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Birthright Citizenship and Dual Citizenship: Harbingers of Administrative Tyranny

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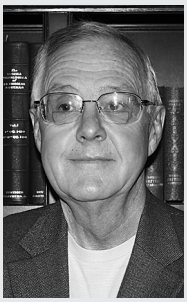

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"Immigration and National Security"

The following is adapted from a speech delivered at a Hillsdale College National Leadership Seminar on February 12, 2008, in Phoenix, Arizona.

Birthright citizenship—the policy whereby the children of illegal aliens born within the geographical limits of the United States are entitled to American citizenship—is a great magnet for illegal immigration. Many believe that this policy is an explicit command of the Constitution, consistent with the British common law system. But this is simply not true.

The framers of the Constitution were, of course, well-versed in the British common law, having learned its essential principles from William Blackstone's *Commentaries on the Laws of England*. As such, they knew that the very concept of citizenship was unknown in British common law. Blackstone speaks only of "birthright subjectship" or "birthright

allegiance," never using the terms citizen or citizenship. The idea of birthright *subjectship* is derived from feudal law. It is the relation of master and servant; all who are born within the protection of the king owe perpetual allegiance as a "debt of gratitude." According to Blackstone, this debt is "intrinsic" and "cannot be forefeited, cancelled, or altered." Birthright subjectship under the common law is thus the doctrine of perpetual allegiance.

America's Founders rejected this doctrine. The Declaration of Independence, after all, solemnly proclaims that "the good People of these Colonies. . . are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved." According to Blackstone, the common law regards such an act as "high treason." So the common law—the feudal doctrine of perpetual allegiance—could not possibly serve as the ground of American (i.e., republican) citizenship. Indeed, the idea is too preposterous to entertain!

James Wilson, a signer of the Declaration of Independence and a member of the Constitutional Convention as well as a Supreme Court Justice, captured the essence of the matter when he remarked: "Under the Constitution of the United States there are citizens, but no subjects." The transformation of subjects into citizens was the work of the Declaration and the Constitution. Both are premised on the idea that citizenship is based on the consent of the governed—not the accident of birth.

Imprimis (im-pri-mis), [Latin]: in the first place

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Who is a Citizen?

Citizenship, of course, does not exist by nature; it is created by law, and the identification of citizens has always been considered an essential aspect of sovereignty. After all, the founders of a new nation are not born citizens of the new nation they create. Indeed, this is true of all citizens of a new nation—they are not born into it, but rather become citizens by law.

Although the Constitution of 1787 mentioned citizens, it did not define citizenship. It was in 1868 that a definition of citizenship entered the Constitution, with the ratification of the Fourteenth Amendment. Here is the familiar language: "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." Thus there are two components to American citizenship: birth or naturalization in the U.S. *and* being subject to the jurisdiction of the U.S. We have somehow come today to believe that anyone born within the geographical limits of the U.S. is automatically subject to its jurisdiction. But this renders the jurisdiction clause utterly superfluous and without force. If this had been the intention of the framers of the Fourteenth Amendment, presumably they would simply have said that all persons born or naturalized in the United States are thereby citizens.

Indeed, during debate over the amendment, Senator Jacob Howard of Ohio, the author of the citizenship clause, attempted to assure skeptical

colleagues that the new language was not intended to make Indians citizens of the U.S. Indians, Howard conceded, were born within the nation's geographical limits; but he steadfastly maintained that they were not subject to its jurisdiction because they owed allegiance to their tribes. Senator Lyman Trumbull, chairman of the Senate Judiciary Committee, rose to support his colleague, arguing that "subject to the jurisdiction thereof" meant "not owing allegiance to anybody else and being subject to the complete jurisdiction of the United States." Jurisdiction understood as allegiance, Senator Howard interjected, excludes not only Indians but "persons born in the United States who are foreigners, aliens, [or] who belong to the families of ambassadors or foreign ministers." Thus "subject to the jurisdiction" does not simply mean, as is commonly thought today, subject to American laws or American courts. It means owing exclusive political allegiance to the U.S.

Consider as well that in 1868, the year the Fourteenth Amendment was ratified, Congress passed the Expatriation Act. This act permitted American citizens to renounce their allegiance and alienate their citizenship. This piece of legislation was supported by Senator Howard and other leading architects of the Fourteenth Amendment, and characterized the right of expatriation as "a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness." Like the idea of citizenship, this right of expatriation is wholly incompatible with the common law understanding of perpetual allegiance and subjectship. One member of the House expressed the general sense of the Congress when he proclaimed: "The old feudal doctrine stated by Blackstone and adopted as part of the common law of England . . . is not only at war with the theory of our institutions, but is equally at war with every principle of justice and of sound public policy." The common law established what was characterized as an "indefensible doctrine of indefeasible allegiance," a feudal doctrine wholly at odds with republican government.

In sum, this legacy of feudalism—which we today call birthright citizenship—was decisively rejected as the ground of American citizenship by the Fourteenth Amendment and the Expatriation Act of 1868. It is absurd, then, to believe that the Fourteenth Amendment confers the boon of American citizenship on the children of illegal aliens. Nor does the denial of birthright citizenship visit the sins of the parents on the children, as is often claimed, since the children of illegal aliens born in the U.S. are not being denied anything to which they have a right. Their allegiance should follow that of their parents during their minority. Furthermore, it is difficult to fathom how those who defy American law can derive benefits for their children by their defiance—or that any sovereign nation would allow such a thing.

There is no Supreme Court decision squarely holding that children of illegal aliens are automatically citizens of the U.S. An 1898 decision, *U.S. v. Wong Kim Ark*, held by a vote of 5-4 that a child of *legal* resident aliens is entitled to birthright citizenship. The *Wong Kim Ark* decision, however, was based on the mistaken premise that the Fourteenth Amendment adopted the common law system of birthright citizenship. The majority opinion did not explain how *subjects* were miraculously transformed into *citizens* within the common law. Justice Gray, writing the majority decision, merely stipulated that "citizen" and "subject" were convertible terms—as if there were no difference between feudal monarchy and republicanism. Indeed, Chief Justice Fuller wrote a powerful dissent in the case arguing that the idea of birthright subjectship had been repealed by the American Revolution and the principles of the Declaration.

The constitutional grounds for the majority opinion in *Wong Kim Ark* are tendentious and it could easily be overturned. This would, of course, require a proper understanding of the foundations of American citizenship, and whether the current Supreme Court is capable of such is open to conjecture. But in any case, to say that children of *legal* aliens are entitled

to citizenship is one thing; after all, their parents are in the country with the permission of the U.S. It is entirely different with *illegal* aliens, who are here without permission. Thus repeal of the current policy of birthright citizenship for the children of illegal aliens would not require a constitutional amendment.

We have seen that the framers of the Fourteenth Amendment unanimously agreed that Indians were not "subject to the jurisdiction" of the U.S. Beginning in 1870, however, Congress began to pass legislation offering citizenship to Indians on a tribe by tribe basis. Finally, in 1923, there was a universal offer to all tribes. Any Indian who consented could become an American citizen. This citizenship was based on reciprocal consent: an offer on the part of the U.S. and acceptance on the part of an individual. Thus Congress used its legislative powers under the Fourteenth Amendment to determine who was within the jurisdiction of the U.S. It could make a similar determination today, based on this legislative precedent, that children born in the U.S. to illegal aliens are not subject to American jurisdiction. A constitutional amendment is no more required now than it was in 1923.

Dual Citizenship and Decline

The same kind of confusion that has led us to accept birthright citizenship for the children of illegal aliens has led us to tolerate dual citizenship. We recall that the framers of the Fourteenth Amendment specified that those who are naturalized must owe *exclusive* allegiance to the U.S. to be included within its jurisdiction. And the citizenship oath taken today still requires a pledge of such allegiance. But in practice dual citizenship—and dual allegiance—is allowed. This is a sign of the decline of American citizenship and of America as a nation-state.

It is remarkable that 85 percent of all immigrants arriving in the U.S. come from countries that allow—and encourage—dual citizenship. Dual citizens, of course, give the sending countries a unique political presence in the U.S., and many countries use their dual citizens to promote their own interests by exerting pressure on American policy makers. Such foreign meddling in our internal political affairs has in fact become quite routine. Thus we have created a situation where a newly naturalized citizen can swear exclusive allegiance to the U.S. while retaining allegiance to a vicious despotism or a theocratic tyranny.

Elite liberal opinion has for many years considered the sovereign nation-state as an historical anachronism in an increasingly globalized world. We are assured that human dignity adheres to the individual and does not require the mediation of the nation-state. In this new universe of international norms, demands on the part of the nation-state to exclusive allegiance or for assimilation violate "universal personhood." In such a universe, citizenship will become superfluous or even dangerous.

Those who advocate open borders tend to share this cosmopolitan view of transnational citizenship. Illegal immigrants, they say, are merely seeking to support their families and improve their lives. Borders, according to them, should not stand in the way of "family values"—those universal "values" that refuse to recognize the importance or relevance of mere political boundaries. Somehow, for those who hold these views, political exclusivity and the requirement of exclusive allegiance are opposed to these universal "values" if not to human decency itself.

Mexican President Felipe Calderon was in California recently pushing for more liberal immigration policies. He assured his fellow citizens who reside in the U.S. that he is "actively working to defend their human rights." "No matter their immigration status," Calderon said, "they are human beings with dignity and rights that should be respected. We are working, with the full effort of the [Mexican] government, to bring a halt to the campaigns that harass migrants." However much Calderon may be worried about the human rights of his fellow

citizens, he is fully cognizant of the fact that Mexico's economy depends on the remittances of its citizens working abroad. These remittances have become Mexico's second largest source of revenue, trailing only its rapidly declining oil revenues. It is far easier—and politically safer—for Mexico to export its poverty than to reform its own political and economic system.

We must constantly remind ourselves, however, of the historical fact that constitutional democracy has existed only in the nation-state, and that the demise of the nation-state will almost certainly mean the demise of constitutional democracy. No one believes that the European Union or similar organizations will ever produce constitutional government. Indeed, the EU is well on its way to becoming an administrative tyranny. Nor would the homogeneous world-state—the EU on a global scale—be a constitutional democracy; it would be the administration of "universal personhood" without the inconvenience of having to rely on the consent of the governed. The doctrine of birthright citizenship and the acceptance of dual citizenship are signs that we in the U.S. are on the verge of reinstituting feudalism and replacing citizenship with the master-servant relationship. The continued vitality of the nation-state and of constitutional government depends on the continued vitality of citizenship, which carries with it exclusive allegiance to what the Declaration calls a "separate and equal" nation. Unless we recover an understanding of the foundations of citizenship, we will find ourselves in a world where there are subjects but no citizens. ■

Immigration and National Security

Michelle Malkin
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The following is excerpted from a speech delivered at a Hillsdale College National Leadership Seminar on May 20, 2008, in New York City.

We all know what happened on September 11, 2001. But how many of us recall what happened on February 26, 1993? That was the date of the first World Trade Center attack, the precursor to 9/11 carried out by a cell of Middle Eastern jihadists. Key members of that cell were illegal aliens.

Mahmud Abouhalima was an Egyptian illegal alien working as a cab driver in New York. He falsely claimed to be an agricultural worker under the 1986 illegal alien amnesty law and snagged a green card that allowed him to travel back and forth to Pakistan for al Qaeda training. Abouhalima said he was a strawberry picker, even though he had never been anywhere near a strawberry field. Overwhelmed INS workers—who are driven to reduce backlogs by simply shredding or rubber stamping applications—failed to vet his claims.

Mohammed Salameh, the operative who rented the truck used in the 1993

bombing, was denied amnesty after filing a bogus claim. But because the INS didn't have the resources or the will to deport him, he was able to work and plot freely right under our noses.

The mastermind of the 1993 plot and of another foiled plot to bomb New York landmarks, Sheik Abdul Rahman, won asylum here based on a fraudulent claim and was allowed to remain thanks to a deadly combination of immigration and intelligence lapses. Seven people died and thousands were injured in the first World Trade Center bombing, which amounted to a trial run for the attack that would lead to the deaths of another 3,000 innocent men, women, and children eight years later.

All of the 9/11 hijackers entered the country with short-term visas issued by State Department consular offices abroad. Fifteen of the 19 came from Saudi Arabia, where a special program allowed them to get fast-track visas. The program, called Visa Express, was hatched by American bureaucrats who were concerned about wealthy Saudis waiting in long lines. So no one bothered to double-check the hijackers' applications, which were so sloppy that they made no sense. To give you a couple of examples, one of them put "Washington hotel" as his address and another described his occupation as "Teeter." Thus, despite obviously lying on their applications, they gained entry to plot mass murder on American soil.

Once in the U.S., several of the hijackers needed fake government documents. They hooked up with illegal alien day laborers who hung out at a Virginia convenience store near the Pentagon. After waiting around with a couple of $20 bills, an illegal alien from El Salvador was willing and able to give them the documents that they needed to board the planes they flew on 9/11. The local cops whom I interviewed admit knowing that those people hanging around the convenience store were here illegally, but they did nothing about it.

The lesson is this: Lax immigration enforcement enables enemy foreign agents to exploit a system that was intended to welcome those who want to make better lives for themselves on our terms. Before 9/11, our nation convinced itself that it could afford massive, systematic abuse and undermining of immigration laws. After 1993, in an age of Islamic terrorism and nuclear threat, we should have been permanently disabused of that notion. But we continued in our folly. And we continue in it still today.

Let's look at some facts:

- There are now upwards of 20 million illegal aliens in the U.S.
- Roughly 1 million legal immigrants are admitted to the U.S. every year.
- Some 400,000 illegal aliens have been ordered to be deported, but are on the loose in the U.S. after being released by federal immigration courts.
- There are only 20,000 detention beds in the entire country to hold illegal aliens.
- There are only 2,000 federal agents employed by the Department of Homeland Security to track down the estimated 12-20 million illegal aliens who are living, working, going to school, getting driver's licenses and, yes, committing crimes and plotting terrorist attacks in America as we speak.
- Border fences to our north and south are a joke, even while we're sending money to Egypt and Mexico to help them build fences on their southern borders.

Despite the fact that Congress created the behemoth Department of Homeland Security, there is still no systematic tracking of criminal alien felons across the country; sanctuary for illegal aliens—that is, deliberate non-enforcement of the laws— remains the policy in almost every major metropolis; and "catch and release" remains standard operating procedure for untold thousands of illegal aliens who pass through the fingers of federal immigration authorities every day.

My book, *Invasion*, argued in great detail that our current immigration and entrance system is in shambles, partly by neglect and partly by design. From America's negligent consular offices overseas, to our porous air, land, and sea points of entry, to our ineffective detention and deportation policies, our federal immigration authorities have failed at every level to protect our borders and preserve our sovereignty.

The argument of my book was simple: Immigration in a post-9/11 world must be treated as a national security issue. Enforcement of immigration laws must be clear and consistent. Lawbreakers must be punished, not rewarded. Illegal aliens must be deported, not naturalized. And the national interest, not special interests—whether Big Business or liberal multiculturalism—must drive immigration policy.

I agree with the late Texas congresswoman Barbara Jordan—a liberal black Democrat and respected immigration authority—who said that credible immigration policy rests on three simple principles: "People who should get in, get in; people who should not enter are kept out; and people who are deportable should be required to leave."

Contrary to the misguided claims of today's open-borders lobby, the demand for a more discriminating immigration policy—one that welcomes American dreamers and bars American destroyers—does not stem from fear or hatred of foreigners, but from the idea of self-preservation and from love of country.

Article 4, Section 4 of the Constitution states clearly: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion." We are not a boarding house for the world. We are a sovereign nation. It's time we started acting like one. ■