



The Citizenship Clause and “Birthright Citizenship”: A Brief Legal Overview

November 1, 2018

President Trump indicated in a recent [interview](#) that he plans to issue an executive order that will limit recognition of birthright citizenship to exclude the children of certain aliens, including presumably [unlawfully present](#) aliens. Absent a concrete proposal from the Trump Administration, CRS cannot analyze the idea in detail. However, the issue of birthright citizenship has come into [public focus](#) and is likely to be of interest to Congress going forward.

Under federal law, nearly all people born in the United States become citizens at birth. This rule is known as “birthright citizenship,” and it derives from both the Constitution and complementary statutes and regulations. The Citizenship Clause of the [Fourteenth Amendment](#) states 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.” The Immigration and Nationality Act (INA), in turn, declares certain persons to be U.S. citizens and nationals at birth. [INA § 301\(a\)](#) more or less tracks the Citizenship Clause in stating that “a person born in the United States, and subject to the jurisdiction thereof” is a “national[] and citizen[] of the United States at birth.” (The INA also extends citizenship at birth to various persons not protected by the Citizenship Clause, such as those born abroad to some U.S. citizen parents.) Federal regulations—including those that govern the issuance of [passports](#) and access to certain [benefits](#)—implement the INA by providing that a person is a U.S. citizen if he or she was born in the United States, so long as the parent was not a “[foreign diplomatic officer](#)” at the time of the birth.

Any executive proposal to restrict birthright citizenship would probably take the approach of interpreting INA § 301(a) to mean that the children of certain aliens are not “subject to the jurisdiction” of the United States and therefore do not acquire citizenship by virtue of birth on U.S. soil. A [bill](#) introduced in the House in the current Congress, like [other legislative proposals](#) from previous Congresses, would take a similar approach to defining the “subject to the jurisdiction” language in the Fourteenth Amendment. Following the President’s statements, at least one Member of the Senate has [announced plans](#) to propose legislation “along the same lines as the proposed executive order.”

The weight of current legal authority suggests that these executive and legislative proposals to restrict birthright citizenship would contravene the Citizenship Clause. At least since the Supreme Court’s decision in the 1898 case [United States v. Wong Kim Ark](#), the prevailing view has been that all persons born in the United States are constitutionally guaranteed citizenship at birth unless their parents are

Congressional Research Service

<https://crsreports.congress.gov>

LSB10214

foreign diplomats, members of occupying foreign forces, or members of Indian tribes. In *Wong Kim Ark*, the Court held that a man born in the United States in 1873 to parents who were Chinese nationals acquired citizenship at birth under the Fourteenth Amendment. The parents were ineligible to naturalize under the law of the time, but they had established “permanent domicil and residence in the United States.” The Court reasoned that the Citizenship Clause should be “interpret[ed] in light of the common law” and grounded its holding in the common law principle of *jus soli* or “right of the soil.” Pursuant to that principle, “every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born.” The Court interpreted the “subject to the jurisdiction thereof” requirement in the Citizenship Clause to mean that the federal government could deny citizenship to people born on U.S. soil who fell within these two narrow, common law exceptions.

The Court also acknowledged that, under the 1884 case *Elk v. Wilkins*, the federal government could also exclude members of Indian tribes from birthright citizenship. *Elk* held that “Indians born within the territorial limits of the United States” were not “born in the United States and subject to the jurisdiction thereof” under the Citizenship Clause because they “ow[ed] immediate allegiance” to their tribe. Construing this holding, the *Wong Kim Ark* Court reasoned that it reflected the tribes’ “peculiar relation to the national government, unknown to the common law.” The *Wong Kim Ark* Court thus concluded that the *Elk* holding “had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country.” (Congress extended birthright citizenship to Native Americans in the [Indian Citizenship Act](#) of 1924. Current law [provides](#) that “a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe” acquires citizenship at birth.)

Outside of the narrow exceptions it recognized, the *Wong Kim Ark* Court reasoned that the guarantee of the Citizenship Clause “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.” “To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries,” the Court concluded, “would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.” Accordingly, the Court held that Wong Kim Ark had acquired citizenship at birth despite his parents’ alienage and despite the bar on their naturalization.

Wong Kim Ark predates the modern era of immigration law. Wong Kim Ark was born in 1873, two years before Congress enacted what are often regarded as the first generally applicable federal restrictions on voluntary immigration in the [Page Act of 1875](#). That law barred the entry of some convicts and prostitutes. The [first Chinese Exclusion Act](#) followed in 1882 and barred the entry of “Chinese laborers.” Congress enacted the [first numerical restrictions](#) on immigration to the United States in 1921 and the [original version](#) of the INA in 1952. As such, *Wong Kim Ark* does not plainly address whether the Citizenship Clause prohibits the denial of birthright citizenship to the children of alien parents who are unlawfully present or who, while permitted to be in the United States on a temporary basis (e.g., for business or tourism purposes), lack lawful permanent resident status under the INA.

Yet *Wong Kim Ark* clearly interprets the “subject to the jurisdiction” requirement to allow the federal government to carve out only the narrow exceptions discussed above to the general rule of birthright citizenship. Because none of these exceptions permits the denial of birthright citizenship based on the alienage of parents who are not diplomats, the case is [most often interpreted](#) as barring the federal government from accomplishing such denial through any means other than a constitutional amendment.

Since *Wong Kim Ark*, the Supreme Court has not made any further holdings on the extent to which Congress or the Executive may deny citizenship to a person born in the United States based on the alienage of his or her parents. The reasoning in one significant twentieth century decision, however,

arguably bears on the issue. In the 1983 case *Plyler v. Doe*, the Court held that the [Equal Protection Clause](#) of the Fourteenth Amendment prohibits states from denying free public education to children on account of their unlawful presence in the United States. The Equal Protection Clause, which appears at the end of the sentence that follows the Citizenship Clause in the Fourteenth Amendment, provides that a state shall not “deny to any person within its jurisdiction the equal protection of the laws.” The Court reasoned that unlawfully present children are “within [the] jurisdiction” of a state for equal protection purposes so long as the children are “within the State’s territorial perimeter” and “subject to the laws” of the state. The case did not concern citizenship, but it cited *Wong Kim Ark* for the proposition that the term “jurisdiction” when used in the Fourteenth Amendment has a “predominantly geographic sense.” The *Plyler* Court also cited a 1912 treatise for the proposition 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.”

Some legal scholars take the position that it would not violate the Fourteenth Amendment to deny birthright citizenship to the children of certain aliens. They express [various views](#) that, in general, rest on the argument that the term “jurisdiction” in the Citizenship Clause means a “[more complete, allegiance-obliging jurisdiction](#)” than the concept of territorial jurisdiction to which the Supreme Court adhered in *Wong Kim Ark* and *Plyler*. Under this more restrictive interpretation of the jurisdiction requirement, children born to some alien parents are not “subject to the jurisdiction” of the United States because (according to these scholars) the alien parents [do not owe allegiance](#) to the United States. These scholars tend to regard *Wong Kim Ark* as wrongly decided. They also tend to argue, however, that because the Chinese parents in that case were permanent residents, the case could be interpreted narrowly to mean only that the Citizenship Clause protects the birthright citizenship of the children of lawfully present permanent residents, as opposed to unlawfully present aliens or nonimmigrant aliens not “domiciled” in the United States.

In light of *Wong Kim Ark* and *Plyler*, Supreme Court precedent does not favor the more restrictive interpretation of the “subject to the jurisdiction” requirement, which is commonly regarded as a “[minority view](#).” Nonetheless, 1) the Supreme Court has yet to decide how the Citizenship Clause applies to the children of aliens who lack lawful permanent resident status under the INA, and 2) the primary authority on how the clause applies to people with non-citizen parents is 120 years old. Thus, while extant legal authority indicates that neither Congress nor the Executive may deny recognition of birthright citizenship based on the immigration status of a person’s parents, the Supreme Court has not firmly settled the issue in the modern era.

Author Information

Ben Harrington
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.