TESTIMONY OF

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BEFORE

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Committee on the Judiciary,
Subcommittee on the Constitution and Limited Government

ON

Subject to the Jurisdiction Thereof: Birthright Citizenship and the Fourteenth Amendment

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INTRODUCTION

Chairman Roy, Ranking Member Scanlon and Members of the Committee, it is a privilege to appear before you today and I thank you for the invitation.

My name is Matthew J. O'Brien. I am a former Immigration Judge, a former head of the National Security Division at U.S. Citizenship and Immigration Services (USCIS) and a former Assistant Chief Counsel with U.S. Immigration and Customs Enforcement (ICE). I have also worked as a private bar immigration attorney, including several years at Boston's Hale & Dorr (which is now Wilmer Hale). Altogether, I have approximately three decades of experience working in immigration law and policy. And my perspective is somewhat unique, in that I have acted as counsel to aliens seeking immigration benefits, in addition to serving as counsel to the United States.

In fact, I began my career in immigration with the old Immigration and Naturalization Service, as an Immigration Examiner working in the Naturalization Division. And birthright citizenship is an issue in which I have had a longstanding academic and professional interest.

Whether the child of a foreign national acquires citizenship merely through birth on American territory, or whether there are additional requirements, is a question of great significance for the United States. As you are well aware, as a matter of Constitutional law, the people of the United States *are* the government of the United States. Accordingly, rules concerning who becomes a U.S. citizen at birth quite literally determine who will govern the United States.

At present, those rules are not being applied according to the provisions of the Fourteenth Amendment and relevant legal precedent. Rather, they are being applied on the basis of folk myth, a misreading of the relevant Supreme Court opinions, and a profound misunderstanding of U.S. immigration history.

THE DEBATE OVER BIRTHRIGHT CITIZENSHIP

The Citizenship Clause of the Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. CONST. amend. XIV, § 1.

The 1898 case *United States v. Wong Kim Ark* is often read as standing for, and indeed establishing, the widespread view that anyone born on American soil, at least to parents who are not members of a foreign country's diplomatic delegation, part of an invading force, or Indians born in the allegiance of a tribe, enjoys birthright citizenship by virtue of this clause. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

At issue in Wong Kim Ark was whether a son born to Chinese subjects while they were lawfully residing in the United States was a citizen at birth by virtue of the Citizenship Clause. The Court held that he was. However, the import of that holding has been consistently and grossly overread in the roughly 127 years that have elapsed since the Court's ruling.

The common narrative describing what *Wong Kim Ark* means runs something like this: In that case, the Supreme Court decided that the Fourteenth Amendment confers citizenship on everyone born on American soil. Later, in *Plyler v. Doe*, 457 U.S. 202 (1982), Justice Brennan confirmed this holding stating 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."

There are, however, two fundamental problems with this narrative. First, in *Wong Kim Ark*, the Supreme court did not address whether children born of parents illegally present in the United States become "natural born" citizens of the United States. Indeed, the Supreme Could not have addressed the question of whether the children of illegal aliens become citizens by birth because in 1898, when the case was decided, there were few restrictions on immigration to the United States.

Pursuant to the *Immigration Act of 1882* (22 Stat. 214), only convicts, the insane and persons likely to become public charges were inadmissible. And pursuant to the *Chinese Exclusion Act* (22 Stat. 58) – which implemented a treaty with the Emperor of China – suspended the admission of Chinese nationals for ten years, while permitting those present in the U.S. as of November 17, 1880 to remain. Other than those falling within these limited grounds of inadmissibility, anyone who could pay the $0.50 admission tax could lawfully enter the United States and remain here. As such, there were few, if any, illegal aliens at the time and the concept of unlawful presence as we understand it today did not exist.

According to Yale Law School Professors Peter Schuck and Rogers Smith, "The question of the citizenship status of the native-born children of illegal aliens never arose [in *Wong Kim Ark*] for the simple reason that no illegal aliens existed at that time, or indeed for some time thereafter." Peter Schuck & Rogers Smith, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985).

The second problem with the standard narrative is that Justice Brennan's assertion in *Plyler v. Doe* is *obiter dicta* – a judge's incidental expression of opinion that is not essential to a decision and does not constitute part of the precedent established by a case. In Footnote 10, located at *Plyler*, 457 U.S. at 211, Justice Brennan expressed his personal opinion – based on a 1912 immigration law treatise, not case law or a statute – that illegal aliens must be treated the same as aliens lawfully present. He was not expressing the opinion of the Court on any issue essential to the resolution of the claims before it in *Plyler.*

In short, neither *Wong Kim Ark*, nor *Plyler*, had anything to do with whether the children of illegal aliens become U.S. citizens at birth. That question has not yet been addressed by the Supreme Court and there is little basis on which it may be argued that the holding in *Wong Kim Ark* would require a conclusion that the children of illegal aliens are entitled to citizenship upon being born within the confines of the United States.

WHAT DID THE COURT REALLY SAY IN *WONG KIM ARK?*

A careful reading of *Wong Kim Ark* reveals that the Supreme Court's holding was actually quite narrow. The case held only that:

> A child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil [*sic*] and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution. *Wong Kim Ark*, 169 U.S. at 649.

The Court's decision turned on the interpretation of two legal terms: "subject to the jurisdiction thereof" and "permission to reside."

The phrase "subject to the jurisdiction thereof," then, as used in the Citizenship Clause, refers not merely to being subject to the laws of the United States. Rather, it connotes being subject to the nation's political jurisdiction, and "owing it direct and immediate allegiance." *Wong Kim Ark*, 169 U.S. at 680 (citing *Elk v. Wilkins*, 112 U.S. 94, 101-102 (1884)). As the Court earlier had held, in a passage cited in the above holding of Wong Kim Ark:

> Chinese laborers, [] like all other aliens residing in the United States for a shorter or longer time, are entitled, *so long as they are permitted by the government of the United States to remain in the country*, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person of property, and to their civil and criminal responsibility. *Fong Yue Ting*, 149 U.S. at 724 (emphasis added).

"Reside" is defined in the 1890 edition of Webster's Dictionary as "to dwell permanently or for a considerable time; to have a settled abode for a time; to abide continuously; to have one's domicile or home." *Webster's International Dictionary of the English Language* (Noah Porter ed., G. & C. Merriam Co. (1890)). *Black's Law Dictionary* (1891) defines "permission" as "[a] license to do a thing; leave to do something which otherwise a person would not have the right to do." Thus, as used in *Wong Kim Ark*, the phrase "permitted to reside" applied to Chinese nationals, and also aliens of nationalities other than Chinese, who resided here without being prohibited from doing so.

In essence, the Justices who authored the majority opinion interpreted "domiciled residents" as meaning something akin to "lawful permanent resident" and "subject to the jurisdiction thereof" as meaning "not subject to any foreign power." *Wong Kim Ark,* 169 U.S. at 651, 721. In turn, the Court found that, due to their intention to reside permanently in the United States, *Ark*'s parents were free enough of foreign allegiance to distinguish them from diplomats and other agents of foreign government whose children do not become citizens at birth.

Not to regard the Court as holding permission to reside in the country to be a prerequisite

for being subject to the jurisdiction of the United States for Citizenship Clause purposes would be to truncate the reasoning the Court gave for its judgment, ignore the precedents it cited, and make nonsense of its opinion. For example, the Court would then have left open the possibility (which it explicitly foreclosed, and had earlier foreclosed, *Fong Yue Ting*, 149 U.S. at 724) that those residing in the country while being prohibited from doing so were within the allegiance and protection of the United States, and thus subject to its jurisdiction. Indeed, an illegal alien, subject to apprehension, detention, and removal at all times, is hardly within the "protection" of the United States, as the phrase "allegiance and protection" has always been understood. *See*, *e.g.*, *Minor v. Happersett*, 88 U.S. 162, 165-66 (1874) ("The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection.") (emphasis added).

The Court's proviso requiring lawfully permitted residence is clearly part of its holding, not *dicta*, under the principle that the Supreme Court may set forth a standard as part of its holding in a case even when the Court finds that the standard has been met in that case. *See*, *e.g.*, *Jackson v. Virginia*, 443 U.S. 307 (1979) (holding that a federal court hearing habeas corpus must consider whether there was legally sufficient evidence to support a conviction, not just whether there was some evidence, and finding that the prosecution had met the former, higher standard).

Likewise, Wong Kim Ark did not leave open the question of whether persons born in this country to persons who did not lawfully reside in the country were birthright citizens, merely because Wong Kim Ark's parents lawfully resided here. Rather, the standard it announced and applied, which implies that those born in this country to illegal aliens, tourists, and others who do not lawfully reside here ***are not*** birthright citizens, was and is part of the Court's holding, even though the Court found that Wong Kim Ark met that standard. (Wong Kim Ark's parents lawfully resided in the United States from 1873 until their return to China in 1890. 169 U.S. at 652-53.)

IN LIGHT OF THE REST OF THE IMMIGRATION AND NATIONALITY ACT, BIRTHRIGHT CITIZENSHIP IS A WHOLLY IRRATIONAL POLICY

The baseless interpretation of the Citizenship Clause of the Fourth Amendment being advanced by those who favor unrestricted birthright citizenship makes no sense within the broader context of our immigration laws.

The provisions of the Immigration and Nationality Act (INA) set forth at 8 U.S.C. §§ 1182 and 1227 define an expansive class of aliens who are inadmissible to and removable from the United States. Anyone falling within that class of aliens is subject to exclusion or deportation. Nevertheless, the United States has long been a magnet for illegal immigration.

One of the reasons for that is that American laws actually reward those who enter and remain in the country illegally. An entire array of local, state and federal benefits are available to foreign nationals, regardless of their immigration status. Many states provide illegal aliens with drivers licenses. The I-9 employment verification process is stacked against employers who wish to comply with laws against employing illegal aliens – but they wind up being sued for

discrimination by the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices. And, despite the fact that 8 U.S.C. §§ 1182 and 1227 define an expansive class of aliens who are inadmissible to and removable from the United States, until very recently the overall risk of deportation for immigration violators has been low.

When aliens do actually find themselves in removal proceedings, the deck tends to be stacked against the government because aliens can access forms of relief such as "Cancellation of Removal for Certain Non-Lawful Permanent Residents," found at 8 U.S.C. § 1229b, which allows illegal aliens – who can convince an immigration court that they have successfully evaded deportation for ten years before removal proceedings and have a parent or child who would suffer undue hardship upon their deportation – to go from illegal to green card holder. Moreover, 8 U.S.C. § 1229b even allows an illegal alien to leave the country (*i.e.,* self-deport) and return (*i.e.* illegally re-enter the U.S. again), as long as the absence is short and the alien does not get caught.

The current misreading of *Wong Kim Ark* being advanced by those who favor unrestricted birthright citizenship is yet another example of how absurdity reigns supreme in America's immigration legislation and precedent.

8 U.S.C. Part II, §§ 1421 through 1459 set forth multiple hundreds of pages of rules and requirements for the conferral of citizenship on aliens. The most significant pre-requisite for naturalization is lawful presence in the United States. Moreover, anyone who is naturalized is required to take the following oath of allegiance to the United States:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God. 8 U.S.C. § 1448, 8 C.F.R. § 337.1.

It beggars belief that any internally coherent system of law could make it both a crime and a civil offense for an alien to enter or remain in the U.S. without authorization; but at the same time confer upon the children of that alien full membership in the American polity. Ultimately, such an approach sets the scene for the invasion of the United States and its occupation and seizure by adverse possession. And it is difficult to believe that either the Framers of the Constitution or the Congress that passed the Fourteenth Amendment could have countenanced such an undesirable result.

CONCLUSION

Simply put, the current interpretations of the Citizenship Clause of the Fourteenth Amendment are based on alleged conclusions that were never actually made by the Supreme Court in *Wong Kim Ark*. Nevertheless, the defenders of unrestricted birthright citizenship insist that the Fourteenth Amendment can only be read in the way they interpret it. These contentions are absurd.

As former Assistant U.S. Attorney Andrew McCarthy wrote in an August 18, 2015 piece published in *National Review*:

> If denying birthright citizenship seems like an offensive proposition to some, it can only be because we've lost our sense of what citizenship should be – the concept of national allegiance inherent in it. If a couple who are nationals of Egypt enter our country and have a baby while they are here, why is it sensible to presume that child's allegiance is to the United States rather than Egypt? If the baby of an American couple happened to be born while they were touring Egypt, would we not presume that the child's allegiance was to the United States.

There are colorable arguments that even the limited Supreme Court holding in *Wong Kim Ark* went too far, that the import of the Fourteenth Amendment was limited to recently emancipated slaves. There are colorable arguments that *Wong Kim Ark* may have been rendered entirely irrelevant because the Immigration and Nationality Act of 1965 significantly altered the criteria for deciding who is lawfully resident and within the allegiance of the United States. However, there are no reasonable arguments that when deciding *Wong Kim Ark* the Supreme Court intended to extend birthright citizenship to a class of aliens that did not then exist: persons inadmissible to or deportable from the United States pursuant to the INA.