

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. TRUMP, PRESIDENT )  
OF THE UNITED STATES, ET AL., )  
Petitioners, )  
v. ) No. 25-365  
BARBARA, ET AL., )  
Respondents. )  
- - - - -

Pages: 1 through 139  
Place: Washington, D.C.  
Date: April 1, 2026

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6                            v.                                 ) No. 25-365

7   BARBARA, ET AL.,                                )

8                            Respondents.                    )

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11   Washington, D.C.

12   Wednesday, April 1, 2026

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14                   The above-entitled matter came on for  
15 oral argument before the Supreme Court of the  
16 United States at 10:04 a.m.

17

18   APPEARANCES:

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20       Justice, Washington, D.C.; on behalf of the  
21       Petitioners.

22   CECILLIA D. WANG, ESQUIRE, San Francisco, California;  
23       on behalf of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 25-365, Trump versus Barbara.

General Sauer.

ORAL ARGUMENT OF GEN. D. JOHN SAUER

ON BEHALF OF THE PETITIONERS

GENERAL SAUER: Mr. Chief Justice, and may it please the Court:

The Citizenship Clause was adopted just after the Civil War to grant citizenship to the newly freed slaves and their children, whose allegiance to the United States had been established by generations of domicile here. It did not grant citizenship to the children of temporary visitors or illegal aliens, who have no such allegiance.

This conclusion reflects the original public meaning of the clause. When Congress used the term "not subject to any foreign power" in the Civil Rights Act of 1866, it rejected the British conception of allegiance. Senator Trumbull explained that "subject to the jurisdiction thereof" in the clause means not

1 owing allegiance to anybody else. And in 1884,  
2 this Court recognized that "subject to the  
3 jurisdiction" means owing direct and immediate  
4 allegiance.

5           The clause thus does not extend  
6 citizenship to the children of temporary visa  
7 holders or illegal aliens. Unlike the newly  
8 freed slaves, those visitors lack direct and  
9 immediate allegiance to the United States. For  
10 aliens, lawful domicile is the status that  
11 creates the requisite allegiance, and the text  
12 of the clause presupposes domicile.

13           For decades following the clause's  
14 adoption, commentators recognized that the  
15 children of temporary visitors are not citizens  
16 and illegal aliens lack the legal capacity to  
17 establish domicile here.

18           Unrestricted birthright citizenship  
19 contradicts the practice of the overwhelming  
20 majority of modern nations. It demeans the  
21 priceless and profound gift of American  
22 citizenship. It operates as a powerful pull  
23 factor for illegal immigration and rewards  
24 illegal aliens who not only violate the  
25 immigration laws but also jump in front of

1 those who follow the rules.

2           It has spawned a sprawling industry of  
3 birth tourism as uncounted thousands of  
4 foreigners from potentially hostile nations  
5 have flocked to give birth in the United States  
6 in recent decades, creating a whole generation  
7 of American citizens abroad with no meaningful  
8 ties to the United States.

9           I welcome the Court's questions.

10           JUSTICE THOMAS: General Sauer, before  
11 we get into the broader national issues, would  
12 you start with Dred Scott? Dred Scott was a  
13 case about state citizenship. It was a  
14 diversity case. The -- and, of course, we know  
15 what Chief Justice Taney did with that.

16           How does the Citizenship Clause  
17 respond specifically to Dred Scott and  
18 answers -- or changes -- or corrects its answer  
19 as to citizenship?

20           The other point is the Citizenship  
21 Clause refers not just to national citizenship  
22 but also to state citizenship. Are we to have  
23 two different definitions for those? It's --  
24 it's one word, citizens of the United States  
25 and citizens of the state wherein you -- they

1       reside.

2                   So, as you begin, I'd like you to go  
3       back at the beginning and be more specific  
4       about the answer. And I want you to explain  
5       whether or not those two definitions are the  
6       same or related and what state citizenship is  
7       based on.

8                   GENERAL SAUER: Thank you, Justice  
9       Thomas.

10                   I'll maybe start by addressing Dred  
11       Scott, you know, as -- as you alluded to the  
12       fact Dred Scott, you know, imposed one of the  
13       worst injustices in the history of -- of this  
14       Court and it led to the outbreak of the Civil  
15       War. It's very clear, and this Court in all of  
16       its early cases interpreting the Fourteenth  
17       Amendment said, you know, the one pervading  
18       purpose, the main object of the Citizenship  
19       Clause, is to overrule dead -- Dred Scott and  
20       establish the citizenship of the freed slaves.

21                   And if you look at the debates in the  
22       Congressional Record and the discussion  
23       surrounding the adoption of the Citizenship  
24       Clause, what you see is a very clear  
25       understanding that the newly freed slaves and

1 their children have a relationship of domicile.  
2 They do not have a relationship of any -- to  
3 any foreign power. For example, there's a  
4 comment where he says, look, people have been  
5 here for five generations and no -- clearly  
6 have no relationships to any foreign African  
7 potentate, you know, are -- have a relationship  
8 of allegiance to the United States.

9           And that reinforces our point that  
10 allegiance is what the word "jurisdiction"  
11 means. It doesn't mean regulatory jurisdiction  
12 or -- or -- you know, or sort of being subject,  
13 merely subject to the laws. They're talking  
14 and they're thinking about it in those debates,  
15 about allegiance.

16           Now, as to your second question, if  
17 you look at the text of the clause, we believe  
18 there -- it says, you know, born in the United  
19 States, born or naturalized in the United  
20 States and subject to the jurisdiction thereof  
21 are citizens of the United States and the  
22 states of which they reside. So there's a  
23 constitutional guarantee that applies to both  
24 federal or national and state citizenship.

25           And the key point we make there is

1 that that word "reside," if you look at, for  
2 example, Section 1473 of Justice Story's  
3 commentaries, was understood to mean domicile.  
4 So, when they say "subject to the jurisdiction"  
5 and then they go on to say you're a citizen of  
6 the United States and the state in which they  
7 reside, the very text of the clause itself  
8 presupposes that the citizen is domiciled in  
9 the United States. If they're present in a  
10 state at all, they reside there. "Reside"  
11 means domicile in the Constitution, and we  
12 think that strongly supports our  
13 interpretation. It's textual evidence of our  
14 domicile-based theory of jurisdiction.

15 CHIEF JUSTICE ROBERTS: Well, starting  
16 with that theory, you obviously put a lot of  
17 weight on "subject to the jurisdiction  
18 thereof," but the examples you give to support  
19 that strike me as very quirky, you know,  
20 children of ambassadors, children of enemies  
21 during a hostile invasion, children on  
22 warships, and then you expand it to a whole  
23 class of illegal aliens are -- are here in the  
24 country.

25 I'm not quite sure how you can get to

1 that big group from such tiny and sort of  
2 idiosyncratic examples.

3 GENERAL SAUER: There are those sort  
4 of narrow exceptions for ambassador, foreign  
5 public ships -- "tribal Indians" is an enormous  
6 one that they were very focused on in the  
7 debates as well.

8 But what I'd do is invite the Court to  
9 look at the intervening step, which is the  
10 enactment of the Civil Rights Act of 1866.  
11 And, there, they didn't say "subject to the  
12 jurisdiction thereof." There, it says "not  
13 subject to any foreign power." Now, if you go  
14 back to Blackstone and Calvin's case, they say  
15 it does not matter if you are subject to any  
16 foreign power. If you are born in the king's  
17 domains, you have this indefeasible duty of  
18 allegiance to the king at any time.

19 So there's a clear repudiation in the  
20 Civil Rights Act. The Civil Rights Act is this  
21 breakwater which makes it very, very clear that  
22 they are not thinking about allegiance in the  
23 terms of, like, the British common law.  
24 They've adopted the Republican conception of  
25 allegiance. So it's from "not subject to any

1 foreign power," and then the debates just a  
2 couple months later make it very clear that  
3 they're re-codifying the same conception. They  
4 were dissatisfied with the potential ambiguity  
5 in the phrase "Indians not taxed" and they  
6 adopted "subject to the jurisdiction thereof."

7           And one of the strongest statements of  
8 this is Senator Trumbull's statement that I  
9 quoted at the beginning where he says -- he's  
10 asked, well, what does that mean, "subject to  
11 the jurisdiction thereof." So he says it means  
12 not owing allegiance to anybody else. That is  
13 what it means.

14           And this Court picked up on that in  
15 Elk against Wilkins when it says -- uses, you  
16 know, completely subject to the political  
17 jurisdiction, not merely regulatory  
18 jurisdiction.

19           JUSTICE SOTOMAYOR: What do you do  
20 with Wong Kim Ark's quote of Daniel Webster,  
21 who said: "Independently of a residence with  
22 intention to continue such residence,  
23 independently of any domiciliation,  
24 independently of the taking of any oath of  
25 allegiance or renouncing any former allegiance,

1 it is well-known that by the public law, a  
2 non-citizen, while he is here in the United  
3 States, owes obedience to this country's laws."

4 Now the examples that Wong Ark Kim  
5 used as exceptions are situations in which  
6 there was not temporary allegiance to the  
7 United States. The children of foreign  
8 diplomats, whose only allegiance was to their  
9 foreign -- to their foreign country, and/or  
10 occupied territory residents, including those  
11 citizens in Maine who had been occupied by the  
12 British forces, the U.S. had no control over  
13 them.

14 And the whole theory of the Indian  
15 tribes was similar. The Indian tribes were  
16 analogized to foreign diplomats. So what do we  
17 do with that?

18 GENERAL SAUER: I'd say two things.  
19 First, as to the Indian tribes, we think that's  
20 a case that strongly supports us because, of  
21 course, by 1866 and 1868, there was strong  
22 understanding that the Indian tribes were  
23 subject to the United States' regulatory  
24 jurisdiction.

25 JUSTICE SOTOMAYOR: But not the same

1 way that temporary foreigners were, meaning  
2 there was a real debate going on whether the  
3 U.S. actually had jurisdiction over Indian  
4 tribes. That's why our cases for the longest  
5 time, until that was finally settled, said  
6 absent some act of Congress, there is -- our  
7 laws don't apply, U.S. laws don't apply, to  
8 Indians on Indian lands, correct?

9 GENERAL SAUER: I believe you look at  
10 the Rogers decision, for example, that we cite  
11 in our brief, where -- where they say that they  
12 are subject to the United States' regulatory --

13 JUSTICE SOTOMAYOR: That's later. I'm  
14 talking at the time.

15 GENERAL SAUER: Yes, at the time. So,  
16 as to 1817 --

17 JUSTICE SOTOMAYOR: All right. So  
18 what do you do during the debates of the 1866  
19 Civil Rights Act and of the Fourteenth  
20 Amendment with the entire discussion of the  
21 people who opposed the amendment who kept  
22 saying we can't pass it because we're making  
23 citizens of gypsies, who have no allegiance to  
24 anybody, and we're now -- we're going to make  
25 citizens of Chinese people, who can't be

1 citizens because we're not going to permit them  
2 to be citizens.

3 What do we do with those debates and  
4 the fact that the proponents of both acts said  
5 everyone who's born in the U.S. will be  
6 citizens?

7 GENERAL SAUER: First, as to that  
8 particular exchange, page 2890 of the  
9 Congressional Record from 1866, Senator Cowan  
10 gives this virulently racist statement where he  
11 says that. And what does he say right at the  
12 beginning of that -- that sort of offensive  
13 speech? He says -- he says, we can't have  
14 children of gypsies, children of Chinese  
15 immigrants, we can't have them become citizens,  
16 and he says: "Have they any more rights than a  
17 sojourner in the United States?"

18 So he's trying to persuade the  
19 Republicans to his view by appealing to a  
20 common understanding that sojourners do not  
21 have children who become citizens.

22 JUSTICE SOTOMAYOR: He failed.

23 GENERAL SAUER: So there's powerful  
24 evidence there that everybody understood this  
25 to, you know, not sweep in the temporary

1 sojourner, and that's why you see for 40, 50  
2 years, you see every commentator who addressed  
3 the specific question of temporary presence  
4 saying it's not covered by the clause,  
5 including for decades after Wong Kim Ark.

6 JUSTICE ALITO: General, can I take  
7 you back to the Chief Justice's question about  
8 the specific exceptions to birthright  
9 citizenship that everybody seems to agree were  
10 recognized under the common law.

11 And it brings up an important  
12 principle about how we interpret the law. When  
13 particular problems pop up, lawmakers may enact  
14 a general rule. When they do that, is the  
15 application of that general rule limited only  
16 to the situations that they had in mind when  
17 they adopted the general rule, or do we say  
18 they adopted a general rule, they meant for  
19 that to apply to later applications that might  
20 come up?

21 Justice Scalia had an example that  
22 dealt with this situation. He imagined an old  
23 theft statute that was enacted well before  
24 anybody conceived of a microwave oven, and then  
25 afterwards someone is charged with the crime of

1 stealing a microwave oven, and this -- this  
2 fellow says: Well, I can't be convicted under  
3 this because a microwave oven didn't exist at  
4 that time.

5 And he dismissed that. There's a  
6 general rule there and you apply it to future  
7 applications. And what we're dealing with here  
8 is something that was basically unknown at the  
9 time when the Fourteenth Amendment was adopted,  
10 which is illegal immigration.

11 So how do we deal with that situation  
12 when we have a general rule?

13 GENERAL SAUER: Yeah, I strongly agree  
14 with the way that you framed it, that there is  
15 a general principle that's a broad principle  
16 that's adopted in the phrase "subject to the  
17 jurisdiction thereof."

18 And we submit that our theory of  
19 allegiance and domicile-based allegiance is  
20 what explains those specific exceptions that  
21 everybody was aware of, but it is broad enough  
22 to sweep in future situations. And, as you  
23 pointed out, illegal immigration did not exist  
24 then.

25 Now the problem of temporary visitors

1 did exist. And it's very interesting that as  
2 you look at pages 26 to 28 of our brief,  
3 commentators going from, you know, 1881 until  
4 1922 are uniformly saying that children of  
5 temporary visitors are not included.

6 Now that logic, we say, naturally  
7 extends. It's really an a fortiori case. If  
8 you have someone who enters illegally, by the  
9 1880s, there are restrictions on immigration.  
10 If you've entered illegally, it's kind of, you  
11 know, a well-established principle of law going  
12 back to the Code of Justinian that says you're  
13 not allowed to be there, you cannot -- you  
14 don't have the legal capacity to create  
15 domicile there.

16 JUSTICE KAGAN: But I think, General  
17 Sauer, that what you just said suggests that  
18 you can't be arguing in the way Justice Alito  
19 suggests because most of your brief is not  
20 about illegal aliens. Most of your brief is  
21 about people who are just temporarily in the  
22 country, where there was quite clearly an  
23 experience of, an understanding of, that they  
24 were going to be temporary inhabitants.

25 And your whole theory of the case is

1 built on that group. You don't get to talking  
2 about undocumented persons until quite later  
3 and at much lesser, you know, I think it's like  
4 10 pages to three pages or something like that.

5 So you can't really be going with  
6 Justice Alito's theory. You must be saying  
7 that there is a principle that developed --  
8 that was there in -- at the time of the  
9 Fourteenth Amendment, isn't that right?

10 GENERAL SAUER: We agree there's a  
11 principle there at the Fourteenth Amendment.  
12 It is the -- jurisdiction means allegiance.  
13 The allegiance of a -- it is very strongly  
14 reflected in 19th century sources. The  
15 allegiance of an alien present in another  
16 country is determined by domicile.

17 And that goes back to The Venus and  
18 The Pizarro, it goes through the Koszta Affair  
19 in 1853, it comes right up to Fong Yue Ting and  
20 Lau Ow Bew that are decided shortly before Wong  
21 Kim Ark. So that's the principle. That  
22 principle clearly applies here. I also  
23 respectfully disagree with that. I think --

24 JUSTICE KAGAN: Yeah, and I guess,  
25 Mr. -- General Sauer, you know, where does this

1 principle come from, allegiance, domicile?  
2 Allegiance, I think you point to a Lincoln  
3 funeral speech as your primary example of where  
4 this principle comes from.

5           It's certainly not what we think of  
6 when we think of the word "jurisdiction." And  
7 I appreciate that jurisdiction has many  
8 meanings, but, you know, the first meaning is,  
9 like, if you're subject to jurisdiction, you're  
10 subject to the authority of.

11           One doesn't say, oh, what that means  
12 is a certain kind of allegiance that  
13 domiciliaries have and nobody else does. So  
14 the text of the clause, I think, does not  
15 support you. I think you're sort of looking  
16 for some more technical, esoteric meaning.

17           And then the question comes, okay, if  
18 the text doesn't support you, if there's a real  
19 history of people using it that way, but as far  
20 as I can tell, you know, at the time of the  
21 Fourteenth -- you're -- you're -- you're using  
22 some pretty obscure sources to get to this  
23 concept.

24           GENERAL SAUER: Well, I take it  
25 straight from the Framers' mouths. So, for

1 example, Senator Trumbull said -- was asked,  
2 what does jurisdiction mean? It means subject  
3 to the jurisdiction. He says, what does that  
4 mean? He says, it means not owing allegiance  
5 to anybody else. He is the principal framer of  
6 the Civil Rights Act of 1866.

7 Representative Bingham, who's the  
8 framer of the Fourteenth Amendment, is asked  
9 what -- what does it mean in the Congressional  
10 Record at page 1291, and he says, "within the  
11 jurisdiction of the United States of parents  
12 not owning allegiance to any foreign  
13 sovereignty." And we've cited many, many  
14 examples where the congressional debates  
15 reflect that.

16 Then you referred to the oration of  
17 George Bancroft. That's one of probably 16  
18 sources where there's at least 13, counting  
19 that one and the 12 treatises we cite at pages  
20 26 to 28 of our brief.

21 There is over a dozen sources that  
22 specifically address temporary sojourners in  
23 the five decades after the enactment of the  
24 amendment, and every single one of them says,  
25 well, temporary sojourners, their children are

1 not included, including for two decades after  
2 Wong Kim Ark. So --

3 JUSTICE GORSUCH: General, if -- if  
4 domicile is the key linchpin to your argument,  
5 and I take it that it is, do we look at how  
6 domicile was understood in 1868, or do we look  
7 at it and how it's understood today in context  
8 of the INA?

9 GENERAL SAUER: The 1868  
10 understanding. Now I'm not aware of a strong  
11 difference between those, but --

12 JUSTICE GORSUCH: Well, here's where  
13 I'm going with it. I'm just working within  
14 your argument for a moment.

15 Today, you can point to laws against  
16 immigration that are much more restrictive than  
17 they were in 18- -- we really didn't have laws  
18 like that, we do today, until maybe 1880. So,  
19 if somebody showed up here in 1868 and  
20 established domicile, that was perfectly fine  
21 without respect to anything, any -- any  
22 immigration laws. There they were.

23 And so why wouldn't we, even if we  
24 were to apply your own test, come to the  
25 conclusion that the fact that someone might be

1 illegal is immaterial?

2 GENERAL SAUER: I would first cite  
3 Wong Kim Ark on that point because Wong Kim Ark  
4 says you're --

5 JUSTICE GORSUCH: Well, I'm not sure  
6 how much you want to rely on Wong Kim Ark.

7 (Laughter.)

8 GENERAL SAUER: But that -- that  
9 statement -- there is a statement in there that  
10 says so long as they are permitted to be here.  
11 So Wong Kim Ark -- keep in mind that by the  
12 time they decide nine -- nine -- Wong Kim Ark  
13 in 1898 --

14 JUSTICE GORSUCH: I know, but  
15 you're -- but that's 1898. Now I'm looking at  
16 1868, you're telling me is when I should look,  
17 in the test for domicile, and -- and -- and the  
18 stuff you have about "unlawfully present" is  
19 like Roman law sources you're going to, and --

20 GENERAL SAUER: First and Second  
21 Restatements as well and --

22 JUSTICE GORSUCH: Yeah, but -- but --

23 GENERAL SAUER: -- and decisions of  
24 this Court. Go -- sorry, go ahead.

25 JUSTICE GORSUCH: Yeah, but -- so it

1 wouldn't be the INA that would control whether  
2 you're -- you're capable of having domicile; it  
3 would be whatever the law was in 1868?

4 GENERAL SAUER: I -- well, I think  
5 that this is addressed by my exchange with  
6 Justice Alito from earlier, which is that this  
7 concept, jurisdiction, baking in --

8 JUSTICE GORSUCH: So -- so --

9 GENERAL SAUER: -- allegiance and  
10 domicile as applied to --

11 JUSTICE GORSUCH: -- so Congress could  
12 continually restrict who may lawfully be  
13 present more and more, and you would say that  
14 would be incorporated into it even though  
15 you're telling us to apply the original meaning  
16 of 1868?

17 GENERAL SAUER: The original meaning  
18 of "domicile."

19 JUSTICE GORSUCH: Okay.

20 GENERAL SAUER: And so the question is  
21 did --

22 JUSTICE GORSUCH: Who -- who --

23 GENERAL SAUER: -- is there any  
24 argument that the Framers intended to preclude  
25 Congress from dictating who can and who cannot

1 establish a lawful domicile here? I don't see  
2 any evidence of that in the Congressional  
3 Record, so it's a natural extension.

4 JUSTICE GORSUCH: Whose domicile --

5 JUSTICE JACKSON: But --

6 JUSTICE GORSUCH: -- matters? I mean,  
7 it's not the child obviously. It's --  
8 you're -- it's the parents you'd have us focus  
9 on. And, you know, what if -- is it the  
10 husband? Is it the wife? What if they're  
11 unmarried? Who -- whose domicile?

12 GENERAL SAUER: Well, in -- in the  
13 Executive Order, it draws a distinction between  
14 the mother and the father, and it's really the  
15 mother's domicile, I think, that would matter  
16 there because that's the first --

17 JUSTICE GORSUCH: Well, but 1868  
18 matters, you're telling us. So what's --  
19 what's the answer?

20 GENERAL SAUER: The 1868 sources talk  
21 about parents. I'm not aware of them drawing a  
22 distinction between mother or father, but they  
23 say the domicile of the child follows the  
24 domicile of the parents.

25 JUSTICE GORSUCH: And how are we going

1 to determine domicile? I mean, would we use  
2 contemporary sources on what qualifies as  
3 domicile in a state, or do we look in 1868, and  
4 do we have to do this for every single person?

5 GENERAL SAUER: And, again, I don't  
6 see a strong distinction between those because,  
7 of course, domicile as a -- a high-level  
8 concept has been pretty consistent over  
9 centuries, which is lawful presence with the  
10 intent to remain permanently. That --  
11 domicile, when you've come to a new nation, you  
12 say I'm here to stay, you become part of their  
13 political community, and you become akin to a  
14 citizen. And that's reflected very strongly in  
15 the cases I cited before.

16 JUSTICE GORSUCH: And just to circle  
17 back to Justice Kagan's point, it's striking  
18 that in none of the debates do we have parents  
19 discussed. We -- we have the -- the child's  
20 citizenship, and the focus of the clause is on  
21 the child, not on the parents. And you don't  
22 see domicile mentioned in -- in the debates.

23 That -- the absence is striking.

24 GENERAL SAUER: I think the 19th  
25 century sources would say a child, a newborn

1 child, lacks the capacity to form a domicile,  
2 so they're imputed the domicile of their  
3 parents. So I don't think they would have seen  
4 a distinction between children and parents.

5 And I'd point out that their -- their  
6 position, like ours, is forced to look at the  
7 domicile of the parents because, if you look at  
8 the exceptions that they accept, like --

9 JUSTICE GORSUCH: I'm talk -- I'm  
10 talking about in --

11 GENERAL SAUER: -- tribal Indians and  
12 so forth --

13 JUSTICE GORSUCH: -- I'm talking about  
14 in the debates over the Fourteenth Amendment  
15 and -- and the Civil Rights Act, it's striking  
16 that these concepts aren't discussed in them.

17 GENERAL SAUER: I think domicile is  
18 discussed. I mean, it's -- it's brought up in  
19 many --

20 JUSTICE GORSUCH: Allegiance,  
21 jurisdiction, complete jurisdiction.

22 GENERAL SAUER: Well, I mean, here's  
23 just a few examples: Page 1679 of the  
24 Congressional Record, President Johnson vetoes  
25 the first version of the Civil Rights Act, and

1 he says, I'm -- I can't sign this because it  
2 would extend alien -- citizenship to the  
3 children of "all domiciled aliens and  
4 foreigners, even if not naturalized."

5 And you have all the other sources  
6 that we cited that say when it -- and this  
7 goes -- I mean, this is a deeply rooted 19th  
8 century understanding. It's reflected in *The*  
9 *Venus*, it's reflected in *The Pizarro* in 1814  
10 and 1817. It carries through the 19th century,  
11 and this Court is talking about it in 1892 and  
12 1893 when it's discussing the Chinese Exclusion  
13 Act. Domicile is the key concept that creates  
14 allegiance. That's a --

15 JUSTICE JACKSON: General -- General,  
16 so can I --

17 JUSTICE BARRETT: General, you -- you  
18 said in your reply brief that the children of  
19 slaves who were brought here unlawfully, you  
20 know, in -- in -- in defiance of laws  
21 forbidding the slave trade, would, in fact, be  
22 citizens.

23 GENERAL SAUER: Yes.

24 JUSTICE BARRETT: And you can imagine  
25 that their parents were not only brought here

1 in violation of United States law but were here  
2 against their will and so maybe felt allegiance  
3 to the countries where they were from. And you  
4 say that the purpose of the Fourteenth  
5 Amendment was to put all slaves on equal  
6 footing, newly freed slaves on equal footing,  
7 and so they would be citizens.

8 But that's not textual. So how do  
9 you -- how do you get there? You say it in  
10 just a few sentences, so can you elaborate?

11 GENERAL SAUER: Sure. If you look at  
12 the nine -- I think, if you look at the 19th  
13 century sources, what you see is that even  
14 though their entry may have been unlawful, 19th  
15 century antebellum law never treated their  
16 presence as unlawful. In fact, quite the  
17 opposite. One of the amici, in fact, points  
18 to, like, a Mississippi statute, which probably  
19 is replicated throughout the South before the  
20 Civil War, that says slaves in Mississippi have  
21 an indefeasible domicile in Mississippi. In  
22 other words, even if they run away, if they get  
23 away, Mississippi says, nope, you still live  
24 here. Right?

25 And so it would be astonishing, in

1 other words, for the opponents of the  
2 Fourteenth Amendment to say, oh, you know,  
3 these people were not domiciled and, therefore,  
4 it goes the other way because, actually, U.S.  
5 law, even if they were -- even if they were  
6 brought in illegally and unlaw -- you know,  
7 through an illegal slave trade, once they were  
8 there, by U.S. law, they --

9 JUSTICE BARRETT: Well, their intent  
10 is to return as soon as they can, let's say.  
11 So they're -- they're here, they're resident,  
12 and maybe under your theory, I mean, which  
13 says, well, lawfulness for a different purpose,  
14 but they're here, they're resident. Let's --  
15 let's take your assumption that they're not  
16 here unlawfully.

17 Let's say they don't have an intent to  
18 stay. They want to escape and go back the  
19 second they can. Are they domiciled?

20 GENERAL SAUER: Under the 19th century  
21 law. I mean, I think this is the flip side of  
22 the hypothetical that we talked about earlier.  
23 Under 19th century law, they are treated as  
24 domiciled in the United States, so it would be  
25 astonishing. And -- and the debates on the

1 congressional floor talk about not this  
2 specific case, but they say, look, slaves who  
3 have been forced to come here and have been  
4 here are lawfully domiciled here. And they  
5 don't use the way as "domiciled" like they  
6 have; they use "allegiance." They say they  
7 don't have allegiance to -- once they've been  
8 forced to come here, they don't have allegiance  
9 to any foreign or African potentate and,  
10 therefore, they're --

11 JUSTICE JACKSON: But, General, that  
12 goes to --

13 JUSTICE BARRETT: How would that apply  
14 to human -- the children of illegally  
15 trafficked people today? Would the same  
16 reasoning apply?

17 GENERAL SAUER: It would turn on  
18 whether the parents -- the parents are lawfully  
19 domiciled in the United States.

20 JUSTICE BARRETT: So, if they're  
21 brought in illegally, but then they choose to  
22 remain and they want to remain and they're  
23 domiciled, you would say that their lawful  
24 presence is not dictated by whether they were  
25 brought here lawfully or not, and that's

1 different from someone who, say, crosses the  
2 border unlawfully?

3 GENERAL SAUER: Yeah, I think it would  
4 turn on whether their presence is lawful. And  
5 I would --

6 JUSTICE JACKSON: General, can I --

7 GENERAL SAUER: In other words,  
8 obviously, there are many -- many other  
9 important things that could be done to assist  
10 people like that. The question is, if they  
11 give birth to someone in the United States, is  
12 that person naturally a citizen? That would  
13 turn based on the original public meaning of  
14 the clause on the lawfulness of their presence,  
15 are they domiciled.

16 JUSTICE JACKSON: General, can I ask  
17 you a question? To follow up on what Justice  
18 Gorsuch was exploring with you with respect to  
19 domicile, did I understand you to say that  
20 domicile is going to be eventually or is  
21 controlled by Congress, who is domiciled?  
22 I'm -- I'm struggling to figure out who is  
23 domiciled in your argument.

24 GENERAL SAUER: The domiciliaries are  
25 people who are lawfully present and have an

1 intent to remain permanently. So that's the  
2 kind of black-letter, you know, understanding  
3 of domicile.

4 Now Congress can dictate that certain  
5 classes of people, illegal entrants and so  
6 forth, cannot lawfully -- lack the legal  
7 capacity to form a legally binding domicile.

8 JUSTICE JACKSON: But, if that's so,  
9 then doesn't it make the domicile for the  
10 purpose of the Fourteenth Amendment turn then  
11 ultimately on Congress's will in a way that the  
12 Framers did not intend? I mean, my  
13 understanding was the Framers put this  
14 Citizenship Clause into the Constitution to  
15 prevent future Congresses from being able to  
16 affect citizenship in this way.

17 GENERAL SAUER: May I respond?

18 CHIEF JUSTICE ROBERTS: Sure.

19 GENERAL SAUER: Very briefly, no, I  
20 don't think so because it is up to the alien  
21 whether or not they want to be domiciled here.  
22 Now there may be clearer --

23 JUSTICE JACKSON: But I thought you  
24 just said Congress can -- can -- can make  
25 determinations as to who counts as being

1 domiciled here.

2 GENERAL SAUER: Yeah, in this --

3 JUSTICE JACKSON: So, if that's true,  
4 then it ultimately would impact, in your  
5 theory, whether or not this person can claim  
6 that they have citizenship for Fourteenth  
7 Amendment purposes based on Congress's  
8 determination. And I just thought that's what  
9 the Fourteenth Amendment was trying to get away  
10 from.

11 GENERAL SAUER: If I may?

12 CHIEF JUSTICE ROBERTS: Yes, please.

13 GENERAL SAUER: Very briefly, I'd just  
14 point -- point you to the discussion in  
15 Professor Wurman's amicus brief where he talks  
16 about that this is not a new problem. Going  
17 back even to the British common law, there's  
18 the situation of people who lack a safe conduct  
19 and are passing through the king's domains  
20 without permission, and he says the best  
21 reading of the common law is they are not under  
22 the protection of the king and they're not  
23 covered by the rule of birthright citizenship.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1           You mentioned in your -- your briefing  
2           and also this morning the problem of birth  
3           tourism. Do you have any information about how  
4           common that is or how significant a problem it  
5           is?

6           GENERAL SAUER: It's a great question.  
7           No one knows for sure. There's a March 9th  
8           letter from a number of members of Congress to  
9           DHS saying do we have any information about  
10          this. The -- the -- the -- the media reports  
11          indicate estimates could be over one -- a  
12          million or 1.5 million from the People's  
13          Republic of China alone.

14          The -- the Congressional Report that  
15          we cite in our brief talks about certain hot  
16          spots like Russian elites coming to Miami  
17          through these birth tourism companies.

18          And, I mean, here's -- here's --  
19          here's a fact about it that I think is  
20          striking. Media reported as early as 2015 that  
21          based on Chinese media reports, there are  
22          500 -- 500 birth tourism companies in the  
23          People's Republic of China whose business is to  
24          bring people here to give birth and return  
25          to -- to that nation.

1 CHIEF JUSTICE ROBERTS: Having said  
2 all that, you do agree that that has no impact  
3 on the legal analysis before us?

4 GENERAL SAUER: I think it's -- I  
5 quote what Justice Scalia said in his Hamdan  
6 dissent, where they had -- where, like, their  
7 interpretation has these implications that  
8 could not possibly have been approved by the  
9 19th century Framers of this amendment. I  
10 think that shows that they've made a mess --  
11 their interpretation has made a mess of the  
12 provision.

13 CHIEF JUSTICE ROBERTS: Well, it  
14 certainly wasn't a problem in the 19th century.

15 GENERAL SAUER: No, but, of course,  
16 we're -- we're in a new world now, as Justice  
17 Alito pointed out to, where 8 billion people  
18 are one plane ride away from having a -- a  
19 child who's a U.S. citizen.

20 CHIEF JUSTICE ROBERTS: Well, it's a  
21 new world. It's the same Constitution.

22 (Laughter.)

23 GENERAL SAUER: It is. And, as  
24 Justice Scalia said, I think, in the case that  
25 Justice Alito was referring to, you've got a

1 constitutional provision that addresses certain  
2 evils and it should be extended to reasonably  
3 comparable evils. He said that about statutory  
4 interpretation. I think the same principle  
5 applies here, and I think we quote that in our  
6 brief.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 Justice Thomas, anything further?

9 JUSTICE THOMAS: General, you're  
10 getting a lot of questions about immigration,  
11 and they harken back, of course, to  
12 citizenship, which is defined in or set out in  
13 the Fourteenth Amendment.

14 How much of the debates around the  
15 Fourteenth Amendment had anything to do with  
16 immigration?

17 GENERAL SAUER: I think that the  
18 principal focus of those debates has to do  
19 really not with immigrants but with the Indian  
20 tribes. I mean, obviously, the main goal, the  
21 one pervading purpose, as this Court said in  
22 the Slaughter-House cases, was to establish the  
23 citizenship of the freed slaves and their  
24 children.

25 But they were very concerned about

1 the -- the -- the -- the problem of something  
2 that they all accepted as a given, which is  
3 that the children of tribal Indians are not  
4 within the rule of birthright citizenship.

5           So I think that's what they focus on.  
6 We draw an analogy to that too, the issue of  
7 temporary sojourners. And then -- but there  
8 are mentions of temporary sojourning multiple  
9 places in the congressional debates, and all of  
10 those quotes go in our direction.

11           JUSTICE THOMAS: And there was --  
12 Justice Sotomayor brought up Wong Kim Ark.  
13 There was no question in that case that --  
14 about domicile, was there?

15           GENERAL SAUER: I disagree. The Court  
16 says at the very beginning of its opinion here  
17 are the accepted facts. These are lawfully  
18 domiciled here. When it states the question  
19 presented, it talks about domicile.

20           When it recites the legal principle at  
21 page 693, it says "domicile" three times. And  
22 at page 705 at the end of the opinion, it says  
23 here's the single question we've decided.  
24 We've decided that Chinese immigrants with a  
25 permanent domicile and residence here fall

1 within the rule of birthright citizenship.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: Under the minimum  
4 definition of "domicile," which I think existed  
5 in 1868 and continues to exist today, a  
6 person's domicile is the place where he or she  
7 intends to make a permanent home.

8 Now, normally, you would think that a  
9 person who is subject to arrest at any time and  
10 removal could not establish a domicile, but we  
11 have an unusual situation here because our  
12 immigration laws have been ineffectively and,  
13 in some instances, unenthusiastically enforced  
14 by federal officials.

15 So there are people who are subject to  
16 removal at any time if they are apprehended and  
17 they go through the proper procedures, but they  
18 have in their minds made a permanent home here  
19 and have established roots, and that raises a  
20 humanitarian problem, and I wonder if you  
21 could -- you could address that.

22 GENERAL SAUER: If I may, one legal  
23 and one humanitarian. The legal point is, if  
24 you look at those cases, for example, Carson  
25 against Reid, Park against Barr, this Court's

1 decisions in Elkins and Toll against Moreno,  
2 they talk about the legal capacity to -- you  
3 know, to -- to create a domicile excluding  
4 someone who may have the subjective intent,  
5 which otherwise would be determinative, as  
6 being excluded.

7           On the humanitarian point, I would  
8 point out, as I said at the beginning, Justice  
9 Alito, that the United States' rule of nearly  
10 unrestricted birthright citizenship is an  
11 outlier among modern nations. It's a very  
12 small minority of nations that have that rule.

13           For example, every -- every nation in  
14 Europe has a different rule. And the notion  
15 that they have a huge humanitarian crisis as a  
16 result of not having unrestricted birthright  
17 citizenship, I don't think, is a strong  
18 argument.

19           And I'd point out, obviously, for --  
20 you know, for -- for -- for reliance-related  
21 reasons, this Executive Order applies only  
22 prospectively. And we ask the Court to rule  
23 only prospectively.

24           CHIEF JUSTICE ROBERTS: Justice  
25 Sotomayor?

1 JUSTICE SOTOMAYOR: I agree with you  
2 what the European nations' rule is, but England  
3 was always different, wasn't it?

4 GENERAL SAUER: Not until 1983 it  
5 changed to the -- to the --

6 JUSTICE SOTOMAYOR: That's not quite  
7 true. The Wong Kim Ark does a wonderful job of  
8 laying out the English rule. And you claim it  
9 was different, but there isn't any treatises or  
10 scholars who say it's different. English rule  
11 was always by birth. Other people were not  
12 by -- other countries were not by birth.

13 Let me just go to the implications of  
14 what you're asking us to do. You are asking us  
15 to overrule Wong Kim Ark. Well, there, Wong  
16 Kim Ark's parents were domiciled in the U.S.,  
17 but they owed loyalty to China. They  
18 eventually returned to China.

19 So they didn't have a primary  
20 allegiance to the United States. So you're not  
21 asking that. Are you asking us to overrule  
22 then our cases, one of which said that a child  
23 of illegal aliens could be -- was a citizen?  
24 You're asking us to overrule that?

25 GENERAL SAUER: No. First of all,

1 we're not asking you to overrule Wong Kim Ark.

2 We agree with the holding of Wong Kim Ark --

3 JUSTICE SOTOMAYOR: But you are asking  
4 us to --

5 GENERAL SAUER: -- and much of the  
6 reasoning, and -- and then, as to those later  
7 cases starting in 1966 where the Court makes  
8 sort of, you know, unreasoned references to  
9 this issue, we think --

10 JUSTICE SOTOMAYOR: Wait a minute.  
11 Hintopoulos, the reference -- the respondent  
12 unlawfully overstayed her visa and gave birth  
13 to a child here. The Court, Harlan II, wrote:  
14 The child is, of course, an American citizen.  
15 That person wasn't domiciled here lawfully.

16 GENERAL SAUER: Yeah. We --

17 JUSTICE SOTOMAYOR: So you're asking  
18 us to overrule that case?

19 GENERAL SAUER: I wouldn't call --  
20 I -- I wouldn't say we're asking you to  
21 overrule. We think that's similar to a  
22 drive-by jurisdictional ruling where there's a  
23 simple statement that's not debated, there's no  
24 further analysis of it, there's really an  
25 assumption there, and we think that's similar

1 to cases where the Court just assumes  
2 jurisdiction without discussing it.

3 JUSTICE SOTOMAYOR: When we ruled in  
4 Thind that Indians could not become citizens,  
5 the government then after began to unnaturalize  
6 many Indians who had been sworn in as citizens.

7 You asked us to concentrate only on  
8 the prospective nature of the citizens order,  
9 but the logic of your position, if accepted, is  
10 that the next president -- this president or  
11 the next president or a Congress or someone  
12 else could decide that it shouldn't be  
13 prospective. There would be nothing limiting  
14 that according to your theory.

15 GENERAL SAUER: If, as we ask, the  
16 Court confines its ruling to prospective relief  
17 only, which I take exception to that --

18 JUSTICE SOTOMAYOR: No, I'm saying to  
19 you don't -- yeah, that's what you're asking us  
20 for relief right now. I'm asking whether the  
21 logic of your theory would permit what happened  
22 after the Court's decision in Thind, that the  
23 government could move to unnaturalize people  
24 who were born here of illegal residents.

25 GENERAL SAUER: No. We believe the

1 Court should do what it did in Sessions against  
2 Morales-Santana, where there was a -- a ruling  
3 that would have deprived people who were  
4 already citizens of citizenship, and the Court  
5 said this applies prospectively only, and we  
6 think that's the appropriate course here.

7 JUSTICE SOTOMAYOR: Well, but that's  
8 not what we did in Thind.

9 GENERAL SAUER: We think that Sessions  
10 provides the -- the proper course here. And  
11 that's what we're asking. We are not asking  
12 for any retroactive relief.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: General, I think even  
15 your brief concedes that the position you're  
16 taking now is a revisionist one with respect to  
17 a substantial part of our history.

18 And I think that that's in large part  
19 because of Wong Kim Ark and the way people have  
20 read that case, which, of course, was in the  
21 late 19th century, and have read it ever since  
22 then. And what that case suggests is -- I  
23 mean, there's a very clear rationale. You say,  
24 oh, it says the word "domicile" a bunch of  
25 times, which it does. It's a long opinion. It

1 says a lot of things.

2 But the rationale of the case is  
3 really quite clear. It says there was this  
4 common law tradition. It came from England.  
5 We know what it was. Everybody got citizenship  
6 by birth except for a few discrete categories,  
7 which were the ones that the Chief Justice  
8 mentioned at the beginning.

9 And that tradition carried over to the  
10 United States. And then what the Fourteenth  
11 Amendment did was accept that tradition and not  
12 attempt to place any limitations on it.

13 And so that was the clear rationale, a  
14 clear rationale that is diametrically different  
15 from your rationale. And everybody took Wong  
16 Kim Ark to say that and to say that, as a  
17 result of that, of course, birthright  
18 citizenship was the rule. And I think  
19 everybody has believed that for a long, long  
20 time.

21 And I guess my question is this. You  
22 have a story about what -- about the reasons  
23 why we should go back to what you view as the  
24 original meaning, and given the long history of  
25 this country's understanding about birthright

1 citizenship, what would it take -- what do you  
2 think it should take to accept that story in  
3 terms of the -- the magnitude of the evidence  
4 that we would need to see in order to accept  
5 this revisionist theory and in order to change  
6 what I think people have thought the rule was  
7 for more than a century?

8           GENERAL SAUER: Let me make two points  
9 in response to that, one historical and one  
10 legal. Historical point: I disagree with the  
11 way you've characterized the understanding of  
12 Wong Kim Ark. And I would point to something  
13 that's emphasized in their amici's briefs,  
14 which is, in 1921, Richard Flournoy, who  
15 becomes a senior State Department official in  
16 the Roosevelt administration and pushes their  
17 theory as to temporary sojourners, writes a Law  
18 Review article in 1921 where he says: I think  
19 that children of temporary visitors should be  
20 citizens. But he admits that is not the  
21 understanding of Wong Kim Ark. He admits Wong  
22 Kim Ark did not hold that.

23           And he admits that there's an array of  
24 authorities that go against him. He talks  
25 about careful and reliable, high authorities.

1 And that's referring to the consensus that we  
2 point out in pages 26 to 28 of our brief, where  
3 you've got 12 treatises from 1881 to 1922 that  
4 all say -- including for decades after Wong Kim  
5 Ark, that say children of temporary sojourners  
6 are not included.

7 What happens between 1921 and the  
8 1930s? Well, Mr. Flournoy became a senior  
9 State Department official, and he adopted that  
10 as the policy of the Roosevelt administration.

11 So their argument is basically saying  
12 there wasn't this consensus going back to 1898.  
13 The consensus, as their own author admits, goes  
14 entirely in the opposite direction for 50  
15 years, right? For 50 years, from the framing  
16 of the clause, through the 1920s, maybe 60  
17 years, the general understanding when it comes  
18 to what's at issue here and was not at issue in  
19 Wong Kim Ark is that children of temporary  
20 visitors do not become citizens under the  
21 clause.

22 And then the legal point, you -- you  
23 referred to the sort of concept of temporary  
24 and local allegiance, and they rely on The  
25 Schooner Exchange, this theory that you've got

1 temporary and local allegiance. But, if you  
2 actually look -- look at page 572 of the  
3 Congressional Record, right at the beginning  
4 introducing the Civil Rights Act, Senator  
5 Trumbull says: I said not subject to any  
6 foreign power. I wanted to say born in the  
7 United States and, you know, owing allegiance  
8 to the United States, but I was aware that  
9 there's "a sort of allegiance for persons  
10 temporary resident in the United States whom we  
11 have no right to make citizens."

12 So Senator Trumbull says: The reason  
13 I haven't adopted the language and meaning that  
14 they say should be packed into these provisions  
15 is that everybody knows that the children of  
16 temporary visitors should not be citizens.

17 JUSTICE KAGAN: Thank you, General.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Gorsuch?

20 JUSTICE GORSUCH: Just to follow up  
21 on -- on that point, General, one interesting  
22 counterpoint about the understanding of Wong  
23 Kim Ark that followed with respect to temporary  
24 sojourners -- and I -- I take you've got  
25 your -- your well-taken points -- but there

1 was, of course, John Marshall Harlan, the great  
2 dissenter, who dissented in Wong Kim Ark and  
3 later gave a bunch of lectures.

4           And he -- he posed the question about  
5 the sojourners: Suppose an English father and  
6 mother went down to the hot springs to get rid  
7 of the gout, and while there, they have a  
8 child, now back in England. Is that child a  
9 citizen of the United States born of the  
10 jurisdiction thereof by mere accident of birth?  
11 And he says: Under Wong Kim Ark, he is. And  
12 he continues: I was one of the minority, and,  
13 of course, I was wrong.

14           Now I -- I'm sure that was  
15 tongue-in-cheek, but what do you do with that?

16           GENERAL SAUER: I draw the -- I mean,  
17 I'd say two things in response to that. First  
18 of all, he gave a speech, but we have 12  
19 uncontradicted treatises that say the opposite,  
20 that that is not what Wong Kim Ark means and  
21 that's not the meaning of the clause.

22           But also, I'd make a more fundamental  
23 point. When you're looking at Wong Kim Ark,  
24 one of the -- the dissent has this dominant  
25 theme that -- really predominant theme, like,

1 you can't be doing this because you can't make  
2 the -- the -- we all agree or it's obvious that  
3 the children of temporary resident -- temporary  
4 visitors do not become citizens.

5           And how does the majority opinion  
6 address that? It says "domicile" three times  
7 when it recites the legal rule. It says  
8 permanent residents and domicile when it  
9 decides the holding. So the Court should be  
10 bound by what it says. This is what we're  
11 deciding.

12           And, again, at page 75, it says this  
13 is the single question -- now there's been a  
14 lot of discussion up to that point, but at the  
15 very end, they say the single question we've  
16 decided is the citizenship status of the  
17 children of Chinese immigrants with a -- a  
18 permanent residence and domicile in the United  
19 States.

20           JUSTICE GORSUCH: Do you think Native  
21 Americans today are birthright citizens under  
22 your test and under your friend's test?

23           GENERAL SAUER: I think so. I mean,  
24 obviously, they've been granted citizenship by  
25 statute.

1 JUSTICE GORSUCH: Put -- put aside the  
2 statute.

3 GENERAL SAUER: Yeah.

4 JUSTICE GORSUCH: Do you think they're  
5 birthright citizens?

6 GENERAL SAUER: No, I think the -- the  
7 clear understanding that everybody agrees in  
8 the congressional debates is that the children  
9 of tribal Indians are not birthright citizens.

10 JUSTICE GORSUCH: I understand that's  
11 what they said, but your test is the domicile  
12 of the parents, and that would be the test  
13 you'd have us apply today, right?

14 GENERAL SAUER: Yes. Yes. So, if a  
15 tribal Indian, for example --

16 JUSTICE GORSUCH: Are tribal members  
17 born --

18 GENERAL SAUER: -- you know, gives up  
19 allegiance to --

20 JUSTICE GORSUCH: -- born today  
21 birthright citizens?

22 GENERAL SAUER: I think so on our  
23 test, yeah, if they're lawfully domiciled here.

24 JUSTICE GORSUCH: Okay. And then --

25 GENERAL SAUER: I'm not sure -- I have

1 to think that through, but -- but --

2 JUSTICE GORSUCH: I'll take the --

3 GENERAL SAUER: -- that's my reaction.

4 JUSTICE GORSUCH: -- I'll take the  
5 yes. That's all right.

6 (Laughter.)

7 JUSTICE GORSUCH: And then I just want  
8 to ask you quickly about the INA adopted in  
9 1940 and 1952. It uses the same term as the  
10 Citizenship Clause. And one might have a  
11 pretty good argument -- I'm sure you've got  
12 some arguments along just these lines -- that  
13 it should be understood to mean whatever it  
14 meant in 1868.

15 Well, there was a lot of water over  
16 the dam between those two things. And as your  
17 brief points out, by the Roosevelt  
18 administration, there's a pretty strong jus  
19 soli move, that is to say that the thin concept  
20 of jurisdiction, power over, is enough, a  
21 broader understanding of birthright.

22 Would there be an argument for reading  
23 that statute under its original plain meaning  
24 at the time, 1940, 1952, to perhaps have a  
25 different meaning than the Constitution?

1           GENERAL SAUER: We don't think that's  
2 the best interpretation referred to. I give  
3 two reasons. One is it would be very  
4 surprising if a statute that says exactly the  
5 constitutional phrase, "subject to the  
6 jurisdiction thereof," were interpreted to mean  
7 something totally different or to ossify a  
8 then-current misunderstanding of the clause.

9           We think that the -- that the best  
10 analogy here is probably state long-arm  
11 statutes. Take a sort of non-controversial  
12 example, state long-arm statutes routinely say  
13 we're going to exercise personal jurisdiction  
14 to the extent of due process. It takes the  
15 constitutional standard and it puts it in -- in  
16 the statute. And nobody thinks that those  
17 ossify -- you know, are limited to the  
18 precedents, this Court's precedents at the time  
19 they were enacted. Everyone thinks that that  
20 phrase "due process" incorporates, you know,  
21 the developing law of due process and minimum  
22 contacts and so forth, including from this  
23 Court.

24           So we think that's the best analogy  
25 when it's -- when you're looking at the

1 constitutional phrase itself and you take it  
2 out of a -- a freighted context, the natural  
3 interpretation is to say this means what --  
4 this reflects the objective meaning of the  
5 Constitution, and the objective meaning of the  
6 Constitution is its original public meaning in  
7 1866 and 1868.

8 JUSTICE GORSUCH: Do you see any  
9 notable counterpoints to that argument?

10 GENERAL SAUER: I'm sure there are  
11 arguments on the other side. We've addressed  
12 them in the brief.

13 JUSTICE GORSUCH: So -- so, really, at  
14 the end of the day then, this is a straight-up  
15 constitutional ruling you want from this Court,  
16 win or -- win, lose, or draw?

17 GENERAL SAUER: Yeah. We -- we -- we  
18 think that the statute and the Constitution  
19 means the same thing. If the Court disagrees,  
20 obviously, we'd prefer an adverse ruling if the  
21 Court's going to do that on a statutory basis  
22 than a constitutional basis --

23 JUSTICE GORSUCH: Well, but you've  
24 just disavowed that in -- in your responses to  
25 me by saying that that's not an available

1 option, is the way I understood it.

2 GENERAL SAUER: Right. Yes. The  
3 Court would have to disagree with our statutory  
4 position, which is that it means the same thing  
5 as the Constitution. But, if the Court were to  
6 do that, then the natural course would probably  
7 be to rule on statutory grounds alone. Now we  
8 think they mean the same thing, and we've got  
9 arguments for that, including, I think, the  
10 analogy I just referenced.

11 JUSTICE GORSUCH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Kavanaugh?

14 JUSTICE KAVANAUGH: General, how  
15 should we think about the text of the  
16 Fourteenth Amendment, "subject to the  
17 jurisdiction thereof," as distinct from the  
18 different language of the Civil Rights Act of  
19 1866, which refers, as you know, to "persons  
20 not subject to any foreign power?"

21 Those texts are on their face  
22 different, and the history that Justice Kagan  
23 referred to might have developed quite a bit  
24 differently if the Fourteenth Amendment's text  
25 had used the phrase that was in the Civil

1 Rights Act.

2           GENERAL SAUER: That's an excellent  
3 point. And this Court has held in multiple  
4 cases -- Hurd against Hodge and General  
5 Building Contractors -- has recognized that  
6 they're intended and they did mean the same  
7 thing. And that's powerfully reinforced by the  
8 congressional debates, where you -- really,  
9 what they're discussing is they said they were  
10 dissatisfied with the language in the Civil  
11 Rights Act because the phrase "Indians not  
12 taxed" they thought was ambiguous. And so they  
13 switched to the affirmative statement as  
14 opposed to the negative statement, the  
15 affirmative statement, "subject to the  
16 jurisdiction thereof," but there's express  
17 statements in the Congressional Record  
18 essentially that were doing the same thing.  
19 And that is what this Court's case law has  
20 reflected.

21           JUSTICE KAVANAUGH: Why didn't they  
22 say the same thing?

23           GENERAL SAUER: Again, it appears they  
24 preferred the sort of positive formulation,  
25 "subject to the jurisdiction thereof," as

1 opposed to "not subject to any foreign power."  
2 And, again, there's a deep concern and lengthy  
3 discussion of the potential ambiguity in the  
4 Civil Rights Act. They wanted to eliminate an  
5 ambiguity but do the same thing. And I think  
6 that that's -- that's very strongly reflected  
7 in those debates.

8 JUSTICE KAVANAUGH: By the time of the  
9 1940 and 1952 congressional actions where  
10 Congress repeats "subject to the jurisdiction  
11 thereof," given Wong Kim Ark, one might have  
12 expected Congress to use a different phrase if  
13 it wanted to try to disagree with Wong Kim Ark  
14 on what the scope of birthright citizenship or  
15 the scope of citizenship should be.

16 And yet Congress repeats that same  
17 language, knowing what the interpretation had  
18 been. So how are we to think about that?

19 GENERAL SAUER: I think baked into  
20 that question is an understanding, I think,  
21 that was reflected in Justice Kagan's earlier  
22 question that everybody understood that Wong  
23 Kim Ark meant that, and the history I talked  
24 about, I think, refutes that, that, really,  
25 there's a consensus that goes our way for

1 decades and decades after the adoption of the  
2 amendment and after Wong Kim Ark on the  
3 specific question of the children of temporary  
4 visitors, and -- and it's really not until --  
5 and, again, their author in 1921 is saying,  
6 hey, the other side is the consensus.

7 JUSTICE KAVANAUGH: Do you -- I'm  
8 sorry to interrupt.

9 GENERAL SAUER: Yeah, sorry, go ahead.

10 JUSTICE KAVANAUGH: But there's  
11 Executive Branch interpretations and others.  
12 And if -- if you're in Congress in 1940 and  
13 1952 and you want to limit the scope of Wong  
14 Kim Ark or to eliminate ambiguity, why do you  
15 repeat the same language rather than choosing  
16 something different?

17 For example, you could use the  
18 language from the Civil Rights Act of 1866 or  
19 some similar formulation if your idea in 1940  
20 and 1952 was to not have ambiguity or not have  
21 an overly broad scope.

22 GENERAL SAUER: I think -- I think, if  
23 you look at the structure of that statute where  
24 it's 1401(a) and then (b) through (h), (a), it  
25 says these are the people who are entitled to

1 birthright citizenship. (A) is the  
2 constitutional standard, and then (b) through  
3 (h) are all the categories that Congress has  
4 super-added to that.

5 I think the natural inference is that  
6 Congress is codifying, which it was consciously  
7 doing in 1941, pulling all the naturalization  
8 rules and immigration rules together into one  
9 statute and said, you go to one place, here's  
10 who's -- who -- who is a birthright citizen;  
11 (a) those who are guaranteed that right by the  
12 Citizenship Clause, and (b) through (h) are the  
13 ones that Congress has added through its  
14 naturalization power.

15 So that inference to me says (a) is  
16 merely -- it's not trying to change or alter  
17 the constitutional standard. It's just saying,  
18 hey, the baseline is what the Constitution  
19 says, and we -- we codify that and then we move  
20 on to the new categories.

21 JUSTICE KAVANAUGH: Of what relevance,  
22 if any, do you think Section 5 of the  
23 Fourteenth Amendment has here that gives  
24 Congress the power to enforce the article, the  
25 Fourteenth Amendment, by appropriate

1 legislation? Does that give Congress room  
2 here, or do you not think so?

3 GENERAL SAUER: I -- I do think that a  
4 ruling in our favor would leave room for  
5 Congress. I -- I don't think you have to rely  
6 on Section 5. I think that Congress has its  
7 own inherent power to grant citizenship by  
8 statute.

9 So, if the Court were to rule in our  
10 favor for the classes of individuals that they  
11 say should be covered, Congress has the  
12 latitude to do that.

13 JUSTICE KAVANAUGH: How much room do  
14 you think Section 5 gives, if any -- and it may  
15 not be any -- Congress to interpret the phrase  
16 "subject to the jurisdiction thereof" or to  
17 define that? Does it -- is that -- is that  
18 relevant at all?

19 GENERAL SAUER: It's a great question,  
20 and I'm thinking about it for the first time.  
21 I assume it would be governed by the congruence  
22 and proportionality test from this Court's case  
23 law. How that would apply here, I don't know.  
24 And I don't think it's presented because our  
25 contention is that the statute means exactly

1 the same thing. If anything is congruent and  
2 proportional, it's that. And I think the Court  
3 held that in United States against Georgia.

4 JUSTICE KAVANAUGH: You've mentioned  
5 several times the practices of other countries,  
6 and that, obviously, as a policy matter  
7 supports what you're arguing here. But,  
8 obviously, we try to interpret American law  
9 with American precedent based on American  
10 history. That's certainly what I try to do and  
11 I think you try to do.

12 And so why should we be thinking  
13 about, even though as a policy matter I get the  
14 point, thinking about, gee, European countries  
15 don't have this or most other countries, many  
16 other countries in the world don't have this?

17 Doesn't that -- I guess I'm not seeing  
18 the relevance as a legal constitutional  
19 interpretive matter necessarily, although I  
20 understand it's a very good point as a policy  
21 matter.

22 GENERAL SAUER: Yeah. I -- I largely  
23 agree with that. And you can view it as being  
24 raised preemptively defensively. I'm going  
25 first, but, obviously, the other side and their

1 amici say -- you know, make prediction --  
2 end-of-the world-type predictions, and our  
3 point is, you know, it's a very small minority  
4 because almost every country and, certainly,  
5 all -- all European countries have a different  
6 rule, and the world hasn't ended there.

7 JUSTICE KAVANAUGH: The other side --  
8 last one. The other side relies heavily, of  
9 course, on Wong Kim Ark, and you disagree with  
10 their interpretation.

11 Oftentimes, when you are dealing with  
12 a constitutional precedent like this, you might  
13 argue we disagree with that interpretation, but  
14 if you adopt their interpretation or agree with  
15 their interpretation of that precedent, you  
16 should overrule it.

17 And you're -- you haven't made that  
18 argument here, and I'm just giving you an  
19 opportunity to explain why you haven't.

20 GENERAL SAUER: Because we think it's  
21 totally unambiguous in Wong Kim Ark that the  
22 holding is -- relates to domiciled aliens. And  
23 so we strongly agree with the holding. We  
24 think domicile was the touchstone, and we think  
25 it's not a coincidence for the reasons I -- I

1 maybe speculated a little bit when I was  
2 talking with Justice Gorsuch about, you know,  
3 how the dissent raises this and then the  
4 majority's like, well, we're putting domicile  
5 in there so we know that the absurd conclusion  
6 that they say would come from this isn't there.

7 But also, domicile has kind of the  
8 sort of relationship that creates this  
9 relationship of allegiance that makes you part  
10 of a political community if you're an alien  
11 from another country.

12 That's deeply rooted in their  
13 understanding where they're doing it -- they  
14 talk about domicile in Yick Wo against Hopkins,  
15 in 1892 and 1893 cases, and there's this deeply  
16 rooted understanding again that goes all the  
17 way back to the early 19th century.

18 So we think that's a really important  
19 conception. So I -- I -- I mean, we disagree  
20 with some of the dicta in Wong Kim Ark that we  
21 discuss and we think there's dicta that goes  
22 our way that the other side overlooks, and  
23 we're not asking the Court to overrule dicta.  
24 We just say don't follow erroneous dicta and  
25 don't apply it to this brand-new situation that

1 was not decided in Wong Kim Ark.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Barrett?

5 JUSTICE BARRETT: So, General Sauer, I  
6 want to zoom out a little bit and think about  
7 jus soli and jus sanguinis. So, as I  
8 understand it, at the time of the Fourteenth  
9 Amendment, those were the two dominant  
10 approaches. You know, jus soli, the English  
11 common law, roughly following the soil, jus  
12 sanguinis, roughly citizenship following the  
13 parents.

14 Now jus soli was very generous on the  
15 soil, the English common law, and so it  
16 extended citizenship to those born there who  
17 may not have been born of parent citizens, but  
18 jus sanguinis, you know, if parents who are  
19 citizens and had a child abroad, then that  
20 child's citizenship followed the parents.

21 So one thing that's puzzling me about  
22 your argument when I think about the  
23 ratification of the Fourteenth Amendment, in  
24 many ways, it would have made sense for them --  
25 and you -- you acknowledge the jus sanguinis in

1 citing Vitel. It would have made sense in some  
2 ways for them to say, okay, we're going to  
3 follow -- if they wanted to accomplish what  
4 you're saying they wanted to accomplish, you  
5 could say, well, we're going to follow jus  
6 sanguinis because we're going to make it all  
7 ride on parentage. But, instead, I mean, the  
8 Fourteenth Amendment we're talking about  
9 "subject to the jurisdiction thereof," but it  
10 also says "born in the United States."

11 So you have the jus soli kind of point  
12 there, but you're saying it narrowed that point  
13 by tying it to the citizenship of the parents  
14 at least as to soil, but I take it you're not  
15 arguing that United States citizens who have  
16 children born abroad would qualify for  
17 birthright citizenship.

18 So it's -- it's kind of a narrower  
19 view of both the traditional jus soli rule and  
20 a narrow -- narrower view of the jus sanguinis  
21 rule. So why would they have done that, and if  
22 they were going to invent an entirely new kind  
23 of citizenship, like an American brand, why  
24 wouldn't we have seen more discussion of that  
25 in the debates?

1                   GENERAL SAUER: I think you do.  
2     And -- and, honestly, I think the right way to  
3     conceptualize it, it is much more -- it is a  
4     modified jus soli because even the British  
5     sources don't just say you're born here, you're  
6     a citizen. They say you're born here and you  
7     have to be under the protection of the  
8     sovereign, you have to have a relationship of  
9     allegiance. "Allegiance" is the word in  
10    Calvin's case that provided the backstop.

11                   JUSTICE BARRETT: But they don't focus  
12    on the parents. It's the child. And your  
13    approach focuses on the parents' allegiance.

14                   GENERAL SAUER: Yeah, I'm not sure  
15    that that's true of the two sources, but --

16                   JUSTICE BARRETT: Well, it seems a  
17    little ambiguous, and I'm going to ask your  
18    friend on the other side that question.

19                   GENERAL SAUER: Let me -- let me point  
20    out then that there are two criteria. One is  
21    birth on the soil and the other is legiance or  
22    allegiance. What we have is birth on the soil  
23    remains the same, right, and -- and so they  
24    are, and that's why so much of Wong Kim Ark is  
25    actually, we agree with because they are

1 adopting a modified British rule. They are not  
2 going the French rule, you know, that Vitel  
3 talks about, where it's like who's -- who's the  
4 citizen. That had to be done by statute, as  
5 you pointed out, which it was in 1401.

6 But what they've got is they say  
7 "birth in the United States" and "subject to  
8 the jurisdiction thereof." That is talked  
9 about as allegiance, allegiance, allegiance, in  
10 the congressional debates. But they were  
11 clearly not incorporating the British feudal  
12 monarchial conception of allegiance, where it's  
13 infeasible.

14 I mean, going back to the early 1700s,  
15 our -- our nation had repudiated the notion  
16 that citizenship is infeasible. The  
17 expatriation statutes for the late 1700s  
18 reflect that. And -- and -- and, again, you  
19 look at the 1868 Congressional Report that we  
20 cite, there, this is the same group of -- group  
21 of congressmen, Republican congressmen, and  
22 they say things like the U.S. Constitution  
23 itself is proof that Blackstone's theory of  
24 allegiance was not accepted.

25 So they accept birth on U.S. soil, but

1 then they take the concept of allegiance and  
2 give it its Republican/Democratic/American  
3 understanding, and that's very, very -- I think  
4 that makes a ton of sense.

5 JUSTICE BARRETT: Okay. And let's  
6 talk about its application. So, you know,  
7 there are some -- I can imagine it being messy  
8 in some applications. So how -- what would you  
9 do with what the common law called  
10 "foundlings"? You know, the -- the thing about  
11 this is then you have to adjudicate if you're  
12 looking at parents and if you're looking at  
13 parents' domicile, then you have to adjudicate  
14 both residence and intent to stay. What if you  
15 don't know who the parents are?

16 GENERAL SAUER: I think -- I think  
17 there are marginal cases. That one, I think,  
18 has the benefit of being addressed in 1401(f),  
19 where it talks about --

20 JUSTICE BARRETT: Yeah, yeah, yeah,  
21 yeah, but what about the Constitution?

22 GENERAL SAUER: Under the  
23 Constitution, it's -- it's -- I mean, look,  
24 the -- "domicile" is a constitutional standard  
25 in all kinds of other situations --

1 JUSTICE BARRETT: Well, and it's hard.

2 I mean --

3 GENERAL SAUER: -- diversity  
4 jurisdiction, personal jurisdiction -- sorry.

5 JUSTICE BARRETT: Well, yeah, in  
6 personal jurisdiction, I mean, 1332, diversity  
7 jurisdiction. And the thing is it has to be  
8 litigated because it turns on intent, and  
9 both -- the virtue of both jus soli and jus  
10 sanguinis, whichever one you pick, it's a  
11 bright-line rule.

12 How would it work? How would you  
13 adjudicate these cases? You're not going to  
14 know at the time of birth for some people  
15 whether they have the intent to stay or not,  
16 including -- including U.S. citizens, by the  
17 way.

18 I mean, what if you have someone who  
19 is living in Norway with, you know, their --  
20 their husband and family but is still a U.S.  
21 citizen, comes home and has her child here and  
22 goes back? How do we know whether the child is  
23 a U.S. citizen because the parent didn't have  
24 an intent to stay?

25 GENERAL SAUER: I'd say -- make two

1 points, one practical, one legal. The  
2 practical point is, under the terms of this  
3 Executive Order, you don't have to because the  
4 Executive Order turns on an objectively  
5 verifiable thing, which is immigration status.  
6 Are you lawfully present but temporarily  
7 present, or are -- do you have an illegal  
8 status? So those kind of, like, you know,  
9 taking evidence, so to speak, under subjective  
10 intent wouldn't be done.

11 And as to the constitutional point,  
12 obviously, domicile is baked into a lot of  
13 constitutional and legal concepts, and there --  
14 there may be situations where facts are  
15 determined. But, if you look at the guidance,  
16 the guidance that all the agencies did after  
17 this Court in CASA said the agency could go  
18 forward and issue guidance, the guidance  
19 provides, I think, very, very clear, objective,  
20 verifiable approaches to -- to doing this.

21 And -- and so the -- as a practical  
22 matter, I don't think it's presented by this  
23 Executive Order.

24 JUSTICE BARRETT: Thank you, General.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: Good morning,  
3 General. So I guess I am looking at your  
4 position in this case, and it boils down to  
5 requiring us to do at least these two things:  
6 One is believe that the Framers were not  
7 importing the common law rule and understanding  
8 of birthright citizenship, and the second is to  
9 believe that what they were doing was departing  
10 from that common law rule in the way that you  
11 suggest, that is, in the -- they were seeking  
12 to have this turn on domicile.

13 I think you have a number of hurdles  
14 to accomplish those two things, one of which, I  
15 think, is that when we look at this Court's  
16 case law -- no one, I think, has mentioned  
17 Schooner's Exchange, but it appears -- that was  
18 a 19- -- an 1812 case in which it seems as  
19 though the Court had already accepted at the  
20 time of the ratification of the Fourteenth  
21 Amendment that the allegiance that you're  
22 talking about was the English common law rule,  
23 that, in other words, allegiance meant that you  
24 are covered by the laws of the jurisdiction,  
25 that you can rely on that jurisdiction's

1 protection. That's what allegiance meant.

2 Now you're saying today, no, no,  
3 allegiance meant something about loyalty or  
4 that kind of idea. But, if the Supreme Court  
5 had, prior to the Fourteenth Amendment,  
6 established that allegiance meant the common  
7 law definition, I think your first hurdle is to  
8 help us understand why we would believe that  
9 when the common -- when the Fourteenth  
10 Amendment was ratified, the Framers weren't  
11 just incorporating what we had previously said  
12 it meant.

13 GENERAL SAUER: Page 572 of the  
14 Congressional Record directly addresses this.  
15 They say the concept of temporary and local  
16 allegiance from The Schooner Exchange is what  
17 is meant by -- or temporary and local  
18 jurisdiction from The Schooner Exchange is what  
19 is meant by the word "jurisdiction" in the  
20 Fourteenth Amendment.

21 Senator Trumbull says: I thought  
22 about saying owing allegiance, but, again,  
23 "there's a sort of allegiance from persons  
24 temporarily resident in the United States whom  
25 we have no right to make citizens." So he

1 expressly and consciously --

2 JUSTICE JACKSON: Okay. But what --

3 GENERAL SAUER: -- rejected reliance  
4 on Schooner Exchange.

5 JUSTICE JACKSON: -- what do we do  
6 with -- I mean, that's a debate and it's a  
7 discussion, very valid, but then we have a  
8 subsequent debate between Fessenden and Wade  
9 where the same concept comes up and it becomes  
10 clear at least from Senator Wade's perspective  
11 that that's wrong.

12 So Senate -- Fessenden -- and I'm not  
13 sure whether these are senators, I apologize --  
14 Fessenden says: Suppose a person is born here  
15 of parents from abroad temporarily in this  
16 country. Wade responds: The Senator says a  
17 person may be born here and not be a citizen.  
18 I know that is so in one instance, in the case  
19 of the children of foreign ministers who reside  
20 near the United States, et cetera, et cetera.

21 So it appears as though, in that  
22 exchange, at least Senator Wade believed that  
23 the English common law understanding of what it  
24 means to have allegiance, to be a temporary  
25 person on the soil, was what was being adopted.

1           GENERAL SAUER: Yeah. That concept or  
2 that exchange strongly supports us. If you  
3 look at it in context, Senator Wade has  
4 introduced a version that says only birth on  
5 U.S. soil and doesn't have any allegiance or  
6 jurisdictional element to it.

7           And so Senator Fessenden stands up and  
8 says, well, that can't be right because, you  
9 know, obviously, what about the children of  
10 temporary visitors? It has this -- you know,  
11 it's another one of these statements that has  
12 this appeal to a background understanding that  
13 we all agree that the temporary visitors, their  
14 children do not become citizens.

15           And then Senator Wade has to kind of  
16 backtrack and say, well, what about the  
17 children of ambassadors? And, in the end,  
18 Congress does not adopt Senator Wade's  
19 proposal. So we think that, to the extent you  
20 can draw an inference from that, the inference  
21 strongly supports us.

22           JUSTICE JACKSON: All right. Well,  
23 let me just ask you about why we wouldn't see  
24 in the Fourteenth Amendment anything about  
25 parental allegiance. Several of my colleagues

1 have talked about the fact that your view of  
2 this turns on what the status of the parents  
3 are and not the child, as would the "born in  
4 the United States" view of it.

5 What -- can you help us understand why  
6 we wouldn't expect to see a mention of parents  
7 in the text of this amendment?

8 GENERAL SAUER: I think it was well  
9 understood that, for example, children  
10 cannot -- you know, newborns cannot form  
11 domicile. So it followed every 19th century --

12 JUSTICE JACKSON: That assumes  
13 domicile is in the test. And I'm asking you,  
14 how do we know that Congress did adopt the test  
15 that you say it adopted?

16 GENERAL SAUER: Yeah, when you're  
17 looking at 19th century conceptions of  
18 allegiance, the notion that the allegiance --  
19 again, you say "domicile" is instantiating the  
20 concept of allegiance for aliens as opposed to  
21 citizen. All of that, the 19th century  
22 understands the newborn's domicile, its  
23 allegiance, follows the allegiance of the  
24 parents.

25 And I'd point out that their theory

1 relies on parental allegiance as well because  
2 they recognize the exceptions for, you know,  
3 hostile invading armies, for tribal Indians,  
4 for ambassadors. Again, the child's allegiance  
5 status, even on their view --

6 JUSTICE JACKSON: All right. But what  
7 do -- what do we do --

8 GENERAL SAUER: -- turns on the status  
9 of the parent.

10 JUSTICE JACKSON: -- what do we do  
11 with -- with Professor Muller's amicus brief  
12 and the historical record and the fact that  
13 even at times in this country where we  
14 understood that the parents were declared  
15 enemies of the United States -- I'm talking  
16 about World War II and Japanese internment --  
17 babies born in that circumstance were given  
18 birthright citizenship? So it seems as though  
19 this concept of allegiance of the parents  
20 really wasn't driving birthright citizenship at  
21 least at this period of -- of our history.

22 GENERAL SAUER: We --

23 JUSTICE JACKSON: So are you saying  
24 this is wrong or they shouldn't have gotten  
25 birthright citizenship?

1           GENERAL SAUER: Well, if they were  
2 domiciled here, yes, they should have. If they  
3 were temporarily present, then no.

4           But -- but the executive practice we  
5 can see --

6           JUSTICE JACKSON: Can I -- I'm sorry.  
7 How does --

8           GENERAL SAUER: -- from the 1930s.

9           JUSTICE JACKSON: -- how does the  
10 temporary presence run with your concept of  
11 allegiance? I'm not sure I understand. So can  
12 you be clear? Are you saying that only people  
13 who are domiciled here as you define it can  
14 form the necessary loyalty to the United  
15 States?

16          GENERAL SAUER: It's not a --  
17 allegiance is not a question of subjective  
18 loyalty.

19          JUSTICE JACKSON: Okay.

20          GENERAL SAUER: You owe. It is  
21 something you owe. It's a reciprocal  
22 relationship between the citizen. Whether they  
23 want it or not, they have that allegiance. And  
24 I think it's powerfully --

25          JUSTICE JACKSON: On the basis of

1 what?

2 GENERAL SAUER: Domicile. I mean,  
3 that's what it says in so many words in The  
4 Venus and The Pizarro. It says, look, if  
5 you're talking about an alien, if they're just  
6 temporarily passing through, no, they don't  
7 have allegiance. But, if they've made it their  
8 permanent home, they become part of our  
9 political community, and they are analogous or  
10 akin to --

11 JUSTICE JACKSON: Yeah.

12 GENERAL SAUER: -- citizens.

13 JUSTICE JACKSON: All right. Just  
14 quickly because I'm -- I'm mindful of the time,  
15 what do you do with Wong -- Wong Kim Ark's  
16 statement that birthright citizenship is -- is  
17 applying "independently of a residence with  
18 intention to continue such residence  
19 independently of any domiciliation"? I know  
20 that they used "domicile." It's a fact in the  
21 case. But that's not a part of their holding.  
22 It's not what the reasoning turns on. Correct?

23 GENERAL SAUER: I believe you're --  
24 yeah, I believe you're quoting from page 693 of  
25 that opinion, and it goes on to say not citizen

1 turns on that but the duty of obedience to our  
2 laws. It doesn't take the further step at that  
3 point and say, therefore, if you have temporary  
4 and local allegiance, you're a citizen. And  
5 immediately before that, you have that, page  
6 693, summary of the Court's holding where it  
7 says --

8 JUSTICE JACKSON: So you say Wong  
9 Kim --

10 GENERAL SAUER: -- domicile, domicile,  
11 domicile.

12 JUSTICE JACKSON: -- Wong Kim Ark  
13 incorporates a domicile requirement?

14 GENERAL SAUER: That is the holding.  
15 It's definitely clearly expressed in the  
16 holding in multiple places.

17 JUSTICE JACKSON: All right. One  
18 final thing. Prospective. You say prospective  
19 we're supposed to do this, don't worry about  
20 the people who are already here and who would  
21 not qualify under your rule.

22 How does this work? Are you  
23 suggesting that when a baby is born, people  
24 have to have documents, present documents? Is  
25 this happening in the delivery room? How are

1 we determining when or whether a newborn child  
2 is a citizen of the United States under your  
3 rule?

4           GENERAL SAUER: And I think that's  
5 directly addressed in the SSA guidance that's  
6 cited in our brief. What SSA says is there's  
7 currently a system where, for example,  
8 secure -- Social Security numbers are generated  
9 based on the birth certificate. They say this  
10 can still be for the vast majority of instances  
11 completely transparent. You will still get  
12 a -- because the --

13           JUSTICE JACKSON: Not on transparent.  
14 I'm just talking about the particulars because  
15 now you say your rule turns on whether the  
16 person intended to stay in the United States.  
17 And I think Justice Barrett brought this up.

18           So are we bringing pregnant women in  
19 for depositions? What -- what are we doing to  
20 figure this out?

21           GENERAL SAUER: No. As I pointed out  
22 earlier, the Executive Order turns on  
23 lawfulness of status. So, if you -- if you --  
24 if you give birth to a baby in the hospital  
25 right now, it gets the birth certificate in the

1 system. There's a computer system that we  
2 talked about that assigns --

3 JUSTICE JACKSON: So there's no  
4 opportunity -- there's apparently no  
5 opportunity then for the person to prove or to  
6 say that they actually intended to stay in the  
7 United States?

8 GENERAL SAUER: Absolutely not. The  
9 opposite is true. Their opportunity to dispute  
10 if they think they were wrongly denied, which  
11 would only happen in a tiny minority of  
12 cases --

13 JUSTICE JACKSON: After the fact.

14 GENERAL SAUER: -- is directly  
15 addressed in that guidance.

16 JUSTICE JACKSON: After the fact --

17 GENERAL SAUER: Yes, yes.

18 JUSTICE JACKSON: -- after their baby  
19 has been denied citizenship, then we can go  
20 through the process?

21 GENERAL SAUER: Yes. And -- and the  
22 way that -- I mean, I'm summarizing because I'm  
23 not a expert on computers --

24 JUSTICE JACKSON: Yes.

25 GENERAL SAUER: -- but there's a

1 computer program that currently automatically  
2 generates a Social Security number.

3 SSA says, look, a Social Security  
4 number, non-citizens can have them if they have  
5 work authorization, so it doesn't prove  
6 citizenship. We'll give you a Social Security  
7 number provided that there's -- the system  
8 automatically checks the immigration status of  
9 the parents, which there are robust databases  
10 for, and then you -- you -- you -- it appears  
11 no different to the vast majority of birthing  
12 parents.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Ms. Wang.

17 ORAL ARGUMENT OF CECILLIA D. WANG

18 ON BEHALF OF THE RESPONDENTS

19 MS. WANG: Mr. Chief Justice, and may  
20 it please the Court:

21 Ask any American what our citizenship  
22 rule is and they'll tell you, everyone born  
23 here is a citizen alike. That rule was  
24 enshrined in the Fourteenth Amendment to put it  
25 out of the reach of any government official to

1 destroy.

2           When the government tried to strip  
3 Mr. Wong Kim Ark's citizenship on largely the  
4 same grounds they raise today, this Court said  
5 no. Thirty years after ratification, this  
6 Court held that the Fourteenth Amendment  
7 embodies the English common law rule.  
8 Virtually everyone born on U.S. soil is subject  
9 to its jurisdiction and is a citizen.

10           It excludes only those cloaked with a  
11 fiction of extraterritoriality because they are  
12 subject to another sovereign's jurisdiction  
13 even when they're in the United States, a  
14 closed set of exceptions to an otherwise  
15 universal rule.

16           My friend has now clearly said that  
17 the government is not asking you to overrule  
18 Wong Kim Ark. That is a fatal concession  
19 because Wong Kim Ark's controlling rule of  
20 decision precludes their parental domicile  
21 requirement.

22           The dissent understood that, and the  
23 majority tells us six times in the opinion that  
24 domicile is irrelevant under common law. Lynch  
25 versus Clarke was already the dominant American

1 case on citizenship, and it held that the  
2 U.S.-born daughter of temporary visitors from  
3 Ireland who took the baby back to Ireland with  
4 them, that that daughter was a U.S. citizen.

5 Authorities including Lincoln's  
6 attorney general and Kent's commentaries  
7 embraced Lynch, and Kent specifically talked  
8 about temporary sojourners' children being U.S.  
9 citizens. Justice Fields said in 1884 that  
10 that reflected the general understanding.

11 That understanding was confirmed by  
12 Congress with its 1940 act. The Fourteenth  
13 Amendment's fixed bright-line rule has  
14 contributed to the growth and thriving of our  
15 nation. It comes from text and history. It is  
16 workable, and it prevents manipulation.

17 The Executive Order fails on all those  
18 counts. Swaths of American laws would be  
19 rendered senseless, thousands of American  
20 babies will immediately lose their citizenship,  
21 and if you credit the government's theory, the  
22 citizenship of millions of Americans, past,  
23 present, and future, could be called into  
24 question.

25 All of this tells us the government's

1 theory is wrong.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: There are five  
4 exceptions to citizenship that you do accept.

5 MS. WANG: Yes, depending on how many  
6 you count, Justice Thomas, how you count them.

7 JUSTICE THOMAS: What is the  
8 underlying rule of law that you use to connect  
9 these five exceptions?

10 MS. WANG: Sure. So, as I just said,  
11 all of the exceptions involve situations where  
12 that U.S.-born child is not subject to the  
13 jurisdiction of the United States because that  
14 extraterritoriality, the fiction of  
15 extraterritoriality, the interaction of another  
16 sovereign between the United States'  
17 jurisdiction and that person, applies to the  
18 child as well as to the parent.

19 Everyone else born in the United  
20 States is subject to the United States'  
21 jurisdiction. To answer Justice Barrett's  
22 question to my friend, that's what sets those  
23 exceptions apart from other U.S.-born persons.

24 CHIEF JUSTICE ROBERTS: We -- we've  
25 heard a lot of talk about Wong Kim Ark, and you

1 dismiss the use of the word "domicile" in it.  
2 It appears in the opinion 20 -- 20 different  
3 times and including in the question presented  
4 and in the actual legal holding. And the  
5 government doesn't want it to be overruled  
6 because it relies on -- it's willing to rely on  
7 that particular fact in that case.

8           Isn't it at least something to be  
9 concerned about to say that since it's  
10 discussed 20 different times and has that  
11 significant role in the opinion that you can  
12 just dismiss it as irrelevant?

13           MS. WANG: Well, Chief Justice,  
14 Mr. Chief Justice, I think we have to look at  
15 what the controlling rule of decision is in  
16 Wong Kim Ark. Justice Gray takes pains in the  
17 majority opinion to set out his analysis.

18           He first starts with a premise that in  
19 construing the Fourteenth Amendment Citizenship  
20 Clause, we look to the English common law.  
21 That was the rule that applied from the  
22 colonial era on at least for the colonists and  
23 for European immigrants.

24           He then says: Look, Chief Justice  
25 Marshall tells us in The Schooner Exchange what

1 "subject to the jurisdiction" means, again  
2 looking to English common law.

3 Under English common law, if you are  
4 born in the dominions of the sovereign, you owe  
5 natural allegiance, and those who are present  
6 in the dominions of the sovereign owe temporary  
7 allegiance for as long as they're present.

8 The only exceptions again at common  
9 law were ambassadors, people born on foreign  
10 ships, and people who are born during periods  
11 of foreign occupation. He then gets to the  
12 government's favorite page, 693, where he says,  
13 look, we have had this rule in the United  
14 States as to citizenship at least for white  
15 Americans from before independence.

16 The purpose of the Fourteenth  
17 Amendment was to embrace that universal rule of  
18 birthright citizenship, to embrace and  
19 incorporate the common law exceptions, with the  
20 single additional exception of the preexisting  
21 exception for tribal Indians that we had in the  
22 United States, which is an analogous exception,  
23 and that's the closed set of exceptions.

24 You can't make sense of the holding in  
25 the case without looking to the controlling

1 rule of decision, which is the common law. And  
2 I think my friend agrees that under English  
3 common law, domicile was not relevant, and the  
4 children born to temporary visitors in the  
5 territory of the sovereign were always  
6 considered birthright citizens.

7 JUSTICE KAGAN: Well, Ms. Wang, I  
8 mean, everything you say strikes me as, yeah,  
9 that's -- that's the way I read it too, but  
10 then what are those 20 domicile words doing  
11 there? Like, you can, you know, take some of  
12 them and say I don't know, they were just  
13 summarizing the facts of the case, but not all  
14 of them. And why did they keep on, like -- why  
15 did they sprinkle that in the opinion?

16 MS. WANG: Well, I think, again, that  
17 was -- those were the stipulated facts in the  
18 case. And it's clear we have textual evidence  
19 in the majority opinion that they were simply  
20 saying this is an a fortiori application of  
21 that controlling rule that comes from the  
22 English common law. Justice Gray writes again,  
23 after setting out the English common law rule  
24 and the exceptions with the single additional  
25 exception for children of members of Indian

1 tribes, that the amendment in clear words and  
2 manifest intent includes that children born  
3 within the territory of the United States of  
4 all other persons of whatever race or color  
5 domiciled within the United States.

6 And, as was pointed out earlier, the  
7 very next part of that same paragraph, he cites  
8 to Webster talking about Thrasher's case and he  
9 says people who are born in this country owe  
10 allegiance independently of residents within --  
11 I'm sorry, foreign nationals owe allegiance  
12 independently of a residence with the intention  
13 to continue such residence independently of any  
14 domiciliation and independently of taking any  
15 oath of allegiance, which is totally contrary  
16 to both the government's theory of dual  
17 allegiance or partial allegiance and to the  
18 theory of domiciliation.

19 JUSTICE ALITO: I mean, I would -- I  
20 might agree with you if "domicile" had simply  
21 been sprinkled in the opinion, but in Wong Kim  
22 Ark, it's a long opinion, but it begins by  
23 saying here's the question, and it ends by  
24 coming back to the question, and it says here's  
25 the question, stated at the beginning of the

1 opinion: Namely, whether a child born in the  
2 United States of parents of Chinese descent who  
3 at the time of his birth are subjects of the  
4 Emperor of China but have a permanent domicile  
5 and residence in the United States and are  
6 there carrying on business. And he states the  
7 diplomatic exception. And he says, for the  
8 reasons above stated, this Court is of the  
9 opinion that the question must be answered in  
10 the affirmative.

11 So why put "domicile" in? Sometimes  
12 it's hard to figure out what is the holding of  
13 a case. Here, he tells us, this is the holding  
14 of the case. Why put "domicile" in there?

15 MS. WANG: Well --

16 JUSTICE ALITO: It's just something --  
17 it's -- it's something irrelevant that he  
18 wanted to throw in? It's like, you know,  
19 whether a child born in the United States of --  
20 of parents of Chinese descent who once resided  
21 at a particular address in San Francisco, who  
22 attempted to enter the country at the Port of  
23 San Francisco, why put it in if it's  
24 irrelevant?

25 MS. WANG: Well, Justice Alito, all I

1 can -- I'll give you two responses. The first  
2 is that, again, it was a stipulated fact. The  
3 second is that, regardless of what the judgment  
4 in the case was, which, again, was an a  
5 fortiori application of the rule of decision,  
6 the rule of decision in Wong Kim Ark has  
7 binding precedential effect.

8 Even if you think that Wong Kim Ark  
9 decided the case based on the stipulated facts,  
10 you have to follow that controlling rule of  
11 decision, and if you follow that rule, you get  
12 to the same result for people without domicile.

13 Wong Kim Ark says six times in the  
14 first parts of the opinion, as well as on the  
15 page the government focuses on, that domicile  
16 is not relevant, that --

17 JUSTICE GORSUCH: Well --

18 JUSTICE JACKSON: Ms. --

19 JUSTICE GORSUCH: -- Ms. Wang, on --

20 MS. WANG: Sure.

21 JUSTICE GORSUCH: -- on that, what do  
22 we do with the fact that, after Wong Kim Ark,  
23 at least some authorities took the view that  
24 the non-domiciliary question wasn't decided,  
25 remained open, and even continued to press the

1 view that domicile is required?

2 Now I know you've got a lot of good  
3 stuff on your side too, but what do we do with  
4 the fact that it -- many -- many sound legal  
5 authorities thought it remained an open  
6 question, even if one of them wasn't John  
7 Marshall Harlan?

8 MS. WANG: I liked your example from  
9 Justice Harlan's lecture here in D.C. So  
10 here's what I would say. All of the  
11 government's citations in their brief generally  
12 either were rejected by Wong Kim Ark expressly  
13 if they predated Wong Kim Ark --

14 JUSTICE GORSUCH: I'm talking post.

15 MS. WANG: Post.

16 JUSTICE GORSUCH: If we're trying to  
17 understand how the legal community understood  
18 what happened in Wong Kim Ark --

19 MS. WANG: Sure.

20 JUSTICE GORSUCH: -- it seems to me  
21 it's a mess.

22 MS. WANG: So --

23 JUSTICE GORSUCH: But maybe you can  
24 persuade me otherwise.

25 MS. WANG: I -- I think I can, Justice

1 Gorsuch.

2 First, as to the post-Wong Kim Ark  
3 authorities that the government cites, each one  
4 of them is inconsistent with Wong Kim Ark's  
5 reasoning or doesn't mention it at all. Most  
6 of them are -- have very little reasoning at  
7 all.

8 And, in contrast, what we have on our  
9 side post-Wong Kim Ark is numerous federal  
10 court decisions around the time of Wong Kim  
11 Ark, between ratification and Wong Kim Ark,  
12 that said that domicile is not relevant. They  
13 cited Lynch versus Clarke, which, again, was  
14 about the daughter of temporary sojourners. We  
15 have the sixth edition of Kent, which was cited  
16 in Wong Kim Ark and, of course, was then cited  
17 after Wong Kim Ark was decided by many  
18 authorities, again, discussing temporary  
19 sojourners.

20 Anyone who wanted to know what the law  
21 of citizenship was under the Fourteenth  
22 Amendment after Wong Kim Ark would go to the  
23 sixth edition of Kent, where he says in that  
24 footnote on page 38 that the rule was Lynch  
25 versus Clarke and temporary sojourners'

1 children are U.S. citizens.

2           We have members of Congress speaking  
3 on the record on debates on immigration laws  
4 where they were finally passing these  
5 immigration restrictions that Senator Cowan  
6 wanted, and they all stated either that Lynch  
7 was the rule, that Attorney General Bates had  
8 stated the rule, again citing Lynch, or Kent,  
9 in stating the rule that everyone born in the  
10 U.S. is a citizen and saying, look, children of  
11 Chinese immigrants, these immigrants who are  
12 unwelcome, these immigrants that Congress is  
13 now trying to bar from entering the United  
14 States, if -- their children born in the United  
15 States are citizens.

16           We have an 1896 -- so a couple years  
17 before Wong Kim Ark -- but an 1896 State  
18 Department regulation which said the U.S.-born  
19 children of foreign nationals are U.S. citizens  
20 excepting only the children of ambassadors.

21           And then you have Marshall Woodworth,  
22 who was a U.S. attorney who writes in a Law  
23 Review article that he -- talking specifically  
24 about temporary sojourners' children, and he  
25 says: I don't think that's a good rule from a

1 policy perspective, but that's the general  
2 rule.

3 JUSTICE GORSUCH: And -- and --

4 JUSTICE ALITO: Ms. Wang, can I --

5 MS. WANG: Yes.

6 JUSTICE GORSUCH: Please.

7 JUSTICE ALITO: Can I offer a possible  
8 explanation for why Justice Gray made a point  
9 of putting "domicile" in what he said was the  
10 holding of the case, and it is this: Wong Kim  
11 Ark and his parents, had they come to the  
12 United States from Europe, could have been  
13 naturalized, but, because they were Chinese,  
14 they could not be naturalized. And they had  
15 done everything that they could to make  
16 themselves Americans by -- by establishing a  
17 domicile in the United States.

18 And so that's what this was about.  
19 He -- he -- he couldn't get naturalized because  
20 of a racist law, but they had done everything  
21 they could to become part of the American  
22 society. At the time -- at the same time,  
23 there were many, many men who were horribly  
24 exploited, brought to the United States to work  
25 on the transcontinental railroad, to work in

1 mines. They were worked to death. They were  
2 treated horrifically. But they were not --  
3 they were overwhelmingly men. There wasn't an  
4 indication that they were -- they would stay  
5 here, they could stay here. They didn't have  
6 permanent homes.

7 And the opinion -- and the opinion is  
8 drawing a distinction between those two  
9 categories of people who would have been well  
10 understood at the time when Wong Kim Ark was  
11 decided.

12 MS. WANG: No, Justice Alito, I don't  
13 think that's a plausible explanation for why  
14 domicile is mentioned in Wong Kim Ark because,  
15 again, the controlling rule of decision based  
16 on the English common law and cases from  
17 Schooner Exchange to Lynch versus Clarke to  
18 State versus Manuel, which was the North  
19 Carolina decision that said, look, the rule in  
20 the United States from independence on has been  
21 the English common law rule, it's -- that  
22 explanation would be inconsistent if --

23 JUSTICE JACKSON: But, Ms. Wang --

24 MS. WANG: Yes?

25 JUSTICE JACKSON: -- isn't -- isn't

1 that explanation -- I -- I take Justice Alito's  
2 point, and I think he actually makes a good one  
3 in the sense that it could be that Justice Gray  
4 emphasized domicile to help the public accept  
5 the outcome of this case.

6           You're suggesting that the emphasis on  
7 domicile was not a part of the rule, meaning he  
8 wasn't saying you had to be like a foreigner  
9 who is doing everything they can and who can't  
10 be naturalized. But he might have emphasized  
11 those facts in this case precisely because  
12 Chinese immigrants were unwanted, precisely  
13 because he had to get this out into the public  
14 and people were going to say: Whoa, you're  
15 saying these people have -- this -- this baby  
16 has to be a citizen?

17           And so one could imagine that it was  
18 important from a standpoint of helping people  
19 accept this citizen rule under these  
20 circumstances to emphasize that these  
21 particular people in this case were in Justice  
22 Alito's first category.

23           MS. WANG: I think that is very  
24 possible, Justice Jackson. And, as evidence of  
25 that, I would point to the fact that if you

1 look at the briefing in Wong Kim Ark, you'll  
2 see that even though the parties had stipulated  
3 in the -- in the district court that Wong Kim  
4 Ark's parents were domiciled in the United  
5 States, when the case came to the Supreme  
6 Court, the government's brief argued that it  
7 was impossible for Chinese immigrants to have  
8 domicile because they expressed the view that  
9 was common among people who opposed immigration  
10 by Chinese nationals to the United States,  
11 there was a common view that Chinese people  
12 were inherently temporary sojourners in the  
13 country.

14 And so I do think it's possible,  
15 Justice Alito and Justice Jackson, that he was  
16 trying to dispel that notion and tell the  
17 government --

18 JUSTICE JACKSON: Absolutely, that at  
19 least it reads as though he's trying to make --  
20 to -- to -- to calm everyone down. These  
21 particular people were domiciled, but we're  
22 following the English common law rule. And  
23 when you look at the English common law rule,  
24 domicile is not a factor.

25 MS. WANG: That's right. I think --

1 you know, who knows why the majority opinion  
2 mentioned domicile. We know it's a stipulated  
3 fact. We know the government tried to renege  
4 on that stipulation and rely on this assumption  
5 on the part of anti-Chinese advocates at that  
6 time that Chinese people couldn't form a  
7 domicile in the United States. And he followed  
8 the English common law rule.

9 JUSTICE BARRETT: Ms. Wang, can I --

10 JUSTICE SOTOMAYOR: Counsel --

11 JUSTICE BARRETT: Oh.

12 JUSTICE SOTOMAYOR: Go ahead.

13 JUSTICE BARRETT: I just wanted to ask  
14 you a question about how the exceptions fit  
15 within the general rule. You've called them  
16 exceptions, and some of the common law sources  
17 call them exceptions, so I take that point.

18 But, if we think of jus soli as tied  
19 to the territory and we look at the exceptions  
20 as territorial in a sense, then they seem kind  
21 of like natural outgrowths of that rule, and  
22 this is what I mean, and -- and -- and this is  
23 where I -- I want your help with how the  
24 exceptions played out in practice.

25 If you look at Indian reservations as

1 unique places because Indians were  
2 quasi-sovereigns, separate nations in the  
3 American system, if you look at occupied alien  
4 territory as territory that's outside of the  
5 jurisdiction of the United States, and then, if  
6 you look at the diplomatic exception almost  
7 like diplomats and their children have little  
8 bubbles around them, like the embassy is really  
9 the territory of that country, and even when  
10 they're traveling around, they're all not  
11 subject to the jurisdiction by virtue of this  
12 territorial fiction, are those just  
13 applications of the rule?

14           And, if they are, then what happens to  
15 alien enemies, like the German spies in Ex  
16 parte Quirin, or what happens to Indians who  
17 are actually not on the reservation but may be  
18 born, say, in Baton Rouge? How does the rule  
19 apply in those situations? Does it travel with  
20 the person, or is it tied in some sense to the  
21 land?

22           MS. WANG: Sure. So let me answer  
23 each part in turn.

24           So the thing that all of the  
25 exceptions have in common, again, is this sense

1 that the -- the person is -- has this fiction  
2 of extraterritorial -- extraterritoriality  
3 around them. Let's set aside the Indian tribal  
4 exception for a moment and come back to it.

5 So the -- the example of enemy aliens,  
6 for example, *Ex parte Quirin*, is one that is  
7 answered by Justice Story in both *Inglis* and in  
8 *Rice*. And the touchstone under the American  
9 application of English common law was that in  
10 wartime, the touchstone is whether there's a  
11 foreign occupation of U.S. territory. So --

12 JUSTICE BARRETT: And that's -- just  
13 to interrupt for one second to clarify.

14 MS. WANG: Sure.

15 JUSTICE BARRETT: And that is  
16 territorial. Sometimes -- it just seemed to me  
17 that the rule varied. Sometimes it was stated  
18 as enemy alien and sometimes it was focused on  
19 occupied territory.

20 MS. WANG: Sure. So -- so the rule --  
21 I -- I don't think there's a separate rule for  
22 enemy aliens. And the government's briefs  
23 describe the exception as an enemy alien  
24 exception. I -- I don't think that is the best  
25 way to think about it.

1           Rice and Inglis tell you that when the  
2 British forces are occupying Castine, Maine, no  
3 one is subject to U.S. jurisdiction there  
4 because Britain is ruling -- is governing  
5 Castine, Maine. And Justice Story explains,  
6 look, if the U.S. then retakes that territory,  
7 people -- babies who are born to U.S. citizens  
8 by what he called post-limine become U.S.  
9 citizens.

10           So that's -- that's the -- that's the  
11 way to think about any wartime situation, enemy  
12 aliens or otherwise.

13           As we heard earlier, Professor  
14 Muller's amicus brief tells us how we've  
15 thought about enemy aliens in wartime. Even in  
16 World War II, when the United States was  
17 detaining Japanese nationals who were deemed  
18 enemy aliens of the United States, when those  
19 enemy aliens had babies in these detention  
20 camps, everyone agreed that those babies were  
21 U.S. citizens.

22           And Professor Muller goes on to  
23 explain that, you know, there are many cases of  
24 those U.S. citizens going on to a lifetime of  
25 government service to the United States.

1 Everyone agrees those babies are U.S. citizens  
2 like everyone else. So, again, the touchstone  
3 for enemy aliens is --

4 JUSTICE BARRETT: So what about --

5 MS. WANG: -- is there an occupation.

6 JUSTICE BARRETT: -- Indians? What  
7 about the Indian who's off the reservation or  
8 born off of a reservation?

9 MS. WANG: Sure. So, to start with  
10 the basics, the -- I'll refer to the Indian  
11 tribal exception just to use the term of art.

12 The Indian tribal exception, Elk  
13 versus Wilkins tells us, comes from the  
14 constitutionally unique status of Indian  
15 tribes. In the Indian Commerce Clause, we know  
16 that tribes are treated as basically  
17 quasi-sovereign nations. We know that from the  
18 Marshall trilogy of cases. We know from  
19 Worcester versus Georgia, where Chief Justice  
20 Marshall said that the tribes are essentially  
21 distinct political communities --

22 JUSTICE BARRETT: Well, I understand  
23 all that.

24 MS. WANG: Sure.

25 JUSTICE BARRETT: So just in the

1 interest of time just to --

2 MS. WANG: Sorry.

3 JUSTICE BARRETT: -- to focus you,  
4 how -- I understand why the Indians are treated  
5 differently for purposes of the law, but I want  
6 to know, is it tied to territory or is it tied  
7 to the status of someone as a member of a  
8 tribe?

9 Because, if -- if you're looking at it  
10 because of the special relationship of Indians  
11 to the United States as a matter of the  
12 Constitution, et cetera, well, I mean, citizens  
13 of France are citizens of a different sovereign  
14 as well.

15 MS. WANG: Sure. So Elk versus  
16 Wilkins doesn't really answer that question.  
17 The Court says there are two ways to look at  
18 this: Either you look at it as a tribal member  
19 is like an ambassador, or you can look at it  
20 like there's a territoriality issue where  
21 people are born on tribal lands and, therefore,  
22 they're essentially, I think he says, Justice  
23 Gray says at one point we might as well be  
24 talking about someone who's born in Mexico.

25 JUSTICE GORSUCH: Well, there's a lot

1 in Elk --

2 MS. WANG: Sure.

3 JUSTICE GORSUCH: -- and some of it's  
4 not terribly helpful for you, it seems to me,  
5 because Justice Gray, again, strikes again,  
6 says that -- that they may be subject in some  
7 degree or respect to the United States.

8 So there's some jurisdiction. He says  
9 they're born with -- in the -- in the  
10 geographic limits, they are in a geographical  
11 sense born in the United States, but, because  
12 they are not completely subject to the  
13 jurisdiction of the United States and owe  
14 allegiance distinct from the United States,  
15 that's what takes them outside. And -- and  
16 that language sure sounds a lot like the  
17 Solicitor General's presentation today.

18 MS. WANG: To the contrary, Justice  
19 Gorsuch. I embrace that part of Elk versus  
20 Wilkins' holding. Justice Gray, of course,  
21 wrote both Wong Kim Ark and --

22 JUSTICE GORSUCH: I know. And it's  
23 a -- it's a struggle.

24 (Laughter.)

25 MS. WANG: Sure. Let -- let me try to

1 help you out with that.

2 (Laughter.)

3 MS. WANG: So, you know, the -- the --  
4 the -- the government tries to make it seem as  
5 though what sets the exceptions apart, what  
6 defines the exceptions, is that the government  
7 has some maximum theoretical power, the  
8 government could have exercised plenary  
9 regulatory power over the tribes, and,  
10 therefore, that's the same situation as a  
11 foreign national in the United States.

12 But that's actually not true, because,  
13 remember, if the -- the -- there's always this  
14 background notion. Whatever the parameters of  
15 the relationship between the United States  
16 Government and tribal nations at that time of  
17 ratification, there was this constitutionally  
18 distinct status of the tribes and tribal  
19 members, setting them -- excluding from  
20 apportionment, which came -- was, you know,  
21 renewed in the Fourteenth Amendment, and that's  
22 not true of foreign nationals.

23 If the government were right that the  
24 question is what's the maximum theoretical  
25 power the government has, there would be no

1 ambassador exception because, of course, the  
2 United States could decide in some instance to  
3 go ahead and prosecute an ambassador. There  
4 would be inter-sovereign comity considerations  
5 there. That's how you define the exceptions.

6 And, as Wong Kim Ark says, Elk versus  
7 Wilkins has no bearing on the question of  
8 foreign nationals.

9 JUSTICE SOTOMAYOR: Ms. Wang, on the  
10 earlier answer you gave to Justice Gorsuch on  
11 the temporary sojourners' cases, those were  
12 distinct cases, correct, where the parents had  
13 come to the U.S. and didn't want to give  
14 citizenship to their kids, took them out  
15 immediately, correct?

16 MS. WANG: I'm sorry, Justice  
17 Sotomayor, I'm not sure which cases you're  
18 referring to.

19 JUSTICE SOTOMAYOR: All right.  
20 I'll -- I'll -- that, we can look it up.

21 MS. WANG: Okay.

22 JUSTICE ALITO: Ms. Wang, would you  
23 agree that the citizenship test in the  
24 Fourteenth Amendment is the same as the test in  
25 the 1866 Civil Rights Act?

1 MS. WANG: So the words are obviously  
2 different. What Wong Kim Ark tells us and what  
3 the debates tell us is that the Framers, there  
4 was -- it was the same Congress, obviously,  
5 framing both. Congress was trying to do the  
6 same thing with both the 1866 Act and with the  
7 Fourteenth Amendment.

8 They wanted to capture the common law  
9 exceptions and the Indian tribal exception.  
10 They started out with the two separate phrases,  
11 "not subject to any foreign power" plus  
12 excluding "Indians not taxed."

13 And as Justice Gray described it in  
14 his majority opinion in Wong Kim Ark, they  
15 decided to switch to the affirmative phrase,  
16 "subject to the jurisdiction" and --

17 JUSTICE ALITO: Yeah. Well, do they  
18 mean the same thing? And wouldn't it be very  
19 odd if the citizenship test in the Fourteenth  
20 Amendment were broader than the citizenship  
21 test in the 1866 Civil Rights Act, particularly  
22 in the light of the fact that the -- the -- the  
23 1866 Civil Rights Act was reenacted after the  
24 adoption of the Fourteenth Amendment and  
25 remained in place until 1940?

1 MS. WANG: Sure. I -- the Framers  
2 were trying to do the same thing with the  
3 language in both.

4 JUSTICE ALITO: Okay. So then I think  
5 we can turn to the language of the 1866 Civil  
6 Rights Act because it's more straightforward.  
7 You know, "subject to the jurisdiction thereof"  
8 is like the -- you know, the puzzle wrapped in  
9 an enigma wrapped in a mystery.

10 (Laughter.)

11 JUSTICE ALITO: But "not subject to  
12 any foreign power" is pretty straightforward.  
13 So let me give you these examples.

14 A boy is born here to an Iranian  
15 father who has entered the country illegally.  
16 That boy is automatically an Iranian national  
17 at birth, and he has a duty to provide military  
18 service to the Iranian government. Is he not  
19 subject to any foreign power?

20 MS. WANG: Not within the meaning of  
21 the 1866 Act, Justice Alito. And that's clear  
22 from Wong Kim Ark, and it's clear from the  
23 debates. What the Framers meant by the phrase  
24 "not subject to any foreign power" was  
25 referring to the ambassador exception.

1           If it meant what the government  
2 contends, basically, not a subject of any  
3 foreign power, that you were -- that another  
4 country considers you a jus sanguinis citizen,  
5 then lawful permanent residents, all foreign  
6 nationals, should be excluded.

7           JUSTICE ALITO: Well, ordinary  
8 public -- ordinary public meaning of that would  
9 certainly encompass that boy, would it not?

10          MS. WANG: Justice Alito, if you think  
11 that the language of the 1866 Act was  
12 ambiguous, as Wong Kim Ark says, the shift to  
13 the language of the Fourteenth Amendment, which  
14 is the operative text, certainly clears up any  
15 ambiguity.

16          JUSTICE ALITO: Well, what I said  
17 about a boy born to an Iranian father is true  
18 of children born here to parents who are  
19 nationals of other countries. If I'm correct,  
20 it's true to a child who's born here to Russian  
21 parents. It's true to a child who's born here  
22 to Mexican parents. They're automatically  
23 citizens or nationals of those countries and  
24 have a duty of -- of military service. It sure  
25 seems like that's a -- that makes them subject

1 to a foreign power.

2 MS. WANG: But, again, Justice Alito,  
3 that would have meant that the children of  
4 Irish, Italian, and other immigrants, which  
5 Wong Kim Ark refers to and the debate -- the  
6 Framers referred to, would not have been  
7 citizens either because, if the only test is  
8 whether that U.S.-born child is considered a  
9 citizen by another country under their jus  
10 sanguinis laws, then no -- no foreign  
11 nationals' children would be included in  
12 citizenship.

13 JUSTICE ALITO: Well, all of -- in all  
14 of those cases, the parents could be  
15 naturalized, and then the children would be  
16 derivatively nationalized -- naturalized when  
17 the -- when the parents were naturalized.

18 Wong Kim Ark -- I'm sorry. The red  
19 light is on.

20 CHIEF JUSTICE ROBERTS: Why don't you  
21 finish.

22 JUSTICE ALITO: Wong Kim Ark has a  
23 passage explaining how this Court should treat  
24 dicta, and it quotes something that John  
25 Marshall said. "It is well" -- this is quoting

1 from Wong Kim Ark: "It is well to bear in mind  
2 the oft-quoted words of Chief Justice Marshall:  
3 'It is a maxim not' -- 'maxim not to be  
4 disregarded that general expressions in every  
5 opinion are to be taken in connection with the  
6 case in which those expressions are used. If  
7 they go beyond the case, they may be respected  
8 but ought not to control the judgment in a  
9 subsequent suit when the very point is  
10 presented for decision.'"

11 So does that fall within the, you  
12 know, "what's good for the goose is good for  
13 the gander" rule? That's how Wong Kim Ark  
14 treats what was said in the Slaughter-House  
15 case -- cases. Should we apply that same rule  
16 to Wong Kim Ark itself?

17 MS. WANG: Wong Kim Ark tells you what  
18 to make of the Slaughter-House dicta. It was  
19 dicta. The issue of citizenship was not at  
20 play in Slaughter-House.

21 And in contrast, the parts of the  
22 holding -- the parts of the decision that I  
23 alluded to are the controlling rule of  
24 decision. Again, we look to the English common  
25 law in construing the Fourteenth Amendment.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Justice Thomas?

4 Anything further, Justice Alito?

5 JUSTICE ALITO: Well, just a couple  
6 more questions.

7 So, if those who framed and adopted  
8 the Fourteenth Amendment had wanted to limit  
9 the citizenship test to just those specific  
10 groups that you concede fall outside the  
11 birthright citizenship rule, why didn't they  
12 refer specifically to those groups? Why did  
13 they adopt a general rule? They could have  
14 said all persons born or naturalized in the  
15 United States, excluding Indians not taxed and  
16 those ineligible under common law, are citizens  
17 of the United States and of the state wherein  
18 they reside. Or they could have said all  
19 persons born or naturalized in the United  
20 States, excluding Indians not taxed and the  
21 children of foreign ambassadors or foreign  
22 invaders, are citizens of the United States and  
23 of the state wherein they reside. But they  
24 didn't do that. They adopted a general rule.  
25 So what's the explanation?

1 MS. WANG: I would say the -- Wong Kim  
2 Ark tells us what the explanation is, that the  
3 Framers of the Fourteenth Amendment, after  
4 overriding President Johnson's veto, wanted to  
5 adopt a universal rule with a closed set of  
6 exceptions, and they believed that "subject to  
7 the jurisdiction of the United States" did  
8 that. And that term does describe both the  
9 universal general rule and the common law  
10 exceptions with the sole additional American  
11 exception for tribal Indians.

12 JUSTICE ALITO: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Sotomayor?

15 JUSTICE SOTOMAYOR: Ms. Wang, I -- I  
16 don't -- I've not quite understood the  
17 Solicitor General's argument that lawful  
18 domicile somehow changes the U.S.'s dominion  
19 over a person or allegiance. Even in Justice  
20 Alito's examples, if your parents are Iranian,  
21 if you get permanent -- lawful permanent  
22 residency here, that child still, by their  
23 laws, when it leaves the United States, must  
24 serve in the Iranian Army, correct?

25 MS. WANG: Well, I -- I don't know the

1 answer to that. What I can tell you is that  
2 under Wong Kim Ark, the Court says we don't  
3 care about problems of dual nationality. We  
4 don't look to other countries' laws in  
5 construing our Fourteenth Amendment.

6 JUSTICE SOTOMAYOR: Well, it was  
7 undisputed there that Wong Kim Ark's parents  
8 owed loyalties to China, correct?

9 MS. WANG: Sure. Yes. I --

10 JUSTICE SOTOMAYOR: What I'm saying  
11 is, even if you become a permanent resident,  
12 you're not a U.S. citizen.

13 MS. WANG: Correct. I --

14 JUSTICE SOTOMAYOR: So your primary  
15 loyalty still remains with your citizenship  
16 country, wherever you came from.

17 MS. WANG: That's right, Justice  
18 Sotomayor. I take your point now.

19 JUSTICE SOTOMAYOR: And you understand  
20 what I'm saying. And during temporary --  
21 whether it's lawful or unlawful, temporary  
22 presence in the United States, you are subject  
23 to the U.S. laws, correct?

24 MS. WANG: That's right. The -- the  
25 question that the Fourteenth Amendment asks is

1 whether the U.S.-born child is subject to U.S.  
2 jurisdiction when they're born.

3 JUSTICE SOTOMAYOR: Meaning are they  
4 within the U.S. territory?

5 MS. WANG: Exactly. Other than people  
6 covered by that closed set of exceptions.

7 JUSTICE SOTOMAYOR: Okay. Thank you.

8 MS. WANG: That's right. The -- in  
9 other words, the -- the government's rule,  
10 which really is looking at whether someone has  
11 a divided allegiance because they're a citizen  
12 of another country, would exclude the children  
13 of all foreign nationals, and that isn't what  
14 they're saying.

15 JUSTICE SOTOMAYOR: Exactly. So the  
16 only way that allegiance, lawful or unlawful,  
17 can -- has no play in this question?

18 MS. WANG: I would say that the  
19 relevance of allegiance is the relevance under  
20 the English common law rule that's embodied in  
21 the Fourteenth Amendment. All persons born in  
22 the territory of the sovereign owe natural  
23 allegiance. Those temp- --

24 JUSTICE SOTOMAYOR: Except for the  
25 limited -- three limited exceptions?

1 MS. WANG: Precisely.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: I think I'd like to  
4 take you back to the first question that  
5 Justice Alito asked General Sauer, and it was  
6 this question of what do we do if we think we  
7 have a new problem that didn't exist at the  
8 time of the Fourteenth Amendment.

9 I don't think, actually, that the U.S.  
10 Government argues the case this way, but -- but  
11 let's put the U.S. Government's arguments aside  
12 and just ask something like: Well, everything  
13 that you're saying would suggest an answer to  
14 the question of people who -- the children of  
15 people who are temporarily in the U.S. but here  
16 lawfully.

17 Is there any way that there might be a  
18 different answer with respect to the children  
19 of people who are here unlawfully because of  
20 this new problem issue that Justice Alito has  
21 raised?

22 MS. WANG: No, there is no difference.  
23 And, of course, the government's arguments as  
24 to people who are unauthorized immigrants in  
25 this country all runs through and hinges on

1 their domicile requirement.

2           The first thing I would say in  
3 response is that, once again, it's  
4 crystal-clear from Wong Kim Ark and from the  
5 debates that the Framers of the Fourteenth  
6 Amendment meant to have a universal common law  
7 rule of citizenship subject to the closed set  
8 of exceptions. And we can't take the current  
9 administration's policy considerations into  
10 account to try to reengineer and radically  
11 reinterpret the original meaning of the  
12 Fourteenth Amendment.

13           The second point I would make is that,  
14 in fact, the Framers did consider the concept  
15 and the actual problems of immigration that  
16 were coming up at that time.

17           In addition to this, you know, notable  
18 exchange between Senator and Cowan -- Senator  
19 Cowan and Senator Conness, where Cowan says, if  
20 we have the Citizenship Clause as part of the  
21 Constitution, we are going to encourage these  
22 gypsies, what he called gypsies, Roma, in  
23 Pennsylvania, whom he characterized as  
24 invaders, trespassers, and-law breakers, we'll  
25 encourage them to come into our country because

1 their children will be citizens.

2 He says, Senator Conness, in your  
3 state of California, you'll be facing a mass  
4 flood of Chinese immigration if we adopt the  
5 citizenship rule. And Senator Conness, himself  
6 an Irish immigrant, says: Yes, and I am voting  
7 for that because I believe in citizenship by  
8 virtue of birth without regard to parentage.

9 And the third point I would make is  
10 a -- an historical one, which is that recall  
11 that at the time the Framers are -- are  
12 thinking about birthright citizenship, we're --  
13 there have just been 15 or 20 years of  
14 unprecedented immigration from Ireland. There  
15 were -- the Know Nothing party was dominant in  
16 the 1850s, just a decade earlier, and they were  
17 vehemently opposed to Irish immigration.

18 They believed Irish Catholic  
19 immigrants were unassimilable and could never  
20 become Americans. But even the Know Nothing  
21 party members of Congress believed that the  
22 children born in the United States to those  
23 Irish immigrants were citizens like anyone  
24 else. That's the intuition that the Framers of  
25 the Fourteenth Amendment had.

1           Contrary to the -- to the  
2 government -- the government's arguments now,  
3 they wanted to grow this country, they wanted  
4 to make sure we had a citizenry to populate the  
5 military, to settle the country, and they --  
6 they -- they also had an intuition that was  
7 consistent with the founding aversion to  
8 inherited rights and disabilities.

9           JUSTICE KAGAN: Thank you.

10          CHIEF JUSTICE ROBERTS: Justice  
11 Gorsuch?

12          Justice Kavanaugh?

13          JUSTICE KAVANAUGH: On Lynch v.  
14 Clarke, which you cite several times in the  
15 brief and today, which I appreciate, the  
16 government's response is that that decision was  
17 questioned at the time and went unmentioned in  
18 congressional debates about the Fourteenth  
19 Amendment. I just want to get your response to  
20 that point on Lynch.

21          MS. WANG: Sure. Not true. Though  
22 the Lynch was not specifically mentioned by  
23 name in the Fourteenth Amendment debates, it  
24 was a couple months earlier in the debates on  
25 the 1866 Act, where Senator Trumbull -- I'm

1     sorry -- Senator Lawrence talks about the great  
2     case of Lynch versus Clarke, where it was  
3     conclusively shown that all children born here  
4     are citizens without any regard to the  
5     political condition or allegiance of their  
6     parents.

7             And then, of course, they discuss the  
8     children of temporary sojourners elsewhere  
9     without mentioning Lynch.

10            JUSTICE KAVANAUGH: I just want to  
11     isolate a point that you've mentioned, which  
12     is, if the Fourteenth Amendment used the phrase  
13     "not subject to any foreign power," I think you  
14     have a much tougher argument, and then earlier,  
15     I think you indicated that they -- that's what  
16     they meant even though they didn't say it. I  
17     just want to give you a chance to unpack that  
18     because I think that's a --

19            MS. WANG: Sure.

20            JUSTICE KAVANAUGH: If it said that, I  
21     think our history would be a little different  
22     and I think the text, even put aside the  
23     history because that's speculation, the text  
24     would be quite a bit different.

25            MS. WANG: Sure. So let me answer in

1 three parts. The first is that Wong Kim Ark  
2 tells us that -- you know, the Court already  
3 dealt with this and said, look, the Framers  
4 were trying to do the same thing with the  
5 language of the 1866 Act. To the extent you  
6 think that the language is ambiguous or not as  
7 good, let's look at the operative text,  
8 "subject to the jurisdiction thereof."

9           The second point I would make is that  
10 it's clear from the debates that the Framers,  
11 in using the phrase "not subject to any foreign  
12 power," were thinking about ambassadors. And  
13 I -- I believe that Senator Wade at one point  
14 says: Well, I wanted to start with the phrase  
15 "all persons born in the United States are U.S.  
16 citizens," but then I thought: Oh, wait, we  
17 have these temporary visitors. In fact, the  
18 government points to this quote. He says: So  
19 there are these temporary visitors we can't  
20 make citizen -- their children -- and we can't  
21 make their children citizens. That's  
22 ambassadors. And that's very clear from that.

23           JUSTICE KAVANAUGH: So, if that had  
24 been the text, your argument would be that was  
25 understood to be narrower than its text would

1 read?

2 MS. WANG: Yes.

3 JUSTICE KAVANAUGH: But that's not the  
4 text, so I guess we don't need to deal with  
5 that.

6 MS. WANG: Sure. And that brings me  
7 to my third point, which is you can't read "not  
8 subject to any foreign power" the way the  
9 government urges you to without making the  
10 children of all foreign nationals non-citizens.  
11 And that's clearly not what the Framers were  
12 doing.

13 JUSTICE KAVANAUGH: Justice Alito and  
14 Justice Kagan raised an interpretive question  
15 that I think is important, which is are the  
16 exceptions -- you've used the word "closed"  
17 many times -- frozen, or do we reason by  
18 analogy to the exceptions that existed based on  
19 things that were unforeseen at the time?

20 This comes up in the Second Amendment  
21 now. It comes up in free speech law.

22 MS. WANG: Sure.

23 JUSTICE KAVANAUGH: And how do we  
24 think about whether it's possible that there  
25 could be an additional exception based on

1 modern circumstances, reasoning by analogy to  
2 the exceptions that exist?

3           And I'm thinking in particular about  
4 the non-citizens unlawfully in the country, not  
5 the temporary part but the non-citizens  
6 unlawfully in the country.

7           MS. WANG: Sure.

8           JUSTICE KAVANAUGH: Could you reason  
9 by analogy, you've used the phrase, the --  
10 several times, I think, the fiction of  
11 extraterritoriality, and could that apply and,  
12 if not, why not?

13           MS. WANG: Sure. So, here, I agree  
14 with Professor Whittington, who says that the  
15 government's position here is not positing a  
16 new application of the rule but a challenge to  
17 the rule itself. And I think that's right.

18           We know that the Fourteenth  
19 Amendment's rule does provide for a universal  
20 rule with a set of closed exceptions. Wong Kim  
21 Ark says so at least twice. It says in an  
22 earlier passage that the Framers were not  
23 trying to introduce any new exceptions. To the  
24 contrary, they were trying to foreclose any  
25 caste-creating exceptions like the Court had

1 created in Dred Scott.

2 The second reason we know this is that  
3 the debates themselves had the Framers saying,  
4 number one, we are doing -- we are declaring  
5 what is already the law in this country at  
6 least for white Americans, and we are putting  
7 any further exceptions to birthright  
8 citizenship outside the reach of any future  
9 Congress. They were very concerned about that.  
10 That's the whole impetus for the Citizenship  
11 Clause.

12 And the third -- the third thing I  
13 would say is that -- that -- that -- that it  
14 would be contrary to the central purpose of the  
15 Fourteenth Amendment Citizenship Clause to  
16 admit new exceptions.

17 For all those reasons, the entire  
18 history of the Citizenship Clause is -- is --  
19 is -- is driven by the notion that we don't  
20 want to have any other exceptions.

21 JUSTICE KAVANAUGH: And then,  
22 relatedly, just a separation-of-powers point  
23 but get your answer. I understand your point  
24 about the Executive Order, but Congress's  
25 authority under Section 5 of the Fourteenth

1 Amendment, I guess the answer you just gave  
2 means they don't have any authority to look at  
3 this. Even if they passed it 435 to zero in  
4 the House and a hundred to zero in the Senate  
5 and said we're carving out a new, by analogy to  
6 the existing categories, a new exception, your  
7 point is no, they're closed, they're frozen  
8 forever?

9 MS. WANG: Correct. And the way I  
10 would put it is that the Citizenship Clause of  
11 the Fourteenth Amendment, again, has a  
12 universal rule with a closed set of exceptions.  
13 Congress -- it sets a floor. So the Congress  
14 has under the Naturalization Clause the power  
15 to expand citizenship to other people not  
16 covered by the Fourteenth Amendment, and,  
17 obviously, they have in many ways, but they  
18 can't go below that floor that -- that the --  
19 the Constitution sets.

20 JUSTICE KAVANAUGH: I think Mr. Sauer  
21 acknowledged that, and you mentioned this in  
22 your opening, that if we agree with you on how  
23 to read Wong Kim Ark, then you win.

24 So that could be a -- if we did agree  
25 with you on Wong Kim Ark, that could be just a

1 short opinion, right, that says the better  
2 reading is Respondents' reading, government  
3 doesn't ask us to overrule, affirmed? Is  
4 that --

5 MS. WANG: Yes.

6 (Laughter.)

7 JUSTICE KAVANAUGH: That's that --  
8 then last question, though, why would we  
9 address the constitutional issue -- this is the  
10 last one -- why would we address the  
11 constitutional issue given your argument on the  
12 statutory -- our usual practice, as you're well  
13 aware, of course, is to resolve things on  
14 statutory grounds and -- and not to do a  
15 constitutional ground.

16 MS. WANG: Sure. You know, I think we  
17 obviously have these two paths to a win here.  
18 We're happy to win on either or both of them.

19 I do think it would be prudent for the  
20 Court to reaffirm its decision in Wong Kim Ark  
21 where it's a landmark decision about the  
22 definition of national citizenship in this  
23 country. I just think it would be prudent for  
24 the Court to go ahead and reaffirm that. But,  
25 of course, we're happy to take a win on any

1 ground.

2 JUSTICE KAVANAUGH: Thank you.

3 (Laughter.)

4 MS. WANG: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Jackson?

7 I'm sorry, Justice Barrett?

8 (Laughter.)

9 JUSTICE BARRETT: So I have a question  
10 about the exceptions again. So, in your  
11 interchange with Justice Kavanaugh just now,  
12 you were talking about it as a closed set of  
13 exceptions. And said that way, it sounds like  
14 exceptions that people had in mind at the time  
15 of the ratification but that were not explicit  
16 in the amendment.

17 But I took your brief to be arguing  
18 that "subject to the jurisdiction thereof" is  
19 the language in the Fourteenth Amendment that  
20 refers to those exceptions. Am I right?

21 MS. WANG: That's right.

22 JUSTICE BARRETT: Okay.

23 MS. WANG: It describes them.

24 JUSTICE BARRETT: It describes them.

25 And would you say -- this goes back to

1 a question that Justice Gorsuch asked General  
2 Sauer. Our relationship to the Indian tribes  
3 is different today than it was at the time that  
4 the Fourteenth Amendment was ratified. Let's  
5 put aside Section 1401. Is an -- a tribal  
6 Indian born on a reservation today, on tribal  
7 land, a natural-born citizen under the  
8 Fourteenth Amendment?

9 MS. WANG: Under the Fourteenth  
10 Amendment, no. Of course, Congress has  
11 provided for citizenship for all tribal members  
12 in the 1924 Act.

13 JUSTICE BARRETT: The by statute -- by  
14 statute. And so is that because what "subject  
15 to the jurisdiction of" meant? When you say  
16 "closed set of exceptions," it means that the  
17 jurisdiction as it existed in -- at the time of  
18 the Fourteenth Amendment is still the  
19 jurisdiction today?

20 MS. WANG: So --

21 JUSTICE BARRETT: To be -- let me just  
22 be a little bit clearer.

23 MS. WANG: Sure.

24 JUSTICE BARRETT: Justice Kavanaugh  
25 asked you if we could create new categories by

1 analogy. So there may be other sorts of people  
2 who are present here to whom this "subject to  
3 the jurisdiction" in the same way that we were  
4 talking about, you know, the bubbles around  
5 ambassadors or the soil of occupied territory  
6 or the soil of tribal land.

7           Perhaps there -- those new carveouts  
8 could exist by analogy today, like, if the  
9 United States carved out some portion of some  
10 state and suspended it from its jurisdiction.  
11 Wouldn't the principle still apply?

12           MS. WANG: No, Justice Barrett, for  
13 two reasons. The first is, again, that there  
14 is a closed set.

15           JUSTICE BARRETT: But why is it  
16 closed?

17           MS. WANG: It's --

18           JUSTICE BARRETT: The language doesn't  
19 say it's closed.

20           MS. WANG: Sure. It's closed -- we  
21 know it's closed because Congress says the very  
22 purpose of the Citizenship Clause was to  
23 foreclose new exceptions. That's clear from  
24 the debates.

25           And I would say that the language

1 describes a closed set as well because it's --  
2 you can't imagine another situation -- the  
3 government is trying to make us imagine another  
4 situation, right? They say, look, what if  
5 Congress, in order to do an end-run, in order  
6 to change the meaning of the Fourteenth  
7 Amendment as to unauthorized immigrants'  
8 children, Congress can say we are not going to  
9 exercise jurisdiction.

10 JUSTICE BARRETT: Well, not quite,  
11 because it's redefining jurisdiction. It's not  
12 quite analogous, right, because the  
13 government's domicile theory is a little bit  
14 different than the jus soli theory, right?

15 MS. WANG: Sure. That's right.

16 JUSTICE BARRETT: Yeah.

17 MS. WANG: I'm just saying that in the  
18 second step of their argument as to  
19 undocumented immigrants, where they have to get  
20 around the fact that undocumented immigrants by  
21 and large are domiciled --

22 JUSTICE BARRETT: Mm-hmm.

23 MS. WANG: -- in the United States,  
24 they're trying to say, look, we're going to --  
25 we're going to manipulate the law either to

1 define domicile or to carve out to say -- just  
2 wave a magic wand and say these babies are not  
3 subject to the jurisdiction of the United  
4 States.

5           There's still a missing factor under  
6 that original meaning of the -- of -- of the  
7 Fourteenth Amendment, and that's that there is  
8 another sovereign who can exercise jurisdiction  
9 over this person even though they're in the  
10 United States.

11           And this gets me back to a question  
12 you asked, Justice Alito. The -- the  
13 difference between an ordinary non-ambassador  
14 foreign national and everyone who's subject to  
15 one of those jurisdictions is that even if --  
16 if you take the government's argument and say a  
17 foreign national is subject to their country of  
18 nationality's jurisdiction in the United States  
19 is actually not true.

20           If I'm a French national in the United  
21 States, France cannot come into the United  
22 States, arrest me, and try me for a crime under  
23 French law. And that's what sets ordinary  
24 foreign nationals apart from ambassadors --

25           JUSTICE BARRETT: Well, no, I mean, I

1 understand -- that wasn't quite the  
2 hypothetical. I understand that. Let me just  
3 ask you --

4 MS. WANG: I'm sorry.

5 JUSTICE BARRETT: No, that's okay.  
6 Let me just ask you one last question --

7 MS. WANG: Sure.

8 JUSTICE BARRETT: -- about Indians.

9 So I gather what you're saying is that  
10 Congress cannot expand the set of, we'll call  
11 them, exceptions, right? But you're saying it  
12 can't contract them either, and that was the  
13 Indian example. So what if, again, putting  
14 aside Section 1401, what if our relationship  
15 with tribal Indians has changed so much that we  
16 would say, no, Indians really are fully subject  
17 to the jurisdiction of the United States in the  
18 way any other, you know, natural-born citizen  
19 is?

20 You're saying that that doesn't change  
21 the constitutional status of Indian  
22 citizenship?

23 MS. WANG: Let me be clear. What I'm  
24 saying is that the meaning of the Fourteenth  
25 Amendment is the -- we have to go with the

1 original public meaning. And, obviously, at  
2 the -- at the very time that the Framers were,  
3 you know, thinking about the Fourteenth  
4 Amendment, at the time of ratification, that  
5 relationship between the United States and  
6 tribal nations was in flux, right?

7           The government has made various  
8 arguments about Congress's authority, but the  
9 way the Framers thought about it and the way  
10 that Wong Kim Ark describes it is that there  
11 was a unique constitutional status unlike any  
12 other relationship between sovereigns in all  
13 the world between the United States and the  
14 Indian tribes.

15           And that is what gave rise to the  
16 preexisting exclusion of Indian tribe -- tribal  
17 members from U.S. citizenship, and that's what  
18 the Fourteenth Amendment captures.

19           CHIEF JUSTICE ROBERTS: Justice  
20 Jackson?

21           JUSTICE JACKSON: So I want to  
22 understand how you are responding to the  
23 government's argument that because temporary  
24 visitors and undocumented immigrants are still  
25 governed by their home countries, and in the

1 government's take on this, you can't have  
2 two -- you can't have allegiance to two  
3 different sovereigns, those groups can't have  
4 the requisite allegiance to be subject to the  
5 United States for the purpose of the Fourteenth  
6 Amendment. That's what I hear the government  
7 saying.

8           But I do think that that seems to rest  
9 on a different understanding of allegiance than  
10 what was in the English common law and that  
11 when we understand what the English common law  
12 thought about allegiance, you can see that you  
13 can have allegiance to two different sovereigns  
14 at the same time. This kind of goes back to  
15 Justice Alito's questions.

16           I mean, I was thinking about this, and  
17 I think they -- there are various sources that  
18 say this, that you can have -- you obviously  
19 have permanent allegiance based on being born  
20 in whatever country you're from. That's what  
21 everybody recognizes. But you also have local  
22 allegiance when you are on the soil of this  
23 other -- other sovereign.

24           And I was thinking, you know, I'm --  
25 I'm -- I, a U.S. citizen, am visiting Japan.

1 And what it means is that, you know, if I steal  
2 someone's wallet in Japan, the -- the Japanese  
3 authorities can arrest me and prosecute me.  
4 It's allegiance meaning can they control you as  
5 a matter of law. I can also rely on them if my  
6 wallet is stolen to, you know, under Japanese  
7 law, go and prosecute the person who has stolen  
8 it.

9 So there's this relationship based  
10 on -- even though I'm a temporary traveler, I'm  
11 just on vacation in Japan, I'm still locally  
12 owing allegiance in that sense. Is that the  
13 right way to think about it? And, if -- if so,  
14 doesn't that explain why both temporary  
15 residents and undocumented people would have  
16 that kind of "allegiance" just by virtue of  
17 being in the United States?

18 MS. WANG: That's absolutely right,  
19 Justice Jackson, and that comports with the  
20 plain text of the Fourteenth Amendment as it  
21 applies to everyone born in the United States.  
22 Other than those subject to the -- to the  
23 exceptions that were baked in, a closed set,  
24 you owe natural allegiance as a U.S.-born  
25 citizen.

1           If you want to look at the parents of  
2 those people, and let's say the parents are  
3 foreign nationals but not ambassadors, the  
4 parents owe temporary allegiance --

5           JUSTICE JACKSON: Right.

6           MS. WANG: -- under the common law.

7           JUSTICE JACKSON: So the babies get  
8 the permanent allegiance piece of this, and the  
9 parents get the local allegiance piece of this.  
10 So, to the extent we're looking for allegiance,  
11 we have it?

12          MS. WANG: That's right.

13          JUSTICE JACKSON: Thank you.

14          CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16          Rebuttal, General Sauer?

17          REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER

18                   ON BEHALF OF THE PETITIONERS

19          GENERAL SAUER: Thank you, Mr. Chief  
20 Justice.

21           Justice Kavanaugh, turning to Lynch  
22 against Clarke that you raised -- it didn't  
23 come up when I was talking about it -- keep in  
24 mind that we said that it was questioned at the  
25 time. It's questioned by a higher court in the

1 same state, the State of New York, and the  
2 Ludlam decision in 1860 specifically said that  
3 someone who's traveling or sojourning abroad,  
4 though born in a foreign country, is not born  
5 in foreign allegiance. So, obviously, there is  
6 tension within that very state, and that's what  
7 contemporary commentators noted.

8           And I'd make a more fundamental point  
9 about that. Lynch is not interpreting the  
10 Fourteenth Amendment because it predates it.  
11 So it's not looking at the language of the  
12 Fourteenth Amendment. It's looking at, you  
13 know, what does the word "citizen" mean, for  
14 example, in the clause. So there's an  
15 anachronism to their reliance on it.

16           And I think that turns to a point that  
17 Justice Alito emphasized, that once you get to  
18 that language of the 1866 Civil Rights Act,  
19 where Congress said "not subject to any foreign  
20 power," clearly, we are no longer dealing with  
21 the British conception of allegiance because  
22 Calvin's case and Blackstone say whether you're  
23 subject to another foreign power is irrelevant  
24 to whether or not you become a citizen.

25           So, again, the concession that I heard

1 to be made that those two mean the same thing,  
2 which this Court held in General Building  
3 Contractors that the Civil Rights Act has the  
4 same scope as -- as the Citizenship Clause of  
5 the Fourteenth Amendment, once -- once you're  
6 saying not subject to any foreign power,  
7 Congress has clearly departed from the common  
8 law, the British conception of allegiance, that  
9 monarchial conception of allegiance. They have  
10 adopted the Republican conception of  
11 allegiance. And there's all kinds of evidence  
12 going back to the late 1700s that that's the  
13 way they thought about it.

14 And there was a reference, I think, in  
15 my friend's presentation about the Marshall  
16 Woodworth treatise from the late 1890s. That  
17 treatise also, just like Lynch against Clarke,  
18 the -- the language they quote is actually  
19 describing the case or -- or the law, the  
20 status of the law before the adoption of --  
21 of -- of the Fourteenth Amendment.

22 So -- but, if you actually look at the  
23 treatises we cite, again, I mean, you know,  
24 Wharton, Morris, Justice Samuel Miller of this  
25 Court, Lesser, Black, Hall, Winchester, Taylor,

1 Westlake, Bellott, there's this consensus going  
2 from the time of the Fourteenth Amendment  
3 onward and they're looking at the specific  
4 question of temporary -- temporarily present  
5 individuals in the jurisdiction, all those  
6 sources say their children are not citizens.  
7 And that goes both before and after -- after  
8 Wong Kim Ark.

9           You see a similar consensus actually  
10 in the congressional debates where, whenever it  
11 comes up, temporary sojourners, it's  
12 understood, the context indicates it's clearly  
13 understood that those children are not  
14 citizens.

15           And I would be -- therefore, finish  
16 where I began with drawing a stark contrast  
17 and -- and turn back to the first question that  
18 Justice Thomas acted, that Republican Congress  
19 in 1866 had a very, very clear understanding  
20 that the children of the newly freed slaves  
21 have the requisite allegiance to the United  
22 States. This was all about overruling the --  
23 the grave injustice of Dred Scott and making  
24 sure that that allegiance was granted to the  
25 children of slaves.

1           However, you have this contrast of a  
2 very, very strong impressive consensus both in  
3 the original understanding in the -- in the  
4 congressional debates and carrying over into  
5 commentators for 50 years afterwards that the  
6 children of temporary sojourners are not  
7 covered.

8           And for those reasons, we ask the  
9 Court to reverse.

10           CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel, General.

12           The case is submitted.

13           (Whereupon, at 12:33 p.m., the case  
14 was submitted.)

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