CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

WHY BIRTHRIGHT CITIZENSHIP IS MOST WONDERFUL FOR AMERICA

Posted on August 22, 2015 by Cyrus Mehta

Donald Trump advocating that the United States should end birthright citizenship in his immigration reform plan is nothing new. Politicians have frequently brought up the so called dangers of birthright citizenship to pander to their base. Recently in 2011, Steve King (R-IA), one of the most anti-immigrant members of Congress, proposed the Birthright Citizenship Act of 2011, which did not go anywhere because of its absurdity. Future attempts too will similarly fail since birthright citizenship is too entrenched in the fabric of this nation. It is also good for America.

The granting of automatic citizenship to a child born in the US is rooted in the first sentence of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."

Lost in the heated political rhetoric of Trump and other Republican presidential contenders who are parroting him is that it is next to impossible to amend the hallowed Fourteenth Amendment, which was enacted to ensure birthright citizenship to African Americans after the Civil War, and following the infamous *Dred Scott*decision that held that African Americans could not claim American citizenship. In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Supreme Court extended the Fourteenth Amendment to an individual who was born to parents of Chinese descent and during a time when Chinese nationals were subjected to the Chinese exclusion laws:

The Fourteenth 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 all 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 owning 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, domiciles here, is within the allegiance and the protection, and consequently subject to the jurisdiction of the United States.

Although in *Elk v. Wilkins*, 112 U.S. 94 (1984), those born within Native American tribes were not born "subject to the jurisdiction" of this country because they owed allegiance to their tribal nations rather than the United States, this preclusion was eventually eliminated by the Indian Citizenship Act of 1924.

Even the Board of Immigration Appeals in *Matter of Cantu*, Interim Decision #2748, broadly held that one who was born on a territory in 1935, the Horton Tract, where the United States had impliedly relinquished control, but had not yet ceded it to Mexico until 1972, was born "subject to the jurisdiction" of the United States and thus a US citizen.

One can also pick a leaf from the State Department's book on birthright citizenship. Contrary to the common notion -that parents come to the US to give birth to children so that they may become US citizens - some non-US citizen parents do not desire that their minor children remain US citizens, notwithstanding their birth in the US. Their main motivation is that if they choose not to live in the US permanently, they would rather that the child enjoys the citizenship of their nationality so that he does not suffer any potential impediments later on in that country, such as the inability to vote, attend educational institutions or stand for elected office. This may not be possible if the child is born in the US, since the State Department's regulation provides that ".

1. *Parents or guardians cannot renounce or relinquish the U.S. citizenship of a child who acquired U.S. citizenship at birth.*

   Since a Constitutional amendment requires a favorable vote of two thirds of each house of Congress and ratification by three quarters of the states or the holding of conventions in three quarters of the states, efforts will be made, like H.R. 140 did, to tinker with section 301 of the Immigration and Nationality Act, which replicates the 14th amendment. H.R. 140 strove to narrowly limit

birthright citizenship to a person born in the US to parents who were either citizens of the United States or lawfully admitted for permanent residence. Assuming that such a bill got enacted into law, it would deprive the child of a nonimmigrant parent from automatically becoming a US citizen who is lawfully in the US in H-1B status, and approved for permanent residence but for the fact that she is stuck in the employment-based preference backlogs for many years. What would be the status of such a child who was not born of parents of the pedigree prescribed in such a law? Would the child be rendered deportable the minute it is born by virtue of being an alien present in the US without being admitted or paroled under INA section 212(a)(6)(A)(i)? Moreover, would such a law also have retroactive application? It is likely to have retroactive effect since a Constitutional provision ought to only be interpreted in one way for all times. If a new statute interprets the Fourteenth Amendment's "subject to the jurisdiction thereof" to not include children of parents who were undocumented, or who were not citizens or permanent residents, and this interpretation is upheld by a court, then children who were born as US citizens will no longer be considered citizens. How far would one have to go then to strip people of citizenship? Parents, grandparents and even great grandparents will no longer be considered citizens, in addition to the child. Millions upon millions of Americans ensconced in comfortable suburbia will overnight be deemed to be non-citizens, perhaps even illegal aliens and deportable. The repealing of birthright would certainly have unintended consequences of a nightmarish quality, and it is quite likely that some of the repeal's most strident champions might be declared as "illegal aliens" and unfit to run for office!

The only historic exceptions to those subject to the jurisdiction of the US are diplomats and enemies during the hostile occupation of a part of US territory. A diplomat, in accordance with *Wong Kim Ark*, is not subject to the jurisdiction of the US as a diplomat enjoys immunity from US law, but a child of such a diplomat born in the US is at least deemed to be a permanent resident. *See Matter of Huang*, Interim Decision #1472 (BIA May 27, 1965). Congress even passed legislation to ensure that children of all Native Americans are US citizens. *See* INA section 301(b). An undocumented immigrant is undoubtedly subject to the jurisdiction of the US. If he commits a crime, he will surely be prosecuted. He can sue and be sued in US courts, and Uncle Sam gleefully collects his taxes as well as his contributions to social security (even if he is unable to claim it later on). One cannot liken an immigrant who has entered the

US without inspection with the objective of finding work to a member of a hostile force occupying a part of the US. When a hostile force occupies any part of the US, the laws of the US are no longer applicable in the occupied territory. Thus, children of an occupying enemy alien have not been considered to be born "subject to the jurisdiction" of the US as they did not derive protection from or owe any obedience or allegiance to the country. *Inglis v. Sailor's Snug Harbor*, 28 U.S. 99 (1830). By contrast, a terrorist who enters the US in a nonimmigrant status, such as on an F-1 student visa with an ulterior motive to commit an act of terrorism, unlike a member of a hostile occupying force, is subject to the jurisdiction of the US as she can be convicted or treated as an enemy noncombatant, and if she gives birth to child here, the child ought to be a US citizen under the Fourteenth Amendment.

It has also become fashionable for politicians to refer to such children born in the US as “anchor babies,” on the assumption that the US citizen children will legalize their undocumented parents. While this is theoretically possible, the parent will have to wait until the US citizen child turns 21 before the parent can be sponsored for permanent residence. If the parent came into the US without inspection, the parent will have to depart the US and proceed overseas for processing at a US consulate, and will likely have to wait for an additional 10 years. The waiting time is rather long under such a game plan: 21 years, if the parent was inspected; or 31 years, if the parent crossed the border without inspection.The repeal of birthright citizenship will result in absurd and disastrous results. Birthright citizenship renders all born in this country to be treated equally as Americans no matter who their parents are or where they came from, and it also prevents a permanent underclass from taking root that will continue for generations.

Now, as a nation, we don't promise equal outcomes, but we were founded on the idea everybody should have an equal opportunity to succeed. No matter who you are, what you look like, where you come from, you can make it. That's an essential promise of America. Where you start should not determine where you end up.

Barack Obama