Anchor Babies

The Case for Correction Through Legislation

by Congressman Brian Bilbray

In the debate surrrounding the strengthening of our immigration laws to reduce illegal immigration, citizenship is a pivotal concept. In March of 1995, I introduced the "Citizenship Reform Act" (H.R. 1363) which denies automatic citizenship to children born to illegal aliens on U.S. soil. The difference between my legislation and others pending before the House of Representatives is that H.R. 1363 makes these changes statutorily and does not makes the changes through a Constitutional Amendment.

The current interpretation of the law allows children of illegal alien parents born on U.S. soil to automatically be granted U.S. citizenship. It is my view that this is an insult to legal aliens, such as my mother, who observed our immigration laws and came to the U.S. through the proper channels. However, the most striking fact about this issue is that there is no basis in law or Supreme Court rulings for the current interpretation. As I will explain further, the Fourteenth Amendment, and the debate surrounding it, is very clear in its assertion that "All persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are citizens of the United States." In addition, there has been no Supreme Court ruling on a case dealing with the children of illegal aliens.

Section 5 of the Fourteenth Amendment states that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Congress has employed this Constitutional power by enacting legislation which clarified the citizenship status of American Indians. After passage of the Fourteenth Amendment, Congress issued the "Act of July 15, 1870," in which a Winnebago Indian from Minnesota was permitted to apply for citizenship, with the condition that the Indian cease to be a member of the tribe, and his land be subject to taxation. The "Indian Territory Naturalization Act" of May 2, 1890 broadened the earlier act by allowing any member of any Indian tribe or nation residing in Indian Territory to apply for citizenship. From 1854 until 1924, citizenship was a common government incentive to encourage the assimilation of *Indians*. Congress' authority to naturalize Indians has been sustained by the courts in the cases of *Elk v Wilkins* in 1884 and *United States v Celestine* in 1909.

> ***"...it is clearly and completely within the authority of the Congress of the United States to further define the citizenship laws of our great country."***

Indians were perceived to owe allegiance to their tribe, and were therefore not under the "obedience" of the United States. Indians could only be granted U.S. citizenship by an act of Congress in which they had to renounce their allegiance to their tribe. Today, those persons that are in the United States illegally are clearly not "subject to the jurisdiction thereof" — that is: obedience to the federal government — as illustrated by the fact that they have chosen to violate our immigration laws. If illegal aliens have babies on U.S. soil they, according to precedent, must demonstrate obedience to our laws. This, as the historical record has demonstrated repeatedly in cases involving Indians, can be achieved only through acts of Congress. Indians

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were not considered automatic citizens; by the same logic, therefore, children of illegal aliens should not receive automatic citizenship.

In the Supreme Court case of the *United States v Wong Kim Ark*, the plaintiff, Mr. Ark, was born in San Francisco in 1873. His parents were legal immigrants from China and were "domiciled residents of the United States." The Court held that Mr. Ark was a citizen of the United States even though his parents owed allegiance to the Emperor of China.

This case was based on a fundamental principle of the British common law. Supreme Court Justice Gray discussed this principle in the Court's opinion — that "the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects, because [they were] not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the king." The *Wong Kim Ark* case was consistent in this regard with British common law.

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However, the major distinction with this case was that Wong Kim Ark's parents had come to America legally. The Supreme Court has never ruled on the case of a child of someone who had come to America illegally. It has only ruled on the narrow factual case of children of legal immigrants.

That is the historical context. In the present, there is the very tangible question of cost to local counties and states that bear the burden of caring for the chldren of illegal aliens. The nearly 96,000 babies who were born to undocumented women covered by the Medi-Cal program in 1992 represented an 85 percent increase over three years. In 1992 alone, the cost to California taxpayers was more than $230 million in medical bills. In my county of San Diego, the county estimates that the total cost for undocumented immigrants, from 1992 to 1993, was over $64 million. These are costs that counties and states just simply cannot afford, especially when a large percentage of these costs is incurred outside the parameters of any true basis in law or Supreme Court ruling.

Let me be clear in one essential point. I do not blame young mothers for wanting the best health care possible for themselves and their babies, or wanting to give their children the option of a better life in America. It is by no fault of their own that the United States' failed immigration policies have resulted in their being encouraged to come into this country illegally. However, their plight or predicament does not give them a free pass to circumvent those who are trying to work within the system and come to America legally. By the same token, it is also not the fault nor the responsibility of the American taxpayer, who is paying for these costs through fewer benefits and higher taxes.

Although a number of my colleagues advocate a constitutional amendment to correct this interpretation of the law, it is my view that this would be superfluous. The fact that the Supreme Court has never ruled on this issue, coupled with the difficulty of passing an amendment to the Constitution, gives strength to my argument that we should implement this change statutorily. The Congress has demonstrated its authority to act under Section 5 of the Fourteenth Amendment by granting citizenship to American Indians. The Congress' elected status and our position as coequal branches of government gives our actions great weight in the Supreme Court. Therefore, it is under Congress' purview to define more clearly the intention of the framers of the Amendment as to who is and who is not a citizen of the United States. We should exercise this purview by amending the Immigration and Naturalization Act. Should this be found to be unconstitutional, then and only then would a Constitutional amendment be necessary. However, until such time, it is clearly and completely within the authority of the Congress of the United States to further define the citizenship laws of our great country. □

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Citizenship and the Babies of Non-Citizens

by Dan Stein and John Bauer

Three questions must be answered in order to determine whether children born on U.S. soil to illegal aliens should be granted automatic U.S. citizenship.

(1) We must analyze the intended meaning of the Fourteenth Amendment clause, "subject to the jurisdiction thereof."

(2) We must ask whether the government should continue to bestow automatic citizenship on children born on U.S. soil if born to illegal aliens.

(3) We must ask whether Congress has the legitimate power to legislatively alter the current interpretation of "subject to the jurisdiction" without resorting to a constitutional amendment.

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These questions are complex, and we cannot possibly provide an exhaustive analysis in these few pages.[1] However, it is our hope that our views will challenge those of others, and will counter-balance the common assumption that the status quo of granting automatic citizenship to children of illegal aliens has an indisputably correct legal mandate.

Introduction

The Fourteenth Amendment of the U.S. Constitution declares that" [A]ll 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."[2] Mirroring this language, section 1401 of Title 8 of the U.S. Code reads, in part: "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...." The government currently interprets these clauses as granting full U.S. citizenship to children born to illegal aliens on U.S. soil. However, this view is rooted in a particular interpretation of "subject to the jurisdiction" — an interpretation that is open to debate.

The phrase "subject to the jurisdiction thereof" dates back to the close of the Civil War, when Congress sought to establish a uniform national rule for naturalization to defeat the political currents that might prevail in any one state. In particular, the language was designed to prevent states from depriving freed slaves and their descendants of U.S. citizenship. But the drafters of the Fourteenth Amendment could not have predicted the impact this language would have on immigration regulation in the modern era of burgeoning populations.

So, from a noble cause comes an unintended modern dilemma. In a world of approximately six billion persons, where more than sixteen million visitors, travelers, and illegal immigrants enter and leave the United States each year,[3] should the U.S. government continue to bestow automatic citizenship on children born in this country to alien parents residing here illegally? Professors Peter Schuck and Rogers Smith explored these ideas in their book, *Citizenship Without Consent: Illegal Aliens In The American Polity.*[4] They concluded that the drafters of the Fourteenth Amendment did not intend to eliminate the notion of consent from our