

COMMENTARY [Gender](#)

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U.S. President Donald Trump joined by women athletes signs the “No Men in Women’s Sports” executive order at the White House on February 5, 2025 in Washington, D.C.

**KEY TAKEAWAYS**

- 1 **They claim the president's directive prohibiting expenditure of federal funds for the purpose of performing transgender treatment or surgery is illegal.**
- 2 **The president's executive order is not ultra vires because it does not violate any specific federal law.**
- 3 **The president's executive order easily satisfies the lowest tier of judicial scrutiny.**

In two short weeks, President Donald Trump has issued scores of executive orders, many of them related to gender identity. Outraged critics claim that he lacks the authority to do so. Do they have a case?

Consider first the orders themselves. In addition to recognition of a formal two-sex policy for the whole of government, Trump issued executive orders barring transgender individuals from service in the military, requiring the removal of preferred pronouns in all government communiques, and directing all federally funded educational institutions to maintain athletic programs separated by biological sex, rather than gender identity.

One particular executive order of January 28, 2025—"Protecting Children from Chemical and Surgical Mutilation"—directed all federal agencies, among others, to "immediately take appropriate steps to ensure that institutions receiving Federal research or education grants end gender-affirming medical care for people under

Medicaid conditions of participation or conditions for coverage,” and through “section 1557 of the Patient Protection and Affordable Care Act,” the ACA’s non-discrimination provision.

An unsurprising flurry of litigation ensued, and, in the most recent, the American Civil Liberties Union sued the president and various federal executives on behalf of national LGBTQ+ advocacy organization, PFLAG, and a group of trans-identified minors and their parents.

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Chief among their claims is that this executive order is beyond the scope of the president’s authority (or *ultra vires*) because Congress—not the executive—controls the power of the public purse. Therefore, they claim, the president’s directive prohibiting expenditure of federal funds for the purpose of performing transgender treatment or surgery is illegal for two reasons: First, Congress has already appropriated funds to be disbursed through HHS without any such limitation, and second, the president cannot revise the text of statutes passed by Congress and signed into law.

But that argument conflates apples with oranges. Yes, appropriations bills are acts of Congress and therefore are statutes. And, yes, Congress passed, and then-President Joe Biden signed into law, the appropriations bill on which plaintiffs rely. But appropriations acts are not identical to statutes that regulate public or private conduct—and that difference matters.

Appropriations laws fund the operation of government. That is critical because, under the Antideficiency Act, government officials may not spend undisbursed federal funds, nor may they encumber the federal government by using a credit card to run up debt. In fact, it is a crime to do so.

Appropriations laws, however, operate against a background of substantive laws empowering government officials to take certain actions and prohibiting those officials from taking others. For example, the Defense Authorization Act passed annually by Congress fixes the number of aircraft carriers that the Defense

Moreover, congressional appropriators, and the appropriations bills that wend their way through the legislative process, do not generally make new substantive law through the appropriations process. The United States Supreme Court made that clear in the well-known case of *Tennessee Valley Authority v. Hill* (1978).

In that case, the court addressed the issue of whether Congress had effectively repealed the Endangered Species Act (ESA) by repeatedly funding the operation of the Tellico Dam and Reservoir Project, even though its continued operation put at risk the continued existence of an endangered small fish, known as the snail darter. The court roundly rejected the argument that continued funding of the dam implicitly repealed the ESA:

We recognize that both substantive enactments and appropriations measures are “Acts of Congress,” but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need [emphasis added].

While Congress could make new substantive law through appropriations bills, should it choose to do so, there is one condition. In *Robertson v. Seattle Audubon Society* (1992), the Supreme Court explained that Congress can legislate through appropriations laws but only “as long as it does so clearly.” The plaintiffs in *PFLAG, et al. v. Trump*, however, do not cite the text of any substantive or appropriations statute law that President Trump violated, so the *TVA v. Hill* rule applies here.

The PFLAG plaintiffs have also brought various constitutional claims in their lawsuit—including the parents' claim that the order violates their Fourteenth Amendment substantive due process right to direct the medical care of their minor children, and a claim that the order violates the Fourteenth Amendment's Equal Protection Clause because it "discriminate[s] based on sex and transgender status." They also claim that the order violates the First Amendment.

Those claims are unpersuasive.

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The Supreme Court will decide this term whether discrimination based on alleged or proven transgender status is entitled to any heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause. The majority of justices expressed skepticism during oral arguments in *United States v. Skrmetti* that it would. As for the general right to direct the medical care of one's minor children, neither the Supreme Court nor any other federal court has ever held that access to experimental, contested, or unproven medical interventions is constitutionally guaranteed.

Atop that, the court has expressly held—twice, in *Maher v. Roe* (1977) and *Harris v. McRae* (1980)—that even if a party has a constitutional right to select certain medical care, the government has no constitutional duty to pay for their choice.

As for the plaintiff's First Amendment claim—that by "withholding federal grants, the [order] engage[s] in unconstitutional viewpoint discrimination in violation of the First Amendment and violate the rights of grant recipients and transgender patients"—there is nothing to remotely suggest this is so.

In *Prince v. Massachusetts* (1944), the court rejected the claim that the First Amendment's Free Exercise Clause prohibits a state from applying its child labor laws to the Jehovah's Witnesses. Also, in *Jehovah's Witnesses v. King's County Hospital Unit No. 1* (1968), the court rejected a claim by parents that the state should not be able to provide life-saving treatment to their child against their

The president’s executive order easily satisfies the lowest tier of judicial scrutiny, rational basis, in that the government clearly has a legitimate state interest (protecting vulnerable minors), and there is clearly a rational connection between that interest and the executive order’s means and goals. Given that the most recent and comprehensive study of medical transgender treatment (England’s nine-year Cass Report released last year) found no proven long-term medical benefit from these treatment for minors, the president’s executive order is all the more constitutionally sound.

Objection overruled.

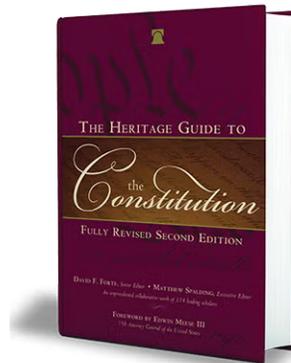
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