

[MUSIC PLAYING]

NINA MOINI: The US Supreme Court just wrapped up oral arguments in the last hour in a case that could reshape the constitutional right to birthright citizenship. President Donald Trump, in one of his first moves in office back in January 2025, issued an executive order that sought to end birthright citizenship. That led to a flurry of lower court challenges that's made its way to the highest court in the land.

If the court rules to limit or end constitutional protections for birthright citizenship, research has shown that some 250,000 children born in the US each year would be without citizenship. University of Minnesota professor and constitutional law expert Jill Hasday was listening in on this morning's arguments and is here to help us sort through all that she heard. Thanks for being with us, Jill.

JILL HASDAY: Thanks for having me.

NINA MOINI: Would you take us back to that executive order from President Donald Trump in January 2025 and talk about what that was about?

JILL HASDAY: So there's been a long standing view, very widely held since the 14th Amendment was ratified in 1868, that the birthright citizenship clause of the 14th Amendment extends citizenship to everyone born in the United States, with just a few exceptions-- so people whose parents are here on a diplomatic passport, if somehow you're born and your parents are part of an invading army, or Native Americans. And the theory was that Native Americans were actually subject to their own sovereignty. And now, Native Americans are US citizens through a statute.

This executive order purported to have a wholly different interpretation of what the 14th Amendment required. And it said that it was denying birthright citizenship to anyone who's born in the United States but doesn't have at least one parent who's either a citizen or a lawful permanent resident. So that would exclude children who are born to undocumented immigrants, but it would also exclude children whose parents are here legally but temporarily-- for instance, your parents are getting their PhD as part of a student visa. Under the executive order, you wouldn't have birthright citizenship.

Another feature of the executive order that I'll just note is it purported to apply only prospectively-- so 30 days from when it went into effect. It hasn't gone into effect because every lower court found that it was unconstitutional. But the idea is if it was able to go into effect, it would apply prospectively.

NINA MOINI: OK. Thank you for that. And thank you for tracking everything this morning that was going on for us. The case at the center of all this is known as *Trump v Barbara*. What was the main argument from the Trump administration?

JILL HASDAY: OK. So the text of the 14th 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. What the Trump administration wants to do is they want to interpret the phrase, "subject to the jurisdiction thereof," to mean that you're lawfully in the United States. You don't have any countervailing allegiances to, say, another country where you're a citizen.

As I said, the dominant reading of that phrase had just been "subject to the jurisdiction thereof," meaning US law applies to you. That's, for instance, why the children of diplomats who are here under diplomatic immunity, they don't have birthright citizenship. Because, if you've ever tried to park near the UN, you know that diplomats are immune from ordinary judicial process. So the idea is you can't come here, say you're not subject to US law, but then have your kids get birthright citizenship. In contrast, your ordinary undocumented immigrant, they're coming to the United States, and they intend to remain, and they want to be subject to US law.

NINA MOINI: Can you just describe, again, what allegiances are? Just tangibly, how do you measure allegiance?

JILL HASDAY: It doesn't seem-- there's a variety of ways you could measure allegiance. So at one point, Justice Jackson says, are you going to have a hearing in the delivery room and ask the mother what she thinks? And it's possible that would be allowed under their view of what the Constitution requires. But what they're saying is we measure allegiance by, are you a citizen or a lawful permanent resident? If you're not, we assume you don't have allegiance to the United States.

NINA MOINI: OK. So the other side, the arguments were led by the ACLU, American Civil Liberties Union. And what were they arguing?

JILL HASDAY: The ACLU was arguing, essentially, to keep the ordinary, common understanding of the 14th Amendment. They stressed this 1898 case, *Wong Kim Ark*, which involves a man of Chinese ancestry. He was born in San Francisco to non-citizen parents. His parents can't become citizens because we have racist immigration laws which prevent Chinese immigrants from becoming US citizens.

He leaves. He travels to China. And then he comes back. And there's a question of, well, does he have a right to come in when we're generally not taking Chinese immigrants? And the Supreme Court says, yes, he has a right to come in. He is a birthright citizen, even though he's born to non-citizen parents. So the ACLU is arguing that the Supreme Court should stay with the interpretation that it has adopted and more. And that's, I think, its main argument.

Second argument the ACLU has, which is also, I think, very strong, is in 1952, Congress enacted the Immigration and Nationality Act, which establishes that anyone born in the United States and subject to the jurisdiction thereof is a citizen. The 14th Amendment sets a floor for federal citizenship, but it doesn't set a ceiling.

Congress today could give citizenship to anyone it wants. So even if the 14th Amendment means what the Trump administration says it does, I think, pretty clearly, Congress in 1952 thought "subject to the jurisdiction thereof" means everyone born in the United States except for the diplomats' kids. So the ACLU also has a statutory argument that people born in the United States are statutory citizens.

NINA MOINI: So the lower courts have all ruled against the Trump administration's position. As you were tuning in and listening this morning, was anything standing out to you? Was anything surprising about how different justices were arguing?

JILL HASDAY: OK, so I think the Trump administration is going to lose. I don't like to predict the future, but I'm very confident of that.

NINA MOINI: OK.

JILL HASDAY: My prediction would be I think the vote is either going to be 8-1, with Alito the sole vote for the Trump administration's view, or possibly 7-2 if it's Alito and Thomas for the Trump administration's view. To me, it was very striking-- of course, the three justices appointed by Democrats are completely not on board with this.

I thought Kagan had a very good question where she says, your brief concedes that your position is this revisionist one. There's been this huge tradition of thinking about the 14th Amendment a different way. You have to have this huge evidentiary burden-- where is that evidence?

But to me, what was striking in the oral argument is even the many members of the conservative six-person supermajority were quite skeptical. Roberts, at one point, he likes these zingers-- at one point, he says, it's a new world, but it's the same Constitution. That's mic drop for Roberts.

Or Gorsuch, at one point, says to the solicitor general, I wouldn't rely on *Wong Kim Ark*-- that's the case about the person of Chinese descent-- because if *Wong Kim Ark* is still good law, you lose. Barrett has a bunch of things she says, but one thing she's obviously concerned about is foundlings-- so that's children who are, basically, abandoned at birth.

I think this fits in with her kind of anti-abortion politics. But she says, under your theory, those kids don't have citizenship because we don't know who their parents are. And that's just a disaster. Kavanaugh says a few times that, as a matter of policy, maybe he suggests that the Trump administration has something to say for it.

But at one point he says to the ACLU, if we agree with you on *Wong Kim Ark*, you win. And it could be a short opinion. And the ACLU lawyer, knowing when a short answer is the best answer, just says "yes."

NINA MOINI: So I'm seeing here we might be expecting a decision, do you think-- it sounds like they are kind on their way-- but maybe by the summertime. Or what does it usually take?

JILL HASDAY: So the Supreme Court doesn't tell us in advance when they're issuing an opinion. Typically, the term would end before July 4. And usually, the most controversial, or at least politically salient, opinions come at the end of the term. And that is because they're working on it the longest. I don't know.

So is this a politically salient opinion? Are people interested? Obviously. I'm on MPR talking about it an hour after it ended. But on the other hand, it doesn't seem like there's going to be so much dissent. But, certainly, I would say by July, we'll have the opinion.

NINA MOINI: Well, just lastly, President Trump, really, at the heart of this, has said that the country is silly to be allowing this, saying that it leads, in a way, to more illegal migration or immigration happening. NPR was reporting President Trump was there listening two arguments. What did you think of that?

JILL HASDAY: It's unprecedented. Actually, he went to the oral argument. He heard the solicitor general's argument in full arguing for his side. But then he left about 10 minutes into the ACLU argument, which is, I feel comfortable saying, a little rude, actually, to leave in the middle, because he has guards and stuff. It's not just slipping out.

NINA MOINI: But they were reporting that that's not common for a president to have ever done that.

JILL HASDAY: The reporting is that the president has never gone to a Supreme Court oral argument, which I haven't done a study of that. So I'm not sure. But, certainly, if it's not unprecedented, it's virtually unprecedented. I suppose the idea was to emphasize the importance he thought of the case, or maybe to put a little pressure on the justices.

I could imagine that backfiring, because one theme you could see in the Supreme Court's opinions is, what is the Supreme Court care most about? A plausible answer to that is it cares most about itself-- its own institutional independence and authority. And having the president come and say, "decide the way I want to," might give some people a little stiffness of the spine to reject.

I also, just one more part of your question-- Trump can think that he doesn't like the 14th Amendment. That's not the policy choice he would make. But that is not the question of the day. The question is what the Constitution requires, not whether Donald Trump agrees with it as a matter of policy. In fact, part of the reason to put principles in the Constitution is so that they're not subject to political vagaries.

NINA MOINI: All right, Jill, thanks, as always, for your analysis. Really appreciate your time.

JILL HASDAY: Thanks for having me.

NINA MOINI: That was Jill Hasday.