

BACKGROUND

UNITED STATES: Birthright Citizenship Update

EXECUTIVE SUMMARY

- The first clause of the Fourteenth Amendment to the U.S. Constitution, known as the Citizenship Clause, provides 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.” This generally has been taken to mean that any person born in the United States automatically gains U.S. citizenship, regardless of the citizenship or immigration status of the person’s parents, with limited exceptions such as children born to recognized foreign diplomats.
- Proponents of restrictive immigration policies have convinced the President that he has authority to issue an Executive Order that would reinterpret the Fourteenth Amendment such that children born in the United States to unlawful immigrants would not become U.S. citizens at birth.
- The prevailing view of those who have studied the issue is that the text of the Constitution and its legislative history only support the current interpretation of the Fourteenth Amendment. An Executive Order would be subject to legal challenge and we anticipate a court would enjoin implementation of the Executive Order pending legal review.

Legal Analysis

The “subject to the jurisdiction thereof” language of the Fourteenth Amendment has been interpreted to impose limited exceptions, such as for children of diplomats and foreign ministers (who are accorded immunity from U.S. law).

The long-established view of the Executive Branch and the courts is that an individual in the country unlawfully is “subject to the jurisdiction” of the United States. As one conservative scholar notes, “illegal aliens are such *because* they are subject to U.S. law.”

Proponents of a narrower reinterpretation of the Fourteenth Amendment argue that the term “jurisdiction” should be read to mean “complete jurisdiction” based on undivided allegiance and the mutual consent of the sovereign and the subject. Under their interpretation children born to immigrants in the country unlawfully would not be U.S. citizens on the basis that their parents do not have undivided allegiance to the U.S.

Supreme Court cases support the current interpretation of the Fourteenth Amendment. In *Wong Kim Ark* (1898), the Supreme Court held that a person born in the United States to resident aliens became a U.S. citizen at birth, even when the person’s parents were barred from ever naturalizing. The Supreme Court stated that “[t]he Fourteenth Amendment. ... has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.”

Proponents of a narrower reinterpretation argue that the plaintiffs in *Wong Kim Ark* were lawfully and permanently in the U.S. and that the Supreme Court has never in fact held that children born on U.S. soil to parents who are in the country illegally are citizens. That argument is undermined by dicta in *Plyler v. Doe* (1982), which said that “no plausible distinction with respect to Fourteenth Amendment ‘jurisdiction’ can be drawn between resident aliens who entry into the United States was lawful, and resident aliens whose entry was unlawful.”

The current interpretation of the Fourteenth Amendment is supported by many conservative scholars, including Judge James C. Ho, who was recently nominated by President Trump and confirmed to the U.S. Court of Appeals for the Fifth Circuit. As Judge Ho wrote over a decade ago: “birthright citizenship is protected [by the Constitution] no less for children of undocumented persons than for descendants of Mayflower passengers.”

Conclusion

Congress has at times contemplated changes to the Fourteenth Amendment through legislation, but the Executive Branch of the U.S. government has never seriously considered unilaterally changing its interpretation of the Fourteenth Amendment.

BACKGROUNDER

The President's statement – just days before the mid-term election – is best viewed as a political pronouncement intended to rally his supporters who care about illegal immigration. The likelihood of the administration successfully changing birthright citizenship is remote.