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United States Senate
Committee on the Judiciary
Subcommittee on the Constitution
Hon. Eric S. Schmitt, Chairman

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Written Testimony of Ilan Wurman

Chairman Schmitt and Members of the Committee:

It is often believed that the common-law rule of birthright citizenship was that mere birth on the sovereign's soil was sufficient to create such citizenship. That is incorrect. Although that statement is an approximation of the rule that usually gets the correct result, the precise rule at common law was birth on the sovereign's soil to parents under the sovereign's protection.

That is how Sir Edward Coke described the rule in *Calvin's Case*, the leading common-law decision from 1608. Aliens from friendly countries with permission to be in the realm were under the sovereign's temporary protection and owed in exchange a temporary allegiance to the sovereign. They were, while in the realm, natural subjects of the king. That is why their children born in the realm were natural-born subjects. In contrast, the children born of invading soldiers were not birthright subjects "although born upon [the king's] soil," because they were not born "under the ligeance of a subject" or "under the protection of the king." That is, a natural-born subject is one who is born to *another subject*, a subject who was under

the protection of the king. Invaders did not count, but aliens were subjects of the king if they were under his protection and gave him, in exchange, allegiance.

William Blackstone in his influential Commentaries described the rule respecting foreign ambassadors similarly: their children were not natural-born subjects because they were born under the protection and within the allegiance of another sovereign represented by the father the ambassador.

To summarize the rule, here is Supreme Court Justice Joseph Story: "Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, *while the parents are resident there under the protection of the government*, and owing a temporary allegiance thereto, are subjects by birth." *Inglis* v. *Trustees of Sailor's Snug Harbor*, 28 U.S. 99, 164 (1830) (concurring opinion of Story, J.) (emphasis added). The status of the parents mattered, and the relevant status was whether they were under the protection of the sovereign.

What is more, in the relevant periods of English history, it appears that an alien could come under the sovereign's protection through one of two ways: the grant of a royal safe-conduct or through statutory permission to enter. Safe-conducts were formal legal documents from the king granting permission to enter the realm and extending the king's protection. The examples of these safe-conducts using the language of protection are legion. For present purposes, here is a summary from Blackstone: "[D]uring the continuance of any safe-conduct, either express or implied, the foreigner is under the *protection* of the king and the law." 4 William Blackstone, Commentaries on the Laws of England 69 (Clarendon Press: 1769).

Eventually safe-conducts were replaced by statutes. Magna Carta guaranteed friendly aliens "safe and secure conduct" to engage in trade "unless they have been previously and publicly forbidden." Magna Carta, Ch. 30 (1297). The Carta Mercatoria of 1303 was a general grant of safe-conduct to merchants from several European provinces. The charter specifically guaranteed them "our protection." A 1353 statute provided clearly and unequivocally: "Merchant Strangers . . . may safely and surely *under our Protection* and safe-conduct come and dwell in our said Realm." 27 Edw. III, Stat. 2, c. 2, 1 Statutes of the Realm 333 (emphasis added).

Even subjects of warring nations could be under the sovereign's protection so long as they had permission to remain. In an American case arising out of the War of 1812, Chancellor James Kent explained the rule as follows: "A lawful residence implies protection, and a capacity to sue and be sued." *Clarke v. Morey*, 10 Johns. 69, 72 (N.Y. 1813).

In summary, it appears from the historical record that unlawfully present aliens would not have been considered under the protection of the sovereign, and their children would not have been considered birthright subjects or citizens.

The case from the War of 1812 also illustrates another important proposition: the connection between *protection* and *jurisdiction*. As Kent wrote, not only does a lawful residence imply protection, but it also *therefore* implies "a capacity to sue and be sued." An alien caught at the border may be subject to U.S. criminal jurisdiction, but it does not follow that that alien must be allowed to sue or be sued in U.S. courts or to enter into contracts. Such an alien is not subject to the

complete jurisdiction of the United States in the sense of the Fourteenth Amendment.

The case of temporary visitors was more complicated at common law. The parents, if lawfully present, were under the temporary protection of the sovereign. That is why one judge in a famous case, Lynch v. Clarke, held in 1844 that a child born of temporary sojourners was a citizen. But the rule was contested because of increasing international travel and the resulting dual allegiances. Joseph Story suggested that an exception for temporary visitors would be a "reasonable qualification" to the rule. Henry St. George Tucker in his treatise stated flatly that temporary visitors fell outside the common-law rule. An appellate decision from New York in 1860 strongly suggested similarly.

Most significantly, the military authorities in the Department of the Gulf had to decide whether, during the Civil War, they could conscript into the Union army children born in Louisiana to French parents. A provost judge and the commanding general both concluded that such children, though born on U.S. soil, were only liable to the duties of American citizenship if their parents had been domiciled at the time of their birth.

The Louisiana example also suggests ways in which temporary visitors are not subject to the complete jurisdiction of the United States. Would it be lawful under international law to conscript them or their children? The Union military authorities appear to have thought not. Domicile also creates a general judicial jurisdiction in the courts, a rule inapplicable to temporary visitors. In these and

other ways, temporary visitors also may not be fully subject to the jurisdiction of the United States in the sense of the Fourteenth Amendment.

All of these points are further elaborated in a longer article, *Jurisdiction and Citizenship*, 49 Harvard Journal of Law and Public Policy 315 (2026), which I commend to your attention.

I look forward to your questions.

Sincerely,

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