Anchor Babies

The Case for Correction Through Legislation

by Congressman Brian Bilbray

In the debate surrrounding the strengthening of our immigration laws to reduce illegal immigration, citizenship is a pivotal concept. In March of 1995, I introduced the "Citizenship Reform Act" (H.R. 1363) which denies automatic citizenship to children born to illegal aliens on U.S. soil. The difference between my legislation and others pending before the House of Representatives is that H.R. 1363 makes these changes statutorily and does not makes the changes through a Constitutional Amendment.

The current interpretation of the law allows children of illegal alien parents born on U.S. soil to automatically be granted U.S. citizenship. It is my view that this is an insult to legal aliens, such as my mother, who observed our immigration laws and came to the U.S. through the proper channels. However, the most striking fact about this issue is that there is no basis in 1aw or Supreme Court rulings for the current interpretation. As I will explain further, the Fourteenth Amendment, and the debate surrounding it, is very clear in its assertion that "All persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are citizens of the United States." In addition, there has been no Supreme Court ruling on a case dealing with the children of illegal aliens.

Section 5 of the Fourteenth Amendment states that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Congress has employed this Constitutional power by enacting legislation which clarified the citizenship status of American Indians. After passage of the Fourteenth Amendment, Congress issued the "Act of July 15, 1870," in which a Winnebago Indian from Minnesota was permitted to apply for citizenship, with the condition that the Indian cease to be a member of the tribe, and his land be subject to taxation. The "Indian Territory Naturalization Act" of May 2, l890 broadened the earlier act by allowing any member of any Indian tribe or nation residing in Indian Territory to apply for citizenship. From 1854 until 1924, citizenship was a common government incentive to encourage the assimilation of *Indians.* Congress' authority to naturalize Indians has been sustained by the courts in the cases of *Elk v Wilkins* in l884 and *United States v Celestine* in 1909.

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Indians were perceived to owe allegiance to their tribe, and were therefore not under the "obedience" of the United States. Indians could only be granted U.S. citizenship by an act of Congress in which they had to renounce their allegiance to their tribe. Today, those persons that are in the United States illegally are clearly not "subject to the jurisdiction thereof" — that is: obedience to the federal government — as illustrated by the fact that they have chosen to violate our immigration laws. If illegal aliens have babies on U.S. soil they, according to precedent, must demonstrate obedience to our laws. This, as the historical record has demonstrated repeatedly in cases involving Indians, can be achieved only through

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acts of Congress. Indians were not considered automatic citizens; by the same logic, therefore, children of illegal aliens should not receive automatic citizenship.

In the Supreme Court case of the *United States v Wong Kim Ark*, the plaintiff, Mr. Ark, was born in San Francisco in 1873. His parents were legal immigrants from China and were "domiciled residents of the United States." The Court held that Mr. Ark was a citizen of the United States even though his parents owed allegiance to the Emperor of China.

This case was based on a fundamental principle of the British common law. Supreme Court Justice Gray discussed this principle in the Court's opinion

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— that "the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects, because [they were] not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the king." The *Wong Kim Ark* case was consistent in this regard with British common law.

However, the major distinction with this case was that Wong Kim Ark's parents had come to America legally. The Supreme Court has never ruled on the case of a child of someone who had come to America illegally. It has only ruled on the narrow factual case of children of legal immigrants.

That is the historical context. In the present, there is the very tangible question of cost to local counties and states that bear the burden of caring for the chldren of illegal aliens. The nearly 96,000 babies who were born to undocumented women covered by the Medi-Cal program in 1992 represented an 85 percent increase over three years. In 1992 alone, the cost to California taxpayers was more than $230 million in medical bills. In my county of San Diego, the county estimates that the total cost for undocumented immigrants, from 1992 to 1993, was over $64 million. These are costs that counties and states just simply cannot afford, especially when a large percentage of these costs is incurred outside the parameters of any true basis in law or Supreme Court ruling.

Let me be clear in one essential point. I do not blame young mothers for wanting the best health care possible for themselves and their babies, or wanting to give their children the option of a better life in America. It is by no fault of their own that the United States' failed immigration policies have resulted in their being encouraged to come into this country illegally. However, their plight or predicament does not give them a free pass to circumvent those who are trying to work within the system and come to America legally. By the same token, it is also not the fault nor the responsibility of the American taxpayer, who is paying for these costs through fewer benefits and higher taxes.

Although a number of my colleagues advocate a constitutional amendment to correct this interpretation of the law, it is my view that this would be superfluous. The fact that the Supreme Court has never ruled on this issue, coupled with the difficulty of passing an amendment to the Constitution, gives strength to my argument that we should implement this change statutorily. The Congress has demonstrated its authority to act under Section 5 of the Fourteenth Amendment by granting citizenship to American Indians. The Congress' elected status and our position as coequal branches of government gives our actions great weight in the Supreme Court. Therefore, it is under Congress' purview to define more clearly the intention of the framers of the Amendment as to who is and who is not a citizen of the United States. We should exercise this purview by amending the Immigration and Naturalization Act. Should this be found to be unconstitutional, then and only then would a Constitutional amendment be necessary. However, until such time, it is clearly and completely within the authority of the Congress of the United States to further define the citizenship laws of our great country. □