

Trump Call to End Birthright Citizenship Faces Tough Legal Odds

Greg Stohr and Andrew M. Harris

October 30th, 2018

President Donald Trump's assertion that he can unilaterally end birthright U.S. citizenship is likely to meet stiff resistance in the courts.

The Supreme Court said more than a century ago that, with few exceptions, the Constitution automatically grants citizenship to all children born in the U.S., even if their parents aren't citizens. Although a handful of legal experts say Congress could pass a law to change that rule, that's a far cry from the president's assertion in an interview with "Axios on HBO" that he can do it by executive order.

"There's an active academic debate over whether mere legislation could change it with respect to illegal immigrants and tourists -- probably not, though there are good arguments on both sides," said Ilya Shapiro, a senior fellow at the libertarian Cato Institute. "But regardless, it's not something that can be done by executive action alone."

The issue turns on the Constitution's 14th Amendment, enacted after the Civil War to protect the rights of newly freed slaves. The amendment confers citizenship on anyone who is born in the U.S. and is "subject to the jurisdiction thereof."

In 1898 the Supreme Court said that test was met by the U.S.-born son of Chinese parents who were legal permanent residents in California. The ruling invoked the "ancient and fundamental rule of citizenship by birth within the territory."

That ruling didn't address people who entered the country illegally, but the court touched on that subject in a 1982 ruling that required school districts to enroll unauthorized immigrants. In a footnote, the court said "no plausible distinction" could be drawn to disqualify the children of undocumented immigrants from the birthright citizenship provision.

Many scholars, including some prominent conservatives, say the issue is settled.

"According to the best reading of its text, structure and history, anyone born on American territory, no matter their national origin, ethnicity or station in life, is an American citizen," John Yoo, a former official in President George W. Bush's Justice Department, wrote last week for the American Enterprise Institute.

University of Virginia law professor Saikrishna Prakash said language in earlier Supreme Court decisions could help Trump make the case that undocumented immigrants aren't "subject to the jurisdiction" of the United States. But Prakash said Trump can't change the conventional understanding on his own.

Trump "can't just decide who is a birthright citizen," he said. "Those people who believe that they qualify for it are going to get an adjudication from the courts."

President Donald Trump said he plans to sign an executive order ending birthright citizenship for babies of non-citizens and unauthorized immigrants born on U.S. soil, a proposal the top House Republican called unconstitutional.

"We're the only country in the world where a person comes in and has a baby, and the baby is essentially a citizen of the United States," Trump told "Axios on HBO" in an interview, excerpts of which were released Tuesday. "It's ridiculous. And it has to end."

Trump's claim that the U.S. is the only country that extends birthright citizenship is false. While the president is correct that European countries all require a period of residency before bestowing citizenship on those born to foreign parents, many countries in the Americas such as Canada, Mexico, Brazil and Argentina have U.S.-style birthright citizenship.

Trump asserted that it would not take a constitutional amendment to rescind birthright citizenship from some people born in the U.S., a stance that would undoubtedly draw a legal challenge should he proceed.

"It was always told to me that you needed a constitutional amendment. Guess what? You don't," he said.

The 14th Amendment to the U.S. Constitution spells out birthplace as an arbiter of citizenship, stating that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

House Speaker Paul Ryan, a Wisconsin Republican who is leaving office when his term ends in early January, told a radio station Tuesday that Trump can't end birthright citizenship with an executive order.

"You obviously cannot do that," Ryan told WVLK in Lexington, Kentucky. "I'm a believer in following the plain text of the Constitution and I think in this case the 14th Amendment is pretty clear, and that would involve a very, very lengthy constitutional process."

Vice President Mike Pence included birthright citizenship among "loopholes" in U.S. law exploited by unauthorized immigrants.

"We want to look at -- in the broadest way possible -- at American law that may be used as a magnet to draw people" into the U.S., he said Tuesday at an event hosted by Politico, including "loopholes" used by migrants and human traffickers. "Frankly, birthright citizenship is a part of that."

Sarah Turberville, a constitutional expert at the Project on Government Oversight, an independent nonprofit, said Trump's proposal would be ripe for a court challenge from those stripped of citizenship. It would also likely prompt bipartisan congressional charges of executive overreach, Turberville said.

“It’s a pretty absurd notion, frankly, that the president believes he would be able to amend the Constitution and 150-plus years of interpreting the 14th Amendment through an executive order,” Turberville said in an interview Tuesday.

But GOP Senator Lindsey Graham of South Carolina, a longtime critic of birthright citizenship, said on Twitter, "Finally, a president willing to take on this absurd policy of birthright citizenship." The senator said he'll introduce legislation along the same lines as Trump's proposed order.

Trump's proposal comes exactly a week before lawmakers' midterm elections, in which Trump's Republican Party is bracing for heavy losses and a potential Democratic takeover of the U.S. House.

About 'Birthright Citizenship,' Trump's Next Battle: QuickTake

The move could give a boost to Trump's fellow immigration hard-liners. Maine Senate candidate Eric Brakey, a Republican who is challenging incumbent Angus King, endorsed Trump's plan in a statement, saying the president “needs fresh support in Congress to follow through.”

But moderate Republican Representative Carlos Curbelo, who is in a competitive race to keep his South Florida seat, distanced himself from Trump, tweeting that birthright citizenship "is protected by the Constitution."

"What we really need is broad immigration reform that makes our country more secure and reaffirms our wonderful tradition as a nation of immigrants," Curbelo said.

“The president cannot erase the Constitution with an executive order, and the 14th Amendment's citizenship guarantee is clear," Omar Jadwat, director of the ACLU's Immigrants' Rights Project, said in a statement. “This is a transparent and blatantly unconstitutional attempt to sow division and fan the flames of anti-immigrant hatred in the days ahead of the midterms.”

Asked about timing or legal justification for the executive order, White House Press Secretary Sarah Sanders said only that the full interview with the president would air Sunday.

Trump has been trying to restore the public focus on immigration after the events of the past week, which included the arrest of a Trump supporter in connection with mailing at least 13 suspected explosive devices to targets of the president's ire, including Democratic politicians and the cable network CNN. In another incident, a gunman on Saturday shot and killed 11 people in a Pittsburgh synagogue in what authorities have said was a hate crime.

After an initial call for unity, Trump has increased his rhetoric against the media and undocumented immigrants, including a group of Central American migrants that is heading toward the U.S. through Mexico. The Trump administration announced Monday that it would send about 5,200 troops to the southern border with Mexico by the end of the week to head off the migrants.

Secretary of State Mike Pompeo in September said the U.S. planned to lower the cap on refugee admissions by a third to a record low 30,000 people for the coming fiscal year. Immediately after taking office in January 2017, Trump attempted to ban entrants from several Muslim nations, an effort that was turned down by the courts and forced his administration to rewrite the policy before the U.S. Supreme Court in June upheld the latest iteration.

Axios said its full interview with Trump would air Sunday.