

# Utah legal scholars, politicians say Trump can't end birthright citizenship with order

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SALT LAKE CITY — There is no disagreement among legal scholars, politicians and advocacy groups in Utah that President Donald Trump can't end birthright citizenship with the stroke of a pen. And for some, Trump's talk of issuing an executive order denying citizenship to babies born in the U.S. to noncitizen parents is nothing more than midterm electioneering.

"The way to change birthright citizenship would be through constitutional amendment, short of that it's electoral politics," said Mark Alvarez, an attorney with Immigrant Defenders Law Group in West Valley City.

Trump told HBO's Axios in an interview released Tuesday that the White House counsel has advised him that there is legal standing to terminate birthright citizenship.

Even House Speaker Paul Ryan, R-Wisc., told a Kentucky radio station, "Well, you obviously cannot do that."

The 14th Amendment, passed after the Civil War, states: "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."

The U.S. Supreme Court has upheld the law for legal permanent residents, but it has never decided a citizenship case involving an illegal immigrant or a short-term visitor to the U.S.

"The president doesn't get to make his own laws," said Rep. Mia Love, R-Utah, adding she has always opposed presidential attempts to change immigration law unilaterally.

"The Constitution gives Congress, not the president, the power to 'establish a uniform rule of naturalization' and the 14th Amendment makes the conditions of citizenship clear: individuals born in this country are citizens. The executive cannot unilaterally change those facts," she said in a statement. Love's parents emigrated from Haiti to the U.S. in the 1970s. Her birth in the U.S. in 1976 paved the way for them to become citizens under immigration law at the time.

Immigration, she said, is a personal issue for her.

"I'm proud of the fact that my parents studied American history. They studied the Constitution. When they took their pledge to become a member of the United States, not only were they willing to take on the benefits, but they were willing to take on the responsibilities also, and I'm a product of that," she said.

Salt Lake County Mayor Ben McAdams, Love's Democratic opponent in the 4th Congressional District, said Trump's proposed action is a result of Congress "once again" failing to address immigration reform. "Congress has the legislative authority for that and the Constitution is clear," he said in a statement. "To succeed, we need members of Congress who are strong enough to resist special interests and who are willing to work across party lines. That's what I will do as Utah's member of Congress."

Sen. Mike Lee, R-Utah, has held the position that Congress must clarify the intent of the citizenship clause through legislation specifying that children born to illegal immigrant parents in the U.S. are not entitled to automatic citizenship.

The senator has backed legislation to amend immigration law to consider a person born in the U.S. "subject to the jurisdiction" of the U.S. for citizenship at birth only if one parent is a U.S. citizen, a lawful permanent resident or on active military duty.

"Sen. Lee does believe Congress has the power to determine what it means to be born in the United States 'and subject to the jurisdiction thereof.' He does not know what legal basis there might be for the executive branch to redefine the meaning unilaterally," said Lee spokesman Conn Carroll.

But constitutional scholar and University of Utah law professor Wayne McCormack said neither Congress nor the president can change the meaning of the Constitution. Interpretation of the Constitution rests with the Supreme Court.

"It seems like an obvious ploy because it's so far-fetched," he said of Trump raising the idea of an executive order a week before Election Day.

However, he said, if the president wants to get the Supreme Court to reverse previous rulings on birthright citizenship, signing an order that would face legal challenges would be a way to go about it. The high court ruled in 1898 that "subject to the jurisdiction thereof" means children of foreign diplomats born in the U.S. are not citizens nor are children of an invading army.

"Those are the only two categories at the time that were in the minds of the drafters," he said. "In order to try and apply that language to the children of persons who are here without lawful permission, they would have to get the Supreme Court to adopt an interpretation that was not the same in the 1890s when the court decided the case."

McCormack said that would be a challenge for the "originalists" — those who interpret the Constitution in light of its original meaning and from the perspective of those who drafted and adopted it — on court.

Interestingly, Trump's two Supreme Court appointees, Neil Gorsuch and Brett Kavanaugh, are originalists.

McCormack said an argument could be made that the court got it wrong in 1898, and to understand the intent, a court would have to go back to the adoption of the 14th Amendment in 1868.

Luis Garza, executive director of Comunidades Unidas, a West Valley City-based Latino advocacy group, said Trump's musings on ending birthright citizenship are "another very clear attack on immigrants" and an "example of the anti-immigrant sentiment of this White House."

"This administration has continued to increase fear and uncertainty among immigrant families here in the state and (is) making it more and more difficult for families to continue to thrive," he said.

Garza said he is confident any attempt to end birthright citizenship by executive order would not hold up in court.

"It is something that is clearly part of the Constitution so, an executive order — I don't know how that would change anything. ... But I think what is more dangerous is just the message that is being sent," he said.

Garza wants to see a strong response to Trump's remarks from Utah's political leaders.

"I really hope that our congressional delegation stands up for our Constitution and stands up for the rights of everyone in this country," he said. "We really need to put pressure on all our representatives locally and at the federal level to really stand up for immigrant families."

Brittney Nystrom, executive director of the American Civil Liberties Union of Utah, said there would "absolutely be legal challenges" to any executive order from the president.

"It's very clear that eliminating citizenship for individuals born in the United States would be unconstitutional. ... Reading the text of the Constitution leaves no ambiguity. It's very clear what the 14th Amendment guarantees," Nystrom said.

Undoing 14th Amendment protections would, besides affecting the children of undocumented immigrants, apply to any American for whom "there was some kind of confusion about that child's parents' immigration status," she said.

Nystrom said the citizenship of those born to parents in the U.S. on temporary visas, for example, would also be threatened if birthright provisions were rolled back.

"Especially in the current context, where we have pretty rampant anti-immigrant hatred, this kind of a tactic would potentially unleash even more efforts to question what rights and liberties all immigrants have in this country," she said.

Nystrom said Utah's congressional delegation should "carry out their oath to uphold the Constitution" and reject Trump's idea.

Catholic Community Services of Utah, which runs immigration and refugee resettlement programs, also heavily criticized the president's proposal Tuesday.

Aden Batar, director of migration and refugee resettlement for Catholic Community Services, said the idea of undoing birthright citizenship shows that Trump "doesn't have any heart whatsoever for immigrants or refugees who come into this country."

Batar contends Trump is using "tactics to scare the immigrants and refugees who are coming to America, that this is not a country that welcomes anymore.

"I think this is the wrong message that the president is sending. That is not what America has stood for, this is not what America is about," Batar said.

If the children of Utah's immigrants and refugees in Utah "cannot get what the Constitution is granting for them, I don't know who will protect (those) rights," he said.

But Batar, like Garza and Nystrom, said he is confident a Trump executive order would not have the legal standing to survive.

**Contributing:** Ladd Egan