BROTHERS IN LAW

Birthright citizenship: 20 questions for the solicitor general

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The government's top Supreme Court lawyer will likely face vigorous questioning from the justices on Wednesday in *Trump v. Barbara*, the birthright-citizenship case.

What follows are 20 sets of questions that we ourselves would love to ask Solicitor General D. John Sauer in some great moot court in the sky. (Here on planet Earth, Sauer has of course not invited us to moot him, though he did expressly respond to Akhil's amicus brief at page 13 of his reply brief.) In a sequel column, we'll list some of the hardest questions that might be posed to the appellate advocate on our side of the case, the ACLU's Cecilia Wang, along with the best answers we think she can give.

1. The executive order and your briefs repeatedly invoke the words "mother," "father," "parents," and "domicile." A simple yes-no question: Are any of these words in the *text* of the 14th Amendment or Section 1401(a) of the 1952 Immigration and Nationality Act?
2. Didn't a landmark 1855 statute expressly use the word "fathers" in granting citizenship to certain children born abroad? Didn't other INA provisions expressly use the words "mother" and "father"? Don't these provisions prove that Congress knew how to say "mother" and "father" when it wanted to create parent-based rules? Why isn't the studious *omission* of such words in the birthright-citizenship amendment and its counterpart 1952 enactment near-fatal to your position, at least for an originalist or textualist?

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[Cheat sheet for readers: See last month's tariffs decision at pages 8-9, highlighting that other statutes – but not the one President Donald Trump invoked – expressly used the word "duty."]

3. Where does your rule that just one citizen parent or just one legal-permanent-resident parent suffices to confer birthright citizenship on a baby come from? And where did you get the rule that fathers need to be "biological"? There were no DNA tests in 1868, correct? Didn't the law back then treat the mother's lawful husband as the father regardless of biology? More generally, isn't the veritable code of rules that you are proposing simply made-up, rather like the trimester rules in *Roe v. Wade*?

[Cheat sheet: For a recent exchange pressing an advocate on where in the text of a statute a particular rule came from, see Justice Samuel Alito's questions in an oral argument just last week, at pages 19-20. See also Alito's criticism of Roe *for "concoct[ing] an elaborate set of rules . . . [without] explain[ing] how this veritable code could be teased out of anything in the Constitution," at page 45 of his majority opinion overturning* Roe.*]*

4. Is a foundling of unknown parentage – a modern Baby Moses, so to speak – denied citizenship under the president's executive order on birthright citizenship? The INA's foundling provision affirmatively confers citizenship on "a person of unknown parentage found in the United States . . . until shown . . . not to have been born in the United States." Doesn't this provision confirm that parentage generally doesn't matter – as opposed to being "born under the flag" of the United States?

[Cheat sheet: For a related question spotlighting the prevalence of safe-haven (or Baby Moses) laws in all 50 states, see Justice Amy Coney Barrett's oral-argument question in Dobbs v. Jackson Women's Health Organization at pages 56-57.]

5. Didn't countless 14th Amendment framers and ratifiers – including sitting House Speaker Schuyler Colfax and Abraham Lincoln's first vice president Hannibal Hamlin – publicly declare, in speeches and letters widely reprinted across the land, that all born "under the flag" were birthright citizens? Didn't Schuyler Colfax in particular publicly declare in 1866 that under the 14th Amendment "every person – every man, every woman, every child, born under our flag, or naturalized under our laws, shall have a birthright in this land of ours?" Why do these and myriad other "under the flag" pronouncements go unmentioned in your briefs? Indeed, isn't the under-the-flag test the best way of construing and cashing out the "subject to the jurisdiction" clause of the 14th Amendment, explaining both what the clause sweeps in and what it excludes? What is your response to the evidence presented in an amicus brief (one that you yourself cite) that "subject to" means "under"; that the flag is a helpfully concrete stand-in for "jurisdiction"; that the framers and ratifiers thus used "subject to the jurisdiction" and "under the flag" synonymously; and that the 14th Amendment's text generally focuses on the "person[] born," not on one parent or the other or both? Didn't the framers and ratifiers conceptualize even the diplomat's-child exception in soil-and-flag terms under a legal fiction of extraterritoriality, and wasn't this exception in any event numerically trivial, "hardly . . . applicable to more than two or three or four persons"?

6. As a self-professed originalist, why do you pay virtually no attention to the 14th Amendment's visionary, Abraham Lincoln, who built the Republican Party coalition that framed and ratified the amendment? Didn't Lincoln's – Lincoln's! – Attorney General Edward Bates expressly rule that "[c]hildren born in the United States of alien parents, who have never been naturalized, are native-born citizens of the United States"? Didn't Lincoln's – Lincoln's! — Secretary of State William Seward expressly say, in connection with the child of a sojourner, that "the children of foreigners born here are citizens of the United States"? And didn't Lincoln's – Lincoln's! – Treasury Secretary (and future Chief Justice) Salmon Chase enthusiastically endorse Bates's opinion? Why do all these Lincoln-administration pronouncements go unmentioned in your briefs?

[Cheat sheet: For a powerful and poignant invocation of Lincoln by another avowed originalist, see Justice Clarence Thomas' concurrence in Students for Fair Admissions v. Harvard, at pages 34 and 50.]

7. Can you identify **even five framers** between 1866 and 1868 who clearly and publicly stated your position that the 14th Amendment in general was – outside the context of diplomats – about *parents*? More generally, isn't the onus on you – as the party asking us to revise 150 years of executive practice and judicial precedent and to go far beyond the text – to produce compelling evidence that your view, with its contrived parental rules, is the correct one?

8. If parental illegal entry precludes citizenship, why did no one ever question the citizenship of children of **illegally trafficked slaves**? Aren't some illegal immigrants today the victims of illegal trafficking? If parental domicile is the rule, why were the children of **nondomiciliary** ("wandering") "**Gypsies**" "undoubtedly" citizens?

[Cheat sheet: For a passionate pronouncement that "the entire point of the [14th] amendment was to secure rights of the freed former slaves," see Justice Ketanji Brown Jackson's line of questioning in **Merrill v. Milligan** *at page 58.]*

9. You dwell on state citizenship at pages 8-9 of your **reply brief**. But isn't a child born today to U.S. citizens in the District of Columbia undoubtedly a U.S. citizen? Wasn't a child born in a territory around 1868, as Vice President Charles Curtis was, also undoubtedly a U.S. citizen? Also, Section 1401(a) says nothing whatsoever about state residence. Doesn't all this make your state-citizenship argument **utterly irrelevant** – indeed, absurd textual gobbledygook? Has any member of the Supreme Court in any prior opinion ever said anything like what you're saying to us now?

10. You quote (at pages 17 and 23-24 of your **merits brief**) stray statements from one or two members of Congress using the word "parent." Weren't these statements about the 1866 Civil Rights Act, not the 14th Amendment? Textually, wasn't the 14th Amendment's citizenship rule broader than the Civil Rights Act's? Or is it your position that the scope of the two rules was absolutely identical in every respect? If so, why did these distinct enactments **use different words**?

[Cheat sheet: For a reminder that amended language generally indicates an amended meaning, see Justice Brett Kavanaugh's majority opinion in **Snyder v. United States** *at pages 8-9.]*

11. Can you point to **even a single** post-1868 judicial decision actually denying citizenship to a person born on American soil and under the American flag because that person was born to temporary sojourners? Or a single decision actually denying citizenship to a child of tribal Indians born off tribal land in say, **Chicago or Detroit**? Or a single case in all of American history, other than ***Dred Scott v. Sandford*** and its pre-Civil War ilk, actually denying citizenship to a soil-and-flag child for being born to the "wrong" parents?

12. Can you point to **even a single** instance of executive-branch practice expressly denying 14th Amendment citizenship to a soil-and-flag child? You cite to two 1885 letters in your **merits brief** at page 25, but weren't those **never-litigated cases in fact *naturalization* disputes** about children who had arguably renounced citizenship by leaving America as children? Why then did you say at page 2 of your **reply brief** that "[o]nly in the early 20th century did Executive Branch practice begin to depart from" your interpretation of the amendment?

13. Didn't the Supreme Court expressly assert in the 1957 ***Hintopoulos*** case that a child of illegal aliens was "*of course*, an American citizen by birth"? Didn't even the solicitor general and the immigration officials in *Hintopoulos* repeatedly assert that the child was a citizen? Wasn't the child's citizenship the statutory prerequisite of the entire legal dispute in the case? And wasn't *Hintopoulos* decided just 5 years after Section 1401(a)'s enactment? Why then did you not even mention *Hintopoulos* in **any of your four** filings to the Supreme Court while dismissing similar language in related cases as mere "assum[ptions]" (in your **reply brief** at page 19)?

[Cheat sheet: For an opinion stressing Hintopoulos' *"of course" language, see page 8 of Justice Sonia Sotomayor's dissent in* **Trump v. CASA**. *And for discussion of the solicitor general's "absolute obligation" of candor to the court, see* ***these 2009 comments*** *by then-Solicitor General Elena Kagan.]*

14. Didn't Congress statutorily ratify *Hintopoulos* by later amending other provisions of the INA – including adding **a 1965 provision** about the deportation rules applied in *Hintopoulos* – but leaving the text of Section 1401(a) totally untouched?

[Cheat sheet: For an enunciation of this statutory-construction principle, see the 1978 case **Lorillard v. Pons** *at pages 580-82.]*

15. Did *any* prominent person in 1952 – in *any* branch of government – read **Section 1401(a)** as you now do, to exclude all the sorts of children you now seek to exclude?

16. Why is Trump the first president ever to read the 1952 statute as you now do? Why did he himself not read the statute this way in his first term? Isn't "the fact that no President has ever" read the statute your way "strong evidence" that your reading is wrong, in the words of Chief Justice John Roberts in the **tariffs decision** (at page 16)?

[Cheat sheet: For more opinions treating novel and aggressive claims with major skepticism, see Barrett's concurrence in **Biden v. Nebraska** *at page 13 and Justice Neil Gorsuch's concurrence in* **Learning Resources v. Trump** *at6.]*

17. Is Trump free tomorrow to make his order retroactive? Is he free to change his rules in other ways at whim, for example by requiring *both* parents to be domiciled in America rather than just one?

18. Can the next president replace Trump's more restrictive rules with more permissive rules? Can that president, for example, redefine "mother" as biological *or* gestational *or* adoptive? Can that president rescind Trump's order altogether and return to the traditional executive-branch practice prior to 2025? Will voting eligibility shift wildly from administration to administration and election to election?

[Cheat sheet: For concerns about whipsawing rules, see, for example, Roberts' **Loper Bright Enterprises v. Raimondo** *majority opinion at page 33, Gorsuch's* **Learning Resources** *concurrence at 17, and Kavanaugh's* **Loper Bright** *oral-argument exchange at 97-98.]*

19. Practically speaking, will newborns' citizenship be in limbo for months and years as parentage and domicile issues are litigated?

[Cheat sheet: For concerns about the workability of the Trump administration's birthright-citizenship rule, see Kavanaugh's oral-argument questions in **CASA** *at pages 56-57. And for doubts about rules that "would inevitably spark collateral litigation" over countless complexities, see* ***Kavanaugh's very first majority opinion*** *at page 7 and a* ***2009 Roberts' dissent*** *at 892-99.]*

20. Why does the executive order use one standard for "mother[s]" and a different one for "father[s]"? What "exceedingly persuasive justification" can you offer for this differential treatment? Doesn't this **sex discrimination** violate the Supreme Court's 2017 decision in ***Sessions v. Morales-Santana*** by using one standard for fathers and another for mothers? And isn't this aspect of the order yet another illustration that its veritable code of rules is entirely made-up?

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