been evaluated and approved for dissemination following a "multi-layered review process…" to ensure not only that it is compliant with internal CRS protocols and policies, but that it is also "…without partisan bias…" as required by 2 U.S.C. § 166(d)(1).

But given the existence of the two "Maskell Memos" at issue and discussed in the prior essays here, perhaps the most ironic assurance made on the CRS "Values" sub-website is the promise related to the category there labeled "Authoritative." In that section is found this: "All services and products are authoritative. Analysts demonstrate rigorous research methodologies, free of built-in bias. They present, explain and justify any critical assumptions; *investigate and recheck data anomalies; use primary resources whenever available; double-check all statements of fact; and document and vet all sources*. This assures Members, as they engage in debate, that the analysis they rely on is as accurate as it is current." (Emphasis added).

Even a cursory examination of the CRS April 3, 2009 Memo reveals that: (1) no checking of any data anomalies was apparently conducted, other than to excise by ellipsis the data

fact that a person born *after* his father's naturalization was actually a natural born citizen in addition to being a native born citizen, thus *creating* rather than eliminating an anomaly; (2) a primary source document purporting to support the conclusion sought – the U.S. Supreme Court decision in *Perkins v. Elg*, 307 U.S. 325 (1939) – was "used" in the sense that it had its language changed to accomplish the end result; (3) no "double-checking" or even single checking was apparently done to confirm that Marie Elg's parents were *not* aliens at the time of her birth, but instead were both naturalized U.S. Citizens, thus making her a "natural born citizen" within the larger population of "native born citizens"; and (4) the only "documenting" and "vetting" of sources performed was with regard to the Internet posted images of Mr. Obama's purported "short form" birth certificate, with the conclusion of the second, March 18, 2010 Maskell Memo being that such an image was sufficient to be accorded "full faith and credit" under federal law and the Constitution and confirming, purportedly, his "natural born citizen" status. Amazing. And wrong.

Accordingly, for purposes of an analysis of the three CRS "products" at issue, the two core questions become: (1) are the three CRS products free from any inclination, prejudice or predilection tending toward a desired result, and; (2) do the three products favor any individual involved in a dispute where certain arguments have been overlooked or facts and cases have been misjudged – or intentionally altered – in ways different than would be perceived by a dispassionate outsider? Against this definitional backdrop, it is difficult – if not impossible – to conclude that the three CRS products at issue come even *close* to being objective and "without partisan bias." And if that be true, it logically follows that significant problems arise under 2 U.S.C. § 166(d)(1). Whether anything will be done about that, of course, is entirely another question.

THE CRS SUPERVISORY HIERARCHY

Because the CRS operates largely beyond view of the general public – contending that it answers only to the Congress and/or its members – independent inquiries into its inner workings beyond that posted on its own website are difficult. Accordingly, in the absence of direct responses from the CRS explaining the anomalies and irregularities presented in the subject documents, we of the general population (sometimes generically known to those in Congress as "constituents") in the meantime will need to rely on secondary and indirect, anecdotal evidence bearing upon the role the CRS has thus far played in "resolving" or "answering" the question of whether Mr. Obama is even eligible under the Constitution to serve as president.

Not surprisingly, this may on occasion tend to require some speculation and "guessing" as well as drawing inferences from the available evidence. However, given the circumstances and cloak of secrecy characterizing many internal CRS procedures, few alternatives exist. Moreover, in the absence of rational explanations for the anomalies, and against the backdrop of potential violations of 2 U.S.C. § 166(d)(1), the public is entitled to examine the available evidence, anecdotal as it may be, to try to divine where the potential sympathies of the people at CRS actually lie. The task of this essay will be

to examine some of that anecdotal evidence within the statutory mandate of law requiring the CRS to perform its duties "…without partisan bias."

Since we already know that CRS "product" is subjected to a "multi-layered review process," it is appropriate to turn, therefore, to those individuals above Messrs. Maskell and Mansfield in the CRS organizational chart who may – or may not – have had a hand in composing, reviewing and/or approving the products. The natural starting point for such an examination would be the person in charge of the Library of Congress, within which the CRS exists as a legislative branch agency. As noted, the CRS exists under the umbrella of the Library of Congress pursuant to specific statutory enactment, 2 U.S.C. § 166. The current Librarian of Congress, Dr. James Billington, was appointed to the post in 1987 by then-president Ronald Reagan.

The image of Dr. Billington and a prominent Library donor posted on the Wikipedia "free encyclopedia" website is, to say the least, an interesting one. Indeed, the link in the photograph to another Library of Congress sub-website confirms that the donor – George Soros – is a "…longtime supporter of various projects at the Library of Congress…" who after mastering financial markets to become a billionaire and self-described "limousine liberal" decided to "…take on something new…" by determining to "…speculate on governments." The link quotes Soros as believing that "…sovereignty is a somewhat archaic concept…" and that, in his view, the only solution to "fix" the "capitalist threat" (yes, those are Soros' words) would seem to be a "…form of global government…." based, in part, on an "open society" model which rejects "…American exceptionalism." Interesting, yes? The Library of Congress "Information Bulletins" sub-website has some additional interesting images in its "Obamabilia" section.

According to Dr. Billington, the Library of Congress exists as "…the nation's oldest federal cultural institution and serves as the research arm of Congress." In addition, Dr. Billington assures us that the Library's mission "…is to support the Congress in fulfilling its constitutional duties and to further the progress of knowledge and creativity for the benefit of the American people." If this is true, then the issuance of the three CRS documents heretofore mentioned against the backdrop of 2 U.S.C. § 166(d)(1), coupled with the continuing failure by anyone in the chain of responsibility to explain their irregularities and anomalies, becomes even more perplexing.

If as an appendage of the Library of Congress, part of the role of the CRS is to "…support the Congress in fulfilling its constitutional duties…" – one of which duties, parenthetically, is to uphold and defend the Constitution of the United States of America – then the rendition of seemingly intentionally deceptive and misleading "research" disguised as the product of "the nation's best thinking" might to a cynic appear a bit "fishy." One is reminded of the observation by Marcellus in Hamlet: "Something is rotten in the state of Denmark." Or perhaps even Washington, D.C. Stated otherwise, we, the people, deserve and demand answers.

Under the authority of 2 U.S.C. § 166, Dr. Billington in 1994 appointed as Director of the CRS Mr. Daniel P. Mulhollan. Mr. Mulhollan had since 1969 been an employee of the

Library of Congress after completing his Ph.D. studies at Georgetown University. He continues to this day to serve as Director of CRS. In 1996, Mr. Mulhollan appointed as his Deputy Director one Angela Evans. Following graduation from the University of Wisconsin in Madison, Ms. Evans joined the CRS as an analyst and moved up through the ranks. She was the first woman to be appointed to the post and held it until 2009, when she left to become a professor at the Lyndon B. Johnson School of Public Affairs at the University of Texas in Austin. In 2010, replacing Ms. Evans, Mr. Mulhollan appointed as his Deputy Director Ms. Mary Manzanec, a pre-med graduate of Notre Dame University with a medical degree and law degree from Case Western Reserve University Law School. These persons, therefore, are the most likely ones to have reviewed and, ultimately, approved the finalization and release of the two memoranda at issue.

THE 2007 MULHOLLAN MEMOS

Insofar as relevant to the discussion of the April 3, 2009 CRS Memo and who within the CRS management and supervisory hierarchy may have reviewed, edited and/or approved its release, there exist two CRS memoranda addressed "To All CRS Staff" dated March 20, 2007, accessible here and April 18, 2007, accessible here. Both documents were from (and presumably authored by) Mr. Mulhollan.

The first memo, dated March 20, 2007, addresses the issue of "Distribution of CRS Products to Non-Congressionals." The opening paragraph makes clear Mr. Mulhollan's desires: "To ensure consistency in the Service's policy on sharing CRS products with non-congressional audiences, distribution controls are being strengthened and clarified. Following upon discussions held before the Research Policy Council, I have concluded that *prior approval should now be required at the division or office level before products are distributed to members of the public. This policy is effective immediately*." (Emphasis added). The first page of the memo finishes by stating: "In summary, to avoid inconsistencies and increase accountability, CRS policy requires prior approval at the division level before products can be disseminated to non-congressionals. Assistant and deputy assistant director questions about the policy should be directed to the Office of the Associate Director for Congressional Affairs and Counselor to the Director."

Reacting to the memo, certain CRS personnel are reported to have called the March 18, 2007 memo an "act of managerial dementia" and that they felt as if they were now "working for Captain Queeg." For those unfamiliar with the idiosyncrasies of Captain Queeg and his ship, the *Caine*, a short tutorial can be found here. The memo even caught the attention of *The Washington Post*. No one seems to know why the first memo was issued when it was or what may have precipitated its release, but the second memo may cast some light on the topic.

The second memo deals generally with the topic of "Access to CRS Reports" and addresses a variety of Mr. Mulhollan's concerns with regard to confidentiality of CRS "products" beyond the target audience, *i.e.,* Congress and its members. While recognizing that individual members of Congress frequently share CRS product with

constituents and others, the memo emphasizes to CRS staff that direct dissemination of product to the general public is generally prohibited except under very narrow circumstances. One such exception noted, however, involves requests for "product" from private, non-congressional sources. Mr. Mulhollan notes in the April 18, 2007 memo (at CRS-5): "Analysts occasionally respond to requests for products from individual researchers, corporations, law offices, private associations, libraries, law firms, and publishers where a collegial exchange of information is deemed to benefit our work."

Law offices? Law firms? "Collegial" exchanges of information? Really? If the potential here to be gleaned is that, where the CRS and its management deems "collegial exchanges of information" with, among others, law offices and law firms upon issues under examination by CRS personnel to "benefit our work," or where CRS "product" can be requested by a law office or law firm, might there also have been any "input" or "collegial suggestions" received from such non-CRS sources and making their way into final CRS "product?" Have any law firms been involved in the ongoing question of Mr. Obama's constitutional eligibility? Since there is no evidence, anecdotal or otherwise, at this point in time to support or refute that potential, it is a topic to be reserved for future examination. But given the confirmation in Mr. Mulhollan's April 18, 2007 memo that such exchanges are not prohibited, but in fact can occur in a "collegial" environment, those possibilities cannot be completely ruled out.

Mr. Mulhollan concludes the April 18, 2007 memo by noting that limiting the availability of product directly to the public – with the exception of the occasional collegial exchanges already noted – is necessary. It is necessary, in his view, because he is convinced that "…the true value of CRS is as a resource devoted solely to the needs of Congress. In that way, the taxpayers realize the utmost value for their "investment." Our staff is also better able to maintain its reputation for objective, authoritative and advocacy-free expertise devoted to an informed National legislature."

Taking the two memos together – and assuming that no less stringent and thorough a product review and approval process than that announced in the March 20, 2007 memo would apply to documents to be distributed to Congress (although that assumption may be questionable as well) – it would seem that at minimum, both of the "presidential eligibility" memos authored by Mr. Maskell dated April 3, 2009 and March 18, 2010 would have had to have been reviewed and approved by either Mr. Mulhollan or one of his deputies "…at the division level…," or even, perhaps, others in the group of "excepted" product requestors following a "…collegial exchange of information."

CONCLUSION

The foregoing, coupled with the matters set forth in the first three essays on the CRS role in the Obama eligibility topic, only further underscores the need for more inquiry and investigation. What on Earth do they have to hide? To borrow a phrase from the first series of essays: "So what does it all mean?" the same answer applies: "Who knows?" But the anecdotal evidence would seem to indicate, at minimum, that there are some serious questions to be answered, including:

1. Who – from Dr. Billington to Mr. Mulhollan to Ms. Evans to Ms. Mazanec to Mr. Maskell and to Mr. Mansfield – knew what, and when did they know it?

2. Why were the actual words of a U.S. Supreme Court decision and U.S. Attorney General's "Letter of Advice" altered by ellipsis?

3. Who within the CRS organization drafted, reviewed and approved the release and dissemination of the April 3, 2009 and March 18, 2010 CRS "products"?

4. Were there any "collegial exchanges of information" between the CRS and "non-congressionals," including lawyers or law firms, in connection with the "products" at issue?

5. Do the "products" at issue violate 2 U.S.C. § 166(d)(1), and if not, why not?

And the biggest question of all:

6. Will anyone in Congress do anything about seeking answers to these questions?

The prudent thing to do here would be to "hope" for a "change" in the continuing insouciance and dismissive attitude characterizing most, if not all congressional responses to inquiries of this sort. It is a sad and dangerous day in the history of the Nation when Congress as a whole doesn't even *care* about discovering the truth. If there are good and sufficient answers to the questions posed, fine. Let them be made known. But let us get serious here: neither Mr. Obama nor his media sycophants nor his lawyers have proven his eligibility under the Constitution. Internet-posted images won't cut it. He may well be eligible… but he may well be *not* eligible. If in fact he is eligible, he wouldn't need grammatical chicanery to bolster his claim. And yet, from all appearances, grammatical chicanery is now the acceptable standard, leaving the conclusion that he is not eligible fortified.

One would hope that, before November 2012, dispositive answers to all of these questions would be forthcoming. But if the past is any portent of the future, don't bet the farm in it….