

The Decisions in Elliott v. Cruz and Williams v. Cruz, Conclusion

“FUNDAMENTALLY FLAWED REASONING”

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During the late 1960s and early 1970s, Calgary, Alberta, Canada saw rapid growth in the oil sector which Sen. Ted Cruz’s parents supported through their geological-analysis business

(Apr. 26, 2016) — [Editor’s Note: The following is a continuation of Joseph DeMaio’s detailed [analysis](#) of the outcome of two challenges to the constitutional eligibility of Sen. [Ted Cruz](#), a Republican presidential candidate born in Calgary, Alberta, Canada to a non-U.S.-citizen father and a presumed U.S.-citizen mother on December 22, 1970.

Thus far, Cruz has not been willing to substantiate his claim with documentation that he is a “natural born Citizen” as required by [Article II, Section 1, clause 5](#) of the U.S. Constitution for the president and commander-in-chief, nor has any judge requested that he do so.

The first challenge was a lawsuit filed by Pennsylvania citizen [Carmon Elliott](#) on the grounds that Cruz is ineligible as a result of his birth in a foreign country. When The Post & Email interviewed Elliott on April 1, he said he would appeal the rejection of his challenge by a Pennsylvania appellate court to the U.S. Supreme Court if he could [raise](#) the necessary funds.

The second challenge to Cruz's eligibility was filed by Republican write-in presidential candidate [Victor Williams](#) which was heard on April 11. Williams's brief submitted to New Jersey Administrative Law Judge Jeff Masin in advance of the hearing, along with that of Atty. Mario Apuzzo, who filed a tandem challenge representing three different plaintiffs, was admittedly [not read](#) by Masin before he issued his opinion the following day that Cruz is a natural born Citizen. Masin's opinion received the backing of New Jersey Lt. Gov. Kim Guadagnano, who [declared](#) that Cruz's name would remain on the June 7 primary ballot.

DeMaio's analysis and conclusion regarding the two decisions follow.]

The Opinion in *Williams*

As previously noted, while the "substantive" portions of the Pennsylvania decision in the *Elliott* case are largely a "cut-and-paste" of the 2011 CRSR and the 2015 CKC, ALJ Masin's opinion is almost entirely his original work. That said, important sections of his opinion replicate portions of both Judge Pellegrini's opinion in the *Elliott* decision as well as parts of the "Summary" from the 2011 CRSR (*see Williams* at 11) and certain conclusions from the CKC (*id.* at 11-12).

Not surprisingly, the same defects and anomalies heretofore addressed and discussed with regard to the *Elliott* opinion, arising as a consequence of the "careful" and "extensive review" of the 2011 and 2016 CRSR documents and the CKC by Judge Pellegrini therein, infect ALJ Masin's opinion in *Williams*.

Unlike Judge Pellegrini's opinion in *Elliott*, however, and as noted before, we now learn that ALJ Masin at the time of the hearing on the dispute informed the parties that although he was in possession of their written briefs stating their respective positions, he had not "looked at any of them ..." and had not "[read any of them.](#)"

For an administrative law judge – or, for that matter, an entry-level hearing officer to a U.S. Supreme Court Justice – to admit that he/she had not taken the time to either "look at" or "read" any of the briefs relating to a dispute coming before him/her is unbelievable.

This is all the more troubling in light of the fact that the actual hearing before ALJ Masin took place on Monday, April 11, 2016 and his 40,312-word opinion came out less than 24 hours later, on April 12, 2016.

Against this backdrop, a cynic might be tempted to jump to the conclusion that the ink (or fused toner) on the Tuesday opinion was already dry well before the first word was muttered at the Monday hearing. So much for according to a litigant due process of law.



Cruz was born on December 22, 1970 at [Foothills Medical Centre](#) in Calgary

The Masin opinion in *Williams* repeats the “*ipse dixit*” error of the *Elliott* opinion by stating categorically that “... as [Senator Cruz’s] 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.’” See *Williams* at 8. ALJ Masin was also clearly aware of both the 2011 and 2016 CRSR documents and the 2015 CKC (see *Williams* at 7, n. 4). Thus, he must also have been aware that in the CKC, the sole basis upon which Messrs. Clement and Katyal based their statement that Senator Cruz was born in a Canadian hospital “... to a U.S. citizen mother...” was the hearsay upon hearsay statement found in a Wall Street Journal article from 2014. Amazing.

Moreover, ALJ Masin concedes that, like Judge Pellegrini in *Elliott*, he too has “... reviewed the several articles and briefs addressing this issue, including in addition Harvard Law Professor Einer Elhauge’s amicus briefs....” It is unclear whether ALJ Masin was referencing “briefs” in a generic sense or whether in a merely introductory way preceding his “including” statement regarding *amicus curiae* briefs prepared by a Harvard Law Professor arguing against Senator Cruz’s eligibility. Either way, ALJ Masin’s “review” must have been performed with both blinders and a blindfold, because his opinion cannot logically be sustained against the realities of the historical backdrop of the issue.

In addition, ALJ Masin should more carefully proofread his opinions. Specifically, he first states (see *Williams* at 6) that some writers on the topic have described the issue as being “mysterious and ambiguous,” citing “Nelson, *The Original Meaning of ‘Natural Born,’* (Revised, The Originalism Blog, Center for the Study of Constitutional Originalism 2016.)” ALJ Masin also later cites Nelson (see *Williams* at 19, n. 7) for the proposition that “... there is nothing in the record of Congress to explain how or why this [*i.e.*, the deletion by Congress of the “natural born” modifier of “citizens” present in 1 Stat. 103 by 1 Stat. 414] happened.”



Warren Hall of the University of San Diego Law School

Do not waste your time, faithful P&E readers, trying to find an article by one “Nelson” as it is referenced in the *Williams* opinion, because it is not there. On the other hand, the identical article – authored instead by University of San Diego Law School Professor Michael D. Ramsey rather than one “Nelson” – appears [here](#). That article parrots both the 2011 and 2016 CRSR documents and is likely the one to which ALJ Masin was referring. While ALJ Masin errs in attributing authorship of the article to “Nelson” in the text of the opinion (*see Williams* at 6) and in n. 7 (*id.* at 19), he correctly identifies Professor Ramsey as the author in nn. 4 and 6 (*see Williams* at 7 and 18). However, in citing and relying on the Ramsey article, the *Williams* opinion raises several important points.

First, although ultimately taking the position (with which your servant disagrees) that “... any person defined as a citizen at birth by the Constitution *or a statute* is eligible to the presidency...,” (emphasis added) (*see* Ramsey “*The Original Meaning of Natural Born*” at 36, hereinafter “Ramsey”), Professor Ramsey engages in an interesting discussion of the reasons underlying (or more precisely, in his view, the *absence* of reasons underlying) the deletion of the “natural born” modifier of “citizens” from 1 Stat. 103 by 1 Stat. 414 in 1795.

Specifically, he notes in this regard that “[t]he effect of the 1795 Act seems thoroughly ambiguous: was the key phrase ‘natural born’ dropped inadvertently, dropped because Congress thought it was surplusage, or *dropped because Congress had decided (for constitutional reasons or otherwise) that foreign-born children of U.S. parents should not be declared natural born?*” (Emphasis added).

Plainly, Professor Ramsey concedes by those questions that, unlike Messrs. Clement and Katyal, the matter is something less than “refreshingly clear” and that the potential exists for a conclusion that Congress erred in the first place when it inserted the “natural born” modifier before “citizens” in the 1790 Act, 1 Stat, 103, and was acting to correct that error by eliminating it in the repeal of 1 Stat. 103 by 1 Stat. 414 in 1795. *See* Ramsey at 9.

Emphasizing that the issue remains murky and ambiguous, Professor Ramsey qualifies and tempers his conclusion with this final sentence: “The proof [of the conclusion that anyone declared by the Constitution or a statute is a natural born Citizen for presidential eligibility purposes], however, *is much more difficult than conventional wisdom supposes.*” (Emphasis added) (Ramsey at 36). Plainly, Messrs. Clement and Katyal did not confer with Professor Ramsey before publishing their article. San Diego Law School is, after all, not Harvard or Yale.

Second, Professor Ramsey, like the 2011 and 2016 CRSR Reports, contends that “[n]othing in the congressional debates indicates a satisfactory answer.” See Ramsey at 9. Accompanying that statement is footnote 43, a long one directing the reader to “4 Annals of Congress 1004-1009....” The footnote acknowledges that “... the lengthy House debates contain *no mention of foreign-born children of U.S. citizens.*” (Emphasis added) See Ramsey at 9-10, n. 43.

While it is true that the term “foreign-born children of U.S. citizens” does not appear in the record of the debates, it is a plain *non sequitur* to conclude that there is “[n]othing in the congressional debates [to indicate] a satisfactory answer [to the question of why the “natural born” modifier of “citizens” in the 1790 Act, 1 Stat. 103, was eliminated in the 1795 Act, 1 Stat. 414].” In fact, as previously noted, there are *plenty* of indicators in the debates as to why Congress eliminated the modifier.

ALJ Masin in his *Williams* opinion, of course, ignores the underlying evidence of congressional intent surrounding the elimination and repeal of the modifier and proceeds on the bare statement of Professor Ramsey – not to mention the narrative of the 2011 and 2016 CRSR Reports – that “[t]here is nothing in the record of Congress to explain how or why this happened.” See *Williams* at 19, n. 7. Like Professor Ramsey, ALJ Masin is likely wrong, and for the following reasons.



The first Congress met in 1789 in Federal Hall, New York City

First, as already noted, it would be unusual for the record to have so clear an admission of error as apparently required by those who suggest that, in the absence of a specific *mea culpa*, the “dropping” of the “natural born” modifier was either “inadvertent” or merely a “stylistic/grammatical decision.” That does not mean, however, that no inferential or anecdotal evidence exists supporting a conclusion that the Congress had identified its error from 1790 and intended to correct it in 1795. To the contrary, that evidence exists if only one is willing to search for it.

Second, the Ramsey article – and thus, by adoption as part of the basis for ALJ Masin’s opinion in *Williams* – persists in utilizing the term “dropped” when referring to Congress’s elimination of the “natural born” modifier of “citizens” in 1 Stat. 103 when enacting 1 Stat.414. *See* Ramsey at 9. Unfortunately, the term “dropped” connotes, in one sense, a “blunder” or an “accidental” or “inadvertent” action.

While the term could also refer to other intentional acts (*e.g.*, he “dropped” the bomb; she “dropped” a hint; etc.), in the context of the interplay between 1 Stat. 103 and 1 Stat. 414, the term is unfortunate in that it lends itself to the argument that, indeed, Congress did *not* intend to eliminate the modifier, but *did* intend to perpetuate the conceptual modifier. The problem with that theory, however, is that in the multiple amendments, enactments and re-enactments of the successor statutes to 1 Stat. 414, *not a single one* re-enacts the modifier at issue.

Stated otherwise, for the past 220+ years, ever since January 29, 1795, a child born to U.S. citizen parents beyond the geographic boundaries of the Nation has been recognized as a “*citizen*” of the United States and entitled to “citizenship” therein, but *not* as a “natural born Citizen,” whether under the statutory “naturalization” laws or under Art. 2, § 1, Cl. 5 of the Constitution. Given the opportunity on myriad occasions to reenact that modifier – as all of the foregoing discussed “scholars” believe has happened *sub silentio* – Congress has not done so.

Third, the term “dropped” has little, if any, relevance in the context of the specific language used by the Congress when it eliminated the modifier. The modifier, along with the rest of 1 Stat. 103, was not “dropped” from the law: it was specifically *repealed*. *See* 4 Annals of Congress at 1499, § 4: “[T]he act entitled ‘An act to establish an uniform rule of naturalization,’ passed the twenty-sixth day of March, one thousand seven hundred and ninety [*i.e.*, 1 Stat 103] *be, and the same is hereby repealed.*” (Emphasis added).

The “repeal” of a statute, including all parts of it not preserved by some articulated exception or “savings clause,” constitutes a recalling or revocation of the statute being repealed. Moreover, the sequential enactment of the first four sections of 1 Stat. 414, which excluded at the outset the “natural born” modifier before the term “citizens,” followed by the express repealer in § 4 of the prior 1790 Act, underscores and confirms a conscious intent on the part of Congress to not only (a) restrict future children born to U.S. citizens abroad to status as “citizens,” but also (b) correct the prior error of “deeming” or “considering” such children to be “natural born citizens.” Any other interpretation of the intent underlying the repeal of the modifier is both illogical and disingenuous.

Accordingly, the argument that because Congress included the “natural born” modifier in 1 Stat. 103 in 1790, somehow that long-since repealed provision now – 220+ years after 1795 – bestows “natural born citizen” status upon *anyone*, Senator Cruz’s candidacy aside, is an opaque mystery. It is a mystery that cannot be squared with the legislative history of 1 Stat. 414; or squared with the specific *conscious repeal* of the entirety of 1 Stat. 103 by 1 Stat. 414; or squared with the original intent of the Founders that only the “highest barrier” to the potential for foreign influence insinuating itself in to the presidency would suffice to constitute one a “natural born Citizen” Unlike modern “scholars,” the Founders were not fond of “tail-wag-the-dog” solutions or “quick fixes” to issues of this nature.

Undeterred, ALJ Masin finally takes into consideration the dissenting opinions of Justices Fuller and Harlan in the *Wong Kim Ark* case. He does *not* focus, of course, on the deceptive mischaracterization of the dissenters’ statements as does the 2011 and 2016 CRSR Reports (*see* 2011 CRSR at 20, n. 94 and 2016 CRSR at 20, n. 96) regarding their purported “agreement” with the majority opinion that Wong Kim Ark would be properly seen as a “natural born citizen.” Instead, he focuses on a different part of the dissent. *See Williams* at 22-23, n.9.

There, ALJ Masin quotes Chief Justice Fuller for the proposition that, as far as he was concerned, in his judgment “... the children of our citizens born abroad were always natural-born citizens from the standpoint of this government.” *See WKA* at 714. ALJ Masin then builds on that point by concluding (*Williams* at 23, n. 9): “[A]s regards the quote above from the dissent [in *WKA*], perhaps today, the dissent’s conclusion on these children’s status as ‘always natural born from the standpoint of this Government’ would prevail.” Not so fast.

Prior to that statement, in the beginning of his footnote 9, ALJ Masin quotes from an earlier part of the dissent, but then – apparently taking a cue from the 2011 CRSR’s creative use of an ellipsis to alter the words, and thus the meaning of the Supreme Court’s decision in *Perkins v. Elg*, 307 U.S. 325 (1939) – omits from his quote of Chief Justice Fuller’s dissent relevant context. Specifically, ALJ Masin omits the jurist’s recognition (*WKA* at 714) that the then-existing naturalization statute declared that children born to U.S. citizens abroad “... are declared to be *citizens* of the United States...” (emphasis added) rather than natural born citizens and that the law had a limiting proviso stating that “...the rights of citizenship shall not descend to children whose fathers have never resided in the United States.”



New Jersey Administrative Law Judge Jeff Masin

It is thus clear that Chief Justice Fuller acknowledged that which ALJ Masin would prefer to overlook, *i.e.*, that although Congress at one time may have (erroneously)

elevated such children to “natural born citizen” status, from January 29, 1795 on, Congress determined to declare them “citizens” rather than “natural born citizens.” Moreover, Chief Justice Fuller’s dissent recognized that the limiting proviso “... was contained in all acts from 1790 down.”

The ellipsis omission, of course, makes it easier for ALJ Masin to suggest that “even the dissenters” in *WKA* would likely agree today that Senator Cruz – having been born in Canada to a mother he *claims* was a U.S. citizen at that time – would be a “natural born citizen” and thus, eligible under the Constitution to be president. To characterize ALJ Masin’s ellipsis omission in *Williams* as being merely disingenuous would be to vastly understate the matter.

Finally, ALJ Masin addresses the limiting proviso of the naturalization law regarding the barring of citizenship rights to children born abroad to “fathers who have never resided in the United States.” After quoting a magazine article — whose author, Bryan Garner, is a professor of law at SMU Dedman School of Law, opines that Senator Cruz satisfies the eligibility criteria despite having been born in Canada “because” his mother was a U.S. citizen at the time of his birth – ALJ Masin ponders why such a proviso should apply where only the father has never been a resident of the United States.

He states (*Williams* at 23): “Clearly, [*sic*] it is hard to understand today how to justify why children borne [*sic*] born abroad of citizen-fathers can be ‘natural born’, whereas those with only a citizen-mother are not.” Once more, like the 2011 and 2016 CRSR Reports, ALJ Masin argues that presidential eligibility should be determined by the Equal Employment Opportunity Commission instead of Art 2, § 1, Cl. 5 of the Constitution.

More significantly, his question is premised on the misapprehension that today, a child born abroad to a father who is a U.S. citizen (ignoring for the moment that children are born to mothers) becomes “natural born” for presidential eligibility purposes. Such a child may be a “natural born citizen” in the minds of Bryan Garner and a number of other “scholars,” but insofar as every act of Congress since 1795 is concerned, and up to the present date, although such a child is a “citizen,” he/she is not a “natural born citizen.” No other rational conclusion can be ascribed to the repeal of 1 Stat. 103, eliminating the “natural born” modifier, and enacting 1 Stat. 414, declaring such a child to be a “citizen” only, a circumstance that persists to this day.

Again, as previously noted, there is nothing in the Annals of Congress stating, in so many words, that Congress erred when it placed the “natural born” modifier before the word “citizens” in the 1790 Act, 1 Stat. 103. Nor is there a declarative statement that Congress was acknowledging the error when it determined to eliminate it in the 1795 Act, 1 Stat. 414.

However, the conclusion espoused by the 2011 and 2016 CRSR Reports that because no such language exists, Congress “may well have” merely considered the deletion of the modifier to be a “stylistic/grammatical decision” or that the deletion was merely to eliminate “surplusage” from the statute is – to again utilize polite terminology – absurd.



The more logical and rational conclusion, as espoused by Congressman Hillhouse (*see* 4 Annals of Congress at 1046), is that in recognition that “the ground upon which foreigners should be admitted to a share in the administration of our Government *ought to be narrowed in every possible way...*” (emphasis added), the removal of the “natural born” modifier would eliminate any question of conflict between the “natural born Citizen” requirements of Art. 2, § 1, Cl. 5 and the “naturalization” powers of Congress under Art. 1, § 8, Cl. 4.

More specifically, under the laws of many European nations, including Great Britain, if a child was merely born there, regardless of the U.S. citizenship status of his/her parents, the child was (or was “deemed” to be) a citizen of that nation, which nation, of course is, *vis à vis* the United States: a foreign nation. Therefore, under 1 Stat. 103, such a child – deemed by the foreign nation, and without regard to and/or contrary objections by the United States, to be one of its own citizens – would be eligible to the presidency.

That potential, of course, would be precisely contrary to the Founders’ objective of erecting the highest barrier to foreign influence in the presidency as articulated in Federalist 68 and similarly inconsistent with Congressman Hillhouse’s observations that eligibility to the presidency and admission of foreigners into the “administration of our government *ought to be narrowed in every possible way....*” (Emphasis added).

Moreover, the removal of the “natural born” modifier effectuated by its repeal in the 1795 Act, 1 Stat. 414, would serve to underscore the intent of Congress that only the “highest” barrier to the insinuation of foreigners into the office, rather than a mere “lower” barrier, be erected. For example, a standard that recognizes as a “natural born citizen” eligible to the presidency someone born “abroad” to but *one* citizen parent – whether the father or the mother – is plainly not as high a standard as one requiring *two* citizen parents. Mathematically speaking, the first barrier is only half as high as the second one. If the goal is 100%, 50% is not “good enough.”

Similarly, a standard that would allow recognition of a “dual-citizen” parent as “good enough” also would not satisfy the “narrowed in every possible way” criterion discussed above. The goal was to *narrow* the potentials for foreign influence, not to expand or *broaden* those potentials.

Ask yourself this: Which standard – a higher one or a lower one – would the Founders in 1787, as opposed to Messrs. Maskell, Clement and Katyal in 2011, 2015 and 2016 as

well as Judge Pellegrini (*Elliott*) and ALJ Masin (*Williams*) and even the EEOC today – have preferred? Rocket science, this is not.

If, as noted by Congressman Hillhouse, the goal in enacting 1 Stat. 414 included preserving the intent of the First Congress to restrict and narrow “*in every possible way...*” the “ground upon which foreigners should be admitted to a share in the administration of our Government...,” (emphasis added), it makes little, if any, sense – and some might argue no sense whatsoever – to contend that the elimination of the “natural born” modifier before the term “citizen” in 1 Stat. 103 by 1 Stat. 414 was merely a “stylistic/grammatical” decision or the ministerial elimination of “surplusage.” That is an absurd and pseudo-naïve excuse calculated only to accomplish a desired result rather than objectively analyze and evaluate the Founders’ intent and the intent of the First Congress.

On the contrary, the elimination of the modifier seems clearly and unambiguously intended to correct the prior erroneous *lowering* of the “barrier” to foreign influence in the administration of the newly-minted government of the United States by again *raising* the barrier to the same height as that intended under Art. 2, § 1, Cl. 5. Stated otherwise, one does not “narrow in every possible way” a barrier by broadening exceptions to it.

Even the Founders understood this simple principle, and rocket science had not even been invented in 1787. None of these matters or documented pieces of legislative history are discussed or analyzed, of course, in the 2011 CRSR, the 2015 CKC or the 2016 CRSR. Thus, it should come as no surprise that they are also missing from ALJ Masin’s *Williams* opinion.

Accordingly, for each and all of the foregoing reasons, it is your humble servant’s opinion that ALJ Masin’s decision in the *Williams* case is fatally flawed and thus manifestly in error. That view, of course, will make little, if any, difference in the end because, as already noted, a locomotive careening down the track with an unconscious engineer slumped over the open throttle is difficult, if not impossible, to stop.

CONCLUSION



Is Ted Cruz a “natural born Citizen?”

The ultimate reality is that, despite the fundamentally flawed reasoning set out in the *Elliott* and *Williams* opinions, the likelihood is that Senator Cruz will be seen by both the electorate and the judiciary to be a “natural born Citizen” eligible to the presidency. No one ever said democracy was always pretty.

If Senator Cruz should succeed in becoming the Republican nominee following the cage fight that promises to be the GOP Convention in Cleveland in July and ultimately is elected President of the United States, he will likely be the third ineligible chief executive in the history of the Republic. They say the third time is the charm. Will the Republic survive? Hopefully, it will. It survived the term of Chester A. Arthur and it *seems* it will survive the remainder of the current Usurper-in-Chief’s term, although many more bad things could happen in the next nine months.

As noted before, Senator Cruz appears to possess all of the requisite qualifications – not to be confused with his eligibility – to well and faithfully serve the Nation as Commander-in-Chief. Frankly, just about anyone would better serve the Nation than the current squatter at 1600 Pennsylvania Avenue, including Senator Cruz and Donald Trump (and even John Kasich), but excluding – “naturally” – Hillary (“that-vile-video-caused-the-Benghazi-attack”) Clinton or Bernie (“comrade”) Sanders. Whether or not Senator Cruz will survive the nomination process in Cleveland remains to be seen, as his multi-billionaire competition seems intent on securing the nomination himself. And if that happens, the foregoing analysis will become largely moot. Time will tell.

Memo to faithful P&E readers: if you are a Trump supporter or a Kasich supporter, do not take the foregoing analysis as either a recommendation or criticism of either of those candidates. The analysis is intended only to underscore the anomalies, deficiencies and errors presented in the *Elliott* and *Williams* decisions and to lament the circumstance that so few people today really care about the Founders’ original intent in enacting Art. 2, § 1, Cl. 5 of the Constitution. Ben Franklin’s [admonition](#) may ultimately prove to be correct.