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Legislative Updates

LEGISLATIVE UPDATES

By Beah Mejia

H.R.140: “Birthright Citizenship Act of 2011”

The Birthright Citizenship Act of 2011 seeks to amend Section 301 of the Immigration and Nationality Act (INA) by redefining the requirements for birthright citizenship.¹ Current law automatically confers citizenship to any person born on United States soil.² Under the proposed act, birthright citizenship would be limited to children born in the United States to at least one parent who is either: (1) a citizen or national of the United States, (2) an alien lawfully admitted for permanent residence in the United States; or (3) an alien performing active service in the armed forces.³ As such, the bill would eliminate birthright citizenship for children born to undocumented immigrants in the United States, as well as those in lawful nonimmigrant status, such as tourists and refugees.⁴

Automatic birthright citizenship is conceptually based on a version of *jus soli* (“citizenship by right of the soil”), where the government acknowledges an individual’s citizenship regardless of the alien parent’s immigration status.⁵ The Citizenship Clause of the Fourteenth Amendment states, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”⁶ The debate over birthright citizenship is centered on the interpretation of “subject to the jurisdiction.”⁷ Proponents of birthright citizenship argue that this phrase is synonymous to being “subject to the police power,” while those against birthright citizenship maintain that the drafters of the Fourteenth Amendment intended the Citizenship Clause to require more than mere birth on United States soil.⁸ According to this originalist interpretation, “subject to the jurisdiction” means “full and complete

jurisdiction to which citizens are generally subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government.”⁹ Opponents of birthright citizenship argue that the broader interpretation, as currently applied, encourages illegal immigration through so-called “anchor babies.”¹⁰ Advocating an end to the birthright citizenship policy, these opponents believe that the policy encourages pregnant women to cross the border illegally to have their children on United States soil.¹¹

Senator Harry Reid (D-NV) proposed the first legislation to end automatic birthright citizenship in 1993¹², and each subsequent Congress has continued to introduce a version of the current Act.¹³ On January 5, 2011, Representative Steve King (R-IA) introduced the bill in a new Republican-controlled House of Representatives in conjunction with a state initiative to end birthright citizenship.¹⁴ Lawmakers from Arizona, Georgia, Oklahoma, Pennsylvania, and South Carolina are testing the boundaries of federal control over immigration through a two-part strategy.¹⁵ First, the states will introduce bills reviving the concept of “state citizenship” and limiting birthright citizenship to children with one U.S. citizen or lawful permanent resident parent.¹⁶ Second, the states will use a state compact to issue birth certificates that distinguish children of undocumented immigrants from those of U.S. citizen or lawful permanent resident parents.¹⁷ If Congress approves the compact, it can become federal law without presidential approval.¹⁸ The state initiative follows growing concerns over the burden of birthright citizenship on state resources.¹⁹

State lawmakers believe that the new initiative may generate litigation ultimately resolving the conflict in their favor before the Supreme

Court.²⁰ However, despite the lawmakers' efforts, Walter Dellinger, former Assistant Attorney General and Acting Solicitor General during the Clinton administration, believes that the Supreme Court would likely dismiss any challenges to the Fourteenth Amendment, stating, "This matter has been raised in every instance in a racial context. That's why we wanted a simple rule: Every new girl or boy born in this country is simply, indisputably, an American."²¹

The Birthright Citizenship Act of 2011 gained support from 79 co-sponsors, and was referred to the House Subcommittee on Immigration and Policy Enforcement on January 24, 2011.

H.R. 1928: "Women's Fair and Equal Right to Military Service Act"

The Women's Fair and Equal Right to Military Service Act aims to repeal the combat exclusion policy codified in Section 652 of Title 10 of the United States Code.²² The Act directs the Secretary of Defense to revise the military personnel policies of the Department of Defense (DOD) and military departments so that the policies do not restrict assignments of members of the Armed Forces based on gender.²³ Under this bill, the prohibition against women participating in ground combat would cease.²⁴

The bill would implement a recommendation advanced by the Military Leadership Diversity Commission (MLDC). The National Defense Authorization Act for Fiscal Year 2009 established the MLDC to "conduct a comprehensive evaluation and assessment of policies and practices that shape diversity among military leaders."²⁵ The MLDC is comprised of a group of current and retired officers, noncommissioned officers, and civilians, who determined that the combat exclusion laws hurt advancement opportunities for women in the military.²⁶ While the MLDC recommends abolishing the combat exclusion policies, they counsel against lowering the qualification standards for combat arms positions.²⁷ This would level the playing field and allow commanders to choose the most capable person for the job amongst the most qualified candidates.²⁸

Representative Loretta Sanchez (D-CA) introduced the bill on May 13, 2011. Sanchez did not comment on the discrepancies in the physical

requirements for men and women in basic training.²⁹ Rather, Sanchez cites ongoing operations in Iraq and Afghanistan as proof that women are already engaged in combat, regardless of the policies and physical requirements.³⁰ Sanchez declared, "I strongly believe in giving our female service members both the privilege and official recognition of serving their country in direct combat. The truth is that military women already fight in combat every day, all over the world. We need a policy that matches the daily reality of female combat service in Iraq and Afghanistan."³¹ To date, the bill has not received any co-sponsors. It was referred to the Subcommittee on Military Personnel on June 24, 2011.

H.R. 2497: "Hinder the Administration's Legalization Temptation Act (HALT)"

The Hinder the Administration's Legalization Temptation Act (HALT Act) would suspend the Obama administration's authority to grant certain forms of discretionary relief and protections on immigration matters until January 21, 2013.³² Existing immigration law allows for the exercise of discretion, such as through the consideration of mitigating factors in removal proceedings, or for humanitarian purposes. Specifically, the bill would eliminate prosecutorial discretion in: (1) waiver of inadmissibility of aliens unlawfully present in the United States; (2) cancellation of removal and adjustment of status for certain non-permanent residents; (3) temporary parole into the United States, except for parole entries for humanitarian, law enforcement, or security purposes; and (4) designation of a country for temporary protected status.³³ The bill would also revoke any of the specified discretionary protections and benefits granted from July 12, 2011, the date of its introduction, until it is enacted.³⁴

Representative Lamar Smith (R-TX) introduced the bill to "remind the Obama Administration that the founding fathers put Congress in charge of setting the nation's immigration policy."³⁵ Smith's bill is a legislative response to U.S. Immigration and Customs Enforcement (ICE) Director John Morton's recent directives, encouraging officials to exercise discretion when enforcing the immigration laws.³⁶ In effect, Morton's directives prioritize the removal of dangerous

criminals and those ICE apprehends while entering illegally at the border.³⁷ However, Republicans have interpreted Morton's directives as granting "backdoor amnesty."³⁸ "This legislation prevents the Obama administration from abusing its authority to grant a mass administrative amnesty to illegal immigrants," Smith said. "The Obama administration should not pick and choose which laws it is going to enforce."³⁹

Despite Smith's views on the current immigration policy, in the past, he supported the exercise of added discretion in immigration cases.⁴⁰ In 1999, Smith was one of several members of Congress who asked the Clinton administration to use discretion in cases where immigrants had ties to the United States, such as jobs and relatives who were U.S. citizens.⁴¹ In a letter to the former Attorney General Janet Reno and Doris Meissner, former Commissioner of the legacy Immigration and Naturalization Service, Smith and his colleagues argued, "True hardship cases call for the exercise of discretion."⁴²

In response to the bill, 75 House Democrats wrote to President Obama, assuring him that they would veto the legislation.⁴³ Representative Zoe Lofgren (D-CA) stated, "ICE has limited resources... if we can only deport a limited number of people — around 400,000, the memos say — then ICE should focus its resources on dangerous individuals."⁴⁴

The HALT Act received 45 co-sponsors, and it was referred to the Subcommittee on Immigration and Policy Enforcement on July 22, 2011. Subcommittee Hearings were held on July 26, 2011. Senator David Vitter (R-LA) introduced a companion bill, S. 1380, on July 17, 2011.⁴⁵ "It is astounding that the executive branch of the U.S. government has adopted a practice that allows, even encourages, individuals to exploit the loopholes of our immigration system," Vitter said in a written statement.⁴⁶ Vitter's bill was referred to the Committee on the Judiciary on July 18, 2011, and has two co-sponsors.

H.R. 2885: "Legal Workforce Act"

The Legal Workforce Act is the latest piece of E-Verify legislation in Congress, aiming to mandate the universal use of the electronic employment verification system.⁴⁷ E-Verify is an internet-based system operated by the Department of Homeland

Security, in partnership with the Social Security Administration that allows employers to determine worker eligibility based on immigration status in the United States.⁴⁸ The system does not replace, but merely supplements the Form I-9, Employment Eligibility Verification process.⁴⁹ While completion of the Form I-9 is obligatory, enrollment in E-Verify is optional for all except: (1) employers who have been convicted of engaging in illegal hiring practices; (2) employers in states who mandate the use of the program; (3) employers that have certain federal contracts.⁵⁰ Although the implementation requirements differ, states that have enacted local E-Verify legislation include Arizona, Colorado, Georgia, Rhode Island, Mississippi, Missouri, and South Carolina.⁵¹

Questions regarding the efficacy of E-Verify have contributed to the controversy in legislation mandating its use nationwide.⁵² Westat, an independent research company, conducted an audit of E-Verify in 2009, and found that 4.1% of E-Verify's initial responses to employment verification queries were inaccurate.⁵³ These inaccuracies were largely due to employer data-entry error and identity fraud, which E-Verify is unable to detect.⁵⁴ In fact, according to Westat's report, the E-Verify system failed to catch 54% of unauthorized workers.⁵⁵ The report further reveals that the system issues a tentative nonconfirmation to nearly one percent of legal workers, causing workers to go through costly and complex bureaucratic appeals.⁵⁶

In this Congress alone, the House of Representatives has introduced eleven E-Verify bills, and the Senate has introduced one bill.⁵⁷ The current version of the Legal Workforce Act was introduced by Representative Lamar Smith (R-TX) on September 12, 2011 and revises a previous bill of the same name (H.R. 2164), introduced on June 14, 2011.⁵⁸ Unlike the previous E-Verify bills introduced in this Congress, H.R. 2885 does not limit the use of E-Verify to its intended purpose: employment verification.⁵⁹ Particularly, H.R. 2885 removed the provision included in H.R. 2164 that prohibited the use of E-Verify by any other entity "for any other purpose than as provided for."⁶⁰ Jim Harper of the Cato Institute commented on the effects of merging E-Verify with other data saying, "Using E-Verify, the Department of Homeland Security is rapidly assembling a national ID system

that can be converted to boundless uses. In addition to controlling employment, E-Verify can be put to use in regulating access to health care and housing, in gun control and registration, in monitoring travel and lodging – the list goes on and on.”⁶¹

The Social Security Administration urges lawmakers to include language that would protect the data from being used improperly.⁶² Christopher Calabresi, American Civil Liberties legislative counsel, shares similar concerns: “It’s been a concern from the start that these databases will eventually extend past the employment realm. That fear is slowly becoming a reality. . . . E-Verify may quickly evolve into a national identity system, bringing E-Verify’s problems to travel, lending and many other parts of Americans’ lives.”⁶³

The Legal Workforce Act has 41 co-sponsors, and, passed the House Judiciary Committee following a September 15, 2011 Mark-up Session. The bill was ordered amended on September 21, 2011, and the Committee passed two amendments. One amendment, offered by bill proponent and House Judiciary Committee Chairman Lamar Smith, returns a provision to H.R. 2885 that was previously included in H.R. 2164, which would require employers to attest that they have verified the employment eligibility of an individual within a three-day verification period, starting on the date an employer extends an offer of employment.⁶⁴ Representative Howard Berman (D-CA) offered the other amendment passed by the Committee, striking a provision from the bill that exempted certain agricultural workers from verification through E-Verify.⁶⁵

After passing the House Judiciary Committee in a 22-13 vote, the bill was referred to the Subcommittee on Immigration Policy and Enforcement on September 23, 2011.

(Endnotes)

¹ Birthright Citizenship Act of 2011, H.R.140, 112th Cong. § 1 (2011).

² 8 U.S.C. § 1401(a) (2011)

³ Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. § 2 (2011).

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¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Marc Lacey, *Birthright Citizenship Looms as Next Immigration Battle*, N.Y. TIMES, Jan. 4, 2011, <http://www.nytimes.com/2011/01/05/us/politics/05babies.html?pagewanted=1&ref=us>.

²⁰ *Id.*

- ²¹ Shankar Vedantam, *State Lawmakers Taking Aim at Amendment Granting Birthright Citizenship*, WASH. POST, Jan. 5, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010503134.html>.
- ²² Women's Fair and Equal Right to Military Service Act, H.R. 1928, 112th Cong. § 3(a) (2011).
- ²³ *Id.* at §3(b).
- ²⁴ *Id.*
- ²⁵ MILITARY LEADERSHIP DIVERSITY COMM'N, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE TWENTY-FIRST CENTURY MILITARY 3 (2011) *available at* http://mldc.whs.mil/download/documents/Final%20Report/MLDC_Final_Report.pdf
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- ⁴² *Id.*
- ⁴³ Smialek, *supra* note 36 (quoting Rep. Lamar Smith).
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- ⁴⁷ Legal Workforce Act, H.R. 2885, 112th Cong. (2011).
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⁶¹ *Id.*

⁶² *Id.*

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