



BEYOND FUTURE NEWBORNS: HOW UPHOLDING TRUMP'S BIRTHRIGHT CITIZENSHIP ORDER COULD JEOPARDIZE TENS OF MILLIONS OF EXISTING AMERICANS

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On April 1, the Supreme Court heard oral argument in [Trump v. Barbara](#), a case which raises a 14th Amendment challenge to President Trump's [executive order](#) restricting birthright citizenship. The executive order, which was discussed in detail in a [prior blog](#), 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 plaintiffs, mostly noncitizen parents of children born in the United States, argued that the executive order violates the 14th Amendment and 8 U.S.C. § 1401(a), which guarantee those born in the United States citizenship.

The Supreme Court appeared largely unpersuaded by the Trump Administration's arguments in support of the executive order. In her colloquy,

Justice Amy Coney Barrett [noted](#) the potential for “messy” outcomes in the implementation of the executive order. Referring to foundlings, or abandoned children born to parents of unknown identity, Justice Barrett said:

“The thing about this is, and then you have to adjudicate, if you’re looking at parents, and if you’re looking at parents’ domicile, then you have to adjudicate both residents and intent to stay. What if you don’t know who the parents are?... “How would it work? How would you adjudicate these cases? You’re not gonna know at the time of birth, for some people, whether they have the intent to stay or not...Including U.S. citizens, by the way. I mean, what if you have someone who is living in Norway with their husband and family, but is still a U.S. citizen, comes home and has her child here and goes back? How do we know whether the child is a U.S. citizen because the parent didn’t have an intent to stay?”

If implemented, the executive order could have perverse and far-reaching [consequences](#). Children born in the United States to undocumented parents would be left without legal status. Because some countries do not automatically confer citizenship to children born abroad based on their parents’ status, some children in this situation could even be born stateless. The U.S. born children of parents who hold a valid nonimmigrant status, such as H-1B and H-4, will also be impacted. One needs to be admitted into the U.S. in H-4 status or change from another nonimmigrant status into H-4 status, so it is unclear how a child could acquire a nonimmigrant status from birth. Parents might be forced to scramble and file immigration applications immediately following a child’s birth to ensure that they are not out of status. Because birth in the United States would no longer be sufficient to confer citizenship, even U.S. citizen parents might be forced to provide exhaustive proof of legal status to ensure that citizenship was also extended to their children. These scenarios are analyzed in greater detail in a [prior blog](#).

Moreover, there is a potential for the executive order to eventually be expanded and applied retroactively as well. Justice Sotomayor [noted](#) that when the Supreme Court ruled that “Indians could not become citizens”, the federal government undertook efforts to de-naturalize even individuals who had already become citizens. D. John Sauer, the lawyer for the Trump administration, emphasized that the administration sought only to apply the order prospectively, but this position does not allay concerns that the executive order could not be applied retroactively in future. Given that millions of

Americans are the children of immigrants, any efforts to retroactively apply the order would have unthinkable consequences. Indeed, many supporters of the Trump administration might find their US citizenship being thrown into question if their parent was not lawfully present in the US or were on a temporary visa. And if these concepts did not exist before the mid-20th century, Americans would have to prove that their parents or their ancestors were domiciled in the US, as D. John Sauer argued for the government was the intent of the Framers of the Fourteenth Amendment.

If Trump's Executive Order is upheld it not just creates a permanent subclass of people born in the US in the future but the destabilization of citizenship itself across generations. If the constitutional meaning of citizenship can be redefined after 150 years, what happens to all citizenship claims derived through parents and grandparents and even beyond who relied on [*United States v. Wong Kim Ark*](#)? It creates a multigenerational problem. If X was never a citizen at birth, then was X able to transmit citizenship to Y?

Trump and his supporters aim for mass deportations. This fantasy would be realized well beyond their wildest dreams if they too get deported through the destabilization of citizenship across generations!

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