7 FAM 1170 COURT CASES AND OPINIONS ABOUT ACQUISITION AND RETENTION OF U.S. CITIZENSHIP

This subchapter is about precedent cases involving acquisition and retention of U.S. citizenship.

7 FAM 1171 UNITED STATES V. WONG KIM ARK

The case of United States v. Wong Kim Ark, decided by the U.S. Supreme Court in 1898 (169 U.S. 649), affirmed the right to citizenship of the United States, under the Fourteenth Amendment to the U.S. Constitution, of a child born in the United States, of parents of Chinese descent, who, at the time of his birth, were subjects of the Emperor of China, but not employed in any diplomatic or official capacity. Thus the Supreme Court made it clear that children born subject to U.S. jurisdiction to alien parents acquire U.S. citizenship--even if their parents are not eligible for naturalization. The opinion of the court, delivered by Mr. Justice Gray, is found in 7 FAM 1171 Appendix A .

7 FAM 1172 WEEDIN, COMMISSIONER OF IMMIGRATION, V. CHIN BOW

This case was decided by the Supreme Court in 1927 (274 U.S. 657). It construed Section 1993 of the Revised Statutes as requiring that fathers may not have the power of transmitting by descent the right of citizenship until they shall become residents in the United States. For the opinion of the court, as delivered by Mr. Chief Justice Taft, see selected portions with omissions, in 7 FAM 1172 Appendix A .

7 FAM 1173 ROGERS V. BELLEI

In Rogers v. Bellei (1971), the U.S. Supreme Court upheld the constitutionality of Section 301(b) INA. The court held that the Congressional imposition of the conditions subsequent on citizenship with which persons in Bellei's circumstances must comply was not "unreasonable, arbitrary, or unlawful."

The Court also held that Mr. Bellei was not a "Fourteenth-Amendment-first-sentence citizen" and that his position therefore, was different from that of Beys Afroyim, who was a naturalized citizen. (In 1969 the U.S. District Court for the District of Columbia had held for Bellei that the retention provisions were unconstitutional, citing "the broad teaching of Afroyim and Schneider that once American citizenship has been recognized or conferred Congress may not remove the status..."). The Court's opinion is excerpted in 7 FAM 1173 Appendix A .

7 FAM 1174 RUCKER V. SAXBE

In Rucker v. Saxbe the U.S. Court of Appeals for the Third Circuit rejected plaintiff Rucker's contention that the retention provisions of Section 301(b) INA were inapplicable to him because he lacked specific knowledge of them. The Court cited language in the District Court's finding. That Court had stated that Rucker, when full grown, had made no "rational inquiry" into his U.S. citizenship status. The Circuit Court held that the "absence of specific knowledge of the retention provisions" was no bar to their application. The Court also dismissed as without merit the contention that the application of the retention provisions to Mr. Rucker violated due process. For the opinion of the Court, see 7 FAM 1174 Appendix A .

7 FAM 1175 THROUGH 1179 UNASSIGNED

7 FAM 1171 Appendix A

(TL:CON-13; 12-31-84)

EXCERPT

United States v. Wong Kim Ark
169 U.S. 649 (1898)

"Wong Kim Ark was born in 1873 in the city of San Francisco... His father and mother were persons of Chinese descent, and subjects of the Emperor of China; they were at the time of his birth domiciled residents of the United States, having previously established and still enjoying a permanent domicile and residence therein at San Francisco... Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States, and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him therefrom...

"The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, '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.'..

"This sentence of the Fourteenth Amendment is declaratory of existing rights, and affirmation of existing law, as to each of the qualifications therein expressed 'born in the United States,' '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 foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth with 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 owing direct allegiances 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, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in Calvin's Case, 7 Rep. 6a, 'strong enough to make a natural born subject, for if he hath issue here, that issue is a natural born subject:' and his child, as said by Mr. Binney in his essay before quoted, 'if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle.'

"To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States.

"VI. Whatever considerations, in the absence of a controlling provision of the Constitution, might influence the legislative or executive branch of the Government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the Fourteenth Amendment, which declares and ordains that 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.'

"The Fourteenth Amendment of the Constitution, in declaration that '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,' contemplates two sources of citizenship and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceeding in the judicial tribunals, as in the order provisions of the naturalization acts.

"The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalizations, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, 'All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.'

"VII. Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth."

7 FAM 1172 Appendix A

(TL:CON-13; 12-31-84)

EXCERPT

Weedin, Commissioner of Immigration, v. Chin Bow
274 U.S. 657 (1927)

"Chin Bow applied for admission to the United States at Seattle. The board of special inquiry of the Immigration Bureau at that place denied him admission on the ground that, though his father is a citizen, he is not a citizen, because at the time of his birth in China his father had never resided in the United States. Chin Bow was born March 29, 1914, in China. His father, Chin Dun, was also born in China on March 8, 1894, and had never been in this country until July 18, 1922. Chin Dun was the son of Chin Tong, the respondent's grandfather. Chin Tong is forty-nine years old and was born in the United States.

"The Secretary of Labor affirmed the decision of the board of inquiry, and the deportation of the respondent was ordered. He secured a writ of habeas corpus from the District Court. Upon a hearing, an order discharging him was entered without an opinion. On appeal by the United States, the Circuit Court of Appeals affirmed the judgment of the District Court, 7 F. (2d) 369, holding him to be a citizen under the provisions of Section 1993 of the Revised Statutes, which is as follows:

"'All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend of children whose fathers never resided in the United States.'

"The rights of Chin Bow are determined by the construction of this section. The Secretary of Labor, April 27, 1916, asked the opinion of Attorney General Gregory whether a rule of the Chinese regulations of his Department, which denied citizenship to foreign-born children of American Chinese, was a valid one. He advised that it was not, because Section 1993 applied to all children and therefore included Chinese children as well. The second question was whether foreign-born children of American-born Chinese fathers were entitled to enter the United States as citizens thereof, when they had continued to reside for some time in China after reaching their majorities, without any affirmative action on their part indicating an intention to remain citizens of the United States, and the Attorney General advised that they were, in spite of these circumstances, entitled to enter the United States as citizens thereof. 30 Op. A.G. 529.

"The United States contends that the proviso of Section 1993, 'but the rights of citizenship shall not descend to the children whose fathers never resided in the United States,' must be construed to mean that only the children whose fathers have resided in the United States before their birth become citizens under the section. It is claimed for the respondent that the residence of the father at any time in the United States before his death entitles his son whenever born to citizenship. These conflicting claims make the issue to be decided . . . "It is very clear that the proviso in Section 1993 has the same meaning as that which Congress intended to give it in the Act of 1790, except that it was then retrospective as it was in the Act of 1802, while in the Act of 1855 it was intended to be made prospective as well as retrospective. What was the source of the peculiar words of the proviso there seems to be no way of finding out, as the discussion of the subject is not contained in any publication brought to our attention. It is evident, however, from the discussion in the First Congress, already referred to, that there was a strong feeling in favor of the encouragement of naturalization. There were some Congressmen, although they did not prevail, who were in favor of the naturalization by the mere application and taking of the oath. The time required for residence to obtain naturalization was finally limited to two years. In the Act of 1795 this was increased to five years, with three years for declaration of intention. Congress must have thought that the questions of

naturalization and of the conferring of citizenship on the sons of American citizens born abroad are related...

"Only two constructions seem to us possible, and we must adopt one or the other. The one is that the descent of citizenship shall be regarded as taking place at the birth of the person to whom it is to be transmitted, and the words, 'have never been resident in the United States,' refer in point of time to the birth of the person to whom the citizenship is to descend. This is the adoption of the rule of jus sanguinis in respect to citizenship, and that emphasizes the fact and time of birth as the basis of it. We think the words, 'the right of citizenship shall not descend to persons whose fathers have never been resident in the United States,' are equivalent to saying that fathers may not have the power of transmitting by descent the right of citizenship until they shall become residents in the United States. The other view is that the words, 'have never been resident in the United States,' have reference to the whole life of the father until his death, and therefore that grandchildren of native-born citizens, even after they, having been born abroad, have lived abroad to middle age and without residing at all in the United States, will become citizens, if their fathers born abroad to middle age and without residing at all in the United States, will become citizens, if their fathers born abroad and living until old age abroad shall adopt a residence in the United States just before death. We are thus to have two generations of citizens who have been born abroad, have lived abroad, the first coming to old age, and the second to maturity, and bringing up a family without any relation to the United States at all until the father shall in his last days adopt a new residence. We do not think that such a construction accords with the probable attitude of the Congress at the time of the adoption of this proviso into the statute. Its construction extends citizenship to a generation whose birth, minority, and majority, whose education, and whose family life have all been out of the United States and naturally within the civilization and environment of an alien country. The beneficiaries would have evaded the duties and responsibilities of American citizenship. They might be persons likely to become public charges or afflicted with disease; yet they would be entitled to enter as citizens of the United States. Van Dyne, Citizenship of the United States, p. 34.

"As between the two interpretations, we feel confident that the first one was more in accord with the views of the First Congress... "In answer to the reasons which influence us to the conclusion already indicated, counsel for the respondent say, first, that the hypothesis that the foreign-born fathers and sons may all live abroad from birth to middle age and bring up families without any association with the United States, and that the sons may then become citizens by the ultimate residence of their fathers in the United States, is not a possible one, because such children must have signified their intention to become citizens when they reached eighteen years of age or at majority at any rate. But these provisions with respect to election of citizenship by those coming to majority were not in the statute when the proviso was enacted, and we must construe it as of 1790 with reference to the views that Congress may be thought to have had at that time.

"Then it is urged that the State Department has held that section 1993 refers only to children and not to adults. This would be a narrow construction of the proviso as it was intended to operate in 1790 when the act was passed, and, although this was suggested as a possible view by Secretary of State Bayard, it would limit too much the meaning of the word 'children' at a time when no provision had been made by law for election of citizenship by those coming of age. Nor does it seem to be in accord with Attorney General Gregory's opinion already referred to. 30 Op. A.G. 529.

"It is said that it would be illogical and unnatural to provide that the father, having begotten children abroad before he lived in the United States at all, and then having gone to the United States and resided there and returned and had more children abroad, should have a family part aliens and part citizens. As this is entirely within the choice of the father, there would seem to be no reason why such a situation should be anomalous. As the father may exercise his option in accordance with the law, so citizenship will follow that option..."

7 FAM 1173 Appendix A

Excerpt, Rogers v. Bellei

Note: Where it is deemed desirable, a syllabus (Headnote will be released, as is being done in connection with this case, at the time of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co*., 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ROGERS, SECRETARY OF STATE *v.* BELLEI

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 24. Argued January 15, 1970—Reargued November 12, 1970—
Decided April 5, 1971

Appellee challenges the constitutionality of § 301)b) of the Immigration and Nationality Act of 1952, which provides that one who acquires United States citizenship by virtue of having been born abroad to parents, one of whom is an American citizen, who has met certain residence requirements, shall lose his citizenship unless he resides in this country continously for five years between the ages of 14 and 28. The three-judge District Court held the section unconstitutional, citing *Alfroyim v. Rusk*, 387 U. S. 253, and *Schneider v. Rusk*, 377 U.S. 163. *Held:* Congress has the power to impose the condition subsequent of residence in this country on appellee, who does not come within the Fourteenth Amendment's definition of citizens as those "born or naturalized in the United States," and its imposition is not unreasonable, arbitrary, or unlawful. *Alfroyim v. Rusk*, supra, and *Schneider v. Rusk, supra*, distinguished. Pp. 5-21.
296 F. Supp. 1247, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN STEWART, and WHITE, JJ., joined BLACK J.. filed a dssenting opinion, in which DOUGLAS and MARSHALL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 24.—October Term, 1970

William P. Rogers, Secretary of State, Appellant.
v.
Aldo Mario Bellei

On Appeal from the United States District Court for the District of Columbia.

[April 5, 1971]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Under constitutional challenge here, primarily on Fifth Amendment due process grounds, but also on Fourteenth Amendment grounds, is § 301 (b) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 236, 8 U.S.C. § 1401 (b).

Section 301 (a) of the Act, 8 U.S.C. § 1401 (a). defines those persons who "shall be nationals and citizens of the United States at birth." Paragraph (7) of § 301 (a) includes in that definition a person born abroad "of parents one of whom is an alien, and the other a ctitizen of the United States" who has met specified conditions of residence in this country. Section 301 (b), however, provides that one who is a citizen at birth under § 301 (a)(7) shall lose his citizenship unless, after age 14 and before age 28, he shall come to the United States and be physically present here continuously for at least five years. We quote the statute in the margin.

The plan thus adopted by Congress with respect to a person of this classification was to bestow citizenship at birth but to take it away upon the person's failure to comply with a post-age-14 and pre-age-28 residential requirement. It is this deprivation of citizenship, once bestowed, that is under attack here.

I

The facts stipulated:

1. The appellee, Aldo Mario Bellei (hereinafter the plaintiff). was born in Italy on December 22, 1939. He is now 31 years of age.

2. The plaintiff's father has always been a citizen of Italy and never has acquired United States citizenship. The plaintiff's mother. however, was born in Philadelphia in 1915 and thus was a native-born United States citizen. She has retained that citizenship. Moreover, she has fulfilled the requirement of § 301 (a)(7) for physical presence in the United States for 10 years, more than five of

which were after she attained the age of 14 years. The mother and father were married in Philadelphia on the mother's 24th birthday. March 14, 1939. Nine days later, on March 23, the newlyweds departed for Italy. They have resided there ever since.

3. By Italian law the plaintiff acquired Italian citizenship upon his birth in Italy. He retains that citizenship. He also acquired United States citizenship at his birth under R.S. § 1993, as amended by the act of May 24, 1934, § 1. 4S Stat. 797. then in effect. That version of the statute, as does the present one, contained a residence condition applicable to a child born abroad with one alien parent.

4. The plaintiff resided in Italy from the time of his birth until recently. He currently resides in England. where he has employment as an electronics engineer with an organization engaged in the NATO defense program.

5. The plaintiff has come to the United States five different times. He was physically present here during the following periods:

April 27 to July 31, 1948
July 10 to October 5, 1951
June to October 1955
December 18, 1962 to February 13, 1963
May 26 to June 13, 1965.

On the first two occasions, when the plaintiff was a boy of eight and 11, he entered the country with his mother on her United States passport. On the next two occasions, when he was 15 and just under 23, he entered on his own United States passport and was admitted as a citizen of this country. His passport was first issued on June 27, 1952. His last application approval, in August 1961, contains the notation "Warned abt. 301 (b)." The plaintiff's United States passport was periodically approved to and including December 22, 1962, his 23d birthday.

6. On his fifth visit to the United States, in 1965, the plaintiff entered with an Italian passport and as an alien visitor. He had just been married and he came with his bride to visit his maternal grandparents.

7. The plaintiff was warned in writing by United States authorities of the impact of § 301 (b) when he was in this country in January 1963 and again in November of that year when he was in Italy. Sometime after February 11, 1964, he was orally advised by the American Embassy at Rome that he had lost his United States citizenship pursuant to § 301 (b). In November 1966 he was so notified in writing by the American Consul in Rome when the plaintiff requested another American passport.

8. On March 28, 1960, plaintiff registered under the United States Selective Service laws with the American Consul in Rome. At that time he already was 20 years of age. He took in Italy, and passed. a United States Army physical examination. On December 11, 1963, he was asked to report for induction in the District of Columbia. This induction, however, was then deferred because of his NATO defense program employment. At the time of deferment he was warned of the danger of losing his United States citizenship if he did not comply with the residence requirement. After February 14, 1964. Selective Service advised him by letter that, due to the

loss of his citizenship, he had no further obligation for United States military service.

Plaintiff thus concededly failed to comply with the conditions imposed by § 301 (b) of the Act.

II

The plaintiff instituted the present action against the Secretary of State in the Southern District of New York. He asked that the Secretary be enjoined from carrying out and enforcing § 301 (b), and also requested a declaratory judgment that § 301 (b) is unconstitutional as violative of the Fifth Amendment's Due Process Clause, the Eighth Amendment's Punishment Clause, and the Ninth Amendment, and that he is and always has been a native-born United States citizen. Because, under 28 U.S.C. § 1391 (e), the New York venue was improper, the case was transferred to the District of Columbia. 28 U.S.C. § 1406 (a).

A three-judge District Court was convened, with the facts stipulated, cross motions for summary judgment were filed. The District Court ruled that § 301 (b) was unconstitutional. citing *Afroyim v. Rusk*, 387 U.S. 253 (1967), and *Schneider v. Rusk*, 377 U.S. 163 (1964), and sustained the plaintiff's summary judgment motion. *Bellei v. Rusk*, 396 F.Supp. 1247 (DC 1969). This Court noted probable jurisdiction. *Rogers v. Bellei*, 396 U.S. 811 (1969), and after argument at the 1969 Term, restored the case to the calendar for reargument. 397 U.S. § 1060 (1970).

III

The two cases primarily relied upon by the three-judge District Court are, of course, of particular significance here.

Schneider v. Rusk, 377 U. S. 163 (1964). Mrs. Schneider, a German national by birth, acquired United States citizenship derivatively through her mother's nat-

uralization in the United States. She came to this country as a small child with her parents and remained here until she finished college. She then went abroad for graduate work, was engaged to a German national. married in Germany, and stayed in residence there. She declared that she had no intention of returning to the United States. In 1959, a passport was denied by the State Department on the ground that she had lost her United States citizenship under the specific provisions of § 352 (a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1484 (a)(1), by continuous residence for three years in a foreign state of which she was formerly a national. The Court, by a five-to-three vote, held the statute violative of Fifth Amendment due process because there was no like restriction against foreign residence by native-born citizens.

The dissent (Mr. Justice Clark, joined by JUSTICES HARLAN and WHITE) based its position on what it regarded as the long acceptance of expatriating naturalized citizens who voluntarily return to residence in their native lands; possible international complications; past decisions approving the power of Congress to enact statutes of that type; and the Constitution's distinctions between native-born and naturalized citizens.

Afroyim v. Rusk, 387 U.S.C. 253 (1967). Mr. Afroyim, a Polish national by birth, immigrated to the United States at age 19 and after 14 years here acquired United States citizenship by naturalization. Twenty-four years later he went to Israel and voted in a political election there. In 1960 a passport was denied him by the State Department on the ground that he had lost his United States citizenship under the specific provisions of § 349 (a)(5) of the Act, 8 U.S.C. § 1481 (a)(5), by his foreign voting. The Court by a five-to-four vote, held that the Fourteenth Amendment's definition of citizenship was significant; that Congress has no "general

power express or implied, to take away an American citizen's citizenship without his assent," 387 U.S. at 237; that Congress' power is to provide a uniform rule of naturalization and. when once exercised with respect to the individual, is exhausted, citing Mr. Chief Justice Marshall's well-known but not uncontroversial dictum in *Osborn v. Bank of the United States*, 9 Wheat. 738, 827 (1824); and that the "undeniable purpose" of the Fourteenth Amendment was to make the recently conferred "citizenship of Negroes permanent and secure" and "to put citizenship beyond the power of any governmental unit to destroy, 387 U.S., at 263. *Perez v. Brownell*, 356 U.S. 44 (1958), a five-to-four holding within the decade and precisely to the opposition effect, was overruled.

The dissent (MR. JUSTICE HARLAN, joined by Justices CLARK, STEWART, and WHITE) took issue with the Court's claim of support in the legislative history, would elucidate the Marshall dictum, and observed that the adop-tion of the Fourteenth Amendment did not deprive Con-gress of the power to expatriate on permissible grounds consistent with "other relevant commands" of the Constitution. 387 U.S. at 292.

It is to be observed tjat bptj Mrs. Schneider and Mr. Afroyim had resided in this country for years. Each had acquired United States citizenship here by the naturalization process (in one case derivative and in the other direct) prescribed by the National Legislature. Each, in short, was covered explicitly by the Fourteenth Amendment's very first sentence: "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." This of course accounts for the Court's emphasis in *Afroyim* upon "Fourteenth Amendment citizenship." 387 U.S. at 262.

The statutes culminating in § 301 merit review:

1. The very first Congress, at its Second Session, proceeded to implement its power, under the Constitution's Article I, § 8, el. 4, to "establish an uniform rule of Naturalization" by producing the Act of March 26, 1790, 1 Stat. 103. That statute, among other things, stated, "And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States . . . ."

2. A like provision, with only minor changes in phrasing and with the same emphasis on paternal residence, was continuously in effect through three succeeding naturalization Acts. Act of January 29, 1795. § 3, 1 Stat. 414, 415; Act of April 14, 1802, § 4. 2 Stat. 153, 155; Act of February 10, 1855. § 1, 10 Stat. 604. The only significant difference is that the 1790, 1795, and 1802 Acts read retrospectively, while the 1855 Act reads prospectively as well. See *Weedin v. Chin Bow*, 274 U.S. 657, 664 (1927), and *Montana v. Kennedy*, 366 U.S. 308, 311 (1961).

3. Section 1 of the 1855 Act, with changes unim-portant here, was embodied as § 1993 of the Revised Statutes of 1878.

4. The Act of March 2 , 1907, § 6, 34 Stat. 1228, 1229, provided that all children born abroad who were citizens under Rev. Stat. § 1993 and who continued to reside

elsewhere, in order to receive governmental protection, were to record at age 18 their intention to become residents and remain citizens of the United States and were to take the oath of allegiance upon attaining their majority.

4. The change in § 1993 effected by the Act of May 24, 1934, is reflected in n. 2. *supra*. This eliminated the theretofore imposed restriction to the paternal parent and prospectively granted citizenship. subject to a five-year continuous residence requirement and an oath, to the foreign-born child of either a citizen father or a citizen mother. This was the form of the statute at the time of plaintiff's birth on December 22, 1939.

6. The Nationality Act of 1940, § 201, 54 Stat. 1137, 1138-1139, contained a similar condition directed to a total of five years' residence in the United States between the ages of 13 and 21.

7. The Immigration and Nationality Act, by its § 407, 66 Stat. 281, became law in December 1952. Its § 301 (b) contains a five years' continuous residence condition (alleviated. with the 1957 amendment, see n. 1. by an allowance for absences less than 12 months in the aggregate) directed to the period between 14 and 28 years of age.

The statutory pattern, therefore, developed and expanded from (a) one, established in 1790 and enduring through the Revised Statutes and until 1934. where citizenship was specifically denied to the child born abroad of a father who never resided in the United States; to (b), in 1907, a governmental protection condition for the child born of an American citizen father and residing abroad. dependent upon a declaration of intent and the oath of allegiance at majority; to (c), in 1934, a condition, for the child born abroad of one United States citizen parent and one alien parent, of five years' continuous residence in the United States before age 18 and the oath of allegiance within six months after majority; to (d), in 1940, a condition, for that child, of five years' residence here, not necessarily continuous. between ages 13 and 21; to (d), in 1952, a condition, for that child, of five years' continuous residence here. with allowance, between ages 14 and 28.

The application of these respective statutes to a person in plaintiff Bellei's position produces the following results:

1. Not until 1934 would that person have had any conceivale claim to United States citizenship. For more than a century and a half no statute was of assistance. Maternal citizenship afforded no benefit. One may observe, too, that if Mr. Bellei had been born in 1933. instead of in 1939, he would have no claim even today. *Montana v. Kennedy, supra.*

2. Despite the recognition of the maternal root by the 1934 amendment, in effect at the time of plaintiff's birth. and despite the continuing liberalization of the succeeding statutes, the plaintiff still would not be entitled to full citizenship for her residence in the United States, the plaintiff never did fullfill the residential condition imposed for him by any of the statutes.

3. This is so even though the liberalizing 1940 and 1952 statutes, enacted after the plaintiff's birth, were applicable by their terms to one born abroad subsequent to May 24, 1934, the date of the 1934 Act, and were available to the plaintiff. See nn. 5 and 1, *supra.*

Thus, in summary, it may be said fairly that, for the most part, each successive statute, as applied to a foreign-born child of one United States citizen parent. moved in a direction of leniency for the child. For plaintiff Bellei the statute changed from complete disqualification to citizenship upon a condition subsequent. with that condition being expanded and made less onerous, and, after his birth, with the succeeding liberalizing provisions made applicable to him in replacement of the stricter statute in effect when he was born. The plaintiff nevertheless failed to satisfy any form of the condition.

V

It is evident that Congress felt itself possessed of the power to grant citizenship to the foreign-born and at the same time to impose qualifications and conditions for that citizenship. Of course, Congress obviously felt that way, too, about the two expatriation provisions invalidated by the decisions in *Schneider and Afroyim*.

We look again, then at the Constitution and further indulge in history's assistance:

Of initial significance, because of its being the foundationstone of the Court's decisional structure in *Afroyim*, and, perhaps by a process of after-the-fact osmosis, of the earlier Schneider as well, is the Fourteenth Amendment's opening sentence:

> "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 where-in they reside."

The central fact, in our weighing of the plaintiff's claim to continuing and thereof current United States citizenship, is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth-Amendment-first-sentence citizen. His posture contrasts with that of Mr. Afroyim, who was naturalized in the United States, and with that of Mrs. Schneider, whose citizenship was derivative by her presence here and by her mother's naturalization here.

The plaintiff's claim thus must center in the statutory power of Congress and in the appropriate exercise of that power within the restrictions of any pertinent constitu-

tional provisions other than the Fourteenth Amendment's first sentence.

The reach of congressional power in this area is readily apparent:

1. Over 70 years ago the Court, in an opinion by Mr. Justice Gray, reviewed and discussed early English statutes relating to rights of inheritance and of citizenship of persons born abroad of parents who are British subjects. *United States v. Wong Kim Ark*, 169 U.S. 649, 668-671 (1898). The Court concluded that "naturalization by descent" was not a common law concept but was dependent, instead, upon statutory enactment. The statutes examined were 25 Edw. III (1350); 29 Car. II (1677), c. 6. § 1; 7 Anne (1708). c. 5 § 3; 4 Geo. II (1731), c. 21; and 13 Geo. III (1773), c. 21. Later Mr. Chief Justice Taft, speaking for a unanimous Court, referred to this "very learned and useful opinion of Mr. Justice Gray" and observed "that birth within the limits of the jurisdiction of the Crown, and of the United States, as the successor of the Crown, fixed nationality, and that there could be no change in this rule of law except by statuted . . . ." *Weedin v. Chin Bow, supra*, 274 U.S. 657, 660 (1927). He referred to the cited English statutes and stated, "These statutes applied to the colonies before the War of Independence."

We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the *jus soli*, that is, that the place of birth governs citizenship status except as modified by statute.

2. The Constitution as orignally adopted contained no definition of United States citizenship. However, it referred to citizenship in general terms and in varying contexts: Article 1. § 3, cl. 3, qualifications for Senators; Article II, § 1, cl 4., eligibility for the office of President;

Article III, § 2., cl. 1. citizenship as affecting judicial power of the United States. And, as has been noted, Article I, § 8, cl. 4, vested Congress with the power to "establish an uniform Rule of Naturalization." The historical reviews in the *Afroyim* opinions provides an intimation that the Constitution's lack of definitional specificity may well have been attributable in part to the desire to avoid entanglement in the then existing controversy between concepts of state and national citizenship and with the difficult question of the status of Negro slaves.

In any event, although one might have expected a definition of citizenship in constitutional terms, none was embraced in the original document or, indeed, in any of the amendments adopted prior to the War between the States.

3. Apart from the passing reference to the "natural born Citizen" in the constitution's Article II, § 1, cl. 4, we have, in the Civil Rights Act of April 9, 1866. 14 Stat. 27, the first statutory recognition and concomitant formal definition of the citizenship status of the native-born: "[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States . . . ." This, of course, found immediate expression in the Fourteenth Amendment, adopted in 1868, with expansion to "All persons born or naturalized in the United States . . . . As has been noted above, the Amendment's "undeniable purpose" was "to make citizenship of Negroes permanent and secure" and not subject to change by mere statute. *Afroyim v. Rusk, supra*, 387 U.S., at 263 See Flack, Adoption of the Fourteenth Amendment 88-94 (1908).

Mr. Justice Gray has observed that the first sentence of the Fourteenth Amendment was "declaratory of existing rights, and affirmative of existing law," so far as the

qualifications of being born in the United States, being naturalized in the United States, and being subject to its jurisdiction are concerned. *United States v. Wong Kim Ark, supra*, 169 U.S., at 688. Then follows a most significant sentence:

> "But it [the first sentence of the Fourteenth Amendment] has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated. as it had always been, by Congress. in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization."

Thus, at long last, there emerged an express *constitutional* definition of citizenship. But it was one restricted to the combination of three factors, each and all significant: birth in the United States, naturalization in the United States. and subjection to the jurisdiction of the United States. The definition obviously did not apply to any acquisition of citizenship by being born abroad of an American parent. That type, and any other not covered by the Fourteenth Amendment, was necessarily left to proper congressional action.

4. The Court has recognized the existence of this power. It has observed. "No alien has the slightest right to naturalization unless all statutory requirements are complied with . . . ." *United States v. Ginsberg*, 243 U.S. 472, 475 (1917). See *United States v. Ness*, 245 U.S. 319 (1917); *Maney v United States*, 278 U.S. 17 (1928). And the Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent. As hereinabove noted. person abroad. even of United States citizen father who. however. acquired American citizenship after the effective date of the 1802 Act. were aliens. Congress responded to that situation only by enacting the 1855

statute. *Montana v. Kennedy, supra*, 366 U.S., at 311. But more than 50 years had expired during which. because of the withholding of that benefit by Congress, citizenship by such descent was not bestowed. *United States v. Wong Kim Ark, supra*, 169 U.S., at 673-674. Then, too, the Court has recognized that until the 1934 Act the transmission of citizenship to one born abroad was restricted to the child of a qualifying American father, and withheld completely from the child of a United States citizen mother and an alien father. *Montana v. Kennedy, supra.*

Further, it is conceded here both that Congress may withhold citizenship from persons like plaintiff Bellei and may prescribe a period of residence in the United States as condition *precedent* without constitutional question.

Thus we have the presence of congressional power in this area, its exercise, and the Court's specific recognition of that power and of its having been properly withheld or properly used in particular situations.

VI

This takes us, then to the issue of the constitutionality of the exercise of that congressional power when it is used to impose the condition subsequent that confronted plaintiff Bellei. We conclude that its imposition is not unreasonable, arbitrary, or unlawful, and that it withstands the present constitutional challenge.

1. The Congress has an appropriate concern with problems attendant on dual nationality. *Savorgnan v.*

United States, 338 U.S. 491, 500 (1950); Bar-Yaacov, Dual Nationality, xi and 4 (1961). These problems are particularly acute when it is the father who is the child's alien parent and the father chooses to have his family reside in the country of his own nationality. The child is reared, at best, in an atmosphere of divided loyalty. We cannot say that a concern that the child's own primary allegiance is to the country of his birth and of his father's allegiance is either misplaced or arbitrary.

The duality also creates problems for the governments involved. MR. JUSTICE BRENNAN recognized this when, concurring in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 187 (1963), a case concerning native-born citizens, he observed: "We have recognized the entanglements which may stem from dual allegiance . . . . " In a famous case. MR. JUSTICE DOUGLAS wrote of the problem of dual citizenship. *Kawakita v. United States*, 343 U.S. 717, 723-736 (1952). He noted that "[o]ne who has a dual nationality will be subject to claims from both nations, claims which at times may be competing or conflicting." p. 733; that one with dual nationality cannot turn that status "into a fair-weather citizenship," p. 736. The District Court in this very case conceded:

> It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States." 296 F. Supp., at 1252.

2. There are at least intimations in the decided cases that a dual national constitutionally may be required to make an election. In Perkins v. Elg, 307 U.S. 325. 329 (1939), the Court observed that a native-born citizen

who had acquired dual nationality during minority through his parents' foreign naturalization abroad did not lose his United States citizenship "provided that on attaining majority he elects to retain that citizenship and to return to the United States to resume its duties." In *Kawakita v. United States, supra*, 343 U.S., at 734, the Court noted that a dual national "under certain circumstances" can be deprived of his American citizenship through an Act of Congress. In *Mandoli v. Acheson*, 344 U.S. 133, 138 (1952), the Court took pains to observe that there was no statute in existence imposing an election upon that dual national litigant.

These cases do not flatly say that a duty to elect may be constitutionally imposed. They surely indicate. however, that this is possible. and in *Mandoli* the holding was based on the very absence of a statute and not on any theory of unconstitutionality. And all three of these cases concerned persons who were born here, that is, persons who possessed Fourteenth Amendment citizenship; they did not concern a person, such as plaintiff Bellei, whose claim to citizenship is wholly, and only, statutory.

3. The statutory development outlined in Part IV above, by itself and without reference to the underlying legislative history, committee reports, and other studies, reveals a careful consideration by the Congress of the problems attendant upon dual nationality of a person born abroad. This was purposeful and not accidental. It was legislation structured with care and in the light of then apparent problems.

4. The solution to the dual nationality dilemma provided by the Congress by way of required residence surely is not unreasonable. It may not be the best that could be devised. but here, too. we cannot say that it is irrational or arbitrary or unfair. Congress first has imposed a condition precedent in that the citizen parent must

have been in the United States or its possessions not less than 10 years, at least five of which are after attain-ing age 14. It then has imposed, as to the foreign-born child himself, the condition subsequent as to residence here. The Court already had emphasized the impor-tance of residence in this country as the talisman of dedicated attachment, *Weedin v. Chin Bow, supra*, 274 U.S., at 666-667, and said:

> "It is not too much to say, therefore, that Congress at that time [when Rev. Stat. § 1993 was under consideration] attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent from those who had been born citizens of the colonies or of the states before the Constitution. As said by Mr. Fish, when Secretary of State, to Minister Wash-burn, June 28, 1873. in speaking of this very proviso. 'the heritable blood of citizenship was thus asso-ciated unmistakeably with residence within the coun-try which was thus recognized as essential to full citizenship.' Foreign Relations of the United States. Pt. 1, 1873, p. 259." 274 U. S., at 665-666.

The same policy is reflected in the required period of residence here for aliens seeking naturalization. 8 U.S.C. § 1427 (a).

5. We feel that it does not make good constitutional sense, or comport with logic, to say, on the one hand. That Congress may impose a condition precedent, with no constitutional complication, and yet be powerless to impose precisely the same condition subsequent. Any such distinction, of course, must rest, if it has any basis at all,. on the asserted "premise that the rights of citi-zenship of the native born and of the naturalized person are of the same dignity and are coextensive," *Schneider v. Rusk, supra*, 377 U.S., at 165, and on the announce-

ment that Congress has no "power. express or implied. to take away an American citizen's citizenship without his assent," *Afroyim v. Rusk, supra*, 387 U.S., at 257. But, as pointed out above. these were utterances bottomed upon Fourteenth Amendment citizenship and that Amedment's direct reference to "persons born or naturalized in the United States." We do not accept the notion that those utterances are now to be judicially extended to citizenship not based upon the Fourteenth Amendment and to make citizenship an absolute. That it is not an absolute is demonstrated by the fact that even Fourteenth Amendment citizenship by naturalization, when unlawfully procured, may be set aside, *Afroyim v. Rusk, supra*, 387 U.S., at 267 n. 23.

6. A contrary holding would convert what is congressional generosity into something unanticipated and obviously undesired by the Congress. Our National Legislature indulged the foreign-born child with presumptive citizenship, subject to subsequent satisfaction of a reasonable residence requirement, rather than to deny him citizenship outright, as concededly it had the power to do, and relegate the child, if he desired American citizenship, to the more arduous requirements of the usual naturalization process. The plaintiff here would force the Congress to choose between unconditional conferment of United States citizenship at birth and deferment of citizenship until a condition precedent is fulfilled. We are not convinced that the Constitution requires so rigid a choice. If it does, the congressional response seems obvious.

7. Neither are we persuaded that a condition subsequent in this area impresses one with "second-class citizenship." That cliche is too handy and too easy. and. like most cliches. can be misleading. That the condition subsequent may be beneficial is apparent in the light of the conceded fact that citizenship to this plaintiff was

fully deniable. The proper emphasis is on what the statute permits him to gain from the possible starting point of noncitizenship, not on what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place. His citizenship, while it lasts, although conditional, is not "second-class."

8. The plaintiff is not stateless. His Italian citizenship remains. He has lived practically all his life in Italy. He has never lived in this country; although he has visited here five times, the stipulated facts contain no indication that he ever will live here. He asserts no claim of ignorance or of mistake or even of hardship. He was warned several times of the provision. Of the statute and of his need to take up residence in the United States prior to his 23rd birthday.

We held that § 301 (b) has no constitutional infirmity in its application to plaintiff Bellei. The judgment of the District Court is reversed.

7 FAM 1174 Appendix A

Excerpts, Rucker v. Saxbe

Excerpt, Rucker v. Saxbe

III. CONCLUSION

In Suarez, No. 76–1033, and in Cappelluti, No. 76–1626, the petitions for review will be granted and the cases remanded to the Board for further proceedings consistent with this opinion, including findings relevant to, and determinations of, the claimants' status as maritime or nonmaritime employees at the time of the injuries. On remand additional testimony may be taken if the present records do not contain sufficient evidence for the purpose of the above remands.

Robert RUCKER, Appellant,

v.

William B. SAXBE, Attorney General of the United States, et al.

No. 76–1509.

United States Court of Appeals, Third Circuit.

Argued Jan. 3, 1977.

Decided March 17, 1977.

Plaintiff, who was born abroad, his father a citizen and his mother an alien, sued for declaration of citizenship. The United States District Court for the District of New Jersey, Vincent P. Biunno, J., rendered judgment for defendant and plaintiff appealed. The Court of Appeals, Van Dusen, Circuit Judge, held that retention of citizenship provision requiring that persons born outside the limits and jurisdiction of United States to parent citizen and parent alien must reside for a certain period within United States to retain citizenship applied despite plaintiff's subjective unawareness of requirement, and plaintiff's situation did not present excuse or hardship which might justify abrogation of requirement, where plaintiff did not undertake any rational inquiry, despite indication that he was aware of possible problems and was a man of some independence and ability, that plaintiff was not denied due process, and that government was not estopped from applying retention requirements.

Affirmed.

Adams, Circuit Judge, concurred and filed opinion.

1. Citizens ⇐18

Retention of citizenship provision requiring that persons born outside limits and jurisdiction of United States to parent citizen and parent alien must reside for a certain period within United States to retain citizenship applied despite plaintiff's subjective unawareness of requirement, and plaintiff's situation did not present excuse or hardship which might justify abrogation of requirement, where plaintiff did not undertake any rational inquiry, despite indication that he was aware of possible problems and was a man of some independence and ability. Immigration and Nationality Act, §§ 301(b), 360 as amended 8 U.S.C.A. §§ 1401(b), 1503; Act May 24, 1934, 48 Stat. 797 as amended.

2. Constitutional Law ⇐274(2)

Application of citizenship retention requirements to plaintiff, who was born abroad of one citizen parent, did not deny due process, although plaintiff did not have subjective knowledge of requirement, where plaintiff was not stateless, asserted no claim of hardship, and was presumably eligible to apply for naturalization. Immigration and Nationality Act, §§ 301(b), 360 as amended 8 U.S.C.A. §§ 1401(b), 1503; Act May 24, 1934, 48 Stat. 797 as amended; U.S.C.A.Const. Amend. 14.

3. Estoppel ⇐62.2(4)

Government has no affirmative duty to inform citizens residing abroad of changes in nationality laws on continuing basis and was not estopped from applying retention requirements to plaintiff who was born abroad of one citizen parent by reason of failure to directly inform plaintiff of

Excerpt, Rucker v. Saxbe — Continued

amendment to retention statute. Immigration and Nationality Act, §§ 301(b), 360 as amended 8 U.S.C.A. §§ 1401(b), 1503; Act May 24, 1934, 48 Stat. 797 as amended.

Michael Krinsky, Rabinowitz, Boudin & Standard, New York City, Ira Gollobin, New York City, for appellant.

Jonathan L. Goldstein, U. S. Atty., George E. Mittelholzer, Asst. U. S. Attorney, Newark, N. J., for appellees.

Before VAN DUSEN and ADAMS, Circuit Judges, and WEINER, District Judge.*

OPINION OF THE COURT

VAN DUSEN, Circuit Judge.

This is an appeal from a district court judgment entered in favor of the Government in a September 1973 action for declaration of citizenship brought pursuant to 8 U.S.C. § 1503. Plaintiff Rucker contests both the applicability and constitutionality of the provisions related to retention of citizenship (8 U.S.C. § 1401(b)) by persons born outside of the limits and jurisdiction of the United States to a parent citizen and a parent alien. Plaintiff urges that: the retention requirements should not apply, absent specific knowledge of them; such application would violate due process; and, in any event, the defendants are estopped from applying them to him for failure to inform his father, Max Rucker, of changes in the statute and for failure to inform plaintiff of the statute's existence. On the facts of this case, we hold that there is no constitutional infirmity to application of those requirements to plaintiff.

I.

Robert Rucker was born in Argentina on August 30, 1939. His mother was a citizen of Argentina; his father, Max Rucker, was a United States citizen by birth.

At the time of his birth, the plaintiff acquired United States citizenship under R.S. § 1993, as amended in 1934, 48 Stat. 797, formerly 8 U.S.C. § 6, which provided that one born abroad of a parent who was a United States citizen and a parent who was an alien was a United States citizen at birth and would retain citizenship if (1) he resided in the United States for five years immediately prior to his 18th birthday, and (2) he took an oath of allegiance within six months after attaining age 21. We quote the statute in the margin.[1]

* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

1. "Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the [Immigration and Naturalization Service]."
Section 1993 was carried forward in slightly modified form by amendments in 1940, the Nationality Act of 1940, 54 Stat. 1137, 1139, 8 U.S.C. § 601; in 1952, the Immigration and Nationality Act, 66 Stat. 163, 8 U.S.C. § 601; and in 1972, 86 Stat. 1289, P.L. 92-584, 8 U.S.C. § 1401.
Section 301 of the Immigration and Nationality Act of June 27, 1952 (8 U.S.C. § 1401), which was applicable from petitioner's 13th birthday until after he became 28, provides:
"(a) The following shall be nationals and citizens of the United States at birth:
"(1) a person born in the United States, and subject to the jurisdiction thereof;
. . . . . .
"(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided* . . . .
"(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall

Excerpt, Rucker v. Saxbe — Continued

On January 17, 1941, Max Rucker registered the date and place of plaintiff's birth with the United States Embassy in Buenos Aires, which issued a Report of Birth. That document indicates that on or about January 12, 1941, Max Rucker became aware of the above residency requirements established by R.S. § 1993, as amended, which was quoted on the back of the Report of Birth. As is apparent, and as the parties stipulated, at all times material to this law suit, Max Rucker was aware of the existence of residency requirements, and aware of their applicability to his son, plaintiff Robert Rucker. Max Rucker registered himself and his son as citizens of the United States with the United States Embassy in 1941, 1943, 1946, 1955 and 1957. The 1955 registration form (Report of Birth, Child Born Abroad of American Parent or Parents), used to report the birth of Max Rucker's daughter Alice to the United States Embassy in Buenos Aires, was sent to Max Rucker on April 26, 1955, by mail. It contained notice of the 1952 amendments to the Immigration and Nationality Act, providing that divestiture of citizenship would occur if the individual whose birth was reported failed to "come to the United States and remain physically present therein for 5 years between the ages of 14 and 28." [2] In January 1962, Max Rucker registered himself alone. Robert Rucker was married in Argentina in May 1962 at the age of 22.

After applying for and obtaining a United States passport, Max Rucker left Argentina for the United States in 1964. His son remained there until 1968, when he came to the United States on a tourist visa issued in Lima, Peru, where he had been involved in a business venture. Plaintiff never made any inquiries to the United States Embassy in Buenos Aires, Argentina, the United States State Department or any other agency of the United States Government concerning his rights to United States citizenship.

In May 1969, plaintiff applied for Certificate of Citizenship with the Immigration and Naturalization Service, which was denied in May 1973, after an evidentiary hearing, on the ground that he had not complied with the retention requirements of 8 U.S.C. § 1401(b), or any of its predecessor statutes. In June 1973, the Assistant Commissioner for Naturalization affirmed the District Director's decision to deny plaintiff's application for a certificate of citizenship.

Plaintiff sought a declaratory judgment that he was a citizen from the district court, which found in favor of the Government. This appeal followed.

II.

In upholding the decision of the Immigration and Naturalization Service, the district court made specific findings. The judge was satisfied that Robert Rucker "was subjectively unaware of the [retention] requirement until after arriving here" and talking with his father, and that until that

come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[s] for at least five years; *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

"(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934."

As noted below, Max Rucker received notice of the above 1952 Amendment to the residence requirement (8 U.S.C. § 1401) when he registered the May 29, 1942, birth of his daughter (petitioner's sister) with the consul at Buenos Aires in 1955.

2. See Item 17 of Answers to Requests for Admissions, Document No. 21 in Civil No. 1288–73, D. N.J., filed February 27, 1975, which is the response to plaintiff's Request for Production of Documents, filed February 7, 1974, as Document No. 6 in Civil No.1288–73, *supra*. The form was received by Max Rucker and executed in the presence of witnesses at Monte Carlo, Misiones, Argentina, on May 3, 1955. Its receipt by the United States Consul at Buenos Aires is evidenced by such Consul's signature on May 13, 1955, affirming, *inter alia*, that

"This report has been executed in triplicate, copy issued to parents, copy transmitted to Department of State, Washington, and copy placed under File No. 131 in the archives of this office."

This form also reported the birth of Robert Rucker as August 30, 1939, for the fourth time. See above this page.

Excerpt, Rucker v. Saxbe — Continued

time "Rucker merely assumed he was a citizen and merely needed to come here to apply." The court noted that, judging from the Record of Birth filed with the Embassy in Argentina, Max Rucker was aware of the retention requirements from at least the time that the plaintiff was 1½ years old, and accepted the testimony that Max Rucker, when asked why he had not told his son of the retention requirements earlier, replied that there were no funds for travel to the United States before Robert's 18th birthday, that his mother had been sick, that the intention had been to take the whole family, and that when things did not work out it was already too late to comply with those provisions, and there was no purpose to saying anything. Also, the district court found that:

". . . at no point along the line, particularly on the trip up via Peru, when he [Robert Rucker] was full grown, did he undertake any rational inquiry. He may have lacked specific knowledge but the behavior indicates that he was at least aware that there might be problems, and he felt it was more prudent not to ask lest it prevent him from entering the U. S. altogether."

The record shows that appellant lived in Argentina until he was 29 years old, is a citizen of Argentina, where he managed land, and has a wife, children, family business, and social contacts.[3]

III.

As to his first contention, plaintiff asserts that *Rogers v. Bellei*, 401 U.S. 815, 91 S.Ct. 1060, 28 L.Ed.2d 499 (1971), is distinguishable because Bellei admitted awareness of the retention provision and consciously disregarded its requirements. At oral argument, plaintiff's counsel urged that lack of specific knowledge of the provision should prevent its application no matter at what age a person who acquired citizenship at birth might apply for declaration of this right. The crux of plaintiff's argument in this regard appears to be the notion that Congress, in enacting the original retention provision and its successors, was primarily concerned with the entanglements which might result from having citizens with dual nationality and dual allegiance. Rucker contends that since he has never acted in a manner inconsistent with allegiance to the United States, the policy underlying the state has not been thwarted, and the fact that he failed to meet the terms of the retention provision should be ignored.

[1] Concededly, as plaintiff points out, "[l]iving abroad . . . is no badge of lack of allegiance . . . [and] may indeed be compelled by family, business, or other legitimate reasons." *Schneider v. Rusk*, 377 U.S. 163, 169, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218 (1964). But just as we recognize the consistency of extended periods of residence outside of the United States with continued loyalty and continued citizenship, the legitimacy of congressional regulation of the terms under which citizenship is offered in this context must also be respected.

IV.

The Supreme Court has held that the problems attendant upon dual nationality are an appropriate concern for Congress (*Savorgnan v. United States*, 338 U.S. 491, 500, 70 S.Ct. 292, 94 L.Ed. 287 (1950); *Rogers v. Bellei*, 401 U.S. at 831, 91 S.Ct. 1060); that Congress has the power to withhold citizenship entirely from individuals born abroad of one alien parent and one citizen parent (*Rogers v. Bellei*, 401 U.S. at 831, 91 S.Ct. 1060); and that Congress may impose conditions precedent and subsequent to the award of citizenship based upon statute, rather than upon the Fourteenth Amendment (*Rogers v. Bellei* at 834–35, 91 S.Ct. 1060). The Supreme Court specifically stated in *Bellei*[4] that statutory citizenship is

3. N.T. 31–32, 42–47, 62.

4. Bellei, like Robert Rucker, was born in 1939, so that the following language of the court in that case is particularly pertinent here:

". . . the plaintiff . . . would not be entitled to full citizenship because, although his mother met the condition for her residence in the United States, the plaintiff never did

Excerpt, Rucker v. Saxbe — Continued

not an absolute, and that to hold otherwise would be to:

> " convert what is congressional generosity into something unanticipated

fulfill the residential condition imposed for him by any of the statutes.

"3. This is so even though the liberalizing 1940 and 1952 statutes, enacted after the plaintiff's birth, were applicable by their terms to one born abroad subsequent to May 24, 1934, the date of the 1934 Act, and were available to the plaintiff. See nn. 5 and 1, *supra*.

"Thus, in summary, it may be said fairly that, for the most part, each successive statute, as applied to a foreign-born child of one United States citizen parent, moved in a direction of leniency for the child. For plaintiff Bellei the statute changed from complete disqualification to citizenship upon a condition subsequent, with that condition being expanded and made less onerous, and, after his birth, with the succeeding liberalizing provisions made applicable to him in replacement of the stricter statute in effect when he was born. The plaintiff nevertheless failed to satisfy any form of the condition.

V

"The central fact, in our weighing of the plaintiff's claim to continuing and therefore current United States citizenship, is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth-Amendment-first-sentence citizen. His posture contrasts with that of Mr. Afroyim, who was naturalized in the United States, and with that of Mrs. Schneider, whose citizenship was derivative by her presence here and by her mother's naturalization here.

"The plaintiff's claim thus must center in the statutory power of Congress and in the appropriate exercise of that power within the restrictions of any pertinent constitutional provisions other than the Fourteenth Amendment's first sentence.

"The reach of congressional power in this area is readily apparent:

"1

" the place of birth governs citizenship status except as modified by statute.

"2. Art. I, § 8, cl. 4, vested Congress with the power to 'establish a uniform Rule of Naturalization.'

"3.

"Mr. Justice Gray has observed that the first sentence of the Fourteenth Amendment was 'declaratory of existing rights, and affirmative of existing law,' so far as the qualifications of being born in the United States, being naturalized in the United States, and being subject to its jurisdiction are concerned. *United States v. Wong Kim Ark*, 169 U.S. [649], at 688 [18 S.Ct. 456, 42 L.Ed. 890]. Then follows a most significant sentence:

> 'But it [the first sentence of the Fourteenth Amendment] has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization.'

"Thus, at long last, there emerged an express *constitutional* definition of citizenship. But it was one restricted to the combination of three factors, each and all significant: birth in the United States, naturalization in the United States, and subjection to the jurisdiction of the United States. The definition obviously did not apply to any acquisition of citizenship by being born abroad of an American parent. That type, and any other not covered by the Fourteenth Amendment, was necessarily left to proper congressional action.

"4. The Court has recognized the existence of this power. It has observed, 'No alien has the slightest right to naturalization unless all statutory requirements are complied with ' *United States v. Ginsberg*, 243 U.S. 472, 475 [37 S.Ct. 422, 425, 61 L.Ed. 853] (1917). See *United States v. Ness*, 245 U.S. 319 [38 S.Ct. 118, 62 L.Ed. 321] (1917); *Maney v. United States*, 278 U.S. 17 [49 S.Ct. 15, 73 L.Ed. 156] (1928). And the Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent.

"Further, it is conceded here both that Congress may withhold citizenship from persons like plaintiff Bellei and may prescribe a period of residence in the United States as a condition *precedent* without constitutional question.

"Thus we have the presence of Congressional power in this area, its exercise, and the Court's specific recognition of that power and of its having been properly withheld or properly used in particular situations.

VI

"This takes us, then, to the issue of the constitutionality of the exercise of that congressional power when it is used to impose the condition subsequent that confronted plaintiff Bellei. We conclude that its imposition is not unreasonable, arbitrary, or unlawful, and that it withstands the present constitutional challenge."

401 U.S. at 826–31, 91 S.Ct. at 1067–68 (footnotes omitted).

Excerpt, Rucker v. Saxbe — Continued

and obviously undesired by the Congress. Our National Legislature indulged the foreign-born child with presumptive citizenship, subject to subsequent satisfaction of a reasonable residence requirement, rather than to deny him citizenship outright, as concededly it had the power to do, and relegate the child, if he desired American citizenship, to the more arduous requirements of the usual naturalization process. The plaintiff here would force the Congress to choose between unconditional conferment of United States citizenship at birth and deferment of citizenship until a condition precedent is fulfilled. We are not convinced that the Constitution requires so rigid a choice. If it does, the congressional response seems obvious." (at 835, 91 S.Ct. at 1071)

The plaintiff does not urge that residence, as a condition subsequent to descent of citizenship, offends the Constitution. Nor does it appear that plaintiff urges that the requirement that residence be completed before a certain age offends the Constitution. Rather, he asserts that as to himself the application of the latter requirement is unfair due to his lack of specific knowledge of the retention provision and its requirements. While we recognize that it is conceivable for unfairness to arise from the application of the retention provision, we are not convinced that plaintiff Rucker's situation presents the excuse or hardship which might justify an abrogation of the congressional prerogative in setting administratively manageable standards and rational nexus requirements upon the extension of citizenship to children born abroad to alien and citizen parents.

Plaintiff Rucker protests that he knew not of this statute—largely because his father kept this information from him—and that he assumed himself to be a citizen of the United States. We again refer to the district court finding that ". . . at no point along the line . . . when he [plaintiff] was full grown, did he undertake any rational inquiry" into his status, even though, as that court noted, his "behavior indicates that he was at least aware that there might be problems" regarding his United States citizenship, "and he felt it more prudent not to ask lest it prevent him from entering the U.S. altogether" (63a).

We note in this regard that the record indicates that plaintiff Rucker was, and is, a man of some independence and ability. After plaintiff's father departed from Argentina for the United States, Robert Rucker remained there for several years, charged with the maintenance and protection of family properties. Such responsibility is not generally entrusted to anyone incapable of attending to his own legal interests, and it further appears on the record that at the time plaintiff obtained a tourist visa for entry into the United States he was in Peru on business. The conduct of business of any sort, and particularly business with international relationships, suggests the capacity and inclination to investigate and comply with the laws of nations. Lastly, on this point, we observe that the statute did not by its terms or application demand action by a minor or incompetent. Rather, the required acts need only have occurred well after plaintiff's majority, whether that age be measured by the current voting age for federal elections (18), the traditional age of majority (21), or the age at which the plaintiff married (22).

On these facts, we find the apparent absence of specific knowledge of the retention provisions no bar to their application.

V.

The Third Circuit cases concerning inapplicability of restrictive time provisions in an action by a potential citizen, indicating that they could not be applied where the individual was unaware of a possible claim to citizenship, are distinguishable. In *Perri v. Dulles*, 206 F.2d 586 (3 Cir. 1953), the plaintiff was "wholly unaware" of his claim to citizenship (at 591). *Perri* involved rather extraordinary circumstances and the question of whether the plaintiff had voluntarily expatriated himself by voting in a foreign election and serving in a foreign army. In *Petition of Acchione*, 213 F.2d 845 (3d Cir. 1954), the court found that the

Excerpt, Rucker v. Saxbe — Continued

petitioner "had no knowledge of her father's prior United States citizenship or of possibility on her part of a right to American citizenship" (at 845). In both cases this court found that claims of citizenship were timely pursued once the claimants became aware of the rights involved. There is no doubt, in this case, that plaintiff was aware at all times of his claim to American citizenship.

VI.

After careful consideration of plaintiff's other contentions—that application of the retention requirements to him, absent knowledge of their existence, violates due process, and that defendants are estopped from applying the retention requirements to plaintiff by reason of their failure to inform his father directly of the 1952 amendment to the statute and by reason of their failure to inform plaintiff of their existence—, we find them to be without merit.

[2] As to the first, we note that plaintiff is not stateless. He has lived practically all his life in Argentina and first visited this country in 1968 at the age of 29. He asserts no claim of hardship and, presumably, is eligible to apply for naturalization.

[3] As to the second contention noted above, we find no basis for the inference that there existed or exists an affirmative duty on the part of the Government to inform United States citizens resident abroad of changes in the nationality laws on a continuing basis, nor, in this case, is there indication of affirmative misconduct on the part of consular officials which, in an extreme situation, might warrant a finding of estoppel.

The change in plaintiff's position due to his alleged lack of knowledge of the law resulted not from any affirmative action of the Government, but from the failure of his father to notify him of the necessity of his returning to the United States for five years between ages 14 and 28, even after receiving notice of the 1952 requirement in 8 U.S.C. § 1401 in 1955. See last paragraph of note 1.[5]

VII.

On the facts of this case, the application of the retention provision has not been shown to be in violation of the Constitution, and the judgment of the district court will be affirmed.

ADAMS, Circuit Judge, concurring:

While I concur in the affirmance of the judgment of the district court, I believe that it is appropriate to register the following comments.

In my view, the present appeal would appear to be controlled by *Rogers v. Bellei*.[1] That case concerned a challenge to the constitutionality of 8 U.S.C. § 1401 and of its application to an individual born abroad to parents, one of whom was an American citizen. The petitioner in *Rogers* had neglected to satisfy the requirements relating to the retention of citizenship. In sustaining the statute against his claims, the Supreme Court announced that Congress has rather plenary power with respect to matters concerning the citizenship of foreign-born individuals. In light of such a sweeping declaration, this Court seemingly has little choice but to uphold the ruling of the district judge that Rucker forfeited his citizenship because of his failure to comply with the retention provision.

However, such a disposition may, at least as I see it, be an unfortunate one. For it is difficult to conceive of many harsher sanctions than the loss of an individual's birthright as a member of the American polity. This is especially so where, as here, such forfeiture stems from factors not wholly attributable to the person who has been stripped of his citizenship.

In this instance, it is evident that Rucker himself was unaware of the retention re-

5. The 1941 Report of Birth of Robert Rucker (Exhibit A to Stipulation at 29a–30a) notified Max Rucker of the five-year residence requirement then in effect.

1. 401 U.S. 815, 91 S.Ct. 1060, 28 L.Ed.2d 499 (1971). See the discussion of *Rogers* in the opinion of the majority at 1001–1003.

Excerpt, Rucker v. Saxbe — Continued

quirement, largely because his father neglected, for whatever reason, to inform him of it. Conceivably, such a situation could be a common one, since children in foreign lands may well be, in practical effect, dependent upon their parents if they are to learn of the statutory strictures in time sufficient to protect their citizenship.[2]

Moreover, the predicament in which Rucker finds himself may become more prevalent in the future. Today, in this era of ever-increasing transnational discourse, United States citizens are residing abroad in greater numbers—for example, as employees of multinational business enterprises or as emissaries—military and civilian—of the American government. It follows that the number of foreign-born children of American parentage promises to rise in the coming decades.

Given the unfortunate results that may obtain upon application of § 1401 in particular contexts, and the spectre of an increase in such cases because of current trends in international affairs, Congress may wish to consider the possibility of drafting a statute more flexible than the current retention provision appears to be. While § 1401 itself constitutes an improvement in the "direction of leniency"[3] over its precursors, this does not mean that further advances in dealing with the subject at hand have been foreclosed.

At this juncture, however, because of *Rogers* and the fact that Congress does have plenary power in the area in question, this Court may not countermand a determination within the province of the legislature. Accordingly, I join in the decision reached by my brethren.

2. At this point, it should be noted that the majority seems to suggest that Rucker is something of a transnational entrepreneur. Majority Opinion at 1003. He is depicted as having engaged in a "business with international relationships." Nevertheless, as I read the record, Rucker appears to be little more than the owner of a local farming operation in Argentina, with minimal international dimensions at best.

3. *Rogers v. Bellei*, 401 U.S. 815, 826, 91 S.Ct. 1060, 28 L.Ed.2d 499 (1971).

Charles DEBOLES and Virgil O. Griffis, on behalf of themselves as Individuals and on behalf of all others similarly situated, Appellants in No. 76–1369,

v.

TRANS WORLD AIRLINES, INC., and International Association of Machinists and Aerospace Workers, AFL–CIO, et al., Appellants in No. 76–1535.

Nos. 76–1369, 76–1535.

United States Court of Appeals, Third Circuit.

Argued Nov. 8, 1976.

Decided March 31, 1977.

Employees brought class action alleging that union had breached its duty of fair representation by entering into collective bargaining agreement which provided certain employees with seniority rights inferior to other employees and by making false statements through union officials regarding union's failure to secure equal seniority rights. The United States District Court for the Eastern District of Pennsylvania, Donald W. VanArtsdalen, J., entered judgment in favor of employer and against union, judgments were appealed. The Court of Appeals, Gerry, District Judge, sitting by designation, held that where seniority provisions of collective bargaining agreement did not give employees at space center seniority credit in employee's system but protected employees at space center from "bumping" by senior employees outside space center and where employer's desire for stable work force at space center was dominant motivation for different treatment of employees at space center, district judge did not err in finding that seniority