

Birthright Citizenship and the 14th Amendment

Roman Mars [00:00:00] In 1998, Alice Wong paid a visit to the National Archives Regional Offices in San Bruno, California.

Elizabeth Joh [00:00:06] The 19-year-old was looking for the immigration records of her great grandfather. Alice's grandfather had suggested the research trip. He'd picked up a Chinese language newspaper near his home in Sacramento and noticed a headline about the great grandfather Alice knew nothing about. The college student wasn't prepared for the welcome she received. An Archives employee asked for her autograph, and she was introduced to the entire staff with this. This is Wong Kim Ark's great granddaughter. The newspaper article that prompted Alice's visit celebrated the 100th anniversary of a somewhat obscure Supreme Court case--United States versus Wong Kim Ark. In the late 19th century, Wong Kim Ark was a cook working in California, the state where he'd been born in 1873. He was a son of Chinese immigrants who'd ended up in San Francisco. In 1889, Wong embarked on the first of a number of long boat trips to China. Such voyages were difficult and not just because of the expense. And that was because an easy return to the United States wasn't guaranteed for someone like Wong. Each trip required Wong to take pictures of himself and to find witnesses--usually white men--to verify his right to return to the United States. Even then, officials sometimes found excuses to keep even American born Chinese, like Wong, from reentry. This was a period of intense anti-Chinese sentiment in the United States. The Chinese Exclusion Act of 1882, for instance, made it impossible for Chinese born immigrants to become naturalized citizens--and that included Wong's parents. And it was this kind of bad luck that Wong encountered in 1895 when he was returning to San Francisco after yet another trip to China. A customs collector named John Wise--a man who declared himself a "zealous opponent of Chinese immigration"--refused Wong's permission to reenter the United States. Wong was held on a steamer called the Coptic, then transferred to another ship, and then a third ship. Lawyers from a Chinese mutual aid society eventually secured Wong's release in January of 1896. Wong had spent five months captive in the San Francisco Bay, unable to enter the United States. Was Wong Kim Ark--born at 751 Sacramento Street in San Francisco--a citizen of the United States, who had a right to reentry? Or was being born in the United States by itself not enough to define his citizenship. In 1898, the United States Supreme Court ruled in Wong's favor. The 14th Amendment was clear about granting people born within the United States citizenship. That right is often referred to as Birthright Citizenship. Wong Kim Ark was an American citizen. You may never have heard of this 19th century case before, and in fact, few people paid attention to it back then. The New York Times thought the decision deserved just a single three sentence paragraph on page seven of its March 29th, 1898, edition. But you've heard about Birthright Citizenship. It was part of a 2015 policy proposal by a presidential candidate named Donald Trump. And now it's a threatened executive order by President Trump. Oh. Oh.

Roman Mars [00:03:58] This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length and sporadic or least we take the norm breaking tweets and the norm breaking actions of the 45th President of the United States and use them to examine our Constitution like we never have before. Our music is from Doomtree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars. The Constitution, as it was originally drafted, referred to the idea of being a citizen of the United States, but it didn't define what citizenship meant. That changed with the adoption of the 14th Amendment.

Elizabeth Joh [00:04:41] The first section of the 14th Amendment contains what's called the Citizenship Clause. It says, "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." The part of the citizenship clause that says you are a citizen if you are born in the United States is often referred to as Birthright Citizenship. The idea that citizenship would be tied to the place of your birth was not a new concept in 1868. Two years before the states provided the necessary approval of the 14th Amendment, congress had passed the Civil Rights Act of 1866. That law had granted birthright citizenship by federal statute. And before 1866, American legal traditions going back to English common law recognized the same legal theory--that citizenship was granted to people born within the country. The only exceptions to this rule were people born in three circumstances: Children born to foreign diplomats, on foreign ships, and to people considered part of a hostile occupying force. The idea here is that none of these people and these exceptions are subject to the legal power of the country where they are born.

Roman Mars [00:06:00] The 14th Amendment's Citizenship Clause was a response to a historically significant event.

Elizabeth Joh [00:06:06] And that's the case of Dred Scott versus Sanford--a case that is widely considered one of the low points in Supreme Court history. In 1857, the court decided that slaves and the children of slaves could not be citizens of the United States. The 14th Amendment's Citizenship Clause by saying that every person who is born in the United States and is subject to its legal powers is a citizen. In one sense, the Citizenship Clause is a direct attempt to undo what the Supreme Court had decided in the Dred Scott case. But it would be a mistake to think that the Citizenship Clause was meant to apply only to African Americans. The language is broad--not specific. Here's the clause again. "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States." And the historical record supports that interpretation too. We know something about the ratification debates over the 14th Amendment. Those who both supported and opposed the amendment understood that the Citizenship Clause would be broadly interpreted. Here's an example. Senator Edgar Cowan of Pennsylvania, who opposed the Citizenship Clause, asked during the ratification debates, "I am really desirous to have a legal definition of citizenship of the United States. What does it mean? Is the child of the Chinese immigrant in California a citizen? Is the child of a gypsy born in Pennsylvania a citizen? Is it proposed that the people of California are to remain quiescent while they are overrun by a flood of immigration of the Mongol race?" Senator John Conness of California, who supported the Citizenship Clause, responded by saying, "Yes, such children shall be citizens," and that he was ready to entirely accept the provision proposed in this constitutional amendment. And then there's the Supreme Court's 1898 decision in the United States versus Wong Kim Ark. The Court ended its lengthy review of the existing law with this: "The 14th Amendment affirms the ancient and fundamental rule of citizenship by birth, within the territory, in the allegiance and under the protection of the country. The amendment, 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." Now, some opponents of birthright citizenship like to point out that the Wong Kim Ark case decides only that American born children of people lawfully within the United States are citizens. They point to the fact that Wong's parents were in the United States lawfully. That's true in a narrow sense, but the objection doesn't go very far, and here's why. First, the Supreme Court's 1898 opinion is written in very broad terms. The legal tradition that the Court cites ties citizenship to the place of a child's birth not to the legal or illegal status of the parents. Second, the Constitution's Citizenship Clause grants birthright citizenship to all people born into the United States and who are

subject to the jurisdiction thereof. Who is not subject to the jurisdiction of the United States? Well, diplomats and their United States born children, for example. There's no serious argument that people who have unlawfully entered the United States can't be prosecuted or sued. Of course, they can. They can also be deported. They are clearly subject to the laws of the United States, even if they didn't enter the country lawfully. So, while there are certainly people who don't like birthright citizenship, that's not the same as saying that there is something unclear about the Constitution's statement about birthright citizenship. We've had a clear understanding of that right for more than a century.

Roman Mars [00:10:05] So let's turn to Trump. Immigration has been a central issue to Trump the candidate and to Trump the president.

Elizabeth Joh [00:10:11] Trump has long derided so-called "anchor babies." Now, that's not a legal term. It's a phrase used by immigration policy critics. The term usually refers to a situation when parents enter the country unlawfully just to make sure their children are born within the United States and become birthright citizens. The "anchor" is supposed to mean that the parents are helped by this process. But having a U.S. citizen child doesn't mean that you have an automatic shield against deportation. Now as a presidential candidate, Trump announced that he wanted to end birthright citizenship. In an interview with Fox News in November of 2015, Trump said to Bill O'Reilly, "Do you remember when you said about the anchor babies that there is nothing you can do about it and I said, 'Yes, there is'? I was right about it." O'Reilly responded, "No, you weren't." Trump continued, "And frankly, all we need is a simply... Well, yes, I was. You don't need a new amendment. All we have to do is to go back to Congress and have a rather routine-- It's been fully vetted now, Bill. I was right on the anchor babies. Everybody thought you needed a constitutional amendment. You don't need that." And then Trump became president. On October 30th, 2018, the media outlet Axios reported that President Trump was considering an executive order that would end birthright citizenship. "We're the only country in the world where a person comes in and has a baby and the baby is essentially a citizen of the United States for 85 years with all of those benefits. It's ridiculous. It's ridiculous. And it has to end." The next day, he tweeted, "So-called birthright citizenship, which costs our country billions of dollars and is very unfair to our citizens, will be ended one way or the other. It is not covered by the 14th Amendment because of the words 'subject to the jurisdiction thereof.' Many legal scholars agree." When Speaker of the House Paul Ryan stated in a radio interview, "Well, you obviously cannot do that. You cannot end birthright citizenship with an executive order." Trump tweeted back, "Paul Ryan should be focusing on holding the majority rather than giving his opinions on birthright citizenship, something he knows nothing about. Our new Republican majority will work on this. Closing the immigration loopholes and securing our border."

Roman Mars [00:12:39] So let's return to Trump's original tweet.

Elizabeth Joh [00:12:43] First, it's just false that birthright citizenship is an oddity. It's not. At least 30 other countries other than the United States grant people this very same right. Second, is it lawful for Trump to do what he proposes? The short answer is no. Whatever you think of birthright citizenship as a policy matter, let's assume what most serious legal commentators conclude--that birthright citizenship is in the text of the Constitution, that the Supreme Court has supported this view of the citizenship clause, and that we've all lived with this interpretation for more than a century. If that's all settled, then the question is whether the president of the United States can simply change the Constitution--any part of it--with an executive order. The answer to that is no. An executive order can either be an official statement by a president about a presidential decision, or it can be a set of

instructions to other officials within the executive branch about how to carry out the president's executive authority. In the legal system, executive orders have a lesser status than statutes passed by Congress. And both executive orders and statutes have a lesser status than the Constitution itself. That means that Senator Lindsey Graham's proposal isn't much better off. On October 30th, he tweeted, "In addition, I plan to introduce legislation along the same lines as the proposed executive order from President @realdonaldtrump." If we assume that the Constitution and the Supreme Court have been clear on the guarantee of birthright citizenship, then a statute trying to overturn that part of the Constitution won't work either. In fact, the Supreme Court observed in Wong Kim Ark's case that the 14th Amendment has conferred no authority upon Congress to restrict the effect of birth declared by the Constitution to constitute a sufficient and complete right to citizenship. If President Trump really wants to end birthright citizenship, his lawful option is clear. And that's a constitutional amendment, which, of course, isn't that easy to do. And in fact, constitutional amendment is deliberately hard to do. It's not designed to be changed at the whim of a president or Congress concerned about a short-term election.

Roman Mars [00:15:09] Here's a little addendum.

Elizabeth Joh [00:15:10] Why did Wong Kim Ark make repeated trips to China despite the risk of not being able to return? Family. Wong had married a woman in China during one trip. Eventually, they had four sons together. All four tried at different times to join their father in the United States. The youngest son made the trip to the United States as an 11-year-old in 1926. The boy, Wong Yook Jim, was held on Angel Island in San Francisco for weeks alone while he waited for a decision. Eventually, Wong's youngest son was allowed to enter the United States. He became a citizen. The boy grew up, joined the Merchant Marines, and eventually settled near Sacramento, California. It was that same son--now an old man--who suggested to his 19-year-old granddaughter to visit the National Archives in San Bruno. After Alice Wong's visit to the archives, she traveled with her 83-year-old grandfather, Wong Kim Ark's son, for a visit to Angel Island. The former immigration station is now a state park. "I've never seen my grandfather cry before," said Alice. "It was like you could feel all of the emotion and anger and everything."

Roman Mars [00:16:29] Wow. So, if Trump does create some kind of basically empty executive order that renounces birthright citizenship and then orders ICE or whomever to act on it as the executive, how does this get tested, and how does it get resolved constitutionally?

Elizabeth Joh [00:16:50] So in the scenario where he signs an executive order as threatened, then I don't think people are immediately subjected to it. They would almost certainly be--as soon as there were rumors of the executive order being drafted--a lawsuit filed immediately as soon as it was issued. A judge would almost certainly enjoin or temporarily stop the order from being enforced. There would be some case at the federal district court level--the trial level. It would be appealed. Presumably, it would go to the Supreme Court, which now has a solid five-person conservative majority with two Trump appointees. Now, the short legal answer is it should be the case that a president should know better than to try and undo a part of the Constitution with an executive order. This is a different kind of president. I really don't know whether Trump would do it or not. He could. But it does introduce a bit of chaos into the world, which, again, is not surprising. And the very notion that somehow you would have this point in time that before the executive order, there would be people who had enjoyed birthright citizenship--and at the moment the executive order is issued, people would be uncertain as to their birthright

citizenship? You know, that also is a very jarring concept--that we'd have this kind of before and after as well.

Roman Mars [00:18:11] Yeah, I wonder if this idea is even fleshed out enough to comment on. But were they thinking that henceforth there would be no birthright citizenship, or would it mean that people, like who previously had citizenship, would be stripped of it?

Elizabeth Joh [00:18:26] No. I mean, presumably it would just be going forward. And it would just introduce chaos. I mean, I think even though, you know, most people looking at this issue would say, "He can't do that," it doesn't literally prevent President Trump from trying to issue an order that would be challenged in court. And it would be chaotic in the same way that many of the other things that we've seen issued by this administration have been immediately subjected to challenge. But the way the legal process works is it's slow and things happen. But Twitter is quick and political pronouncements are quick. And it all is part of this mix of legal uncertainty, which now seems to be part of the president's deliberate strategy.

Roman Mars [00:19:08] Does your assessment of no serious legal scholar doubts birthright citizenship include the five conservatives in the Supreme Court.

Elizabeth Joh [00:19:18] I would like to think that that's true, so that is my hope and my wish, I suppose. But again, I don't think I don't think the danger is in what would ultimately happen. I think the danger is just in the chaos of that might happen if the president did issue such an order. Now, it could be that there is nothing to this, and it evaporates just as many of the other threatened legal actions of the presidents. In which case, it may have been just a political ploy. It's--for better or worse--a good opportunity for the public to learn about this part of the Constitution and what it guarantees. One of the central things it does is it defines what does it mean to be a citizen and what does it mean to be an American?

Roman Mars [00:20:13] This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop collective. You can find out all about Doomtree Records, get merch, and learn about current tours at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.