



# TRUMP'S EXECUTIVE ORDER RESTRICTING BIRTHRIGHT CITIZENSHIP IS SO UNCONSTITUTIONAL THAT EVEN THE SUPREME COURT MAY REJECT IT

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On January 20, 2025, Inauguration Day, Donald Trump signed an [executive order](#) entitled "Protecting the Meaning and Value of American Citizenship", which interprets the language "subject to the jurisdiction thereof" in the Fourteenth Amendment to mean that U.S. citizenship does not extend to individuals born in the United States:

1. when that person's mother was unlawfully present in the United States and the father was not a United States citizen or lawful permanent resident at the time of said person's birth,
2. or when that person's mother's presence in the United States at the time of said person's birth was lawful but temporary (such as, but not limited to, visiting the United States under the auspices of the Visa Waiver Program or visiting on a student, work, or tourist visa) and the father was not a United States citizen or lawful permanent resident at the time of said person's birth.

The executive order further directs agencies not to "issue documents recognizing United States citizenship, or accept documents issued by State, local, or other governments or authorities purporting to recognize United States citizenship" to individuals falling within these categories. Further, the executive order specifies that it applies "only to persons who are born within the United States after 30 days from the date of this order", and does not speak to whether the U.S. citizenship of a child who has already been born to two non-U.S. citizen or LPR parents will continue to be recognized.

The American Civil Liberties Union has already [sued](#) the Trump administration over this executive order. The complaint argues that the Fourteenth Amendment was indented to confer U.S. citizenship on all persons born in the United States, regardless of the citizenship status of their parents, and asserts that the executive order violates the Fourteenth Amendment, 8 U.S.C. § 1401, which mirrors the Fourteenth Amendment's language, and the Administrative Procedure Act.

The granting of automatic citizenship to a child born in the US is rooted in the first sentence of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."

Lost in the heated political rhetoric surrounding Trump's executive order is that it is next to impossible to amend the hallowed Fourteenth Amendment, which was enacted to ensure birthright citizenship to African Americans after the Civil War, and following the infamous decision in [Dred Scott v. Sanford](#) that held that African Americans could not claim American citizenship. In *United States. V Wong Kim Ark*, 169 U.S. 649 (1898), the Supreme Court extended the Fourteenth Amendment to an individual who was born to parents of Chinese descent and during a time when Chinese nationals were subjected to the Chinese exclusion laws:

*The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owning direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons, of whatever race or color, domiciles here, is within the allegiance and the protection, and consequently subject to the jurisdiction of the United States.*

Although in [Elk v. Williams](#), 112 U.S. 94 (1884), those born within Native

American tribes were not born “subject to the jurisdiction” of this country because they owed allegiance to their tribal nations rather than the United States, this preclusion was eventually eliminated by the [Indian Citizenship Act of 1924](#). Even the Board of Immigration Appeals in [Matter of Cantu](#), Interim Decision #2748, broadly held that one who was born on a territory in 1935, the Horcon Tract, where the United States had impliedly relinquished control, but had not yet ceded it to Mexico until 1972, was born “subject to the jurisdiction” of the United States and thus a US citizen.

Other lawsuits are sure to follow, and the executive order may be blocked by federal courts. As the recent [decision](#) on DACA in the Fifth Circuit, which enjoined the program only in Texas, demonstrates, a federal court decision could result in the different definitions of who is a U.S. citizen depending on the jurisdiction. Thus, even if plaintiffs prevail in the legal action in federal court in New Hampshire, the court may not issue a nationwide injunction. A Trump appointed federal judge in Texas in a different lawsuit may reach a different conclusion based on his or her interpretation of “subject to the jurisdiction thereof” in the Fourteenth Amendment. Given its current conservative composition, however, Trump is hoping that the Supreme Court may ultimately accept his administration’s reinterpretation of the “subject to the jurisdiction thereof” language and uphold the executive order. Even that is unlikely as the parents of a child who are undocumented or in nonimmigrant status are always subject to prosecution, unlike a diplomat who enjoys immunity, and are thus subject to the jurisdiction of the US. It is also highly unlikely that nonimmigrant parents would be considered enemies during a hostile occupation of a part of US territory even if Trump might like to imagine so!

In the meantime, the executive order creates much ambiguity and poses severe consequences for individuals who otherwise would have been U.S. citizens. The executive order applies not only to children of two undocumented parents, but also to the U.S. born children of parents who hold a valid nonimmigrant status, such as H-1B and H-4. How will a child as soon as it is born acquire H-4 status? One needs to be admitted into the US in H-4 status or change from another nonimmigrant status into H-4 status. Perhaps, the Trump administration may need to issue a regulation recognizing H-4 status of the child at the time of its birth. As we noted in a [prior blog](#), the best chance for Indian-born beneficiaries of approved I-140 petitions who are trapped in the employment-

based second (EB-2) and third (EB-3) preference backlogs to obtain permanent residence without waiting for several decades could be sponsorship by a U.S.-born adult child. Parents of children born after the effective date of the executive order may no longer have this opportunity. The executive order will cruelly create a permanent underclass of noncitizens. The child in H-4 status would have to leave the US when it turns 21 unless it finds a way to change to another nonimmigrant status or obtain permanent residence independently such as through marriage with a U.S. citizen.

The executive order's application to other categories of children born in the U.S. is unclear. For example, would U.S. citizenship extend to the child born to a mother in valid H-1B status, but who also had a pending I-485 application and is able to exercise portability under INA § 204(j)? Similarly, would a child born to a nonimmigrant mother be considered a U.S. citizen if the father is an anonymous sperm donor in the U.S.? Based on the plain language of the executive order, it appears likely that U.S. citizenship would not extend to either of these children.

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Update: Since the publication of the blog, on January 23, 2025 Judge Coughenour in the US District Court Western District of Washington at Seattle issued a temporary injunction stating "This is a blatantly unconstitutional order. Where were the lawyers when this decision was being made?"