



## Trump again raises much-debated but rarely tested question of birthright citizenship

Robert Barnes

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President Trump resurrected a much-debated but rarely tested legal question when he said he planned to issue an executive order that would end the automatic grant of citizenship to those born in this country to noncitizens.

Legal experts have debated for years how to interpret the Citizenship Clause of the Constitution's 14th Amendment, but most agree with the long-held practice of granting citizenship to those born on U.S. soil.

The text of the amendment says: "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."

Some legal scholars argue that the phrase, "and subject to the jurisdiction thereof," seems to give the government leeway to restrict the right, just as other Constitutional amendments can be limited.

But the mainstream opinion from both right and left is that something more would be needed to change what has been the birthright conferred on those born here.

"Regardless of whether birthright citizenship is a good idea, it's enshrined in the Fourteenth Amendment and so would take another constitutional amendment to change," said Ilya Shapiro of the libertarian Cato Institute.

"There's an active academic debate over whether mere legislation could change it with respect to illegal immigrants and tourists, but regardless it's not something that can be done by executive action alone."

Trump said he had been advised by the White House Counsel's Office that he had the power.

"It was always told to me that you needed a constitutional amendment. Guess what? You don't," Trump told Axios in an interview scheduled to air as part of a new HBO series starting this weekend.

When told that view is disputed, Trump asserted: "You can definitely do it with an act of Congress. But now they're saying I can do it just with an executive order."

In the part of the interview released, it is not clear whether Trump would deny citizenship to the baby of any noncitizen, or just to immigrants in the country illegally.

Trump: Immigrants are 'using children' to get into U.S.

President Trump spoke to reporters about immigration on Oct. 13, before leaving D.C. for a rally in Kentucky. (The Washington Post)

The most cited Supreme Court decision in the area is the 1898 case *United States v. Wong Kim Ark*. The court held that a child born to Chinese immigrants who were legal residents was a birthright U.S. citizen under the 14th Amendment.

Related, but less directly on point, was the 1982 case *Plyer v. Doe*, which held that denying children in the country illegally admission to public schools would violate the 14th Amendment's Equal Protection Clause.

Justice William Brennan, writing for the majority in the 5-to-4 decision, noted language from the *Wong Kim Ark* decision.

He said “no 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.”

But modern Supreme Courts simply haven't been presented with the issue, so it is unclear how the current justices would see the issue.

Some legal experts question whether the 14th Amendment provides such a broad mandate, and says the law granting citizenship has developed without real input from Congress.

Retired Judge Richard Posner of the U.S. Court of Appeals for the 7th Circuit was among those who said the purpose of the 14th Amendment was to grant citizenship to recently freed slaves, and that Congress could limit the granting of citizenship.

Michael Anton, a former national security official in the Trump administration, made the case in an op-ed in The Washington Post:

“The notion that simply being born within the geographical limits of the United States automatically confers U.S. citizenship is an absurdity — historically, constitutionally, philosophically and practically,” he wrote.

But Trump's comments set off an immediate debate on the issue, just as he did during the campaign when he criticized what he called “anchor babies.”

On the liberal legal blog Balkinization, Indiana University law professor Gerard N. Magliocca, who has written about the subject, said the issue has been decided.

“The text of Section One of the Fourteenth Amendment, as well as the background law, the debates in Congress, and the subsequent practice are clear on this point,” he wrote. “No doubt the White House can produce at least three stooges to say that the executive order is lawful and then claim that legal experts are ‘divided’ on this issue. It's a lie.”