State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

(CONSOLIDATED)

VICTOR WILLIAMS, OAL DKT. NO. STE 5016-16

Petitioner,

v.

TED CRUZ,

Respondent.

And

FERNANDO POWERS, DONNA WARD, AND BRUCE STOM (SOUTH JERSEY CONCERNED CITIZENS COMMITTEE), OAL DKT. NO. STE 5018-16

Petitioners,

v.

TED CRUZ,

Respondent.

Victor Williams, petitioner, pro se

Mario Apuzzo, Esq., for petitioners Fernando Powers, Donna Ward and Bruce Stom

Shalom D. Stone, Esq., for respondent (Brown, Moskowitz and Kallen, P.C., attorneys)

Record Closed: April 12, 2016 Decided: April 12, 2016

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BEFORE **JEFF S. MASIN**, ALJ t/a:

Nominating petitions supporting Senator Ted Cruz of Texas for the Republican nomination for President of the United States have been filed with the Secretary of State, seeking to place Senator Cruz's name on the ballot for the New Jersey Republican primary.[1] Challenges to Senator Cruz's eligibility for nomination have been filed by a group calling itself South Jersey Concerned Citizens Fellowship, and by Victor Williams, an attorney and law professor, appearing pro se, who identifies himself as a candidate for the Republican presidential nomination. Each objector contends that the Senator does not meet the Constitutional requirement that a person be a "natural born Citizen" to serve in the Office of President. U.S.CONST., Art. 2, § 1.

The Objectors' petitions were filed on March 28, 2016, and were transmitted to the Office of Administrative Law (OAL) on April 4, 2016. The final day for filing objections was April 8, and no further challenges to Senator Cruz's eligibility were filed. Oral argument was held on April 11, 2016. At oral argument, counsel for Senator Cruz objected that the challengers have no standing to object to his nominating petitions. Additionally, if standing was found to exist for one or both of the objectors, counsel contends that the issue of Senator Cruz's eligibility for nomination to the Presidency is a non-justiciable issue, such that neither the Secretary of State, for whom the Office of Administrative Law provides the administrative hearing, nor the New Jersey Judiciary, has any role to play, as that issue is reserved to the Electoral College and Congress. Having considered these objections to proceeding to the merits of the objections, I **CONCLUDE** that the challengers have standing and that the issue is justiciable.

[1] N.J.S.A. 19:23-21. "The Secretary of State shall certify the names of the persons indorsed in the petitions filed in his office to the clerks of counties concerned thereby not later than the 54th day prior to the holding of the primary election, specifying in such certificate the political parties to which the persons so nominated in the petitions belong.

Standing

In Layton and Costa v. Lewis, A-4047-10T1 (unpublished, May 2, 2011), the Appellate Division addressed a challenge to the candidacy of Carl Lewis for the office of State Senator. The court concluded that N.J.S.A. 19:13-10, which provides that "[E]very petition of nomination in apparent conformity with the provisions of this Title shall be deemed valid unless objection thereto be duly made . . ." does not contain any restriction on the objector. The need to protect the integrity of elections justified this broad approach to standing to object. "In addition to the absence of restrictive language under the statutes, a practice of screening objectors before accepting a challenge to a nomination petition would raise significant collateral issues that would be outweighed by the salutary purpose of permitting challenges from any objector under N.J.S.A. 19:13-10." Layton, supra, slip opinion at 6. While Layton is unpublished and therefore not precedential, it presents a fair understanding that in New Jersey, standing is broadly interpreted. This has been the case in numerous election-related challenges and there is no reason to narrow that position in the present matter. I **CONCLUDE** that the objectors have standing to challenge Senator Cruz's eligibility. Although Mr. Williams is neither a New Jersey resident nor a registered voter in this State, those facts do not appear to lessen his right to object under the broad standard. However, even if his standing is less clear, as the other objector certainly has standing, Mr. William's involvement is not of concern, and his views may be helpful.

Justiciability

It is the responsibility of the Judiciary to decide cases that are properly before it, even those it "would gladly avoid. Cohens v. Virginia, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821); quoted in Zivotofsky ex rel. Zivotofsky v. Clinton, U.S. 132 S.Ct. 1421, 1427, 182 L.Ed. 2d 423 (2012). The avoidance of "political questions" by courts is a "narrow exception" to this rule. This exception comes into play where "there is a 'textually demonstrable constitutional commitment to the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'"

Nixon v. United States, 506 U.S. 224, 228, 113 S.Ct 732, 122 L.Ed. 2d 1 (1993)(quoting Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962). Neither of these criteria exists in the present matter. The issue here involves an interpretation of the meaning of a phrase contained in the United States Constitution. That document has been held to be a judicially declarable law. Madison v. Marbury, 1 Cranch 137, 2 L.Ed 60 (1803).

N.J.S,.A. 19:13-11 requires that the "officer with whom the original petition was filed shall pass in the first instance on the validity of such objection . . . ." Thus, the Secretary of State is obliged to rule. In doing so, the Secretary sits in a quasi-judicial role, to adjudicate the acceptability of a nominating petition that she must determine to certify or reject. While she does not sit in the Judiciary, the same issue of interpreting the Constitution is before her, and judicial review, by a Judiciary competent to adjudicate that meaning, lies after her decision is rendered. The Constitution, as originally adopted, provided that the legislature of the several states would "appoint, in such Manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and representatives to which the State may be entitled." U.S. CONST. art. II, § 1, cl. 2. These electors then meet in their respective states and vote by ballot for President and for Vice President, in conformity with the Twelfth Amendment, which changed the procedure from its original format. These votes are transported to the nation's seat of government where the President of the Senate opens the ballots and counts them in the presence of the members of both Houses of Congress. The Electoral College is not vested with the power to determine the eligibility of the Presidential candidate since it is only charged to select the candidate for each office and transmit its votes to the "seat of government." Congress has no power over this process for choosing the President and Vice President, except where a tie vote occurs, when Congress chooses the President and Vice President. While Congress is the Judge of the Elections, Returns, and Qualifications of its Own Members, including their citizenship as required for service in the house to which they have been elected, U.S. CONST. art. I, § 5, cl. 1.; U.S. CONST. art I. § 2, cl.2; U.S. CONST. art. I, § 3, cl. 3., Congress is not afforded any similar role in connection with the issue of Presidential

eligibility. There is no basis to conclude that the issue of eligibility of a person to serve as President has been textually committed to Congress or the Electoral College.

As for judicial competence to consider the issue, there clearly are standards to apply in determining United States citizenship, including the present question of “natural born Citizen.” The United States Supreme Court, as well as numerous lower courts, have had occasion to consider and apply these standards. See e.g., United States v. Wong Kim Ark, 169 U.S. 649, 655, 18 S.Ct. 456, 42 L.Ed 890 (1898). No purpose would be served to review that decision at this juncture, although it will be discussed below as to the merits of the issue. Suffice it to say the Supreme Court dealt with the question of Wong Kim Ark’s citizenship, the effect thereon of his parentage and their domicile, the place of his birth in the United States, and the relevance and impact of English common law, American judicial precedent at the state and federal level, and determined that

> there are none that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the [F]ourteenth [A]mendment, which declares and ordains that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.”

There can be no question that courts are competent to determine the question at hand, and again, in the context of this administrative quasi-judicial function, the Secretary of State is capable of applying these same criteria. The issue is therefore justiciable.

The Meaning of “natural born Citizen”

Initially, the factual basis upon which this decision is rendered must be clear. As discussed with counsel at hearing, it is undisputed that Senator Cruz was born in Calgary, Canada, the child of a mother who was an American citizen and a father who was not a citizen of the United States. No other issues of fact concerning his place of

birth, parentage, status or actions of his parents have been asserted or supported by any proofs whatsoever.[2]

The challengers contend that Senator Cruz is ineligible to hold the Office of President, as he fails to meet one of the criteria identified in the United States Constitution as required of anyone holding that position. Article II, Section I, provides

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

The challengers claim that Senator Cruz is not a "natural born Citizen" of the United States and therefore cannot hold the Office. As such, they seek to have the nominating petition rejected by the Secretary of State.

As noted, the location of Mr. Cruz's birth is not in dispute. He was born in Calgary, Alberta, Canada on December 22, 1970. His mother was born in the State of Delaware in 1934, and was a citizen at the time of her birth and remained so. Further, it is undisputed that at the time of his birth to an American citizen, Mr. Cruz was a citizen of the United States. Therefore, this case involves a purely legal issue, that is, is Senator Cruz a "natural born Citizen?"

Before discussing this challenge in detail, it is perhaps appropriate to note that the issue of the meaning of the Constitutional term "natural born" is a very legitimate subject of legal and historical debate, and whatever the outcome of the issue and its impact on the current Presidential campaign, it is by no means a frivolous matter. And, as has been noted by several scholars and commentators on the issue, it involves a difficult examination of historical and legal materials which can be seen, to quote one writer, as "mysterious and ambiguous." "Nelson, <u>The Original Meaning of "Natural</u>

[2] To this end, it should be clear that whatever rumors, innuendoes, purported facts or otherwise about conduct of the Senator's parents while in Canada that may have been circulated on the internet or otherwise are not before me, and no party presented any proofs whatsoever concerning any such matters.

Born," (Revised, The Originalism Blog, Center for the Study of Constitutional Originalism 2016).

As of the time of this writing, as far as I have been able to determine, only one court has decided this issue on its merits.[3] While challenges to Senator Cruz's eligibility based on the "natural born" issue have been filed in a number of states, only the Commonwealth Court of Pennsylvania has decided the question on its merits, in a decision authored by Senior Judge Pellegrini, filed on March 10, 2016. Elliot v. Cruz, No. 77 M.D. 2016 (Commonwealth Court, March 10, 2016). Judge Pellegrini determined that Senator Cruz was eligible to appear on Pennsylvania's Republican primary ballot, finding that he met the criteria of "natural born Citizen." On March 31, 2016, the Pennsylvania Supreme Court affirmed the Commonwealth Court's decision, without discussing the merits of the issue. Elliot v. Cruz, J-56-2016. Thus, Judge Pellegrini's ruling appears to be the sole judicial analysis of the question in the context of the current election cycle and the debate over Senator Cruz's status. The United States Supreme Court has never addressed the "natural born Citizen" question in the context of eligibility for the Presidency. However, at least recently, several law professors and commentators have considered the question and written, in some cases extensively, on the meaning of the phrase. Judge Pellegrini discussed some of these writings in his opinion, while alluding to others.[4] Of course, the Pennsylvania decision is not in any manner binding on the New Jersey Secretary of State or the New Jersey Judiciary. As such, this decision will consider both that ruling and the positions

[3] A number of challenges have been filed in primary states, such as Illinois, New York, New Hampshire and elsewhere, but it appears these have been dismissed on procedural or other grounds that have not addressed the issue of "natural born Citizen" on its merits.

[4] Generally, See Charles Gordon, Who Can Be President of the United States: the Unresolved Enigma, 28 Md. L. Rev. 1 (1968); Jack Maskell, "Qualifications for President and the 'Natural Born' Citizenship Requirement." Congressional Research Service, 2011); Bryan A. Garner, Memorandum: Is Ted Cruz Eligible For the Presidency, (The Atlantic, January, 2016); Paul Clement and Neal Katyal, On the Meaning of "Natural Born Citizen". 128 Harv. L. Rev. 161 (2015); Mary Brigid McManamon, The Natural Born Citizen Clause as Originally Understood, 64 Catholic University Law Review 317 (2015); Michael Ramsey, The Original Meaning of "Natural Born", (Revised, The Originalism Blog, Center for the Study of Constitutional Originalism 2016); Eric Posner, Ted Cruz Is Not Eligible to Be President, (2016).

expressed by legal analysts, who in some cases would entirely disagree with the Pennsylvania outcome.

The Constitution neither defines nor elaborates upon the phrase, "natural born Citizen." The document contains no "Definitions" section. The meaning was never a subject of discussion at the Constitutional Convention of 1787. The meaning of "natural born Citizen" must then be determined with reference to its meaning under the English, or as it is also referred to British, common law. As the Supreme Court has noted, words and phrases used, but not defined, within the Constitution, should "be read in light of British common law," since the U.S. Constitution is "framed in the language of the English common law." Carmel v. Texas, 529 U.S. 513, 521, 120 S.Ct. 1620, 1627, 146 L.Ed. 2d 577, 588 (2000)(meaning of an undefined term in the Constitution "necessarily requires some explanation," and "the necessary explanation is derived from English common law well known to the Framers.")

Reference to the laws of England and more generally, to the historical understanding of citizenship that developed not only in England but elsewhere, identifies at least three types of citizenship. One is based upon the location of one's birth. This is jus soli citizenship, known as "law of the soil." Another is jus sanguinis, or "law of the blood." Under jus soli, citizenship is immediately vested depending upon the location of one's birth; under jus sanguinis, citizenship results immediately based upon ancestry. Under these concepts, Senator Cruz's birth in Canada would certainly result in his citizenship as a Canadian, for he was born on that nation's soil. However, as his mother was an American citizen, under jus sanguinis, he arguably could be considered an American citizen at birth, and arguably be a "natural born Citizen." The third type of citizenship is that given to persons who are "naturalized," by whatever process a government determines to use to confer citizenship on one born an "alien," that is, one not able to claim citizenship under jus soli or under jus sanguinis.

The genesis of the appearance in the Constitution of the term "natural-born Citizen" has been attributed to a letter written by John Jay to George Washington on July 25, 1787. Despite speculation there is no indication of the reason for Jay's

comment, quoted below. The phrase itself was added to the originally offered qualifications for the President, which did not include this "natural-born" qualification. It appeared in the report of the Committee of Eleven on September 4, 1787. Thereafter, the phrase, as part of the qualifications for the Presidency, was not the subject of discussion or debate prior to the adoption of the Constitution. Jay, later the first Chief Justice of the United States Supreme Court, wrote

> [W]hether it would not be wise & seasonable to provide a . . . strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the american [sic] army shall not be given to, nor devolve on, any but a natural born Citizen.
> [3 THE RECORDS OF THE FEDERAL CONVENTION of 1787.]

Jay did not elaborate upon his understanding of "natural born Citizen." Presumably, he assumed that Washington knew its meaning. Or at least, the meaning of the term "natural born subject," for that would have been the context in which the "natural born" label would have applied in English law, where one was a "subject" of the King or Queen, or if not, was an "alien." For, as is pointed out in the scholarly writings that have recently addressed this issue, the great English commentator on English law, William Blackstone, wrote

> The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligence, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it. Allegiance is the tie, or ligament, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and in the nature of government; the name and the form are derived to us from our Gothic ancestors.
>
> [1 Blackstone, Commentaries on the Laws of England 354 (1765)]

In 1352, Parliament provided that all children born abroad whose parents were both English subjects, that is, both were "in allegiance of the king," were natural-born subjects. In 1708 and 1731, Parliament acted again, this time declaring, "so that all children, born out of the king's ligence, whose fathers were natural-born subjects, are

now natural-born subjects themselves, for all intents and purposes, without any exception." Thus, as Blackstone recognized, writing in a period when the American colonies were still under English dominion but just before the Revolution,

> by several more modern statutes . . . all children, born out of the king's ligeance, whose fathers were natural-born subjects, are now natural born subjects themselves, to all intents and purposes, without any exception; unless their said fathers were attainted, or banished beyond sea, for high treason; or were then in the service of a prince at enmity with Great Britain.

This then was the law of England, as it would have been known to the founding fathers, Jay and Washington included. And this law was binding in the American colonies. In Weedin v. Chin Bow, 274 U.S. 657, 660, 47 S.Ct. 772, 773, 71 L. Ed. 1284, 1286 (1926), the Supreme Court, speaking of citizenship provisions of the English law, noted, that "These statutes applied to the colonies before the War of Independence." However, as the Constitution adopted English "common law," it is necessary to ascertain exactly what was the "common law" that was adopted. Did the statutory enactments of Parliament, which in some cases may, or indeed did, amend earlier common law, become part of the adopted "common law," and thus part of the language in which the Constitution was "framed," Carmel, supra, or instead, did the adopted common law not include such "later" legislative actions, but only those judge-made determinations of the law that stood apart from Parliamentary action? It appears that the answer to this question lies at the heart of the controversy over the meaning of the Constitution's use of "natural born Citizen." And it is fair to say that this is a long-standing dispute that has now emerged in this most contentious of circumstances. The answer to the question is, it must be admitted, not necessarily as obvious as some commentators may suggest.

In his decision affirming Senator Cruz's eligibility, Judge Pellegrini discussed a law review article authored by Charles Gordon, who at the time he wrote the piece was the General Counsel of the United States Immigration and Naturalization Service. Gordon's article, Who Can Be President of the United States: the Unresolved Enigma, 28 Md. L. Rev. 1 (1968), discussed the "natural-born Citizen" issue. Gordon, noting that

the English usage of the term would have been, "well known to the Framers of the Constitution," wrote that that "common law, particularly as it had been declared or modified by statute, accorded full status as natural-born subjects to persons born abroad to British subjects." He continued, with some candor, that

> although the evidence is slender, it seems likely that the natural-born qualification was intended only to exclude those who were not born American citizens, but acquired citizenship by naturalization. The Framers were well aware of the need to assure full citizenship rights to the children born to American citizens in foreign countries. Their English forebearers had made certain that the rights of such children were protected, and it is hardly likely that the Framers intended to deal less generously with their own children. The evidence, although not overwhelming, unquestionably points in the direction of such generosity.
>
> [Gordon, supra, at 31-32].

Finally, Gordon noted that actions taken by the Congress in 1790, when it adopted legislation dealing with the issue, and in adopting the Fourteenth Amendment, did not, in his view, "dull" "this gloss of prior history and usage." Ibid.

Judge Pellegrini then noted that in January 2016, the Congressional Research Service (CRS), updated its 2011 report, authored by Jack Maskell in 2011, entitled, "Qualifications for President and the 'Natural Born' Citizenship Eligibility Requirement." This report reached the same conclusion as that arrived at by Charles Gordon. In doing so, Maskell wrote that

> Although the eligibility of native born U.S. citizens has been settled law for more than a century, there have been legitimate legal issues raised concerning those born outside of the country to U.S. citizens. From historical material and case law, it appears that the common understanding of the term "natural born" in England and in the American colonies in the 1700s may have included both the strict common law meaning as born in the territory (jus soli), as well as the statutory laws adopted in England since at least 1350, which included children born abroad to British fathers (jus sanguinis, the law of descent).

Maskell concludes that

> "[t]he weight of legal and historical authority indicates that the term "natural born" citizen would mean a person who is entitled to U.S. citizenship "by birth" or "at birth," either by being born "in" the United States and under its jurisdiction, even those born to alien parents; or by being born in other situations meeting legal requirements for U.S. citizenship "at birth."

Judge Pellegrini then considered that two former Solicitors General of the United States, Paul Clement and Neal Katyal, have agreed with this conclusion that a person born abroad to a United States citizen is a natural born citizen and eligible to hold the Office of President. "On the Meaning of "Natural Born Citizen," 128 Harv. L. Rev. 161 (2015). Essentially, these authors conclude that the sources normally consulted for interpreting the Constitution "confirm that the phrase "natural born Citizen" has a specific meaning: namely, someone who was a U.S. citizen at birth with no need to go through a naturalization proceeding at some later time. The authors review the two "particularly useful sources" "long recognized" by the Supreme Court for understanding constitutional terms, the British common law and the enactments of the First Congress. Smith v. Alabama, 124 U.S. 465, 478, 8 S.Ct. 564, 569, 31 L.Ed. 239, 246 (1888); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297, 8 S.Ct. 1370, 1378, 32 L.Ed. 239, 246 (1888). The authors find that these sources confirm their conclusion that the phrase "includes persons born abroad who are citizens from birth based on the citizenship of a parent."

After a considerable quotation from Clement and Katyal's Harvard Law Review piece, Judge Pellegrini mentions that there are "[O]thers" who conclude that Article II, Section I, must instead be understood to exclude one not born in the United States, "except in certain instances." He singles out Mary McManamon, Professor of Law at Widener University School of Law, noting that she has criticized the "scholarship" of those whom he has cited who favor the broader understanding of the term. McManamon, "citing provisions of English common law, "statements by early American jurists," and selected passages from Blackstone," Elliot v. Cruz, supra, at 21, supports "the proposition that in the eyes of the Framers, a presidential candidate must be born in the United States." Id. Mary Brigid McManamon, The Natural Born Citizen Clause as Originally Understood, 64 Cath. U.L. Rev. 317, 343 (2015). Judge Pellegrini does not

discuss either the details of Professor McManamon's analysis or his reasons for rejecting her conclusion. Instead, he closes his opinion with:

> Having extensively reviewed all articles cited in this opinion, as well as many others, this Court holds, consistent with the common law precedent and statutory history, that a "natural born citizen" includes any person who is a United States citizen from birth."

Thus, Judge Pellegrini determines that Senator Cruz, who was an American citizen at birth, is eligible to serve as President of the United States. As noted, the Pennsylvania Supreme Court affirmed his decision.

I too have reviewed the several articles and briefs addressing this issue, including in addition Harvard Law Professor Einer Elhauge's amicus briefs, apparently filed in connection with proceedings in New York State and later in Pennsylvania.[5] Boiled down, it appears that both Professor McManamon's and Professor Elhauge's chief contention is that the "common law" of England, that body of law "so familiar to the Framers" and adopted by the United States at the time of the adoption of the Constitution, did not, as argued by others, provide that children born outside the allegiance of the King were "natural-born subjects," even if the child's parents, father and/or mother, were themselves "natural-born subjects" of the English sovereign. While enactments of Parliament, adopted either before 1709 or as late as 1731 or the 1750's, may have changed the law of England, broadening the meaning of the term (indeed in McManamon's view only the 18th Century statutes did this), these legislative enactments did not change the "common law" of England adopted through the Constitution. Consideration of these Parliamentary enactments is not an appropriate tool for ascertaining the meaning of the phrase at the time of adoption of the Constitution. McManamon writes

> As this Article demonstrates, the evidence points to only one conclusion: the Framers constitutionalized the common law notion of "natural born"—not the notion expanded upon by the English naturalization statutes—into Article II. Nonetheless, most commentators currently addressing this question contend that the Framers adopted a broader view. These authors posit that children born abroad to American parents satisfy the

[5] I am unaware whether these courts accepted these briefs as filings in their proceedings.

> constitutional requirement. In addition to relying on a mistaken understanding of the English statutes, current American pundits suggest a few other creative arguments to support their view. However, none can be substantiated.

In support of her position that the statutory enactments of Parliament are irrelevant, McManamon argues that while the several states adopted so-called “reception statutes” which, by their terms, adopted the common law of England, together with the statutory enactments of Parliament, the United States Constitution does not include language involving such broad “reception” and, indeed, Congress never adopted a “reception statute.” Thus, any assumption or implication that the common law carried forward by the Constitution included the then existing statutory provisions, such as the 18th Century statutes touching on the subject of “natural-born,” is not justified.

In Doe ex dem. Patterson v. Winn, 30 U.S. 233 (1831), Justice Story, writing for the Supreme Court in a case arising under Georgia law, discussed statutes enacted by Parliament prior to 1607, the year the Jamestown colony was founded, which amended the common law regarding issues concerning land titles. Discussing the state of the law applicable to the issue, he wrote

> These statutes being passed before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute a part of our common law.
>
> [Patterson, supra, 30 U.S. at 241, 8 L. Ed. at 112]]

What is possibly unclear is whether Justice Story, in stating that the statutes were “part of our common law,” was addressing only the common law as adopted in Georgia, or was speaking more broadly, that is, stating that the English common law adopted in the United States included the statutory enactments, even where no “reception statute” had been adopted. His statement, short as it is, does not by its words limit the assertion to the Georgia context. But his statement clearly refutes the view that at least some statutory enactments were not themselves integral parts of the “common law” that travelled to the colonies. Others have addressed this issue as well.

In Sackett v. Sackett, 25 Mass. 309, 316 (Sup. Ct. Mass. 1829), Chief Justice Parker quoted his predecessor in office, Chief Justice Dana,

> Thus Chief Justice Dana, in the case Commonwealth v. Leach, et al, 1 Mass. 59, 61 says, 'the term 'common law' ought not to be construed so strictly as is contended for. Generally, when an English statute has been made in amendment of the common law of England, it is here to be considered as part of our common law.

Chief Justice Parker then quotes another of his predecessors, Chief Justice Parsons, who he notes was considered by Massachusetts Chief Justice Lemuel Shaw, himself well recognized as an eminent jurist, to be, along with Chief Justice Parker, the two most learned in the common law that Shaw knew. Chief Justice Parsons wrote

> Our ancestors, when they came into this new world claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law thus claimed, was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never re-enacted in this country, but were considered as incorporated into the common law.

In Manoukian v. Tomasian, 237 F.2d 211 (D.C. Cir. 1956), the court was confronted with an issue regarding inheritance rights of a child of the deceased who had witnessed the will and testified to establish it. The issue arose in the District of Columbia, which had been created from land which had partially been in the Colony and then the of State of Maryland. A British statute of 1752, 25 Geo. II, Ch. 6, 1, 7, notably enacted well after the "emigration of our ancestors" [starting in 1607] established the law applicable at the time to the right of such witness/beneficiary to inherit. Provisions of the District of Columbia Code described by the court as derived from this English statute were relied upon by the appellees as a bar to the appellants inheriting, as they were the sole witnesses to the will. In the court's view, literal application of the D.C. Code would have undermined the very purpose of the provision, intended to prevent fraud. Circuit Judge Washington wrote for the court, and explained that these D.C. Code provisions were not acts of Congress passed to apply in the District, but were "[I]nstead, . . . part of the law of the District because they are British statutes which were recognized as being in

force in Maryland prior to the cession of the District in 1801. These were maintained by the Act of March 3, 1901, which provided that

> The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, . . . shall remain in force except in so far as the same are inconsistent with, or are replaced by, subsequent legislation of Congress.
>
> [Manoukian, supra, 237 F.2d at 214.]

The Act of March 3, 1901, appears to be a "reception statute." But Judge Washington explained that the apparent distinction between "common law" and "statute law of the colony" did not in fact exist, at least in regard to the status of the latter as a part of the "common law" that existed at the time of independence. Noting that "British statutes antedating the Declaration of Independence have almost universally been regarded as having the effect of judicial precedent, rather than legislative enactment," he then added the following, quoting from a decision of a New York State court,

> The common law of the mother country as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, becomes in fact the common law rather than the common law and statute law of the colony. The statute law of the mother country, therefore, when introduced into the colony of New York, by common consent, because it was applicable to the colonists in their new situation, and not by legislative enactment, became a part of the common law of this province.' Bogardus v. Trinity Church, N.Y.,Ch. 1833, 4 Paige 178, 198, affirmed N.Y. Ct. of Errs.1835, 15 Wend. 111.

Judge Washington continued, citing Justice Story

> Such statutes are for many purposes considered part of our common law, Doe ex dem Patterson . . ., to be applied by American courts like the common law, rather than like enactments of our own legislatures. In substance, they have been received here as 'part of our judicial heritage' cf. Gertman v. Burdick, 123 F.2d 924, 929 (1941), cert. denied sub nom. Burdick v. Burdick, 315 U.S. 824 (1942)], and should be interpreted and applied as such.
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> [Manoukian, supra, 237 F.2d at 215.]

While it may be true that there is no Federal “reception statute,” it is also true that the Framers of the Constitution were men who were steeped in the legal traditions and developments of the common law. As Chief Justice Taft, himself a former President of the United States, wrote

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.
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> [Ex Parte Grossman, 267 U.S. 87, 108-109, 45 S. Ct. 332, 333, 69 L.Ed. 527, 530 (1925)]

It must then be recognized that the Framers were well aware of the 18th Century Parliamentary enactments and most likely understood the term “natural-born” in their light. Did they intend to ignore them when they incorporated the “common law” understanding of “natural-born,” as Professors McManamon and Elhauge would have it, or did they simply understand that in placing that term in the Constitution they meant the term to apply as the English law had developed over time up through the legislation of the early 18th Century? The statements of Justice Story, the Massachusetts Chief Justices and the Court of Appeals for the D.C. Circuit all appear to refute the notion that the Framers would have intended to exclude English statutory enactments when using terms that had meaning to them under the English law as they knew it and as it would have been known to reasonably aware late 18th Century Americans. That the English statutes may be read as “naturalizing” these children born-abroad, “deeming” them to be natural born subjects, “adjudged” to be natural born, does not detract from the fact that the English law as of the adoption of the Constitution specifically said they were “natural-born,” and that is the “common law” inherited from England and known to the Framers. If the Framers intent was to only adopt in this instance, or others, the “narrow”

extent of the common law, that is, without any inclusion in that common law of any statutory action, the records do not contain any specific statement to this effect.

As noted, the appearance of the phrase, "natural-born Citizen" in our Constitution appears to be traced to the concerns expressed in the Jay letter. That letter indicates a concern that "foreigners" could present a danger to the welfare of the Country if permitted to be "Command in chief" of the army. Apparently, at that point in the process of drafting the Constitution, it was at least unclear if the head of the army and the President would be one and the same person. Some commentators have noted that Jay certainly would not have wanted to bar his own children born abroad from an opportunity to serve as "Command in chief" and thus he must have not included the children of American citizens born abroad within this category of "foreigners" whom he sought to ban from that Office. Others note that his own children would not have been barred under a strict jus soli approach to those born abroad, for he was serving as a diplomat and the common law had from some ancient time understood that children of diplomats serving abroad were "natural born subjects" exempt from any disqualification that might arise against children born abroad to non-diplomat subjects, or in the American example, non-diplomat citizens. Thus, the situation of his own children is no proof that he meant "natural-born" to include children born outside the United States to American citizens. However, in his letter Jay does not speak of jus soli, or of the location of one's birth, in such direct terms. He speaks of "foreigners" and "natural-born Citizen." He does not say if he means this latter term in the sense of pre-18th Century, or pre-1350 understandings, or of a time somewhere in between these eras, or if he means it as defined by the then existing Late 18th Century British understanding, as affected by the earlier 18th Century legislation that Blackstone wrote of in his influential Commentaries, which had been widely known in America. As a man steeped in the law, one must assume he knew of these enactments. Did he think that his children, born abroad, were less of a concern than those of other children born abroad of American citizens, perhaps his own neighbors in places where he served as a diplomat, simply because his children's father was a diplomat and theirs were not? Did the allegiance of his children, the "tie that binds" mean more to his children due to his diplomatic status, than the allegiance, the "tie" of those children of non-diplomat

American citizens? Jay speaks of "foreigners" and "natural-born Citizen." Blackstone distinguishes between "aliens" and "natural-born subjects." Jay certainly knew that by 1787, or indeed 1776, English law defined children born abroad to natural-born subjects as themselves "natural born subjects." At least in terms of what he wrote to Washington, his mention of "foreigners" and his concern to exclude them from the "Command in chief" and thus, as it developed, from the Presidency, is not any proof that he meant to include within the term "foreigners," those children already well-known at the time to be "natural-born." And as other commentators have noted, the idea behind Jay's comment can be seen as attempting to deny to persons without "attachment to the country" from this Office. Charles Pinckney, a delegate to the Convention, quoted in 3 Records of the Federal Convention of 1787 387 (Max Farrand ed. Rev. ed. 1938).[6]

Article I, Section 8 of the Constitution provided that Congress had the authority to "establish an uniform Rule of Naturalization." In 1790, the first Congress passed legislation, entitled, "An Act to establish an uniform Rule of Naturalization," tracking exactly the grant of authority it had been provided by the Framers. This statute provided in part, "[T]he children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." 1The Laws of the United States of America 87 (1796). This legislation was repealed, but in a version adopted five years later, Congress said that, [T]he children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States: *Provided*, That the right of citizenship shall not descend to persons, whose fathers have never been resident in the United States." 3 The Laws of the United States of America 163, 165 (1796). The phrase "natural-born" was omitted. In 1802, the Act of 14 Apr. 1802, § 4 (2 Stat. 155), provided, "the children of persons who now are, or

[6] Michael D. Ramsey suggests that "the events surrounding the drafting indicate a paradigm case of exclusion-persons lacking any plausible connections to the United States at birth-but standing alone they are not helpful in determining what connections would be sufficient. Ramsey, The Original Meaning of "Natural Born", at 8.

have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States."[7]

The 1790 Act provided that at birth, a child of a citizen of the United States, even if born outside the limits of the United States, was a "natural-born" citizen of the United States. No process was necessary for them to obtain this citizenship. No barrier stood in their way. Just as a child born within the limits of the United States, these children were "natural-born" citizens. As citizens from birth, they were certainly not "foreigners" at birth, in any sensible meaning. The English law in existence at the time of the adoption of the Constitution declared this to be the case for children born outside the realm to natural born subjects; the 1790 statute and its succeeding statutes do the same, although only the 1790 enactment used the term "natural-born." But did the 1790 legislation amend the Constitution, an act Congress clearly had no power to do by itself, did it merely state that which was already embedded in Article II, Section I, or was Congress simply acting in accord with a power of definition that it already had? Professor McManamon argues that the mere existence of this 1790 statute shows that the meaning of the term in the Constitution was not the expansive one asserted by those who contend that Senator Cruz is "natural-born." Instead, to the extent it might be understood to change or expand the meaning of the Constitutional term "natural born Citizen," it represents possibly an unauthorized amendment by Congress of the Constitution, certainly not a valid means to change the exclusion of children born abroad of United States citizens from the Presidency.

The actual piece of legislation passed in 1790 had three parts. In United States v. Wong Kim Ark, 169 U.S. 649, 672, 18 S. Ct. 456, 466, 42 L. Ed. 890, 899 (1898), the Supreme Court, referring to Article I, Section 8 of the Constitution, said

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[7] Nelson notes that there is no indication in regard to the 1795 legislation as to why the term "natural born" was omitted. It could have been inadvertent, it might have been viewed as surplusage, or it might have been that Congress had decided that for Constitutional or other reasons, foreign born children of citizens could not, or should not be declared "natural born." There is nothing in the record of Congress to explain how or why this happened, and comments about matters pertaining to citizenship issues, such as regarding former U.S. citizens who had renounced their citizenship, made by James Madison and others, did not address the "natural born" clause, or the reasons for the change in 1795. Nelson, supra, at 10.

> By the Constitution of the United States, Congress was empowered "to establish an uniform rule of naturalization." In the exercise of this power, Congress, by successive acts, beginning with the act entitled "An act to establish an uniform rule of naturalization," passed at the second session of the First Congress under the Constitution, has made provision for the admission to citizenship of three principal classes of persons: First. Aliens, having resided for a certain time "within the limits and under the jurisdiction of the United States," and naturalized individually by proceedings in a court of record. Second. Children of persons so naturalized, "dwelling within the United States, and being under the age of twenty-one years at the time of such naturalization." Third. Foreign-born children of American citizens, coming within the definitions prescribed by Congress. Acts of March 26, 1790, c. 3; January 29, 1795, c. 20; June 18, 1798, c. 54; 1 Stat. 103, 414, 566; April 14, 1802, c. 28; March 2

Consideration of the language of this legislation shows that the first provision provided that "any Alien" who had resided for at least two years within the limits and jurisdiction of the United States "may be admitted to become a citizen," by going through a designated process. The second part provided for the children of such "aliens", who are described as having been "naturalized." These children, if below the age of twenty-one years of age at the time of such alien's "naturalization" "shall be considered as citizens of the United States." The third part provided that children of citizens born beyond the seas or outside of the limits of the United States "shall be considered as natural-born citizens." Thus, the first part deals with persons designated as "aliens," certainly then persons who were "foreigners," who by following the necessary process and having resided in the United States for the specified time, could be "naturalized." The second addresses the effect of these "aliens" "naturalization" on their minor children. The third speaks not of "aliens," not of "foreigners," not of "naturalization" not of the subject persons being "naturalized" or related to "naturalized" "aliens." Instead, simply by birth, these children are "considered as natural-born citizens." That is how they are to be understood, and there is here no suggestion that the attempt was to change their standing under the Constitution, which after all had been drafted by many who sat in that First Congress and who knew that the English law that they were so steeped in had treated these children exactly that way. That they saw fit to address the situation of these children in this legislation does not signal that these wise men felt it necessary to change something they had enshrined in the formative document. They simply made it clear that these children, as opposed to persons who were "aliens" and the children of these "aliens," whose citizenship depended on a formal naturalization

process, were, as English law existing as of 1776 and 1789 stated, at birth, "natural-born."

Michael Ramsey contends that in passing this legislation, which in effect declared the meaning of "natural-born" to include the children born abroad of citizens, Congress was acting as the English Parliament did over time, that is, it determined to "naturalize" classes of persons, and in some instances this involved declaring them to be "natural-born." To the extent that the Constitution provided this power to make such "uniform rule of naturalization," Congress would most likely have understood this authority in light of the English Parliament's authority.

> As a result, it is extremely important that under the U.S. Constitution Congress has "Power . . . To establish an uniform Rule of Naturalization." The most obvious marker for the scope of this power is parliament's power of naturalization. In modern American discourse, "naturalization" is often understood as the power to extend U.S. citizenship to foreign citizens on an individualized basis. That, however, was not a full description of the power as understood in the eighteenth century (although it included that power). In addition to individualized grants of citizenship, "naturalization" in English law referred to statutes that made categories of persons English citizens. That is, "naturalization" meant a process that made someone a citizen who was not a citizen under common law. This is indeed the origin of the word: a person who was a citizen under common law was a "natural" citizen; a person made a citizen by statute was made as if they were a natural citizen – hence, naturalized. Crucially, all of the eighteenth-century statutes that declared a class of persons to be "natural born" subjects were called acts of naturalization. As a result, there is no doubt that parliament's power of naturalization included the power to declare categories of natural born subjects beyond the traditional common law. Somewhat confusingly, in terms of modern usage, these persons were *both* "natural born" and "naturalized."
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> [Ramsey, supra, at 33-34]

Noting that the existing definitions of "natural born" included the original common law meaning, the meaning as further defined and enhanced by English statutory enactments and the "law-of-nations" theory as described in the writings of Emer de

Vattel,[8] Congress's action in 1790 can be understood as in effect not adopting for the "Uniform rule" any of these exactly,

> Thus Congress did not seem to be adopting any existing definition, but rather creating its own definition. In this sense, it was acting entirely consistently with Blackstone's description of "natural born" as open to statutory definition (even though Congress did not adopt the exact definition of English statutory law).
> [Ramsey, supra, at 34].

Recognizing that the First Congress did indeed adopt some "unconstitutional provisions" Ramsey observes, "[B]ut in this case, where the constitutional language is ambiguous on its face, the First Congress' actions seem relevant evidence of the proper interpretation." Ramsey, supra, at 35.

Ramsey's arguments are persuasive, although it might just be the case that these "natural-born" children were not actually "naturalized." If indeed the Constitution adopted the common law definition, understood as including the enactments previously discussed, Congress's action in 1790 did not then first make these children "natural born," as they already were. While the Supreme Court termed this an "admission to citizenship," that seems hardly the sense where the child's citizenship arrives immediately at birth, without the need for process, and, most significantly, where at the time of the adoption of the Constitution, the common law of England, known to the Framers and adopted by them, already understood that these children were "natural born." [9] But even if in 1787 the term did not then include these children among those in

[8] Emer de Vattel, The Law of Nations, or Principles of the Law of Nations, Applied to the Conduct and Affairs of Nations and Sovereigns, (London 1797 (1st ed. Neuchatel 1758).

[9] Chief Justice Fuller and Justice Harlan, in their dissent in Wong Kim Ark, supra, at 169 U.S. at 714, 18 S. Ct. at 481-82, 42 L. Ed. at 913-14, considered the meaning of this legislation.

> Whether it was also the rule at common law that the children of British subjects born abroad were themselves British subjects -- nationality being attributed to parentage instead of locality -- has been variously determined. If this were so, of course the statute of Edw. III was declaratory, as was the subsequent legislation. But if not, then such children were aliens, and the statute of 7 Anne and subsequent statutes must be regarded as in some sort acts of naturalization. On the other hand, it seems to me that the rule partus sequitur patrem has always applied to children of our citizens born abroad and that the acts of Congress on this subject are clearly declaratory, passed out of abundant caution to obviate misunderstandings which might arise from the prevalence of the contrary rule elsewhere . . . In my judgment, the children of our citizens born abroad were always natural-born citizens from the standpoint of this Government.

the category "natural-born," Ramsey sees them as placed in that category in 1790 by a Congress acting well within its Constitutional prerogatives under the Naturalization authority and the established Parliamentary practice under its own such authority to change the definition of "natural born" in accordance with its judgment. The change, if that be what it was, preserved the important element of a "tie," a "linkage," a "connection at birth" to the United States.

The final issue to be noted is the fact that the parliamentary legislation recognized in Blackstone and presumably known to the founders that declared children born abroad to English-subject fathers to be natural born subjects did not provide that the children born abroad whose mother was the sole English subject parent were "natural-born." Over time the required parentage of the child born abroad and denominated as "natural-born" had varied. As Bryan Garner notes, this gender-based differentiation does not automatically involve an unconstitutional distinction, "As things stand today, the Equal Protection Clause doesn't forbid all gender differentiations." Garner, supra, at 11. Clearly, it is hard to understand today how to justify why children borne abroad of citizen-fathers can be "natural born", whereas those with only a citizen-mother are not. Indeed, in a case noted by Garner, Miller v. Albright, 523 U.S. 420, 118 S. Ct.1428, 140 L. Ed.2 575 (1998), the Court, considering immigration matters relating to a child born to unwed parents, the Supreme Court upheld the distinction in treatment, noting that the mother must be present at birth and the father need not, and that the fact of giving birth automatically afforded the mother the opportunity to establish ties with the child that the father may not have. Such analysis might lead to the conclusion that if anything, allowable discrimination would favor the child with only a citizen-mother

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While these Justices spoke in dissent to the Court's opinion, their position appears to properly understand that the common law inherited from England was constituted of not only the ancient meanings, but also that body of legislation discussed herein which expanded the meaning of "natural born" prior to the founding of the United States and the later adoption of the Constitution. The case has much to say about citizenship, and while it mentions children born abroad to American citizens, the subject at issue was about the citizenship of person born in the United States of non-citizens, whose right to citizenship was affirmed, as he was born in the United States. The issue of "natural born" as affecting children of citizens born abroad was not before the Court. Clearly, the Court distinguishes between citizenship based on "birth" and "naturalization." But that discussion must be considered in light of the concepts addressed. How the Court would have understood Senator Cruz's situation, as a child born a citizen, and considered the concerns of the Jay letter and the entire issue of "narrow" and "broad" common law, is not certain. And, frankly, as regards the quote above from the dissent, perhaps today, the dissent's conclusion on these childrens' status as "always natural born from the standpoint of this Government" would prevail.

over the child with only a citizen-father. Garner observes that an originalist interpretation "would almost certainly" see the father-only distinction as one that the Supreme Court would today uphold. However, as he notes, and I agree, such an outcome seems to be at complete odds with contemporary understandings of equal protection as it is hard to discern any rational basis that would favor the child of father over child of the mother. If the distinction is to be upheld, and only father-citizen children born abroad and not those with only a mother-citizen parent are to be found to fit the definition of "natural born" such a conclusion must lie with another authority. Here, the equal protection element of the Constitution would properly override any common law based discrimination.[10]

CONCLUSION

As demonstrated above and in the thoughtful examinations of the scholars whose materials are mentioned herein, it must be acknowledged that the arguments against finding a child born outside the United States to a non-diplomat or non-military citizen of the United States are not facetious and the issue can never be entirely free of doubt, at least barring a definitive ruling of the United States Supreme Court. While absolute certainty as to this issue is only available to those who actually sat in Philadelphia and themselves thought on the issue, having weighed the arguments as they are presented by those trying to understand the Framers' intent, I **CONCLUDE** that the more persuasive legal analysis is that such a child, born of a citizen-father, citizen-mother, or both, is indeed a "natural born Citizen" within the contemplation of the Constitution. As such I **CONCLUDE** that Senator Cruz meets the Article II, Section I qualifications and is eligible to be nominated for President. His name may therefore appear on the New Jersey Republican primary ballot.

[10] In this discussion, it is of course to be assumed that the initial issue of whether a child born abroad of a citizen is "natural-born" and otherwise eligible for the Presidency has already been determined in the affirmative, leaving the issue of which parent is the citizen to be considered in regard to its potential

I hereby **FILE** my initial decision with the **SECRETARY OF STATE** for consideration.

This recommended decision may be adopted, modified or rejected by the **SECRETARY OF STATE**, who by law is authorized to make a final decision in this matter. If the Secretary of State does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Any party may file exceptions with the **DIRECTOR OF THE DIVISION OF ELECTIONS**, **DEPARTMENT OF STATE**, by facsimile transmission at (609) 777-1280 within two hours of receipt of the initial decision. A hard copy shall be mailed within twenty-four hours of the facsimile transmission to the **DIRECTOR OF THE DIVISION OF ELECTIONS, DEPARTMENT OF STATE, 225 West State Street, 5th Floor, PO Box 304, Trenton, New Jersey 08625-0304**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 12, 2016	
DATE	**JEFF S. MASIN**, ALJ t/a
Date Received at Agency:	April 12, 2016
Date Mailed to Parties:	April 12, 2016

mph

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discriminatory aspect. If both parents are citizens, this issue is irrelevant. And it must be noted, at times the requirement seems to have been that both be, although such is not always clear.