



Trump Wants Birth Tourism Ended, but Even Conservatives Are Divided

Brendan Kirby

October 31st, 2018

President Donald Trump expressed doubt about the long-accepted notion of “birthright citizenship” as far back as 2015, but his intention to challenge it formally kicks an issue that divides even conservatives up to top-tier status.

Trump said in a forthcoming HBO show produced by Axios that he intends to issue an executive order to deny citizenship benefits to babies born in the U.S. to illegal immigrants, tourists, and other foreigners with no connection to the United States.

Such an executive order would raise the temperature of the white-hot immigration debate even further and ignite a certain legal challenge. Mark Krikorian, executive director of the Center for Immigration Studies argued Tuesday on “The Laura Ingraham Show” that such a legal challenge could finally settle a dispute that has been debated for decades in legal circles but has never gotten a hearing in the Supreme Court.

“Whatever you think the policy should be, this is a smart way to tee up the issue so we can move it along in the process of, you know, public debate,” he said.

At issue is the intent of the 14th Amendment, which extended full citizenship to the newly freed slaves after the Civil War. Most scholars believe those rights also extend automatically to virtually any child born on U.S. soil.

The result is that illegal immigrants give birth to American citizens, who not only cannot be deported but also qualify for government assistance that illegal immigrants are not eligible to receive. Mass immigration critics maintain this creates a powerful incentive for foreigners to come to the United States — and also complicates enforcement efforts.

“There are a bunch of different reasons people do this, none of which is in the interest of the United States.”

Recent years have brought another phenomenon — birth tourism. An unknown number of pregnant women from China, Russia and elsewhere travel to the United States to have their babies specifically here so that they can be U.S. citizens.

Those foreign-raised babies enjoy all the rights of American citizens as they grow up. They can travel freely to the United States, obtain a U.S. passport, vote, and attend state universities at a lower cost.

Krikorian said South Korean and Turkish parents use the method so that their children can avoid compulsory military service in their home countries. Others use it as a “retirement plan,” he said. U.S.-born children can move to America and then sponsor their elderly parents for immigration.

“There are a bunch of different reasons people do this, none of which is in the interest of the United States,” he said.

Some Experts Contend 14th Amendment Misinterpreted

Some legal experts, however, said there is no constitutional basis for it.

“Everyone who says the 14th Amendment guarantees citizenship is wrong,” said Hans von Spakovsky, a legal fellow at the conservative Heritage Foundation. “They’re ignoring that the sentence in the 14th Amendment has two conditional clauses.”

That condition is that automatic citizenship applies to all persons born in the United States who are “subject to the jurisdiction thereof.” Those five words are the source of the dispute.

Jan Ting, a professor at Temple University’s Beasley School of Law in Philadelphia, said it is clear that the 14th Amendment does not apply universally. Children of diplomats, for example, are not subject to U.S. jurisdiction and are not citizens, he said.

Ting added that the same is true of invading armies, and noted that Japan, during World War II, occupied some of the Aleutian Islands in Alaska. It would be absurd to consider a child born to an occupying soldier an American citizen, Ting said.

The same goes for American Indians, who were excluded from U.S. citizenship until Congress passed a statute years later, Ting said. He added that an executive order certainly would be challenged.

“Obviously, there’s a legal question here ... It’s not an idea without plausible legal arguments,” he told LifeZette.

Ting said he has witnessed the issue in real life.

“I have international students who are here and make some effort to produce a child while they are here.”

“I have international students who are here and make some effort to produce a child while they are here,” he said.

An executive order attempting to disturb the status quo on birthright citizenship would be controversial. It split the Republican field during the presidential primaries. And some conservative legal scholars have reached the opposite conclusion on the Constitution.

That includes James Ho, a judge appointed by Trump to the 5th U.S. Circuit Court of Appeals, who wrote a law journal article defending birthright citizenship.

Ilya Shapiro, a senior fellow in constitutional studies at the libertarian Cato Institute, expressed skepticism that Trump could change the status quo through an 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 — but regardless, it’s not something that can be done by executive action alone,” he told LifeZette.

Some say only Congress has the power. Peter Schuck, a Yale University law professor who has expressed skepticism that Congress intended to surrender its authority to regulate immigration when it wrote the 14th Amendment, argued, nevertheless, that only Congress can limit birthright citizenship now.

“Congress has the power under the Constitution to change the BC [birthright citizenship] rule,” he wrote in an email to LifeZette. “But Trump clearly cannot do so by EO [executive order] — and I feel confident that no competent lawyer would advise him otherwise. This is just pre-election politics, and misrepresentation and should be sharply criticized as such.”

Birthright citizenship supporters generally point to two arguments. The first is a case decided in 1898 called *United States v. Wong Kim Ark*, in which the Supreme Court held that a man born in San Francisco to Chinese parents could return after visiting China because he was a U.S. citizen.

The second is that English common law, from which America derives much of its legal heritage, has held for centuries that anyone born in the British empire is a subject of the crown.

But von Spakovsky, the Heritage Foundation scholar, told LifeZette that the *Wong Kim Ark* case dealt only with a legal resident and that people who cite it ignore another case decided in the same era — *Elk v. Wilkins* — which held that an American Indian was not a U.S. citizen because the amendment applies only to people “owing no allegiance to any alien power.”

As to the common law argument, von Spakovsky said Americans rejected the notion that foreigners born under British rule were British subjects and were tied to that status for life.

Related: [Trump Plans to End Birthright Citizenship with Executive Order](#)

“We fought a war over that — the War of 1812,” he said.

Ting recommended that Trump draw any executive order narrowly, applying to the smallest number of people possible.

Christopher Hajec, director of litigation at the Immigration Reform Law Institute agreed. He said Trump almost certainly would lose if he tried to deny citizenship to U.S.-born children of green-card holders and people living in America under work visas, or if he tried to apply it retroactively.

But Hajec said Trump could prevail if he focused his efforts on tourists and illegal immigrants.

“I’m pretty confident that this present court would allow a regulation limiting citizenship to the children of legal residents, because it’s reasonable,” he said.

[Trump Immigration Executive Order President To Terminate Birthright Citizenship](#)