



# PRESIDENT TRUMP'S ATTACK ON BIRTHRIGHT CITIZENSHIP

## INTRODUCTION

Hours into his presidency, President Trump issued an executive order to end birthright citizenship for children of immigrants where their mother is “unauthorized” or on a lawful but temporary visa, and their father is not a U.S. citizen or lawful permanent resident. This order, entitled “Protecting the Meaning and Value of American Citizenship,” is an attack on a fundamental constitutional protection, and one that is central to equality and inclusion.<sup>i</sup>

Every attack on birthright citizenship, from the 19th century until now, has been grounded in racism. The Fourteenth Amendment to the U.S. Constitution was introduced in the wake of the Civil War to establish that all persons born in the United States and subject to its jurisdiction are U.S. citizens, and to guarantee equal rights to all citizens and equal protection of the laws to all persons under U.S. jurisdiction. It is the cornerstone of civil rights in the United States, and a direct response to previous legal precedent that restricted who could be a citizen and who was a slave.

President Trump cannot unilaterally end birthright citizenship, guaranteed by the Fourteenth Amendment, and the American Civil Liberties Union (ACLU) and others will challenge an attempt by this or any administration to override the Constitution. This paper outlines the legal and policy issues at play and previews how the Trump administration may try to attack this foundational right.

## BIRTHRIGHT CITIZENSHIP IN THE CONSTITUTION: LEGAL BACKGROUND

In the United States, birthright citizenship predates its constitutional protection and was a recognized right under common law.<sup>ii</sup> In 1857, in one of the most shameful and racist judicial decisions in our history,

the U.S. Supreme Court rejected this right in *Dred Scott v. Sanford*, denying citizenship to the descendants of slaves despite their birth in the United States.<sup>iii</sup>

Dred Scott was born in Virginia to two enslaved parents; when his subsequent owner, a surgeon in the U.S. Army, brought him to Missouri where slavery was outlawed, Scott initiated a case under Missouri law to sue for his freedom. In its opinion, rejecting Dred Scott’s claim, the Supreme Court stated that enslaved persons are “and were not intended to be included under the word ‘citizens’ in the Constitution;”<sup>iv</sup> the Court continued that Black enslaved persons had “for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect...”<sup>v</sup>

This decision was controversial even at the time it was issued, and a decade later in 1868, Congress abrogated this infamous ruling by proposing the Fourteenth Amendment to the U.S. Constitution, which provides that “[a]ll 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.”<sup>vi</sup> Although the Fourteenth Amendment was a direct response to the Dred Scott decision and confirmed, in the wake of the Civil War, that former slaves and their children were U.S. citizens, it is also clear from the text of the amendment, its historical context, and contemporaneous congressional debates that this birthright citizenship guarantee applied not only to the former slaves and their descendants but also the children of immigrants to the United States.<sup>vii</sup>

In 1898, thirty years after the Fourteenth Amendment was ratified, the Supreme Court held that a child born in the United States to noncitizen Chinese parents was “subject to the jurisdiction” of the United States and thus a citizen under the Fourteenth

Amendment.<sup>viii</sup> This decision was reached in spite of the Chinese Exclusion Act of 1882, a federal law that barred the entry of most Chinese people into the United States and explicitly prohibited the naturalization of any Chinese national doubling down on prior anti-Chinese immigration restrictions. This was the first significant federal law banning voluntary immigration to the U.S., and it was repeatedly extended, not only limiting immigration from China but also fueling anti-Chinese discrimination and violence in the U.S.<sup>ix</sup> Despite this infamous law and its successor bans, the Supreme Court nevertheless affirmed in *United States v. Wong Kim Ark* that children born in the U.S. to immigrant parents are nevertheless U.S. citizens.

To further cement this protection, in 1952 Congress enacted 8 U.S.C. § 1401, following a 1940 predecessor statute, which provides parallel language to the Fourteenth Amendment and ensures that “a person born in the United States, and subject to the jurisdiction thereof,” is a “citizen[] of the United States.”

### **PRESIDENT TRUMP’S EXECUTIVE ORDER REDEFINING BIRTHRIGHT CITIZENSHIP**

On January 20, 2025, hours after taking office, President Trump delivered on that threat, issuing an executive order titled “Protecting the Meaning and Value of American Citizenship” to redefine birthright citizenship.<sup>x</sup> Far from protecting this core right, the order upends a fundamental constitutional protection. Under this order, children born on American soil to a mother who is “unlawfully present” or lawfully but temporarily present, and a father who is not a U.S. citizen or lawful permanent resident, will no longer be entitled to birthright citizenship. The order applies prospectively to children born 30 days from the order. It further directs the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Commissioner of Social Security to implement this newly-invented rule and directs the agencies to issue guidance on its implementation. The ACLU and partners have challenged this order in federal court.<sup>xi</sup>

If implemented, this order will exclude the children of noncitizens with various statuses in the United

States, such as people on various work visas, student visa holders, people with various protected status like DACA, or asylees.

This Executive Order is clearly unconstitutional; there is no carveout in the Fourteenth Amendment for specific immigration statuses as earlier discussed. If implemented, it would create a permanent underclass of potentially stateless people and deny critical benefits to children born in the U.S. to immigrant parents, including the right to vote, the ability to get a passport and other necessary documentation, and access to essential education, health, employment and other benefits. Denying citizenship to a class of people, born in the U.S., because of their parents’ immigration status will also lead to stigma, racial profiling, and questioning of citizenship of all sorts of families. This order will also result in enormous bureaucratic strain, delays, costs, and confusion for the agencies tasked with implementing this new order and questioning the right to citizenship of children born in this country.

### **POTENTIAL STATE THREATS**

Over the years, state legislatures and officials have also attempted—unsuccessfully—to restrict birthright citizenship, and it is possible that some states may be emboldened by a Trump Executive Order to try again. In 2011, for example, Arizona state legislators introduced bills that would limit citizenship to children born in the United States who have at least one parent who has no allegiance to a foreign country.<sup>xii</sup> These bills created an interstate compact where states would agree to make a distinction in the birth certificates of the children of undocumented noncitizens.<sup>xiii</sup> (Arizona legislators across party lines rejected these bills that same year.<sup>xiv</sup>)

Even without directly attacking the definition of a citizen, some state officials or policies have attempted to interfere with the rights of children born in the U.S. to noncitizens, using tactics we may see by the federal or some state governments. For decades, residents of south Texas were denied passports when the State Department accused midwives of creating fraudulent birth certificates and calling these individuals’ citizenship into question.<sup>xv</sup>

In 2015, Texan officials refused to issue certified birth certificates to U.S. citizens born to undocumented parents, requiring parents to provide a form of primary documentation that was only available to U.S. citizens and lawful permanent residents or else two forms of secondary documentation, most of which was also only available to individuals with lawful status in the U.S. The state settled a lawsuit brought by Mexican parents of U.S. citizens in 2016 and agreed to amend its regulations,<sup>xvi</sup> but given the policy attacks on immigrants in Texas it is possible the state could attempt similar regulations or guidance that would impede if not prevent undocumented residents from getting birth certificates and other documentation for their children.

### RECOMMENDATIONS TO CONGRESS

- Speak out against this new Executive Order, “Protecting the Meaning and Value of American Citizenship”, or any other order that attempts to redefine citizenship.
- Consider filing amicus briefs in litigation, in consultation with litigating organizations.
- Reject any legislation that would purport to codify this attack and attempt to restrict birthright citizenship.
- Seek appropriations language to limit the Trump Administration’s attempts to undermine birthright citizenship.

- Set up an intake hotline to support constituents who are impacted and have their children’s passports, birth certificates, SSN and other benefits denied.
- Commission CBO and other oversight reports in order to document the cost of implementing this new agency vetting for people born to non-citizen parents.
- Create an intake line and support individuals impacted by this Executive Order and attempts by federal or state agencies to deprive them of necessary documentation proving their citizenship.

### RECOMMENDATIONS TO STATE AND LOCAL OFFICIALS

- Reject any state agency action that would restrict the issuance of birth certificates and related documentation to children of immigrants, born in your state, or add additional hurdles and costs for families.
- Speak out against any Executive Order that would redefine citizenship and support communities in your state targeted by these actions.
- Create intake and other support lines for community members in your state who may be impacted by an Executive Order or other federal actions to redefine citizenship or limit the issuance of critical documentation to children of immigrants.

**ACLU Contact:** Sarah Mehta, Senior Policy Counsel, [smehta1@aclu.org](mailto:smehta1@aclu.org)

<sup>i</sup> The White House, Executive Order, “Protecting the Meaning and Value of American Citizenship,” Jan. 20, 2025, <https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-meaning-and-value-of-american-citizenship/>.

<sup>ii</sup> Under the common law rule of jus soli, every child born in a country was a citizen regardless of the alienage of the parents, with very narrow exceptions for children of ambassadors and invaders during a hostile occupation. See, e.g., *Inglis v. Trustees of Sailor’s Snug Harbor*, 28 U.S. 99, 164 (1830).

<sup>iii</sup> See *Scott v. Sanford*, 60 U.S. 393, 404-05 (1857).

<sup>iv</sup> 60 U.S. at 404.

<sup>v</sup> 60 U.S. at 407.

<sup>vi</sup> U.S. Const. amend. XIV, § 1.

<sup>vii</sup> See generally, Margaret Mikyung Lee, *Birthright Citizenship Under the 14th Amendment of Persons Born in the United States to Alien Parents*, Congressional Research Service, (2012), pp. 6-8 citing Cong. Globe, 39th Cong., 1st Sess. (1866) <https://sgp.fas.org/crs/misc/RL33079.pdf>.

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<sup>viii</sup> *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (concluding that all children born in the United States, including of noncitizen parents, are citizens, except only some narrow exceptions at common law for children born of “foreign sovereigns or their ministers,” noncitizens serving on a “foreign public ship[],” or “enemies within and during a hostile occupation of part of our territory”).

<sup>ix</sup> See generally, Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (2004).

<sup>x</sup> The White House, Executive Order, “Protecting the Meaning and Value of American Citizenship,” Jan. 20, 2025, <https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-meaning-and-value-of-american-citizenship/>. President Trump’s campaign website previewed his plans to end birthright citizenship through an Executive Order “making clear to federal agencies that under the correct interpretation of the law, going forward, the future children of illegal aliens will not receive automatic U.S. citizenship. Trump Vance 2024, Agenda47: Day One Executive Order Ending Citizenship for Children of Illegals and Outlawing Birth Tourism, <https://www.donaldjtrump.com/agenda47/agenda47-day-one-executive-order-ending-citizenship-for-children-of-illegals-and-outlawing-birth-tourism>.

<sup>xi</sup> *New Hampshire Indonesian Community Support v. Donald J. Trump*, Case No. 1:25-cv-38, D. N.H. Jan. 20, 2025, <https://www.aclu.org/cases/new-hampshire-indonesian-community-support-v-donald-j-trump?document=Complaint>.

<sup>xii</sup> House Bill 2562; Senate Bill 1308

<sup>xiii</sup> Under this compact, a person without allegiance to a foreign country was defined as a U.S. citizen or national or a person with permanent lawful residence in the U.S., or a person without another nationality in a foreign country.

<sup>xiv</sup> Frank James, National Public Radio, *Arizona Rejects Birthright Citizen Bills; Utah Pushes Immigration Reform*, March 18, 2011, <https://www.npr.org/sections/itsallpolitics/2011/03/18/134652376/arizona-rejects-birthright-citizenship-bills-utah-pushes-immigration-reform>

<sup>xv</sup> Kevin Sieff, *The Washington Post*, “U.S. is denying passports to Americans along the border, throwing their citizenship into question,” Sept. 13, 2018, [https://www.washingtonpost.com/world/the\\_americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd-2a1991f075d5\\_story.html](https://www.washingtonpost.com/world/the_americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd-2a1991f075d5_story.html); <https://www.texasstandard.org/stories/thousands-of-u-s-citizens-in-south-texas-have-been-denied-passports/>

<sup>xvi</sup> See generally, ACLU of Texas, *Perales Serna, et al. v. Texas Department of State Health Services*, <https://www.aclutx.org/en/cases/perales-serna-et-al-v-texas-department-state-health-services-vital-s>