

SUPERIOR COURT OF GEORGIA
FOR THE COUNTY OF FULTON

DAVID P. WELDEN	:	
	:	
Petitioner	:	
	:	Superior Court
v.	:	Docket Number:
	:	
BARACK OBAMA	:	OSAH Docket Number:
	:	OSAH-SECSTATE-CE-
Respondent	:	1215137-60-MALIHI
	:	
	:	
	:	

**PETITION PURSUANT TO O.C.G.A. § 21-2-5(e) FOR APPEAL AND REVIEW OF
FINAL DECISION OF GEORGIA SECRETARY OF STATE**

Pursuant to O.C.G.A. § 21-2-5(e), Petitioner respectfully submits this petition for appeal from the final decision of the Secretary of State in the above-named action. Grounds for this petition, as set forth more fully below, are that the rights of the Petitioner have been prejudiced because the conclusions and decision of the Secretary of State is affected by error of law.

Supporting Authorities and Facts

O.C.G.A. § 21-2-5(e), states in relevant part “The elector filing the challenge or the candidate challenged shall have the right to appeal the decision of the Secretary of State by filing a petition in the Superior Court of Fulton County within ten days after the entry of the final decision by the Secretary of State...The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the findings, inferences, conclusions, or decisions of the Secretary of State are: ...(4) Affected by other error of law.”

The instant decision entered by the Secretary of State relies upon, and explicitly adopts clear errors of law contained within the Office of State Administrative Hearings ruling regarding the definition of “natural born citizen” under Article II of the United States Constitution.

Procedural History

On November 1, 2011, the Democratic Party of Georgia notified the Georgia Secretary of State that the only candidate that should appear on the Democratic Presidential primary ballot would be Barack Obama. Pursuant to O.C.G.A. section 21-2-5 the Petitioner filed a timely challenge with the Secretary of State. Said challenge alleged that defendant Obama is not Constitutionally qualified to hold the office of President. Pursuant to Georgia law the challenge was referred by the Secretary of State to the Office of State Administrative Hearings (“OSAH”). Defendant Obama responded with a motion to dismiss filed on December 15, 2011. That motion was denied by the OSAH on January 3, 2011. On December 20, 2011, the OSAH consolidated the instant challenge with several others filed against Defendant Obama. Petitioner filed a motion for separate hearings which was granted. The matter was heard by the OSAH on January 26, 2011. On February 3, the OSAH issued an initial decision in favor of the Defendant. On February 7th the Secretary of State’s Office formally adopted the initial decision of the Administrative Law Judge (OSAH) as its final decision.

Facts

The one fact asserted by the Petitioner was that candidate Obama’s father was not a U.S. Citizen. *See* Pltf.’s Prop. Findings of Fact and Concl. Of Law, at 1. The OSAH’s Decision appears to adopt this fact: “For purposes of this section’s analysis, the following facts are

considered:...3) Mr. Obama’s father was never a United States citizen.” OSAH Decision at 4. The OSAH Decision’s analysis of law then presumes this fact.¹

Errors of Law

A. Summary

The OSAH decision concludes that any person born within the United States, regardless of the citizenship or legal status of their parents, are “natural born citizen” under Article II of the United States Constitution. This conclusion runs contrary to common sense, violates venerable rules of Constitutional Construction followed by the U.S. Supreme Court since its inception, and violates the explicit holding of the Supreme Court case relied upon.

Had the drafters of the Constitution intended all people born in the U.S. to be considered natural born citizens, the 14th Amendment would not have been necessary. Had the drafters of the 14th Amendment intended that Amendment to alter the Article II definition of natural born citizen, they would have clearly stated so. Yet the term “natural born citizen” is not found anywhere within the 14th Amendment. The Amendment also makes no reference to Article II. The OSAH ruling, therefore, violates rules of construction that the OSAH had itself relied upon just days earlier in the same litigation.

The OSAH decision ignores a precedential holding from the U.S. Supreme Court in favor of dicta from a later Supreme Court case. This issue was presented at length to the OSAH at oral

¹ The OSAH Decision analyzed evidence submitted by a different plaintiff under a different case, but failed to mention the evidence submitted by the Petitioner. The OSAH took this action despite the fact that it had granted Petitioner’s motion to sever the instant action from all other challenges. The Petitioner entered unopposed evidence including a birth certificate adopted by the Respondent as his own, excerpts of a book written by the Respondent, and a Department of Justice document obtained via a FOIA request, all of which establish the one fact asserted by the Petitioner: the Respondent’s father was not a U.S. Citizen at the time the Petitioner was born. The OSAH’s failure to discuss Petitioner’s unopposed evidence, coupled with its adoption of Petitioner’s one asserted fact in its analysis of law, must be taken as the OSAH’s finding of fact that the Respondent’s father was not a U.S. Citizen at the time the Petitioner was born.

arguments and in written submissions, yet the OSAH chose to completely ignore this issue in its decision.

Instead the OSAH decision relies upon a non-binding opinion from an Indiana State Appellate Court to support its conclusion. *See Arkeny v. Governor*, 916 N.E.2d 678 (Ind. Ct. App. 2009). The Indiana opinion relied upon was litigated by pro-se citizens of Indiana against the Governor of that state. *Id.* The Indiana court reached its holding via an issue that didn't require interpretation of the U.S. Constitution, yet that court then proceeded to construe the U.S. Constitution as an independent means of reaching its holding. *Id.* at 684-85. The Indiana court's decision to construe the U.S. Constitution without need to do so also represents yet another violation of venerable rules of construction and judicial restraint. The OSAH's reliance upon the Indiana court's opinion, rather than follow a precedential holding of the U.S. Supreme Court, further demonstrates the OSAH's errors of law.

B. Rules of Constitutional Construction

The early Supreme Court established the relevant rule of Constitutional construction in *Marbury v. Madison*: "It cannot be presumed that any clause in the Constitution is intended to be without effect; and therefore such a construction is inadmissible." 5 U.S. 137, 174 (1805). This rule is still in effect and a similar rule is used for statutory construction: "When there are two acts upon the same subject, the rule is to give effect to both if possible...The intention of the legislature to repeal must be clear and manifest." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). See also, *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *United States v. Tynen*, 78 U.S. 88 (1870); *Henderson's Tobacco*, 78 U.S. 652 657 (1870); *General Motors Acceptance Corp. v. United States*, 286 U.S. 49, 61 (1932); *Wood v. United States*, 41 U.S. 342, 362-63 (1842).

In the instant litigation the OSAH itself stated “When the Court construes a constitutional or statutory provision, the ‘first step...is to examine the plain statutory language.’ [T]his Court is ‘not authorized either to read into or to read out that which would add to or change its meaning.” Or. Denying Def.’s Mot. Dismiss, at 3 (*quoting Morrison v. Claborn*, 294 Ga. App. 508, 512 (2008); *Blum v. Schrader*, 281 Ga. 238, 240 (2006)).

Yet the OSAH’s decision reads the term “natural born” into the language of the 14th Amendment. It also reads the words “natural born” into the holding of the Supreme Court in *Wong Kim Ark*. 169 U.S. 649 (1898). Neither the 14th Amendment nor the holding of *Wong Kim Ark* include the term “natural born.” As discussed more fully below, the *Wong Kim Ark* court was determining the meaning of the term “citizen” under the 14th Amendment. *Id.* at 705. Its holding was explicitly identified as its holding. *Id.* Its holding was fact-specific. *Id.* Its holding neither mentioned Article II nor the term of “natural born.” *Id.*

The OSAH in the instant case ruled that the 14th Amendment term “citizen” means the same thing as Article II “natural born citizen.” Yet there is nothing in the 14th Amendment that supports the OSAH conclusion. By its own statement on constitutional interpretation, the OSAH simply is “not authorized either to read into or to read out that which would add to or change its meaning.” Or. Denying Def.’s Mot. Dismiss, at 3 (*quoting Morrison v. Claborn*, 294 Ga. App. 508, 512 (2008); *Blum v. Schrader*, 281 Ga. 238, 240 (2006)). Citizen simply does not have the same legal meaning as the term “natural born citizen.” The OSAH’s ruling to the contrary is an error of law.

The OSAH’s conclusion not only violates the above precedent and rules of construction, it runs contrary to Supreme Court precedent.

C. *Minor v. Happersett*, 88 U.S. 162 (1874)

In *Minor v. Happersett* the United States Supreme Court was presented the question: Does the 14th Amendment grant all citizens the right to vote? *Minor*, a woman living in Missouri, challenged that state's constitutional prohibition against women voting. The Court held that women could be citizens before ratification of the 14th Amendment, but that the 14th Amendment created no new privileges or immunities.

1. *Minor* Court's Definition of Natural Born Citizen Under Article II

The United States Supreme Court defined the term "natural born citizen" in *Minor v. Happersett*. 88 U.S. at 167. The *Minor* Court established that "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." *Id.*

It is clear that the *Minor* Court was referring to the term "natural born citizen," as it appears in Article II of the Constitution because, in the paragraph preceding the definition quoted here, that Court quoted the Article II requirement that the President must be a "natural born citizen."

The *Minor* Court's definition of natural born citizen is immediately followed by a statement that "there have been doubts" about the broader class of people identified as "citizens." *Id.* However, this statement is immediately followed by the clarification that there have "never been doubts" as to the narrower class of natural born citizens. *Id.* This understanding of the *Minor* Court's statement is supported by its extensive discussion of the broader term "citizen" at the beginning of the Court's opinion. *Id.* at 166. The Court concludes its discussion of the term "citizen" by stating, "When used in this sense it is understood as conveying the idea of

membership of a nation, and nothing more.” *Id.* The Court, therefore, clearly established that the term “citizen” in its opinion was to be understood to be very broad. With this in mind, the *Minor* Court’s statement is unambiguous: it established two distinct classes of people, citizens and natural born citizens; “citizen” is a broad term that is inclusive of all “natural born citizens.” *Id.* All natural born citizens are citizens, but not all citizens are natural born citizens; as to the outer limits of the term “citizen” there are doubts; and as to the definition of “natural born citizen” there have “never been doubts”. *Id.*

2. Precedential Status of the *Minor* Court’s Definition of “natural born citizen”

The definition of natural born citizen was part of the *Minor* Court’s opinion because that Court explicitly stated that it had to determine whether Mrs. Minor was a citizen before it could determine whether she had a constitutional right to vote. *Id.* at 167. Because the *Minor* Court’s definition of “natural born citizen” was pivotal to reaching its holding, the Court’s definition is part of its holding and is, therefore, also precedent. *See Black’s Law Dictionary* 737 (Bryan A. Garner ed., 7th ed., West 1999) (*see also Id.* at 1195 defining “precedent” and *quoting* James Parker Hall, *American Law and Procedure* xlviii (1952); *see also Black’s Law Dictionary* at 465, distinguishing “dictum gratis”).

In order to reach its holding, the *Minor* Court first had to determine whether Mrs. Minor was a citizen. It explicitly did so by determining that she was a natural born citizen: “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.” *Id.* at 167. Because both of Mrs. Minor’s parents were U.S. citizens at the

time she was born, and she was born in the U.S., she was a natural born citizen. *Id.* Because all natural born citizens are also within the broader category “citizen,” Mrs. Minor was a citizen.

The *Minor* Court’s decision to establish that Mrs. Minor was a citizen because she was a natural born citizen followed the well-established doctrine of judicial restraint. Judicial restraint required the *Minor* Court to avoid interpreting the citizenship clause of the 14th Amendment if the circumstances presented in the case at hand didn’t require the Court to construe the 14th Amendment’s citizenship clause in order to reach its holding. The facts presented didn’t require such construction, so the Court wasn’t required to interpret the 14th Amendment’s citizenship clause. But judicial restraint did require the Court to conclude that Mrs. Minor was a citizen via its definition of natural born citizen and its conclusion that all natural born citizens are within the broader category of “citizens.” This is why it made the statement “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.” *Id.* at 168. In other words, the *Minor* Court’s definition of “natural born citizen” was pivotal to reaching its holding.

3. *Minor* Court’s Discussion of Other Categories of Citizens

The *Minor* Court then discussed several other types of citizenship as general examples of its conclusion that women could be citizens. However, it then returned to the specific case of Mrs. Minor, concluding: “The fourteenth amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship.” *Id.* at 170.

This discussion not only shows that the *Minor* Court explicitly distinguished the terms citizen and natural born citizen, it also shows that the Court determined that Minor was a citizen because she was a natural born citizen. Because citizen is a much broader term, but includes the narrower term natural born citizen, Minor was a citizen because she was a natural born citizen.

Because the *Minor* Court's definition of "natural born citizen" was pivotal to reaching its holding, the Court's definition is part of its holding and is, therefore, also precedent. *See Black's Law Dictionary* 737 (Bryan A. Garner ed., 7th ed., West 1999) (*see also Id.* at 1195 defining "precedent" and *quoting* James Parker Hall, *American Law and Procedure* xlvi (1952); *see also Black's Law Dictionary* at 465, distinguishing "dictum gratis").

4. Minor Court Held that the 14th Amendment "Did Not Add to the Privileges and Immunities of a Citizen"

The OSAH's decision also ignored the *Minor* Court's holding that "The amendment did not add to the privileges and immunities of a citizen." *Id.* at 171. The *Minor* Court established that if an individual didn't have the right to vote before the 14th Amendment, then that citizen didn't have the right to vote after the Amendment. *Id.* It is clear from this holding that if a person was not qualified to hold the office of President under Article II before the amendment, then he or she was not qualified to hold the office of President after the amendment. *Id.* In other words, the holding of the *Minor* Court explicitly established that the 14th Amendment did not change the definition of natural born citizen under Article II.

Contrary to the assertion of the OSAH, this conclusion is confirmed by the Supreme Court's holding in *Wong Kim Ark*. 169 U.S. 649 (1898). Nothing in *Wong Kim Ark* contradicts anything in *Minor v. Happersett*. Reading these two opinions with an understanding of the rules of construction in mind, and with the definitions of "holding," "precedent," and "dicta" in mind,

confirms that the *Minor* and *Wong Kim Ark* opinions do not conflict, and in fact conform to each other and complement each other. Another rule of construction states that if two laws, constitutional provisions, or court opinions can be read to *not* conflict, such interpretation is more likely correct than any interpretation that requires conflict.

D. *Wong Kim Ark*, 169 U.S. 649 (1898)

The Supreme Court’s holding in *Wong Kim Ark* (“WKA”) did not alter or negate the definition of natural born citizen as established by the *Minor* Court. Compare *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) with *Minor*, 88 U.S. 162. The holding of WKA answered the narrow question that was avoided by the *Minor* Court: namely construction of the *citizenship* clause of the 14th Amendment.

A review of the *holding* from WKA confirms this conclusion: “the single question stated at the beginning of this opinion, namely, 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 fourteenth amendment of the Constitution: ‘All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.’ For the reasons above stated, this court is of the opinion that the question must be answered in the affirmative.” 169 U.S. at 705 (emphasis added). The WKA holding does not contain the term “natural born” nor mention Article II.

This makes sense because the WKA Court did not need to define the term natural born citizen in order to reach its holding. Had Mr. Wong Kim Ark been a natural born citizen then the Court would not have had to resort to the 14th Amendment in order to find that he was a “citizen.” Because Mr. Ark was not a natural born citizen, the WKA court had no reason to construe the term natural born citizen in order to answer the question: Was Mr. Ark a *citizen* under the 14th Amendment? Therefore, any discussion within the WKA opinion that could possibly be construed to alter the Article II term natural born citizen, was unnecessary to reach the WKA holding and was, by definition, dicta. See *Black’s Law Dictionary* 465 (Bryan A. Garner e., 7th ed., West 1999)(*defining* Dictum Gratis).

Rather than construing the definition of the term “natural born citizen” under Article II, the WKA Court was construing the term “citizen” under the 14th Amendment. Regardless of the answer to the question answered by the WKA Court, it does nothing to change the requirements for the office of President.

To conclude that the WKA court altered the definition of natural born citizen under Article II would require a conclusion that dicta alters established precedent. This is simply not the rule. Dicta can be persuasive. Where the reasoning in dicta is logical and well supported, and where it does not conflict with precedent, it can be followed at the discretion of other courts. However, where dicta directly conflicts with precedent it cannot be followed by lower courts.

Also, to conclude that the WKA court altered the definition of natural born citizen under Article II would also require a conclusion that the WKA court intended to overturn *Minor*’s holding that the 14th amendment didn’t create any new privileges or immunities. Yet the WKA Court never made any such assertion, nor has any decision of the Supreme Court since WKA.

The holdings from *Minor* and WKA simply do not conflict. Any other conclusion runs contrary to every rule of construction and is not supported by any subsequent precedent from the Supreme Court.

E. *Arkeny v. Governor* Should Not be Relied Upon and Reflects a Failure to Understand Judicial Restraint

Rather than follow Supreme Court precedent that clearly defines the term natural born citizen, the OSAH instead relies upon an opinion of another state's appellate court. OSAH Decision at 6-10; *citing Arkeny v. Governor*, 916 N.S.2d 678 (Ind. Ct. App. 2009). While the *Arkeny* Court's decision can certainly be used to the degree it is persuasive, it should go without saying that the *Arkeny* Court's opinion is not binding upon any court in this state. The *Arkeny* opinion should be followed only to the degree that the reasoning within that opinion follows acceptable rules of construction and binding precedent. To the degree the *Arkeny* opinion violates rules of construction or ignores precedent, its opinion should be disregarded. The *Arkeny* Court certainly does not have authority to alter or ignore precedent from the U.S. Supreme Court construing the U.S. Constitution.

For all the reasons discussed above, the *Arkeny* opinion violates multiple rules of construction, ignores binding precedent from the U.S. Supreme Court, and supplants precedent with dicta.

A cursory reading of the *Arkeny* opinion should lead any court to immediately recognize the limited value of the *Arkeny* opinion. First, *Arkeny* was a challenge brought by pro-se litigants in Indiana against that state's Governor. *Id.* at 679. While litigation by pro-se parties certainly doesn't, by itself, negate the value of an opinion, it certainly should raise some

concerns. Most pro-se litigants cannot be expected to present courts with fully researched and briefed arguments in support of their constitutional assertions. Add to this the fact that the Defendant in *Arkaney* was a sitting Governor with all the resources of the state at his disposal. *Id.* This picture explains the very one-sided presentation of the issues and the ultimate result in *Arkaney*.

Next, the *Arkaney* Court reached its holding by concluding that the pro-se litigants had not stated a claim upon which relief could be granted because the challenged candidates were not candidates for the general Presidential election within the definitions of Indiana law. *Id.* at 684. Yet after reaching this conclusive finding, the *Arkaney* court pushed ahead and took it upon itself to construe Article II of the U.S. Constitution. While a court may use alternative means to reach a holding, it should not construe the U.S. Constitution to do so. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 445-46 (1988) (“A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”). Judicial restraint requires all courts to avoid construing any clause of the Constitution if avoiding such construction is at all possible. *Id.* By pushing forward to give its opinion on the meaning of Article II the *Arkaney* Court took on a task that the U.S. Supreme Court would have avoided under the same circumstances. *Id.*

In other words, the *Arkaney* Court’s decision to reach the constitutional question demonstrates that Court’s failure to understand the most basic doctrines applied by the U.S. Supreme Court when construing the Constitution. With this fact in mind, the *Arkaney* Court’s opinion regarding the meaning of Article II and the 14th Amendment should be avoided at all costs by any other court.

Prejudice to Petitioner's Rights

Contrary to popular opinion, voters are not the final arbiters of whether an individual is qualified to hold office. In a Constitutional Republic the power of the majority is limited and cannot infringe upon constitutionally protected rights of a minority.

The Constitution is an anti-majoritarian document; meaning that it protects individuals from invasions and usurpations by the majority. Constitutionally protected rights are held inviolate regardless of the majority's desire to violate them. Without such protections, any law could be enacted simply because it becomes popular. This would be true even if such law denied an individual their right to life, liberty, or property. Without the anti-majoritarian protection of the Constitution, Congress could legalize the killing of all Jews, for example, as was done in World War II Germany. Constitutional requirements are absolute, and must be followed regardless of how popular or unpopular such requirements may be, because they are in place to protect the minority.

Therefore, a minority of Americans, including the Petitioner, have an absolute right to have the Constitution enforced, regardless of how popular or unpopular the rights asserted may currently be. Specifically, the Petitioner has a right to prevent an unqualified candidate from appearing on the Georgia Presidential Primary ballot. Such appearance would represent a waste of resources by the state, and more importantly, could lead to a constitutionally disqualified individual being elected to the Office of President.

Conclusion

For the reasons set forth herein, the Petitioner respectfully requests that this Court reverse the final decision of the Secretary of State and prohibit the Secretary of State from including candidate Barack Obama's name on the Georgia Presidential Primary ballot.



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CERTIFICATE OF SERVICE

I certify that I have served the opposing party in this matter with a copy of Petitioner's Petition for Appeal and Review of Final Decision of Georgia Secretary of State by sending a copy via first class U.S. mail to attorney Michael Jablonski at 260 Brighton Rd. NE, Atlanta, GA 30309. A copy was also sent via e-mail addressed to: Michael Jablonski Michael.jablonski@comcast.net

This the 14th day of February, 2012.



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