The True Meaning of the Fourteenth Amendment's Citizenship Clause

Testimony of

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By John C. Eastman[1]

Good afternoon, Subcommittee Chairman Gowdy, Ranking Member Lofgren and other Members of the Subcommittee. I am delighted to be with you today as you take up once again what I consider to be an extremely important inquiry with profound consequences for our very notion of citizenship and sovereignty. As a few of the longer-serving members of this Committee may recall, I testified before this Committee back in 2005 at a hearing entitled "Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty." The Supreme Court had just recently decided the case of Yaser Esam Hamdi, an enemy combatant who had been captured fighting for the Taliban against U.S. forces in Afghanistan and ultimately transferred to the detention facility at the U.S. Naval Base in Guantanamo Bay, Cuba.[2] When U.S. military officials discovered that Hamdi had been born in Baton Rouge, Louisiana, they began treating him as a U.S. citizen as a result of that birth on U.S. soil even those his parents were both subjects of the Kingdom of Saudi Arabia at the time, residing only temporarily in Louisiana while his father held a temporary visa to work as a chemical engineer on a project for Exxon.[3]

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[2] Brief of the United States, *Hamdi v. Rumsfeld*, at 6-7.

[3] *See* Certificate of Live Birth, Birth No. 117-1980-058-00393, on file in the Vital Records Registry of the State of Louisiana and available at http://news.findlaw.com/cnn/docs/terrorism/hamdi92680birthc.pdf (last visited March 20, 2003); Frances Stead Sellers, *A Citizen on Paper Has No Weight*, Wash. Post B1 (Jan. 19, 2003).

The Supreme Court's holding in the case did not address whether Hamdi was actually a citizen[4]—Justices Scalia and Stevens even referred to him as merely a "presumed citizen"[5]—and the Court has never actually *held* that anyone who happens to make it to U.S. soil can unilaterally bestow U.S. citizenship on their children merely by giving birth here. Although such an understanding of the Fourteenth Amendment has become widespread in recent years, it is not the understanding of those who drafted the Fourteenth Amendment, or of those who ratified it, or of the leading constitutional commentators of the time. Neither was it the understanding of the Supreme Court when the Court first considered the matter in 1872, or when it considered the matter a second time a decade later in 1884, or even when it considered the matter a third time fifteen years after that in the decision many erroneously view as interpreting the Fourteenth Amendment to mandate automatic citizenship for anyone and everyone born on U.S. soil, whether their parents were here permanently or only temporarily, legally or illegally, or might even be here as enemy combatants seeking to commit acts of terrorism against the United States and its citizens.

As I describe more fully below, the modern view ignores—or misunderstands—a key phrase in the Citizenship Clause, which sets out two criteria for automatic citizenship rather than just one. Mere birth on U.S. soil is not enough. A person must be both "born or naturalized in the United States" *and* "subject to its jurisdiction" in order to be granted

[4] Rather, in an opinion by Justice O'Connor, the Court held that Hamdi had a right to challenge the factual basis for his classification and detention as an enemy combatant. *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 2635 (2004). As the Supreme Court later made clear, that right did not turn on whether or not Hamdi was a citizen, for the Due Process clause applies not just to citizens but to all "persons." *See Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that other combatants who were clearly not citizens could bring a habeas petition because that provision, like the Due Process Clause of the Fifth Amendment, applied to all "persons" and not just citizens).

[5] *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 2660 (2004) (Scalia, J., dissenting).

automatic citizenship. Congress remains free to offer citizenship more broadly than that, of course, pursuant to its plenary power over naturalization granted in Article I, Section 8 of the Constitution, but it has done so. Current law merely parrots the "birth" and "subject to the jurisdiction" requirements that are the floor for automatic citizenship already set by the Constitution.

With the ever-increasing waves of illegal immigration into this country undermining the policy judgments Congress has made about the extent of immigration that should be allowed, it is particularly important to get the birthright citizenship issue right, as the mistaken notion about it has provided a powerful magnet for illegal immigration for far too long. Worse, it has encouraged a trade in human trafficking that has placed at great risk millions of men, women, and children who have succumbed to the false siren's song of birthright citizenship. I am therefore heartened that this Committee is giving serious thought once again to correcting the misinterpretation of this important provision of our Constitution.

I. The Citizenship Clause of the Fourteenth Amendment

To counteract the Supreme Court's decision in *Dred Scott v. Sanford* [6] denying citizenship not just to Dred Scott, a slave, but to all African-Americans, whether slave or free, the Congress proposed and the states ratified the Citizenship Clause of the Fourteenth Amendment, which specifies: "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."[7] It is today routinely believed that, under the Clause, mere birth on U.S. soil is sufficient to confer U.S. citizenship. Legal commentator Michael

[6] 60 U.S. 393 (1857).

[7] U.S. Const. Amend. XIV, § 1.

Dorf, for example, noted some years back that "Yaser Esam Hamdi was born in Louisiana. Under Section One of the Fourteenth Amendment, he is *therefore* a citizen of the United States, even though he spent most of his life outside this country."[8] What Dorf's formulation omits, of course, is the other component of the Citizenship Clause. One must also be "subject to the jurisdiction" of the United States in order constitutionally to be entitled to citizenship.

To the modern ear, Dorf's formulation nevertheless appears perfectly sensible. Any person entering the territory of the United States—even for a short visit; even illegally—is considered to have subjected himself to the jurisdiction of the United States, which is to say, subjected himself to the laws of the United States. Indeed, former Attorney General William Barr has even contended that one who has never entered the territory of the United States subjects himself to its jurisdiction and laws by taking actions that have an effect in the United States.[9] Surely one who is actually born in the United States is therefore "subject to the jurisdiction" of the Unites States, and entitled to full citizenship as a result.

However strong this interpretation is as a matter of contemporary common parlance, is simply does not comport with either the text or the history surrounding adoption of the Citizenship Clause, or with the political theory underlying the Clause.

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[8] Michael C. Dorf, *Who Decides Whether Yaser Hamdi, Or Any Other Citizen, Is An Enemy Combatant?* FindLaw (Aug. 21, 2002) (emphasis added).

[9] *See, e.g.*, The Legality as a Matter of Domestic Law of Extraterritorial Law Enforcement Activities that Depart from International law: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 3 (1989) (statement of William Barr, U.S. Assistant Attorney General); William J. Tuttle, *The Return of Timberlane? The Fifth Circuit Signals a Return to Restrictive Notions of Extraterritorial Antitrust*, 36 Vanderbilt J. Transnat'l L. 319, 348 (Jan. 2003) (noting that in April 1992 then-Attorney General William Barr revised Department of Justice antitrust enforcement guidelines to permit lawsuits against foreign corporations who acted exclusively outside the United States if their operations were detrimental to U.S. exporters); *see also United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

Textually, such an interpretation would render the entire "subject to the jurisdiction" clause redundant—anyone who is "born" in the United States is, under this interpretation, necessarily "subject to the jurisdiction" of the United States—and it is a well-established doctrine of legal interpretation that legal texts, including the Constitution, are not to be interpreted to create redundancy unless any other interpretation would lead to absurd results.[10]

A. The 1866 Civil Rights Act, Which the 14th Amendment Was Intended to Codify, Clearly Limits Automatic Citizenship to Those "Not Subject to Any Foreign Power."

Historically, the language of the 1866 Civil Rights Act, from which the Citizenship Clause of the Fourteenth Amendment (like the rest of Section 1 of the Fourteenth Amendment) was derived so as to provide a more certain constitutional foundation for the 1866 Act, strongly suggests that Congress did *not* intend to provide for such a broad and absolute birthright citizenship. The 1866 Act provides: "All persons born in the United States, *and not subject to any foreign power*, excluding Indians not taxed, are hereby declared to be citizens of the United States."[11] As this formulation makes clear, any child born on U.S. soil to parents who were temporary visitors to this country and who, as a result of the foreign citizenship of the child's parents, remained a

[10] *See, e.g.*, Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case. W. Res. L. Rev. 179 (1989); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 562 (1995) ("this Court will avoid a reading which renders some words altogether redundant"). Some have argued that the "subject to the jurisdiction" clause serves to exclude foreign diplomats from the reach of the citizenship clause, and is therefore not entirely redundant with the "birth" clause. Quite apart from the fact that there is not a shred of evidence in the legislative or ratification history to support such a purpose, the explanation does not work. Because of the diplomatic fiction of "extraterritoriality" that an ambassador is the sovereign presence of his home nation even while in the United States, the ambassador's children are not "born . . . in the United States," and the "subject to the jurisdiction" clause, therefore, does not provide any additional limtiation.

[11] Chapter 31, 14 Stat. 27 (April 9, 1866).

citizen or subject of the parents' home country, was not entitled to claim the birthright citizenship provided in the 1866 Act.

B. Despite its Slightly Different Phrasing, the Fourteenth Amendment Codified the Citizenship Language of the 1866 Act.

The Fourteenth Amendment was specifically designed to codify the provisions of the 1866 Civil Rights Act and to place that act beyond the ability of a future Congress to repeal. Nevertheless, because the jurisdiction clause of the Fourteenth Amendment is phrased somewhat differently than the jurisdiction clause of the 1866 Act, some have asserted that the difference dramatically broadened the guarantee of automatic citizenship contained in the 1866 Act. The positively-phrased "subject to the jurisdiction" of the United States might easily have been intended to describe a broader grant of citizenship than the negatively-phrased language from the 1866 Act, the argument goes, one more in line with the contemporary understanding accepted unquestioningly by Dorf that birth on U.S. soil is alone sufficient for citizenship. But the relatively sparse debate we have regarding this provision of the Fourteenth Amendment does not support such a reading. When pressed about whether Indians living on reservations would be covered by the clause since they were "most clearly subject to our jurisdiction, both civil and military," for example, Senator Lyman Trumbull, a key figure in the drafting and adoption of the Fourteenth Amendment, responded that "subject to the jurisdiction" of the United States meant subject to its "complete" jurisdiction; "[n]ot owing allegiance to anybody else." And Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of the Senate, contended that it should be construed to mean "a full and complete jurisdiction," "the same jurisdiction in extent and quality as applies to every citizen of the United States now" (i.e., under the 1866 Act). That meant that the children of Indians

who still "belong[ed] to a tribal relation" and hence owed allegiance to another sovereign (however dependent the sovereign was) would not qualify for citizenship under the clause. The switch from the "not subject to any foreign power" clause of the 1866 Act to the "subject to the jurisdiction" clause of the 14th Amendment simply avoided the concern that the Indian tribes might be deemed within rather than without the grant of automatic citizenship because they were "domestic" rather than "foreign" sovereign powers. Because of this interpretative gloss, provided by the authors of the provision, an amendment offered by Senator James Doolittle of Wisconsin to explicitly exclude "Indians not taxed," as the 1866 Act had done, was rejected as redundant.[12]

There is other evidence in the legislative history as well. During the debate over the 1866 Act, for example, Edgar Cowan, a one-term Senator from Pennsylvania, claimed disparagingly that the bill would "have the effect of naturalizing the children of Chinese and Gypsies born in this country." Senator Trumbull, the bill's lead manager, answered "Undoubtedly." But when Senator Cowan elaborated on the point during debate over the Fourteenth Amendment, it became clear that he was speaking about people who were mere "sojourners" to the United States, here only temporarily and without any obligation of allegiance to the United States, and he would not support an amendment that he mistakenly believed treated as citizens the children born on U.S. soil to such individuals. The response from Senator Conness of California was telling, for he claimed that Senator Cowan's concerns had no relevance "to the first section of the constitutional amendment before us," namely, the Citizenship Clause. Senator Cowan's concerns had no relevance because the Citizenship Clause was not understood by those who drafted it and those who

[12] Congressional Globe, 39th Cong., 1st Sess., 2892-97 (May 30, 1866). For a more thorough discussion of the debate, see Peter H. Schuck and Rogers M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity 72-89 (Yale Univ. Press 1985).

voted for it to cover people only subject to the *territorial* jurisdiction of the United States by virtue of (and only so long as) their temporary presence within the borders of the United States.

Indeed, as Senator Howard repeatedly pointed out, the proposed amendment would "not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons."[13] It was limited, as Senator Trumbull pointed out several times, to those who were subject to the "complete jurisdiction" of the United States, not merely a temporary and partial jurisdiction. And in response to a concern raised by Senator Johnson that the courts might erroneously interpret the "subject to the jurisdiction clause" to cover Indians because they were subject to our laws—that is, subject to our territorial jurisdiction—Senator Trumbull responded that Indians were not covered ("except in reference to those who are incorporated into the United States as some are, and are taxable and become citizens," as he noted during the 1866 Act debate[14]) because "they are not subject to our jurisdiction in the sense of owing allegiance solely to the United States." In other words, mere presence on U.S. soil was not enough; that subjected one only to the territorial jurisdiction of our laws, but it did not make one subject to the "complete jurisdiction, the

[13] Cong. Globe, at 2890 (May 30, 1866). Particularly noteworthy is the fact that, in this discussion, Senator Howard said that the Citizenship Clause would exclude not just the families of ambassadors but others who are "foreigners, aliens" as well—in other words, anyone who retained their allegiance to a foreign sovereign. That distinction, though perhaps not perfectly clear from the passage quoted above, becomes undeniable when considered in light of Senator Howard's very next comment, in response to a proposed amendment to exclude "Indians not taxed." "Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born "subject to the jurisdiction of the United States," he said. Instead, [t]hey are regarded, and always have been in our legislation and jurisprudence, as being *quasi* foreign nations." *Id.*

[14] Cong. Globe, at 498 (Jan. 30, 1866).

allegiance-owing jurisdiction that the drafters of the clause intended. Think of it this way: foreign tourists visiting the United States subject themselves to the laws of the United States while here. An Englishman must drive on the right side of the road rather than the left, for example, when visiting here. But they do not owe allegiance to the United States, they do not get to exercise any part of the political power of the United States, and they cannot be tried for treason if they take up arms against the United States. They are subject only to the partial, territorial jurisdiction while here, but not to the broader jurisdiction that would follow them beyond the borders, the more complete jurisdiction intended by the Fourteenth Amendment.

C. The Ratification Debates Confirm that the Citizenship Clause Did Not Cover Those Who Were Subject to a Foreign Power.

Of course, the statements of those who drafted the language of the Fourteenth Amendment and those who voted in Congress to propose it to the States does not necessarily reflect what the amendment's language meant to those who ratified it, and it is the latter who actually give the amendment its binding constitutional authority. But what little evidence we have from the ratification debates in the States confirms rather than detracts from the understanding of the clause discussed above.

Reports about the debates in the Louisiana legislature over ratification of the Fourteenth Amendment that were published in the New Orleans Tribune, for example, confirm the general understanding. On June 18, 1866, for example, the paper reported that the proposed amendment's Citizenship Clause meant the same thing as the language in the 1866 Act: "This [language] is the reiteration of the declaration in the Civil Rights Bill that every person born in the United States and not subject of a foreign power is an American citizen," the paper reported. This followed its earlier report of January 9, 1866,

that the amendment which had been proposed provided for equal privileges for all naturalized citizens and "among persons born on its soil of parents permanently resident there."

The same understanding of the language's meaning was expressed over in Alabama, both by those who supported and those who opposed ratification. The Clark County Journal reported on May 10, 1866, for example, that "Section 1 [of the Fourteenth Amendment] reaffirms the Civil Rights Act and incorporates it into the Constitution." On the other side of the ratification fight, the Union Springs Times reported that Section 1 "legitimized" the "bastard" Civil Rights Act.

D. The Supreme Court Adopts The Allegiance Understanding.

The interpretative gloss offered by Senators Trumbull and Howard was also accepted by the Supreme Court—by both the majority and the dissenting justices—in *The Slaughter-House Cases*. The majority correctly noted that the "main purpose" of the Clause "was to establish the citizenship of the negro." It added that "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, *and* citizens or subjects of foreign States born within the United States,"[15] thereby rejecting the claim advanced by some recent scholars, discussed above, that "subject to the jurisdiction" only excluded the children of diplomats. Justice Steven Field, joined by Chief Justice Chase and Justices Swayne and Bradley in dissent from the principal holding of the case, likewise acknowledged that the Clause was designed to remove any doubts about the constitutionality of the 1866 Civil Rights Act, which provided that all persons born in the United States were as a result citizens both of the

[15] 83 U.S. (16 Wall.) 36, 73 (1872).

United States and the state in which they resided, provided they were not at the time subjects of any foreign power.[16]

Although the statement by the majority in *Slaughter-House* was *dicta*, the position regarding the "subject to the jurisdiction" language advanced there was subsequently adopted by the Supreme Court in the 1884 case addressing a claim of Indian citizenship, *Elk v. Wilkins*.[17] The Supreme Court in that case rejected the claim by an Indian who had been born on a reservation and subsequently moved to non-reservation U.S. territory, renouncing his former tribal allegiance. The Court held that the claimant was not "subject to the jurisdiction" of the United States at birth, which required that he be "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance."[18] John Elk did not meet the jurisdictional test because, as a member of an Indian tribe at his birth, he "owed immediate allegiance to" his tribe and not to the United States. Although "Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states," "they were alien nations, distinct political communities," according to the Court.[19] Drawing explicitly on the language of the 1866 Civil Rights Act, the Court continued:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign

[16] *Id*. at 92-93.

[17] 112 U.S. 94 (1884).

[18] *Id*. at 102.

[19] *Id*. at 99.

> government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.[20]

Indeed, if anything, Indians, as members of tribes that were themselves dependent to the United States (and hence themselves subject to its jurisdiction), had a stronger claim to citizenship under the Fourteenth Amendment merely by virtue of their birth within the territorial jurisdiction of the United States than did children of foreign nationals. But the Court in *Elk* rejected that claim, and in the process necessarily rejected the claim that the phrase, "subject to the jurisdiction" of the United States, meant merely territorial jurisdiction as opposed to complete, political jurisdiction.

Such was the interpretation of the Citizenship Clause initially given by the Supreme Court. As Thomas Cooley noted in his treatise, The General Principles of Constitutional Law in America, "subject to the jurisdiction" of the United States "meant full and complete jurisdiction to which citizens are generally subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government."

II. The Supreme Court's *Holding* in the 1898 *Wong Kim Ark* Case is Limited to Lawful, Permanent Residents; Its Broader *Dicta* is Erroneous and has Never Been Adopted by the Court.

The Supreme Court next confronted the Citizenship Clause in 1898, in the case of *United States v. Wong Kim Ark.*[21] Here, I must confess that the actual holding of the case (as opposed to its dicta) is a much closer call than I believed when I testified before this Committee back in 2005. Wong Kim Ark was a citizen, the Court held, because he was "born in the United States, of parents of Chinese descent, who at the time of his birth

[20] *Id*. at 102.

[21] 169 U.S. 649 (1898).

were subjects of the emperor of China, but have a permanent domicile and residence in the United States." I had previously focused on the Court's description of Wong Kim Ark's parents as being "subjects of the emperor of China," which should, standing alone, have placed Wong Kim Ark outside the scope of the automatic citizenship guaranteed by the Fourteenth Amendment because he would have been, through them, "subject to the jurisdiction" of another power. But I have come to appreciate that the issue was more complicated than that. Not only were Wong Kim Ark's parents lawful, permanent residents in the United States, but they were also "domiciled" in the United States, a legal term of art that conveys more than mere temporary residence but a fixed and permanent home. Moreover, they had not taken more formal steps to demonstrate allegiance to the United States (by becoming citizens, for example, and renouncing their former allegiance) because a U.S. treaty with the emperor of China foreclosed that possibility. In other words, Wong Kim Ark's parents had become as subject to the complete jurisdiction of the United States (and not just the territorial jurisdiction) as we had allowed. Under those circumstances, it is not a surprise that the Supreme Court held that Wong Kim Ark was a citizen because he had been born on U.S. soil to parents who were lawfully and permanently "domiciled" here. But that is the limit of the actual holding in the case.

To be sure, Justice Horace Gray, writing for the Court, spoke more broadly, and it is that *obiter dictum* that has erroneously come to be viewed in recent years as having established that birth on U.S. soil alone is sufficient for automatic citizenship, no matter the circumstances. After correctly noted that the language to the contrary in *The*

Slaughter-House Cases was merely dicta and therefore not binding precedent,[22] Justice Gray made several errors in his own *dicta*. He found the *Slaughter-House* dicta unpersuasive, for example, because of a subsequent decision holding that foreign consuls (unlike ambassadors) were "subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside,"[23] thereby demonstrating confusion about the critical distinction between partial, territorial jurisdiction, which subjects all who are present within the territory of a sovereign to the jurisdiction of its laws, and complete, political jurisdiction, which requires as well allegiance to the sovereign.

More troubling than his rejection of the persuasive *dicta* from *Slaugher-House* was the fact that Justice Gray also repudiated the actual holding in *Elk v. Wilkins*, which he himself had authored. After quoting extensively from the opinion, including the portion, reprinted above, noting that the children of Indians owing allegiance to an Indian tribe were no more "subject to the jurisdiction" of the United States within the meaning of the Fourteenth Amendment than were the children of ambassadors and other public ministers of foreign nations born in the United States, Justice Gray simply claimed, without any analysis, that *Elk* "concerned only members of the Indian tribes within the United States, and 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."[24]

By limiting the "subject to the jurisdiction" clause to the children of diplomats, who neither owed allegiance to the United States nor were (at least at the ambassadorial

[22] 169 U.S. at 678.

[23] *Id*. at 679 (citing, e.g., 1 Kent, Comm. 44; *In re Baiz*, 135 U.S. 403, 424 (1890)).

[24] *Id*. at 681-82.

level) subject to its laws merely by virtue of their residence in the United States as the result of the long-established international law fiction of extraterritoriality by which the sovereignty of a diplomat is said to follow him wherever he goes, Justice Gray simply failed to appreciate what he seemed to have understood in *Elk*, namely, that there is a difference between territorial jurisdiction and the more complete, allegiance-obliging jurisdiction that the Fourteenth Amendment codified.

Justice Gray's failure even to address, much less appreciate, the distinction between territorial jurisdiction and complete, political jurisdiction was taken to task by Justice Fuller, joined by Justice Harlan, in dissent. Drawing on an impressive array of legal scholars, from Vattel to Blackstone, Justice Fuller correctly noted that there was a distinction between two sorts of allegiance—"the one, natural and perpetual; the other, local and temporary." The Citizenship Clause of the Fourteenth Amendment referred only to the former, he contended. He contended that the absolute birthright citizenship urged by Justice Gray was really a lingering vestige of a feudalism that the Americans had rejected, implicitly at the time of the Revolution, and explicitly with the 1866 Civil Rights Act and the Fourteenth Amendment.

Quite apart from the fact that Justice Fuller's dissent was logically compelled by the text and history of the Citizenship Clause, Justice Gray's broad interpretation led him to make some astoundingly incorrect assertions. He claimed, for example, that "a stranger born, for so long as he continues within the dominions of a foreign government, owes obedience to the laws of that government, *and may be punished for treason*."[25] That is simply not true, as allegiance to the sovereign is a necessary prerequisite for a charge

[25] *Id.* at 693.

of treason.[26] Justice Gray also had to recognize dual citizenship as a necessary implication of his position,[27] despite the fact that, ever since the Naturalization Act of 1795, "applicants for naturalization were required to take, not simply an oath to support the constitution of the United States, but of absolute renunciation and abjuration of all allegiance and fidelity to every foreign prince or state, and particularly to the prince or state of which they were before the citizens or subjects."[28] That requirement still exists though it no longer seems to be taken seriously. Hopefully this Committee will, as a result of these hearings, begin to address that fundamental contradiction in our naturalization practice.

Finally, Justice Gray's broader *dicta* is simply at odds with the notion of consent that underlay the sovereign's power over naturalization. What it meant, fundamentally, was that foreign nationals could secure American citizenship for their children unilaterally, merely by giving birth on American soil, whether or not their arrival on America's shores was legal or illegal, temporary or permanent, with the consent of the United States or explicitly contrary to its consent.

Justice Gray believed that the children of only two classes of foreigners were not "subject to the jurisdiction" of the United States and therefore not entitled to the birthright citizenship he thought guaranteed by the Fourteenth Amendment. First, as noted above, were the children of ambassadors and other foreign diplomats who, as the result of the fiction of extraterritoriality, were not even considered subject to the

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[26] *See* 18 U.S.C.A. § 2381 ("Whoever, *owing allegiance to the United States*, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason") (emphasis added).

[27] *Id*. at 691.

[28] *Id*. at 711 (Fuller, J., dissenting) (citing Act of Jan. 29, 1795, 1 Stat. 414, c. 20)

territorial jurisdiction of the United States. Second were the children of invading armies born on U.S. soil while it was occupied by the foreign army. But apart from that, all children of foreign nationals who managed to be born on U.S. soil were, in his formulation, citizens of the United States. Children born of parents who had been offered permanent residence but were not yet citizens and who as a result had not yet renounced their allegiance to their prior sovereign would become citizens by birth on U.S. soil. This was true even if, as was the case in *Wong Kim Ark* itself, the parents were, by treaty, unable ever to become citizens.

Children of parents residing only temporarily in the United States on a work or student visa, such as Yaser Hamdi's parents, would also become U.S. citizens. Children of parents who had overstayed their temporary visa would also become U.S. citizens, even though born of parents who were now here illegally. And, perhaps most troubling from the "consent" rationale, children of parents who never were in the United States legally would also become citizens as the direct result of the illegal action by their parents. This would be true even if the parents were nationals of a regime at war with the United States and even if the parents were here to commit acts of sabotage against the United States, at least as long as the sabotage did not actually involve occupying a portion of the territory of the United States. The notion that the framers of the Fourteenth Amendment, when seeking to guarantee the right of citizenship to the former slaves, also sought to guarantee citizenship to the children of enemies of the United States who were in our territory illegally, is simply too absurd to be a credible interpretation of the Citizenship Clause.

III. Reviving Congress's Constitutional Power Over Naturalization

This is not to say that Congress could not, pursuant to its naturalization power, choose to grant citizenship to the children of foreign nationals. But thus far it has not done so. Instead, the language of the current naturalization statute simply tracks the minimum constitutional guarantee—anyone born in the United States, *and subject to its jurisdiction*, is a citizen. With the absurdity of Hamdi's claim of citizenship so recently and vividly before us, it is time for the courts, and for the political branches as well, to revisit Justice Gray's erroneous *dicta* purporting to interpret that language, and to restore to the constitutional mandate what its drafters actually intended, that only a complete jurisdiction, of the kind that brings with it a total and exclusive allegiance, is sufficient to qualify for the automatic grant of citizenship to which the people of the United States actually consented when they adopted the Fourteenth Amendment.

Of course, Congress has in analogous contexts been hesitant to exercise its own constitutional authority to interpret the Constitution in ways contrary to the pronouncements of the Courts. Even if that course is warranted in most situations so as to avoid a constitutional conflict with a co-equal branch of the government, it is not warranted here for at least two reasons. First, as the Supreme Court itself has repeatedly acknowledged, Congress's power over naturalization is "plenary," while "judicial power over immigration and naturalization is extremely limited."[29] While that recognition of plenary power does not permit Congress to dip below the constitutional floor, of course, it does counsel against any judicial interpretation that provides a broader grant of citizenship than is actually supported by the Constitution's text, history, and theory.

[29] *See, e.g.*, *Miller v. Albright*, 523 U.S. 420, 455 (1998); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 769-770 (1972); *Galvan v. Press*, 347 U.S. 522, 531 (1954).

Second, the gloss that has been placed on the *Wong Kim Ark* decision is actually much broader than the actual holding of the case. This Committee should therefore recommend, and Congress should then adopt, a narrow reading of the decision that does not intrude on the plenary power of Congress in this area any more than the actual holding of the case requires. Wong Kim Ark's parents were actually in this country both legally and permanently, yet were barred from ever pursuing citizenship (and renouncing their former allegiance) by a treaty that closed that door to all Chinese immigrants. They were therefore as fully subject to the jurisdiction of the United States as they were legally permitted to be, and under those circumstances, it is at least arguable that the Citizenship Clause extends birthright citizenship to their children. But the effort to read *Wong Kim Ark* more broadly than that, as interpreting the Citizenship Clause to confer birthright citizenship on the children of those *not* subject to the full and sovereign (as opposed to territorial) jurisdiction of the United States, not only ignores the text, history, and theory of the Citizenship Clause, but it permits the Court to intrude upon a plenary power assigned to Congress itself. Yaser Hamdi's case has highlighted for us all the dangers of recognizing unilateral claims of birthright citizenship by the children of people only temporarily visiting this country, and highlighted even more the dangers of recognizing such claims by the children of those who have arrived illegally to do us harm. It is time for Congress to reassert its plenary authority here, and make clear, by resolution, its view that the "subject to the jurisdiction" phrase of the Citizenship Clause has meaning of fundamental importance to the naturalization policy of the nation.

Because the promise of citizenship has become one of the three most significant magnets for illegal immigration to this country—which is to say, one of the three things

that most seriously undermines Congress's considered policy judgments about the level of immigration that can be sustained, it is extremely important that we get back to the correct understanding of what the Constitution actually requires, and especially what it does not require.

I understand that a bill has been introduced in the House that would do just that. It confirms that children born on U.S. soil to parents, at least one of whom is a U.S. "citizen or national," are "subject to the jurisdiction" as contemplated by the Fourteenth Amendment and therefore automatic citizens at birth. It recognizes the actual holding of *Wong Kim Ark* and deems children born on U.S. soil to "an alien admitted for permanent residence in the United States whose residence is in the United States" are likewise "subject to the jurisdiction" for purposes of the Fourteenth Amendment. And the bill adds an important additional category of children who are properly deemed automatic citizens at birth under this allegiance-owing understanding of the "subject to the jurisdiction" requirement, namely, the children of those serving in the armed forces of the United States who, by virtue of their service, have already taken an oath of allegiance to the United States.

As important as clarifying what the Fourteenth Amendment covers is clarifying what it does not cover, however. The bill currently does that only implicitly, in a provision that states the bill should not be construed to affect the citizenship or nationality status of anyone born before the effective date of the Act. With a slight addition, this provision can make explicit what is now only implicit, namely, that this retroactive grant of citizenship to people who were not "subject to the jurisdiction" of the United States at the time of their birth in the way that phrase is properly understood, is

made pursuant to Congress's plenary power over naturalization, not because of some perceived mandate of the Fourteenth Amendment.

I applaud this Committee's efforts in beginning the process to address this problem, and I look forward to working with you and the Committee's staff to help in your efforts to clarify an important constitutional requirement, the misinterpretation of which is beginning to have profound implications for the very idea of sovereignty.