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

"A BLIND RUBBER-STAMPING"

by Joseph DeMaio, ©2016

Senior Judge Dan Pellegrini is a member of the Pennsylvania Commonwealth Court

(Apr. 25, 2016) — **Introduction**

No sooner had your faithful servant submitted the prior post here analyzing the myriad anomalies of the January 11, 2016 Congressional Research Service Report R4209732 entitled "Qualifications [*sic*] for President and the 'Natural Born' Citizenship [*sic*] Eligibility Requirement" when the news broke that on March 31, 2016, the Pennsylvania Supreme Court had affirmed, in a *per curiam* decision, the March 10, 2016 Commonwealth Court of Pennsylvania decision of Judge Dan Pellegrini in *Carmon Elliott v. Ted Cruz*, Docket No. 77 M.D. 2016 (hereinafter "*Elliott*").

Further cluttering the scene, on April 12, 2016, news broke of the decision of Administrative Law Judge ("ALJ, a hearing officer and not an Art. III constitutional judge) Jeff F. Masin in *Victor Williams v. Ted Cruz*, New Jersey Office of Administrative Law Docket No. STE 5016-16 (hereinafter "*Williams*").

The "short" version of the matter is that Judge Pellegrini (in the Pennsylvania *Elliott* case) and ALJ Masin (in the New Jersey *Williams* case) both opined that, because Senator Cruz was, in their opinion, a "citizen from birth" owing to the fact that his mother was, purportedly, a U.S. citizen when he was born in Calgary, Alberta, Canada – a matter to be discussed hereafter – he was thus in Judge Pellegrini's opinion and in ALJ Masin's opinion a "natural born Citizen" eligible to the presidency.

Accordingly, Mr. Elliott's and Mr. Williams's attempts to have Senator Cruz's name removed, respectively, from the Pennsylvania primary election and the New Jersey primary election ballots were denied. The Pennsylvania primary election is scheduled for April 26, 2016 and the New Jersey primary election is set for June 7, 2016.

And, adding insult to injury, it is now asserted in the *Williams* case the ALJ Masin told the petitioners at the beginning of the hearing that, although he had received the briefs in the case, he had not "looked at any of them …" and had not "read any of them." Recalling that a speeding locomotive with an unconscious engineer at the throttle is hard to stop, look for similar decisions upholding Senator Cruz's purported constitutional eligibility from other states in the coming weeks and months.

Suffice it to say that in reaching their respective conclusions, both the Pellegrini and Masin opinions cite and rely upon, among other sources, (a) a January 11, 2016 Congressional Research Service Report ("CRSR") No. R42097; (b) a predecessor CRSR dated November 14, 2011; and (c) a March 11, 2015 commentary article of Messrs. Paul Clement and Neal Katyal in the Harvard Law Review Forum entitled "On the Meaning of 'Natural Born Citizen'" (hereinafter "CKC").

Accordingly, this post will address their opinions against the backdrop of your humble servant's prior offerings, addressing each of these sources (among others) upon which the core premises of each decision are based.

To be clear, in your servant's view, both opinions (including the summary *per curiam* affirmance by the Pennsylvania Supreme Court in the *Elliott* case) are poorly reasoned and thus, very likely wrong, but a line-by-line critique – while tempting, – would take too long, so only the major structural anomalies will be addressed.

Why has the U.S. Supreme Court "evaded" the question of the meaning of "natural born Citizen" for the last eight years?

Moreover, as both opinions recognize, unless and until the United States Supreme Court accepts jurisdiction over a "ripe" and "justiciable" case or controversy and thereafter renders a binding decision and opinion on the legal issue of what, exactly, the term "natural born Citizen" means within Art. 2, § 1, Cl. 5 of the Constitution – the "Eligibility Clause" – the issue will remain unresolved.

The respective *Elliott* and *Williams* opinions regarding the question in the context of Senator Cruz's purported constitutional eligibility and entitlement to have his name appear on primary election ballots in Pennsylvania and New Jersey are merely the next two steps in the metastasizing process.

Interested? Read on.

The Preliminaries

At the outset, and again with apologies for the length of the offering, due to the complexities and linguistic shenanigans of the 2016 Congressional Research Service Report (references to which will be hereinafter signaled: "2016 CRSR at **"), as well as its predecessor report from 2011 (hereinafter signaled "2011 CRSR at **") – both of which were authored by CRS Legislative Attorney Jack Maskell – the following analysis of the *Elliott* and *Williams* decisions will presume that the reader has either read this servant's prior post here or is sufficiently familiar with the general background of the dispute concerning presidential eligibility to make the discussion less convoluted and opaque.

Second, as noted in the first sentence of your servant's prior post, it would appear that the CRS's objective of persuading the judiciary, among others, that Senator Cruz is a "natural born Citizen" under Art. 2, § 1, Cl. 5 of the Constitution and thus eligible to the presidency, is working: Judge Pellegrini's opinion in *Elliott*, for example. quotes liberally from the Summary section of the 2011 CRSR (*see Elliott* at 14-16), and ALJ Masin not only cites the Pellegrini opinion in support of his own conclusions, he too cites and relies upon the conclusions reached by Mr. Maskell in the 2011 CRSR. *(See Williams* at 7, n. 4; 11).

Moreover, while New Jersey ALJ Masin's opinion (*Williams*) is largely original text, the "meat" of Judge Pellegrini's opinion in *Elliott* (*i.e.*, Section "D", pp. 10-21) is primarily a "cut-and-paste" of both the Summary section of the 2011 CRSR plus wide swaths of the Clement/Katyal commentary article, albeit with proper attribution to the authors. *See Elliott* at 14-20.

Indeed, of the twelve pages constituting Section "D" of the *Elliott* opinion, eight of those pages – two-thirds of the total – constitute the work and words of Messrs. Maskell, Clement and Katyal rather than those of Judge Pellegrini. That surprising percentage aside, if anything good can be said of the Clement/Katyal article, it is that it is largely devoid of the linguistic chicanery which characterizes the 2011 and 2016 Congressional Research Service "products" that Mr. Maskell has produced in recent years on this topic.

Third, the Pellegrini opinion in *Elliott* (and to the extent the *Williams* opinion relies on it as well) must be viewed against the reality that it apparently was issued and decided ***not*** after or upon a full evidentiary hearing or trial, where contested facts and/or factual evidence and documents were offered, witness testimony was taken and – of critical importance – cross-examination conducted.

Instead, we learn from the opinion's first page that the matter was treated by the parties as merely involving the resolution of a legal question, but premised upon a set of *stipulated facts.* The *sole* basis upon which Mr. Elliott apparently sought Senator Cruz's disqualification was that he was born in Canada and not the United States.

No issue was apparently raised with respect to whether, at the time of his birth, either or both of his parents were U.S. citizens and, indeed, it is generally conceded that his father was not a U.S. citizen when he was born. This, of course, would alone render Senator Cruz ineligible to the presidency under the principles articulated in § 212 of Emmerich de Vattel's tome "The Law of Nations" regarding parental citizenship as bearing on the definition of "natural born citizen" as used in Art. 2, § 1, Cl. 5 of the Constitution.

In this regard, the stipulated facts in *Elliott* included the assertions that Senator Cruz's mother, "…Eleanor Darragh, was born on November 23, 1934, in the State of Delaware; [and] that his mother *is and always has been a United States citizen, since the moment of her birth.*…." (Emphasis added) (*see Elliott* at 1). In fact, at the time of Senator Cruz's birth, his mother's name "before marriage" was listed on his birth certificate as "Eleanor Elizabeth Wilson," owing to her prior marriage to one Alan Wilson (they divorced in 1963).

Moreover, with each passing day, additional anecdotal evidence emerges suggesting that, at minimum, critical factual anomalies and questions still persist surrounding the citizenship status of Senator Cruz's mother prior to and at the time of his birth, as seen here and here. These anomalies, of course, are completely ignored in the CKC and, therefore by incorporation, both Judge Pellegrini's opinion in *Elliott* and ALJ Masin's opinion in *Williams.*

If the "stipulated fact" that Eleanor Darragh "is and always has been a United States citizen…" turns out to be in error, then even under the reasoning of the CRS reports and the Clement/Katyal commentary article, the basis for Senator Cruz's claim of eligibility as a "natural born Citizen" under the Constitution evaporates. Indeed, the CKC article makes clear that its conclusion that Senator Cruz is constitutionally eligible as a "natural born Citizen" is *because* he was, purportedly, "born to a U.S. citizen parent – whether in California, Canada or the Canal Zone –…" and is thus "a U.S. citizen from birth." *See* CKC, 128 Harv.L.Rev.F. at 167.

More disturbingly, the CKC commentary documents its assertion that Senator Cruz was born "… to a U.S. citizen mother…" with a citation to a Wall Street Journal article authored by one Monica Langley in 2014. *See* CKC at 5, n. 15, 128 Harv.L.Rev.F. at 165, n. 15. The sole and *entire* basis for the assertion by Messrs. Clement and Katyal in their jointly-authored commentary that Senator Cruz was "born to a U.S. citizen parent…" is as follows (from p. 4 of Ms. Langley's 2014 article). "When [Senator] Cruz's Canadian birthplace came up last year [*i.e.*, 2013] as a presidential-bid issue, *he said his American-born mother – she is of Irish-Italian descent – made him a 'natural born citizen,' as the Constitution requires.*" (Emphasis added.)

Can presidential candidate and U.S. Sen. Ted Cruz prove that his mother was a U.S. citizen at the time of his birth? Would that render him a "natural born Citizen" under Art. II, Section 1, clause 5 of the U.S. Constitution?

Seriously? Messrs. Clement (Harvard Law) and Katyal (Yale Law) posit in the Harvard Law Review Forum magazine that documentation of the core factual basis for their conclusion that Senator Cruz is a "natural born citizen" is premised on a reporter's repetition of… the Senator's *own statement* that he is a natural born citizen "as the Constitution requires." What else would she have expected him to say? Really?

In a matter as substantial as the eligibility of a person to the office of President of the United States of America, one would hope that confirmation of the U.S. citizenship status of Senator Cruz's mother – the cornerstone of the CKC conclusion that Senator Cruz is a "natural born Citizen" for constitutional eligibility purposes – would rely on documentation a bit more substantial than the hearsay representations of a reporter for a newspaper, albeit a well-known newspaper, repeating the hearsay claims of Senator Cruz himself.

Stated otherwise, this circumstance gives new meaning to the Latin term "*ipse dixit*": "it is so because I say it is so." Amazing. And now, of course, the CKC is elevated to status as a structural cornerstone of a judicial opinion (*Elliott*) and an administrative law decision (*Williams*) ratifying its conclusions. Granted, the fact might well be that documentation exists – somewhere other than by way of a "stipulation" of an undocumented fact or through *ipse dixit* – that Senator Cruz's mother was, in fact, a U.S. citizen when he was born. That proof, however, is certainly not evident today or substantiated either by the 2011 CRSR, the 2016 CRSR, the 2015 CKC or even the Wall Street Journal.

Such documentation might include, for example, proof that on December 22, 1970, she was *not* a Canadian citizen as otherwise anecdotally suggested by examination of

Canadian voter registration rolls. There is no question that she was born an American citizen in Delaware on November 23, 1934. The critical question, however, is whether she was a U.S. citizen on December 22, 1970. While the issue remains ambiguous, for the CKC to cite the Wall Street Journal for its categorical statement that Senator Cruz was born to "a U.S. citizen mother" upon these facts is problematic, both as a practical matter as well as from a legal evidentiary standpoint.

If Eleanor Darragh (Elizabeth Wilson Cruz) was, on December 22, 1970, a Canadian citizen instead of a U.S. citizen – or even if she claimed to be a dual Canadian-U.S. citizen (itself a matter of continuing spirited and unresolved debate – the CKC conclusion that Senator Cruz was "born to a U.S. citizen mother…" could well fall into a tar pit. And this fate, of course, arises under their *own* theory as opposed to the more restrictive "Vatellian § 212" view, which would render Senator Cruz ineligible in any event because (a) he was not born "in" the same country where (b) both of his parents were already its citizens. That is the highest standard for determining "natural born" status.

To reiterate the point, for a case of this significance to have proceeded before Judge Pellegrini on the basis of a stipulated fact which might be in error – based only on publicly-available anecdotal evidence thus far known – is, to state the matter politely, disturbing. And where the right of cross-examination has been stipulated away, as is apparently the case in *Elliott,* the likelihood that the ultimate truth has also been stipulated away is more likely than not.

To opine and conclude on stipulated "facts" and in the absence of the opportunity for cross-examination – the "greatest engine ever invented for the discovery of the truth" (*see* 5 Wigmore on Evidence § 1367 (J. Chadbourn rev., 1974)) – that a person is eligible to the presidency of the United State of America where evidence exists suggesting that the person may *not* be a "natural born Citizen" – even under the theories espoused by the CRS and by Messrs. Clement and Katyal – would have horrified the Founders in 1787. Frankly, it should also horrify Americans today. It won't, of course… but it should.

Moreover, in the *Williams* case, ALJ Masin states that "[a]s discussed with counsel at hearing, it is undisputed that Senator Cruz was born in Calgary, [Alberta], Canada, *the child of a mother who was an American citizen and a father who was not a citizen of the United States.*" *See Williams* at 5. Far from being an "undisputed" factual issue, this appears to be a *hotly* disputed statement, as the attorneys for the petitioners there filed "exceptions" to ALJ Masin's ruling.

Not unexpectedly, ALJ Masin rejected the exceptions and the New Jersey Secretary of State has accepted and adopted the ruling, leading Mr. Williams to file a final administrative appeal with New Jersey Governor Chris Christie.

Accordingly, to summarize the preliminaries, both of the opinions in *Elliott* and *Williams* appear to be fundamentally flawed for having relied upon the "facts" and "reasoning" set out in the 2011 and 2016 CRSR documents and, to a lesser but still significant degree, the discussion of the issues characterized as "refreshingly clear" in the Clement/Katyal

article (*see* 128 Harv.L.Rev.F. at 167). Against this backdrop, your humble servant offers the following analyses.

The Opinion in *Elliott*

Even a cursory review of Judge Pellegrini's 21-page opinion reveals that the first eight pages are devoted to preliminary questions, including whether (as argued by Senator Cruz's attorneys) the issue presented was a "non-justiciable political question" (*id.* at 4-5) and whether, as a sub-issue, the determination of a person's eligibility to the office had been "textually committed to one or the other political branches of the federal government." (*id.* at 6-8). Since these topics are tangential to the core of the opinion, they are here noted, but not further analyzed.

After citing and quoting form the U.S. Supreme Court decision in *Wong Kim Ark* (*id.* at 9), Judge Pellegrini then states (*id.* at 10):

"Because there is neither textually demonstrable constitutional commitment entrusting the determination of a person's eligibility to be President to the Electoral College or Congress nor a lack of judicially discoverable and manageable standards for resolving the issue, the political question doctrine does not apply in this case. As such, the Court will proceed to address the merits of the claim."

In arriving at this point in his opinion, Judge Pellegrini cites *Hall v. Florida*, __ U.S. __, 134 S.Ct. 1986, 1992 (2014) for the proposition that "no natural born citizen may be denaturalized." *Id.* An examination of the decision in *Hall* reveals that it relies for that proposition, in turn, on the *dissenting* opinion in *Trop v. Dulles*, 356 U.S. 86, 126 (1958) discussing, by way of *dictum*, the proposition that Mr. Trop – who was a *native-born* citizen – could not be stripped of his citizenship by virtue of being convicted of desertion from the army during World War II.

Accordingly, how a case involving dictum in a dissenting opinion relating to a native-born citizen – with no evidence presented showing that Mr. Trop was also a natural born citizen – has any bearing on eligibility issues under Art. 2, § 1, Cl. 5 of the Constitution is something of a mystery. Yet Judge Pellegrini (and the Pennsylvania Supreme Court) apparently had no trouble making the connection. To do otherwise would seemingly run counter to the objective of confirming Senator Cruz's constitutional eligibility.

Thereafter, the remainder of the *Elliott* opinion, consisting of Section "D" of the document, directly "addresses" and "analyzes" the "merits" of Petitioner Carmon Elliott's claim, *i.e.*, that because Senator Cruz was not born on U.S. soil but instead was born in Calgary, Alberta, Canada, he is not a "natural born Citizen" and thus,

purportedly, ineligible to the presidency, thereby necessitating the removal of his name from the Republican Party nomination ballot.

Reasonable minds can and will differ. That is why judicial review sometimes results in affirmances of lower court decisions and opinions, sometimes results in reversals of same and sometimes results in "split the difference" decisions which partially affirm and partially reverse. The same might be said to exist here.

While there is, in fact, substantial anecdotal evidence supporting the contention that, for example, the "common law" guided the Founders in their tasks, that anecdotal evidence has many exceptions. Moreover, there are many lower court decisional authorities standing for the proposition that, for example, a person born here is a "citizen" for Fourteenth Amendment purposes. This is the cornerstone argument of those who rely on the decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) for the extrapolation that, therefore, if one is a "native born citizen" either "at birth" of "from birth," one is eligible to the presidency.

However, the fact that one is a "citizen" under the Fourteenth Amendment – whether "at birth" or "from birth" – does ***not*** mean that they are also a "natural born Citizen" within Art. 2, § 1, Cl. 5 of the Constitution as originally intended by the Founders.

Judge Pellegrini's opinion, by adopting the reasoning of both the 2016 CRSR (which he characterizes as an "updated" version of the 2011 CRS Report, inadvertently exposes his opinion to the same criticisms leveled at the 2011 and 2016 CRS "products."

The main objection lodged by your servant against the 2011 and 2016 CRSR documents and, to a lesser extent, against the Harvard Law Review Forum CKC, is that in the former "Reports," there is a demonstrable bias and manipulation of words, sometimes deceptively, to reverse-engineer a predetermined and desired result. This bias runs exactly contrary to the assurances of the Congressional Research Service that its "products" are always "authoritative, objective and non-partisan."

As for the Harvard Law Review Forum article by Messrs. Clement and Katyal, there is an almost haughty, didactic tone positing that "since" the answer to the eligibility question is, purportedly, "refreshingly clear" under the Constitution, those who would dare to question that reasoning are engaging in "specious objections."

Respectfully, when did legitimate questions regarding constitutional issues which the Supreme Court has for years evaded and still *refuses* to resolve become "specious?" Even ALJ Masin in *Williams* concedes that the eligibility issue "is a very legitimate subject of legal and historical debate…" and that "it is by no means a frivolous matter." *See Williams* at 6. They must teach law differently at Rutgers than at Harvard and Yale.

To the extent that Judge Pellegrini's decision adopts, *verbatim*, various portions of both the 2011 CRSR and the Clement/Katyal article, the decision may be seen to have therefore also adopted the misrepresentations and defects of same, converting those

misrepresentations and defects into judicial opinion and, lamentably, judicial precedent. This is not exactly a prudent course of conduct as a matter of general judicial practice, but it becomes uniquely problematic when the issue is the eligibility of persons seeking to serve as the President of the United States.

The *Elliott* opinion acknowledges, as it must, that the United States Supreme Court "has never addressed its [*i.e.*, Art. 2, § 1, Cl. 5, the "Eligibility Clause"] meaning within the specific context of a challenge to the eligibility of a candidate…" and that "[b]ecause of the paucity of both constitutional history and legal precedent, the meaning of a 'natural born citizen' has been the subject of much dispute." *See Elliott* at 10 – 11. Again, Judge Pellegrini fails to explain how on the one hand he reconciles that statement with his adoption on the other hand of the CKC narrative and conclusion that "the Constitution is refreshingly clear on these eligibility issues." *See* 128 Harv.L.Rev.F. at 167.

The *Elliott* opinion also notes that Senator Cruz's attorneys, arguing in opposition to Mr. Elliott's position that he was not constitutionally eligible, claimed that "one is a natural born citizen, regardless if born outside the United States, *where one of [the] parents is a United States citizen, thereby vesting him with citizenship at birth.*" (Emphasis added). *See Elliott* at 11. Significantly, Judge Pellegrini then adds: "This type of citizenship is known a [j]us sanguinis ("law of the blood") citizenship and *inheres in a person based on his ancestry*." (Emphasis added). *Id.* And it bears repeating that the term "citizenship" appears nowhere in the Constitution. The operative words under Art. 2, § 1, Cl. 5 are: "natural born Citizen."

So now, let us get this straight: here we have a "real" Article III judge opining that *jus sanguinis* is a legitimate basis for the analysis of constitutional eligibility, contrary to the incessant and repeated pontifications of the 2011 CRSR and 2016 CRSR that only *jus soli* ("law of the soil") as contemplated under the "common law" must control. Both principles – *jus soli* and *jus sanguinis* – of course, lie at the core of § 212 of Emmerich de Vattel's tome "The Law of Nations" regarding parental citizenship in the country of birth as bearing on the definition of "natural born citizen."

Judge Pellegrini, however, cannot get to the desired goal of confirming Senator Cruz's eligibility by adopting the complete principles of § 212, so he "bends" its provisions by concluding that (a) the birth need *not* be in the country wherein *both* of the parents are citizens, and (b) if born beyond the geographic boundaries of the United States, only *one* parent need be a U.S. citizen.

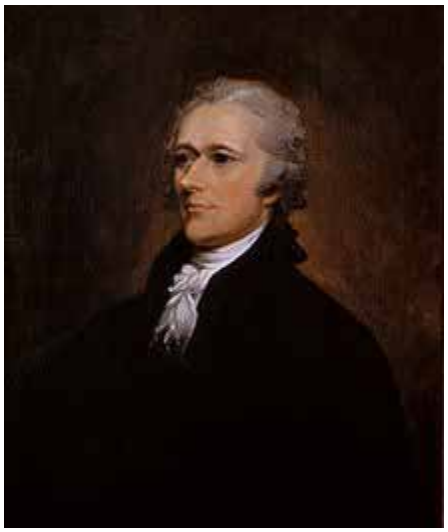
In some ways, this process is not unlike the procedures used by that Dr. Frankenstein: he took a part from here, a part from there, sewed and bolted them together, then applied some electricity and, *voilà*: a monster. Instead of electricity, Judge Pellegrini uses words, some taken from here (the 2011 and 2016 CRSR), some taken from there (the CKC and Wall Street Journal), cuts and pastes them together and, *voilà*: a natural born citizen.

Judge Pellegrini's words, of course, include the erroneous assertion that, with respect to the repeal of the "natural born" modifier of "citizen" in the original 1790 Naturalization

Act (1 Stat. 103) by the 1795 Naturalization Act (1 Stat. 414) "there is no legislative history indicating the reason for the deletion of that term…" and that "it is possible that the deletion is merely a stylistic/grammatical decision." *See* 2011 CRSR at 20, n. 94 and 2016 CRSR at 20, n. 96, both of which footnotes use *exactly* the same language to make the assertion that there is "no legislative history" shedding light on why the "natural born" modifier was eliminated.

As noted here, that is a demonstrably erroneous – and some might argue false – claim. In fact, there is abundant evidence – at least to anyone desirous of learning the truth underlying the reasons for the elimination of the modifier – in the available recorded legislative history of 1 Stat. 414 (see previous article here*).*

The Annals of Congress accompanying the repeal of the "natural born" modifier of "citizens" originally appearing in 1 Stat. 103, but eliminated by Congress in 1 Stat. 414, plainly document congressional concern that the naturalization law likely had improperly amended the Constitution and that, in order to fortify the original objective of erecting the "highest possible barrier" to "foreign influence" insinuating itself into the presidency, the modifier needed to be removed.



The legislative history of the 1795 Act, 1 Stat. 414, plainly suggests that, consistent with the concerns articulated by Alexander Hamilton in Federalist 68 with respect to the goal of erecting the *highest possible* barrier against "foreign influence" in the office of the "Chief Magistrate," the repeal and removal of the term "natural born" before the word "citizen" was in recognition of the potential that, at some future date – say, 2016 – a person who was *not* actually born within the geographic boundaries of the United States to two parents who were, at the time of birth, already U.S. citizens, could claim constitutional eligibility to the presidency as a "natural born Citizen." Such a potential was seen as "*an idea which ought not, explicitly or impliedly, to be admitted*." (Emphasis added) (Remarks of Cong. James Hillhouse, 4 Annals of Congress at 1046).

Earlier in the debate regarding passage of the 1795 act, Cong. Hillhouse stated 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*, and that if the gentleman would so modify the amendment [relating to renunciation by aliens of hereditary titles as a condition of being eligible for naturalization and admission to citizenship, moved by Cong. Giles] as *wholly to exclude that class of foreigners, or any other, from ever becoming citizens, so far as to elect or be elected to any office*, he would most heartily join in giving his vote for it." (Emphasis added) (Remarks of Cong. Hillhouse, *id.* at 1045).

Moreover, Cong. Hillhouse was noted as taking the position with regard to foreign influence in the newly-formed government that he was unalterably opposed to any law which would "…indirectly establish the principle that [foreign] privileged orders might be introduced and exist among us, *a principle which he wholly rejected and reprobated.*" (Emphasis added). *Id.*

Granted, there appears to be no declarative statement by congressmen in the debates such as: "We acknowledge that we goofed when we put that modifier into the 1790 Act and inadvertently tried to amend the Constitution, but now we are correcting that mistake by removing the modifier in this 1795 act." Such a statement, of course, would be argued by the proponents of the conclusions in the *Elliott* and *Williams* decisions as being absolutely necessary to overcome the hypothetical conclusion that the elimination was simply a non-substantive or "stylistic/grammatical" exercise. *See* 2011 CRSR at 20, n. 94 and 2016 CRSR at 20, n. 96.

This is an absurd argument. It is hornbook law that when a legislating body – here, the U.S. Congress – makes a material change in the language of a statute, the action is presumed to indicate a change in legal rights through a change in the law. *See* 1A C. Sands, *Sutherland Statutes and Statutory Construction* § 22.30 at 178 (1972).

The congressional debates attending the enactment of the 1795 Act, 1 Stat. 414, repealing the "natural born" modifier, plainly underscore a congressional intent to remove from the category of "natural born citizens" theretofore existing under 1 Stat. 103 those children born to U.S. citizen parents abroad by declaring them still to be entitled to U.S. *citizenship*, but only as "citizens" and no longer as "natural born citizens." Again, "citizenship" is not a synonym for "natural born Citizen," the exhortations of the 2011 and 2016 CRSR documents to the contrary notwithstanding.

Worse, the CKC – and therefore Judge Pellegrini – makes no attempt to engage in anything close to an analysis of why the modifier was eliminated by Congress a mere five years after it was originally enacted. Instead, Messrs. Clement and Katyal merely note, by way of a perfunctory and dismissive parenthetical, that it was "(repealed 1795)." *See* CKC at 3, n. 8; 128 Harv.L.Rev.F. at 163, n. 8.

Even a law review article cited approvingly in the CKC – and therefore incorporated into the *Elliott* opinion – in support of its conclusions (*see* CKC at 4, n. 10, 128 Harv.L.Rev.F.

at 164, n. 8, citing Christina S. Lohman, *Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*, 36 Gonzaga Law Review 349 (2000/01)) acknowledges that, while the issue remains ambiguous, "… *one could certainly posit that the [Congress] recognized a possible constitutional conflict and sought to correct it. Further, the omission of 'natural-born' makes the statute look more like one devolving citizenship by naturalization.*" (Emphasis added). *See Lohman*, 38 Gonz.L.Rev. at 372-373.

This is an unsurprising conclusion, and more likely the correct one, since after all, the title of *both* statutes – 1 Stat. 103 and 1 Stat. 414 – confirms that Congress was exercising its constitutional powers under Art. 1, § 8, Cl. 4 to enact a uniform rule regarding "naturalization" and *not* a uniform rule regarding "natural born Citizens."

While the *Lohman* article, like the 2011 and 2016 CRSR documents, still tends toward a conclusion that the elimination of the modifier was because Congress "may" have considered it to be "surplusage," *id.* at 373, more significantly, the article – again, cited approvingly by the CKC and presumably, therefore, adopted by Judge Pellegrini – posits that "a good argument can be made that the First Congress *interpreted the constitutional meaning of natural-born via the 1790 act [i.e., 1 Stat.103]*." (Emphasis added).

This is an important point, because if it is accepted as true, then it means, among other things, that with regard to children born abroad, they must have been born, pursuant to the law of *jus sanguinis,* to *two* parents, *both* of whom were at the time of birth already U.S. citizens. *See Lohman* at 368, where she states with regard to the meaning of "natural born citizen" that "… the common law, at least with regard to foreign-born children, *appears to contemplate* ***only children of two citizen parents.***" (Emphasis added). *Id. at* 368. Indeed, throughout her law review article, she consistently refers to "natural born citizens" as being those born to "*parents,*" in the plural, not the singular, who are already at the time of birth citizens of the United States.

Stated otherwise, under the "reasoning" of the two CRSR documents and the CKC, if two citizen parents are necessary to make their foreign-born child under 1 Stat. 103 a "natural born citizen," it makes no sense at all to contend – particularly after the repeal in 1795 of

1 Stat. 103 by 1 Stat. 414 – that only *one* citizen parent will suffice, whether born abroad or in the United States.

Why should there be a different standard regarding how many parents were needed as a function of whether the birth takes place in the United States or in a country *other* than the United States? Recall as well that the issue of "citizenship" cannot properly be conflated with or function as a substitute for what constitutes a "natural born Citizen" for constitutional eligibility purposes.

The conclusion that two citizen parents are required to render a child born "abroad" under 1 Stat. 103 a "natural born citizen" is also consistent with Blackstone's view that, in matters involving offices of the "highest trust" in service to the king – the "Privy Council" – only "natural born *subjects*" who, if born outside England, had to be born to "English *parents"* – again in the plural – to be eligible. In the words of Blackstone: "[I]n order to prevent any persons under foreign attachments from insinuating themselves into this important trust, … *no person born out of the dominions of the crown of England, unless born of English parents*, even though naturalized by parliament, shall be capable of being of the privy council." (Emphasis added). *See* 1 Blackstone's Commentaries, Ch. 5 on "The Rights of Persons" at 224.

It must therefore logically follow that, if this is the thrust of 1 Stat. 103, as contended by Ms. Lohman, then it must also be the thrust of Art. 2, § 1, Cl. 5 of the Constitution: for a person to be a "natural born Citizen" eligible to the presidency, one must – at minimum, regardless of the place of birth under *jus soli* principles – be the offspring of ***two parents*** – not one mother or one father – who at the time of the birth are already U.S. citizens via *jus sanguinis*.

Again, Judge Pellegrini, in accepting the proposition advanced by Senator Cruz's attorneys that he acquired his U.S. "citizenship" from his mother via *jus sanguinis*, must be seen as also acknowledging that exclusive reliance on *jus soli* for the determination of eligibility (as argued by the 2011 CRSR in support of the current "president's" eligibility) is not controlling. But for the requirement of birth within the geographic limits of the United States, this is the same criterion articulated in § 212 of de Vattel's treatise.

Thus, the assertion that "no legislative history" underlies the elimination of the "natural born" modifier in the 1790 Act by the 1795 Act is inferentially adopted in *Elliott* because, as noted in Judge Pellegrini's own words, he "extensively reviewed all articles cited in this [*Elliott*] opinion." *See Elliott* at 21. To appreciate the full irony and error of Judge Pellegrini's "extensive review" of the 2011 and 2016 CRSR documents, examine again these facts here.

And if Judge Pellegrini's "extensive review" of the bases for his opinion is better described as "perfunctory," one hesitates to characterize the Pennsylvania Supreme Court's *per curiam* affirmance as anything other than a blind rubber-stamping.

Judge Pellegrini also adopts and makes a part of his opinion the following quote from the CKC article: "Despite the happenstance of a birth across the border [in Canada], there is no question that Senator Cruz has been a citizen from birth *and thus a 'natural born Citizen' within the meaning of the Constitution.*" (Emphasis added). Apart from the rank "*ipse dixit*" ("it is so because I say it is so") nature of that assertion, given that the following sentence from the article is counterintuitive, the conclusion that "thus," purportedly, Senator Cruz is eligible is a patent *non sequitur*.

Specifically, the next sentence from the CKC article (and thus, the Pellegrini opinion in *Elliott*) states: "Indeed, because [Senator Cruz's] father had also been resident in the United States, Senator Cruz would have been a 'natural born Citizen' *even under the Naturalization Act of 1790.*" (Emphasis added).

The problem with this analysis, both under the CKC article and the *Elliott* opinion, is that the assertion of the second sentence above quoted would have been true *only* if Senator Cruz had been born between March 26, 1790 (when 1 Stat. 103 became law) and January 29, 1795 (when 1 Stat. 414 repealed 1 Stat. 103 in its entirety and itself became law). Only during that period of time, when the language of 1 Stat. 103 was in place and constituted one component of "an uniform rule of naturalization," would the second sentence from the CKC make sense.

However, from January 29, 1795 to December 22, 1970 – a period of some 175 years – the law has *never* stated that, even if a person's father had been resident in the United States, the mother's citizenship aside, that person would be either "considered" or in "actuality" a "natural born Citizen." Instead, that person would be only a "citizen" to be welcomed into the body politic by process of "naturalization" rather entering the body politic "by birth" or "at birth" as a "natural born Citizen" within the intended meaning of Art. 2, § 1, Cl. 5.

Finally, Judge Pellegrini deigns to note that others have taken a contrary view, citing a law professor's review article reaching the conclusion that the Founders intended that, in order to be a "natural born Citizen" for constitutional eligibility purposes, one needed to be born within the geographic boundaries of the United States. *See Elliott* at 21, citing "Mary McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64

Cath.Univ.L.Rev. 317, 343 (2015). Judge Pellegrini then states: "Undoubtedly, this is a minority view among legal scholars."

In this regard, it bears remembering that what was once a "minority view" that freed Negro slaves were, indeed, persons and citizens rather than property – *see Dred Scott v. Sandford*, 60 U.S. 393, 529 (1856) (McLean, J., Curtis, J., dissenting) – is now, one civil war and the Fourteenth Amendment later, accepted as the "majority view" and the law of the land. A '"minority view" is not synonymous with an "erroneous view" or a "specious view," but instead is merely a view that on occasion may simply be one that exists "before its time."

Moreover, the "legal scholars" upon which Judge Pellegrini relies, of course, have no difficulty ignoring available legislative history regarding the elimination of substantive words in statutes; no difficulty in misquoting the words of Supreme Court Justices in their opinions; and no difficulty in altering the words of constitutional experts like James Corwin to fit their narrative.

By analogy, one is reminded of the "modified" list of commandments issued by Napoleon the Pig in *Animal Farm*: "All scholars are equal, but some scholars are more equal than others." None are to be doubted more than the willfully ignorant.

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The remainder of Joseph DeMaio's analysis concerning the *Williams* and *Elliott* decisions will appear in a subsequent article.