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**“Subject to the Jurisdiction Thereof’: Birthright
Citizenship and the Fourteenth Amendment, Part II”**

Chairman Roy, Ranking Member Scanlon, and Members of the Subcommittee:

Thank you for the opportunity to submit this written testimony regarding the true meaning of the Fourteenth Amendment's Citizenship Clause and the vital role Congress must play in defining American citizenship following the Supreme Court's erroneous recent decision in *Trump v. Barbara*, 609 U.S. ____ (2026).

The Supreme Court's ruling that President Trump's Executive Order on birthright citizenship is unconstitutional was a profound disappointment to those who hold to the original understanding of the Fourteenth Amendment. It was not, however, profoundly surprising that a simple majority (five of the nine justices) went nearly two centuries out of their way—back to English feudal times—to justify a practice that has existed in the United States for only about 60 years.

Despite the majority's overzealous dedication to maintaining the status quo, the Court's ruling in *Barbara* explicitly and implicitly leaves the door open for Congress to exercise its Article I plenary power over immigration and naturalization. In fact, I would argue that the ruling actually invites Congress to step into the breach the Court has created.

My testimony today will address three core areas: (1) the historical and constitutional errors made by the majority in *Trump v. Barbara*; (2) the reality that our current birthright citizenship practice is a global anomaly driven by executive fiat rather than constitutional mandate; and (3) a legislative roadmap for Congress to exercise its authority and resolve this crisis statutorily.

I. The Flawed Foundation of *Trump v. Barbara*: 1608 vs. 1776

The fundamental error of the majority opinion in *Trump v. Barbara* lies in the historical point at which the Justices began their analysis. Chief Justice Roberts began the Court's analysis of birthright citizenship in Great Britain in 1608 with *Calvin's Case*, which relied heavily on the English common law of royal subjectship.

As constitutional scholar John C. Eastman has rightly pointed out, this approach ignores the fact that America fought a revolution specifically to repudiate the monarch-serf relationship between the governors and the governed.¹ The American Revolution changed more than just who governed the colonies; it fundamentally transformed the nature of political membership in America.

Under the English feudal system of *jus soli* (right of the soil), a subject owed perpetual allegiance and servitude to the King merely by the accident of being born on his territory. Likewise, as the court pointed out, the King owed his subjects protection simply by the fact of their birth on his soil. This doctrine of "soil and servitude" is fundamentally incompatible with the American Republic—a fact that the *Barbara* majority completely ignores. The Declaration of Independence established that the American government derives its "just powers from the

¹ John C. Eastman, "1776, Not 1608: What the Supreme Court Got Wrong on Birthright Citizenship," *The American Mind / Salvo*, June 30, 2026.

consent of the governed,” not from feudal geography.

The legislative history of the Fourteenth Amendment confirms this American departure from English common law. The text contains two distinct prerequisites for citizenship: birth (or naturalization) in the United States, *and* being "subject to the jurisdiction thereof." As Charles J. Cooper noted in his recent Senate testimony, the term "jurisdiction" is ambiguous and has "many, too many, meanings" in American jurisprudence.² To understand the word's meaning in the Citizenship Clause, we must look to the authors of the Amendment.

The 14th Amendment was passed by Congress the same year as the Civil Rights Act of 1866. It was adopted specifically to enshrine in the Constitution the principles of the Civil Rights Act, so they could not easily be overturned by a future Congress.

The Civil Rights Act extended U.S. citizenship to those born in the United States “and not subject to any foreign power.” Senator Lyman Trumbull, the main author of the Civil Rights Act, made clear that this language would extend citizenship only to those individuals who had complete allegiance to America, not merely those who were subject to our laws.³

Rather than using the negative language (“not subject to any foreign power”) from the Civil Rights Act, Senator Jacob Howard, the author and primary sponsor of the 14th Amendment's Citizenship Clause, chose to use the positive framing (“subject to the jurisdiction thereof”), but intended it to have the same meaning. He explicitly stated on the Senate floor that the guarantee of citizenship "will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers...but will include every other class of persons."⁴

Senator Trumbull made clear that the language in the 14th Amendment had the same meaning as that in the Civil Rights Act by explaining that being "subject to the jurisdiction of the United States" referred to a person "[n]ot owing allegiance to anybody else."⁵

The dissenting Justices in *Barbara* correctly identified the majority's error in looking to feudal law as the starting point for their analysis. As Justice Thomas eloquently laid out in his dissent, early American practice recognized that citizenship is rooted in domicile (in today's parlance, lawful permanent residence) and mutual consent, not mere physical location.⁶ Justice Gorsuch similarly contrasted the "feudal" English rule with the "distinctly American settler's view of

² Testimony of Charles J. Cooper, "Protecting American Citizenship: Birthright Citizenship for Illegal Aliens and Tourists," Senate Committee on the Judiciary, March 10, 2026 (citing *Wilkins v. United States*, 598 U.S. 152, 156–57 (2023)).

³ John C. Eastman, "1776, Not 1608: What the Supreme Court Got Wrong on Birthright Citizenship," *The American Mind / Salvo*, June 30, 2026.

⁴ Cong. Globe, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Jacob Howard).

⁵ Heritage Foundation, "The Citizenship Clause," Essay No. 192 (citing Sen. Lyman Trumbull).

⁶ *Trump v. Barbara*, 609 U.S. ____ (2026) (Thomas, J., dissenting).

citizenship" that promises membership only to those whose parents have made America their permanent home.⁷

Moreover, as legal scholars like Richard Epstein have pointed out, the majority's reliance on the 1898 *Wong Kim Ark* decision is misplaced. That case dealt with the child of legal, permanently domiciled immigrants—not temporary visitors or illegal aliens.⁸ Even after *Wong Kim Ark*, Henry Campbell Black, the founder of *Black's Law Dictionary*, noted in his 1910 constitutional law treatise that this jurisdiction "must at the time be both actual and exclusive," meaning that a temporary visitor or illegal alien who is subject to our laws, but still a subject of a foreign power, does not pass the test.⁹

II. A Global Anomaly Driven by Bureaucratic Drift

The United States' current practice of unconditional birthright citizenship is an anomaly on the global stage. According to a comprehensive survey conducted by the Law Library of Congress, only 33 countries currently grant unconditional birthright citizenship.¹⁰ No advanced European democracy operates under a system of unconditional *jus soli*. The United Kingdom, the very birthplace of the common law relied upon by the *Barbara* majority, abandoned unconditional birthright citizenship in 1983.¹¹ Other than the United States, Canada is the only Western, industrialized nation that practices unconditional birthright citizenship.

Our modern application of this policy is largely the result of bureaucratic drift, not constitutional law. As Hans von Spakovsky has noted, birthright citizenship for the children of illegal aliens and tourists has been implemented largely by executive fiat and erroneous State Department interpretations.¹² Prior to 1966, the federal government required parental status information on passport applications. It was a 1966 bureaucratic revision by the State Department—unaccompanied by any new legal or constitutional developments—that dropped the parental status questions and began treating birthplace as solely dispositive.¹³

Because our policies are so out of step with the rest of the developed world, our nation is being systematically exploited. Birth tourism has ballooned into a highly lucrative, international industry, with packages ranging from \$20,000 to \$200,000 to secure American passports for an

⁷ *Ibid.* (Gorsuch, J., dissenting).

⁸ Richard Epstein, as referenced in Ediberto Roman, "The 14th Amendment Adopted Birthright Citizenship," *Notice & Comment*, April 24, 2026.

⁹ Henry Campbell Black, *Handbook of American Constitutional Law* 634 (3d ed. 1910).

¹⁰ Law Library of Congress, Global Legal Research Directorate, *Birthright Citizenship Around the World* (November 2018), 1.

¹¹ British Nationality Act 1981, c. 61 (U.K.).

¹² Hans A. von Spakovsky, "Birthright Citizenship -- A Fundamental Misunderstanding of the 14th Amendment," *Fox News*.

¹³ John C. Eastman, Amicus Curiae Brief for The Claremont Institute's Center for Constitutional Jurisprudence, *Trump v. Barbara*, October 2025 (citing 31 Fed.Reg. 13537).

alien's child.¹⁴ Chinese government estimates indicate that between 50,000 and 100,000 Chinese children are born to birth tourists in the United States every year.¹⁵

We have seen egregious examples of this abuse. A recent *Wall Street Journal* investigation revealed that a Chinese tech billionaire has reportedly fathered over 100 children using American surrogates in an attempt to build a "family dynasty" with U.S. citizenship.¹⁶ Foreign governments, including Mexican officials, have openly discussed leveraging expatriate populations to build political networks intended to sway our elections from the inside.¹⁷

Conservative estimates from the Center for Immigration Studies indicate that up to 250,000 children were born to illegal aliens in the United States in 2023.¹⁸ An additional 70,000 are estimated to have been born to temporary (nonimmigrant) visa holders that same year.¹⁹ This means that a bureaucratic decision within the State Department is adding the population of Lexington, Kentucky, to the U.S. population each year.

III. The Path Forward: Legislative Solutions

The Supreme Court's decision in *Barbara* overturned an Executive Order; it did not strip Congress of its constitutional plenary power over immigration and naturalization. Congress should immediately codify President Trump's border security policies by passing Chairman Roy's **Permanent Trump Secure Border Act (H.R. 9773)**, which has already been approved by the Judiciary Committee. If illegal aliens cannot enter the United States, they cannot give birth here.

By enacting the One Big Beautiful Bill and the Secure America Act, Congress has provided Immigration and Customs Enforcement with the resources necessary to ramp up the removal of illegal aliens already in the United States. Congress should ensure that removals are being conducted as effectively and efficiently as possible.

Congress also should codify the State Department's and U.S. Citizenship and Immigration Services' efforts to improve the vetting of aliens seeking admission to or adjustment of status within the United States. Aliens seeking admission to the United States or an extension of stay in order to give birth on American soil should be denied.

¹⁴ *The Wall Street Journal*, "Chinese Billionaire Who Fathered 100 Children Eyes US-Born Heirs For Business Succession," December 2025.

¹⁵ Farley, Robert, "What Do We Know About 'Birth Tourism'?" *FactCheck.org*, Annenberg Public Policy Center, April 16, 2026.

¹⁶ *The Wall Street Journal*, "Chinese Billionaire Who Fathered 100 Children Eyes US-Born Heirs For Business Succession," December 2025.

¹⁷ Schweizer, Peter. *The Invisible Coup: How American Elites and Foreign Powers Use Immigration as a Weapon*. New York: Harper, 2026.

¹⁸ Jason Richwine and Steven A. Camarota, "Births to Illegal Immigrants and Long-Term Temporary Visitors," *Center for Immigration Studies*, February 14, 2025.

¹⁹ *Ibid.*

Justice Kavanaugh explicitly noted in his separate opinion in *Barbara* that "Congress could amend §1401(a) or otherwise enact new legislation establishing exceptions to birthright citizenship for children born to foreign citizens unlawfully or temporarily in the country."²⁰

Just as Congress passed the Indian Citizenship Act of 1924 to extend U.S. citizenship to children born to Native Americans on tribal lands, Congress can further define “subject to the jurisdiction thereof” to exclude children born to illegal aliens and temporary visitors.²¹

Congress should pass the **Birthright Citizenship Act of 2025 (H.R. 569)**. This bill does exactly as Justice Kavanaugh suggested and defines “subject to the jurisdiction thereof” to include the children of U.S. citizens, nationals, lawful permanent residents (LPRs) residing in the United States, and active-duty military members. The bill, introduced by Representative Brian Babin, already has 93 cosponsors in the House, and a Senate companion bill, S. 304, introduced by the late Senator Lindsey Graham, has 11 cosponsors.

The Birthright Citizenship Act is not a new idea. It has been introduced in every Congress for the last two decades. Even before that, in 1993, the late Senate Majority Leader Harry Reid included a version of it in his Immigration Stabilization Act (S. 1351).

Beyond defining who is “subject to the jurisdiction” of the United States, Congress can take several concrete steps to capitalize on the opportunities presented by the *Barbara* majority opinion and to minimize its harm to the American body politic. These include:

1. Codifying the "Entry Fiction" for Birthright Citizenship

Importantly, the Supreme Court’s ruling in *Barbara* stated explicitly that automatic birthright citizenship is not universal. The majority relied heavily on the “extraterritorial fiction” to explain that Native Americans, diplomats, and invaders were excluded from automatic birthright citizenship because they are not “subject to the jurisdiction” of the United States.

The majority explained that Native Americans born on tribal lands were subject to the jurisdiction of their tribal governments, even though they were physically present in the United States. Similarly, diplomats are considered to be residing on foreign soil, even though they are physically present on U.S. soil. Invaders are not subject to the jurisdiction of the United States because they control the jurisdiction of whatever part of United States territory they have invaded. So even though all these individuals are clearly physically present on U.S. soil, an “extraterritorial fiction” applies to them, which makes them not subject to U.S. jurisdiction.

In immigration law, there is a similar fiction called the “entry fiction.” Under long-

²⁰ *Trump v. Barbara*, 609 U.S. ____ (2026) (Kavanaugh, J., separate opinion).

²¹ John Fonte, "Understanding the Fight over Birthright Citizenship," *Hudson Institute*, February 17, 2025.

standing Supreme Court precedent, aliens who cross the border unlawfully or are paroled into the country are treated legally as if they were stopped at the border and remain outside the United States.²² In other words, they are treated as if they are applying for admission to U.S. territory, even though they are physically present on U.S. soil.

As legal scholars David Haungs and Ilan Wurman have pointed out, *Trump v. Barbara* provides Congress with the opportunity to leverage the existing "entry fiction" in immigration law.²³ Just as the children of diplomats are excluded from birthright citizenship because their parents are residing on foreign soil under the "fiction of extraterritoriality," so too the children of unadmitted aliens should be excluded because they are residing outside the United States under the "fiction of entry" in immigration law. The exclusion of these children from automatic birthright citizenship flows directly from the very territorial rule articulated by the *Barbara* majority.

2. Breaking the Anchor from "Anchor Babies"

The U.S.-born children of illegal aliens are often called "anchor babies" because, as adults, they are eligible to sponsor their relatives, including their parents, for lawful permanent residence in the United States. The children thus become an anchor for the rest of the family to obtain lawful permanent status in America.

Congress should break this cycle by enacting Representative Eli Crane's **Nuclear Family Priority Act (H.R. 7833)**, as well as by making aliens who have resided in the United States illegally ineligible for LPR status and for the nonimmigrant parent visa included in Rep. Crane's bill.

By clarifying that illegal aliens will not obtain immigration benefits through their U.S.-born children, Congress will remove a major incentive for aliens to enter the United States illegally to give birth.

3. Disincentivizing Welfare Abuse Through Birthright Citizenship

The "Barbara" in *Trump v. Barbara* is a Honduran national who was paroled into the United States under President Biden's unlawful parole program. She entered in 2024 with her husband and three children, none of whom has a valid visa. She admitted in a supplemental declaration in the case that she wanted her fourth child to receive U.S. citizenship at birth so her family could take advantage of the welfare benefits that would be available:

"My child who is due in October will, if acknowledged to be a U.S. citizen, be eligible for Supplemental Nutrition Assistance Program (SNAP), Medicaid, and

²² *Kaplan v. Tod*, 267 U.S. 228 (1925); *Leng May Ma v. Barber*, 357 U.S. 185 (1958).

²³ David Haungs, "Barbara's Entry Fiction Problem," *Harv. J.L. & Pub. Pol'y Per Curiam* (Forthcoming 2026); Ilan Wurman, "Is Congress Powerless After *Trump v. Barbara*?" *Rationally Based*, July 7, 2026.

other benefits for which citizens are eligible."²⁴

While current law makes illegal aliens ineligible for most non-emergency welfare benefits, U.S. citizens are eligible for those benefits from the day of their birth. Clearly, the availability of taxpayer-funded welfare programs for the U.S.-born children of illegal aliens provides an incentive for these aliens to give birth in the United States. Under existing policy, the illegal alien parents collect the benefits on behalf of their U.S.-born children and can use the funds however they wish, even though they are ineligible.

Congress should amend current law to prohibit the payment of any welfare benefits directly to any individual who is not a U.S. citizen or Lawful Permanent Resident (LPR). Illegal aliens and nonimmigrant visa holders should be required to designate a citizen or LPR to receive welfare benefits on behalf of any U.S.-born child, and welfare benefits should be distributed directly to that individual. The designated citizen or LPR should be required to sign a legally binding contract that requires the individual to use the benefits exclusively to provide for the U.S. citizen child. Congress should include strict penalties for the misuse of these benefits by the designated individual.

4. Implementing Residency Requirements for Retention of Citizenship

Congress should amend 8 U.S.C. §1401 to establish a residency requirement for the *retention* of citizenship for children born to parents who are neither citizens nor LPRs. A child born to illegal or nonimmigrant parents should lose their U.S. citizenship upon reaching the age of 18 if they have not resided in the United States for a required number of consecutive years. This would ensure that only those with a genuine connection to America retain citizenship.

This provision would strongly disincentivize birth tourism. Parents who came to the United States to have a baby, and then returned home with the U.S. citizen child, would not get the reward they were seeking, since the child would lose U.S. citizenship upon turning 18.

5. Investigating and Closing the Diplomatic Loophole

While the children of foreign diplomats are universally recognized—including by the *Barbara* majority—as being excluded from birthright citizenship, there is rampant abuse of this exclusion. Under 8 C.F.R. 101.3, the U.S.-born children of diplomats may be granted green cards, while the U.S.-born children of other foreign embassy personnel are granted U.S. citizenship. Senator Eric Schmitt has rightfully called for an investigation into the illegal granting of citizenship documentation to foreign diplomats' children.²⁵

²⁴ Richwine, Jason, "Expectant Mother in Birthright Citizenship Case Was Suing to Access More Welfare," *Center for Immigration Studies*, July 13, 2026.

²⁵ Press Release, "Senator Schmitt Calls for Citizenship Illegally Obtained by Foreign Diplomats'

Congress must clarify that children born in the United States to aliens employed by foreign embassies are not eligible for birthright citizenship, and instead should be given the same visa status as their parents have. Congress should also require the State Department and DHS to revoke illegally procured citizenship documents from the children of foreign agents.

6. Ending Commercial Foreign Surrogacy Contracts

Congress should pass Representative Scott Perry's **Preventing International Surrogacy Exploitation Act (H.R. 9132)** to void commercial surrogacy contracts between U.S. citizens and foreign nationals seeking to buy birthright citizenship.

This legislation is tailored specifically to prevent foreign nationals, including adversaries of the United States, from abusing lax surrogacy laws to take advantage of birthright citizenship. According to the findings in the bill, "[m]any countries, including Australia, Brazil, Britain, Canada, China, Denmark, France, Germany, India, Italy, Nepal, New Zealand, Portugal, Spain, Thailand, and Taiwan, have banned international commercial surrogacy altogether." America should follow suit.

Conclusion

American citizenship is a precious commodity. That is abundantly clear based simply on the fact that birth tourism has become a multi-billion dollar industry in the United States.²⁶ Our government must zealously protect U.S. citizenship and ensure it is only granted to those aliens we have legally invited to permanently join our American community.

The *Trump v. Barbara* decision, while wrong on its face, presents an opportunity for Congress to do just that. Congress possesses the clear constitutional authority under Article I to define our national community, secure our borders, and clarify our naturalization laws. By rejecting the feudal doctrines of 1608 and returning to the consent-based principles of 1776, Congress can enact commonsense statutory reforms that safeguard the profound meaning and value of American citizenship.

I welcome any questions the Subcommittee may have.

Children to be Revoked," July 16, 2026.

²⁶ Durand, Isabelle, "Birth Tourism Usa [*sic*] Statistics," *Worldmetrics*, February 12, 2026.