No. _____

In The

Supreme Court of the United States

JERMAINE AMANI THOMAS,
ALSO KNOWN AS JERMAINE THOMAS,

Petitioner,

v.

LORETTA LYNCH, U.S. ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Citizenship Clause of the Fourteenth Amendment confers United States citizenship upon all persons born "in the United States, and subject to the jurisdiction thereof." U.S. Const. amend. XIV, § 1, cl. 1. It is undisputed that the Citizenship Clause applies to persons born in one of the States. But cases and authorities disagree about whether and under what circumstances the Citizenship Clause applies to persons born outside of the States, in locations such as United States territories and United States military bases.

Petitioner was born in a United States military base overseas at which the United States exercised complete jurisdiction and at which Petitioner's father, a United States citizen, was serving on active duty.

The question presented is whether the Citizenship Clause confers United States citizenship upon Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jermaine Thomas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS AND ORDERS BELOW

The Fifth Circuit's opinion is reported at 796 F.3d 535 and reprinted at App. 1a-16a. The order denying Petitioner's petition for rehearing en banc is unreported and reprinted at App. 48a-49a.

The Decision of the Board of Immigration Appeals ("BIA") is unreported and reprinted at App. 18a-27a. The Memorandum and Decision of the Immigration Judge ("IJ") is unreported and reprinted at App. 28a-47a.

JURISDICTION

28 U.S.C. § 1254(1) confers jurisdiction on this Court. The Fifth Circuit entered its judgment on August 7, 2015 and entered its order denying the petition for rehearing en banc on October 14, 2015.

CONSTITUTIONAL PROVISION INVOLVED

The Citizenship Clause of the Fourteenth Amendment provides:

> 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.

U.S. Const. amend. XIV, § 1, cl. 1.

STATEMENT OF THE CASE

The Citizenship Clause's geographic reach is an important, recurring, and potentially divisive issue. It could arise in the midst of a politically-charged case involving qualifications for the office of President. Indeed, it almost did so in 2008. Here, however, it arises in a simple immigration case, free of political consequences.

The Fifth Circuit denied Petitioner's citizenship by holding that the Citizenship Clause never applies outside of the States. But under either of two other competing constructions, Petitioner's birthplace – an overseas United States military base over which the United States exercised jurisdiction and at which Petitioner's citizen father was serving on active duty – entitles him to citizenship. If anyone born outside of a State has a constitutional right to United States citizenship, Petitioner does.

A. Facts

Petitioner Jermaine Thomas was born overseas on August 9, 1986 in the 97th General Hospital of the United States Army in Frankfurt, Germany. App. 2a, 28a. By treaty and in fact, the United States exercised jurisdiction over this base.

Thomas's father was (at the time of Thomas's birth) a United States citizen serving in the United States Army on active duty at the base. App. 2a, 20a, 28a. He came to the United States in 1977, enlisted in 1979, and became a United States citizen in 1984. App. 2a. His service earned multiple medals and an honorable discharge.

Thomas's mother was (at the time of Thomas's birth) a Kenyan citizen married to Thomas's father. App. 28a. They divorced later. App. 28a-29a.

Thomas came to the United States at age three (admitted as a lawful permanent resident) and has resided here ever since. App. 28a-29a. Texas courts convicted him of assault in 2011 and theft in 2012. App. 29a.

B. Agency Proceedings

The Department of Homeland Security began removal proceedings against Thomas in 2013. App. 29a. DHS argued that Thomas was *not* a United States citizen and asserted the convictions as removal grounds under 8 U.S.C. § 1227. App. 29a.

Before the Immigration Judge, Thomas opposed removal by "consistently maintain[ing] that he is a United States citizen by virtue of his birth in a United States military hospital, on a United States military base in Germany, to a United States citizen father." App. 30a. The IJ disagreed and ordered removal. App. 28a-47a.

Before the Board of Immigration Appeals, Thomas opposed removal by again arguing that "he is a United States citizen pursuant to the 'Citizenship Clause' of the Fourteenth Amendment" and contending that his military base birthplace was "under the jurisdiction and control of the United States." App. 20a. The BIA disagreed and concluded that Thomas was removable. App. 18a-27a.

C. Court Proceedings

Thomas filed a timely petition for review of the BIA decision in the United States Court of Appeals for the Fifth Circuit. App. 3a. As a basis for jurisdiction, he invoked 8 U.S.C. § 1252(a)(2)(D), the statute granting circuit courts jurisdiction over constitutional claims and questions of law arising in BIA proceedings. App. 4a.

Before the Fifth Circuit, Thomas once again argued that "the military base . . . where he was born was 'in the United States' for purposes of the Fourteenth Amendment." App. 7a. He rooted this position in multiple lines of authority, including *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898),

Reid v. *Covert*, 354 U.S. 1 (1957), and *Boumediene* v. *Bush*, 553 U.S. 723 (2008).

The Fifth Circuit issued a precedential opinion deciding "whether a United States military base located within what is now Germany was 'in the United States' for purposes of the Fourteenth Amendment." App. 4a. The opinion correctly noted that "Thomas was not a statutory birthright citizen because his father did not meet the physical presence requirement of the statute in force at the time of Thomas's birth." App. 6a. It recognized the constitutional question as being dispositive: "If Thomas derived birthright citizenship from the Fourteenth Amendment, we must grant his petition for review because only aliens can be deported." App. 5a.

The Fifth Circuit denied the petition for review by deciding that "Thomas is not a citizen, because the United States military base where he was born, which is located in modern-day Germany, was not 'in the United States' for purposes of the Fourteenth Amendment." App. 5a. The decision rests on several key holdings about the Citizenship Clause's geographic reach.

First, the Fifth Circuit defined the Citizenship Clause in a literal way, without considering its original meaning at the time of enactment. It held that the Citizenship Clause's phrase "in the United States" is an unambiguous "express geographical limitation, which does not encompass the military base where Thomas was born." App. 11a-12a.

Second, the Fifth Circuit held that two of this Court's decisions play no role whatsoever in defining the Citizenship Clause's reach: *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898), and *Reid* v. *Covert*, 354 U.S. 1 (1957). Each received close attention.

Wong Kim Ark construed the Citizenship Clause at length and understood it to incorporate "*jus soli*" – an established common law of citizenship principles defining the right's territorial reach in terms of birthplace (as opposed to parental identity). *Wong Kim Ark*, 169 U.S. at 654-693. But because of the Fifth Circuit's literal reading, it dismissed *Wong Kim Ark* as "inapposite." App. 13a-14a.

By rejecting *Wong Kim Ark* and *jus soli*, the Fifth Circuit refused to consider the United States' "jurisdiction" or "dominion." App. 7a-12a. It thus disregarded as irrelevant the issue of "whether the treaties applicable to the military base in which Thomas was born rendered it 'subject to the jurisdiction or within the dominion of the United States.'" App. 10a-11a.

Reid held that decisions about constitutional rights abroad call for a functional, practical analysis. *Boumediene* v. *Bush*, 553 U.S. 723, 759-762 (2008). Justice Harlan called it a context-specific inquiry into "the particular local setting, the practical necessities, and the possible alternatives," framed by a desire to avoid "impracticable and anomalous" results. *Reid*, 354 U.S. at 75 (Harlan, J., concurring).

The Fifth Circuit "decline[d] to engage in a functional inquiry." App. 14a-15a. The panel was "not convinced that *Reid* requires us to consider whether it would be 'impracticable and anomalous' to recognize a right to birthright citizenship to those born on military bases abroad." App. 14a.

The Fifth Circuit acknowledged that its rejection of *Reid* created a conflict with the D.C. Circuit. App. 14a-15a. In *Tuaua* v. *United States*, 788 F.3d 300 (D.C. Cir. 2015) – issued just two months before the opinion below – the D.C. Circuit rejected the literal reading, determined that the Citizenship Clause's text is ambiguous, and held that *Reid* requires courts to "ask whether the circumstances are such that recognition of the right to birthright citizenship would prove 'impracticable and anomalous.'" *Id.* at 309. The Fifth Circuit expressly rejected *Tuaua*'s conclusion about ambiguity and rejected *Tuaua*'s use of *Reid* to construe the Citizenship Clause. App. 14a-15a.

Thomas petitioned the Fifth Circuit for rehearing en banc, identifying the conflict with *Tuaua*. The Fifth Circuit denied the petition. App. 48a-49a.

REASONS FOR GRANTING THE PETITION

I. There is an acknowledged split over whether the Citizenship Clause confers United States citizenship on persons born outside the States.

The court below deepened an acknowledged circuit split about the Citizenship Clause's geographic reach. Three approaches exist. The split is ready to be resolved.

The Second, Third, Fifth, and Ninth Circuits use a literal test. They hold that the Citizenship Clause phrase "in the United States" means within one of the fifty States and nowhere else. Petitioner would not be entitled to citizenship under this test.

The D.C. Circuit rejects the literalist test. It upholds a "practical" test based on *Reid* v. *Covert*, 354 U.S. 1 (1957), and will apply the Citizenship Clause outside of a State so long as doing so is not "impractical and anomalous." Petitioner would be entitled to citizenship under this test.

Third, during Senator John McCain's 2008 presidential candidacy, legal scholars articulated the originalist test. This test defines the Citizenship Clause's reach in accordance with the traditional "*jus soli*" common law of citizenship. Petitioner would be entitled to citizenship under this test, which he contends is correct.

A. The Fifth Circuit, along with the Second, Third, and Ninth Circuits, construes the Citizenship Clause literally to apply within the States and nowhere else, disregarding *Reid*.

The Fifth Circuit's decision in this case followed its earlier decision in *Nolos* v. *Holder*, 611 F.3d 279 (5th Cir. 2010) (per curiam), which held that the phrase "in the United States" does not include United States territories. *Id.* at 282-284. The opinion below relies on *Nolos* in holding that United States military bases overseas are not "in the United States." App. 10a ("We are bound by our decision in *Nolos*.").

In these holdings, the Fifth Circuit construed "in the United States" literally as an "express territorial limitation" meaning only in the States. App. 10a-12a.

The Second, Third, and Ninth Circuits accord. They also employ a literal reading of "in the United States" to hold that the Citizenship Clause does not cover United States territories or military bases (not located in a State). Like the Fifth Circuit, they do not focus on the text's original public meaning. They also do not use the functional test.

The Ninth Circuit's decision came first. *Rabang* v. *INS*, 35 F.3d 1449 (9th Cir. 1994), held that the Citizenship Clause's phrase "in the United States" is "limited to the states of the Union." *Id.* at 1452-1454.

Judge Pregerson dissented at length. In his view, the Citizenship Clause constitutionalized the doctrine of "*jus soli*" – the "principles of common law, readily accepted by the framers of the Constitution and the authors of the Fourteenth Amendment, which demonstrate that the Citizenship Clause applies to all persons who owe allegiance to, and are born within the territory or dominion of, the United States." *Id.* at 1454-1455 (Pregerson, J., dissenting).

The Second Circuit decided the next case and followed *Rabang*'s majority. *Valmonte* v. *INS*, 136 F.3d 914 (2d Cir. 1998), held that "[c]itizenship under the Fourteenth Amendment . . . is limited to persons born or naturalized in the states of the Union." *Id.* at 918-920 ("We agree [with *Rabang*].").

Then the Third Circuit joined the Second and Ninth Circuits. Its first case adopted the literalist position in a territory case and a second case reached the same result for a military base. *Lacap* v. *INS*, 138 F.3d 518, 518 (3d Cir. 1998) (per curiam) ("We agree with the result and reasoning of the court in *Rabang* and note that the United States Court of Appeals for the Second Circuit recently has followed *Rabang* as well."); *Williams* v. *Atty. Gen. of U.S.*, 458 F. App'x 148, 152 (3d Cir. 2012) (per curiam) (unpublished).

The meaning of the Citizenship Clause in these four circuits is now settled. In these jurisdictions, the Citizenship Clause will never apply to any military base, territory, or other location not within a State.[1]

B. The D.C. Circuit rejects the literal view and allows for the Citizenship Clause to apply outside of the States under *Reid*.

The D.C. Circuit adopted its position in the split shortly before the Fifth Circuit's decision below. It does not follow the other circuits. To the contrary, the D.C. Circuit considers the Citizenship Clause "textually ambiguous" and capable of application outside of the States. *Tuaua* v. *United States*, 788 F.3d 300, 302 (D.C. Cir. 2015).

The D.C. Circuit expressly rejected the test applied by the other circuits, concluding that the literalist interpretation is not "fully persuasive, nor does it squarely resolve the meaning of the ambiguous phrase 'in the United States.'" *Id.* at 303. The D.C. Circuit concluded that "both text and structure are silent as to the precise contours of the 'United States' under the Citizenship Clause," and that the "text and structure alone are insufficient to divine the Citizenship Clause's geographic scope." *Id.*

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[1] These circuits would probably also exclude the District of Columbia from the Citizenship Clause's reach.

The D.C. Circuit held that the Citizenship Clause may create a right to citizenship outside the fifty States under the *Reid* v. *Covert*, 354 U.S. 1 (1957), line of decisions, which originates with the *Insular Cases* and includes *Boumediene* v. *Bush*, 553 U.S. 723 (2008). Under the D.C. Circuit test, application of the Citizenship Clause outside of the fifty States turns on the place-by-place, "practical" inquiry described by the *Reid* line of decisions:

> "The decision in the present case does not depend on key words such as 'fundamental' or 'unincorporated territory[,]' . . . but can be reached only by applying the principles of the [*Insular*] [C]ases, as controlled by their respective contexts, to the situation as it exists in American Samoa today." *King* [v. *Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975)]. *Cf. Boumediene*, 553 U.S. at 758, 128 S.Ct. 2229. . . . "[T]he question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it." *Reid*, 354 U.S. at 75, 77 S.Ct. 1222. In sum, we must ask whether the circumstances are such that recognition of the right to birthright citizenship would prove "impracticable and anomalous," as applied to contemporary American Samoa. *Id.* at 74, 77 S.Ct. 1222.

Tuaua, 788 F.3d at 309. The D.C. Circuit's approval of *Reid*'s "practical" test for questions of Citizenship Clause reach is a holding. *Id.* at 302 ("we hold it 'impractical and anomalous,' *see Reid* v. *Covert*, 354 U.S. 1, 75 (1957), to impose citizenship").

The Fifth Circuit opinion below expressly rejected the D.C. Circuit's method of construing the Citizenship Clause. The Fifth Circuit considered *Tuaua*'s use of *Reid* and was "not convinced that *Reid* requires us to consider whether it would be 'impracticable and anomalous' to recognize a right to birthright citizenship to those born on military bases located abroad." App. 14a. Given that Fifth Circuit precedent "ha[d] already determined that 'the Citizenship Clause has an express territorial limitation,'" the opinion below "decline[d] to engage in a functional inquiry as to the scope of the Citizenship Clause." App. 15a.

Thus, the conflict between Fifth Circuit and D.C. Circuit tests is express and acknowledged. Petitions for rehearing en banc were denied in both cases.

C. The Fifth Circuit's decision conflicts with the Citizenship Clause's original public meaning.

A third approach defines the Citizenship Clause's scope in accordance with the citizenship common law that prevailed at the time of the Amendment's adoption (*jus soli*). Scholars publicized this as a basis for the citizenship of Senator John McCain in his 2008 presidential candidacy. The opinion below acknowledges that it conflicts with this construction.

Senator McCain was born in a United States military base in the Panama Canal Zone; his parents were citizens stationed there on active duty. See, *e.g.*, Carl Hulse, *McCain's Canal Zone Birth Prompts*

Queries About Whether That Rules Him Out, New York Times, Feb. 28, 2008, at A21. During the 2008 campaign, "questions about the eligibility[2] of Senator John McCain implicated genuinely disputed legal issues that scholars have hotly contested for decades." James C. Ho, *Natural Born Presidents*, 2 Journal of Law (2 Pub. L. Misc.) 505, 505 (2012). Lawsuits challenged Senator McCain's citizenship[3] and a public controversy ensued.

The dispute about Senator McCain's citizenship was laid to rest, at least "as a practical matter," "after the publication of a legal opinion by renowned constitutional scholar Laurence H. Tribe and former U.S. Solicitor General Theodore B. Olson." *Id.* at 506-507. Following the opinion letter's publication, "the United States Senate unanimously approved a resolution deeming Senator McCain eligible for the Presidency." *Id.*

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[2] The president must be a "natural born citizen." U.S. Const. art. II, § 1, cl. 5. Authorities equate this with the status of citizen by birth (as opposed to naturalization) that the constitution and statutes provide. See Laurence H. Tribe & Theodore B. Olson, *Presidents and Citizenship*, 2 J.L. 509 (2012); Paul Clement & Neal Katyal, *On the Meaning of "Natural Born Citizen*," 128 Harv. L. Rev. Forum 161 (2015).

[3] See *Robinson* v. *Bowen*, 567 F. Supp. 2d 1144 (N.D. Cal. 2008) ("Senator John McCain, this action alleges, is not a 'natural-born citizen' within the meaning of Article II of the Constitution of the United States and is therefore ineligible to serve as president.") (dismissed on standing grounds); *Hollander* v. *McCain*, 566 F. Supp. 2d 63, 66 n.3 (D.N.H. 2008) (same).

The scholars' consensus is that Senator McCain holds United States citizenship on two grounds. One ground is the United States citizenship of both parents, which is not at issue here. The other ground is his birth at a military base in the Panama Canal Zone, which the scholars concluded made Senator McCain a citizen under the Citizenship Clause. Under this view, Petitioner is a citizen.

The scholars' Opinion Letter summarized the originalist case for Senator McCain's citizenship:

> There is a second and independent basis for concluding that Senator McCain is a "natural born" citizen within the meaning of the Constitution. If the Panama Canal Zone was sovereign U.S. territory at the time of Senator McCain's birth, then that fact alone would make him a "natural born" citizen under the well-established principle that "natural born" citizenship includes birth within the territory and allegiance of the United States. *See, e.g.*, *Wong Kim Ark*, 169 U.S. at 655-66. The Fourteenth Amendment expressly enshrines this connection between birthplace and citizenship in the text of the Constitution. U.S. Const. amend. XIV, § 1 ("All persons *born* or naturalized *in the United States*, and subject to the jurisdiction thereof, are citizens of the United States. . . .") (emphases added). Premising "natural born" citizenship on the character of the territory in which one is born is rooted in the common-law understanding that persons born within the British kingdom and under

loyalty to the British Crown – including most of the Framers themselves, who were born in the American colonies – were deemed "natural born subjects." *See, e.g.*, 1 William Blackstone, *Commentaries on the Laws of England* 354 (Legal Classics Library 1983) (1765) ("Natural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king. . . .").

There is substantial legal support for the proposition that the Panama Canal Zone was indeed sovereign U.S. territory when Senator McCain was born there in 1936. . . . Thus, although Senator McCain was not born within a State, there is a significant body of legal authority indicating that he was nevertheless born within the sovereign territory of the United States.

Historical practice confirms that birth on soil that is under the sovereignty of the United States, but not within a State, satisfies the Natural Born Citizen Clause. . . .

. . .

Therefore, based on the original meaning of the Constitution, the Framers' intentions, and subsequent legal and historical precedent, Senator McCain's birth to parents who were U.S. citizens, serving on a U.S. military base in the Panama Canal Zone in 1936, makes him a "natural born Citizen" within the meaning of the Constitution.

Tribe & Olson, *supra*, at 510-512. The scholars' conclusions accord with Judge Pregerson's dissent in *Rabang*, which sets out the originalist position at greater length.

Even though no circuit has adopted this construction, the Fifth Circuit saw fit to acknowledge that its decision conflicted with the scholars' view, citing the opinion letter. App. 12a n.7. The Fifth Circuit also acknowledged that its decision conflicted with Judge Pregerson's dissent. App. 8a n.2.

II. The Citizenship Clause's geographic reach is an important and recurring issue.

A. Citizenship should not depend on the circuit in which removal proceedings are initiated.

The birthright of United States citizenship serves as a foundation of rights. "The freedoms and opportunities secured by United States citizenship long have been treasured by persons fortunate enough to be born with them, and are yearned for by countless less fortunate." *Fedorenko* v. *United States*, 449 U.S. 490, 522 (1981) (Blackmun, J., concurring). "Indeed, citizenship has been described as 'man's basic right for it is nothing less than the right to have rights.'" *Id.* (quoting *Perez* v. *Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting)). It is difficult to imagine a more important issue in the lives of those affected.

Thankfully, in most cases, broad citizenship statutes pretermit the need to invoke the Citizenship Clause. For example, if two citizen parents reside in Texas before having a baby in Paris, 8 U.S.C. § 1401(c) makes the child a citizen without more. Statutes also grant citizenship to those born in select insular areas. *E.g.*, 8 U.S.C. § 1402 (Puerto Rico).

But as this case exemplifies, differences in the treatment of birthplaces and parents leave substantial gaps in the statutory citizenship scheme. See 8 U.S.C. § 1401. For example, when a child is born outside of a State and only one parent is a citizen, Congress conditions the child's citizenship on the citizen parent's time of residence in a State beforehand. 8 U.S.C. § 1401(g). Congress could also amend the statutes at any time to provide less statutory coverage and open up more gaps. Thus, constitutional citizenship disputes continue to arise.

Petitioner's case typifies the immigration context in which the issue of Citizenship Clause reach is important. The United States seeks to physically remove Petitioner from this country forever under a statute that applies to non-citizen "aliens," but not to citizens. 8 U.S.C. § 1229a. Petitioner's construction of the Citizenship Clause's reach would provide a complete defense to removal.

This is an area of the law in which uniformity and correctness are particularly important. Indeed, cases like this one will arise more frequently in the future, as the United States continues to send citizens like Thomas's father to its military bases across the globe.

Members of the armed forces deserve clear rules regarding their children's citizenship, and Petitioner should not be denied his birthright of United States citizenship merely because he resided in the Fifth Circuit instead of the D.C. Circuit when the government sought to remove him.

B. Deciding the issue now avoids having to do so in a politically sensitive case.

In a different vein of importance, Senator McCain's 2008 presidential candidacy highlights the potential for a crisis. Sooner or later, a serious national election controversy turning on the Citizenship Clause will come to the fore.[4] With circuits already having adopted conflicting tests for constitutional citizenship, the Court might be forced to resolve the split while ruling on the birthright citizenship of a presidential candidate or (even worse) President-Elect.

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[4] History shows that Senator McCain's need to invoke the Citizenship Clause is not a fluke. Vice President Charles Curtis was born in the Kansas territory, Senator Barry Goldwater was born in Arizona before its statehood, and even President Barack Obama's birth in the former territory of Hawaii (during its first year of statehood) prompted new inquiries into the matter. See Laurence H. Tribe & Theodore B. Olson, *Presidents and Citizenship*, 2 J.L. 509, 511 (2012); Paul Clement & Neal Katyal, *On the Meaning of "Natural Born Citizen*," 128 Harv. L. Rev. Forum 161, 164 (2015).

The Court should not wait until the midst of such a crisis to define the Citizenship Clause's geographic reach. Instead, the Court should avert the risk and address the matter now, in an ordinary case that squarely presents the issues free of political complications.

C. The conflict should be resolved now.

Further conflict or percolation would not aid the Court's decisional process. The split is unambiguous and acknowledged. All three constructions have been fully articulated and considered by lower courts. The literal construction and practical construction have been adopted by circuits that acknowledge disagreement. And even though no circuit has adopted the originalist test, Judge Pregerson's dissent articulated it fully, the opinions confront it, and the special attention given by Senator McCain's candidacy ensured its full vetting.

Under the literal "States only" test applied by the Fifth Circuit (and the Second, Third, and Ninth Circuits), Petitioner is not a citizen. But Petitioner would be a citizen under the D.C. Circuit's practical test, and Petitioner would also be a citizen under the originalist test. The conflict is ripe for resolution.

III. This case is an ideal vehicle.

The sole issue here is the meaning of the Citizenship Clause. The facts about Petitioner's birth are undisputed and his argument was preserved at every

stage. The court below ruled on the issue expressly and acknowledged the competing rules. No alternate holdings would complicate the Court's analysis. No vehicle problems weigh against review.

IV. The Fifth Circuit erred in limiting the Citizenship Clause to the States.

The Citizenship Clause makes Petitioner a United States citizen. The Fifth Circuit erred in holding to the contrary and approving of his removal.

The Fifth Circuit's literal view is the only construction that works to deny Petitioner's citizenship. Petitioner would be a United States citizen under the originalist Citizenship Clause construction, see Part IV.B, *infra*; and Petitioner would also be a United States citizen under *Reid*'s "objective factors and practical concerns" inquiry.[5]

That is not to suggest that Petitioner is agnostic about the appropriate construction. Petitioner submits that the originalist view is best. But because the Fifth Circuit's construction is demonstrably wrong,

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[5] Compare *Tuaua* v. *United States*, 788 F.3d 300, 309-311 (D.C. Cir. 2015), with *Boumediene* v. *Bush*, 553 U.S. 723, 757-764 (2008), and *Reid* v. *Covert*, 354 U.S. 1 (1957). None of the concerns driving *Tuaua*'s holding (that it would be "impractical and anomalous" to apply the Citizenship Clause in American Samoa) are present at Petitioner's birthplace. To the contrary and as *Reid* establishes, the only "impractical and anomalous" result would be for a right so basic as citizenship to *not* function at such military bases as it does on the mainland.

the Court should reverse regardless of which other construction it adopts.

A. The Fifth Circuit's literal view is wrong.

The holding that Petitioner lacks citizenship is wrong. The Fifth Circuit's method – defining the Citizenship Clause solely by reference to other geographic clauses – is inappropriate; and even if not, the court erred by using it to make *Downes* v. *Bidwell*, 182 U.S. 244 (1901), dispositive.

1. The Fifth Circuit's first error concerned the Fourteenth Amendment's text. If the Citizenship Clause was truly meant to apply only to persons born in a State, it would *not* have used the phrase "in the United States" to say so. Instead, it would have applied to persons born "in any State" – a phrase that occurs in the very next sentence.

As it stands, the Citizenship Clause does not say "in any State" and does not define "in the United States." For this reason, at least some meaning comes from outside of the text. But instead of realizing this, the Fifth Circuit's literal view equates this use of "in the United States" with what it views as the most analogous version of that phrase elsewhere in the Constitution. This is not the proper method.

The Constitution's geographic references are many and varied. Some refer to "the United States," some refer to "the Several States," some refer to "the States," and some refer to "any State." No universal

definition applies to each phrase wherever it appears. Instead, each phrase's meaning "depends upon the character and aim of the specific provision involved." *District of Columbia* v. *Carter*, 409 U.S. 418, 420 (1973). The literalist method errs by ignoring this reasoning.

2. The Fifth Circuit's reading also errs in its analogy to the revenue clauses and *Downes*. It is true that both the revenue clauses and Citizenship Clause operate with respect to "the United States." And it is also true that territories like Puerto Rico are considered "not a part of the United States within the revenue clauses." *Downes*, 182 U.S. at 287. But the *Downes* conclusion about territories is *not* true of all non-State places because the District of Columbia constitutes part of "the United States" under the revenue clauses. *Loughborough* v. *Blake*, 18 U.S. 317 (1820).

Thus, regardless of what *Downes* means for the issue of territories as "in the United States," it does not help explain how that phrase treats all non-State places. Territories and military bases are different. Each non-State United States place deserves it own Citizenship Clause analysis.

B. The originalist view is correct and makes Petitioner a citizen.

The Citizenship Clause should be construed in accordance with its original public meaning. Essentially, Petitioner's position accords with Judge

Pregerson's *Rabang* dissent and the opinion letter regarding Senator McCain.

Specifically, Petitioner submits that the Citizenship Clause of the Fourteenth Amendment constitutionalized *jus soli* – the common law of citizenship principles defining the right's territorial reach. Under *jus soli*, births at certain places located outside of a State qualify as births "in the United States." Petitioner's military base fits squarely within this set of qualifying places. As a result, the Citizenship Clause provides Petitioner with United States citizenship.

1. Constitutional Amendments carry a present meaning that accords with their meaning at the time of adoption. See*, e.g.*, *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). The Citizenship Clause is no exception. Courts should define its principle of citizenship by birth "in the United States" in "light of the common law, the principles and history of which were familiarly known to the framers." *Wong Kim Ark*, 169 U.S. at 654.

2. The Fourteenth Amendment's drafters and ratifiers knew the English common law of *jus soli* well because its principles had stabilized long before the United States declared independence. Indeed, once independence occurred, American courts did not hesitate to recognize English *jus soli* as United States citizenship law. See *Inglis* v. *Trustees of Sailor's Snug Harbor*, 28 U.S. 99, 120 (1830). In 1868, United States law embraced English *jus soli* (again) by codifying it in the Citizenship Clause. See *Wong Kim*

Ark, 169 U.S. at 654-693; see also *Rogers* v. *Bellei*, 401 U.S. 815, 828 (1971); *Afroyim* v. *Rusk*, 387 U.S. 253, 263-266 (1967); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873).

Petitioner submits that *Wong Kim Ark* and the other cited precedents establish this proposition – that the Citizenship Clause was originally meant as a codification of the English common law of *jus soli*. Circuit opinions disagree, but on a limited basis only.

The opposing opinions only go so far as to dispute what *Wong Kim Ark* and other decisions "held" about *jus soli*'s role in the Citizenship Clause. See, *e.g.*, *Rabang*, 35 F.3d at 1454. They never offer a contrary account of the Citizenship Clause's original understanding and never offer a contrary account of the common law. Thus, if it is still necessary to "hold" that the Citizenship Clause codifies the English common law of *jus soli*, the Court should do so for the reasons explained at length in the Court's existing opinions.

3. *Jus soli* so codified provides a substantive legal rule defining what it means to be born "in the United States, and subject to the jurisdiction thereof." In historic terms, the applicable rule of geographic citizenship was this: "[t]hose born 'within the King's domain' and 'within the obedience or ligeance of the King' were subjects of the King, or 'citizens' in modern parlance." *Tuaua* v. *United States*, 788 F.3d 300, 304 (D.C. Cir. 2015) (quoting *Calvin's Case*, 77 Eng. Rep. 377, 399 (1608)). "The domain of the King was

defined broadly." *Id.* "It extended beyond the British Isles to include, for example, persons born in the American colonies." *Id.*

4. Petitioner is a citizen under this rule because his birthplace constitutes a modern analog of the King's "domain" and is within its "obedience" and "ligeance." Reasonable debates can be had about whether certain places possess the requisite character, especially those on the edge of independence. See *Tuaua*, 788 F.3d at 305. But by every measure that *jus soli* makes relevant, the 97th General Hospital of the United States Army in Frankfurt passed the threshold.

Through a series of post-World War II treaties and other international arrangements,[6] the United States acquired complete dominion over this location, where everyone allowed on site owed the United States their undivided obedience and allegiance. Not unlike the United States Naval Station at Guantanamo Bay, Cuba, see *Boumediene* v. *Bush*, 553 U.S. 723, 753-754 (2008), the magnitude of sovereignty

[6] See Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846 (effective Aug. 23, 1953); Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, Aug. 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351 (effective July 1, 1963); Dieter Fleck, The Handbook of The Law of Visiting Forces 353 (OUP Oxford July 5, 2001).

actually exercised by the United States over this base far surpassed what *jus soli* requires.

Further support for the base's status as a fitting analog comes from historical scholarship about cross-border military operations,[7] as well as historical scholarship regarding non-military treaty-based enclaves of extraterritoriality.[8]

When properly construed as applying beyond the States, the Citizenship Clause confers United States citizenship upon Petitioner. Thus, the Fifth Circuit erred in affirming removal and its judgment should be reversed.

[7] See, *e.g.*, Stephen E. Sachs, Commentary, *Why John McCain Was a Citizen at Birth*, 107 Mich. L. Rev. First Impressions 49, 55 (2008) ("Like ambassadors, soldiers stationed abroad are traditionally subject to the jurisdiction of their home country; and the children of these soldiers, like those of ambassadors, were recognized at common law as having the same jurisdictional status as their parents.").

[8] See, *e.g.*, United States State Department, Report on the Subject of Citizenship, Expatriation, and Protection Abroad, H.R. Doc. No. 59-326, at 196-199 (2d Sess. 1906); III John Bassett Moore, A Digest of International Law, H.R. Doc. No. 56-551, at 287-288 (2d Sess. 1906).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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January 12, 2016

REVISED AUGUST 25, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-60297

JERMAINE AMANI THOMAS,
also known as Jermaine Thomas,

Petitioner

v.

LORETTA LYNCH, U. S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

Before KING, SMITH, and ELROD, Circuit Judges.

KING, Circuit Judge:

Jermaine Amani Thomas petitions for review of an order that he be removed from the United States pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii) and (iii). Thomas, who was born on a United States military base located in what is now Germany, argues that he is not removable because he is a United States citizen by virtue of the Fourteenth Amendment. For the following reasons, we DENY the petition for review.

I. BACKGROUND

Petitioner Jermaine Amani Thomas was born on August 9, 1986, in a military hospital located on a U.S. military base in Frankfurt, Germany. Thomas's father, a United States citizen, was a member of the United States military serving on the base. Thomas's father first entered the United States in September 1977, enlisted in the United States Army in 1979, and became a United States citizen in May 1984. Thomas's mother was a citizen of Kenya. Thomas was admitted to the United States as a lawful permanent resident in July 1989. His visa form listed his nationality as Jamaican.

In 2013, the Department of Homeland Security issued Thomas a Notice to Appear and Additional Charges of Inadmissibility/Deportability. The Additional Charges notice alleged that Thomas was a citizen of Jamaica and had three criminal convictions in the United States. It also stated that Thomas was subject to deportation or removal pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) because he had been convicted of an aggravated felony; 8 U.S.C. § 1227(a)(2)(E)(i) because he had been convicted of a crime of domestic violence; and 8 U.S.C. § 1227(a)(2)(A)(ii) because he had been convicted of two or more crimes involving moral turpitude.

At a hearing before an Immigration Judge ("IJ") on December 12, 2013, Thomas conceded that, if he is not a United States citizen, he is removable based on his aggravated felony and domestic violence

convictions. The only relief sought by Thomas before the IJ was a declaration that he is a United States citizen and the termination of removal proceedings. The IJ found that Thomas's birth in Germany gave rise to a rebuttable presumption of alienage. The IJ determined that based on the Department of State Foreign Affairs Manual (FAM), as well as the plain language of 8 U.S.C. § 1401(a) and the Constitution, the military base on which Thomas was born was not part of the United States for purposes of the Fourteenth Amendment. Accordingly, the IJ concluded that Thomas had failed to rebut the presumption of alienage. The IJ further found that Thomas was a citizen of Jamaica, and designated Jamaica as the country for removal. Finally, the IJ ordered Thomas removed pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii) and (iii).

Thomas appealed the IJ's order to the Board of Immigration Appeals (the "BIA"). The BIA agreed with the IJ that Thomas's birth at the military hospital in Germany, to only one United States citizen parent, gave rise to a rebuttable presumption of alienage. The BIA rejected Thomas's claim that his birth on a military base in Germany rendered him a birthright citizen by virtue of the Fourteenth Amendment. Therefore, the BIA concluded that Thomas was removable and it dismissed the appeal. On April 22, 2014, Thomas filed a timely petition for review in this court.

II. STANDARD OF REVIEW

Generally, this court does not have jurisdiction to review a final order of removal entered against an alien who has been convicted of certain offenses, including aggravated felonies, or who has multiple convictions for crimes involving moral turpitude. 8 U.S.C. § 1252(a)(2)(C); *see Ogunfuye v. Holder*, 610 F.3d 303, 307 (5th Cir. 2010) (explaining that this court is stripped "of jurisdiction to review a final order of removal entered against an alien convicted of certain criminal offenses, including aggravated felonies"). However, in such cases, this court retains jurisdiction to review constitutional claims or questions of law. 8 U.S.C. § 1252(a)(2)(D); *see Marquez-Marquez v. Gonzales*, 455 F.3d 548, 560-61 (5th Cir. 2006). If a "petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim." 8 U.S.C. § 1252(b)(5)(A). Thomas's constitutional claim is afforded de novo review. *Danso v. Gonzales*, 489 F.3d 709, 712 (5th Cir. 2007).

III. DISCUSSION

This case requires us to determine whether a United States military base located within what is now Germany was "in the United States" for purposes of the Fourteenth Amendment. The answer to this question is decisive because the Fourteenth Amendment

grants birthright citizenship to "[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof." U.S. Const. amend. XIV, § 1; *see also Schneider v. Rusk*, 377 U.S. 163, 166 (1964) (explaining that "the rights of citizenship of the native born derive from § 1 of the Fourteenth Amendment"). If Thomas derived birthright citizenship from the Fourteenth Amendment, we must grant his petition for review because only aliens can be deported. *See* 8 U.S.C. § 1227(a). If he is in fact not a citizen, the petition for review must be denied because it is undisputed that he is otherwise deportable as an aggravated felon. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). After a careful review of the decisions of the Supreme Court, other circuit courts of appeals, and our own court, we hold that Thomas is not a citizen, because the United States military base where he was born, which is located in modern-day Germany, was not "in the United States" for purposes of the Fourteenth Amendment.

"There are two sources of citizenship, and two only: birth and naturalization." *Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 394 (5th Cir. 2006) (internal quotation marks omitted). "Within the former category, the Fourteenth Amendment of the Constitution guarantees that every person 'born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization.'" *Miller v. Albright*, 523 U.S. 420, 423-24 (1998) (quoting *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898)). "Persons not born

in the United States acquire citizenship by birth only as provided by Acts of Congress." *Id.* At the time of Thomas's birth, Congress extended birthright citizenship to children born abroad to one citizen parent and one alien parent, as long as the citizen parent met certain physical-presence requirements. *See* 8 U.S.C. § 1401(g) (1982), *amended by* Pub. L. No. 99-653, § 12, 100 Stat. 3655, 3657 (Nov. 14, 1986). Thomas was born on a United States military base located within the territorial boundaries of modern-day Germany. His father was a naturalized United States citizen serving in the United States military and his mother was an alien. However, it is undisputed that Thomas was not a statutory birthright citizen because his father did not meet the physical presence requirement of the statute in force at the time of Thomas's birth.[1] *Id.* Consequently, Thomas must rely on the Fourteenth Amendment, which provides, in relevant part, that "[a]ll persons born . . . in the

[1] The version of 8 U.S.C. § 1401(g) in effect at the time of Thomas's birth required his father to have at least ten years of physical presence in the United States for Thomas to acquire citizenship through that statutory vehicle. 8 U.S.C. § 1401(g) (1982); *see United States v. Duron-Caldera*, 737 F.3d 988, 990 n.1 (5th Cir. 2013) ("Derivative citizenship is determined under the law in effect at the time of the child's birth."). The statute counted time spent abroad in the military towards the ten year physical presence requirement. 8 U.S.C. § 1401(g) (1982). Congress amended the statute in 1986 to decrease the requisite U.S. presence or service, but only after Thomas's birth. *See* An Act to amend the Immigration and Nationality Act, and for other purposes, Pub. L. No. 99-653, § 12, 100 Stat. 3655, 3657 (Nov. 14, 1986).

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," U.S. Const. amend. XIV, § 1, to sustain his claim that he is a birthright citizen. Thomas contends that the military base located in modern-day Germany where he was born was "in the United States" for purposes of the Fourteenth Amendment. We disagree.

We have not previously decided whether a military base located abroad qualifies as "in the United States" for Fourteenth Amendment purposes. However, we have addressed whether a person derived United States citizenship from his parents, who he claimed "became United States citizens at birth because they were born in the Philippines when the country was a United States territory." *Nolos v. Holder*, 611 F.3d 279, 282 (5th Cir. 2010) (per curiam). In that case, we were required to determine whether the Philippines was "in the United States" for Fourteenth Amendment purposes. *Id.* at 282. For guidance, we looked to the Second, Third and Ninth Circuits, which had previously "held that birth in the Philippines at a time when the country was a territory of the United States does not constitute birth 'in the United States' under the Citizenship Clause, and thus did not give rise to United States citizenship." *Id.* (citing *Lacap v. INS*, 138 F.3d 518, 518-19 (3d Cir. 1998); *Valmonte v. INS*, 136 F.3d 914, 915-21 (2d Cir. 1998); *Rabang v. INS*, 35 F.3d 1449, 1450-54 (9th Cir.

1994)).[2] Underlying those circuits' conclusion was the recognition that "the Citizenship Clause of the Fourteenth Amendment did not, without more, include United States territories simply because the territories were subject to the jurisdiction or within the dominion of the United States." *Id.* (internal quotation marks and brackets omitted).

"In reaching their holdings, the courts found guidance from the Supreme Court's *Insular Cases* jurisprudence on the territorial scope of the term 'the United States' as used in the Citizenship Clause of the Fourteenth Amendment." *Id.* (citing *Valmonte*, 136 F.3d at 918-19; *Rabang*, 35 F.3d at 1452).[3] In the *Insular Cases*, the Supreme Court "created the doctrine of incorporated and unincorporated Territories."

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[2] In *Rabang*, Judge Pregerson dissented from the majority opinion. Judge Pregerson opined that the common law rule of dominion and the original intent of the authors of the Fourteenth Amendment led to the conclusion that persons born in the Philippines during the territorial period were born "in the United States" within the meaning of the Fourteenth Amendment. *Rabang*, 35 F.3d at 1454-66 (Pregerson, J., dissenting).

[3] The *Insular Cases* were a series of Supreme Court opinions that "addressed whether the Constitution, by its own force, applies in any territory that is not a State." *Boumediene v. Bush*, 553 U.S. 723, 756 (2008). "The 'Insular Cases,' which arose at the turn of the century, involved territories which had only recently been conquered or acquired by the United States." *Reid v. Covert*, 354 U.S. 1, 13 (1957). The Supreme Court ruled "that certain constitutional safeguards were not applicable to these territories since they had not been expressly or impliedly incorporated into the Union by Congress." *Id.* (internal quotation marks omitted).

Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 599 n.30 (1976). Incorporated Territories "encompassed those Territories destined for statehood from the time of acquisition, and the Constitution was applied to them with full force," while unincorporated Territories were not destined for statehood and only "fundamental constitutional rights were guaranteed to the inhabitants." *Id.* (internal quotation marks omitted). As relevant here, the Court's decision in *Downes v. Bidwell*, 182 U.S. 244 (1901), one of the *Insular Cases*, "was derived in part by analyzing the territorial scope of the Thirteenth and Fourteenth Amendments." *Valmonte*, 136 F.3d at 918. In *Downes*, the Court held that Puerto Rico was "not a part of the United States within the revenue clauses of the Constitution." *Downes*, 182 U.S. at 287. The Court noted that the Thirteenth Amendment prohibits slavery and involuntary servitude "within the United States, *or* any place subject to their jurisdiction." *Id.* at 251 (quoting U.S. Const. amend. XIII, § 1 (emphasis added)). The "disjunctive 'or' in the Thirteenth Amendment demonstrates that 'there may be places within the jurisdiction of the United States that are no[t] part of the Union' to which the Thirteenth Amendment would apply." *Valmonte*, 136 F.3d at 919 (quoting *Downes*, 182 U.S. at 251).

Conversely, the Fourteenth Amendment "is not extended to persons born in any place 'subject to [the United States'] jurisdiction.'" *Downes*, 182 U.S. at 251. Instead, citizenship under the Fourteenth

Amendment is "limited to those born or naturalized in the states of the Union." *Nolos*, 611 F.3d at 283 (citing *Rabang*, 35 F.3d at 1452-53). In fact, the Citizenship Clause of the Fourteenth Amendment, like the Revenue Clause, "'has an express territorial limitation which prevents its extension to every place over which the government exercises its sovereignty.'" *Id.* (quoting *Rabang*, 35 F.3d at 1453). Therefore, we held that "'[i]t is . . . incorrect to extend citizenship to persons living in United States territories simply because the territories are subject to the jurisdiction or within the dominion of the United States, because those persons are not born "in the United States" within the meaning of the Fourteenth Amendment.'" *Id.* at 283-84 (alteration in original) (internal quotation marks omitted) (quoting *Valmonte*, 126 F.3d at 920); *see also Rabang*, 35 F.3d at 1453; *Lacap*, 138 F.3d at 519.[4] We are bound by our decision in *Nolos*.

Accordingly, regardless of whether the treaties applicable to the military base in which Thomas was born rendered it "subject to the jurisdiction or within the dominion of the United States," such a base was

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[4] The Supreme Court has previously assumed that persons born in the Philippines at the time the Philippines was a territory of the United States were not United States citizens. *See Rabang v. Boyd*, 353 U.S. 427, 432 n.12 (1957) ("The inhabitants of the islands acquired by the United States during the late war with Spain, not being citizens of the United States, do not possess the right of free entry into the United States." (internal citation and quotation marks omitted)).

not "in the United States" for purposes of the Fourteenth Amendment. *See id.* at 283-84 (internal quotation marks omitted) (citing *Valmonte*, 126 F.3d at 920; *Rabang*, 35 F.3d at 1453; *Lacap*, 138 F.3d at 519).[5] Having already determined that the Philippines, which was "under the complete and absolute sovereignty and dominion of the United States" during its time as a United States territory, *The Diamond Rings*, 183 U.S. 176, 179 (1901), was not "in the United States" for Fourteenth Amendment purposes, we decline to hold that a military base located in Germany qualifies as such, *Nolos*, 611 F.3d at 284; *see also Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1983) (explaining that a different military base in Germany "is not sovereign territory of the United States"); *Rabang*, 35 F.3d at 1452 ("In the *Insular Cases* the Supreme Court decided that the territorial scope of the phrase 'the United States' as used in the Constitution is limited to the states of the Union." (footnote omitted)). As we held in *Nolos*, the Fourteenth Amendment's grant of birthright citizenship

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[5] In an unpublished opinion, the Third Circuit considered a petitioner's argument that his mother was a United States citizen because she "was born in Guantanamo Bay, Cuba, which he asserts is a sovereign territory of the United States." *Williams v. Attorney General of the United States*, 458 F. App'x 148, 152 (3d Cir. 2012) (unpublished) (per curiam). The *Williams* court noted that "the Department of State's Foreign Affairs Manual provides that military installations are not part of the United States within the meaning of the Fourteenth Amendment." *Id.* Accordingly, it held that the petitioner's mother was not a citizen by birth. *Id.*

contains an express geographical limitation, which does not encompass the military base where Thomas was born. Accordingly, because Thomas was not born "in the United States" for purposes of the Fourteenth Amendment, he is not a birthright citizen.[6]

Furthermore, scholars who have addressed the issue agree that "contrary to popular belief, birth in . . . United States military facilities, does not result in United States citizenship in the absence of another basis for citizenship."[7] Sarah Helene Duggin & Mary Beth Collins, *'Natural Born' in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. Rev. 53, 103 (2005); *see also* Charles Gordon et al., *Immigration Law and Procedure* § 92.03(d) (rev. ed. 2010) ("The far-flung foreign

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[6] Even though, as we held in *Nolos*, the Fourteenth Amendment contains a territorial limitation, Congress may extend birthright citizenship to individuals born outside of the territorial United States. *See Miller*, 523 U.S. at 424 ("Persons not born in the United States acquire citizenship by birth only as provided by Acts of Congress."). Congress has provided for birthright citizenship for individuals born abroad to one United States citizen parent. *See* 8 U.S.C. § 1401(g). However, as explained above, Thomas did not qualify for the statutory grant of birthright citizenship applicable at the time of his birth.

[7] We acknowledge that some scholars have argued that the Fourteenth Amendment confers citizenship on certain individuals born outside the territorial United States. *See, e.g.*, Lawrence Tribe and Theodore Olson, *The 'Natural Born Citizen' Memo*, (Mar. 19, 2008); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv. L. Rev. 393, 406 (1899).

interest and operations of the United States . . . may also raise questions concerning the status of children born in U.S. installations in foreign countries. It seems quite clear that such installations cannot be regarded as part of the United States for purposes of the Fourteenth Amendment. . . ."); Allan Erbsen, *Constitutional Spaces*, 95 Minn. L. Rev. 1168, 1195 n.101 (2011) ("Few commentators have considered whether birth on a U.S. military base located within a foreign country would constitute birth 'in' the United States for purposes of the Fourteenth Amendment. The consensus is that such births would not confer automatic citizenship."). The commentary by these scholars supports our conclusion that the military base where Thomas was born was not "in the United States" for Fourteenth Amendment purposes.

Thomas cites the Supreme Court's decision in *United States v. Wong Kim Ark*, to support his position. There, the Supreme Court was asked to decide "whether a child born in the United States, of parents of Chinese descent . . . becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the constitution." *Wong Kim Ark*, 169 U.S. at 653. However, *Wong Kim Ark* is inapposite. As we explained in *Nolos*, "the question of the territorial scope of the Citizenship Clause of the Fourteenth Amendment was not before the Court in *Wong Kim Ark*." *Nolos*, 611 F.3d at 284. This is because the fact that "the child was born in San Francisco was undisputed and it was therefore unnecessary to define 'territory'

rigorously or decide whether 'territory' in its broader sense (i.e. outlying land subject to the jurisdiction of this country) meant 'in the United States' under the Citizenship Clause." *Id.* (internal quotation marks and brackets omitted). Accordingly, *Wong Kim Ark* does not support Thomas's contention that the military base on which he was born was "in the United States" for purposes of the Fourteenth Amendment.

Thomas likewise does not find support in the recent decision of the Court of Appeals for the District of Columbia Circuit in *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015). In *Tuaua*, the D.C. Circuit was asked whether the Citizenship Clause of the Fourteenth Amendment affords birthright citizenship to individuals born in American Samoa. *Id.* at 301. In order to answer this question, the D.C. Circuit considered at length "whether the circumstances are such that recognition of the right to birthright citizenship would prove 'impracticable and anomalous,' as applied to contemporary American Samoa." *Id.* at 309 (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)). Ultimately, the D.C. Circuit held that it was "anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives." *Id.* at 310. We are not convinced that *Reid* requires us to consider whether it would be "impracticable and anomalous" to recognize a right to birthright citizenship to those born on military bases located abroad. *Reid* was concerned with what "constitutional limitations apply to the Government when

it acts outside the continental United States." 354 U.S. at 8. Here, we are not concerned with any of the Constitution's limitations on the federal or state governments; rather, we are concerned with the "territorial scope of the term 'in the United States' as used in the Citizenship Clause of the Fourteenth Amendment." *Nolos*, 611 F.3d at 282. "We note that the territorial scope of the phrase 'the United States' is a distinct inquiry from whether a constitutional provision should extend to a territory." *Rabang*, 35 F.3d at 1453 n.8 (citing *Downes*, 182 U.S. at 249). Given that we have already determined that "the Citizenship Clause has an express territorial limitation which prevents its extension to every place over which the government exercises its sovereignty," *Nolos*, 611 F.3d at 283 (internal quotation marks omitted), we decline to engage in a functional inquiry as to the scope of the Citizenship Clause. Therefore, *Tuaua* does not change our conclusion that Thomas was not born "in the United States" for Fourteenth Amendment purposes.[8]

[8] Thomas argues that if the Fourteenth Amendment does not provide him with birthright citizenship, he is effectively stateless. However, even if we were to assume that he would be rendered stateless because he is not a United States citizen, we are not convinced that such a classification would change the analysis under the Fourteenth Amendment.

IV. CONCLUSION

For the foregoing reasons, we DENY the petition for review.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-60297

BIA Docket No. A042 132 384

JERMAINE AMANI THOMAS,
also known as Jermaine Thomas,

Petitioner

v.

LORETTA LYNCH, U. S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

Before KING, SMITH, and ELROD, Circuit Judges.

JUDGMENT

(Filed Aug. 7, 2015)

This cause was considered on the petition of Jermaine Amani Thomas, also known as Jermaine Thomas, for review of an order of the Board of Immigration Appeals and was argued by counsel.

It is ordered and adjudged that the petition for review is denied.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 20530

Decision of the Board of Immigration Appeals

File: A042 132 384 – Houston, Texas

Date: MAR 27 2014

In re: JERMAINE AMANI THOMAS a.k.a. Jermaine Thomas

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Charlotte Herring, Esquire

ON BEHALF OF DHS: Pamela Perillo
Assistant Chief Counsel

CHARGE:

Lodged: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] – Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony under section 101(a)(43)(G) of the Act

Sec. 237(a)(2)(E)(i), I&N Act
[8 U.S.C. § 1227(a)(2)(E)(i)] –
Convicted of crime of domestic violence, stalking, or child abuse, neglect, or abandonment

APPLICATION: Termination

The respondent has filed an appeal from an Immigration Judge's December 20, 2013, decision, denying the respondent's motion to terminate based on a putative claim to United States citizenship, and finding the respondent removable, as charged (Exh. 1-A), based on his admissions (Tr. at 100), and record of convictions (Exhs. 3, 4. 5, and 6). Aside from the request to terminate proceedings, the Immigration Judge considered that the respondent had neither requested nor established eligibility for any relief or protection from removal (I.J. at 2). The respondent's appeal will be dismissed. The respondent's request to proceed on appeal *in forma pauperis* is granted under 8 C.F.R. § 1003.8(a)(3). *See Matter of Chicas*, 19 I&N Dec. 114 (BIA 1984).

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). The Board reviews questions of law, discretion, and judgment and all other issues in an appeal of an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

A claim to citizenship, as has been proffered by the respondent, raises issues directly related to this Board's jurisdiction over the instant case. Thus, the threshold and only issue raised on appeal is whether the respondent, who was born on August 9, 1986, in the 97th General Hospital of the United States Army in Frankfurt, Germany, while his United States citizen father was stationed there as a member of the United States military, is a citizen of the United States. *See INS v. Pangilinan*, 486 U.S. 875, 886 (1988) (burden is on alien applicant to show his eligibility for citizenship in every respect); *see also Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 164 (BIA 2001) (evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to respondent to substantiate U.S. citizenship claim).

The respondent initially argues on appeal that he is a United States citizen pursuant to the "Citizenship Clause" of the Fourteenth Amendment. The respondent contends that although he was born in Germany, his birth took place at a US Army hospital located within a US military base, that under an international treaty agreement between the United States and the Federal Republic of Germany, was under the jurisdiction and control of the United States.

Even though the common law principle of *jus soli*, the rule that citizenship is determined by the place of birth, has always been applied *within* the United States, both before and after the passage of the Fourteenth Amendment, the rule has not been extended to apply to individuals whose births took

place outside of the United States. *See Matter of S-*, 3 I&N Dec. 589, 593 (BIA 1949). The United States Court of Appeals for the Fifth Circuit, wherein this case arises, citing to the decisions of the Second and Ninth Circuit, which in turn, were guided by the decisions of the United States Supreme Court in the *Insular* cases,[1] explained that the term "United States" as it is used in the Citizenship Clause of the Fourteenth Amendment did not include all places (in this case, territories and other possessions of the United States), simply because they were "subject to the jurisdiction" or "within the dominion" of the United States." *See Nolos v. Holder,* 611 F.3d 279, 282 (5th Cir. 2010) (citing to *Rabang v. INS*, 35 F.3d 1449, 1450-54 (9th Cir. 1994), *and Valmonte v. INS*, 136 F.3d 914, 915-21 (2d Cir. 1998)). The *Nolos* court noted that in *Downes v. Bidwell*, 182 U.S. 244, 287 (1901), one of the *Insular* cases, the Supreme Court, considered the territorial scope of the term "the United States" in various clauses of the Constitution in arriving at its conclusion that "Puerto Rico was 'not a part of the United States within the revenue clause of the Constitution.'" *Id.* at 282-83. The Court compared the revenue clause language in Art. I, § 8 of the Constitution that "all duties . . . shall be uniform throughout the United States," with the Thirteenth Amendment's prohibition of slavery and involuntary servitude "within

[1] The *insular* cases were a series of Supreme Court decisions addressing the reach of the Constitution to U.S. territories located in the Caribbean and the Pacific.

the United States, or any place subject to their jurisdiction," and that of the Citizenship Clause of the Fourteenth Amendment providing that 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." *Id.* at 283 (citing *Downes*, 182 U.S. at 251). The *Downes* Court considered that the disjunctive "or" in the Thirteenth Amendment showed that "there may be places within the jurisdiction of the United States that are no part of the Union" to which the Thirteenth Amendment would still apply, while citizenship under the Fourteenth Amendment "is not extended to persons born in any place 'subject to [the United States'] jurisdiction'" (but instead limited to those born or naturalized in the states of the Union). *See Nolos v. Holder*, *supra*, at 283 (citing *Rabang*, 35 F.3d at 1452-53 (discussing *Downes*, 182 U.S. at 251); and *Valmonte*, 136 F.3d at 919 (discussing *Downes*, 182 U.S. at 251)).

Thus, on de novo review, we find the respondent's putative claim to have acquired United States citizenship by virtue of having been born in a United States army base hospital in Germany while his father was stationed there, just because it was subject to the *de facto* jurisdiction of the United States, cannot be sustained. *See id.* As noted by the Immigration Judge (I.J. at 7), the respondent's reliance on *Boumediene v. Bush*, 553 U.S. 723 (2008) (Court determined that the United States exercised *de facto* jurisdiction over the military base at Guantanamo Bay for the purposes of habeas corpus, but that the Cuban

government exercised *de jure* sovereignty over the territory encompassing the U.S. base), is misplaced, as the Department of State's Foreign Affairs Manual ("FAM") provides that military installations are not part of the United States within the meaning of the Fourteenth Amendment.[2] *See, e.g.*, *Williams v. Attorney General of U.S.*, 458 Fed.Appx. 148, 151 (3d Cir. 2012).

Nonetheless, applying the legal principle *of jus sanguinis*, under which citizenship is acquired by descent, children born outside the United States to parents, one or both of whom are American citizens, can acquire U.S. citizenship in certain circumstances, as embodied in the statutory law of the United States. *See Matter of T-*, 5 I&N Dec. 380 (BIA 1953); *Matter of S-,supra*, at 593. Thus, the respondent's father, a United States citizen and a member of the United States military stationed abroad, could have applied at an American Consulate abroad for a

[2] Specifically, the FAM provides that, "[d]espite widespread popular belief, U.S. military installations abroad and U.S. diplomatic or consular facilities abroad are not part of the United States within the meaning of the 14th Amendment . . . A child born on the premises of such a facility is not born in the United States and does not acquire U.S. citizenship by reason of birth." *See* 7 FAM 1113c(1) (Exh. 27). Moreover, as to the respondent's appellate challenge to the Immigration Judge's reliance on the FAM, we note that Congress has given the Secretary of State the responsibility for the administration and enforcement of all nationality laws relating to "the determination of nationality of a person not in the United States." *See* section 104(a) of the Act, 8 U.S.C. § 1104(a).

"Consular Report of Birth Abroad of a Citizen of the United States of America" ("CRBA") (Form FS-240), which is a formal document certifying the acquisition of U.S. citizenship at birth by a person born abroad to a U.S. citizen parent or parents. *See* 7 FAM 1441.1(a). Moreover, under 22 U.S.C. 2705, the CRBA establishes a "prima facie case" of U.S. citizenship.

However, even though the record does not indicate whether the respondent's U.S.C. father ever applied for a CRBA (Form DS-2029) with an American consul abroad, the application would not have been approved, as the U.S.C. parent must demonstrate that the child has a valid claim to U.S. citizenship. The applicable law for transmitting citizenship to a legitimate child born abroad when one parent is a United States citizen is the statute that was in effect at the time of the child's birth.[3] *See United States v. Cervantes-Nava*, 281 F.3d 501, 503 n. 2 (5th Cir.2002). In this case, the version of section 301(g) of the Act, 8 U.S.C. § 1401(g), the applicable statute then in effect at the time of the respondent's birth on August 9, 1986, conferred United States citizenship upon individuals born outside the United States of

[3] Although the Immigration Judge incorrectly cites to former section 301(a)(7) of the Act, 8 U.S.C. § 1401(a)(7), as the applicable statute in effect at the time of the respondent's birth on August 9, 1986, it was redesignated, without change, at section 301(g) of the Act, by section 3 of Pub. L. No. 95-432, 92 Stat. 1046 (October 10, 1978). Section 301(g) has since undergone several amendments, none of which affects the respondent's citizenship claim.

parents one of whom was an alien, and the other a citizen of the United States, if, prior to the birth of the individual claiming citizenship, the United States citizen parent had been physically present in the United States for an aggregate period of not less than 10 years, at least 5 of which were after the parent attained the age of fourteen years. Even though the law allows for consideration of the period of the respondent's father's military service abroad, the record reflects that his period of physical presence only began in 1977, one year short of the statutory requirement of an aggregate period of physical presence in the United States of not less than 10 years.[4] *See, e.g.*, *Matter of C-*, 2 I&N Dec. 311 (BIA 1945) (U.S.C. parent's residence while abroad as member of the United States military counts towards fulfilling residency requirements of section 201(g) of the Nationality Act of 1940, so as to transmit United States citizenship to his child born abroad). Thus, we agree with the Immigration Judge (I.J. at 8) that the respondent, who was born outside of the United States,

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[4] The requisite period of physical presence was shortened in November 1986, and section 301(g) of the Act was amended by striking out "ten years, at least five," and inserting in lieu thereof "five years, at least two." *See* section 12 of the Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653, 100 Stat. 3655, (Nov. 14, 1986). However, Congress limited the application of the 1986 amendments to section 301(g), to only those persons born on or after November 14, 1986. *See* Immigration Technical Corrections Act of 1988, Pub.L. 100-525, § 8(r), 102 Stat. 2609 (Oct. 4, 1988). As the respondent was born before that date, he does not benefit from the statutory changes to the physical presence requirement in section 301(g).

has not met his burden to show that he acquired United States citizenship under section 301(g) of the Act, by virtue of his relationship to his United States citizen father. See *Matter of Rodriguez-Tejedor*, *supra*, at 164.

Finally, with regard to the respondent's appellate constitutional challenges, we note that this Board and the Immigration Judges lack the authority to consider constitutional challenges to the statutes and regulations we administer. *See Matter of Romalez-Alcalde*, 23 I&N Dec. 423, 439 fn.1 (BIA 2002) (citing *Matter of Fede*, 20 I&N Dec. 35, 36 (BIA 1989), and Matter of C-, 20 I&N Dec. 529, 532 (BIA 1992)); *see also Matter of Valdovinos*, 18 I&N Dec. 343 (BIA 1982). Furthermore, we do not have the authority to fashion an equitable remedy for the respondent's United States citizenship claim.[5]

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[5] As similarly found by the Supreme Court in *INS v. Pangilinan*, courts cannot employ equitable remedies to confer citizenship where the statutory requirements for citizenship were not satisfied. *Id.* at 883-84. Acts of Congress establishing rules for citizenship must be enforced, and courts "are without authority to sanction changes or modifications . . . " *Id.* at 884; see also Fedorenko v United States, 449 U.S. 490, 506 (1981) ("[t]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship."). Thus, "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of these limitations." *See Mustanich v. Mukasey*, 518 F.3d 1084, 1088 (9th Cir. 2008) (quoting *INS v. Pangilinan*, *supra*, at 885).

Consequently, as the respondent has not established that he is a United States citizen, the respondent is subject to the provisions of the Act, and we agree with the Immigration Judge that the respondent is subject to removal from the United States based on the respondent's admissions and record of conviction. *See* section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A). Moreover, the respondent has not established his eligibility for any relief or protection from removal. *See* section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d).

The respondent raises no arguments on appeal[6] to persuade us to disturb the Immigration Judge's decision. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

[6] Finally, as to the respondent's appellate challenge to the Immigration Judge's designation of Jamaica as the proposed country of removal, as the respondent failed to indicate his preference of a country of removal, we find the Immigration Judge determination not to be clearly erroneous and supported by the record. *See* section 241(b)(2) of the Act, 8 U.S.C. § 1231(b)(2); *see also Matter of Linnas*, 19 I&N Dec. 302 (BIA 1985); *Matter of Lau*, 12 I&N Dec. 573 (BIA 1968).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON SERVICE PROCESSING CENTER
HOUSTON, TEXAS

IN THE MATTER OF Jermaine Amani THOMAS, Respondent.	) IN REMOVAL) PROCEEDINGS)) File No. A042-132-384)

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE GOVERNMENT:
Charlotte Herring, Esq. YMCA International Services P.O. Box 740425 Houston, TX 77274	Pamela Perillo, Assistant Chief Counsel Department of Homeland Security

MEMORANDUM AND DECISION
OF THE IMMIGRATION JUDGE

(Filed Dec. 20, 2013)

I. FACTUAL AND PROCEDURAL HISTORY

On August 9, 1986, Respondent was born in a United States military hospital in Germany to married parents. Exhs. 7; 9; 16-23. Respondent's father was a United States citizen serving in the United States Army in Germany. Exhs. 10-11. Respondent's mother was a citizen of Kenya. *See* Exh. 2. On April 28, 1988, Respondent's parents divorced, and Respondent's mother was granted custody of Respondent. *See* Exh. 43. On July 12, 1989, Respondent

was admitted to the United States as a lawful permanent resident. Exh. 1A. He resided with his mother in the United States thereafter. Exh. 43.

On October 7, 2011, Respondent was convicted in Texas for the offense of Assault Causing Bodily Injury – Family Violence, in violation of Texas Penal Code § 22.01(a)(1). Exhs. 1A; 4. On May 10, 2012, Respondent was convicted in Texas for the offense of Theft from Person, in violation of Texas Penal Code § 31.03, and was sentenced to 18 months imprisonment. Exhs. 1A; 6.

On May 22, 2013, the Department of Homeland Security (DHS) served Respondent with a Notice to Appear (NTA), and, on December 12, 2013, a Form I-261, alleging, *inter alia*, that Respondent is not a citizen or national of the United States, and that he is a native of Germany and a citizen of Jamaica. Exh. 1A. The I-213 charged Respondent with removability pursuant to: (1) Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (INA or Act), for having been convicted, at any time after admission, of an aggravated felony, as defined in INA § 101(a)(43)(G); (2) INA § 237(a)(2)(E)(i), as an alien who, at any time after entry, has been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment; and (3) INA § 237(a)(2)(A)(ii), as an alien who, at any time after admission, has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. Exh. 1A.

At Respondent's hearings before this Court, he has consistently maintained that he is a United States citizen by virtue of his birth in a United States military hospital, on a United States military base in Germany, to a United States citizen father. The Court adjourned Respondent's case multiple times to accord him the opportunity to submit evidence in support of his claim to U.S. citizenship. It is uncontested that: Respondent was born at a U.S. military hospital in Germany on August 8, 1986, that his father became a naturalized United States citizen on May 31, 1984, and that his father served in the U.S. Army for approximately 19 years. Exhs. 7; 10-11; 16-23.

On October 10, 2013, Respondent submitted a memorandum in support of his claim to U.S. citizenship at birth. On November 21, 2013, the Texas Legal Services Center submitted an *amicus curiae* brief on Respondent's behalf. On November 21, 2013, DHS submitted a brief disputing Respondent's claim to U.S. citizenship at birth. Respondent seeks no form of relief from removal other than a declaration that he is a United States citizen, and the termination of removal proceedings.

On December 12, 2013, Respondent, through counsel, admitted the factual allegations in the Form I-261 with the exception of allegations one and two, which allege that Respondent is not a citizen and national of the United States, and that he is a native of Germany and a citizen of Jamaica. Although Respondent argued that he is not removable because he is a United States citizen, he conceded that his May

10, 2012 conviction for Theft from Person, for which he was sentenced to 18 months of incarceration, qualifies as an aggravated felony under INA § 101(a)(43)(G). Respondent also conceded that his October 7, 2011 conviction for Assault Causing Bodily Injury – Family Violence constitutes a deportable offense under INA § 237(a)(2)(E)(i). The Fifth Circuit, however, has held that a conviction for the offense of Assault Causing Bodily Injury – Family Violence, in violation of Texas Penal Code § 22.01(a)(1), is not a "crime of violence," as defined in 18 U.S.C. § 16(a). *U.S. v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006). Because this conviction was for a misdemeanor, and not a felony, it also does not qualify as a "crime of violence under 18 U.S.C. § 169(b). *Id.* Consequently, Respondent's conviction is not a, "crime of domestic violence" under INA § 237(a)(2)(E)(i). Thus, the Court vacates Respondent's concession and dismisses the charge of removability under INA § 237(a)(2)(E)(i).

Regarding the charge of removability under INA § 237(a)(2)(A)(ii), Respondent denied that his October 7, 2011 conviction for Assault Causing Bodily Injury – Family Violence is a crime involving moral turpitude (CIMT). Applying the modified categorical approach, the Court concluded that Respondent's conviction for Assault Causing Bodily Injury – Family Violence is a CIMT under the Fifth Circuit's decision in *Esparza-Rodriguez v. Holder*, 699 F.3d 821 (5th Cir. 2012). The Court further held that his conviction for Theft from Person is also a CIMT. Therefore, the Court ruled that Respondent had indeed been convicted of two

CIMTs not arising out of a single scheme of criminal misconduct. Consequently, whether Respondent is removable under INA § 237(a)(2)(A)(ii) and INA § 237(a)(2)(A)(iii) turns on the validity of his claim to U.S. citizenship.

II. EVIDENCE PRESENTED

Exhibits

1. Notice to Appear (dated May 22, 2013)

1A. Form I-261 (dated Dec. 12, 2013)

2. Form I-213, Record of Deportable/Inadmissible Alien

3. Record of Conviction for Respondent's May 11, 2012 Conviction for Evading Arrest

4. Record of Conviction for Respondent's October 7, 2011 Conviction for Assault Causing Bodily Injury – Family Violence

5. Record of Conviction for Respondent's March 2, 2007 Conviction for Possession of a Controlled Substance

6. Record of Conviction for Respondent's May 10, 2012 Conviction for Theft from Person

7. Respondent's Birth Certificate

8. Respondent's June 19, 2013 Letter to the Court

9. Marriage certificate of Leston Hugh Thomas and Lucy Sheila Frisch

10. Naturalization Certificate of Leston Hugh Thomas
11. Leston Hugh Thomas' Certificate of Release or Discharge from Active Duty
12. Death Certificate of Leston Hugh Thomas
13. Lucy S. Stewart's July 9, 2013 Letter to the National Personnel Records Center
14. Lucy S. Stewart's September 13, 2013 Letter to YMCA
15. Robin Dawson's August 14, 2013 Letter to Respondent
16. Inpatient Treatment Record Cover Sheet
17. Medical Records – Nursing Assessment and Care
18. Medical Records – Request for Administration of Anesthesia and for Performance of Operations and Other Procedures
19. Clinical Record – Pediatric Nursing Notes
20. Medical Record – Pediatric Graphic Chart
21. Clinical Record – Doctor's Orders
22. Clinical Record – Therapeutic Documentation Care Plan
23. Clinical Record – Newborn
24. About.com excerpt on U.S. Army Garrison Hanau
25. March 19, 2008 Memorandum of Lawrence Tribe and Theodore Olson

26. Senate Resolution Bill
27. Excerpt from U.S. Department of State Foreign Affairs Manual
28. Excerpt from Third Restatement of the Law, Foreign Relations Law of the United States
29. German Missions in the United States, "Welcome to Germany," information on obtaining German citizenship
30. I-485 of Leston Hugh Thomas
31. I-181 of Leston Hugh Thomas
32. I-130 for Leston Hugh Thomas
33. B-2 application for Leston Hugh Thomas
34. N-400 of Leston Hugh Thomas
35. DS-2029, Application for Consular Report of Birth Abroad of a Citizen of the United States of America
36. GlobalSecurity.org article on U.S. Military Facilities
37. Excerpt from the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany
38. German Federal Foreign Office, "Legal status of forces in Germany and abroad"
39. Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany

40. Federal Office of Administration – Notes of Applying for confirmation of German Nationality

41. German Nationality Law § 4(3)

42. Respondent's Immigrant Visa and Alien Registration Face Sheet

43. Respondent's Application for Immigrant Visa and Alien Registration

44. Central Index System Details: Details for Person

III. UNITED STATES CITIZENSHIP

In removal proceedings, DHS has the burden of establishing alienage. *See, e.g.*, *Matter of Cantu*, 17 I&N Dec. 190, 194 (BIA 1978); *Murphy v. INS.*, 54 F.3d 605 (9th Cir. 1993). Evidence of foreign birth, however, gives rise to a rebuttable presumption of alienage. *Matter of Leyva*, 16 I&N Dec. 118, 119 (BIA 1977). When a claim to United States citizenship is asserted, the person asserting the claim must establish citizenship, by "produc[ing] substantial credible evidence in support of his . . . citizenship claim." *Chau v. INS*, 247 F.3d 1026, 1029 (9th Cir. 2001); *see also Matter of Tijerina-Villarreal*, 13 I&N Dec. 327, 330 (BIA 1969) (holding that the respondent must establish citizenship by a preponderance of credible evidence). In considering a citizenship claim based on birth abroad, the applicable law is that which was in effect at the time of the birth. *Id.*

Respondent was born in Germany; thus, there is a rebuttable presumption of alienage. *See* Exh. 7. Respondent asserts that he is a United States citizen on two bases. Respondent's Memorandum in Support at 4, 6 n.2 (Oct. 10, 2013) ("Respondent's Memorandum). Respondent argues, first, that his birth in a U.S. military hospital to a U.S. citizen father serving in the military constitutes birth in the United States. *Id.* Second, Respondent asserts that he is a U.S. citizen pursuant to former INA § 301(a)(7) because of his father was physically present in the United States for a period of 10 years prior to his birth. *Id* Respondent also argues that it would be unjust to deny citizenship to a child born in a U.S. military hospital to a U.S. citizen serving active duty in the U.S. Army abroad, and that a finding of U.S. citizenship would be consistent with the United States Constitution. *Id.* at 6-9, 15-16.

A. Acquired United States Citizenship Based on Location of Birth

Respondent argues that his birth in a U.S. military hospital on a U.S. military base to a U.S. citizen father qualifies as birth in the "United States," rendering him a United States citizen at birth. *Id* at 9-15.

The Fourteenth Amendment of the U.S. Constitution and INA § 301(a) state that a person born in the United States, and subject to the jurisdiction thereof, is a national and citizen of the United States.

U.S. Constitution, Amendment XIV; INA § 301(a). According to INA § 101(a)(38), "when used in a geographical sense, ['United States'] means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands." INA § 101(a)(38).

Respondent was born in Germany. Exh 7. Based on a straightforward reading of the statutory definition of "United States," Respondent was not born in the United States, and therefore, is not a United States national or citizen by his location of birth. Moreover, the U.S. Department of State Foreign Affairs Manual states that military installations are not part of the "United States" within the meaning of the Fourteenth Amendment:

> Despite widespread popular belief, U.S. military installations abroad and U.S. diplomatic or consular facilities abroad are not part of the United States within the meaning of the 14th Amendment. A child born on the premises of such a facility is not born in the United States and does not acquire U.S. citizenship by reason of birth.

Exh. 27 at 63. Respondent asserts that the term "military installation" is a general description, not including military hospitals. Respondent's Memorandum at 14-15. According to an article submitted by DHS, the term "military installation" is defined to include:

> A base, camp, post, station, yard, center, homeport facility or any ship, or any other activity under the jurisdiction of the department, agency, or other instrumentality of the Department of Defense, including a leased facility, except that such term shall not include any facility used primarily for civil works, rivers and harbor projects, or flood control projects.

Exh. 36. Respondent concedes that the hospital in which he was born was staffed by U.S. military personnel, and that the U.S. military exercised control over the hospital. Respondent's Memorandum at 12. Consequently, the Court finds that the military hospital fell under the jurisdiction of the Department of Defense, and that the military hospital is included in the term "military installation" used in the Foreign Affairs Manual. Therefore, Respondent's birth in a U.S. military hospital on a U.S. military base abroad does not equate to birth in the United States.

The Court also observes that the U.S. Department of State Foreign Affairs Manual discusses the process for certifying the U.S. citizenship of a person born abroad to a U.S. citizen parent. According to the Foreign Affairs Manual, a "Consular Report of Birth Abroad of a Citizen of the United States of America" ("Report of Birth Abroad") is a formal document certifying the acquisition of U.S. citizenship at birth by a person born abroad to a U.S. citizen parent, and "establishes a 'prima facie case' of U.S. citizenship." Exh. 27 at 71. A Report of Birth Abroad may be issued

upon submission of form DS-2029, "Application for Consular Report of Birth Abroad of a Citizen of the United States of America," together with certain evidence, most importantly, "evidence of the U.S. citizen parent(s)' physical presence or residence in the United States prior to the birth of the child." Exh. 35. The instructions for the application specifically state that in the case of children born in U.S. military hospitals, the application must be signed before a designated military official. The Court finds this to be further evidence that children born in U.S. military hospitals abroad do not automatically acquire United States citizenship. Such children must acquire United States citizenship by fulfilling other criteria.

Respondent argues that the submission of a Report of Birth Abroad is not required to confer citizenship at birth, and cites, as an example, to U.S. Senator John McCain, who was born on August 29, 1936, on a U.S. military base in the Panama Canal Zone to U.S. citizen parents. Respondent's Memorandum at 6-9, 15 n.4. Respondent argues, essentially, that because Senator McCain is a United States citizen despite the fact that his parents did not apply for a Report of Birth Abroad, the absence of this document in Respondent's case has no legal consequence. *Id* at 15.

The Court does not rely on the mere existence of the State Department's Report of Birth Abroad, a ministerial document, for the proposition that the Report itself grants citizenship or that its absence necessarily indicates a lack of citizenship. Rather, the

Court considers the instructions accompanying the Report of Birth Abroad as somewhat probative of whether children born in military hospitals abroad are U.S. citizens by virtue of the location of their birth. The Court agrees that a foreign-born person may be a citizen regardless of whether his parents filed an application for a Report of Birth Abroad.

In regard to the analogy to Senator McCain, the Court observes that the legal basis for Senator McCain's citizenship is different from Respondent's. Senator McCain was born to two U.S. citizen parents,[1] and consequently acquired United States citizenship pursuant to INA § 301(c). Additionally, at the time of Senator McCain's birth, INA § 303(a) specifically granted citizenship at birth to children born in the Panama Canal Zone to a U.S. citizen parent. Respondent was not born to two U.S. citizen parents and he was not statutorily granted citizenship at birth by virtue of his birth in Germany.

Respondent also asserts that because the U.S. had sovereign control over the military hospital in which he was born, the military hospital was part of the U.S., and, therefore, he was automatically a United States citizen at birth. Respondent's Memorandum at 11-12. Respondent notes that the hospital

[1] The Court may take administrative notice of commonly known facts or the contents of official documents. 8 C.F.R. § 1003.1(d)(3)(iv); *U.S*. v. *Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir. 2001).

is staffed by U.S. military members. *Id.* at 12. The *Amicus* brief further observes that the hospital performed a circumcision on Respondent, a surgery which the German population allegedly disapproves of, and that the form explaining the circumcision procedure was written in American English. *Amicus Curiae* Brief in Support of Respondent's Claim to Citizenship at Birth at 7-8 (Nov. 21, 2013).

In support of his argument that sovereign control of the military hospital renders the military hospital part of the United States, Respondent cites to *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that prisoners at the U.S. detention facility in Guantanamo Bay have the right to habeas corpus review, in part because the U.S. exerts *de facto* sovereignty over the detention facility), and *Reid v. Covert*, 354 U.S. 1, 19 (1957) (holding that U.S. citizen civilians living on military bases abroad are entitled to the constitutional safeguards of a civil trial, and that the Uniform Code of Military Justice does not apply to limit the rights of U.S. citizen civilians living on U.S. military bases abroad). Respondent's Memorandum at 9-12. However, *Boumediene* and *Reid* are not controlling, as they considered entirely different questions than those present before this Court. *Boumediene* and *Reid* involved the right to habeas corpus review and the right to the procedural safeguards of a civil trial, not citizenship. Furthermore, although the U.S. did exert some level of control over the military hospital, Germany retained *de jure* sovereignty, which, in the immigration context, is

especially significant. The Court also observes that the Third Circuit, in an unpublished decision, rejected reliance on *Boumediene* for the proposition that birth on the U.S. military installation at Guantanamo Bay confers U.S. citizenship, finding it relevant that Cuba retains *de jure* sovereignty over Guantanamo Bay. *Williams v. Attorney General*, 2012 WL 120150 at *152 (3rd Cir. 2012). Germanely, the Third Circuit also relied on the Department of State Foreign Affairs Manual, which, again, states that military installations are not part of the United States within the meaning of the Fourteenth Amendment. *Id.*; Exh. 27. Consequently, the Court finds that alleged *de facto* control over the military hospital in which Respondent was born does not establish that Respondent was "born" in the United States.

In conclusion, the Court finds that Respondent is not a citizen by virtue of his birth in a U.S. military hospital on a U.S. military base in Germany.

B. Acquired U.S. Citizenship Based on Physical Presence of Respondent's Father in the United States

Former INA § 301(a)(7), which was in effect at the time of Respondent's birth, states:

> [A] person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was

> physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.

INA § 301(a)(7). Any periods of honorable service in the Armed Forces of the United States may be included in order to satisfy the physical-presence requirement. INA § 301(a)(7).

Respondent has demonstrated that he was born in a U.S. military hospital in Germany on August 9, 1986, and that his father was a United States citizen. *See*, Exhs. 7; 10; 16-23. Based on the record, Respondent's father was physically present in the United States from September 1, 1977, and, thereafter in the U.S. military outside the United States, until Respondent's birth on August 9, 1986. *See* Exhs. 7; 11; 30. Thus, Respondent's father was physically present in the United States for approximately nine years before Respondent's birth. Consequently, Respondent has failed to demonstrate that his father satisfied the ten-year physical presence requirement under former INA § 301(a)(7). The Court therefore concludes that Respondent did not acquire citizenship under INA § 301(a)(7).

C. Constitutional Interpretation and Public Policy Argument

Respondent also avers that a finding of U.S. citizenship would be consistent with the United States

Constitution. Respondent's Memorandum at 6-9. In furtherance of his argument, Respondent cites to Senate Resolution 511, which declared Senator John McCain to be a natural born citizen, and which stated that "there is no evidence of the intention of the Framers or any Congress to limit the constitutional rights of children born to Americans serving in the military nor prevent those children from serving as their country's President." Exh. 26. Respondent also cites to a memorandum produced by two legal scholars concluding that:

> [T]he Framers did not intend to exclude a person from the office of the President simply because he or she was born to U.S. citizens serving in the U.S. military outside of the continental United States; [such a person] is certainly not the hypothetical 'Foreigner' who John Jay and George Washington were concerned might usurp the Role of Commander in Chief.

Exh. 25.

Respondent is thus essentially arguing that denying him U.S. citizenship, despite his birth on a U.S. military base to a U.S. citizen serving in the U.S. military abroad, is a violation of his constitutional rights. However, it is well-established that the Court lacks jurisdiction to rule on constitutional questions. *See Matter of Sanchez-Lopez*, 26 I&N Dec. 71 (BIA 2012); *Matter of Valdovinos*, 18 I&N Dec. 343 (BIA 1982); *Matter of Bogart*, 15 I&N Dec. 552 (BIA 1975, 1976; A.G. 1976).

Respondent also asserts that public policy demands a finding that Respondent is a United States citizen. Respondent's Memorandum at 15-16. Respondent argues that but for the fact that his father was stationed on active duty in Germany, Respondent would have been born in the United States. *Id.* Respondent states that his father was a sergeant in the United States Army and served in the Army for nearly 19 years. *Id.* Respondent avers that it would be "egregiously unjust" and ill-serve our nation's interests to penalize his family because his father fulfilled his patriotic duty. *Id.*

As this argument is also essentially predicated on the concepts of due process and equal protection, the Court declines to rule on the argument for lack of jurisdiction.

IV GERMAN CITIZENSHIP

Respondent was born in Germany on August 9, 1986. At the time of Respondent's birth, a person born in Germany was not a German citizen by virtue of being born there; German citizenship could be acquired at birth only by children born to a German father or mother. Exhs. 29; 40. Upon considering all of the materials presented to the Court, the Court finds that Respondent is not a German citizen.

V JAMAICAN CITIZENSHIP

The Court observes that people born outside Jamaica to a Jamaican parent have an automatic right to Jamaican citizenship. Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Jamaica Country Report on Human Rights Practices – 2012; Embassy of Jamaica, "Jamaican Citizenship," http://www.embassyofjamaica.orgNISjamaicancitizenship.htm.[2] Respondent's father was born in Jamaica and was a Jamaican citizen. *See* Exhs. 30-34; 42. Moreover, Respondent's I-130, Application for U.S. Immigrant Visa and Alien Registration, lists Respondent's Nationality as Jamaican. Additionally, Respondent submitted a letter from his mother, in which she discloses that Respondent's father acquired a Jamaican passport for Respondent, with which Respondent traveled to the United States. Exhs. 14; 43. Based on the totality of the evidence, the Court concludes that Respondent is a citizen of Jamaica, and will therefore designate Jamaica as the country for removal.

VII. CONCLUSION

Based on the foregoing, the Court finds that Respondent has failed to demonstrate that he is a U.S. citizen or rebut the presumption of alienage. Thus,

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[2] The Court may take administrative notice of commonly known facts or the contents of official documents. 8 C.F.R. § 1003.1(d)(3)(iv); *U.S.* v. *Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir. 2001).

Respondent is removable under INA § 237(a)(2)(A)(ii) and INA § 237(a)(2)(A)(iii). The Court, therefore, sustains the INA § 237(a)(2)(A)(ii) and INA § 237(a)(2)(A)(iii) charges of removability contained in the Form I-261.

VIII. ORDERS

IT IS ORDERED that Respondent's Motion to Terminate be DENIED.

IT IS FURTHER ORDERED that Respondent be REMOVED from the United States to Jamaica on the INA § 237(a)(2)(A)(ii) and INA § 237(a)(2)(A)(iii) charges contained in the Form I-261.

12/20/13 /s/ Saul Greenstein
Date Saul Greenstein
Immigration Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-60297

JERMAINE AMANI THOMAS,
also known as Jermaine Thomas,

Petitioner

v.

LORETTA LYNCH,
U. S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING EN BANC

(Filed Oct. 14, 2015)

(Opinion ___, 5 Cir., ___, ___, F.3d ___)

Before KING, SMITH, and ELROD, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the

court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
UNITED STATES
CIRCUIT JUDGE