

BAR WATCH BULLETIN – SUNDAY, AUGUST 7

Reporting live from the ABA Meetings in Toronto.

Birthright Citizenship

The ABA's Commission on Hispanic Legal Rights and Responsibilities filed a late recommendation urging Congress "to reject any resolution proposing an amendment to the United States Constitution that would alter, in any way, the grant of United States citizenship under the Fourteenth Amendment to any persons born in the United States."

According to the Commission, proposals to curb birthright citizenship "seek to undermine well-established precedent and alter the legal interpretation and application of the Citizenship Clause of the Fourteenth Amendment to the United States Constitution in order to deny citizenship to infants born in the United States." Specifically, the proposals target those children born to parents who are in the country illegally. The Commission maintains such proposals "are a significant threat to the civil rights of Latinas and Latinos in the United States, including their rights to participate fully in the United States legal system."

The Commission noted in the recommendation's accompanying report that it sponsored a series of regional hearings on the rights of Hispanics and received testimony "on the ongoing efforts to curtail and eliminate rights of Latinas and Latinos regardless of citizenship and immigration status." These hearings led to this recommendation.

The report offered some historical background of the Fourteenth Amendment's Citizenship Clause and recent legislative proposals to curb birthright citizenship. The sponsor extensively discusses the case of *United States vs. Wong Kim Ark*, in which the Supreme Court concluded that the phrase "subject to the jurisdiction thereof" only precluded birthright citizenship for "children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory."

The Commission notes that Senators David Vitter and Rand Paul have proposed a constitutional amendment stating "that a person born in the United States shall not be a U.S. citizen unless: (1) one parent of the person is a U.S. citizen; (2) one parent of the person is an alien lawfully admitted for permanent residence in the United States who resides in the United States; (3) one parent of the person is an alien performing active service in the U.S. Armed Forces; or (4) the person is naturalized in accordance with the laws of the United States." According to the sponsor, this "would create a large class of stateless persons, children born and raised in the United States but without the rights or obligations of citizenship, and also without strong ties to any other nation." This would provoke "dangerous and unknown" implications.

The Commission also references other legislative proposals, such as the Birthright Citizenship Act, which would restrict citizenship to children who have at least one parent who is a citizen, lawful permanent resident, or an active duty member of the armed forces. The "State Legislators for Legal Immigration" coalition has launched state legislative initiatives restricting birthright citizenship, according to the Commission. These proposals would "seek to overturn the Supreme

Court precedent in *Wong Kim Ark* without a Supreme Court decision or duly ratified Constitutional Amendment.” These are “arduous” tasks and “pose a broader threat to the Separation of Powers” by advocating legislative approaches to change a Supreme Court precedent.

Critics of this recommendation note that illegal immigration poses far more “dangerous and unknown” implications than the Commission acknowledges. They contend that the Commission mischaracterizes some of the Congressional and state legislative proposals as well as the Supreme Court precedents that grant birthright citizenship. Critics also maintain that there is no case law that expansively interprets the Citizenship Clause, as the sponsor claims. Critics note that *Wong Kim Ark* does allow for exceptions to Citizenship Clause, and there is more room to interpret the Clause than the sponsor acknowledges.

Point-Counterpoint

The ABA House of Delegates is now offering a point-counterpoint on its webpage. According to the House, “To better inform all lawyers and to encourage a vigorous and thoughtful debate on one or more Resolutions, proponents and opponents of a particular House Resolution will be asked to prepare brief memos to distribute to the members of the House and other bar association leaders.” This feature is similar to one served by ABA Watch [LINK], which offers a critical perspective on proposed recommendations before the House of Delegates

Two recommendations are covered. The first is Resolution 11-2, which amends “§2.2 and §6.2 of the [ABA] Constitution and various other sections of the Constitution and the House Rules of Procedure, to provide that each territory, as defined, shall have a seat in the House of Delegates.” The second is 110B, which “Approves the Uniform Collaborative Law Rules/Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2010, as appropriate legislation or rules for those states desiring to adopt the specific substantive law suggested therein.”

The full point/counterpoints can be found here:

http://www.americanbar.org/groups/leadership/2011_annual_house_mtg_docs.html.

Judicial Funding

Former United States Supreme Court Justice Sandra Day O’Connor joined Ted Olson and David Boies, the co-chairmen of the ABA’s Commission on the Preservation of the Justice System, on a panel Sunday to call for additional funding for the judicial branch. Boies described a “crisis” in funding, which caused increased judicial vacancies, reduced court hours, and lay-offs amongst court staff. Olson echoed the concern, stating “we cannot ensure justice, we cannot ensure domestic tranquility” with diminished resources. Justice O’Connor discussed strategies to communicate these concerns to legislators, including personal contact and arranging meetings with legislators and general counsels. Along with co-panelist Mary McQueen, the president of the National Center for State Courts, the participants urged ABA members to become engaged in lobbying for increased funding, engaging the public and the press, reaching out to legislators, and possibly even organizing a PAC to campaign for more funds.

Olson endorsed the passage of Resolution 302, which will be considered by the ABA House of Delegates on Monday at 4:00 pm. The recommendation “urges state, territorial, and local bar associations to document the impact of funding cutbacks to the justice systems in their jurisdictions, to publicize the effects of those cutbacks, and to create coalitions to address and respond to the ramifications of funding shortages to their justice systems.” Additionally, it “urges state, territorial, and local governments to recognize their constitutional responsibilities to fund their justice systems adequately, provide that funding as a governmental priority, and develop principles that would provide for stable and predictable levels of funding of those justice systems.”

Future ABA Leadership

James Silkenat, a partner at Sullivan & Worcester in New York City, is running unopposed to serve as the ABA president-elect nominee for 2012-13. He will officially be nominated in February at the 2012 Midyear Meeting in New Orleans. Silkenat will become ABA president in August 2013 at the Annual Meeting in San Francisco, serving a one-year term.

Robert M. Carlson, a member of Corette Pohlman & Kebe in Montana, is running unopposed to serve as the chairman of the ABA House of Delegates beginning in August 2012-14.