

Why Ted Cruz is eligible to be president

By Akhil Reed Amar

Story highlights

Akhil Reed Amar:
Congress, not the courts, decides if Cruz is eligible to be elected president

He says the key point is that the law in effect at Cruz's birth makes him a natural born citizen

you.

Editor's Note: Akhil Reed Amar is a professor of constitutional law at Yale University and the author of ["The Law of the Land: A Grand Tour of Our Constitutional Republic."](#) The opinions expressed in this commentary are his.

I do not embrace Ted Cruz politically, but I do embrace his right to run for president, and so should

Here is our first question: Who decides whether Cruz is eligible? My answer: At first, you do. We, the people, do. We do this on Election Day when we cast our ballots with the Constitution in our hearts and minds if not in our hands. If you think Cruz is ineligible — if what I say here does not persuade you — you can vote against him.

If Cruz gets enough electoral votes this fall, then Congress and not the Supreme Court should be the final legal judge of Cruz's eligibility. The Constitution's 12th Amendment clearly says that Congress counts the electoral votes at a special session; and thus Congress is constitutionally authorized to refuse to count any electoral votes that Congress considers invalid.

Elsewhere, Article I, section 5 of the Constitution makes clear that each house of Congress may "judge" whether a would-be member of that house meets the constitutional eligibility rules for that house. Suppose Mr. Smith

wants to go to Washington as a senator. He wins election in his home state. But the Constitution says a senator must be 30 years old.

If a dispute arises about Smith's age, about whether there a proper birth certificate and what it says, the Constitution clearly says the Senate is "the judge" of Smith's birth certificate dispute.

Similarly, for presidential elections the Constitution's structure makes Congress the judge of any birth certificate dispute or any other issue of presidential eligibility. Congress cannot fabricate new presidential eligibility rules but it is the judge of the eligibility rules prescribed in the Constitution.

Thus, ordinary courts should butt out, now and forever. They have no proper role here, because the Constitution itself makes Congress the special judge. In legal jargon, the issue is a "nonjusticiable political question."

Presidents should pick judges, not vice versa. This is one reason why the Supreme Court's 2000 ruling in Bush v. Gore was a disgrace and is now widely viewed by experts as such.

OK, so voters and Congress decide, but what is the right answer to the Cruz question and how can ordinary citizens deduce this right answer?

Simple: We can read the Constitution, which was written for ordinary citizens. And then we can fold in a few simple points about constitutional history, tradition and common sense.

Article II requires that a president must be either a U.S. citizen “at the time of the Adoption of this Constitution” — that is, 1788 — or else “a natural born Citizen.” Though old-fashioned, Cruz was not around in 1788. So he needs to be — just like everyone else running for president today — a “natural born Citizen.”

For starters, put aside the word “natural.” Ask yourself whether Cruz is a “born Citizen.” In other words, was he a citizen on the day he was born? Was he a citizen because of his birth, because of where and how and to whom he was born? Note what the text does NOT say. It does not say, Springsteen-like, that a president must be “born in the United States.” Yet it would have been so easy to say that, had that been the founders’ legal meaning and the legal purpose!

So the question is, was Ted Cruz born a citizen? The Constitution says, in the 14th Amendment, that anyone born in the United States and subject to our laws is a U.S. citizen. Today, that means everyone born on American soil except children of foreign diplomats — even children whose parents are not themselves U.S. citizens. Donald Trump, are you listening?

Unlike Barack Obama, who was born in Hawaii — again, please pay attention, Donald! — Cruz is not a citizen at birth because of where he was born. Cruz was born in Canada. But neither Article II nor the 14th Amendment says that only those born in the United States are birth citizens. The 14th Amendment says that birth on American soil is sufficient to be a birth citizen. But it is not necessary.

How else can a person be a citizen at birth? Simple. From the founding to the present, Congress has enacted laws specifying that certain categories of foreign-born persons are citizens at birth. The [earliest statute](#), passed in 1790, explicitly called certain foreign-born children of U.S. citizens “natural

born citizens." It did not say they should be treated "as if" they were "natural born citizens." It said they were in law deemed and declared to be "natural born citizens." Congressional laws have changed over the years, but this 1790 law makes clear that from the beginning, Congress by law has the power to define the outer boundaries of birth-citizenship by conferring citizenship at birth to various persons born outside the United States.

And here is the key point: The statute on the books on the day Cruz was born made him a citizen on that day.

The statute conferred birth-based American citizenship on any foreign-born baby who had at least one parent who was a U.S. citizen, so long as that parent had met certain conditions of extensive prior physical presence in the United States.

On the day of his birth, Cruz's mother was a U.S. citizen, even though his father was not; and his mother also apparently met the relevant rules of extensive prior physical presence.

A critical aside: Why would Barack Obama have been any different even if he had been born in Kenya, as has been preposterously but repeatedly claimed by Trump? Like Cruz, Obama's mother was a U.S. citizen on the day of his birth, even though, like Cruz, his father was not. And nothing in the relevant congressional statute treats a Kenyan birth as any different from a Canadian birth.

The answer to this puzzle is that the congressional law on the books when Obama was born required a foreign-born child to have at least one citizen parent who had been physically present in the United States at least five years after age 14. Obama's mother did not clear this bar, because she was only 18 when she gave birth. So this birth had to happen in the United States to make her son a citizen at birth. Of course this birth did in actual fact happen in the United States, in the state of Hawaii, despite all Trump's malevolent mischief.

OK, back to Cruz who was a citizen at birth. He was born a citizen. He is a citizen because of the way he was born. And all this is clear if we look at the relevant citizenship law that was on the books on the day of his birth. Read it for yourself: [Act of June 27, 1952, 66 Stat. 235-36; Title III, ch. 1, section 301\(a\)\(7\)](#). (Note that Cruz's mother apparently met the requirement of the law to have lived in the United States at least five years after age 14; she was in her 30s when Cruz was born.)

But what about that word I asked you to put aside for a moment — the word, "natural"? Does that word change the analysis?

No. That word confirms the analysis. First, the word itself derives from Latin and French roots that are about birth. The word is arguably redundant (in the way that much of language is). In effect, the Constitution says that a president must be a "birth-born citizen." But the word "natural" does add a key clarification: Congress is empowered by statute to define birthright citizenship under its Article I, section 8 power to pass a "Rule of Naturalization."

Note the obvious linguistic link between "natural" (Article II) and "Naturalization" (Article I). Under this Article I Naturalization power (in tandem with Article II and with another sweeping clause at the end of Article

I, section 8), Congress can define who is a citizen at birth, and can also allow persons who are not birth citizens — and thus not eligible to be president — to become citizens at some post-birth moment. Henry Kissinger, Madeleine Albright, Arnold Schwarzenegger: None of these persons was born a citizen; none is eligible to be president; but all have become nonbirth citizens — naturalized as opposed to natural-born citizens — thanks to congressional naturalization statutes.

So Congress has two powers under the Naturalization power: to define birth citizens, eligible for the presidency, and to allow other nonbirth citizens to become naturalized citizens, to treat them for most other (nonpresidential) purposes as if they had been born citizens.

When the framers were drafting the Constitution, they were aware that the British Parliament had a long tradition of passing both types of naturalization laws, and the founders were specifically aware of laws that Parliament had passed conferring birthright status upon certain babies born to English parents outside England, babies referred to by these landmark statutes as “natural born.”

Note that the right question to ask is not: What were the natural-born statutory rules in 1788 or 1790? The right question is: What are the natural-born statutory rules on the day a given presidential candidate was born? These statutory rules have changed over the years, and Article II builds these future changes into its elegant language.

And a good thing, too, given that the rules of 1790 were rather sexist. In both England and America, the law in that era typically focused on the status of a foreign-born baby’s father, not mother. In other sections of the 1790 law,

race tests were in place, treating “white” persons better than all others.

Ironies abound. Cruz is eligible, but thanks to modern — newfangled, nonsexist, nonracist — naturalization laws. Had Cruz been born in 1790 to a noncitizen father it is not at all clear that he would have been eligible.

And although he has managed to make this all about Cruz, the real person whose fundamental fitness for office is called into question by a careful constitutional examination of the natural born clause is none other than Donald Trump.

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Here’s why. Beyond the rules of formal eligibility, our next president surely needs to understand the Constitution — and Donald Trump does not. He has repeatedly suggested that courts should decide this. Wrong; the Constitution itself make voters and Congress the judges. Trump has repeatedly suggested the issue is where someone is born. Wrong again. Many born outside the United States have been eligible from the beginning.

Trump also denies the full citizenship of those who have in fact been born in the United States. Wrong yet again. Anyone born in the United States (except for the child of a foreign diplomat) is a full citizen under the clear words of the Constitution and very well settled Supreme Court case law. Trump has also repeatedly and outrageously challenged the natural-born citizenship of President Obama in racially coded/dog-whistle ways that strongly suggest Trump scorns basic constitutional principles of racial

equality.

If you take the Constitution seriously, especially its rules about citizenship, you are welcome to vote for Cruz, but you should never vote for Trump.