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## Will the President Succeed in Ending Birthright Citizenship?

By Lindsay Gilmore\*

### Introduction

In an interview with Axios released on October 30, 2018, President Donald Trump indicated he intends to sign an executive order that would end birthright citizenship for children of non-citizens.<sup>1</sup> Birthright citizenship is the principle that anyone born on U.S. soil is a citizen of the United States.<sup>2</sup> Proponents of this 150-year-old concept rely on the Fourteenth Amendment to the Constitution, which reads: “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.”<sup>3</sup> Whether President Trump has the power to eliminate birthright citizenship via an executive order is a controversial topic, but most legal scholars agree this is not a possibility.<sup>4</sup> Nevertheless, if President Trump does implement his plan, his executive order would inevitably be challenged as unconstitutional, and courts likely would preserve the Constitutional guarantee of birthright citizenship.

### History

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<sup>1</sup> Adam Edelman, *Trump Vows to End Birthright Citizenship with an Executive Order. Speaker Ryan Says No Way*, NBC News (Oct. 30, 2018), <https://www.nbcnews.com/politics/immigration/trump-wants-end-birthright-citizenship-executive-order-n926081>.

<sup>2</sup> Alan Gomez, *US Birthright Citizenship Explained: What is it, How Many People Benefit*, USA Today (Oct. 30, 2018), <https://www.usatoday.com/story/news/world/2018/10/30/birthright-citizenship-explained-president-donald-trump-immigration/1817034002/>.

<sup>3</sup> U.S. Const. amend. XIV, § 1; Kevin Liptak, *Trump Claims He Can Defy Constitution and End Birthright Citizenship*, CNN (Oct. 31, 2018), <https://www.cnn.com/2018/10/30/politics/donald-trump-ending-birthright-citizenship/index.html>.

<sup>4</sup> Joel Rose, *Fact Check: 14th Amendment on Citizenship Cannot be Overridden by Executive Order*, National Public Radio (October 30, 2018), <https://www.npr.org/2018/10/30/662335612/legal-scholars-say-14th-amendment-doubt-trump-can-end-birthright-citizenship-wit>.

The Fourteenth Amendment was enacted in 1868 with the main purpose of establishing the citizenship of freed slaves, which had been denied by the Supreme Court in *Dred Scott v. Sandford* in 1857.<sup>5</sup> The reach of the Fourteenth Amendment, however, was not seriously questioned until 1898, when Wong Kim Ark attempted to return to the United States after a temporary visit to China and was denied permission to enter on “the sole ground that he was not a citizen of the United States.”<sup>6</sup>

Wong Kim Ark was born in 1873 in San Francisco, California to parents of Chinese descent who had obtained citizenship in the United States.<sup>7</sup> In 1890, when Ark was 17-years-old, he temporarily visited China, returning to the United States within the same year.<sup>8</sup> Upon his return, Ark was permitted to enter “upon the sole ground that he was a native-born citizen of the United States” – his citizenship was a birthright.<sup>9</sup> However, upon Ark’s return from a second trip to China in 1894, he was denied permission to re-enter the United States because he was “not a citizen of the United States.”<sup>10</sup> In determining Ark’s citizenship, the Supreme Court analyzed the language of the Fourteenth Amendment, noting that it “contemplates two sources of citizenship, and two only, - birth and naturalization.”<sup>11</sup> The Court went on to say that, “citizenship by birth is established by the mere fact of birth under the circumstances defined by the constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States.”<sup>12</sup> Thus, it was determined that Ark was a citizen of the United States by virtue of being born on U.S. soil.<sup>13</sup>

In *Wong Kim Ark*, the Court did carve out three exceptions to the rule of birthright citizenship: the concept does not apply to children of sovereigns or their ministers, children of enemies within and during a hostile

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<sup>5</sup> *Dred Scott v. Sanford*, 60 U.S. 393 (1857); *United States v. Wong Kim Ark*, 169 U.S. 649, 676 (1898).

<sup>6</sup> *Wong Kim Ark*, 169 U.S. at 653.

<sup>7</sup> *Id.* at 652.

<sup>8</sup> *Id.* at 653.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Wong Kim Ark*, 169 U.S. at 702.

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Id.* at 705.

occupation of part of a U.S. territory,<sup>14</sup> and children of members of Indian tribes who pledge their allegiance to their tribe.<sup>15</sup> Notably, none of these exceptions are based exclusively on whether the individual is a child of a citizen or non-citizen. [GC1]

Proponents of President Trump's executive order argue that the phrase "subject to the jurisdiction thereof" necessarily excludes illegal immigrants residing in the United States.<sup>16</sup> However, this argument was flatly rejected by the Supreme Court in 1898, which noted it is "impossible to...hold that persons 'within the jurisdiction' of one of the States of Union are not 'subject to the jurisdiction of the United States.'"<sup>17</sup> Moreover, in 1982 the Supreme Court decided *Plyler v. Doe* and acknowledged that, "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."<sup>18</sup> Thus, there can be no question that the Fourteenth Amendment guarantee of birthright citizenship applies to children of legal and illegal residents alike.

In a final attempt to support eliminating birthright citizenship for children of non-citizens, proponents look to *Elk v. Wilkens*, a 1884 Supreme Court case that addressed the citizenship rights of an Indian child.<sup>19</sup> In *Elk*,

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<sup>14</sup> The Court further describes these first two exceptions as covering "children born of alien enemies in hostile occupation and children of diplomatic representatives of a foreign state," which is contradictory to President Trump's suggestion that a dictator on American soil during wartime could have a child who would be deemed a citizen at birth. *See id.* at 682; *see also* Salvador Rizzo, *Can Dictators and Enemy Generals Obtain Birthright Citizenship for their Children?*, The Washington Post (November 12, 2018), [https://www.washingtonpost.com/politics/2018/11/12/can-dictators-enemy-generals-get-birthright-citizenship-their-kids/?noredirect=on&utm\\_term=.bf9e696f389c](https://www.washingtonpost.com/politics/2018/11/12/can-dictators-enemy-generals-get-birthright-citizenship-their-kids/?noredirect=on&utm_term=.bf9e696f389c).

<sup>15</sup> *Id.* at 693; *see infra* note 24 for further explanation of the exception for children of members of Indian tribes.

<sup>16</sup> John Wagner, Josh Dawsey and Felecia Sonmez, *Trump Vows Executive Order to End Birthright Citizenship, a Move Most Legal Experts say Would Run Afoul of the Constitution*, The Washington Post (Oct. 30, 2018), [https://www.washingtonpost.com/politics/trump-eyeing-executive-order-to-end-citizenship-for-children-of-noncitizens-born-on-us-soil/2018/10/30/66892050-dc29-11e8-b3f0-62607289efee\\_story.html?noredirect=on&utm\\_term=.471dfa6b615a](https://www.washingtonpost.com/politics/trump-eyeing-executive-order-to-end-citizenship-for-children-of-noncitizens-born-on-us-soil/2018/10/30/66892050-dc29-11e8-b3f0-62607289efee_story.html?noredirect=on&utm_term=.471dfa6b615a).

<sup>17</sup> *Wong Kim Ark*, 169 U.S. at 687.

<sup>18</sup> *Plyler v. Doe*, 457 U.S. 202, 212 n.10 (1982).

<sup>19</sup> *Elk v. Wilkins*, 112 U.S. 94 (1884).

plaintiff John Elk brought suit against the registrar of one of the wards of the city of Omaha, Nebraska, for refusing to register him as a qualified voter.<sup>20</sup> Elk contended that he had severed his tribal relation to the Indian tribes and had “fully and completely surrendered himself to the jurisdiction of the United States.”<sup>21</sup> Therefore, Elk averred that, pursuant to the Fourteenth Amendment, he was entitled to the right and privilege of citizens of the United States.<sup>22</sup> The Court rejected Elk’s contention, however, noting “although in a geographical sense born in the United States,” Indians “are no more ‘born in the United States and subject to the jurisdiction thereof,’ ... than the children... born within the United States, of ambassadors or other public ministers of foreign nations.”<sup>23</sup> Thus, proponents’ reliance on Elk is misplaced. Elk, decided fourteen years before Wong, merely recognized one of the exceptions explicitly carved out by the Court in Wong – namely, that birthright citizenship does not apply to children of members of Indian tribes.<sup>24</sup> Elk does not support the idea that all children of non-citizens are not entitled to the privilege of birthright citizenship, as proponents of President Trump’s executive order suggest.

The law surrounding the interpretation of the Fourteenth Amendment, which states “[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,” is well-settled.<sup>25</sup> Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, unless one of the three exceptions articulated by the Court in Wong apply.<sup>26</sup> Given that those exceptions consider more than citizenship alone and only apply to children of non-citizens born in particular circumstances, President Trump’s attack on the Fourteenth Amendment’s guarantee of birthright citizenship is unlikely to succeed.

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 102.

<sup>24</sup> Elk, 112 U.S. at 102 (noting that Indians born within the territorial limits of the United States “although in a geographical sense born in the United States, are no more ‘born in the United States and subject to the jurisdiction thereof,’” than the children of ambassadors or other public ministers of foreign nations); Wong Kim Ark, 169 U.S. at 693.

<sup>25</sup> U.S. Const. amend. XIV, § 1.

<sup>26</sup> Wong Kim Ark, 169 U.S. at 702..

## Conclusion

If President Trump moves forward with his plan to eliminate birthright citizenship for children of non-citizens, opponents will almost certainly mount a legal challenge. If so, it is highly likely that courts will conclude that the Constitutional guarantee of birthright citizenship to those born on U.S. soil applies to children of legal and illegal immigrants – citizens and non-citizens – alike. To hold otherwise would run afoul of the plain text of the Constitution and settled Supreme Court precedent. Thus, while the President may move to attack birthright citizenship, the judiciary should uphold this long-standing path to citizenship.

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