

Birthright citizenship – Matt Gaetz would end it

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By Terry A. Hurlbut

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Yesterday Rep. Matt Gaetz (R-Fla.) introduced another in a long line of bills trying to tackle the birthright citizenship problem. His bill is actually the best attempt so far – because it puts on record a body of historical research worthy of a Justice of the Supreme Court. Gaetz demonstrates irrefutably why the framers of the Fourteenth Amendment *never intended* to enshrine birthright citizenship in our law. His bill then makes a simple but significant adjustment to current law. But we can expect certain people to make a fight of it – people who do not have the interests of America and American citizens at heart.

The essence of the birthright citizenship problem

CNAV has covered citizenship by birth, and natural born citizenship, before. To review: common law recognizes two ways to establish birthright citizenship:

- *Jus soli* (the Law of the Soil), according to which a person is a birthright citizen of the country on the soil of which he is born, and
- *Jus sanguinis* (the Law of the Blood), according to which a person inherits the citizenship of his parent(s).

Jus soli is an English common law philosophy, whereas *jus sanguinis* derives from Roman law.

Thus far the Constitution has never had to specify citizenship by *jus sanguinis*. Courts have generally recognized *jus sanguinis* in the case of a person born to two citizen parents. When only *one* parent is a citizen, that weakens the *jus sanguinis* claim. For that reason, many countries attach continuous residency requirements to the citizen parent to validate a *jus sanguinis* claim.

The *jus soli* claim excites the greatest controversy. Does it, or does it not, apply to a child born to a non-permanent resident? His Majesty's Kingdom in fact says no.

Many European countries stopped birthright citizenship long ago because they recognized that it was being abused. US needs to do the same.

pic.twitter.com/Pi2kxpUO8c

— Sandy (@SandraLogmein) [May 30, 2023](#)

Nevertheless, we have the Fourteenth Amendment, which reads in relevant part:

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.

Judge Andrew P. Napolitano firmly believes that settles it: a *jus soli* claim is absolute. But in fact the case of *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898), doesn't quite hold that. Here is its holding:

citizenship as prescribed in the Fourteenth Amendment extends to U.S.-born children of foreign subjects or citizens who, at the time of the child's birth, are permanent residents and are carrying on business in the United States.

Jus soli also assigns citizenship to place of birth if otherwise the child would be stateless.

Congressman Gaetz' research

Now let us examine the bill that Rep. Gaetz introduced yesterday. (One can also read his press release, and articles at Breitbart and The Hill.)

Today I'm introducing the "End Birthright Citizenship Fraud Act."


American citizenship is a privilege – not an automatic right to be co-opted by illegal aliens.

This is an important step in preserving the sanctity of American citizenship. <https://t.co/DAoSTZYrjI>

— Rep. Matt Gaetz (@RepMattGaetz) [July 25, 2023](#)

Episode 115 LIVE: End Birthright Citizenship – Firebrand with Matt Gaetz
<https://t.co/IKiZiwCwqI>

— Rep. Matt Gaetz (@RepMattGaetz) [July 25, 2023](#)

 [@RepMattGaetz](https://t.co/p6KmkFYcPV) moves to end birthright citizenship to stop 'abuse' in immigration system <https://t.co/p6KmkFYcPV>

— Rep. Matt Gaetz (@RepMattGaetz) [July 25, 2023](#)

END BIRTHRIGHT CITIZENSHIP! pic.twitter.com/DsnxTZlesx

— Rep. Matt Gaetz (@RepMattGaetz) [July 25, 2023](#)

 Congressman Matt Gaetz Introduces 'End Birthright Citizenship Fraud Act of 2023'

READ my full press release: <https://t.co/Kc1MLDkr6f> pic.twitter.com/CTOnZhRGcO

— Rep. Matt Gaetz (@RepMattGaetz) [July 25, 2023](#)

Rep. Matt Gaetz (R-Fla.) introduced a bill that would end “unqualified” birthright citizenship for children whose parents are not themselves U.S. citizens.

<https://t.co/S82DynblmK>

— The Hill (@thehill) [July 25, 2023](#)

Gaetz goes back further than English common law to find a workable limit on *jus soli*. He goes back to Roman law, through Bartolus di Saxoferrato, a 14th century Italian scholar. According to Roman law, a Roman citizen by birth was one born within the territory of the Roman state, one of whose parents was himself (or herself) a citizen of that state. This is how Paul of Tarsus could claim Roman citizenship by birth. [Acts 22:25-28](#).

Turn now to the case of [Calvin v. Smith](#) (1608).

The judges in that case determined that a subject of the King was one born owing allegiance to the King. But Sir Edward Coke articulated a key exception. Aliens engaged in hostile occupation of a land *cannot* produce citizens of that land while so engaged. Furthermore, “owing allegiance” means residing lawfully, permanently, voluntarily, and *with the consent of the sovereign*. An illegal immigrant, by definition, *does not* have the consent of the government to remain permanently. Senator Jacob Howard (R-Mich.), in addition, added another exception: birthright citizenship does not apply to the children of foreign diplomats. This Senator Howard gave us the “subject to the jurisdiction thereof” clause of the Fourteenth Amendment.

The value of this research

Gaetz’ research does not end here. He goes on to cite Senator Lyman Trumbull (R-Ill.), co-author of the Thirteenth Amendment. Senator Trumbull clarified that children of *permanent lawful residents* should be entitled to birthright citizenship. This is the standard the Supreme Court would adopt in the famous 1898 case. [U.S. v. Wong Kim Ark](#), 169 U.S. 649 (1898).

Gaetz noticed something else. The Indian Citizenship Act of 1924 granted citizenship to Native Americans and their children *for the first time*. If the Fourteenth Amendment really granted citizenship to them by birth, Gaetz says, that Act would be redundant. (Section 3 of the Fourteenth Amendment apportions Representatives by the total population of a State, *excluding Native Americans not taxed*. But that hasn't anything to do with birthright citizenship, which Section One defines.)

Finally, Gaetz points out that no case law exists extending birthright citizenship to all persons born in the United States, regardless of parental status. He then asserts the United States is one of *two* countries that grant birthright citizenship so generously. (Actually, World Population Review might dispute that finding.)

What the birthright citizenship law does

The relevant part of the law reads as follows:

| SEC. 4. CLARIFICATION OF BIRTHRIGHT CITIZENSHIP.

| Section 101 of the Immigration and Nationality Act (8 U.S.C. 1101) is amended by adding at the end the following:

| “(j) For purposes of section 301(a), the term ‘subject to the jurisdiction thereof’ means, with respect to a person born in the United States, that the person was born to a parent who is, at the time of the person’s birth,—

| “(1) a national of the United States;

| “(2) a refugee;

| “(3) an alien lawfully admitted for permanent residence; or

| “(4) an alien performing active service in the armed forces (as defined in section 101 of title 10, United States Code).”

This doesn't quite address all the questions that, say, Emmerich de Vattel answered about birthright citizenship. For instance, this does not necessarily clarify the “born in-country” status of persons born:

- Within U.S. territorial waters or airspace, or
- Aboard a ship or aircraft belonging to the U.S. armed forces, or registered in the U.S., in international waters.

Vattel would certainly count such persons as “born in the United States,” and no doubt Gaetz would do the same. The question, for Matt Gaetz, is the status of the parents. Notice that the Gaetz bill does not, as Nathan Deal's 2005 bill did, distinguish between children born within

or out of wedlock. And perhaps Gaetz would do well to offer another clarification, to amend 10 U.S.C. Section 101(a)(4) to read,

 | The term “armed forces” means the Army, Navy, Air Force, Space Force, Marine Corps, and Coast Guard.

Nevertheless, this would be a good start, to back away from the present automatic birthright citizenship regime. “Birth tourism” would become a non-starter. Citizenship by birth would go only to persons whose parent(s) had shown some loyalty to the United States. Refugees are a possible exception. Gaetz didn’t define those, nor cite Title and Section for a definition, as he should have. (And perhaps the children of refugees might deserve, if not full citizenship, then permanent lawful residence.) Happily, *armed forces* have a proper definition. They would exclude “Private Military Companies,” or even allied forces.

Best of all, Gaetz would do this by law, not by Executive Order, as Donald Trump proposes. That makes it permanent.