



Birthright Citizenship: An Overview

By Andrew R. Arthur

Summary

- The issue of birthright citizenship, as it pertains to children born in the United States to aliens unlawfully present, remains an open question. Although this fact would appear to be resolved in the public imagination, it has not actually been ruled upon dispositively by the Supreme Court. President Trump's assertion that he would end birthright citizenship by an as-yet-unpublished executive order has brought this issue into focus. Should he issue such an executive order, it would provide the Supreme Court the opportunity to resolve the issue once and for all.
- Citizenship is currently offered to all children who are born in 39 countries (with the exception of children of diplomats), most of which are in the Western Hemisphere. No country in Western Europe offers birthright citizenship without exceptions to all children born within their borders.¹
- Many countries, including France, New Zealand, and Australia, have abandoned birthright citizenship in the past few decades.² Ireland was the last country in the European Union to follow the practice, abolishing birthright citizenship in 2005.³
- The costs of births for the children of illegal aliens is staggering. The Center for Immigration Studies (CIS) estimates that in 2014, \$2.35 billion in taxpayer funding went to pay for more than 273,000 births to illegal immigrants.⁴

Introduction

President Trump's recent pronouncement that he plans to sign an executive order to end birthright citizenship has brought that issue, which has been debated for the last 150 years, to the fore. According to *Quartz*, 39 countries currently offer citizenship to persons born therein, with the exception of children of diplomats, most of which are in the Western Hemisphere.⁵

Most of our major allies do not follow the practice. The Central Intelligence Agency (CIA) *World Factbook*, for example, states that Germany does not offer citizenship by birth, and offers citizenship by descent only if at least one parent is a German citizen or a resident alien who has lived in Germany for at least eight years.⁶ Similarly, according to the CIA, the United Kingdom does not offer birthright citizenship, and offers citizenship by descent only if at least one parent is a citizen of the United Kingdom.⁷

As *The Atlantic* has noted, many countries that used to have birthright citizenship have done away with the practice.⁸ It explains:

France did away with birthright citizenship in 1993, following the passage of the Méhaignerie Law. The law limited citizenship to those born to a French parent, or to a parent also born in France. As a result, those born in France to foreign-born parents must wait until they turn 18 to automatically acquire French citizenship (a process that can begin when they turn 13, if they apply).

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Ireland was the last of the European Union countries to abolish birthright citizenship, in 2005. Through a referendum backed by nearly 80 percent of Irish voters, citizenship was limited to those born to at least one Irish parent. The decision was a response to a controversy surrounding birth tourism and the high-profile case of Man Levette Chen, a Chinese national who traveled to Northern Ireland so that her daughter would be born an Irish citizen. Chen sought residency rights in Britain, citing her child's Irish and EU citizenship. Though the United Kingdom Home Office rejected Chen's application, the decision was overturned by the European Court of Justice in 2004.

Other countries, including New Zealand and Australia, have also abolished their birthright-citizenship laws in recent years. The latest is the Dominican Republic, whose supreme court ruled to remove the country's birthright laws in 2013. The decision retroactively stripped tens of thousands of people born to undocumented foreign parents of their citizenship and rendered them "ghost citizens," according to Amnesty International.

Benefits of U.S. Citizenship

United States citizenship is one of, if not the, most exalted and prized statuses in the world. Citizenship in this country offers the most significant economic opportunities. It guarantees the fullest protection of our laws and of the security afforded by our military servicemen and -women around the world. And, most importantly, it provides the chance to participate in the world's oldest existing democracy.⁹

As an immigration judge, I was honored to have had the authority and opportunity to administer the oath of allegiance and renunciation to new citizens.¹⁰ In addition, I was often called upon to adjudicate cases in which an individual charged as an alien with removability claimed instead to be a citizen of the United States, either by birth or derivation.

Significantly, while there are many benefits that the Constitution and laws of the United States grant to both citizens and aliens, certain benefits are available only to U.S. citizens. These include the right to vote, priority when it comes to bringing family members to the United States, the ability to convey citizenship to a child born abroad, travel with a U.S. passport, and eligibility for most federal jobs and elected offices.¹¹

More prosaically, U.S. citizens have access to many forms of government benefits that are not, as a rule, available to aliens, even to many aliens lawfully present in the United States.¹² Specifically, citizens are not subject to restrictions for the Supplemental Nutrition Assistance Program (SNAP, formerly food stamps), the Supplemental Security Income (SSI) program, Temporary Assistance for Needy Families (TANF) cash assistance, and Medicaid that apply to certain categories of aliens in the United States.¹³ In addition, citizens are not barred from receiving federal student aid, as certain aliens are.¹⁴

Most significantly, however, U.S. citizens are not amenable to removal from the United States, unless they have been denaturalized.¹⁵

Becoming a Citizen

Understanding the benefits of U.S. citizenship, the question is then how one becomes a citizen. As the Congressional Research Service (CRS) has explained: "United States citizenship is conferred at birth both under the principle of *jus soli* (nationality of place of birth) and the principle of *jus sanguinis* (nationality of parents)."¹⁶ With respect to these individuals, section 301 of the Immigration and Nationality Act (INA) states that:

The following shall be nationals and citizens of the United States at birth:

(a) a person born in the United States, and subject to the jurisdiction thereof;

(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(f) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 1 of the International Organizations Immunities Act (59 Stat. 669; 22 U.S.C. 288) by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 1 of the International Organizations Immunities Act, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and

(h) a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States.¹⁷

In addition, as noted, aliens may become naturalized citizens¹⁸ and “[o]n occasion, Congress has collectively naturalized the population of a territory upon its acquisition by the United States, though in these instances individuals have at times been given the option of retaining their former nationality.”¹⁹

Birthright Citizenship Generally

The first group of individuals identified under section 301(a) of the INA as nationals and citizens at birth, generally, is the group that receives the most public attention²⁰ and the one that raises the most significant public policy issues.²¹

Section 301(a) of the INA tracks the language in the first sentence of the first section of the Fourteenth Amendment to the Constitution, which states: “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.”²²

Because of the ambiguous nature of the language used therein, the second clause of this section has been the primary source of disagreement with respect to the intent and scope of this section. Those who are proponents of birthright citizenship for all those born within the United States (except the children of diplomats and enemy aliens on conquered territory) contend that simply being born on U.S. soil is sufficient to convey citizenship.²³ As CRS has noted, though:

[D]riven in part by concerns about unauthorized immigration, some have questioned this understanding of the Citizenship Clause, and in particular the meaning of “subject to the jurisdiction [of the United States].” Proponents of a narrower reinterpretation of that phrase argue that the term “jurisdiction” can have multiple meanings, and that in the Citizenship Clause, “jurisdiction” should be read to mean “complete jurisdiction” based on undivided allegiance and the mutual consent of the sovereign and the subject. This has been termed a “consensual” approach to citizenship.

Background to the Fourteenth Amendment

A review of the background of the origins of the Fourteenth Amendment is helpful in framing these arguments. First, as CRS explains:

The original framers of the U.S. Constitution referenced, but did not define, national citizenship. The Constitution required that a person have been a citizen of the United States for seven years to be a Representative and for nine years to be a Senator, and that a person be a natural-born citizen or a citizen at the time of the adoption of the Constitution in order to be eligible to be President. It also gave Congress the power to establish a uniform rule of naturalization, but naturalization refers to the manner in which a non-citizen acquires citizenship, rather than citizenship by birth. Nor did the Naturalization Act of 1790 or subsequent acts until the Civil Rights Act of 1866 define citizenship by birth within the United States. In the absence of any statement in the Constitution or federal statutes that U.S. citizenship was acquired by right of birth in the United States, citizenship at birth generally was construed in the context of the English common law. As noted by the Supreme Court, “[t]he interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.”

...

*These birthright citizenship principles were not extended to slaves, or generally to Native Americans.*²⁴

Specifically, in *Dred Scott v. Sandford*, the Supreme Court considered a suit brought by the plaintiff Scott, who was a slave in Missouri, but who had lived in the free state of Illinois and in a section of the Louisiana Territory where slavery was outlawed by the Missouri Compromise of 1820, seeking his freedom.²⁵ As the Court stated:

*The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed [sic] by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.*²⁶

It concluded:

*In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.*²⁷

To overrule the Court’s conclusion in *Dred Scott* “that African Americans were not citizens of the United States ... Congress enacted, over the veto of President Andrew Johnson, the Civil Rights Act” of 1866, 14 Stat. 27, ch. 31 (Apr. 9, 1866).²⁸ It stated, in pertinent part: “All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”²⁹

In April 29, 2015, testimony before the House Judiciary Committee’s Subcommittee on Immigration and Border Security, Professor John C. Eastman explained:

*As this formulation makes clear, any child born on U.S. soil to parents who were temporary visitors to this country and who, as a result of the foreign citizenship of the child’s parents, remained a citizen or subject of the parents’ home country, was not entitled to claim the birthright citizenship provided in the 1866 Act.*³⁰

Legislative History of the Fourteenth Amendment

Issues were raised about the permanence of this provision, and its susceptibility to subsequent revision by subsequent legislation. Specifically, “because there were concerns that the Civil Rights Act might be subsequently repealed or limited the Congress took steps to include similar language when it considered the draft of the Fourteenth Amendment.”³¹

Notably, however, the language of the Civil Rights Act of 1866 and the first section of the Fourteenth Amendment are not identical.³² As Eastman testified:

[B]ecause the jurisdiction clause of the Fourteenth Amendment is phrased somewhat differently than the jurisdiction clause of the 1866 Act, some have asserted that the difference dramatically broadened the guarantee of automatic citizenship contained in the 1866 Act. The positively phrased “subject to the jurisdiction” of the United States might easily have been intended to describe a broader grant of citizenship than the negatively-phrased language from the 1866 Act, the argument goes ... that birth on U.S. soil is alone sufficient for citizenship. But the relatively sparse debate we have regarding this provision of the Fourteenth Amendment does not support such a reading. When pressed about whether Indians living on reservations would be covered by the clause since they were “most clearly subject to our jurisdiction, both civil and military,” for example, Senator Lyman Trumbull, a key figure in the drafting and adoption of the Fourteenth Amendment, responded that “subject to the jurisdiction” of the United States meant subject to its “complete” jurisdiction; “[n]ot owing allegiance to anybody else.” And Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of the Senate, contended that it should be construed to mean “a full and complete jurisdiction,” “the same jurisdiction in extent and quality as applies to every citizen of the United States now” (i.e., under the 1866 Act). That meant that the children of Indians who still “belong[ed] to a tribal relation” and hence owed allegiance to another sovereign (however dependent the sovereign was) would not qualify for citizenship under the clause. The switch from the “not subject to any foreign power” clause of the 1866 Act to the “subject to the jurisdiction” clause of the 14th Amendment simply avoided the concern that the Indian tribes might be deemed within rather than without the grant of automatic citizenship because they were “domestic” rather than “foreign” sovereign powers. Because of this interpretative gloss, provided by the authors of the provision, an amendment offered by Senator James Doolittle of Wisconsin to explicitly exclude “Indians not taxed,” as the 1866 Act had done, was rejected as redundant.³³

In his testimony, Eastman also provided examples from the state ratification debates to support the conclusion that “the citizenship clause” in the Fourteenth Amendment “did not cover those who were subject to a foreign power.”³⁴

Subsequent Interpretation of the Fourteenth Amendment

It is important to note, however, that the leading Supreme Court precedent on the interpretation of the Fourteenth Amendment, *United States v. Wong Kim Ark*, applies a more expansive coverage to that amendment, and has led to the popular conclusion that the amendment applies to any child born in the United States, with only limited exceptions for the children of diplomats and the children of enemy aliens in occupied areas.³⁵

In that case, the government argued that Wong:

[A]lthough born in the city and county of San Francisco, state of California, United States of America, is not, under the laws of the state of California and of the United States, a citizen thereof, the mother and father of the said Wong Kim Ark being Chinese persons, and subjects of the emperor of China, and the said Wong Kim Ark being also a Chinese person, and a subject of the emperor of China.³⁶

The Court noted:

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the constitution: “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.”³⁷

It concluded, however, that:

The 14th Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words

*and in manifest intent, includes the children born within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States.*³⁸

Possible Limitations on the Scope of *Wong Kim Ark*

As noted above, Eastman convincingly argued before the Subcommittee on Immigration and Border Security that the Court's "holding in the 1898 *Wong Kim Ark* case is limited to lawful, permanent residents; its broader *dicta* is erroneous and has never been adopted by the Court."³⁹

Similarly, CRS has stated: "The Supreme Court has not directly addressed whether the Citizenship Clause necessarily requires U.S. citizenship to be granted to persons born in the United States to unlawfully present aliens."⁴⁰ CRS contends, however, that the Court "has made pronouncements arguably relevant to that question while addressing other issues,"⁴¹ particularly in *Plyler v. Doe*.⁴²

In *Plyler*, the Court held "that states cannot constitutionally deny students a free public education on account of their immigration status."⁴³ As CRS explains it:

While the threshold inquiry in Plyler centered on the "person within [a state's] jurisdiction" language of the Equal Protection Clause, the Court also analogized that phrase to the use of "jurisdiction" in the Citizenship Clause, in a footnote, stating:

Although we have not previously focused on the intended meaning of this phrase ["within its jurisdiction"], we have had occasion to examine the first sentence of the Fourteenth Amendment, which provides that "[all] persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. ..." Justice Gray, writing for the Court in United States v. Wong Kim Ark, 169 U.S. 649 (1898), detailed at some length the history of the Citizenship Clause, and the predominantly geographic sense in which the term "jurisdiction" was used. He further noted that it was "impossible to construe the words 'subject to the jurisdiction thereof,' in the opening sentence [of the Fourteenth Amendment], as less comprehensive than the words 'within its jurisdiction,' in the concluding sentence of the same section. ..." Justice Gray concluded that "[every] citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States." Id., at 693. As one early commentator noted, given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance, no plausible distinction with respect to Fourteenth Amendment "jurisdiction" can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.

*In the same Equal Protection context, the Court in Plyler also recognized "[p]ersuasive arguments" for withholding benefits "from those whose very presence within the United States is the product of their own unlawful conduct," but was more skeptical of "classifications imposing disabilities on the minor children of such illegal entrants," who could not control their parents' conduct or their own status.*⁴⁴

Inasmuch as *Plyler*, by its terms, only applied to "undocumented school-age children", however, it is not dispositive of the issue.⁴⁵ And, as former CIS Legal Policy Analyst Jon Feere explained in an August 2010 *Backgrounder* captioned "Birthright Citizenship in the United States, A Global Comparison":⁴⁶

According to University of Texas law professor Lino A. Graglia, Justice Brennan seems to have based his reasoning on the mistaken premise that Wong Kim Ark decided the case of illegal aliens. Ultimately, this dictum hardly represents an investigation into the appropriate scope of the 14th Amendment's Citizenship Clause and it does not bind any subsequent court. As Yale law professor Peter Schuck has written: "no court has ever squarely decided the question of the status under the Citizenship Clause of the native-born children of illegal and nonimmigrant aliens."

Of more relevance (though no precedential authority) is the concurrence of Seventh Circuit Judge Richard Posner in *Oforji v. Ashcroft*.⁴⁷ That case involved an asylum claim filed by a Nigerian national who was the mother of two daughters who had been born in the United States. Her claim was premised, in part, on her assertion that her daughters would be subjected to female genital mutilation if they were forced to return with her to Nigeria, testifying "that she did not have anyone with whom to leave her children in this country in the event she was deported to Nigeria."⁴⁸

As Judge Posner wrote:

We should not be encouraging foreigners to come to the United States solely to enable them to confer U.S. citizenship on their future children. But the way to stop that abuse of hospitality is to remove the incentive by changing the rule on citizenship, rather than to subject U.S. citizens to the ugly choice to which the Immigration Service is (legally) subjecting these two girls. A constitutional amendment may be required to change the rule whereby birth in this country automatically confers U.S. citizenship, but I doubt it. ... The purpose of the rule was to grant citizenship to the recently freed slaves, and the exception for children of foreign diplomats and heads of state shows that Congress does not read the citizenship clause of the Fourteenth Amendment literally. Congress would not be flouting the Constitution if it amended the Immigration and Nationality Act to put an end to the nonsense. On May 5, 2003, H.R. 1567, a bill “To amend the Immigration and Nationality Act to deny citizenship at birth to children born in the United States of parents who are not citizens or permanent resident aliens,” was referred to the House Subcommittee on Immigration, Border Security, and Claims. I hope it passes. [Emphasis added.]

While concurrences are common, and (as noted) of limited or no precedential value, Judge Posner is, as the *Chicago Tribune* recently stated, “one of the nation’s leading appellate judges.”⁴⁹ His dispositive statement on this issue should, therefore, be given due consideration.

Costs of Birthright Citizenship

Assuming that Congress could amend this interpretation of the Fourteenth Amendment by statute, or that the president could change it by executive order, there would be strong arguments in favor of doing so.

According to the Pew Research Center, “[a]bout 275,000 babies were born to unauthorized-immigrant parents in 2014, or about 7 [percent] of the 4 million births in the U.S. that year.”⁵⁰ A recent CIS *Backgrounder* suggests that the number of children born to undocumented parents that year was actually higher, 297,000, or 7.5 percent of all births in the United States that year.⁵¹

While either of these figures represents a decline from the 330,000 births to illegal alien parents in 2009, it is still a significant number of children.⁵² In addition, Pew has reported that:

*About 11.1 million unauthorized immigrants lived in the U.S. in 2014. ... They made up 3.5 [percent] of the nation’s total population, but accounted for a higher share of births because the immigrant population overall (lawful and unauthorized) includes a higher share of women in their childbearing years and has higher birthrates than the overall U.S. population.*⁵³

All told, according to Pew, “there were 4.7 million U.S.-born children younger than 18 living with unauthorized-immigrant parents.”⁵⁴

As *National Review* reported in 2015, the costs of children born to illegal immigrants are “not negligible.”⁵⁵ It noted:

*Inflation-adjusted figures from the U.S. Department of Agriculture projected that a child born in 2013 would cost his parents \$304,480 from birth to his eighteenth birthday. Given that illegal-alien households are normally low-income households (three out of five illegal aliens and their U.S.-born children live at or near the poverty line), one would expect that a significant portion of that cost will fall on the government.*⁵⁶

Those expectations are borne out by the findings of my colleague at CIS, Steven Camarota. In a September 2015 report, he concluded that almost 87 percent of illegal immigrant households with children used at least one welfare program, compared to almost 72 percent of legal immigrant households and 52.4 percent of native households.⁵⁷

CIS concludes that it is possible to estimate the net fiscal costs of illegal immigrants and their children based on new research done by the National Academies of Sciences, Engineering, and Medicine, which estimates the fiscal impact of immigrants based on their education level. Based on the Academies’ work, CIS estimates that the average illegal immigrant and his or her progeny create a net fiscal drain of \$82,290 in their lifetimes, taking into account all the taxes they will pay and all the services they will use.⁵⁸

Those costs begin at birth. CIS has determined: “Illegal immigrants account for 11 percent (198,000) of all publicly funded births. ... We estimate that the cost to taxpayers for births to immigrants (legal and illegal) is roughly \$5.3 billion — \$2.4 billion of which is for illegal immigrants.”⁵⁹

And, interestingly, as my colleague David North has explained, at least one healthcare system figured out a way to pass along to U.S. taxpayers the costs of deliveries of children to illegal alien mothers in the United States. As he reported in October 2016:

The Justice Department has announced a financial settlement of a complicated civil and criminal case against Tenet Healthcare Corporation in which the company was forced to pay back to the feds more than a half a billion dollars that it had received for providing fraud-related maternity services to illegal alien mothers giving birth to thousands and thousands of instant U.S. citizens over a period of many years.

Half a billion dollars.

Or more precisely “\$513,000,000 to resolve criminal charges and civil claims”, according to the press release issued by the U.S. Department of Justice. Two of the hospitals agreed in the settlement to plead guilty to criminal fraud charges. Where that leaves the executives of the hospitals was not clear.

These were Medicaid-funded births taking place in for-profit hospitals, primarily in Georgia, but also in North and South Carolina. The Medicaid system regards any birth as a medical emergency and funds it; the baby is immediately eligible for the Medicaid baby program. The court case thus sheds some light on another of the taxpayer costs associated with illegal immigration, the tax-paid medical bills.

Tenet was charged with, essentially, bribing another, much smaller for-profit health care organization, Clinica de Mama, to refer its illegal alien pregnant mothers to Tenet’s hospitals. The women had little information and little choice and most of them went to where they were sent. Some, according to the complaint in the PACER files of federal court documents ... were told (erroneously) that the only way that they could access Medicaid assistance was through the hospital favored by Clinica.

The Tenet/Clinica relationship was interesting. Though half a billion dollars was at stake, over the years, the complaint in the PACER file speaks of the bribes as being in the \$15,000 to \$20,000 a month range; at \$17,500 for a month, over five years, this works out to be a shade over a million dollars.

Further — and this shows how creative crooks can be as they work in or near the migration field — Tenet used Medicaid funds to pay the bribes. This Tenet did by charging Medicaid for interpreter services allegedly provided by Clinica; in other circumstances, this would be a legitimate cost item.

The problem, as Ralph D. Williams, briefly the chief financial officer of one of the many hospitals in the case, discovered was that no such services were provided — the payments to Clinica were simply for the illicit referrals of the pregnant women. The Medicaid program, understandably, forbids such practices.

Williams was fired for pointing out the lack of interpreter services, but he more than got his revenge. He brought the court case under the qui tam provisions of the Federal False Claims Act, filing, on behalf of the government, against Tenet and Health Management Associates, Inc., another hospital firm. The settlement indicates this whistle-blower will be rewarded with \$84 million for bringing this matter into the courts.

There was an earlier settlement involving a small portion of this overall case. It involved the payment of \$595,155 by Health Management Associates and was described in a Justice Department press release on June 4, 2015.

The half-billion charge relates to the federal definition of fraud in these cases; the hospital services were, in fact, provided to the women and their babies, but since there was fraud in the reference process (denied in writing by Tenet) the entire payments for the maternity care services had to be forfeited.⁶⁰

Birth Tourism

Birthright citizenship has also resulted in an unusual (but hardly unexpected) phenomenon known as “birth tourism”, whereby foreign nationals travel on valid visas to the United States to give birth, thus conveying the benefits of U.S. citizenship to their children. In April 2015, CIS estimated that there were possibly as many as 36,000 birth tourists coming to the United States each year.⁶¹

As Jon Feere explained in August 2015, while “[t]here is not any breakdown of the nationality of birth tourists, in large part because the practice is largely clandestine ... there are media reports (both American and international) that shed some light on the origins of birth tourists.”⁶² Specifically, Feere recounted reports of birth tourism from China, Taiwan, South Korea, Nigeria, Turkey, Russia, and Mexico.⁶³

With respect to China, Feere stated:

It has been reported that there are “at least 500 companies” offering birth tourism services in China. A Chinese news article titled “China’s ‘Born in the USA’ Frenzy” details the efforts one Chinese birth tourist took to conceal her fraud and quoted an organizer of birth tourism who explained that “The return on investment is higher than robbing a bank.”

The article also notes that “Giving birth to a child abroad is not a privilege reserved to the stars and the very wealthy. An increasing number of expectant middle-class parents also fancy giving their children passports that they can feel proud of.”

Rolling Stone ... published a lengthy expose on Chinese birth tourists, noting that “birth tourism has become extremely popular in China.”

In 2011, city officials in southern California uncovered a makeshift maternity ward described by the media as one “that primarily caters to Chinese and Taiwanese” birth tourists. City officials shut the operation down after a resident complained about traffic, density, and building code issues. A city official noted that he had seen makeshift maternity homes in cities throughout Los Angeles County over his 13 years working for the city of San Gabriel, but that this operation was the largest he had ever encountered.

*Earlier [in 2015], federal agents investigated 37 locations in southern California involved with birth tourism. The federal affidavit notes that Chinese government sources have reported that Chinese nationals had 10,000 babies in the United States in 2012, up from 4,200 in 2008.*⁶⁴

There are strong incentives for aliens, both illegal and nonimmigrant, to have children in the United States. The parents of a U.S. citizen who is at least 21 years old are “immediate relatives” for purposes of applying for lawful permanent residence,⁶⁵ meaning that they “have special immigration priority and do not have to wait in line for a visa number to become available for them to immigrate because there are an unlimited number of visas for their particular categor[y].”⁶⁶ In addition, U.S. citizens can also petition for their siblings to immigrate.⁶⁷

Other Consequences of Birthright Citizenship

Birth tourism is not the only negative consequence of birthright citizenship, however. Another is the prospect that an individual who is born in the United States to a parent or parents remaining briefly or simply transiting the country, would, nonetheless, be entitled to all of the rights and privileges of citizenship, including the full protection of the Constitution and access to a U.S. passport.⁶⁸

As Feere stated in 2015 testimony before the House Judiciary Committee’s Subcommittee on Immigration and Border Security:

*It is very important for people we allow in on a permanent basis who obtain citizenship to think of themselves as Americans. It is equally important for Americans to think of them as Americans. Assimilating new U.S. citizens is a critical part of our immigration system as it helps maintain the social fabric of America. But a broad interpretation of our nation’s birthright citizenship clause is creating situations that threaten to break down the nation’s social cohesion.*⁶⁹

Not only is the possibility that there would be such “attenuated Americans” not as farfetched as it might sound, but it is likely more common than most would think. In fact, even individuals who never touch dry ground in this country may be considered “citizens” under prevailing law. Notably, 7 Foreign Affairs Manual (FAM) 1100, which is captioned “Acquisition and Retention of U.S. Citizenship and Nationality,”⁷⁰ contains guidance for State Department and other government employees on assessing whether an individual is a citizen or national of the United States.⁷¹ Under 7 FAM 1114(a), “[p]ersons born on ships located within U.S. internal waters ... are considered to have been born in the United States.”⁷² The only exceptions to this rule are those born on “[f]oreign warships, naval auxiliaries, and other vessels or aircraft owned or operated by a State and used for governmental non-commercial service.”⁷³ Similarly, “a child born on a plane in the United States or flying over its territory would acquire United States citizenship at birth.”⁷⁴

The most notorious “attenuated citizen” is Yaser Esam Hamdi. As then-Chairman John Hostettler of the House Judiciary Committee’s Subcommittee on Immigration, Border Security, and Claims explained at a 2005 subcommittee hearing: “Hamdi ... was born in Louisiana to Saudi parents who were in the U.S. on temporary visas. He returned to Saudi Arabia as a small child and maintained little connection to the United States.”⁷⁵ Hamdi was subsequently captured “by the U.S.-allied Northern Alliance in Afghanistan in December 2001,” and after he was detained by the U.S. government, “he became the central figure in a landmark terrorism case before the Supreme Court.”⁷⁶

More benign figures also fall into this category, however. The aforementioned testimony of Feere included the story of “Jennifer Shih, a UC Davis college student born in New York,” who had told the *Sacramento Bee*: “I’m Taiwanese more than American.”⁷⁷

As Feere explained it:

Back in 1989, Shih’s mother boarded a jet bound for New York, tourist visa in hand. She didn’t arrange her travel in order to take in Broadway show, however; she was eight months pregnant and the goal was to add a U.S.-passport holder to her family. In other words, she was engaging in fraud as admitted by Mr. Shih, who cited the quality of American schools as the impetus. Two months after giving birth Mrs. Shih “returned to Taiwan with her U.S. passport-bearing daughter in tow.”

In 2004, when Jennifer reached the age of 15, she returned to the United States to take advantage of U.S.-taxpayer subsidized high schools in Idaho, Utah, and college in California. Understandably, Jennifer — who didn’t speak English when she arrived — describes the United States as a “foreign country”. The reporter who interviewed her notes that “even after eight years”, Jennifer says she still “thinks about Taiwan every day” and visits nearly every year. Jennifer’s honesty highlights the absurdity of a lax birthright citizenship policy and raises significant questions of allegiance and assimilation.

Jennifer’s father has since moved to the United States, presumably as a result of chain migration, which allows individuals to sponsor parents and siblings upon turning 21 years of age. Jennifer says she is interested in having kids of her own who will go to college in America. This is a perfect example of how one instance of fraud from a temporary alien can result in a permanency that was never welcomed by the American public.

...

Despite the fact that no one in Jennifer’s family has been paying taxes to support the University of California system, she will be treated like every other California student whose parents have been subsidizing the system for decades. As a result of her mother’s fraud, Jennifer will pay a tuition rate that is much less than she otherwise would have as a foreign student. And every social welfare program available to Americans will also be available to Jennifer and her father.”⁷⁸

There is one final consequence of the popular interpretation of the Fourteenth Amendment in light of the Supreme Court’s decision in *Wong Kim Ark*. Under case law, U.S. Immigration and Customs Enforcement (ICE) bears the burden of proving alienage in every removal case.

As the Supreme Court held in the 1923 case *United States ex rel. Bilokumsky v. Tod*: “It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact. It is true that the burden of proving alienage rests upon the Government.”⁷⁹ In connection with this burden, the Board of Immigration Appeals (BIA) has ruled that: “In removal proceedings, evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent to come forward with evidence to substantiate his citizenship claim.”⁸⁰

Usually in immigration court, this burden-shifting occurs in connection with what are referred to as “derivative citizenship claims.”⁸¹ In a handful of cases, however, aliens attempt to avoid removal by fraudulently claiming that they were, in fact, born in the United States, and therefore are U.S. citizens. While a false claim to U.S. citizenship is a ground of inadmissibility,⁸² this presents little impediment to an individual who would be otherwise removable anyway. Given the fact that the former Immigration and Naturalization Service (INS) and its successor, ICE, have long relied on paper records, such claims can result in costly investigations for the government, some of which require foreign in-country searches for birth records.

I have seen respondents in removal proceedings use the birth certificates of long-dead citizens to make such claims, and I have also seen respondents simply aver that they were “told by their parents” that they were actually born in this country. In one case, I even saw an amendment made years after the fact based upon the statements of relatives to a church registry that was offered, and accepted, as proof of citizenship. Needless to say, I cannot tell you that evidence was fraudulent, but it is indicative of the issue.

In my experience, these claims are most common in cases where the respondent is removable on criminal grounds, with no eligibility for relief. Were more aliens to realize that they could simply make a fraudulent oral representation of U.S. birth to avoid removal, it would add to the already significant burdens on our immigration system.

It should be noted, in fact, that fraud quickly followed the decision in *Wong Kim Ark*, in a manner known as the “paper-son” phenomenon. During the San Francisco earthquake of 1906, and the subsequent fire that swept the city, all birth records for the state of California were destroyed.⁸³ Thereafter, Chinese nationals who were in the United States, but who were barred from naturalization, could claim that they had been born in this country.⁸⁴ As the *Los Angeles Times* explained in 2009: “So many men claimed U.S. citizenship this way that it was said for it to be true, every Chinese woman in California pre-1906 would have needed to have given birth to 600 sons.”⁸⁵ That article continued:⁸⁶

This loophole was a boon, for it allowed Chinese men to return to China as U.S. citizens, report that their wives had given birth to a son there (a child born to a U.S. citizen abroad is automatically eligible to be a U.S. citizen) and receive a piece of paper creating a “paper son.” This document could then be used by a real son or sold to a friend, neighbor, relative or total stranger. The paper sons adopted their new surnames, then came to the U.S. as citizens and lived with their new families as sons and brothers. Later, they were able to bring in wives and children and sometimes even bring in paper sons themselves.

This legacy of fraud continues to the present day.

Conclusion

By raising the possibility of limiting birthright citizenship by executive order, President Trump has brought to the fore an as-yet-unresolved legal issue: whether a child born to an alien unlawfully present in the United States automatically becomes a U.S. citizen at birth under the Fourteenth Amendment. Inevitably, if the president were to take such action, it will be up to the Supreme Court to resolve this issue, once and for all.

If the Supreme Court were to find that under the Fourteenth Amendment, children of aliens unlawfully present in the United States do not automatically receive U.S. citizenship at birth, U.S. law would be brought in line on this issue with the policies of many of our major allies, and many other industrial powers. The taxpayers of the United States would also save the costs of providing government benefits to those erstwhile U.S. citizens.

End Notes

- ¹ Youyou Zhou, [“One in four countries around the world grant birthright citizenship”](#), *Quartz*, October 30, 2018.
- ² Yasmeen Serhan and Uri Friedman, [“America Isn’t the ‘Only Country’ With Birthright Citizenship”](#), *The Atlantic*, October 31, 2018.
- ³ *Id.*
- ⁴ Steven A. Camarota, Karen Zeigler, and Jason Richwine, [“Births to Legal and Illegal Immigrants in the U.S.: A look at health insurance coverage among new mothers by legal status at the state and local level”](#), Center for Immigration Studies *Background*, October 9, 2018.
- ⁵ Youyou Zhou, [“One in four countries around the world grant birthright citizenship”](#), *Quartz*, October 30, 2018.
- ⁶ [“World Factbook: Europe: Germany”](#), Central Intelligence Agency, undated.
- ⁷ [“World Factbook: Europe: United Kingdom”](#), Central Intelligence Agency, undated.
- ⁸ Yasmeen Serhan and Uri Friedman, [“America Isn’t the ‘Only Country’ With Birthright Citizenship”](#), *The Atlantic*, October 31, 2018.
- ⁹ Sarah Hauer, [“Paul Ryan claims the US is the ‘oldest democracy’ in the world. Is he right?”](#), *Politifact*, July 11, 2016.
- ¹⁰ 8 C.F.R. § 337.2.
- ¹¹ [“What are the Benefits and Responsibilities of Citizenship?”](#), U.S. Citizenship and Immigration Services, undated.
- ¹² See Alison Siskind, [“Noncitizen Eligibility for Federal Public Assistance: Policy Overview”](#), Congressional Research Service, December 12, 2016.
- ¹³ *Id.*
- ¹⁴ [“Non-U.S. Citizens, Federal Student Aid”](#), U.S. Department of Education, undated.
- ¹⁵ [Section 240](#) of the Immigration and Nationality Act (INA), “An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”
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- ¹⁷ [Section 301 of the INA](#).
- ¹⁸ See [Section 310 of the INA](#), *et seq.*
- ¹⁹ [Section 301 of the INA](#).
- ²⁰ See, e.g., Eyder Peralta, [“3 Things You Should Know About Birthright Citizenship”](#), NPR, August 18, 2015.
- ²¹ Alexandra M. Wyatt, [“Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate”](#), Congressional Research Service, October 28, 2015.
- ²² [U.S. Constitution Amendment XIV, §1](#).

- ²³ See Alexandra M. Wyatt, [“Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate”](#), Congressional Research Service, October 28, 2015.
- ²⁴ *Id.* (citations omitted).
- ²⁵ [Dred Scott v. Sandford](#), Oyez, October 4, 2017.
- ²⁶ [Dred Scott v. Sandford](#), 60 U.S. 393 (1857).
- ²⁷ *Id.*
- ²⁸ [“Fourteenth Amendment and Citizenship”](#), Library of Congress, updated July 31, 2015.
- ²⁹ 14 Stat. 27 Chapter 31, 39 Congress, Session 1, [“An Act: To protect all persons in the United States in their civil rights, and furnish the means of their vindication”](#), April 9, 1866.
- ³⁰ “Birthright Citizenship: Is it the Right Policy for America?”, Hearing Before the Subcommittee on Immigration and Border Security of the House Committee on the Judiciary, 114th Congress 6-7 (2015), [statement of Dr. John C. Eastman](#), Henry Salvatori Professor of Law & Community Service, Chapman University, Dale E. Fowler School of Law; Founding Director, The Claremont Institute Center for Constitutional Jurisprudence.
- ³¹ [“Fourteenth Amendment and Citizenship”](#), Library of Congress, updated July 31, 2015.
- ³² Compare 14 Stat. 27 Chapter 31, 39 Congress, Session 1, [“An Act: To protect all persons in the United States in their civil rights, and furnish the means of their vindication”](#), April 9, 1866, with [U.S. Constitution Amendment XIV, §1](#).
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- ³⁴ *Id.* at 11.
- ³⁵ [United States v. Wong Kim Ark](#), 169 U.S. 649 (1898).
- ³⁶ *Id.* at 650.
- ³⁷ *Id.* at 653.
- ³⁸ *Id.* at 674-75.
- ³⁹ “Birthright Citizenship: Is it the Right Policy for America?”, Hearing Before the Subcommittee on Immigration and Border Security of the House Committee on the Judiciary, 114th Congress 6-7 (2015), [statement of Dr. John C. Eastman](#), Henry Salvatori Professor of Law & Community Service, Chapman University, Dale E. Fowler School of Law; Founding Director, The Claremont Institute Center for Constitutional Jurisprudence.
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- ⁴¹ *Id.*
- ⁴² [Plyler v. Doe](#), 457 U.S. 202 (U.S. 1982).

- ⁴³ [“Public Education for Immigrant Students: Understanding *Plyler v. Doe*”](#), American Immigration Council fact sheet, October 24, 2016, p. 1.
- ⁴⁴ See Alexandra M. Wyatt, [“Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate”](#), Congressional Research Service, October 28, 2015, p. 11.
- ⁴⁵ [Plyler v. Doe](#), 457 U.S. 202, 205 (1982).
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- ⁴⁹ Jason Meisner and Patrick M. O’Connell, [“Richard Posner announces sudden retirement from federal appeals court in Chicago”](#), *Chicago Tribune*, September 1, 2017.
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- ⁵¹ Steven A. Camarota, Karen Zeigler, and Jason Richwine, [“Births to Legal and Illegal Immigrants in the U.S.: A look at health insurance coverage among new mothers by legal status at the state and local level”](#), Center for Immigration Studies *Background*, October 9, 2018.
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- ⁵³ *Id.*
- ⁵⁴ *Id.*
- ⁵⁵ Ian Tuttle, [“The Very Real Economic Costs of Birthright Citizenship”](#), *National Review*, August 21, 2015.
- ⁵⁶ *Id.*
- ⁵⁷ Steven A. Camarota, [“Welfare Use by Legal and Illegal Immigrant Households, An Analysis of Medicaid, cash, food, and housing programs”](#), Center for Immigration Studies *Background*, September 9, 2015.
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⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ [“Green Card for Immediate Relatives of U.S. Citizen”](#), U.S. Citizenship and Immigration Services, last updated July 10, 2017; see also [Section 201\(b\)\(2\)\(A\)\(i\) of the INA](#).

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⁶⁷ See [Section 203\(a\)\(3\) of the INA](#).

⁶⁸ The advantages of this latter benefit include the fact that, with a U.S. passport, American citizens can visit 174 countries without a visa. See [“The Henley & Partners Visa Restrictions Index 2017”](#), Henley & Partners, undated.

⁶⁹ “Birthright Citizenship: Is it the Right Policy for America?”, Hearing Before the Subcommittee on Immigration and Border Security of the House Committee on the Judiciary, 114th Congress 6-7 (2015), [statement of Jon Feere](#).

⁷⁰ See [7 FAM 1100](#), *et seq.*

⁷¹ For the differences between “citizens” and “nationals” of the United States, see Andrew Arthur, [“Defining Immigrants, Noncitizens, Aliens, Nonimmigrants, and Nationals: Who’s Who in Immigration Law?”](#), Center for Immigration Studies blog, June 26, 2017.

⁷² [7 FAM 1114\(a\)](#).

⁷³ [FAM 1113\(d\)\(2\)](#).

⁷⁴ [7 FAM 1115\(b\)](#), quoting Gordon, *Immigration Law and Procedure, Part 8, Nationality and Citizenship, Chapter 92*, 92.03, New York: Matthew Bender, 2007.

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⁷⁶ [“Hamdi voices innocence, joy about reunion”](#), CNN, October 14, 2004; see also [Hamdi v. Rumsfeld](#), 542 U.S. 507 (2004).

⁷⁷ “Birthright Citizenship: Is it the Right Policy for America?”, Hearing Before the Subcommittee on Immigration and Border Security of the House Committee on the Judiciary, 114th Congress 6-7 (2015), [statement of Jon Feere](#); see also Richard Chang, [“In California, ‘birth tourism’ appears to grow”](#), *Sacramento Bee*, September 24, 2012.

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⁷⁹ [United States ex rel. Bilokumsky v. Tod](#), 263 U.S. 149, 153 (1923), overruled on other grounds; [INS v. Lopez-Mendoza](#), 468 U.S. 1032 (1984).

⁸⁰ [Matter of Hines](#), 24 I&N Dec. 544, 546 (BIA 2008).

⁸¹ See, e.g., *id.*

⁸² See [Section 212\(a\)\(6\)\(C\)\(ii\) of the INA](#).

⁸³ See Lisa See, [“Paper sons, hidden pasts”](#), *Los Angeles Times*, August 2, 2009.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*