IN THE SUPREME COURT OF PENNSYLVANIA

No. 29 MAP 2016

CARMON ELLIOTT,

Appellant,

v.

TED CRUZ,

Appellee.

AMICUS CURIAE BRIEF OF PROF. MARY BRIGID McMANAMON ON THE NATURAL BORN CITIZEN REQUIREMENT OF ARTICLE II OF THE UNITED STATES CONSTITUTION

Appeal from the March 10, 2016, Order of the Commonwealth Court of Pennsylvania at Docket No. 77 MD 2017

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STATEMENT OF INTEREST OF AMICUS

Amicus curiae, Mary Brigid McManamon, is a professor of law at Widener University Delaware Law School. She currently teaches Constitutional Law I and Federal Courts (an advanced course in American constitutional law). In addition, Professor McManamon has taught classes that address, in whole or in part, provisions of the U.S. Constitution for over 30 years. Moreover, she has frequently written about, and occasionally taught seminars on, both English and American legal history.

Specifically to the point of the present appeal, Professor McManamon recently spent almost a year researching and writing the article, *The Natural Born Citizen Clause as Originally Understood*, 64 Cath. U. L. Rev. 317 (2015), which is cited, but not relied on, in the opinion of the court below. She is therefore in the unique position of being to advise this court not only on the ancient common law doctrine at issue in this case, but also as to the weaknesses of the authorities relied on by the lower court.

The amicus, moreover, is not involved in any political campaign. Her only interest is in the sound development of constitutional law and legal interpretation. She has no financial interest in the outcome of this matter; she is the sole author of this brief; and she has received no compensation for producing this brief.

ARGUMENT

I. SENATOR CRUZ IS NOT A "NATURAL BORN" CITIZEN UNDER THE COMMON LAW.

The president of the United States must be a "natural born" citizen. U.S. Const. art. II, § 1, cl. 5. The phrase is derived from the common law, which developed in England. *See, e.g.*, 1 William Blackstone, Commentaries on the Laws of England 354 (Oxford, The Clarendon Press 1765). Under

these circumstances, the Supreme Court has repeatedly declared that the constitutional language "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898). Thus, we must discover the meaning of "natural born" in the common law.

Sir William Blackstone, the famed eighteenth-century treatise writer on the common law, defined "natural born" succinctly thus:

> The first and most obvious division of the people is into aliens and natural-born subjects.[1] Natural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it.

1 Blackstone, *supra* (footnote added).

Several pages after this passage, Blackstone explained the rules regarding citizenship more fully. This later passage is frequently misconstrued and misrepresented, including by counsel for Senator Cruz in the proceedings below, T. at 30-32. It is therefore necessary to take the pertinent paragraph apart bit by bit and explain it.

Blackstone began:

> When I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. *The common law indeed stood absolutely so*; with only a very few exceptions . . . .

Id. at 361 (emphasis added). To this absolute rule–i.e., that those born outside the king's dominions

[1] "The term 'citizen' as understood in our law, is precisely analogous to the term *subject* in the common law, and the change of phrase has entirely resulted from the change of government." State v. Manuel, 20 N.C. (3 & 4 Dev. & Bat.) 20, 26 (N.C. 1838).

were aliens–Blackstone only noted the exception that children of the king's ambassadors born abroad were natural born. He explained this nuance as follows:

> [T]his maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the king's embassadors [sic] born abroad were always held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *postliminium*) to be born under the king of England's allegiance, represented by his father, the embassador [sic].

Id. (footnote omitted).

An alien could become naturalized, but that required a private bill in Parliament, which was very expensive. Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 Cath. U. L. Rev. 317, 322 (2015). In addition, the alien had to take two oaths, one swearing allegiance to the king and the other renouncing the pope's authority. Finally, the alien had to take Protestant communion. *Id.* at 326; *see, e.g.*, 7 Jac. 1, c. 2, § 1 (1609).

Understanding the hardships that the naturalization presented, Parliament enacted a law that allowed children born abroad to English subjects who had fled the country during the English civil war to become naturalized without the expense of a private bill. 29 Car. 2, c. 6, § 1 (1677). This statute is the one to which Blackstone referred in this passage

> "[Because the common law absolutely considered those born outside of the king's dominions to be aliens,] a particular act of parliament became necessary after the

> restoration,[2] for the naturalization of children of his majesty's English subjects, born in foreign countries during the late troubles.

1 Blackstone, *supra*, at 361 (footnote omitted, footnote supplied).

Numerous authors have wrongly asserted that this statute somehow demonstrates that the common law considered children born abroad to English parents to be natural born subjects at birth. Nothing could be further from the truth. First, as every lawyer trained in the common law tradition should know, statutes are not the same thing as the common law. The 1677 law was a remedial statute ameliorating the status derived from the common law rule for certain selected people. "[I]t only applied to children of natural born subjects born abroad between June 14, 1641, and March 24, 1660." McManamon, *supra*, at 326. Second, the statute provided for the *naturalization* of the children. And it did so because they were aliens and needed to be naturalized. The law only saved these children from the expense of the private bill. But

> to benefit from the statute, the child had to go through the usual naturalization process within seven years of its enactment; that is, the child had to "receive the [Protestant] Sacrament of the Lords Supper and within one moneth next after such receiving the Sacrament take the Oathes of Allegiance and Supremacy in some of his Majestyes Courts at Westminster."

Id. (quoting the 1677 statute; all language sic).

Next, Blackstone discussed a 1350 statute that had nothing to do with citizenship. He wrote:

> To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2. that all children born abroad, provided *both* their parents were at the time of the birth in

[2]Blackstone referred to the Restoration of the Monarchy in 1660.

> allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England: and accordingly it hath been so adjudged in behalf of merchants.

1 Blackstone, *supra*, at 361. There were many legal disabilities facing aliens in England. For example, they could not inherit real estate; they could not purchase real estate; their customs were double that of natives; they could not be members of Parliament. McManamon, *supra*, at 325. The 1350 statute merely removed one of those disabilities: it allowed natural born subjects who had children born abroad to bequeath their property to their alien children. Those who suggest that somehow this statute establishes that the common law stood for the proposition that children born abroad to English parents were natural born themselves are mistaken. First, those children still faced all the disabilities other aliens faced. Second, in the centuries after 1350, hundreds of children born abroad to English parents paid the extremely high price to become naturalized, something they would not have done if they had been natural born subjects. *Id.* at 322-25.

Finally, Blackstone referred to two eighteenth-century statutes:

> [B]y several more modern statutes these restrictions are still farther taken off: so that all children, born out of the king's ligeance, whose *fathers* were natural-born subjects, are now natural-born subjects themselves, to all intents and purposes, without any exception; unless their said fathers were attainted, or banished beyond sea, for high treason; or were then in the service of a prince at enmity with Great Britain.

1 Blackstone, *supra*, at 361.[3] These acts, like the other statutes discussed above, were not the common law. Instead,

> These three[4] acts, heralded as "revolutionary" and "novel," "enunciated a new principle in English naturalization law." By declaring persons born in the ligeance of another sovereign to be also English subjects, the new statutes resolutely rejected all mediæval conceptions of allegiance." Moreover, they "brought into existence a new class of international status–persons of double nationality."

McManamon, *supra*, at 328 (footnote added, footnotes deleted).

Thus, English law as to who is "natural born" can be divided into two approaches: the common law, which treated anyone born outside the dominions of England as an alien, and the statutory law, which treated children born abroad to natural born fathers as natural born themselves. As amicus wrote in her article, the question to be answered is as follows:

> Did the Framers believe they had constitutionalized the common law concept of "natural born"? Or did they consider the English statutes regarding the subject to have crossed the Atlantic, too? Early American sources indicate that the Framers

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[3]Counsel for Senator Cruz misrepresented the contents of amicus's article to the court below. Counsel stressed that amicus had not *quoted* this language from Blackstone in her article, T. at 31. However, counsel did not acknowledge that amicus *discussed these statutes in detail*, McManamon, *supra*, at 327-28. Instead, counsel declared disingenuously, and perhaps slanderously:

> She just ignores it, and I would suggest ignores it because, oh how do I deal with that? Well, you deal with that the way people argue in court a lot which is if you've got an argument you can't deal with, let's ignore it and hope the judge doesn't, you know–doesn't catch on.

T. at 32. Amicus, who teaches students the importance of Rule 11 of the Federal Rules of Civil Procedure, would never ignore an argument and "hope the judge doesn't . . . catch on."

[4]Counsel for Senator Cruz below did not admit to the court that amicus not only discussed the two 18th-century statutes cited in Blackstone, but she even discussed a statute enacted after Blackstone had written his commentaries, but before the U.S. Constitution was drafted, 13 Geo. 3, c. 21 (1773). Amicus did not withhold any information about early English law; instead she included many other sources not even found in Blackstone. The importance in the passage from Blackstone is to understand the lines he drew between the common law, which the Americans adopted, and the statutory law, which they did not.

intended to write the common law concept into the Constitution.

Id. at 330.

II. THE FRAMERS ADOPTED THE COMMON LAW DEFINITION OF "NATURAL BORN," AND SO SENATOR CRUZ IS NOT ELIGIBLE FOR THE PRESIDENCY UNDER THE TERMS OF ARTICLE II OF THE CONSTITUTION.

The Framers were aware of British law, both statutory and unwritten, on the subject of citizenship. For example, in the debate on the first U.S. naturalization act, one congressman referred to a statute that allowed English children to inherit from alien parents. *Id*. at 333. The statute was not one of the eighteenth-century statutes, however.[5] Simply because the Framers *knew about* the British statutes did not mean the Framers *adopted* it. After all, the American states only adopted such British law as they declared in their reception statutes. There is no federal reception statute. Instead, the words of important jurists of the early decades of the United States tell us that the common law definition is what was accepted here:

> Nicknamed "the Father of the Constitution" for his role in drafting that foundational document, James Madison is one of the most reliable sources for its interpretation. In 1789, he indicated that the United States followed the common law notion of citizenship. On May 22 of that year, in a speech to the House of Representatives, Congressman Madison declared: "it is an established maxim that birth is a criterion of allegiance. Birth . . . derives its force sometimes from place, and sometimes from parentage; but . . . place is the most certain criterion; it is what applies in the United States . . . .
>
> William Rawle–a member of the Pennsylvania Constitutional Assembly and

[5]The congressman referred to 11 Will. 3, c. 6 (1699).

> the first United States Attorney for the District of Pennsylvania–agreed. He produced a scholarly treatise on the Constitution and released a second edition in 1829. He stated that location dictated the meaning of the phrase and concluded that "[u]nder our Constitution the question is settled by its express language, and when we are informed that . . . no person is eligible to the office of president unless he is a natural born citizen, the principle that the place of birth creates the relative quality is established as to us."
>
> James Kent–the well-regarded chancellor of New York–also asserted that the United States distinguished between "natives" and "aliens" by using "the ancient English law" or the "common law." In the first edition of his *Commentaries on American Law*, originally published in 1827, Kent averred: "Natives are all persons born within the jurisdiction of the United States." In the third edition, published in 1836, he added: "They are what the common law terms natural-born subjects." He further explained that "[a]n alien is a person born out of the jurisdiction of the United States," with the exception of "the children of public ministers abroad."

Id. at 330-31.

The authorities relied on by the court below do not refute this clear authority. The first, and article by Charles Gordon, merely says "it seems likely" that the Framers meant to follow the British statutory definition of natural born. *Elliott v. Cruz*, Unreported Opinion of the Commonwealth Court, at 13. The second source, the Congressional Research Service, proposes only that "it appears" that early American understanding of the term "natural born" "may have included" both the common law and statutory view. *Id*. at 15.The third source, a short, thinly researched piece by Paul Clement and

Neal Katyal,[6] relies for its conclusion that the Framers relied on the British statutes for their conception of "natural born" on the fact that they "would have been intimately familiar with these statutes." *Id*. at 17. "Maybes" and "perhapses" do not rebut the clear statements of early Americans on their own understanding of the constitutional term.

CONCLUSION

For the foregoing reasons, this Court should determine that Constitutional requirement that a president be a "natural born" citizen follows the common law definition. The president must be born within the United States, unless he or she is the child of a diplomat. Senator Cruz is therefore ineligible to be elected president.

Dated: March 22, 2016
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[6]This essay did not appear in the Harvard Law Review, as cited in the lower court's opinion, *Elliott v. Cruz*, Unreported Opinion of the Commonwealth Court, at 16, but rather in an online publication called the Harvard Law Review Forum.