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THE GREAT DEBATE

Cruz citizenship case should be tried in court of public opinion

By Akhil Reed Amar
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Senator Ted Cruz (R-Tex.) announces he will not filibuster, after a Republican Senate caucus meeting at the Capitol in Washington, October 16, 2013. REUTERS/Jonathan Ernst

Senator Ted Cruz (R-Tex.) has a problem. Most constitutional scholars — myself included — think that Cruz is eligible to be president because he is an American citizen when born in Canada on Dec. 22, 1970. All thanks to a 1952 congressional statute that conferred natural-born birthright citizenship on various foreign-born children of American citizens. (Cruz's mother was and is an American citizen, but his father was not in 1970.)

But there are others out there — for example, Mary Brigid McManamon, a professor at Widener University's Delaware Law School — who disagree with this general consensus. Alas, Cruz cannot point to a definitive U.S. Supreme Court case that squarely settles the constitutional issue, and it is unclear how a definitive court case might materialize.

The problem is not, as some commentators have claimed, a legal doctrine known as “standing” — a rule that requires that a person who comes to court must have a proper legal interest at stake in the litigation. Rather, the biggest barrier is a principle of judicial restraint known as “the political question doctrine.”

A key idea underlying this doctrine is that the Constitution itself, in its text or spirit, sometimes takes a certain sort of constitutional question away from ordinary courts and makes some other decision-maker the real judge — a special court for a special question. In a presidential impeachment, for example, the Senate, and only the Senate, is the real court. Senators are the judges and jurors — the deciders of fact and law — under the Constitution itself.



Supreme Court Chief Justice William Rehnquist reads the vote tally in the Senate's impeachment trial of President Bill Clinton, as Clinton's attorney Charles Ruff (L) listens, February 12, 1999. REUTERS/Archive

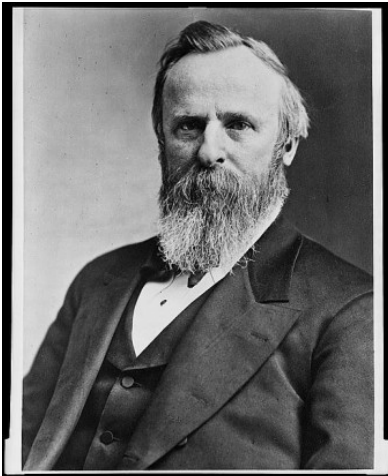
Did the president, in fact, do what he is alleged to have done? In law, does what he did count as a removal-worthy "high crime [or] misdemeanor"? Whatever the Senate decides is the last word and the only word — what lawyers call *res judicata*, a thing already adjudicated. A final judgment that cannot be undone by any other tribunal. Thus, ordinary courts, state and federal, are not allowed to overturn impeachments and have never done so in American history.

Similarly, the Senate is designated by the Constitution as "the judge" of the qualifications of would-be senators. If a dispute arises about whether Senator X is in fact 30 years old, as the Constitution requires — if he points to his birth certificate but others claim the certificate is inadequate or fake — who decides this question? The Senate, and not some ordinary court.

Now return to Cruz. Here, too, his eligibility — whether *his* birth certificate is good enough — is in certain situations an issue not best decided in an ordinary courtroom. Under the structure of the Constitution, and in keeping with American traditions stretching back to the founding, the proper court to judge Cruz's eligibility is, first and foremost, the court of public opinion. Anyone who thinks that Cruz is not eligible is free to vote against him.

If Cruz prevails in that court of public opinion, the Constitution provides a final appeal to a second court of sorts: Congress, sitting as a whole. The Constitution specifies that Congress must tally all electoral votes — and in this process Congress may lawfully disregard any electoral votes that it deems invalid.

Twice in history — in 1800-01 and 1824-25 — no candidate got the requisite majority of electoral votes, so Congress itself picked the president. But on two other prominent occasions, Congress acted as decisive judge of electoral-vote validity. In 1873, Congress refused to count three electoral votes that Georgia had cast for Horace Greeley because Greeley died after Election Day but before the state electors met. Because Ulysses Grant had an overwhelming majority of electoral votes, the Greeley issue was a sideshow. But this episode clearly confirms that Congress decides which electoral votes are valid. There is no difference between judging death and judging natural birth.



President Rutherford B. Hayes. Library of

Congress

More famously, in 1876-77, key electoral votes were contested and once again Congress, not ordinary courts, made the decisive ruling — handing the Oval Office to Rutherford B. Hayes over Samuel J. Tilden.

Under these precedents, if Americans do choose Cruz on Election Day, all he needs is for Congress to credit and count his electoral votes. And why wouldn't Congress oblige him? Republicans control both houses. Why would congressional Republicans ever refuse to crown their party's choice and America's choice?

True, Cruz is — to put it mildly — not as popular among his Senate colleagues as was Senator John McCain (R-Ariz.) in 2008. Maybe Cruz's colleagues are not willing to publicly announce today that they consider him eligible, a courtesy they extended to McCain, pre-election in 2008. Still, the very fact that the Senate registered its strong support for McCain's eligibility in 2008 further illustrates that presidential eligibility should be decided by Congress and not by ordinary courts.

But will courts agree that they have no starring role on this question? After all, the Supreme Court leapt into the electoral-vote dispute of 2000. In a post-*Bush v. Gore* world, anything is possible. So let's imagine scenarios in which a court might be tempted to get involved, in order of increasing plausibility of judicial intervention.

First, suppose Cruz wins on Election Day, is crowned the victor when Congress counts the electoral votes and is sworn in as president by Chief Justice John Roberts. He issues executive orders early on, and some person injured by some order balks. Suppose Cruz orders an army unit into action, and a soldier refuses to deploy and claims that the order is illegal because Cruz is illegal. The soldier sues, or is brought to trial. Either way, the court is asked to decide whether Cruz is legally the president.

It is hard to imagine a court taking the bait. In this scenario, the American people have already rendered their considered verdict on Election Day. The Congress has already rendered its verdict on electoral-vote-counting day. No appeal properly lies to any other court. *Res judicata*. Political-question doctrine. Next case.

Another scenario: Presidential ballots are being prepared in some state this fall. The Democratic Party or some minor-party candidate threatens to sue the state's highest election official if the official lists Cruz on the ballot. The official would be delighted to keep Cruz off the ballot but does not want to take the heat. So the anti-Cruz official seeks a court's permission to exclude Cruz.



Ted Cruz speaks during a campaign town hall meeting in Whitefield, New Hampshire, January 18, 2016. REUTERS/Brian Snyder

A sober court should think twice — thrice! — before jumping in. True, unlike our soldier scenario, the Congress has not yet weighed in, so there is no *res judicata* issue. But unless Congress itself enters the lawsuit and asks the court to keep Cruz's name off the ballot — do the members of Congress dislike Cruz that much? — the court should butt out and deny the official the permission she seeks. No irreparable injury will be done if Cruz's name appears on the ballot. If he loses, the issue goes away. If he wins, Congress can decide what to do, and Congress is the proper judge here.

Third, consider the strongest case for judicial intervention — a suit brought by Cruz himself. If some official somewhere threatens to keep him off the ballot, he might seek judicial help to get his name before the voters. Here is the key point: The court need not decide that Cruz is definitely 100 percent eligible. It should be enough that Cruz's claim of eligibility is very plausible. It is a claim that deserves to be judged by the people themselves — on Election Day — and by Congress, thereafter, should Cruz win.

In other words, the trial judge should remind herself that the real court that should make the call under the Constitution is the electorate — the people's court — with final appeal to Congress. The trial judge here is more like a law clerk, whose job should be to preserve the options for the clerk's boss — the real decision-maker. So if our law clerk/judge is sure that Cruz is eligible — which, by the way, is the right answer — she can say so, and order Cruz's name on the ballot. If the big bosses — the electorate or Congress — disagree, they can vote against Cruz because they think he is ineligible.

On the other hand, even if our law clerk/judge somehow thinks Cruz is ineligible, she surely must concede that there is a strong constitutional argument that Cruz is in law and fact a fully eligible natural-born citizen. That is what most experts believe, after all. So here, too, the law clerk/judge

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should put Cruz's name on the ballot — and let the people and the Congress decide.

If there is a role for ordinary courts here, the role should be, ironically, to ensure that these courts are *not* the only or the last word on this issue. Rather, a sober and restrained judge's aim should be to ensure that the decision about who the next U.S. president will be is made, in keeping with the Constitution and American traditions, by the people themselves, and by their duly elected national representatives.