



Can Trump End Birthright Citizenship With An Executive Order?

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On Monday, President Trump announced to *Axios on HBO* that he would pursue an executive order to outlaw birthright citizenship just before the election. “It was always told to me that you needed a constitutional amendment,” Trump stated. “Guess what? You don’t.” He then added, “You can definitely do it with an act of Congress. But now they’re saying I can do it just with an executive order... 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... with all of those benefits. It’s ridiculous. It’s ridiculous. And it has to end.”

Trump isn’t wrong that the United States is one of only two developed countries to maintain birthright citizenship (the other is Canada). But it’s dicey whether an executive order could simply change birthright citizenship, or whether an act of Congress could.

At issue is the interpretation of the 14th Amendment, which 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.

The key phrase here is “subject to the jurisdiction thereof.” As Ilya Shapiro of CATO Institute points out, that phrase was originally written to exclude the children of Native American tribes from American citizenship – since those children were subject to the jurisdiction of Native American governance – as well as the children of foreign diplomats and soldiers from abroad fighting on American land. The amendment was specifically written in order to guarantee the citizenship of freed slaves and their children, in order to abrogate the Supreme Court’s despicable *Dred Scott* ruling. Senator Jacob Howard (R-MI) explained the purpose of the “subject to the jurisdiction thereof” provision:

This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons. It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States.

In 1884, the Supreme Court ruled that a Native American born under the jurisdiction of a Native American tribe could not unilaterally make himself a United States citizen, since “no one can become a citizen of a nation without its consent.” In 1898, the Supreme Court ruled that Wong Kim Ark, a child born in the United States to legal resident Chinese immigrants, was included in the birthright citizenship provided by the 14th Amendment. In 1982, the Supreme Court ruled that for a state to deny public benefits to the child of illegal immigrants would be illegal; Justice William Brennan wrote in a footnote, “[N]o plausible distinction with respect to Fourteenth Amendment ‘jurisdiction’ can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.”

The Court has never fully decided on whether the 14th Amendment protects the children of illegal immigrants – people who are clearly subject to the jurisdiction of foreign countries. Illegal immigrants have a right under the Vienna Convention to consular contact if they are arrested for a crime, for example. It seems highly unlikely that the framers of the 14th Amendment meant to include the children of illegal immigrants. But the Supreme Court has also been warmer toward birthright citizenship to children of illegal immigrants than the text would warrant.

Presumably, Trump knows that an executive order will immediately be challenged in court, and then taken to the Supreme Court. That’s his goal. So no, an executive order won’t immediately take effect, and even an act of Congress would be litigated. But the issue itself isn’t quite as clear-cut as advocates for birthright citizenship maintain.