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## Rethinking Presidential Eligibility

Eugene D. Mazo  
*George Mason University*

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# RETHINKING PRESIDENTIAL ELIGIBILITY

Eugene D. Mazo\*

*Many aspiring American Presidents have had their candidacies challenged for failing to meet the Constitution’s eligibility requirements. Although none of these challenges have ever been successful, they have sapped campaigns of valuable resources and posed a threat to several ambitious men. This Article examines several notable presidential eligibility challenges and explains why they have often been unsuccessful. The literature on presidential eligibility traditionally has focused on the Eligibility Clause, which enumerates the age, residency, and citizenship requirements that a President must satisfy before taking office. By contrast, very little of it examines how a challenge to one’s candidacy impacts a presidential campaign. This Article seeks to fill this gap. It also offers a modest proposal: Congress should pass legislation defining exactly who is eligible to be President and also implement procedural rules that would expedite presidential eligibility cases for review to the Supreme Court.*

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\* Antonin Scalia Law School, George Mason University. This Article is dedicated to the memory of my father, Eugene B. Mazo (1938–2016), who inspired my enduring love of politics. He will always be missed. I owe thanks to Jerry Goldfeder, Ned Foley, Tony Gaughan, Derek Muller, Michael Morley, Michael Waldman, Sean Wright, and the many audience members who participated in the forum on *Election Law and the Presidency* at Fordham University School of Law for their thoughtful comments on the ideas presented here. I am grateful to David Noll for pushing me to think harder about the consequences of my proposed solutions. Finally, I wish to thank Max Bernstein, Jessica Lee, and the editors of the *Fordham Law Review* for their help in editing this Article and for showing extreme patience with me throughout its publication process. All remaining errors are my own.

## INTRODUCTION

The U.S. Supreme Court has yet to rule that any candidate for the presidency of the United States is ineligible for that office. This is so despite the fact that the eligibility of U.S. presidential candidates has often been challenged. Several aspiring Presidents have had lawsuits filed against them alleging that they fail to meet the requirements of the Constitution's Eligibility Clause.<sup>1</sup> In most instances, these lawsuits have been summarily dismissed. In the few circumstances when the courts have decided these cases on their merits, they have always ruled against the challengers.<sup>2</sup>

Much of the literature on presidential eligibility focuses on the text of the Constitution and on the provisions of its Eligibility Clause.<sup>3</sup> By contrast, little of it examines how actual challenges to a candidate's eligibility play out in the heat of a presidential campaign. Nor has the literature examined how our presidential candidates are affected by these challenges or how their campaigns respond to them. The few scholars who have looked at these challenges closely conclude that having the courts resolve them has been "disastrous."<sup>4</sup> As such, commentators have put forth various proposals to make resolving eligibility disputes easier. For example, over the years, scholars have repeatedly called for a constitutional amendment to abolish the requirement of electing a natural born citizen.<sup>5</sup>

This Article calls for a different solution. It posits that Congress should define who a "natural born citizen" is. Congress has long regulated by statute the conditions that must be satisfied for children born overseas to U.S. citizen parents to obtain their citizenship. Now Congress should provide guidance as to which of these children qualify as natural born citizens for purposes of presidential eligibility.<sup>6</sup> If Congress does not feel it can do this, then this Article argues for an original solution: it calls on Congress to create a statutory provision mandating that presidential

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1. U.S. CONST. art. II, § 1, cl. 5.

2. See *infra* Part II.D.

3. See, e.g., Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1 (1968); Jordan Steiker et al., *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995).

4. See, e.g., Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 561 (2015) (noting how any attempt to determine presidential eligibility questions through litigation "has been disastrous"); see also JACK MASKELL, CONG. RESEARCH SERV., R42097, QUALIFICATIONS FOR PRESIDENT AND THE "NATURAL BORN" CITIZENSHIP ELIGIBILITY REQUIREMENT 34–50 (2011) (examining the cases that challenged the presidential eligibility of presidential candidates John McCain and Barack Obama).

5. See, e.g., Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 BYU L. REV. 927, 991–94 (explaining why a constitutional amendment to repeal the Natural Born Citizen Clause is justified); see also Derek Muller, "Natural Born" Disputes in the 2016 Presidential Election, 85 FORDHAM L. REV. 1097, 1111 (2016) (explaining how a constitutional amendment concerning natural born citizens "is nothing new").

6. See Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881, 884 (1988) (recognizing "Congress's role, through legislation, to determine who is a natural-born citizen").

eligibility challenges get a hearing before a three-judge district court, with mandatory review by the Supreme Court. Such procedures already exist in other areas of election law.<sup>7</sup> Eligibility contests should not be distinguishable. This would allow these disputes to be resolved more expeditiously.

The Article proceeds in three parts. Part I examines the relevant constitutional provisions and some of the difficulties that scholars have had in determining what they mean. Part II examines the bases of the various eligibility challenges that several U.S. presidential candidates have faced. It focuses both on famous eligibility challenges from the past and on the more recent challenges that John McCain, Barack Obama, and Ted Cruz faced in 2008, 2012, and 2016. Part III explains why these constitutional challenges have repeatedly been unsuccessful. It also offers a proposal for what Congress can do to respond to them should they occur in future elections.

Leaving unresolved the question of who is eligible to serve as President of the United States poses great dangers and risks for American democracy. It also forces campaigns to waste valuable time and resources litigating a question to which most voters expect there to be a clear answer. This result is not only confusing to citizens, but it also lowers their confidence in the integrity of the democratic process. Because 2016 is a presidential election year, this Article is timely and hopes to fill a gap in the growing but indeterminate literature on presidential eligibility. That literature has extensively debated who is qualified to serve as the U.S. President. It has, however, largely failed to come up with a solution for resolving eligibility disputes with fairness and finality. In examining the eligibility challenges that several American presidential candidates have faced, this Article proposes a solution for what Congress can do to move forward.

### I. THE CONSTITUTIONAL PROVISIONS

The Framers wanted to ensure that only a person of good judgment, who was also loyal to his country, could be elected President of the United States. To ensure this, they mandated in the Eligibility Clause of the U.S. Constitution three requirements for the presidency. These focused on a candidate's age, residency, and citizenship:

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.<sup>8</sup>

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7. See, e.g., Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 433 (noting how "in litigation involving the Voting Rights Act, certain aspects of campaign finance, and redistricting, a three-judge district court comprised of both appellate and district judges initially hears the dispute, and the Supreme Court is required to review any appeal").

8. U.S. CONST. art. II, § 1, cl. 5.

Other presidential eligibility restrictions exist elsewhere in the Constitution as well.<sup>9</sup> For example, the Twenty-Second Amendment prevents any person from being elected President more than twice<sup>10</sup> or from a person being elected more than once if he has served more than two years of a term to which some other person was elected.<sup>11</sup> This ensures that a Vice President who succeeds to the office of the presidency to fill the shoes of a sitting President who dies or resigns can only be elected once more.

The Eligibility Clause has led to much controversy. Especially problematic has been the natural born citizenship requirement, which does not resolve the question of whether an individual who may be born overseas to U.S. citizen parents—and is granted citizenship at birth by congressional statute—qualifies to serve as President of the United States.

#### A. *Interpreting the Eligibility Clause*

The constitutional requirement that the President has to be thirty-five years of age at the time of taking office is clear on its face,<sup>12</sup> and there has not been a serious court challenge to a candidate on behalf of his age. The United States has, however, witnessed several young candidates run for office. In 1896, when William Jennings Bryan became the Democratic Party's nominee for the presidency, he was only 36 years old.<sup>13</sup> Bryan remains the youngest nominee of any major political party for this office.<sup>14</sup>

In 2015, Marco Rubio began campaigning for the presidency at age forty-three.<sup>15</sup> Other candidates have begun their campaigns when they had not yet reached the age of thirty-five.<sup>16</sup> None of these latter candidates are

9. See Muller, *supra* note 4, at 567–72 (enumerating a President's qualifications and, in addition to those of the Eligibility Clause, finding that a candidate cannot be or have been term limited, disqualified from office because of impeachment, conviction, insurrection, or rebellion, and cannot be an inhabitant of the same state as the Vice President).

10. U.S. CONST. amend. XXII, § 1 (“No person shall be elected to the office of the President more than twice . . .”).

11. *Id.* (“[N]o person who has held the office of President, or acted as President, for more than two years of a term of which some other person was elected President shall be elected to the office of the President more than once.”).

12. See Anthony D’Amato, *Aspects of Deconstruction: The “Easy Case” of the Under-Aged President*, 84 NW. U. L. REV. 250, 250 (1989) (arguing that there is nothing in the Constitution that is more “crystal-clear” than the age cut off for a President); Muller, *supra* note 4, at 567 (calling this requirement “fairly straightforward”).

13. See MICHAEL KAZIN, *A GODLY HERO: THE LIFE OF WILLIAM JENNINGS BRYAN* 46 (2007). See generally ROBERT W. CHERNY, *A RIGHTEOUS CAUSE: THE LIFE OF WILLIAM JENNINGS BRYAN* (1994); GERALD N. MAGLIOCCA, *THE TRAGEDY OF WILLIAM JENNINGS BRYAN: CONSTITUTIONAL LAW AND THE POLITICS OF BACKLASH* (2011).

14. Several U.S. Presidents have begun their terms when they were in their forties. On Inauguration Day, Theodore Roosevelt was forty-two; John F. Kennedy, forty-three; Bill Clinton and Ulysses S. Grant, forty-six; and Grover Cleveland and Barack Obama, forty-seven. See Ronald Feinman, *Are We Entering an Age of Older Presidents?*, PROGRESSIVE PROFESSOR (Nov. 26, 2014), <http://www.theprogressiveprofessor.com/?tag=presidents-in-their-40s> [https://perma.cc/5HSQ-B5Y7].

15. See MANUEL ROIG-FRANZIA, *THE RISE OF MARCO RUBIO* 51 (2012) (chronicling Rubio's political ascent in Florida).

16. See, e.g., Gil Kaufman, *Meet the Youngest Candidate for President, Ever: Brian Russell May Not Even Be 35 yet, but He Wants to Be Your President*, MTV (Apr. 13, 2015),

nationally known, though most of them have filed to run for the presidency successfully. Such filings have sometimes tasked courts and administrative agencies, such as the Federal Election Commission, with issuing rulings concerning the right of these candidates to receive campaign contributions, qualify for matching funds, purchase advertising, and so forth—issues that are crucial to a successful campaign and on which we now have established some precedent.<sup>17</sup>

The Eligibility Clause also requires the President to have been “fourteen Years a Resident within the United States.”<sup>18</sup> Some commentators, such as Ted Cruz’s counsel James C. Ho, suggest that the Framers did not believe the fourteen-year residency requirement needed to be satisfied consecutively but rather only cumulatively.<sup>19</sup> An earlier version of the Eligibility Clause, argues Ho, excluded individuals who have “not been in the whole, at least fourteen years a resident within the U.S.,”<sup>20</sup> although the phrase “in the whole” was apparently deleted during the debates at the Constitutional Convention.<sup>21</sup> It was for this reason that Herbert Hoover, who ran for the presidency in 1928, less than fourteen years after returning to the United States in 1917 from London and Belgium, where he worked organizing food relief programs during World War I, could be elected.<sup>22</sup>

The third qualification to be President is the one that has received the most attention from commentators and has also been most often challenged in the courts.<sup>23</sup> It requires the President to be a “natural born Citizen.”<sup>24</sup> As mentioned, the Framers wished to ensure loyalty to their new country and did not want a foreigner to occupy the office of the President. In a famous letter, John Jay related to George Washington how the Natural Born Citizen Clause “cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office; and interposes a barrier against those corrupt interferences of foreign governments in executive elections.”<sup>25</sup>

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<http://www.mtv.com/news/2125732/youngest-candidate-president-brian-russell/> (explaining how a thirty-four-year-old “self-employed investment banker from Ponte Vedra Beach, Florida, filed to run for president”) [<https://perma.cc/5HA5-QSZG>].

17. See, e.g., FEC Advisory Opinion 2011-15 (Hassan), at 1 (Sept. 2, 2011), [http://saos.fec.gov/saos/searchao.jsessionid=B396EAB8E3F4153478F5FB536326B1E?SU\\_BMIT=continue&PAGE\\_NO=0](http://saos.fec.gov/saos/searchao.jsessionid=B396EAB8E3F4153478F5FB536326B1E?SU_BMIT=continue&PAGE_NO=0) (ruling that Mr. Hassan, a naturalized U.S. citizen, is not prevented from becoming a “candidate” for President and is allowed both to solicit and receive campaign contributions under the Federal Election Campaign Act of 1971, though he is not eligible to receive federal matching funds) [<https://perma.cc/J2XH-FBWG>].

18. U.S. CONST. art. II, § 1, cl. 5.

19. See James C. Ho, *Presidential Eligibility*, in THE HERITAGE GUIDE TO THE CONSTITUTION 189, 190 (Edwin Meese III et al. eds., 2005).

20. *Id.*

21. *Id.*

22. *Id.*; see also CHARLES RAPPLEYE, HERBERT HOOVER IN THE WHITE HOUSE: THE ORDEAL OF THE PRESIDENCY 31–42 (2016) (chronicling Hoover’s run for the White House against Alfred Smith of New York).

23. See MASKELL, *supra* note 4, at 34–50.

24. U.S. CONST. art. II, § 1, cl. 5.

25. 3 JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1473 (1833).

Of course, few people mention that several nonnatural born citizens have served as President before. Eight out of our forty-four Presidents—18 percent of the total—were not born as citizens of United States. These men were born before the American Revolution, and they each became United States citizens only after independence. To ensure that members of the founding generation were not precluded from the presidency, the Framers inserted language into the Eligibility Clause that allowed “a Citizen of the United States, at the time of the Adoption of this Constitution” to serve.<sup>26</sup> Martin van Buren, who became the country’s eighth President in 1837, was the first natural born citizen elected to this office.<sup>27</sup>

But what is a “natural born citizen”? The meaning of these words has been debated for decades, but neither courts nor scholars have come to a clear resolution about what they actually mean. The originalist scholar Lawrence Solum believes that the original meaning of the Natural Born Citizen Clause is subject to an “irreducible ambiguity.”<sup>28</sup> Other originalist scholars, such as Michael Ramsey, have written about how the drafting and ratifying history of the clause “are not helpful to finding [its] conclusive meaning.”<sup>29</sup> Often, commentators have looked to English law to interpret the term. English common law embraced two concepts that bestowed citizenship to the crown’s subjects. The first, *jus soli*, conferred citizenship on those born on British soil.<sup>30</sup> The second, *jus sanguinis*, conferred citizenship on the child of a British subject, even if she was born overseas.<sup>31</sup> In the United States, however, how the offspring of a U.S. citizen qualified for citizenship would be determined by statute.

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26. U.S. CONST. art. II, § 1, cl. 5.

27. See Donald A. Zinman, *Martin Van Buren: 8th President of the United States*, in 1 CHRONOLOGY OF THE U.S. PRESIDENCY 261, 262 (Matthew Manweller ed., 2012); Steve Frank, *Martin Van Buren, Immigration and the Presidency*, CONST. DAILY (Dec. 6, 2010), <http://blog.constitutioncenter.org/2010/12/martin-van-buren-immigration-and-the-presidency/> [https://perma.cc/TSW4-6WMH].

28. Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22, 30 (2008).

29. Michael D. Ramsey, *The Original Meaning of “Natural Born”* 6 (Jan. 7, 2016) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2712485](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712485) [https://perma.cc/6AP8-VGPA]; see also Robert Post, *What Is the Constitution’s Worst Provision?*, 12 CONST. COMMENT. 191, 192 (1995) (explaining how the Eligibility Clause is “remarkably innocent” of legislative history); Pryor, *supra* note 6, at 887–88 (“[A]t the time of the framing of the Constitution, there was no common understanding of what ‘natural born citizen’ meant”); cf. Saul Cornell, *The 1790 Naturalization Act and the Original Meaning of the Natural Born Citizen Clause: A Short Primer on Historical Method and the Limits of Originalism*, 2016 WIS. L. REV. FORWARD 92 (criticizing originalist scholarship regarding the clause).

30. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 38, 50 (7th ed. 2012); KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 605–06 (2015).

31. ALEINIKOFF ET AL., *supra* note 30, at 38–41; JOHNSON ET AL., *supra* note 30, at 616, 618.

*B. The Citizenship Rights of Children Born Abroad*

The phrase “natural born citizen” has often been studied in conjunction with the Naturalization Act of 1790, the first such statute. This law constituted Congress’s first pronouncement of how foreign-born children of U.S. citizens could gain citizenship. The relevant language declared that “the 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” would not “descend to persons whose fathers have never been resident in the United States.”<sup>32</sup> It is clear that members of the founding generation believed that the child of U.S. citizen parents born abroad could be considered a natural born citizen, but to qualify for this designation there were also requirements that had to be satisfied by the child’s parents. Natural born citizenship was not only based on the circumstances of one’s birth, in other words, but also on the decisions made by one’s begetter. Since the Naturalization Act of 1790, Congress has on many occasions amended the conditions under which the child of U.S. citizens born overseas is granted U.S. citizenship at birth.

The requirements of the Naturalization Act of 1790 were retained when that statute was amended in 1795 and 1802,<sup>33</sup> but they were later altered by Congress in 1855. This time, Congress declared that children born “out of the limits and jurisdiction of the United States,” specifically to fathers who were U.S. citizens at the time of the child’s birth, would be U.S. citizens, although, again, not if the child’s father had never resided in the United States.<sup>34</sup> No provision at all was made for the children of U.S. citizen mothers. There can be little doubt that Ted Cruz, had he been born in 1855, would not have qualified to be a U.S. citizen.<sup>35</sup> Cruz was born in Canada to a U.S. citizen mother and a Cuban father.<sup>36</sup>

In the early years of the republic, the citizenship of those born in the United States was also dictated by statute. Notably, Congress did not bestow citizenship on all people born within the country’s borders. Native

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32. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104 (repealed 1795).

33. Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415 (“[T]he children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as natural born 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”); *see also* Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155 (same general provisions as above).

34. Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604 (“That persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens of the United States, shall be deemed and considered to be and are hereby declared to be citizens of the United States: *Provided, however*, That the rights of citizenship shall not descend to persons whose fathers never resided in the United States.”).

35. *See* *Montana v. Kennedy*, 366 U.S. 308, 311–12 (1961) (holding that a child who was born overseas to a U.S. mother prior to May 24, 1934, did not acquire citizenship at birth, because at that time citizenship at birth was transmitted only by a U.S. father).

36. Wendy Mead, *Ted Cruz Biography*, BIOGRAPHY, <http://www.biography.com/people/ted-cruz> (last updated Sept. 23, 2016) [<https://perma.cc/82MF-4YPH>].

Americans, even if born in the United States, were not citizens,<sup>37</sup> and neither were African Americans.<sup>38</sup> In 1868, the Fourteenth Amendment finally placed into the text of Constitution the definition of a citizen. The Fourteenth Amendment's first sentence declared, "All persons born . . . in the United States and subject to the jurisdiction thereof, are citizens of the United States."<sup>39</sup> Since the passage of the Fourteenth Amendment, birth in the United States clearly makes one a natural born citizen eligible for the presidency. The Supreme Court has confirmed that even the children of aliens born in the United States are eligible to be President,<sup>40</sup> although we have had few presidential candidates come from that background. Instead, we have often witnessed the reverse: children born on foreign soil to two U.S. citizen parents—or to one U.S. citizen parent and an alien parent—who decide to become candidates for the presidency of the United States. But the Court has never determined the eligibility of these people.

Nonetheless, the Court has explained that there are only two ways to become a citizen. Those born in the United States automatically become citizens according to the first sentence of the Fourteenth Amendment.<sup>41</sup> The other way to gain U.S. citizenship is by statute.<sup>42</sup> This "second category" of citizenship, as the scholar Gabriel Chin explains, "includes naturalization of individual adults or children already born, collective naturalization of groups, such as natives of territory acquired by the United States, and naturalization at birth of certain classes of children born abroad to citizens."<sup>43</sup> The problem is that that Congress's scheme for awarding birthright citizenship to the persons who fall into the last of these categories has not been governed by one consistent policy. Rather, the law has fluctuated over the years, with Congress at times making some of the children born overseas to U.S. parents into U.S. citizens and some not.

By 1934, Congress had decided that if U.S. citizenship was to descend to children born overseas to U.S. citizen parents, either the child's mother or father had to reside in the United States prior to the birth of the child.<sup>44</sup> Moreover, if one parent happened to be an alien, the child could not obtain U.S. citizenship unless she also resided in the United States for at least five

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37. *Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (confirming that Native Americans do not acquire U.S. citizenship at birth even if they happened to be born in the United States).

38. *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1856) (holding that blacks, even though born in the United States, could not be American citizens).

39. U.S. CONST. amend. XIV ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

40. *See, e.g., Perkins v. Elg*, 307 U.S. 325, 330 (1939) (holding that a person born in America and raised in another country was a natural born citizen, and finding that he could "become President of the United States"); *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898) (holding that the child of foreign parents born in the United States is a natural born citizen who could become President).

41. U.S. CONST. amend. XIV, § 1.

42. 8 U.S.C. § 1401 (2012).

43. Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1, 2 (2008).

44. Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797.

years immediately before her eighteenth birthday—and unless, within six months after her twenty-first birthday, she took an oath of allegiance to the United States.<sup>45</sup> This ensured that a child who happened to be born in the United States to alien parents, but had never lived in the country, could not give birth to children who then automatically acquired U.S. citizenship.

In 1940, Congress once again changed the statutory scheme. This time, it defined a child as being a “citizen of the United States at birth” if at least one of her parents was a U.S. citizen when the child was born, and the parent had resided in the United States (or in one of its outlying territories) for at least ten years, five of which had to come after attaining the age of sixteen.<sup>46</sup> This meant that a child born overseas to a U.S. citizen who had not yet reached the age of twenty-one would not be considered a U.S. citizen. Furthermore, the statute declared that if the child did not reside in the United States by the time she reached the age of sixteen and for the five years immediately before she reached the age of twenty-one, her American citizenship would “cease.”<sup>47</sup> Congress not only provided requirements for birthright citizenship here but also a means for it to be taken away.

By 1952, Congress had changed the necessary residency period for a child born abroad to a U.S. citizen parent once again. The Immigration and Nationality Act of 1952 declared that a child born outside the limits of the country would only be granted U.S. citizenship if her U.S. citizen parent was “physically present” in the United States—“residence” was no longer the term used—for ten years, five of which had to come after that parent was older than fourteen years of age.<sup>48</sup> This provision would later become salient in the challenges to Barack Obama’s eligibility, some of which falsely claimed that Obama was born in Kenya; the place of his birth was important because Obama’s mother, although she was a U.S. citizen, could not satisfy the statute because she gave birth at age eighteen.<sup>49</sup>

In 1952, Congress provided that birthright U.S. citizenship could be taken away from any person who did not come to the United States before the age of twenty-three and was not “continuously physically present” in the country for a five-year period sometime between the ages of fourteen

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45. *Id.* (“Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of birth of such child is a citizen of the United States, is declared to be a citizen of the United States: but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child’s twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.”).

46. The Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1137, 1139.

47. *Id.*

48. The Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, 236 (codified as amended at 8 U.S.C. § 1401 (2012)).

49. See *infra* Part II.D.2.

and twenty-eight.<sup>50</sup> The requirement of maintaining continuous physical presence in the country proved to be too onerous for some and in 1957, Congress relaxed this requirement slightly by allowing an absence for the child of twelve months, in the aggregate, during the five-year period.<sup>51</sup>

By 1972, Congress lowered the duration of physical presence required between the ages of fourteen and twenty-eight to two years, with an allowable absence of sixty days during this period.<sup>52</sup> It also allowed a child's birthright citizenship to be retained if the child came to the United States before the age of eighteen and her alien parent became naturalized during that time.<sup>53</sup> By 1994, however, the law would change once again. This time it granted citizenship to a child born abroad if either her U.S. citizen parent or her U.S. citizen grandparent had been physically present in the United States for at least five years, two of which had to come after the age of fourteen, prior to the child's birth abroad.<sup>54</sup>

The purpose here is not to explain all of the myriad ways in which Congress has legislated to determine when a child born abroad to American parents qualifies for U.S. citizenship. Rather, it is to remind us that the question of whether such children are "natural born citizens" who are eligible for the presidency is not answered by the Constitution. Nor has it ever been resolved by the Supreme Court. This is an issue that, instead, has been left to up to the wisdom of our legislative branch of government.

The Constitution does not say how the children of U.S. citizens born outside the United States acquire their citizenship.<sup>55</sup> Because the Supreme Court has also not spoken on the matter, the only way they can acquire it, despite whatever the academic literature says to the contrary,<sup>56</sup> is legislatively. Today, people born outside the United States to at least one U.S. citizen parent are made citizens at birth by statute.<sup>57</sup> But in its

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50. The Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, 236; *see also* *Rogers v. Bellei*, 401 U.S. 815, 831 (1971) (upholding the power of Congress to impose a subsequent residence condition on a U.S. citizen born abroad and to strip citizenship from any such person if he does not reside in the United States for a five-year period between the ages of fourteen and twenty-eight).

51. Act of Sept. 11, 1957, Pub. L. 85-316, 71 Stat. 639, 644 ("In the administration of section 301 (b) of the Immigration and Nationality Act, absences from the United States of less than twelve months in the aggregate, during the period for which continuous physical presence in the United States is required, shall not be considered to break the continuity of such physical presence.").

52. Act of Oct. 27, 1972, Pub. L. No. 92-584, 86 Stat. 1289.

53. *Id.*

54. The Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305, 4307.

55. We should think of two groups of people as acquiring citizenship by statute. The first acquire their citizenship by meeting Congress's requirements for naturalization. The second acquire it by being a descendant of another U.S. citizen. *See* Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1, 10-11 (1997) (explaining this distinction).

56. *See, e.g.*, Paul Clement & Neal Katyal, *On the Meaning of "Natural Born Citizen,"* 128 HARV. L. REV. F. 161, 161 (2015) (arguing that "the framing-era sources . . . indicate that a 'natural born Citizen' means a citizen from birth with no need to go through naturalization proceedings").

57. *See* 8 U.S.C. § 1401(g) (2012).

statutory scheme, Congress has not gone far enough. Whether a presidential candidate born overseas to U.S. citizens is a “natural born citizen” under the Eligibility Clause is a question that Congress has yet to answer explicitly. It is a question Congress could easily resolve simply by defining the term “natural born citizen.” So far, Congress has refused to do this. As a result, we have had presidential candidates whose eligibility for office has been challenged, both by their rivals and by ordinary voters.

## II. NOTABLE AMERICAN ELIGIBILITY CHALLENGES

Throughout American history, many aspiring Presidents have had their candidacies challenged. These challenges began in the 1880s and have since gained increasing public attention. In recent years, presidential eligibility challenges have been thrust into the courts of law as well as contested in the court of public opinion, posing an additional threat to the campaigns of several ambitious men. A presidential candidate’s eligibility has been challenged in each national presidential election since 2008. With each cycle, these challenges have become more prominent and poignant.

### A. *Historical Challenges from the 1880s to 1970s*

The twenty-first President of the United States, Chester A. Arthur, was born to an Irish father who immigrated to Canada and met his wife in Quebec.<sup>58</sup> Arthur’s mother was born in Vermont and was a U.S. citizen, although her family had immigrated to Quebec when she was a child.<sup>59</sup> Arthur’s biography asserts that he was born in North Fairfield, Vermont, south of the Canadian border.<sup>60</sup> By the time of his birth, Arthur’s parents had moved back to Vermont, and he always claimed Vermont as his home state.<sup>61</sup> However, it was not until 1843, fifteen years after his birth, that his father also became a naturalized U.S. citizen.<sup>62</sup>

When Arthur received the Republican Party’s nomination for the vice presidency in 1880, the Democrats hired a New York attorney named Arthur P. Hinman to investigate whether Arthur may have been born abroad.<sup>63</sup> Hinman initially claimed publicly that Arthur was born in Ireland and brought to the United States as a teenager, thus making him ineligible for the vice presidency.<sup>64</sup> When that theory was disproven, Hinman

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58. J. Gordon Hylton, *President Chester A. Arthur and the Birthers, 1880’s Style*, MARQ. U. L. SCH. FAC. BLOG (Oct. 14, 2009), <http://law.marquette.edu/facultyblog/2009/10/14/president-chester-a-arthur-and-the-birthers-1880%E2%80%99s-style/comment-page-1/> [https://perma.cc/3SBG-98WW].

59. *Id.*

60. *Chester A. Arthur Biography*, BIOGRAPHY, <http://www.biography.com/people/chester-a-arthur-9190059#final-years> (last updated Apr. 19, 2014) [https://perma.cc/WZ8M-KPXU].

61. Hylton, *supra* note 58.

62. *Id.*

63. See ZACHARY KARABELL, *CHESTER ALAN ARTHUR 53–54* (2004); THOMAS C. REEVES, *GENTLEMAN BOSS: THE LIFE OF CHESTER A. ARTHUR 202–03* (1975).

64. See REEVES, *supra* note 63.

claimed that Arthur was born in Canada.<sup>65</sup> Legal historian J. Gordon Hylton explains the relevant history as follows:

The controversy over Arthur's citizenship status centers around the place of Arthur's actual birth. By one account he was born in his family's home in Franklin County, Vermont. If this was true, then he was clearly a natural born citizen. On the other hand, the competing account has it that he was born during his pregnant mother's visit to her family's home in Canada.

If the latter story is true, then Arthur was technically foreign-born, and in 1829, citizenship in such cases passed to the child only if the father was a United States citizen, and, of course, at this point Arthur's father was still a citizen of the British Empire.<sup>66</sup>

When James A. Garfield, the twentieth President, was assassinated in 1881, Arthur became President of the United States.<sup>67</sup> He served in the office until 1884.<sup>68</sup> Hinman's allegations of Arthur's foreign birth were never proven. Nonetheless, in 1884, the last year of Arthur's presidency, Hinman published a book about Arthur's birth in which he detailed his views about Arthur's ineligibility to serve as President.<sup>69</sup>

Allegations that a candidate is ineligible to be President of the United States have been targeted against other candidates in American history as well. When Charles Evans Hughes ran for the presidency against Woodrow Wilson in 1916, his eligibility was publicly challenged by Breckinridge Long, an attorney who would go on to serve in the Wilson administration.<sup>70</sup> Hughes was born in the United States. Nonetheless, as Long explained in some detail, Hughes was also born to an American mother and a British father before the adoption of the Fourteenth Amendment.<sup>71</sup> This meant that his citizenship would have to have been determined by the congressional statutes operating at the time of his birth. The relevant statutes in existence at the time of Hughes's birth, however, made a person a citizen only if both of his parents were U.S. citizens or if they were naturalized before the child's twenty-first birthday.<sup>72</sup> But Hughes's father remained a British subject and never became a U.S. citizen.<sup>73</sup>

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65. See *id.*; see also KARABELL, *supra* note 63, at 53–54.

66. Hylton, *supra* note 58.

67. See *Chester A. Arthur Biography*, *supra* note 60.

68. *Id.*

69. See A.P. HINMAN, HOW A BRITISH SUBJECT BECAME PRESIDENT OF THE UNITED STATES 4–10 (1884) (claiming that Arthur was born in Canada, but when campaigning for the vice presidency, chose to say he was born in Vermont, the state where a deceased brother of his was born, to make it appear that he was a natural born citizen).

70. See, e.g., Breckinridge Long, *Is Mr. Charles Evans Hughes a "Natural Born Citizen" Within the Meaning of the Constitution?*, CHI. LEGAL NEWS, Dec. 7, 1916, at 220 (questioning Hughes's eligibility to be President in 1916); see also Sharon Rondeau, *Obama Not the First to Have Presidential Eligibility Questioned: Charles Evans Hughes's Father Was a British Subject, Just as Obama's Was; The Only Difference Was, He Lost*, POST & MAIL (Apr. 5, 2010), <http://www.thepostemail.com/2010/04/05/obama-not-the-first-to-have-presidential-eligibility-questioned/> [<https://perma.cc/C36Y-5JXW>].

71. Long, *supra* note 70, at 220.

72. *Id.* at 221.

73. *Id.*

Chester A. Arthur and Charles Evans Hughes were born in the United States, but they each had a foreign parent. These circumstances differ from the presidential candidates whose eligibility has been contested for having been born in a U.S. territory or on foreign soil.<sup>74</sup> For example, Barry Goldwater, the conservative Senator from Arizona, was born in Phoenix in 1909, in what was then the incorporated Arizona Territory.<sup>75</sup> During Goldwater's 1964 presidential campaign, a minor controversy arose over his presidential eligibility.<sup>76</sup> While Goldwater was born in Arizona, it was three years before that territory had become a U.S. state.<sup>77</sup>

Presidential candidate George Romney, the former Governor of Michigan and the father of presidential candidate Mitt Romney, was born in Mexico in 1907.<sup>78</sup> In 1886, after the U.S. government began prosecuting polygamy, George Romney's father, Gaskell Romney, immigrated to Mexico with his wife and children.<sup>79</sup> Once in Mexico, he had two more children, including George Romney. Gaskell Romney retained his U.S. citizenship while in Mexico, where he raised his family in a Mormon colony. After twenty-five years there, he returned to the United States in 1912.<sup>80</sup> However, when George Romney sought the Republican Party's nomination for the presidency in 1968, his presidential eligibility was contested by his opponents,<sup>81</sup> and Richard Nixon wound up winning the Republican nomination.

Christian Herter, the former Massachusetts governor and Secretary of State, was also born abroad to American parents. Herter was born in Paris, where his parents were artists and expatriates.<sup>82</sup> When Herter considered running for the presidency, questions were raised about his eligibility.<sup>83</sup> Questions were also raised about former Connecticut governor Lowell

74. See *infra* Part II.B.

75. *Barry Goldwater Biography*, BIOGRAPHY, <http://www.biography.com/people/barry-goldwater-9314846#later-life> (last updated Apr. 2, 2014) [<https://perma.cc/A4LE-TJNY>].

76. See Gordon, *supra* note 3, at 28 n.219 (noting the dismissal of a lawsuit filed against Goldwater during his campaign which claimed that he was not a natural born citizen).

77. See THEODORE H. WHITE, *THE MAKING OF THE AMERICAN PRESIDENT 1964*, at 211–12 (1965) (discussing Goldwater's birth in the Arizona Territory in 1909); John R. Hein, Comment, *Born in the U.S.A., but Not Natural Born: How Congressional Territorial Policy Bars Native-Born Puerto Ricans from the Presidency*, 11 U. PA. J. CONST. L. 423, 425 (2009) (noting how Goldwater was born in Arizona three years before statehood). See generally J. WILLIAM MIDDENDORF II, *A GLORIOUS DISASTER: BARRY GOLDWATER'S PRESIDENTIAL CAMPAIGN AND THE ORIGINS OF THE CONSERVATIVE MOVEMENT* (2008).

78. CLARK R. MOLLENHOFF, *GEORGE ROMNEY: MORMON IN POLITICS* 24 (1968).

79. See *id.* at 23–24; see also T. GEORGE HARRIS, *ROMNEY'S WAY: A MAN AND AN IDEA* 35–43 (1967) (examining George Romney's birth and childhood in Mexico).

80. MOLLENHOFF, *supra* note 78, at 25.

81. See Isidor Blum, *Is Gov. George Romney Eligible to Be President?* (pt. 1), N.Y. L.J., Oct. 16, 1967, at 1 (“The answer would seem to be that he is not a natural born citizen, but is a naturalized citizen.”); see also VINCENT A. DOYLE, CONG. RESEARCH SERV., 425/225, *THE NATURAL BORN CITIZEN QUALIFICATION FOR THE OFFICE OF THE PRESIDENT: IS GEORGE W. ROMNEY ELIGIBLE?*, at i (1968) (explaining how “questions are being raised about the eligibility of Governor George W. Romney, who was born in Mexico”).

82. See generally G. BERNARD NOBLE, *CHRISTIAN A. HERTER* (1970).

83. See DOYLE, *supra* note 81; see also Gordon, *supra* note 3, at 1.

Weicker, who, like Herter, was born in Paris to U.S. parents.<sup>84</sup> When Weicker sought the Republican Party's nomination for the presidency in 1980, his presidential eligibility was challenged.<sup>85</sup> Weicker ordered a legal opinion to be issued on the subject to assure himself and the American people that he could run.<sup>86</sup>

### B. Modern Challenges to McCain, Obama, and Cruz

Recently, John McCain, Barack Obama, and Ted Cruz have each had their presidential eligibility contested. McCain was born in the Panama Canal Zone, at the time an unincorporated territory, to two U.S. citizen parents.<sup>87</sup> Obama was born on U.S. soil, but to a U.S. citizen mother and a Kenyan father.<sup>88</sup> Cruz was born in Canada to a U.S. citizen mother and a Cuban father.<sup>89</sup> The eligibility challenges to these three candidates were featured prominently in the media when each ran for office and had the potential to derail each of their campaigns.<sup>90</sup> And, unlike an earlier generation of eligibility challenges, these were contested in the courts.

#### 1. John McCain

John McCain's father had been serving in the U.S. military and was stationed in the Panama Canal Zone at the time of John McCain's birth on August 29, 1936.<sup>91</sup> Both of McCain's parents were U.S. citizens, and McCain lived in the Canal Zone only until he was three months old.<sup>92</sup> Nonetheless, because he was not born in the United States, McCain could only be granted citizenship by congressional authority. However, as some scholars have pointed out, in 1936, the year of McCain's birth, no statute

84. ALEXANDER HEARD & MICHAEL NELSON, PRESIDENTIAL SELECTION 127 (1987).

85. *Id.*

86. See Carl Hulse, *McCain's Canal Zone Birth Prompts Queries About Whether That Rules Him Out*, N.Y. TIMES (Feb. 28, 2008), <http://www.nytimes.com/2008/02/28/us/politics/28mccain.html> (noting Weicker's situation) [<https://perma.cc/FHU4-CF3D>].

87. *Id.*

88. See *infra* note 123 and accompanying text.

89. See *infra* note 143 and accompanying text.

90. See, e.g., Hulse, *supra* note 86; Adam Liptak, *A Hint of New Life to a McCain Birth Issue*, N.Y. TIMES (July 11, 2008), [http://www.nytimes.com/2008/07/11/us/politics/11mccain.html?\\_r=](http://www.nytimes.com/2008/07/11/us/politics/11mccain.html?_r=) [<https://perma.cc/PYG6-529L>]; Mary Brigid McManamon, *Ted Cruz Is Not Eligible to Be President*, WASH. POST (Jan. 12, 2016), [https://www.washingtonpost.com/opinions/ted-cruz-is-not-eligible-to-be-president/2016/01/12/1484a7d0-b7af-11e5-99f3-184bc379b12d\\_story.html?utm\\_term=.4a0da3e7c0a7](https://www.washingtonpost.com/opinions/ted-cruz-is-not-eligible-to-be-president/2016/01/12/1484a7d0-b7af-11e5-99f3-184bc379b12d_story.html?utm_term=.4a0da3e7c0a7) [<https://perma.cc/RX4L-B6N8>]; Ashley Parker & Steve Eder, *Inside the Six Weeks Donald Trump Was a Nonstop 'Birther,'* N.Y. TIMES (July 2, 2016), <http://www.nytimes.com/2016/07/03/us/politics/donald-trump-birther-obama.html> [<https://perma.cc/8YML-JBMG>]; Michael D. Shear, *With Document, Obama Seeks to End 'Birther' Issue*, N.Y. TIMES (Apr. 27, 2011), <http://www.nytimes.com/2011/04/28/us/politics/28obama.html> [<https://perma.cc/EW7D-4NF8>].

91. JOHN MCCAIN & MARK SALTER, FAITH OF MY FATHERS: A FAMILY MEMOIR 47 (1999) ("In 1936, while commanding the naval air station in Panama, my grandfather was introduced to me, his first grandson and namesake. My father was stationed in Panama . . . serving aboard a submarine as executive officer. He had brought his young, pregnant wife with him. I was born in the Canal Zone at the Coco Solo air base hospital shortly after my grandfather arrived there.").

92. Chin, *supra* note 43, at 2, 7.

conferred citizenship to the children of U.S. parents who were born in “unincorporated territories.”<sup>93</sup> According to immigration scholar Gabriel Chin, the Canal Zone was a “no man’s land.”<sup>94</sup> It was not part of the United States, meaning that the protections of the Constitution did not apply in full there; and nor was it foreign territory.<sup>95</sup>

As Chin explains, the only statute in existence at the time that could have made the children of U.S. citizens born outside of the United States citizens at birth did not apply to births that occurred in the Canal Zone.<sup>96</sup> The Canal Zone was clearly an unincorporated territory under U.S. law,<sup>97</sup> and the Supreme Court had held that unincorporated territories were not within the “limits” of the United States for constitutional purposes.<sup>98</sup> Fourteenth Amendment citizenship, and the protections of the Constitution, thus did not apply there.<sup>99</sup> At the time of McCain’s birth, this issue was well understood by Congress, which passed a statute in 1937 granting citizenship to “[a]ny person born in the Canal Zone on or after February 26, 1904” who had one U.S. citizen parent.<sup>100</sup> Thus, McCain was made a U.S. citizen at birth, statutorily, when he was already eleven months old.<sup>101</sup>

But if John McCain was not a citizen at birth because he was born outside of the limits of the United States and the Constitution did not extend to “unincorporated territories”—which also included places like the Philippines, where birth likewise did not bestow automatic U.S. citizenship<sup>102</sup>—why could McCain not claim to be a U.S. citizen at birth as the child of two U.S. citizen parents? The reason, according to Chin, is because in 1936, the governing statute specifically did not grant citizenship to the children of U.S. citizens who were born in the Canal Zone.<sup>103</sup> It granted citizenship to “[a]ny child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States.”<sup>104</sup> The Canal Zone satisfied the first criterion, according to Chin, as it was outside the

93. *Id.* at 4.

94. *Id.*

95. *Id.*

96. *Id.* at 5–6.

97. *Id.* at 5.

98. A series of Supreme Court decisions, known as the *Insular Cases*, explicitly held that the U.S. Constitution did not extend to places like the Canal Zone. *See, e.g.,* *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (holding that unincorporated territory was “not a part of the United States” for constitutional purposes). *See generally* BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006).

99. *See generally Downes*, 182 U.S. at 287; SPARROW, *supra*, note 98.

100. Act of Aug. 4, 1937, ch. 563, § 1, 50 Stat. 558 (codified as amended at 8 U.S.C. § 1403(a) (2012)).

101. Chin, *supra* note 43, at 2.

102. *See, e.g.,* *Barber v. Gonzales*, 347 U.S. 637, 639 n.1 (1954) (inhabitants of the Philippines were “nationals” of the United States when the country was a U.S. territory but were not “United States citizens”); *Rabang v. INS*, 35 F.3d 1449, 1452 (9th Cir. 1994) (holding that persons born in the Philippines are not citizens); *see also* Chin, *supra* note 43, at 15 (citing the *Insular Cases*).

103. Chin, *supra* note 43, at 16, 20.

104. *Id.* at 6 (quoting Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797).

“limits” of the United States; yet Congress still considered the Canal Zone to be within the “jurisdiction” of the United States.<sup>105</sup>

In other words, the Canal Zone, by a quirk of U.S. law, fell into a gray area, and McCain was unlucky enough to be born there a few months before Congress recognized and remedied the problem. This, according to Chin, meant McCain was ineligible to be President.<sup>106</sup> However, Chin’s argument has found detractors. Stephen Sachs believes that Chin’s thesis is based on a misreading of the statute.<sup>107</sup> When the key statutory language on which Chin relies—“outside the limits and jurisdiction of the United States”—was adopted in 1795, the terms “limits and jurisdiction” were synonymous, argues Sachs, and the phrase was understood to mean “being born outside of the United States proper.”<sup>108</sup> The “limits and jurisdiction” of the United States was a set phrase that was simply used to refer to the nation’s borders.<sup>109</sup> Like Sachs, other scholars have also come to McCain’s defense, although they have often done so on other grounds.<sup>110</sup>

In 2000, McCain sought the Republican nomination for the presidency against George W. Bush. At that time, the issue of his eligibility was raised, but it was not seriously challenged. During his 2008 presidential campaign, however, a number of challenges against McCain brought to light new questions about who has legal standing to challenge the eligibility of a presidential candidate. Most of the legal challenges filed against McCain were dismissed for lack of standing, with federal courts finding that they do not have subject matter jurisdiction to hear these lawsuits.<sup>111</sup> In many of these challenges, McCain argued that the courts could not decide eligibility contests against him because his challengers lacked standing to sue.<sup>112</sup> McCain also argued that their claims suffered from mootness and ripeness defects, and that they were barred by the political question doctrine.<sup>113</sup> Virtually none of the cases that were filed against McCain were decided on the merits.<sup>114</sup>

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105. 18 U.S.C. § 173 (1926) (“The term ‘United States’ shall be construed to mean the United States, and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone.”); see Chin, *supra* note 43, at 21 (“Therefore, based on the original meaning of the Constitution, [and] the Framers’ intentions . . . Senator McCain’s birth to parents who were U.S. citizens, serving on a U.S. military base in the Panama Canal Zone in 1936, makes him a ‘natural born Citizen’ within the meaning of the Constitution.”).

106. Chin, *supra* note 43, at 18.

107. Stephen E. Sachs, *Why John McCain Was a Citizen at Birth*, 107 MICH. L. REV. FIRST IMPRESSIONS 49, 49–50 (2008).

108. *Id.* at 50.

109. *Id.* at 51–52.

110. See, e.g., Ramsey, *supra* note 29.

111. See, e.g., *Hollander v. McCain*, 566 F. Supp. 2d 63, 71 (D.N.H. 2008) (dismissing case filed pro se by Fred Hollander, a New Hampshire resident, against both McCain and the Republican National Committee, challenging McCain’s presidential eligibility).

112. Memorandum of Law in Support of Defendants’ Motion to Dismiss First Amended Complaint, *Hollander v. McCain*, 566 F. Supp. 2d 63 (D.N.H. 2008) (No. 08-cv-99-JL).

113. *Id.* at 1, 10.

114. *But see* *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1145–46 (N.D. Cal. 2008) (ruling for McCain’s eligibility on the merits and finding that a citizen “by birth” and “at birth” are both categories that satisfy the Natural Born Citizen Clause).

## 2. Barack Obama

Barack Obama was born in Hawaii on August 4, 1961,<sup>115</sup> two years after Hawaii was granted statehood on August 21, 1959.<sup>116</sup> During Obama's campaign for the presidency in 2008, and in the years following his election, a number of people asserted that Obama was not a natural born citizen and that he was ineligible to serve as President.<sup>117</sup> In 2012, these claims arose anew. Although most of the accusations circulated against Obama were false conspiracy theories that were disproven, they dogged the Obama campaign and the subsequent Obama presidency for many years. Eight years into the Obama presidency, in 2016, the Republican Party's presidential nominee, Donald J. Trump, still refused to disavow them.<sup>118</sup>

The so-called "Birther Movement" has been a pathetic saga in American politics.<sup>119</sup> According to some sources, the rumors against Obama began to spread during the 2008 Democratic primaries and were originally advanced by Democrats, not Republicans.<sup>120</sup> The initial stories about candidate Obama advanced by his opponents insinuated that Obama was not born in the United States and that his birthplace was Kenya, rather than Hawaii.<sup>121</sup> Other theories alleged that Obama became a citizen of Indonesia during his childhood, thereby somehow losing his U.S. citizenship.<sup>122</sup> Yet other theories claimed that Obama was not a natural born citizen because he was allegedly born a dual citizen, given that his father was from Kenya and not a U.S. citizen at the time of Obama's birth.<sup>123</sup> A great many commentators have characterized these various claims against Obama as being racist.<sup>124</sup>

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115. Certificate of Live Birth for Barack Hussein Obama, II, File No. 151, Hawaii Department of Health (August 4, 1961), [https://www.whitehouse.gov/sites/default/files/rss\\_viewer/birth-certificate-long-form.pdf](https://www.whitehouse.gov/sites/default/files/rss_viewer/birth-certificate-long-form.pdf) [<https://perma.cc/PKM5-V4S9>].

116. *Hawaii Statehood, August 21, 1959*, NAT'L ARCHIVES, <https://www.archives.gov/legislative/features/hawaii> (last visited Nov. 19, 2016) [<https://perma.cc/9B44-BRHR>].

117. Ben Smith & Byron Tau, *Birtherism: Where It All Began*, POLITICO (Apr. 22, 2011, 4:22 AM), <http://www.politico.com/story/2011/04/birtherism-where-it-all-began-053563#ixzz4KcOa4H8h> [<https://perma.cc/QR5F-67KC>].

118. See Michael Barbaro, *Donald Trump Clung to 'Birther' Lie for Years, and Still Isn't Apologetic*, N.Y. TIMES (Sept. 16, 2016), [http://www.nytimes.com/2016/09/17/us/politics/donald-trump-obama-birther.html?\\_r=0](http://www.nytimes.com/2016/09/17/us/politics/donald-trump-obama-birther.html?_r=0) [<https://perma.cc/2S2G-SQZH>].

119. See generally ARCHIE P. JONES & DAVID L. GOETSCH, *BORN TO LIE: FROM THE BIRTH CERTIFICATE TO HEALTHCARE* (2009); CHRIS SMITH, *INSIDE THE MIND OF THE BIRTHEES* (2011).

120. See Smith & Tau, *supra* note 117. But see Gregory Krieg, *No, Hillary Clinton Did Not Start the 'Birther' Movement*, CNN (Sept. 17, 2016, 8:20 PM), <http://www.cnn.com/2016/09/17/politics/hillary-clinton-birther-conspiracy> [<https://perma.cc/2UXW-KDJF>].

121. See, e.g., Aaron Sharockman, *Full Flop: Donald Trump Abandons Barack Obama Birther Conspiracy*, POLITIFACT (Sept. 16, 2016, 11:33 AM), <http://www.politifact.com/truth-o-meter/statements/2016/sep/16/donald-trump-full-flop-donald-trump-abandons-barack-obama-birth/> [<https://perma.cc/4TYV-WH9A>].

122. See, e.g., Jerome R. Corsi, *Claim: 'Absolute Proof' Obama Was Indonesian Citizen*, WND (Aug. 7, 2012, 10:07 PM), <http://www.wnd.com/2012/08/claim-absolute-proof-obama-was-indonesian-citizen/> [<https://perma.cc/54N9-24CC>].

123. BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* 9 (2004).

124. See, e.g., MATTHEW W. HUGHEY & GREGORY S. PARKS, *THE WRONGS OF THE RIGHT: LANGUAGE, RACE, AND THE REPUBLICAN PARTY IN THE AGE OF OBAMA* (2014).

Irrespective of the merits of these claims, challengers to Obama's candidacy eventually began seeking court rulings that would declare Obama ineligible to take office or grant them access to various documents which they believed would prove Obama's ineligibility.<sup>125</sup> Most prominently among these documents, they sought to obtain an original copy of Obama's birth certificate.<sup>126</sup> Even after Obama released his birth certificate, and even after its authenticity was confirmed by the Department of Health in Hawaii, claims that Obama was not born in the United States persisted.<sup>127</sup> Birth announcements published at the time of Obama's birth in Hawaii's newspapers were produced, but these did little to placate those who believed in the narrative about Obama's presidential eligibility.<sup>128</sup>

The cases against Obama, as Jack Maskell explains, fell into several categories.<sup>129</sup> Some alleged that Obama was not born in the United States. In 1961, the year of Obama's birth, the federal statute granting citizenship to a person born outside of the United States to one U.S. citizen parent conferred that citizenship only if the parent resided in the United States for at least ten years, five of which had to be satisfied after the parent reached the age of fourteen.<sup>130</sup> Obama's mother, however, would not have met this requirement, given that she gave birth to Obama at age 18. Other cases filed against Obama claimed that even if he was born in Hawaii, his childhood years spent in Indonesia revoked his natural born status.<sup>131</sup> For example, a lawsuit challenging Obama's eligibility and advancing this line of argument was filed by Philip J. Berg, an attorney in Pennsylvania.<sup>132</sup> Berg alleged that Obama was born in Kenya, and that the birth certificate on Obama's website was a forgery.<sup>133</sup> As such, his lawsuit claimed Obama did not have the right to be President.<sup>134</sup> The district court, relying on a similar case against McCain, found that Berg did not have standing to sue.<sup>135</sup>

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125. See *infra* notes 129–135 and accompanying text.

126. See, e.g., JEROME R. CORSI, WHERE'S THE BIRTH CERTIFICATE?: THE CASE THAT BARACK OBAMA IS NOT ELIGIBLE TO BE PRESIDENT (2011).

127. Robert Farley, *Obama's Birth Certificate: Final Chapter. This Time We Mean It!*, POLITIFACT (July 1, 2009, 7:12 PM), <http://www.politifact.com/truth-o-meter/article/2009/jul/01/obamas-birth-certificate-final-chapter-time-we-mean/> [<https://perma.cc/Y368-WWV7>].

128. Drew Zahn, *Hawaiian Newspapers Don't Prove Birthplace*, WND (July 22, 2009, 9:21 PM), <http://www.wnd.com/2009/07/104678/> [<https://perma.cc/HY48-4PCQ>].

129. See MASKELL, *supra* note 4, at 39.

130. See 8 U.S.C. § 1401 (1958).

131. MASKELL, *supra* note 4, at 42–43 (listing these cases).

132. Berg v. Obama, 574 F. Supp. 2d 509 (E.D. Pa. 2008), *aff'd* 586 F.3d 234 (3d Cir. 2009).

133. *Id.* at 513.

134. *Id.*

135. See Memorandum and Order Dismissing Plaintiff's First Amended Complaint at 1, 12, Berg v. Obama, 574 F. Supp. 2d 509 (3d Cir. 2009) (No. 08-4083) ("The alleged harm to voters stemming from a presidential candidate's failure to satisfy the eligibility requirements of the Natural Born Citizen Clause is not concrete or particularized enough to constitute an injury in fact sufficient to satisfy Article III standing.").

By some counts, at least 225 lawsuits were filed to contest Barack Obama's presidential eligibility.<sup>136</sup> Each one of these was eventually dismissed. Courts have alternatively found that Obama's challengers did not have standing to bring their claims, could not state a cognizable claim for relief, or were seeking a stay or an injunction against a future event when they were unlikely to succeed on the merits.<sup>137</sup> Although these lawsuits were mostly dismissed before getting to the merits, they did attract a great deal of attention. Equally important, the Obama campaign had to spend valuable resources answering these lawsuits during both of the candidate's 2008 and 2012 presidential campaigns.

The controversy sparked by Obama's eligibility also invited some conservative states to get into the game of regulating who can run for President by legislating that candidates needed to meet additional qualifications to appear on their state ballots. For instance, a number of Republican-led state legislatures proposed new legislation aimed at requiring presidential candidates to release copies of their birth certificates.<sup>138</sup> In April 2011, the Arizona legislature became the first to pass a bill requiring presidential candidates to prove that they are natural born citizens before their names could appear on the state's ballot, including by attaching "a certified copy of the presidential candidate's long form birth certificate that includes at least the date and place of birth, the name of the hospital and the attending physician . . . and the signatures of any witnesses in attendance."<sup>139</sup> Although the bill was vetoed by Arizona's Republican governor,<sup>140</sup> Jan Brewer, it foreshadowed similar movements in other states.<sup>141</sup> Meanwhile, various websites devoted to chronicling the eligibility challenges to Barack Obama's presidential candidacy continued to proliferate on the Internet.<sup>142</sup>

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136. See MASKELL, *supra* note 4, at 49 n.231 ("It has been averred in listings of cases that there have been nearly 225 cases concerning the eligibility of President Obama which have been brought and dismissed.").

137. See, e.g., Kerchner v. Obama, 669 F. Supp. 2d 477 (D.N.J. 2009), *aff'd*, 612 F.3d 204 (3rd Cir. 2010); Stamper v. United States, No. 1:08 CV 2593, 2008 WL 4838073 (N.D. Ohio 2008); Wrotnowski v. Bysiewicz, 958 A.2d 709, 712 (Conn. 2008).

138. See, e.g., *Bills Demanding Eligibility Evidence Hit 13th State*, WND (Mar. 8, 2011, 8:09 PM), <http://www.wnd.com/2011/03/272697/> [<https://perma.cc/4ZNB-86VN>].

139. H.B. 2177, 150th Leg., 1st Sess. (Ariz. 2011).

140. See Osha Gray Davidson, *Arizona Governor's Veto of 'Birther' Bill Draws Tea Party Ire*, FORBES (Apr. 19, 2011), <http://www.forbes.com/sites/oshadavidson/2011/04/19/arizona-governors-veto-of-birther-bill-draws-tea-party-ire/#1b11b3c67f73> [<https://perma.cc/FN5X-5V8X>].

141. See Julianne Hing, *Arizona Senate Passes Birther Bill: But It's Not the First State to Try to Turn the Hysteria Around President Obama's Black Roots into Legislation*, COLORLINES (Apr. 11, 2011), <http://www.colorlines.com/articles/arizona-senate-passes-birther-bill> [<https://perma.cc/6PTC-A3KG>].

142. See OBAMA UNCONSTITUTIONAL PRESIDENT, <http://www.obamaunconstitutional.com> (last visited Nov. 19, 2016) [<https://perma.cc/GD2W-FS5M>].

## 3. Ted Cruz

Rafael Edward Cruz was born on December 22, 1970, in Calgary, Canada, to a U.S. citizen mother and a Cuban immigrant father.<sup>143</sup> He was granted dual Canadian-American citizenship at birth.<sup>144</sup> After law school, Cruz clerked for Chief Justice William Rehnquist on the U.S. Supreme Court and then went into private practice.<sup>145</sup> In 2003, he became the Solicitor General of Texas.<sup>146</sup> In 2012, he was elected U.S. Senator from Texas.<sup>147</sup> Cruz then announced his candidacy for the presidency in 2015.<sup>148</sup> Given his Canadian birth, however, Cruz's eligibility was quickly challenged,<sup>149</sup> including by Donald Trump, his opponent in the Republican state primaries. In response, Cruz applied to renounce his Canadian citizenship.<sup>150</sup> Yet the controversy over whether he was eligible to be President played out prominently during the primaries in the media and in the courts of law.

Like McCain and Obama before him, Cruz was sued in federal court and in a number of state courts as well.<sup>151</sup> One of the prominent lawsuits challenging Cruz's eligibility was filed by Walter Wagner, a retired Utah lawyer.<sup>152</sup> When Wagner asked a federal court in January 2016 to determine that Cruz was ineligible to run for the presidency, Cruz filed a motion to dismiss, arguing that his challenger did not have standing to sue, that the case was not yet ripe, and that a U.S. federal district court was not the proper forum to hear this challenge.<sup>153</sup> The court found that Wagner lacked standing, as he was not able to show why a Cruz candidacy would cause him any particular harm.<sup>154</sup> The other lawsuits filed against Cruz in federal court were each dismissed for the challenger's lack of standing.<sup>155</sup>

To get around the standing issue, a challenge to the eligibility of a presidential candidate may need to come from another presidential candidate. Donald Trump perhaps recognized this when he declared, in a message sent from his Twitter account on February 12, 2016, "If @TedCruz doesn't clean up his act, stop cheating, & doing negative ads, I have standing to sue him for not being a natural born citizen."<sup>156</sup>

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143. Mead, *supra* note 36.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *See, e.g.,* McManamon, *supra* note 90.

150. *See* Mead, *supra* note 36.

151. *See* Muller, *supra* note 5, at 1 n.2 (listing the lawsuits filed against Cruz).

152. Wagner v. Cruz, No. 2:16-cv-55-JNP, 2016 WL 1089245 (D. Utah Mar. 18, 2016).

153. *Id.* at \*2.

154. *Id.* at \*4.

155. *See, e.g.,* Fischer v. Cruz, No. 16-CV-1224, 2016 WL 1383493 (E.D.N.Y. Apr. 7, 2016) (dismissing action filed against Senator Cruz sua sponte for lack of standing).

156. Christina Wilkie, *Trump Backers File 'Birther' Lawsuit Against Ted Cruz*, HUFFINGTON POST (Feb. 12, 2016, 3:39 PM), [http://www.huffingtonpost.com/entry/trump-backers-birther-lawsuit-against-ted-cruz\\_us\\_56be3a29e4b08ffac1253a49](http://www.huffingtonpost.com/entry/trump-backers-birther-lawsuit-against-ted-cruz_us_56be3a29e4b08ffac1253a49) [https://perma.cc/CM2Y-UTJX].

Meanwhile, Victor Williams, a law professor at the Catholic University of America in Washington, D.C., registered to run for President to contest Cruz's eligibility. Williams registered as a write-in candidate in nine states for the sole purpose of filing an eligibility challenge to Cruz.<sup>157</sup> Williams's challenge was dismissed by an administrative body in New Jersey, and Cruz soon quit his campaign, rendering Williams's other challenges moot.<sup>158</sup>

Some of Cruz's challengers have tried to appeal to the Supreme Court. But, so far, the Supreme Court has refused to hear these cases.<sup>159</sup> In May 2016, the Court refused to grant a writ of certiorari in *Wagner v. Cruz*,<sup>160</sup> the last in a series of cases to be dismissed challenging a presidential candidate's eligibility.

### III. RESOLVING PRESIDENTIAL ELIGIBILITY DISPUTES

Without a mechanism to resolve presidential eligibility disputes, American democracy is imperiled. The text of the Eligibility Clause is not controversial regarding two of its three requirements, yet does that mean that every citizen who is not naturalized, is over thirty-five years old, and has lived in the United States for fourteen years qualifies to be President? Is there any citizen who meets these criteria who does not qualify for the office? For those who seek to be faithful to the Constitution, not knowing the answer to these questions is troubling. American citizens deserve to know who is eligible to be their President.

#### A. *The Reluctance of Courts to Be Involved*

These days, the Eligibility Clause has been turned into a tool of campaigns, and contesting a rival's eligibility has become a worthwhile campaign tactic. It is used by challengers to ensure that opponents waste valuable time and resources. Even if a rival may not be the party to file a challenger lawsuit, he often encourages his supporters to do so. The tactic can be used to draw the attention of voters to an issue that is certain to receive media attention yet unlikely to be resolved during the course of the campaign.<sup>161</sup> Like contesting a candidate's failure to meet a residency

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157. See Pete Williams, *Law Professor Challenges Cruz on Citizenship, Candidacy*, NBC (Apr. 11, 2016), <http://www.nbcnews.com/news/us-news/law-professor-candidate-challenges-cruz-citizenship-n554046> [<https://perma.cc/BNY9-D55D>].

158. See Matt Flegenheimer, *Ted Cruz Suspends His Campaign for President*, N.Y. TIMES (May 3, 2016), [http://www.nytimes.com/2016/05/04/us/politics/ted-cruz.html?\\_r=0](http://www.nytimes.com/2016/05/04/us/politics/ted-cruz.html?_r=0) [<https://perma.cc/9VUB-5X3Q>].

159. See Christian Fanas, *The Supreme Court Won't Touch This Legal Challenge to Ted Cruz's 'Natural Born' Status*, HUFFINGTON POST (May 31, 2016), [http://www.huffingtonpost.com/entry/supreme-court-ted-cruz\\_us\\_574de545e4b0757eab0def0](http://www.huffingtonpost.com/entry/supreme-court-ted-cruz_us_574de545e4b0757eab0def0) [<https://perma.cc/69M9-QB2C>].

160. 136 S. Ct. 2395 (2016).

161. The claim that a rival is ineligible for the office he seeks is used in many situations in politics at the state and municipal levels. State law often provides eligibility hurdles for state office holders, such as the requirement that a governor or mayor must reside in a jurisdiction for a certain period of time before he can run for office. Candidates who come close to the line often see their eligibility contested by their opponents or their opponents'

requirement<sup>162</sup> or any other electoral qualification, an Eligibility Clause challenge is mainly used to bring an issue before the public, to insinuate that the candidate did something wrong, and ultimately to gain an upper hand with voters.

There are, of course, good reasons why courts have refused to adjudicate these disputes on their merits. These challenges present the courts with the kind of “heightened political question” that the judiciary wishes to avoid.<sup>163</sup> The reluctance of the courts to weigh in, however, can also lead to a perverse result. For example, during a presidential campaign today, the most controversial aspects of a candidate’s background, such as his foreign birth, will not normally pose a serious impediment to his electoral success. This is especially true because most of our presidential candidates happen to be well-known politicians and because the challenges to their candidacies are based on arcane constitutional provisions that few members of the public understand. Since eligibility challenges are not taken seriously in the court of public opinion, it comes as no surprise that the courts of law are reluctant to wade into these waters. Instead, these challenges are mostly of interest only to newspaper editorial-page editors and academic commentators.

The real effect of an eligibility challenge is that it saps a campaign of valuable resources. Given that eligibility challenges are brought in many different jurisdictions, formulating a legal response can pose a significant drain on the finances of a presidential campaign. The candidates must spend time and money responding to any legal challenges filed, or they risk being thrown off the ballot in various state contests. The other effect of a challenge to a candidate’s eligibility is that it creates democratic uncertainty. Is Ted Cruz, who was born in Canada to a U.S. citizen mother and a Canadian father, both of whom also happened to be Canadian citizens, eligible to be President of the United States? The answer is that we do not know. In order to know, we need Congress to act.

An example of the perils of the status quo may bring to light why it is imperative that we find a way to resolve presidential eligibility disputes. A total of 1,900 candidates filed a Statement of Candidacy with the Federal Election Commission, stating their intent to run for President, as of September 2016.<sup>164</sup> Americans have never heard of most of these candidates, the vast majority of whom receive no media attention. Even those who lead a ticket for a third party are not well known beyond the small base of their ardent supporters. Libertarian Party candidate Gary

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supporters. See Eugene D. Mazo, *Residency and Democracy: Durational Residency Requirements from the Framers to the Present*, 43 FLA. ST. U. L. REV. 611, 652–63 (2016) (chronicling the challenges on eligibility grounds against Rahm Emanuel when he ran for mayor of Chicago and Zephyr Teachout when she ran for governor of New York).

162. *Id.* at 654.

163. Our courts, especially since the 1960s, have sometimes found the need to resolve disputes that were before thought to be best resolved by the political branches. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

164. See *2016 Presidential Form 2 Filers*, FEC, [http://www.fec.gov/press/resources/2016\\_presidential\\_form2nm.shtml](http://www.fec.gov/press/resources/2016_presidential_form2nm.shtml) (last visited Nov. 19, 2016) [<https://perma.cc/L989-DCBW>].

Johnson's or Green Party candidate Jill Stein's chances of becoming the next President are very slim. On the other hand, Bill Clinton, for whom a Statement of Candidacy was filed in 2016 by the Democratic-Farm-Labor Party,<sup>165</sup> is a well-known politician. But Bill Clinton is ineligible to be the next President of the United States because he has already served two terms in office and is explicitly precluded from being elected again under the Twenty-Second Amendment.<sup>166</sup>

Right now, it is too difficult to contest the presidential eligibility of a registered candidate for the presidency, even if that person, like Bill Clinton, is ineligible for the office. Courts have held that ordinary citizens do not have standing to bring eligibility challenges under the Natural Born Citizen Clause.<sup>167</sup> In granting President Obama's motion to dismiss an eligibility challenge, a district court in Pennsylvania quoted what Chief Justice Warren Burger said in *United States v. Richardson*,<sup>168</sup> the 1974 cases concerning the standing of a taxpayer:

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of a particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.<sup>169</sup>

After quoting Burger, the court went on to explain that if "Congress determines that citizens, voters, or party members should police the Constitution's eligibility requirements for the Presidency, then it is free to pass laws conferring standing on [such] individuals."<sup>170</sup> But until Congress does so, voters have no standing to bring these sorts of challenges. Thus, congressional action is the only way forward.

### *B. The Need for Congressional Action*

Congress clearly believes that it has the power to define who a natural born citizen is. And it has acted in this realm before, especially when it has tried to broaden the orbit of the Natural Born Citizen Clause. After the Civil War, Congress introduced four separate resolutions that were aimed at allowing naturalized citizens to serve as President.<sup>171</sup> In the 1960s and 1970s, similar proposals were introduced in Congress, except these sought

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165. *Details for Candidate ID: P60012333*, FEC, <http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do?candidateCommitteeId=P60012333&tabIndex=3> (last visited Nov. 19, 2016) [<https://perma.cc/6VRM-53HY>].

166. *See* U.S. CONST. amend. XXII.

167. *See, e.g.,* *Berg v. Obama*, 574 F. Supp. 2d 509 (E.D. Pa. 2008) (dismissing a citizen challenge to President Obama's presidential eligibility for lack of standing).

168. 418 U.S. 166 (1974).

169. *Berg*, 574 F. Supp. 2d at 520 n.13 (quoting *Richardson*, 418 U.S. at 179).

170. *Id.*

171. One of these resolutions was introduced in 1868, two in 1871, and the last one in 1872. *See* H.R. Res. 166-169, 42d Cong. (1872); H.R. Res. 52, 42d Cong. (1871); S. Res. 284, 41st Cong. (1871); H.R. Res. 269, 40th Cong. (1868); *see also* Seymore, *supra* note 5, at 947 n.109-110 (citing these resolutions).

to repeal the Natural Born Citizen Clause altogether.<sup>172</sup> These proposals, according to Malinda Seymore, were inspired by the many presidential candidates of the era who were born outside of the United States, including Barry Goldwater, Christian Herter, George Romney, and others.<sup>173</sup> However, as the candidacies of these men faded, so did interest in amending the Constitution.<sup>174</sup>

In 1974, Representative Jonathan Brewster Bingham of New York introduced several new amendments in Congress, with the intent of allowing Henry Kissinger, then serving as Secretary of State, to become eligible for the presidency. Kissinger, who was born in Germany, had become a naturalized American citizen at the age of twenty.<sup>175</sup> Brewster introduced four bills in 1974, and a fifth bill in 1977, seeking to amend the Constitution so that it no longer contained a requirement for the President to be a natural born citizen.<sup>176</sup>

In 2003, when the United States had two prominent state governors who happened to be naturalized citizens, Jennifer Granholm of Michigan and Arnold Schwarzenegger of California, new proposals emerged to amend the Eligibility Clause.<sup>177</sup> Senator Orrin Hatch of Utah and Representative Dana Rohrabacher of California proposed an amendment that would allow those “who had been for 20 years a citizen of the United States” to serve as President.<sup>178</sup>

In light of these efforts, it is perhaps unsurprising that the constitutionality of the Eligibility Clause has repeatedly been questioned by scholars. Law professors on both sides of the political spectrum have argued over what Ilya Somin calls “the absurdity of excluding naturalized citizens from the presidency in the first place.”<sup>179</sup> And indeed, the clause

172. See H.R.J. Res. 1255, 92d Cong. (1972); H.R.J. Res. 1245, 92d Cong. (1972); S.J. Res. 161, 92d Cong. (1971); H.R.J. Res. 795, 90th Cong. (1967); H.R.J. Res. 511, 90th Cong. (1967); H.R.J. Res. 16, 89th Cong. (1965); H.R.J. Res. 397, 88th Cong. (1963); H.R.J. Res. 127, 87th Cong. (1961); H.R.J. Res. 547, 86th Cong. (1960); see also Seymore, *supra* note 5, at 947 n.113 (citing these resolutions).

173. See *id.* at 948.

174. See *id.*

175. See WALTER ISAACSON, *KISSINGER: A BIOGRAPHY* 39 (1993).

176. See H.R.J. Res. 38, 95th Cong. (1977); H.R.J. Res. 993, 93d Cong. (1974); H.R.J. Res. 896, 93d Cong. (1974); H.R.J. Res. 890, 93d Cong. (1974); H.R.J. Res. 880, 93d Cong. (1974); see also Seymore, *supra* note 5, at 949 n.129 (citing these resolutions).

177. See Martin Kasindorf, *Should the Constitution Be Amended for Arnold?*, USA TODAY (Dec. 3, 2004) [http://usatoday30.usatoday.com/news/politics/selections/2004-12-02-schwarzenegger-amendment\\_x.htm](http://usatoday30.usatoday.com/news/politics/selections/2004-12-02-schwarzenegger-amendment_x.htm) [https://perma.cc/CGH8-5ALM].

178. The text of the proposed amendment read:

A person who is a citizen of the United States, who had been for 20 years a citizen of the United States, and who is otherwise eligible for the Office of President, is not ineligible to the Office by reason of not being a native born citizen of the United States.

H.R.J. Res. 104, 108th Cong. (2004); S.J. Res. 15, 108th Cong. (2003); see also Seymore, *supra* note 5, at 950.

179. Ilya Somin, *The Case for Getting Rid of the Requirement That the President Must Be a “Natural Born Citizen,”* WASH. POST. (Jan. 14, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/14/the-case-for-getting-rid-of-the-requirement-that-the-president-must-be-a-natural-born-citizen/?utm\\_term=.56578929e537](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/14/the-case-for-getting-rid-of-the-requirement-that-the-president-must-be-a-natural-born-citizen/?utm_term=.56578929e537) [https://perma.cc/7ZJP-

itself has been challenged in the courts, quite apart from the challenges that have been brought against the presidential candidates themselves. In 2012, for example, Abdul Karim Hassan filed several lawsuits claiming that the Natural Born Citizen Clause contravened the Equal Protection Clause of the Fourteenth Amendment and that it was essentially a form of discrimination based on national origin. Hassan's lawsuits were not successful and have each been dismissed.<sup>180</sup>

On a deeper level, the lawsuits brought by Hassan and others, and the many proposals to change the Constitution, raise the question of why Congress cannot allow the foreign born children of U.S. citizens to be "natural born citizens" by statute. Certainly, it is within Congress's power to offer a statutory definition of natural born citizenship, and it seems that Congress not only has the power to legislate like this but that it has actively tried to do so in the past. In 2004, a bill was introduced in the Senate that sought to offer a statutory definition of natural born citizenship that would include the children of American citizens born overseas.<sup>181</sup> The language of the proposed legislation would have extended presidential eligibility to "any person born outside the United States . . . who derives citizenship at birth from a United States citizen parent or parents pursuant to an Act of Congress."<sup>182</sup> And in 2008, the Senate famously passed a unanimous resolution declaring that John McCain was a natural born citizen.<sup>183</sup>

Rather than let issues of who is eligible linger, Congress might consider doing something additional to clear them up. First, Congress should grant standing to ordinary citizens to be able to challenge a presidential candidate's eligibility in the federal courts.<sup>184</sup> Second, it should enact

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9N64]; see, e.g., James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575, 576–77 (2000); Randall Kennedy, *A Natural Aristocracy?*, 12 CONST. COMMENT. 175, 176 (1995) (explaining that, despite the many reasons "Henry Kissinger should not have become President . . . his having been born in Germany is certainly not one of [the reasons why]"); Randall Kennedy, *The Right of All Citizens: Why Naturalized Americans Should Be Allowed to Run for President*, NEW REPUBLIC (May 12, 2011), <https://newrepublic.com/article/88161/obama-birther-constitution-natural-citizens-president> [https://perma.cc/HJ9A-ETSM].

180. See, e.g., *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1201 (D. Colo. 2012), *aff'd*, 495 F. App'x 947 (10th Cir. 2012).

181. See Natural Born Citizen Act, S. 2128, 108th Cong. (2004); see also Seymore, *supra* note 5, at 950 n.131 (discussing this legislation).

182. See Seymore, *supra* note 5, at 950 n.131.

183. See Resolution Recognizing that John Sidney McCain, III, Is a Natural Born Citizen, S. Res. 511, 110th Cong. (2008) (finding that Senator McCain is a natural born citizen).

184. The scope of congressional power to influence standing has been a source of some controversy. In recent years, the Supreme Court has granted certiorari in two cases to consider whether the conferral of standing by statute is constitutional, especially in circumstances where a plaintiff's injury in fact is not concrete and particularized; however, the Court did not rule on the merits in either case. See *Edwards v. First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 564 U.S. 1018 (2011), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012) (per curiam); *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015), *vacated and remanded*, 136 S. Ct. 1540 (2016). *But see* Mark Seidenfeld & Allie Akre, *Standing in the Wake of Statutes*, 57 ARIZ. L. REV. 745 (2015) (arguing that Congress is "institutionally superior" to courts in evaluating the gravity of likely harms to a plaintiff and therefore has the ability to confer standing by statute).

legislation to speed up the resolution of eligibility disputes. Most scholars do not pay close attention to the specific procedure by which federal courts decide eligibility disputes. However, because election disputes require a certain degree of certainty and finality in the result, Congress has enacted special procedures to resolve many kinds of election-related cases.<sup>185</sup> Most federal court cases go through a three-tiered decision-making process before reaching finality.<sup>186</sup> A federal case is initially filed in district court, where a district judge first hears the dispute. It is then appealed to the court of appeals, where a panel of three judges hears it. The losing party at the court of appeals may then ask the court of appeals to rehear the case sitting en banc<sup>187</sup> or can seek a writ of certiorari for the case to be heard by the Supreme Court.<sup>188</sup> Of course, the Supreme Court has discretion over whether to hear the case.<sup>189</sup> One of the benefits of this three-tiered system is that it allows multiple judges to consider complicated legal issues carefully. One of the system's downsides, however, is that it is slow. Disputes take a long time to resolve.<sup>190</sup>

To expedite the resolution of some kinds of election-related disputes, Congress has created a different kind of procedure. These types of cases are initially heard by a three-judge district court, and the district court's ruling is then reviewed directly by the Supreme Court.<sup>191</sup> When these cases are filed, the chief judge of the court of appeals is tasked with appointing the three-judge panel. This panel includes two district court judges and one judge from the court of appeals.<sup>192</sup> The panel makes factual findings and resolves any questions of law that may come before it.<sup>193</sup> Once the panel renders its decision, it is appealed directly to the Supreme Court, which does not exercise discretion over whether to hear the case.<sup>194</sup> As Joshua Douglas, a scholar of procedure in election law, explains, "The Court can 'note probable jurisdiction,' which means that it will conduct a full merits hearing on the case, or it can summarily affirm or summarily reverse, but either way the Supreme Court must decide the dispute."<sup>195</sup>

There are three election related situations for which Congress has authorized the use of three-judge courts. Challenges brought under the Voting Rights Act (VRA), constitutional challenges brought under the Bipartisan Campaign Reform Act (BCRA), and constitutional challenges to

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185. See Douglas, *supra* note 7, at 435 (noting how "Congress has enacted special mechanisms for election law cases and obviously believes that certain types of election law disputes are different from other court cases").

186. See 28 U.S.C. §§ 46(c), 132(c), 1291, 1294, 1331, 1332 (2012).

187. See *id.* § 46(c).

188. See *id.* §§ 1254(1), 1291, 1294.

189. *Id.* § 1254(1).

190. See, e.g., Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL ST. J. (Apr. 6, 2015, 2:09 PM), <http://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746> [<https://perma.cc/4SSY-HL7R>].

191. See Douglas, *supra* note 7, at 455.

192. *Id.*; see 28 U.S.C. § 2284(b).

193. See 28 U.S.C. § 2284(b).

194. See *id.* § 1253.

195. Douglas, *supra* note 7, at 456.

the apportionment of federal congressional districts or the apportionment of any statewide legislative body<sup>196</sup> are all required to use this procedure, according to Douglas.<sup>197</sup> For challenges to campaign finance practices brought under BCRA, Congress has further designated the proper venue in these cases as the U.S. District Court for the District of Columbia.<sup>198</sup>

There are several benefits to three-judge courts. Among the key benefits is that they allow important matters to be resolved in a timely fashion. “Three judge district courts, with direct review to the Supreme Court,” explains Douglas, “ultimately have some virtues that are important in election law cases: quick resolution, an air of accuracy and legitimacy, and the symbolism of increased scrutiny for particularly important cases, to name a few.”<sup>199</sup> In the United States, where no election is more important than that which results in the selection of the country’s President, Congress should use a similar expedited procedure for candidate qualification disputes that may arise under the Eligibility Clause.

Given that these cases would be challenges brought under the Constitution, the federal courts already would have jurisdiction to hear them.<sup>200</sup> Such cases could be certified to be heard by a three-judge district court, with mandatory review by the Supreme Court thereafter. The benefit of this system is that it would force the Supreme Court to render an opinion fairly quickly on who qualifies to be a natural born citizen, thus providing a resolution to this issue that would then apply in subsequent cases. To expedite the three-judge panel’s finding, Congress could require the panel to move any eligibility cases filed before it to the top of its docket.<sup>201</sup> Discovery in these cases should not take long, as there would be few disputes of fact regarding a candidate’s background. Questions of law, and who qualifies, could therefore be resolved fairly quickly.

When it comes to our presidential elections, the American people want to know that the person they are electing is eligible for the office she seeks to fill. A candidate must be legitimately qualified to hold the office, and a decision on her eligibility must be made before voters can cast a meaningful ballot in favor of the person’s candidacy. The constitutional challenges brought to our presidential candidates so far have been resolved on technical and procedural grounds, but whether these candidates are eligible for the office has never been resolved one way or another either by Congress or by our nation’s highest court. Congress has the ability to

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196. 28 U.S.C. § 2284(a); *see also* Shapiro v. McManus, 136 S. Ct. 250 (2015) (holding that a federal district court is required to refer cases to a three-judge panel when plaintiffs challenge the constitutionality of the apportionment of congressional districts).

197. *See* Douglas, *supra* note 7, at 455. Notably, Congress has designated a separate procedural path for constitutional challenges that are brought under the Federal Election Campaign Act of 1971. These cases allow a district judge to directly certify a constitutional challenge brought under the act to a federal court of appeals that sits en banc. *See* 52 U.S.C. § 30110.

198. 52 U.S.C. § 30109(a)(8)(A).

199. Douglas, *supra* note 7, at 467.

200. *See* U.S. CONST. art. III, § 2.

201. Douglas, *supra* note 7, at 479.

change this. It is within its power to define statutorily who qualifies as a natural born citizen or to force the Supreme Court to render a decision interpreting the Eligibility Clause. The voters are owed a pronouncement from Congress or a resolution from the courts on this issue.

#### CONCLUSION

Throughout American history, a number of aspiring Presidents have had their candidacies challenged for allegedly failing to meet the Constitution's eligibility requirements. Most of these challenges have been targeted at candidates who were either born abroad or who had a parent or parents who were not U.S. citizens at the time of the candidate's birth. John McCain, Barack Obama, and Ted Cruz each have had their candidacies challenged on these grounds. Even as scholars have begun to examine these challenges, there is little research on how the campaigns have responded and what the costs of these eligibility challenges have been to them, and few scholars have written about what Congress might do to resolve these challenges more expeditiously. Viewed through the lens of history, presidential eligibility challenges are not unique. Yet, as this Article explains, there is no reason for them to persist. This Article takes a small step toward offering a solution for how Congress can address these cases.