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## “Natural Born” Disputes in the 2016 Presidential Election

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# “NATURAL BORN” DISPUTES IN THE 2016 PRESIDENTIAL ELECTION

Derek T. Muller\*

## INTRODUCTION

The 2016 presidential election brought forth new disputes concerning the definition of “natural born Citizen.”<sup>1</sup> The most significant challenges surrounded the eligibility of Senator Ted Cruz,<sup>2</sup> born in Canada to a Cuban father and an American mother.<sup>3</sup> Unlike challenges to President Barack Obama’s eligibility, which largely turned on conspiratorial facts, challenges

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\* Associate Professor of Law, Pepperdine University School of Law. Special thanks to Jerry Goldfeder and the *Fordham Law Review* for organizing this important discussion concerning election law arising out of the 2016 presidential election. Derek O’Reilly-Jones provided invaluable research assistance. This Article is part of a forum entitled *Election Law and the Presidency* held at Fordham University School of Law.

1. U.S. CONST. art. II, § 1, cl. 5.

2. See *Green v. Cruz*, No. 5:16-cv-00207-HGD (N.D. Ala. May 10, 2016); *Schwartz v. Cruz*, No. H-16-106, 2016 WL 1449251, at \*1 (S.D. Tex. Apr. 13, 2016), *aff’d*, No. 16-20231 (5th Cir. June 21, 2016) (per curiam); *Fischer v. Cruz*, No. 16-CV-1224(JS)(ARL), 2016 WL 1383493, at \*1 (E.D.N.Y. Apr. 7, 2016); *Wagner v. Cruz*, No. 2:16-cv-55-JNP (D. Utah Mar. 18, 2016), *cert. denied*, 136 S. Ct. 2395 (2016); *Librace v. Martin*, No. 4:16-cv-00057-BSM (E.D. Ark. Feb. 29, 2016); *Voeltz v. Cruz*, No. 15-022044(02) (Fla. Cir. Ct. Mar. 14, 2016); *Smallwood v. State*, No. SCEC-16-0000330 (Haw. Apr. 21, 2016); *Korman v. N.Y. State Bd. of Elections*, No. 522647 (N.Y. App. Div. Mar. 24, 2016), *appeal denied*, No. 2016-374 (N.Y. Apr. 1, 2016); *Elliot v. Cruz*, 137 A.3d 646 (Pa. Commw. Ct. 2016), *aff’d*, 134 A.3d 51 (Pa. 2016), *cert. denied*, No. 16-13, 2016 WL 3570607 (U.S. Oct. 3, 2016); *Joyce v. Cruz*, 16 SOEB GP 526 (Ill. State Bd. of Elections Jan. 28, 2016); *Graham v. Cruz*, 16 SOEB GP 527 (Ill. State Bd. of Elections Jan. 28, 2016); *Graham v. Rubio*, 16 SOEB GP 528 (Ill. State Bd. of Elections Jan. 28, 2016); *Elliot v. Cruz*, BLC 2015-2 (N.H. Ballot Law Comm’n 2015); *Laity v. Cruz*, BLC 2015-4 (N.H. Ballot Law Comm’n 2015); *Williams v. Cruz (Williams II)*, OAL Nos. STE 5016-16, STE 5018-16 (N.J. Office of Admin. Law Apr. 13, 2016); Tony Cook, *Cruz, Rubio Presidential Candidacies Face Citizenship Challenges in Indiana*, INDYSTAR (Feb. 19, 2016), <http://www.indystar.com/story/news/politics/2016/02/18/cruz-rubio-presidential-candidacies-face-citizenship-challenges-indiana/80560572/> [<https://perma.cc/4876-43DL>]; see also Derek T. Muller, *Status of Pending “Natural Born Citizen” Challenges and Litigation in 2016 Presidential Election*, EXCESS DEMOCRACY, <http://excessofdemocracy.com/blog/2016/2/status-of-pending-natural-born-citizen-challenges-and-litigation-in-2016-presidential-election> (last visited Nov. 19, 2016) [<https://perma.cc/5C36-F5D6>].

3. While this Article focuses on these disputes, challenges concerning other candidates did exist. Some challenges attacked Marco Rubio’s eligibility—he was born in the United States to Cuban immigrant parents. See, e.g., *Laity*, BLC 2015-4. Additionally, challenges concerning Rick Santorum (son of an Italian immigrant) and Bobby Jindal (son of Indian immigrants) were also filed but abandoned early. See Email from Robert Laity to Joseph Foster, Att’y Gen., State of N.H. (Nov. 13, 2015, 5:17 AM), <http://sos.nh.gov/WorkArea/DownloadAsset.aspx?id=8589951073> [<https://perma.cc/X5LJ-ZWB5>].

to Cruz's eligibility turned principally on the law and garnered more serious attention concerning a somewhat cryptic constitutional clause. Understandably, much attention focused on the definition of "natural born citizen" and whether candidates like Cruz qualified.<sup>4</sup> Administrative challenges and litigation in court revealed deficiencies in the procedures for handling such disputes. This paper exhaustively examines these challenges, identifies three significant complications arising out of these disputes, and urges a solution for future presidential elections.

Accordingly, Part I of this Article briefly discusses the history of natural born citizen litigation. Part II then highlights how agencies tasked with administering elections and reviewing challenges to candidate eligibility often construed their own jurisdiction broadly. But good reasons exist for construing such jurisdiction narrowly—after all, voters, political parties, the Electoral College, and Congress all may scrutinize whether a candidate is a natural born citizen, and unless the legislature has expressly spoken otherwise, these agencies should defer to others before deciding whether to keep a candidate off the ballot.

Part III examines how, although litigation in federal court usually led to swift dismissal on a procedural ground, challenges in state proceedings sometimes led to broad—and incorrect—pronouncements about the power to scrutinize the eligibility of presidential candidates. A state court in Pennsylvania and the New Jersey Secretary of State each erroneously held that neither the Electoral College nor Congress has the power to review the qualifications of candidates.<sup>5</sup> While state legislatures may well have empowered a state court or an elections official to review qualifications, it is not because of an absence of other capable bodies to do so. Compressed timeframes to file briefs and inadequately prepared decision makers led to sloppy findings that linger as precedent for future litigation.

Part IV discusses how decision makers repeatedly mused about how useful it would be if the U.S. Supreme Court offered a clear definition of "natural born citizen." Some reached the outright conclusion that Cruz was qualified for office. Others found that he was not so obviously unqualified

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4. See, e.g., Paul Clement & Neal Katyal, *On the Meaning of "Natural Born Citizen,"* 128 HARV. L. REV. F. 161 (2015); Michael D. Ramsey, *The Original Meaning of "Natural Born"* (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/7YPS-FTGC]; Akhil Reed Amar, *Why Ted Cruz Is Eligible to Be President*, CNN (Jan. 14, 2016, 11:59 PM), <http://www.cnn.com/2016/01/13/opinions/amar-cruz-trump-natural-born-citizen/index.html> [https://perma.cc/Y5EG-JYSF]; Bryan A. Garner, *Memorandum: Is Ted Cruz Eligible for the Presidency?*, ATLANTIC (Jan. 14, 2016), <http://www.theatlantic.com/politics/archive/2016/01/ted-cruz-eligibility-memo/424206/> [https://perma.cc/9MVP-3244]; Thomas Lee, *Is Ted Cruz a 'Natural Born Citizen'? Not If You're a Constitutional Originalist*, L.A. TIMES (Jan. 10, 2016, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-lee-is-ted-cruz-eligible-to-be-president-20160110-story.html> [https://perma.cc/9MUR-B9YK]; Rob Natelson, *Claims That Senator Cruz Is Not "Natural Born" Need to Be Taken Seriously*, ORIGINALISM BLOG (Jan. 11, 2016, 11:45 PM), <http://originalismblog.typepad.com/the-originalism-blog/2016/01/claims-that-sen-cruz-is-not-natural-born-need-to-be-taken-seriouslyrob-natelson.html> [https://perma.cc/M5V5-P49A].

5. See *infra* Part III.

as to keep his name off the ballot. Repeatedly, however, they expected a final judicial pronouncement from the highest court to resolve the matter rather than leaving the matter to the voters, Electoral College, or Congress. This suggests that executive and state judicial actors are uncomfortable with nonfederal judicial resolution of a constitutional claim like this one.

Finally, Part V offers a small recommendation. After three consecutive presidential election cycles with time-consuming and costly litigation, it may well be time to amend the Constitution and abolish the natural born citizen requirement. Although no court has excluded any major party candidate from the ballot on such grounds yet, the procedural wrangling and political uncertainty surrounding the issue may counsel in favor of a simpler, easy-to-administer standard for future candidates. Amending the Constitution is admittedly no simple task. But perhaps an uncontroversial amendment would find broad support in order to avoid delays and legal challenges seen in recent presidential primaries and elections.

#### I. HISTORY OF “NATURAL BORN CITIZEN” LITIGATION AND TRADITIONAL MECHANISMS FOR OVERSEEING A CANDIDATE’S ELIGIBILITY

Disputes over presidential qualifications are hardly of recent vintage,<sup>6</sup> but voluminous and serious litigation over such disputes is assuredly new. The proliferation of litigation surrounding Barack Obama (born in Hawaii to a Kenyan father and raised for some years in Indonesia) and John McCain (born in the United States-controlled Panama Canal Zone) was unprecedented.<sup>7</sup> The bulk of the litigation surrounded conspiracy theories regarding Obama, often allegations that he was actually born in Kenya or Indonesia, which meant he was not a natural born citizen<sup>8</sup> and therefore not qualified to serve as President of the United States.<sup>9</sup> Most challenges were raised in courts, often by individuals who lacked standing to bring such claims in the first place.<sup>10</sup> Because most claims were thrown out on procedural or jurisdictional grounds, almost no tribunal actually weighed in on the definition of “natural born citizen.”<sup>11</sup>

But courts are not the only place where such claims could be addressed. I have previously argued that there are several bodies that have the ability to scrutinize a presidential candidate’s eligibility.<sup>12</sup> Consider the many actors with political (and legal) opportunities to review the qualifications of presidential candidates: primary voters; political parties and convention

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6. See, e.g., 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, 882 n.6 (1988).

7. See Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 576 (2015).

8. U.S. CONST. art. II, § 1, cl. 5.

9. See generally Muller, *supra* note 7, at 576 & nn.134–36.

10. See *id.* at 576–77 & nn.132–41.

11. See *id.*

12. See generally *id.*

delegates; general-election voters; presidential electors; and, last but not least, Congress.

### A. Primary Voters

The presidential primaries include robust opportunities to debate whether candidates are eligible for office, and voters may evaluate such arguments. When Hillary Clinton supporters raised challenges to Barack Obama's eligibility in 2008<sup>13</sup> or when Donald Trump openly questioned Ted Cruz's eligibility in 2016,<sup>14</sup> voters could evaluate the claims as a part of their decision-making process. It is the first of two opportunities for voters—the second being the general election.<sup>15</sup>

### B. Political Parties and Convention Delegates

The parties themselves can stipulate as to whether their candidates meet the qualifications needed to be their presidential and vice-presidential nominees.<sup>16</sup> They may deny the party's nomination to ineligible candidates.<sup>17</sup> The Republican National Convention's decision in 2016 to count 484 delegates' votes cast for Ted Cruz, for instance, may well reflect the party's view that Cruz is constitutionally eligible.<sup>18</sup> Additionally, while the parties typically constrain delegates to vote for the candidates they were pledged to support, delegates who are not pledged to a candidate (perhaps after a round of voting at the convention) are also free to consider the purported eligibility of candidates, much as voters do.

### C. General-Election Voters

General-election voters are not required to behave in a particular fashion in their decision-making process, and they are free to consider a wide range

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13. See Ben Smith & Byron Tau, *Birtherism: Where It All Began*, POLITICO, <http://www.politico.com/news/stories/0411/53563.html> (last updated Apr. 24, 2011, 5:33 PM) [<https://perma.cc/5B6C-36KR>].

14. Todd J. Gillman, *Trump Questions Cruz Eligibility, and Canada-Born Senator Says Rival Has 'Jumped the Shark'*, DALL. MORNING NEWS (Jan. 5, 2016), <http://trailblazersblog.dallasnews.com/2016/01/trump-questions-cruz-eligibility-canada-born-senator-says-rival-has-jumped-the-shark.html/> [<https://perma.cc/SK2V-ZZ5Q>].

15. See *infra* Part I.C.

16. Cf. Chad Flanders, *What Do We Want in a Presidential Primary—An Election Law Perspective*, 44 U. MICH. J.L. REFORM 901, 922 (2011).

17. Cf. DEMOCRATIC NAT'L COMM., DELEGATE SELECTION MATERIALS FOR THE 2016 DEMOCRATIC NATIONAL CONVENTION r. 12(K) (2014), [http://www.demrulz.org/wp-content/files/12.15.14\\_2016\\_Delegate\\_Selection\\_Documents\\_Mailing\\_-\\_Rules\\_Call\\_Regs\\_Model\\_Plan\\_Checklist\\_12.15.14.pdf](http://www.demrulz.org/wp-content/files/12.15.14_2016_Delegate_Selection_Documents_Mailing_-_Rules_Call_Regs_Model_Plan_Checklist_12.15.14.pdf) (describing criteria for the Democratic presidential candidates "in addition to the requirements set forth by the United States Constitution") [<https://perma.cc/NZ5A-TTWJ>]; REPUBLICAN NAT'L COMM., RULES OF THE REPUBLICAN PARTY r. 16(d)(5) (2016), [https://s3.amazonaws.com/prod-static-ngop-pbl/docs/Rules\\_of\\_the\\_Republican+Party\\_FINAL\\_S14090314.pdf](https://s3.amazonaws.com/prod-static-ngop-pbl/docs/Rules_of_the_Republican+Party_FINAL_S14090314.pdf) (prohibiting state laws that "hinder[], abridge[], or den[y]" the right of constitutionally eligible candidates from being candidates) [<https://perma.cc/K7VY-9ERC>].

18. Admittedly, in this particular case, the Republican National Convention rules do not formally require candidates to be eligible, and no one formally objected to Cruz's nomination.

of factors. One of those factors may well be a candidate’s constitutional ineligibility—actual or perceived.<sup>19</sup>

#### D. Presidential Electors

Presidential electors theoretically exercise independent judgment in casting votes for the President and Vice President, and they could reject candidates they found to be ineligible. Practically, few electors today exercise such independent judgment and almost uniformly cast votes consistent with the candidate they are pledged to support. Some states also compel electors to take an oath to support their pledged candidate; a few make it a crime to be a faithless elector or, alternatively, refuse to count their votes.<sup>20</sup>

But electors have historically had the power to exercise independent judgment in voting. That role is particularly significant when the candidate has passed away before the electors meet. In 1912, for instance, eight electors who pledged to support William Howard Taft cast vice-presidential votes for Nicholas Butler after Taft’s Vice President, James Sherman, died just days before the election.<sup>21</sup> And in 1872, electors scattered their votes for presidential candidates after Horace Greeley died between Election Day and the meeting of the Electoral College.<sup>22</sup> They were not simply exercising independent judgment about whether these candidates deserved their votes. Presumably, they were also scrutinizing the qualifications of candidates and concluded that dead men were ineligible for executive office.

#### E. Congress

While Congress’s power to judge the qualifications, elections, and returns of its own members is well established,<sup>23</sup> its power in presidential election is less certain. Congress is given the power to count the electoral votes cast for President and Vice President.<sup>24</sup> A robust debate in 1800 left open the question whether Congress had the power to independently

19. See, e.g., Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 94 (1990); see also Muller, *supra* note 7, at 579–80 & nn.152–53.

20. See Muller, *supra* note 7, at 571–72.

21. See Joshua Spivak, *Could Trump Drop Out?*, USA TODAY (Aug. 9, 2016, 5:47 PM), <http://www.usatoday.com/story/opinion/2016/08/09/trump-drop-out-race-ballot-republicans-ryan-delegates-november-column/88450076/> [<https://perma.cc/CK7D-5L5H>]; see also *Historical Election Results: Electoral College Box Scores 1789–1996*, NAT’L ARCHIVES & RECORDS ADMIN.: U.S. ELECTORAL C., <https://www.archives.gov/federal-register/electoral-college/scores.html#1912> (last visited Nov. 19, 2016) [<https://perma.cc/Q24U-GUPX>].

22. See Muller, *supra* note 7, at 586–87.

23. See, e.g., Lisa Marshall Manheim, *Judging Congressional Elections*, 51 GA. L. REV. (forthcoming 2017); see also Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1, 24–29 (2013) (describing statutes promulgated by Congress designed to resolve election congressional disputes). See generally Franita Tolson, *What Is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433 (2015) (describing Congress’s power to reduce a state’s delegation in the House of Representatives if the state abridges the right to vote).

24. See Muller, *supra* note 7, at 585.

evaluate whether the candidates were eligible for office or whether its task counting electoral votes was simply ministerial.<sup>25</sup> In 1873, however, the House refused to count three electoral votes cast for the deceased Horace Greeley—an exercise of its independent discretion to review the qualifications of candidates.<sup>26</sup>

#### F. State-Level Implications

These opportunities to resolve questions about a candidate's eligibility ought to give states some pause. Should states be in the business of scrutinizing whether candidates are eligible for office, or should they simply accept the paperwork of candidates as a ministerial task and let the electoral process play out? Given other opportunities to settle the question in the political process, what role, if any, should courts play in this decision-making process?

States have no constitutional *duty* to scrutinize the qualifications of federal candidates.<sup>27</sup> And states might simply be reluctant to empower these officials; after all, there are ample opportunities to moot these disputes. Indeed, consider that Cruz failed to secure the Republican nomination.

But states also may have a desire to ensure that their voters are not wasting their votes on ineligible candidates at any stage of the process. State legislatures have the authority to empower election officials or state courts with the power to resolve such disputes.<sup>28</sup> In the event they choose to do so, what should such scrutiny look like?

Despite the protracted, often frivolous litigation surrounding presidential candidates in 2008 and 2012, most states did nothing—paving the way for potential litigation surrounding the next candidate whose eligibility was at all in question. Most of the litigation surrounding Obama turned on findings of fact—usually, was he born in Hawaii, or was he secretly born in Indonesia? Perhaps, then, states were reluctant to seriously address how such disputes should be resolved given the frivolity of the claims. Challenges<sup>29</sup> surrounding Cruz, however, turned on conclusions of law (similar to McCain). The facts around Cruz were not in dispute—he was born to a Cuban father and an American mother in Canada. That left the potential for more serious complications when election officials or courts face these disputes.

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25. *See id.* at 585–86.

26. *See id.* at 586–88.

27. *See id.* at 601 n.341.

28. *See id.* at 561.

29. The word “challenges” is deliberately broad. It is used here to refer to any formal challenges to a candidate's eligibility, whether a hearing before an administrative tribunal, a petition to an election official, or a lawsuit filed in court.

## II. JURISDICTIONAL SCOPE OF ELECTION BOARDS AND STATE COURTS

The first question confronting election officials or state courts in resolving natural born citizen challenges raised during this election was whether the arbiters even had the jurisdiction to hear such challenges to a candidate’s eligibility. State legislatures define the power of administrative officials and state courts. These tribunals might construe their jurisdiction narrowly and refuse to hear such disputes absent a rather express directive from the legislature. But most found jurisdiction rather easily, sometimes despite plain language to the contrary.<sup>30</sup>

### A. Illinois

Illinois law requires that presidential candidates sign a statement of candidacy that one is “qualified for the office.”<sup>31</sup> The electoral board has the power to review objections to the petition—whether they are in “proper form,” “within the time and under the conditions required by law,” “genuine,” and “valid.”<sup>32</sup> Put another way, in Illinois, the “scope of inquiry with respect to objections to nomination papers is limited to ascertaining whether those papers comply with the provisions of the Election Code governing such papers.”<sup>33</sup> Other provisions of the Elections Code describe the eligibility of candidates for state office.<sup>34</sup> There is no question in Illinois that the board has the power to scrutinize qualifications for state office enunciated elsewhere in state law.<sup>35</sup>

But did the board have the power to decide whether a candidate for President is a natural born citizen or otherwise meets provisions of the U.S. Constitution? Yes, the board concluded; it had jurisdiction to hear such challenges, including over whether Cruz was a natural born citizen.<sup>36</sup> And it went on to conclude that “Ted Cruz became a natural born citizen at the moment of his birth” because his mother “was a U.S. citizen.”<sup>37</sup>

### B. Indiana

The Indiana Election Commission is empowered to administer Indiana election laws.<sup>38</sup> Indiana law dictates that presidential candidates must meet

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30. The jurisdictions discussed in this part are those that had any meaningful assessment of the scope of their jurisdiction or the appropriate authority to engage in eligibility determinations. Other jurisdictions also considered such challenges but dismissed them on other grounds, like standing, without reaching these issues, or they summarily dismissed the claims without meaningful analysis.

31. 10 ILL. COMP. STAT. 5/10-5(3) (2016).

32. *Id.* at 5/10-10.

33. *Bryant v. Bd. of Election Comm’rs*, 865 N.E. 2d 189, 192 (Ill. 2007).

34. *See id.*

35. *Id.*

36. *Joyce v. Cruz*, 16 SOEB GP 526 (Ill. State Bd. of Elections Jan. 28, 2016); *Graham v. Cruz*, 16 SOEB GP 527 (Ill. State Bd. of Elections Jan. 28, 2016); *Graham v. Rubio*, 16 SOEB GP 528 (Ill. State Bd. of Elections Jan. 28, 2016).

37. *Id.*

38. *See* IND. CODE ANN. § 3-6-4.1-14 (2016).



the qualifications set forth in the U.S. Constitution,<sup>39</sup> and the commission may hear questions about the validity of candidacies.<sup>40</sup> Candidates in presidential primaries sign a request to appear on the ballot and include petitions signed by voters.<sup>41</sup> But, unlike candidates for other federal or state offices governed by a different chapter, there is ostensibly no requirement that the candidate even certify that he is eligible for office or that he complies with the qualifications in Indiana state law.<sup>42</sup>

Parties filed petitions seeking to exclude Marco Rubio's and Cruz's names from the ballot, challenging their eligibility before the commission. During a hearing over Rubio's eligibility, one member of the commission thought that a question of subject matter jurisdiction "was the most direct point and the more basic argument."<sup>43</sup> Another commissioner was more uncertain about the question of jurisdiction.<sup>44</sup> The commission then entertained a motion that the challenge "be denied," without clarification as to whether it was a lack of jurisdiction or a finding on the merits, and the motion was unanimously approved.<sup>45</sup>

An attorney representing Cruz claimed that the question was beyond the jurisdiction of the commission and "lies solely before the U.S. Congress."<sup>46</sup> The commission again entertained a motion that "both petitions be denied," without clarification.<sup>47</sup> After some extended discussion on the merits, the commission denied the motion by a 3–1 vote.<sup>48</sup>

### C. New Hampshire

New Hampshire law also requires candidates to sign a declaration under penalty of perjury that they are "qualified to be a candidate for president of the United States pursuant to . . . the United States Constitution, which states, 'No person except a natural born citizen . . . shall be eligible to the office of the President . . . .'"<sup>49</sup> The secretary of state reviews the declarations for "regularity," and such decisions "shall be final."<sup>50</sup> The state's Ballot Law Commission (BLC), however, is empowered to "hear and determine disputes arising over whether nomination papers or declarations of candidacy filed with the secretary of state conform with the law."<sup>51</sup>

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39. *See id.* § 3-8-1-6(a).

40. *See id.* § 3-8-2-14.

41. *See id.* § 3-8-3-2.

42. *See id.* § 3-8-2-7(a)(5).

43. Transcript of Proceeding at 23, Challenge to Marco Rubio, Cause No. 2016-2 (Ind. Election Comm'n Feb. 19, 2016), [https://secure.in.gov/sos/elections/files/IEC\\_Minutes\\_Feb\\_19\\_2016\\_Part\\_1.pdf](https://secure.in.gov/sos/elections/files/IEC_Minutes_Feb_19_2016_Part_1.pdf) [<https://perma.cc/T5RL-26P4>].

44. *See id.* at 25.

45. *Id.* at 26–28.

46. *Id.* at 34.

47. *Id.* at 43.

48. *Id.* at 49.

49. N.H. REV. STAT. ANN. § 655:47(I) (2016).

50. *Id.* § 655:47(III).

51. *Id.* § 665:7.

The BLC determined it has the power to hear disputes over whether a candidate is a natural born citizen. It distinguished the power over “regularity,” which resided with the secretary of state, from whether the petitions “conform with the law,” a task for the BLC.<sup>52</sup> Conformity with law, it reasoned, included the power to review the presidential candidates’ qualifications.

In a challenge to Cruz’s eligibility, however, it offered an unusually deferential standard of legal review. “Absent an obvious defect in a filing,” the BLC explained, it would approve the reasonableness of the secretary of state’s decision.<sup>53</sup> “Clearly, there is no final decision on the meaning of ‘natural born citizen,’ and this Commission is not the appropriate forum for the determination of major Constitutional questions.”<sup>54</sup> The BLC likewise found that there was no “obvious defect” in Cruz’s declaration.<sup>55</sup>

#### D. New Jersey

New Jersey law requires that petitions for candidacy include the candidate’s name, residence, and office sought.<sup>56</sup> It does not require a certification that the candidate is eligible for office.<sup>57</sup> Candidates must submit petitions with sufficient signatures to appear on the ballot. Petitions “in apparent conformity” with the law are “deemed to be valid” unless an objection is filed.<sup>58</sup> If an objection is filed, the secretary of state “shall in the first instance pass upon the validity of such objection” to a petition.<sup>59</sup>

A New Jersey administrative law judge accepted that the secretary of state “is obliged to rule” on a question of Cruz’s eligibility.<sup>60</sup> And the secretary of state embraced this conclusion. There was no scrutiny of the jurisdictional basis for doing so; jurisdiction was assumed. After all, a petition’s validity means that it conforms with state law—that it includes the proper number of valid signatures, that it was filed on time, and so on. Nothing in state law requires candidates to certify that they meet the qualifications enumerated in the Constitution. Indeed, it is a reason an avowedly unqualified candidate like Nicaraguan citizen Róger Calero appeared on the New Jersey ballot in 2004 and 2008 as the presidential candidate for the Socialist Workers Party.<sup>61</sup> And while state law does

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52. *Elliot v. Cruz*, BLC 2015-2 (N.H. Ballot Law Comm’n 2015); *see also Laity v. Cruz*, BLC 2015-4 (N.H. Ballot Law Comm’n 2015).

53. *Elliot*, BLC 2015-2; *see also Laity*, BLC 2015-4 (rejecting a challenge to Marco Rubio’s candidacy for identical reasons).

54. *Elliot*, BLC 2015-2; *see also Laity*, BLC 2015-4.

55. *Elliot*, BLC 2015-2; *see also Laity*, BLC 2015-4.

56. *See* N.J. STAT. ANN. § 19:13-4 (West 2016).

57. *See id.*

58. *Id.* § 19:13-10.

59. *Id.* § 19:13-11.

60. *Williams v. Cruz (Williams I)*, OAL Nos. STE 5016-16, STE 5018-16, slip op. at 4 (N.J. Office of Admin. Law Apr. 12, 2016) (initial decision by administrative law judge).

61. *See* FEC, FEDERAL ELECTIONS 2004: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 27–39 (2005), <http://www.fec.gov/pubrec/fe2004/federaelections2004.pdf> [<https://perma.cc/4Z2G-F67L>]; FEC, FEDERAL ELECTIONS 2008: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE

permit an election contest on the basis that the incumbent was not “eligible to the office,” that is only triggered “at the time of the election.”<sup>62</sup> New Jersey’s statute looks to be quite deferential to the political process and would not permit judicial and administrative review of presidential candidates. But an administrative law judge, and the secretary of state, construed the statute broadly to assert jurisdiction.<sup>63</sup>

#### *E. New York*

An outlier among these challenges came from New York. The New York State Board of Elections was aware of legal challenges surrounding Cruz when it agreed to permit his name to appear on the ballot.<sup>64</sup> During discussions about this litigation, one board member indicated that the “goal is not for us to get involved in the substance,” with another affirming, “[w]e have limited jurisdiction.”<sup>65</sup> They allowed the judiciary to handle the dispute. And in that dispute, the courts did not need to address the jurisdictional question after they concluded the petitions were untimely.<sup>66</sup>

#### *F. Florida*

Challenges to Rubio’s and Cruz’s eligibility were filed in Florida state court.<sup>67</sup> In a somewhat complicated procedural posture, the plaintiff sued Rubio, Cruz, and the Florida secretary of state. The plaintiff then voluntarily dismissed the claim against the secretary of state. When the court considered Rubio’s and Cruz’s motions to dismiss, it issued a three-part ruling: the voluntary dismissal of the secretary of state was fatal to the rest of the case; the plaintiff lacked standing; and even if the plaintiff had standing, the plaintiff’s “substantive arguments reside in the hands of the United States Congress.”<sup>68</sup> While it might have been better to cite the lack of jurisdictional authority in Florida rather than a bare recital of Congress’s authority, it reflected another court deferring to the existing dispute resolution mechanisms rather than assume authority existed.

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AND THE U.S. HOUSE OF REPRESENTATIVES 27–40 (2009), <http://www.fec.gov/pubrec/fe2008/federalections2008.pdf> [<https://perma.cc/36HH-F7KJ>].

62. N.J. STAT. ANN. § 19:29-1(b).

63. See *Williams I*, OAL Nos. STE 5016-16, STE 5018-16, slip op at 25; see also *Williams v. Cruz (Williams II)*, OAL Nos. STE 5016-16, STE 5018-16 (N.J. Office of Admin. Law Apr. 13, 2016) (final decision by Secretary of State adopting administrative law judge’s findings).

64. See generally N.Y. State Bd. of Elections, Commissioners Meeting Transcript (Feb. 23, 2016), <http://www.elections.ny.gov/NYSBOE/News/MeetingMinutes/CCTranscriptions02232016.pdf> [<https://perma.cc/6KPX-TNTF>].

65. *Id.* at 10.

66. See *Korman v. N.Y. State Bd. of Elections*, No. 522647 (N.Y. App. Div. Mar. 24, 2016), *appeal denied*, No. 2016-374 (N.Y. Apr. 1, 2016).

67. See, e.g., *Voeltz v. Cruz*, No. 15-022044(02) (Fla. Cir. Ct. Mar. 14, 2016).

68. *Id.*

### G. Reflections on Jurisdiction

In a nation of fifty states, it is hardly surprising to see great diversity in how states administer presidential elections and presidential preference primaries.<sup>69</sup> The Constitution leaves to the discretion of each state legislature to decide the manner in which such elections take place.<sup>70</sup> Some have given election boards and state courts some power to review qualifications (or, at least, have been interpreted to do so); others have not. But in instances where decision makers do assert the authority to hear such challenges, they can encounter difficulties assessing the law that governs these disputes.

## III. ERRORS OF LAW

Most election boards and state courts concluded, expressly or implicitly, that they had authority to hear challenges to Cruz’s eligibility. They frequently dismissed such challenges on other grounds, for example, because the challenge was filed in an untimely fashion<sup>71</sup> or the plaintiff lacked standing to raise the challenge.<sup>72</sup> But some courts also made erroneous statements of constitutional law concerning the Electoral College and Congress.

### A. New Jersey

A New Jersey administrative law judge focused on whether a dispute over Cruz’s eligibility was a political question, reserved to a branch of government other than the judiciary.<sup>73</sup> Most simplistically, the political question doctrine asks whether the Constitution forbids a court to answer certain questions of law because the resolution of those issues has been committed to another branch of government. For example, one such question concerns whether the power to review is a textually demonstrable commitment to another branch of government.<sup>74</sup> But there are times where other branches may still examine questions of law and courts may independently examine the same questions.<sup>75</sup>

In New Jersey, the judge provided an inaccurate statement of law when he confused the political question doctrine with state jurisdiction:

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69. See generally Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237 (2012).

70. See U.S. CONST. art. II, § 1, cl. 2.

71. See, e.g., *Korman*, No. 522647 (discussing the lower court’s dismissal for untimeliness of the claim).

72. See, e.g., *Schwartz v. Cruz*, No. H-16-106, 2016 WL 1449251, at \*1 (S.D. Tex. Apr. 13, 2016); *Wagner v. Cruz*, No. 2:16-cv-55-JNP (D. Utah Mar. 18, 2016).

73. See *Williams v. Cruz (Williams I)*, OAL Nos. STE 5016-16, STE 5018-16, slip op. at 3–4 (N.J. Office of Admin. Law Apr. 12, 2016).

74. See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993); see also Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1914 (2015); Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Questions Doctrine, and the Fourteenth Amendment: A Reply to Professors Kent and Shane*, 29 FLA. ST. U. L. REV. 603, 607 (2001).

75. See, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803).

The Electoral College is not vested with the power to determine the eligibility of the Presidential candidate since it is only charged to select the candidate for each office and transmit its votes to the “seat of government.” Congress has no power over this process . . . except where a tie vote occurs . . . Congress is not afforded [a] role in connection with the issue of Presidential eligibility. There is no basis to conclude that the issue of eligibility of a person to serve as President has been textually committed to Congress or the Electoral College.<sup>76</sup>

The last sentence does not follow from the previous several, which are incorrect as a matter of law. Both the Electoral College and Congress have the power to review the qualifications of candidates. The election of 1872 is the paradigmatic example, as noted earlier.<sup>77</sup> Horace Greeley died after Election Day but before the Electoral College met.<sup>78</sup> Most electors cast their votes for someone else—presumably because they believed that Greeley was no longer eligible to serve as President.<sup>79</sup> And when Congress was confronted with three electoral votes for the deceased Greeley, it refused to count them—again, presumably because it believed that he was no longer eligible to serve as President.<sup>80</sup> Both bodies adjudicated the qualifications of presidential candidates.<sup>81</sup>

So the Electoral College and Congress may review qualifications of presidential candidates. But it is another thing entirely to say that these bodies possess the *sole* authority to do so, to the exclusion of the judicial branch. The political question doctrine, as articulated by the Supreme Court, involves a “textually demonstrable commitment of the issue to a coordinate political department.”<sup>82</sup> That means a commitment to another branch in such a way that the judiciary *cannot* interfere. State legislatures are permitted to empower state courts or state election officials to review qualifications.<sup>83</sup> They may choose not to do so, but they could task review to the courts if they so desired. The New Jersey administrative law judge, however, apparently worried that ceding any authority to review qualifications might deprive his court of the ability to review them. And he decided to deny the Electoral College and Congress any role whatsoever, a clear error. The secretary of state adopted the reasoning of the administrative law judge in its entirety, errors and all.<sup>84</sup>

### B. Pennsylvania

A state judge in Pennsylvania committed a similar error as the New Jersey court: “[T]he Constitution does not vest the Electoral College with

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76. *Williams I*, OAL Nos. STE 5016-16, STE 5018-16, slip op at 4–5.

77. *See supra* Part I.

78. *See Muller, supra* note 7, at 586–87.

79. *See id.*

80. *See id.*

81. *See id.*

82. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

83. *See supra* Part II.

84. *See Williams v. Cruz (Williams II)*, OAL Nos. STE 5016-16, STE 5018-16 (N.J. Office of Admin. Law Apr. 13, 2016).

power to determine the eligibility of a Presidential candidate since it only charges the embers [sic] of the Electoral College to select a candidate for President and then transmit their votes to the nation’s ‘seat of government.’”<sup>85</sup> But what does the power to “select” mean if it does not include the discretion to decide whether someone is fit for office—including, perhaps, whether someone is *eligible* for office?

The judge went on to find that Congress also lacked such power: “[N]o Constitutional provision places such power in Congress to determine Presidential eligibility. Moreover, other than setting forth the bare argument, the Candidate offers no further support for the contrary proposition.”<sup>86</sup> Perhaps a failure to adequately brief the court in the haste of resolving a time-sensitive ballot access dispute led to this finding. But Congress’s refusal in 1873 to count electoral votes cast for the deceased Greeley suggests that power does in fact reside in Congress to determine presidential eligibility, as rarely as that power might have been used.<sup>87</sup> Indeed, the Senate’s proclamation in 2008 that John McCain was a natural born citizen suggests that Congress, to this day, believes it has the power to review the qualifications of presidential candidates.<sup>88</sup>

### C. Reflections on Errors of Law

Perhaps these judges have some excuse for their errors. The period of time between the opening briefs to the final decision was sometimes a matter of days, typical of short-fuse litigation in challenges to candidates’ petitions for ballot access. The formal role of the Electoral College and of Congress in presidential elections is rarely considered in contemporary legal disputes. While the parties and press often emphasized the merits of the natural born citizen dispute, perhaps less attention may have been given to these more rote procedural matters. But by asserting jurisdiction to hear these claims, the courts set themselves up for erroneous statements of law.

Appellate tribunals were far more cautious. They mostly summarily affirmed or affirmed without comment as to the basis of the finding. In Pennsylvania, for instance, the Supreme Court of Pennsylvania affirmed the order dismissing the case without explanation.<sup>89</sup> But these lingering judicial precedents make future litigation all the more complicated. Eager plaintiffs now have multiple sources of inaccurate law to cite in furtherance of their claims. Perhaps the risk of erroneous statements of law is a major reason that many election tribunals expressly desired clarity and certainty in the form of an opinion from the Supreme Court.

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85. *Elliot v. Cruz*, 137 A.3d 646, 650–51 (Pa. Commw. Ct. 2016), *aff’d*, 134 A.3d 51 (Pa. 2016), *cert. denied*, No. 16-13, 2016 WL 3570607 (U.S. Oct. 3, 2016).

86. *Id.* at 651.

87. *See supra* notes 26, 80 and accompanying text.

88. *See* S. Res. 511, 110th Cong. (2008) (enacted) (resolving unanimously that Senator McCain is a natural born citizen); *see also* Muller, *supra* note 7, at 587–89.

89. *See Elliot*, 134 A.3d at 51.

## IV. A DESIRE FOR CERTAINTY AND JUDICIAL INTERVENTION

When election administrators heard these eligibility challenges, they often asserted jurisdiction.<sup>90</sup> But they also frequently expressed reluctance that they should be the ones who handled such disputes. They preferred that a court—perhaps a federal court, or the Supreme Court—would hear the challenge. For example, a commissioner in New York lamented, “[T]his type of heavy decision should really be made in a federal court.”<sup>91</sup> Another chimed in, “I agree with you that it’s an important issue that ought to be resolved in the courts.”<sup>92</sup> An Indiana commissioner complained, “I wish that there was a way that we could transfer this directly to the Supreme Court and let them rule.”<sup>93</sup> After permitting Cruz to appear on the ballot, the New Hampshire BLC concluded parenthetically: “[T]he appropriate raising in and deciding of this question by a court equipped to decide such Constitutional matters, so that all election officials and the American people know once and for all the definition of ‘natural born citizen,’ would be helpful in avoiding uncertainty.”<sup>94</sup>

The election officials seemed to be at a loss in deciding how to handle the uncertainty before them. The term “natural born citizen” remained the subject of some dispute. An Indiana commissioner thought that they should err on the side of permitting the candidate on the ballot.<sup>95</sup> The New Hampshire BLC concluded that Cruz’s petition did not contain an “obvious” defect.<sup>96</sup> These are hardly sure statements of Cruz’s eligibility. It is something of a curiosity, then, that these agencies would so easily find jurisdiction and yet so desire to delegate the actual jurisdiction to another court—rather than leaving the matter to the voters, Electoral College, or Congress. It is a sign that executive and state judicial actors are uncomfortable with nonjudicial resolution of constitutional claims like these. That discomfort perhaps counsels against state legislatures empowering them to make such decisions. It is not obvious, however, that judicial intervention, even from the Supreme Court, would offer the best solution.

## V. AMENDING THE CONSTITUTION

Solutions to this litigation are not simple. The jurisdictional and procedural issues continue to entangle election officials and state courts in vexatious challenges. Presidential elections are operated by the states, which leaves discretion to fifty separate jurisdictions to handle such disputes and will create a patchwork of solutions under the existing regime (assuming individual states decide to seek solutions, a doubtful proposition

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90. *See supra* Part II.

91. N.Y. State Bd. of Elections, *supra* note 64, at 10.

92. *Id.*

93. Transcript of Proceeding, *supra* note 43, at 47.

94. *Elliot v. Cruz*, BLC 2015-2 (N.H. Ballot Law Comm’n 2015).

95. Transcript of Proceeding, *supra* note 43, at 46.

96. *Elliot*, BLC 2015-2.

given the repetition of issues in 2016 that first arose in 2008 and 2012). A small, but complicated, solution does exist: amending the Constitution.

A constitutional amendment concerning natural born citizens is nothing new. The most recent serious attempt to abolish the natural born citizen requirement arose from a proposal promulgated by Senator Orrin Hatch in 2003. The "Equal Opportunity to Govern" amendment would have changed the natural born citizen requirement to a qualification that a candidate be "20 years a citizen of the United States."<sup>97</sup> Such an amendment was ostensibly targeted to permit obviously disqualified candidates, like Austria-born former California Governor Arnold Schwarzenegger, an opportunity to run for President.<sup>98</sup>

The justifications for this clause appear to have fallen away in our contemporary society. The Framers were likely worried that a foreign monarch might swoop in and seize control of the fledgling republic.<sup>99</sup> Even assuming that the challengers to recent presidential candidates' eligibility are correct in their definition of "natural born citizen," there is no serious concern that Obama, McCain, or Cruz would turn America over to a foreign sovereign. A twenty-year citizenship requirement seems reasonably sufficient to protect against concerns of foreign incursion into the executive branch.

Admittedly, some may believe that a twenty-year citizenship period is insufficient and would prefer a thirty-year, or even longer, citizenship period, perhaps coupled with a lengthy domestic residency requirement. Matters of such policy would surely generate robust debate but all toward the common end of providing greater clarity in our constitutional qualifications for presidential and vice-presidential candidates.

If we need not fear longstanding citizens serving as President, then we can help courts avoid these many challenges for generations to come. Despite some academic scholarship offering concrete understandings of the phrase, the administrative and judicial uncertainty surrounding the phrase "natural born citizen" is a valuable basis for passing the amendment.<sup>100</sup> It would have prevented all these lawsuits concerning the eligibility of presidential candidates. It would have moved political and legal resources toward more meaningful endeavors.

Amending the Constitution is, I concede, no easy solution. But three consecutive presidential election cycles have yielded major challenges to an understanding of "natural born citizen." A fourth cycle with such challenges seems inevitable.<sup>101</sup> But the last eight years have demonstrated

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97. S.J. Res. 15, 108th Cong. (2003).

98. See Martin Kasindorf, *Should the Constitution Be Amended for Arnold?*, USA TODAY (Dec. 3, 2016, 8:54 AM), [http://usatoday30.usatoday.com/news/politics/elections/2004-12-02-schwarzenegger-amendment\\_x.htm](http://usatoday30.usatoday.com/news/politics/elections/2004-12-02-schwarzenegger-amendment_x.htm) [<https://perma.cc/22WK-Z7KZ>].

99. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 164–66 (2005).

100. See, e.g., Sarah Helene Duggin & Mary Beth Collins, *'Natural Born' in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53 (2005).

101. See Tim Alberta, *Ted Cruz Isn't Changing a Thing*, NAT'L REV. (July 20, 2016, 10:21 PM), <http://www.nationalreview.com/article/438144/interview-ted-cruz-2016->



that the states lack an adequate procedural mechanism for reviewing the Natural Born Citizen Clause, particularly in instances where its understanding is a matter of some dispute. Their inability to do so counsels in favor of a federal, and more lasting, solution.

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strategy-and-2020-plans (“There is no question Cruz will run for president again. . . . [H]is 2020 plans are likely to move forward no matter who wins the White House this fall . . . .”) [<https://perma.cc/W78T-EHDB>].