

# Supreme Court of the United States

OCTOBER TERM, ~~1969~~  
1970

In the Matter of:

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: WILLIAM P. ROGERS, SECRETARY OF STATE :  
: OF THE UNITED STATES OF AMERICA :  
: :  
: Appellant, :  
: :  
: vs :  
: :  
: ALSO MARIO BELLEI, :  
: :  
: Appellee. :  
: :  
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Docket No. ~~179~~  
24

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Place      Washington, D. C.  
Date        January 15, 1970

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ARGUMENTS OF:

P A G E

Joseph J. Connolly, Office of the Solicitor  
General, on behalf of the Appellant

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John Rogge, Esq., on behalf of the Appellee

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REBUTTAL ARGUMENT:

P A G E

John J. Connolly, on behalf of Appellant

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\* \* \* \* \*

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

WILLIAM P. ROGERS, SECRETARY OF STATE  
OF THE UNITED STATES OF AMERICA,

Appellant

vs

ALSO MARIO BELLEI,

Appellee

No. 179

The above-entitled matter came on for argument at  
1:18 o'clock p.m. on Thursday, January 15, 1970.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

JOSEPH J. CONNOLLY,  
Office of Solicitor General  
Department of Justice  
Washington, D. C.  
On behalf of Appellant

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New York, N. Y. 10036  
On behalf of Appellee



1 will not break the required continuity of physical presence in  
2 the United States.

3 The facts in this case are stipulated and can be  
4 stated quite briefly. The Appellee, Also Mario Bellei, was  
5 born in Italy in December, 1939. His father is a native and  
6 citizen of Italy. Aldo Bellei became an Italian citizen at  
7 birth; he is an Italian citizen today.

8 He also acquired American citizenship at birth under  
9 the predecessor of Section 301(a)(7) because his mother had  
10 been born and raised in the United States and was an American  
11 citizen.

12 Appellee resided in Italy from the time of his birth  
13 until recently, when he moved from Italy to England. Prior to  
14 his 23rd birthday he made four brief visits to the United States,  
15 the longest being four months in duration.

16 On several occasions when he applied for renewals of  
17 his United States passport he was advised by American consular  
18 officials that he must satisfy the requirement of the period of  
19 continuous presence in the United States. When the Appellee did  
20 not heed these warnings and remained in Italy past his 24th  
21 birthday, his passport was cancelled on the ground that he was  
22 no longer an American citizen.

23 Thereafter the Appellee instituted this suit for  
24 declaratory and injunctive relief premised on the contention  
25 that Section 301(b) is unconstitutional. A three-judge District

1 Court sustained Appellee's claim to American citizenship, hold-  
2 ing Section 301(b) unconstitutional on the authority of this  
3 Court's decisions in Schneider versus Rusk and Afroyim versus  
4 Rusk. The Government has appealed directly to this Court.

5 We argue in this case that the type of citizenship  
6 involved here is of an entirely different type of that involved  
7 in Schneider and Afroyim; that it owes its existence entirely  
8 to legislative judgment and that the provision for its termina-  
9 tion is a reasonable exercise of the same authority by which  
10 Appellee's citizenship was created.

11 We contend further that a decision sustaining this  
12 statute would not undermine the principles on which this Court's  
13 previous decisions rested. We built our argument on the  
14 following points:

15 First, there is no claim that Section 301(b) is a  
16 penal law, either in its intent or its effect. Residence  
17 abroad is not a criminal or reprehensible act declared by the  
18 American Government or by the American people. The loss of  
19 citizenship is in no way intended to punish such absence from  
20 the United States. Therefore, the principles which underlie  
21 this Court's decision in Mendoza-Martinez, is not applicable  
22 here.

23 Second, the loss of nationality under Section --

24 Q Tell me, Mr. Connolly, if the constitutional  
25 standard were to be that one can't lose citizenship without

1 voluntarily giving it up, I take it this argument wouldn't  
2 hold, would it?

3 A Our case would be much more difficult. I  
4 would not --

5 Q Well, could you win it if that were the case?

6 A I think we could make a contention that  
7 absence abroad of extremely long-duration may indicate a volun-  
8 tary relinquishment of American citizenship but then we would  
9 be struck with the counter-argument premised on Schneider that  
10 we would be distinguished between this class of American --  
11 immediately distinguishing between this class of American  
12 citizens and other citizens who acquired their citizenship --

13 Q So that if voluntary relinquishment you  
14 probably --

15 A I think that that's right, Mr. Justice.  
16 We are contending quite forcefully in this case --

17 Q Of course.

18 A -- that voluntary relinquishment is not  
19 necessarily the standard, because of the lack of Fourteenth  
20 Amendment foundation.

21 My second point is that the loss of nationality under  
22 Section 301, unlike the statute involved in Trop versus Dulles,  
23 does not create the risk of statelessness, which concerned  
24 Chief Justice Warren in that case. The legislative history set  
25 out in our brief shows that Congress was concerned that the

1 problem of dual nationality and the protection of persons  
2 abroad who held American citizenship, while holding primary and  
3 permanent allegiance to another country. To such persons the  
4 loss of American citizenship does not result in statelessness.  
5 They simply retain the citizenship of the country to which they  
6 have shown their principal attachment. In this case, the  
7 Appellee is, and always has been a citizen of Italy.

8 My third point and this is a critical point of  
9 distinction between this case and the Court's recent precedent  
10 is that the type of citizenship involved here does not derive  
11 any constitutional protection from the Fourteenth Amendment.

12 The majority of the Court in Afroyim versus Rusk,  
13 found in the first sentence of the 14th Amendment, a protection  
14 against involuntary expatriation for those persons whose citizen-  
15 ship is declared by that sentence. The process by which the  
16 first sentence in the 14th Amendment was held to include cer-  
17 tain substantive guarantees and the type and scope of these  
18 guarantees are matters which I confess are not entirely clear  
19 to me.

20 But it does seem clear that whatever those rights  
21 may be they are guaranteed only to those persons whose citizen-  
22 ship is declared by the first sentence of the 14th Amendment.  
23 The first sentence of the 14th Amendment reads: "All persons  
24 born or naturalized in the United States and subject to the  
25 jurisdiction thereof, are citizens of the United States and of



1 the state wherein they reside. The Appellee, of course, was  
2 not born in the United States. There may be some question of  
3 whether he acquired his citizenship by naturalization, although  
4 he does not press that contention. We doubt whether Section  
5 301(a) (7) can be considered a naturalization statute as that  
6 term is used in the 14th Amendment. We can find no authority  
7 that the Reconstruction Congress viewed the statutory acquisi-  
8 tion of citizenship at birth as part of the naturalization pro-  
9 cess. But, even if --

10 Q Well, what then is the constitutional author-  
11 ity of Congress to make him an American citizen?

12 A Mr. Justice, that is not entirely clear. The  
13 Court below passed over the point in its opinion and in our  
14 brief we agreed that there was constitutional authority to  
15 grant this type of citizenship and suggested that it might be  
16 premised on the naturalization clause and it might be premised  
17 on the Congress's inherent powers, the legislative body of the  
18 sovereign to declare the classes of persons who will be con-  
19 sidered its citizens.

20 My own research in the area leads me to conclude that  
21 the creation of this class of citizenship is in the exercise  
22 of an inherent power, rather than the exercise --

23 Q Of course that power, could the Congress make  
24 every resident of Canada or every Canadian an American citizen,  
25 merely by legislation?

1 Q They made Mr. Churchill one, didn't they?

2 A They perhaps could. The basis for my con-  
3 clusion is that the Congress -- according to the English pre-  
4 cedent where the use solely was the fundamental law of citizen-  
5 ship, but as I will show later, was amended by Parliament in  
6 1350 to provide for a limited grant of citizenship to children  
7 born of British Nationals overseas. The English authorities  
8 viewed that as of the same order of creation of citizenship as  
9 in natural law of use solely; and that it was considered to be  
10 part of the naturalization process which proceeded separately  
11 by separate statutes.

12 And I believe that that was the approach which the  
13 founding fathers had in the constitution; that is to the extent  
14 that this power is existing in Congress; it exists as a natural  
15 incident in the sovereignty, and there is limited authority to  
16 cite for that. The very first statute --

17 Q Does that suggest that instead of the first  
18 sentence of the 14th Amendment, Congress might have enacted a  
19 statute which overruled Dred Scot?

20 A I think so. The civil rights --

21 Q Going back to your earlier quotation of the  
22 first sentence of the 14th Amendment, do I understand your  
23 position to be that one who derives his citizenship, achieves  
24 his citizenship by being born in Italy as here, of two American  
25 parents, then residing in Italy, has less in the way of protection

1 than an Italian National who came over here and became a  
2 citizen by naturalization?

3 A Well, his citizenship would not be derived.  
4 He would gain no protection from the first sentence of the 14th  
5 Amendment.

6 Q Well, then it follows from that that he does  
7 have less.

8 A It does follow from that that --

9 Q Does that seem rather anomalous?

10 A No, Mr. Justice -- Mr. Chief Justice, the  
11 first sentence of the 14th Amendment was designed to take care  
12 of the particular problem in the United States at that time,  
13 securing the right of citizenship to the newly-freed slaves,  
14 and has since been interpreted more broadly to have rights in-  
15 volving -- rights associated with the preservation of citizen-  
16 ship.

17 But, insofar as citizenship is to be created by the  
18 Congress in the exercise of its power to define citizens of the  
19 United States, then it must be admitted that that power has --  
20 that included within that power is the authority to impose  
21 reasonable conditions upon that citizenship. That power,  
22 Afroyim holds, perhaps was taken away with respect to 14th  
23 Amendment citizens by the 14th Amendment, but insofar as our  
24 constitutional principles are concerned, we are either -- where  
25 the citizenship was created entirely by statute in an exercise

1 of Congressional judgment that reasonable conditions may be  
2 imposed.

3 Q I'd like to go back to Justice Brennan's  
4 question on the constitutional source. If there is no con-  
5 stitutional authority for this, you have won your case without  
6 more; haven't you?

7 A That's right; we don't make that argument.  
8 We do not argue that Congress lacks the authority to make ad-  
9 verse citizens of the United States those who were born abroad.

10 Mr. Justice Brennan, just to complete my answer to  
11 your question, some limited authority to my proposition comes  
12 from the very first law containing this provision providing for  
13 the grant of citizenship to children born abroad. In that law  
14 which was passed by the First Congress in 1790, it says that:  
15 "And the children of citizens of the United States that may be  
16 born beyond sea or out of the limits of the United States,  
17 shall be considered as natural-born citizens. I suggest that  
18 it wasn't in the exercise of its naturalization authority under  
19 the constitution.

20 Q Were there any judicial challenges to that  
21 kind of legislation before the adoption of the 14th Amendment?

22 A I'm not aware of any.

23 We take the position that even if it is assumed that  
24 the Appellee acquired his citizenship by naturalization it  
25 still would not come within the 14th Amendment. This is so

1 because he was neither naturalized in the United States, nor  
2 was he subject to the jurisdiction of the United States when he  
3 acquired his citizenship.

4 The history of the amendment confirms what its  
5 language unmistakably contemplates, that it was directed to  
6 events occurring in the United States. This was well-settled  
7 by what Mr. Justice Douglas has galled the "historic decision"  
8 in the United States versus Wong Kim Ark. And I would like to  
9 quote certain passages from that opinion. This is 169 U.S. at  
10 687:

11 "And from 1795 the provision of those acts which  
12 granted citizenship to foreign-born children of American parents  
13 describes such children as born out of the limits and jurisdic-  
14 tion of the United States. Thus, Congress, in dealing with the  
15 question of citizenship in that aspect, treated aliens residing  
16 in this country as "under the jurisdiction of the United States"  
17 and "American parents residing abroad as "out of the jurisdiction  
18 of the United States."

19 Passing on to page 688: This sentence of the 14th  
20 Amendment is declaratory of existing rights; that's the first  
21 sentence of the 14th Amendment: "An affirmative of existing law  
22 as to each of the qualifications therein expressed: Born in the  
23 United States, naturalized in the United States, and subject to  
24 the jurisdiction thereof. In short, as to everything relating  
25 to the acquisition of citizenship by facts occurring within the

1 limits of the United States, but it has not touched the acqui-  
2 sition of citizenship by being born abroad of American parents.  
3 It has left that subject to be regulated, as it has always  
4 been, by Congress, in the exercise of the power conferred by the  
5 the constitution to establish uniform rules of naturalization."

6 Q You say you thought that was just a little  
7 support?

8 A A little support for the other proposition.  
9 As I expressed earlier, it was my own conclusion.

10 Q Yes.

11 Q Apart from the 14th Amendment, there is  
12 nothing in the constitution, is there, that purports to define  
13 citizenship of the United States?

14 A No.

15 Q Or to explicitly confer power on Congress?

16 A No. It is not an explicit --

17 Q Naturalized --

18 A Except in the Naturalization Act.

19 Q The citation from Wong Kim Ark leads to our  
20 fourth point, that lacking any constitutional protection the  
21 citizenship which Appellee enjoyed was dependent entirely for  
22 its existence and its rights on Congressional enactments.

23 Q On what?

24 A On Congressional enactments.

25 This was established more than 100 years ago by Mr.

1 Horace Benny in the study which has thrice been cited by this  
2 Court with approval. It appears in two American Law Registers.  
3 At common-law the foreign-born child of English citizens did  
4 not inherit the right of English citizenship and such a child  
5 was treated as an alien in England. The first statute to  
6 remedy this was passed in 1350, the 25th year of the reign of  
7 Edward III. That statute, which granted citizenship at birth  
8 to a child born abroad of two English parents and subsequent  
9 statutes on the same subject, were construed strictly by the  
10 English courts.

11 This Court's decision in Montana versus Kennedy,  
12 decided nine years ago, puts to rest any notions that the rights  
13 of children born abroad to American parents are greater than  
14 what Congress has provided in its citizenship laws. The  
15 Petitioner in that case was born in Italy of an Italian father  
16 and an American mother in 1906. The law provided for citizen-  
17 ship by inheritance only from American fathers. Shortly after  
18 his birth he was brought to the United States where he resided  
19 continuously for 50 years without ever being naturalized. When  
20 the government sought to deport him as an alien he brought an  
21 action for a declaratory judgment of his citizenship.

22 Eight Justices of this Court held that he was not a  
23 citizen of the United States, because he did not come literally  
24 within the grant of citizenship in the statute. Surely, if  
25 Federal Common Law or the constitution afforded any rights of

1 citizenship to the foreign-born they would have been exercised  
2 in favor of this man, who had resided in this country for more  
3 than 50 years.

4 ON the basis of the foregoing points, the primary  
5 question presented, in our view, is whether the Congress, in  
6 the exercise of its power to grant citizenship to the foreign-  
7 born children of American citizens may condition that grant on  
8 the child's coming to live in the United States for a certain  
9 period --

10 Q Well, Mr. Connolly, on that point if you were  
11 right and the constitution leaves these situations to Congress-  
12 ional regulation, then what is there left of the argument of  
13 voluntary relinquishment in this situation?

14 A The voluntary relinquishment, Mr. Justice, in  
15 our view, is inapplicable here. That is not a test.

16 Q If that standard is a standard at all it would  
17 apply only to constitutionally-conferred?

18 A That is correct.

19 The legislative history of the requirement of five  
20 years continuous presence in the United States, shows that  
21 Congress was concerned with the unsatisfactory status of persons  
22 abroad having both American citizenship and citizenship in  
23 another country. This was, and it is today, a legitimate con-  
24 cern. The presence of American citizens abroad imposes on our  
25 government a duty to assure proper treatment of their persons



1 and property. The carrying out of this duty inevitably results  
2 in international conflicts with the other nation which also  
3 regards the individual as its citizen.

4 An examination of any of the several textbooks on  
5 nationality will reveal that there are many types of conflicts  
6 which may develop on matters such as reparations, protests and  
7 claims for losses. It also would reveal the fact that law is  
8 not settled on the resolution of many of these conflicts. These  
9 conflicts are, to borrow the language of Mr. Justice Brennan,  
10 "serious problems, inevitably implicating nationality."

11 To continue with Mr. Justice Brennan's concurring  
12 opinion in *Mendoza-Martinez*, we have recognized the entangle-  
13 ments which may stem from dual allegiance, and have twice sus-  
14 tained statutes which provided for the loss of American citizen-  
15 ship upon the deliberate assumption of a foreign attachment.

16 The Congress recognized that an unconditional granting  
17 of American citizenship solely because one of the individual's  
18 parents was an American citizen, meant that our government would  
19 risk involvement in such international disputes on behalf of  
20 persons who had no attachment or allegiance to the United States.

21 This much the Court below also recognized. It said:  
22 "There is an undeniable danger that children born and raised  
23 abroad in a foreign home where English may never be spoken;  
24 schooled where English is not taught, celebrating foreign  
25 holidays with the family of the non-American parent, will have

1 no meaningful with the United States in culture or heritage.

2 It is of legitimate concern of Congress that those  
3 who bear American citizenship and receive these benefits have  
4 some nexus to the United States. Thus, the Congress decided  
5 that in continuing the grant of American citizenship to for-  
6 eign-born persons to which the 14th Amendment does not apply,  
7 it was desirable to reduce the risk that there would be a class  
8 of citizens living permanently abroad, having no attachment to  
9 the United States. It sought to achieve this goal as it had  
10 done under the naturalization laws by requiring a period of  
11 residence in this country. In writing the considerations which  
12 prompted it we think that this requirement is entirely reason-  
13 able.

14 Q What is the period of residence for an alien;  
15 is it five years?

16 A I believe it is five years; for naturalization?

17 Q In other words you are saying that it isn't  
18 too much to ask of an American citizen who's claiming deriva-  
19 tive citizenship because he was born of American parents in  
20 Europe or somewhere else, ask him to do the same things that an  
21 alien must do.

22 A Yes, Mr. Chief Justice; something along that  
23 line. It says that The same considerations which prompted  
24 Congress to require a period of residence in the United States  
25 for aliens, to make sure that they had some association with

1 life in the United States, are the same considerations which  
2 prompted the Congress to enact this particular requirement and  
3 in this case, coupled with the fact that the presence of such  
4 people abroad imposes burdens on the United States in its  
5 diplomatic representation.

6 The final question, then, is whether Congress may  
7 constitutionally make a residence requirement a condition of  
8 the continuation of this statutory citizenship rather than the  
9 acquisition of the citizenship.

10 The Congress, of course, could have provided that  
11 children born abroad of one American parent shall become  
12 citizens after a period of residence in this country. But  
13 this would have had unfortunate consequences during the child's  
14 minority when the American parent could not rely on American  
15 diplomatic protection to his or her child. It also would have  
16 created novel problems of status and rights when the child  
17 returned to this country in order to fulfill its residence  
18 requirements.

19 So, the Congress elected to declare the minor child a  
20 citizen but to condition the grant of lifetime citizenship  
21 upon the child's coming to the United States and residing here  
22 for a period of time. This, too, we think, was a reasonable  
23 decision by the Congress and did not violate the due process  
24 rights of the Appellee and others affected by this statute.

25 Appellee had American diplomatic protection during his

1 minority when he was dependent on his parents. There was no  
2 contention that he suffered any disability or any prejudice by  
3 reason of being an American citizen during his minority. When  
4 he came of age the Congress, in effect, asked him the question  
5 that it properly could ask in granting citizenship to such  
6 persons: "Is your sole allegiance to the United States or is  
7 your allegiance to Italy, where you were born and raised, where  
8 you went to school, where you worked and married?"

9 The Congress asked only that he come to this country  
10 and be part of its life for five years. There is no reason  
11 apparent for the Appellee's failure to do so, other than that  
12 he was too deeply involved in activities in his homeland. For  
13 us, there is no apparent reason why he should be able to command  
14 United States citizenship for the rest of his life.

15 May I reserve the remaining time for rebuttal?

16 MR. CHIEF JUSTICE BURGER: Very well, Mr. Connolly.

17 Mr. Rogge.

18 ORAL ARGUMENT BY O. JOHN ROGGE, ESQ.

19 ON BEHALF OF APPELLEE

20 MR. ROGGE: Mr. Chief Justice, and may it please the  
21 Court: In addition to the usual documents in this case, the  
22 Court should also have before it the brief amici curiae in one  
23 of which the American Bar Association has joined.

24 May I spend just a brief moment on the facts: Aldo  
25 Mario Bellei's mother was born and raised in Philadelphia, where

1 she stayed until she was 24, when she married Aldo Mario  
2 Bellei's father and moved with him to Italy. Her parents have  
3 remained in Philadelphia. On five different occasions Aldo  
4 Mario Bellei came to this country to visit his grandparents.  
5 On the first two such occasions, he came on his mother's pass-  
6 port and on the second two such occasions he came on his own  
7 passport.

8           The fifth occasion our State Department denied him a  
9 passport. This was when he wanted to come here with his bride  
10 to visit his grandparents and he did, but he did that on an  
11 Italian passport.

12           Aldo Mario Bellei has had his own United States  
13 passport as an American citizen for a period of 12 years. He  
14 first got it, as you will see from page 6 of the appendix, on  
15 June 27, 1952. If you will turn to page 11 you will find that  
16 it was renewed from time to time until February 11, 1964.

17           Now the Government comes along with a condition sub-  
18 sequently imposed and seeks to take this away and I think this  
19 case presents the simple question of whether the Congress has  
20 the power with reference to an American citizen at birth to take  
21 away that citizenship without his voluntary renunciation and  
22 could do that consistent with the due process clause of the  
23 Fifth Amendment. That's what I think the issue is in this case.

24           And in answer to the question that you put, Mr. Chief  
25 Justice Burger, I think it is the government's position that

1 two aliens coming over here, having a child born here and re-  
2 turning to their own country, or in the case of persons  
3 naturalized over here with a minor child, that those children  
4 have greater rights than a person like Aldo Mario Bellei, who,  
5 by Section 1993 of Revised Statute as amended by the Nationality  
6 Act of 1934 was given American citizenship at birth.

7 I think, as a matter of fact, that Schneider against  
8 Rusk is precisely in point because Angelica Schneider never  
9 went through naturalization proceedings. Her parents came over  
10 and were naturalized and an act of Congress then said that she  
11 was an American citizen. I cannot see but what Schneider  
12 against Rusk is directly in point; and in that case it was  
13 held that the fact that Angelica Schneider, who had citizenship  
14 by statute, she could go abroad to Germany and stay there and  
15 the three-year residence requirement was declared unconstitu-  
16 tional.

17 I submit, the same reasoning that in Schneider against  
18 Rusk compelled that provision to be held unconstitutional com-  
19 pels the section that was attacked and held unconstitutional  
20 below, which is a provision of the Immigration and Nationality  
21 Act of 1952, is likewise unconstitutional.

22 The provision at the time that Aldo Mario Bellei was  
23 born required that he come here for five years immediately  
24 previous to his 15th birthday and unless within six months  
25 after the child's 21st birthday he or she shall take an oath of

1 allegiance to the United States of America.

2 Now, that section was repealed by the Nationality  
3 Act of 1940, but that repeal had in it this proviso that the  
4 repeal shall not terminate nationality heretofore lawfully  
5 acquired.

6 So, you have someone who has American citizenship at  
7 birth and Congress comes along in a condition subsequent,  
8 subsequently enacted and says he doesn't have it any more. Now  
9 the government says, "Well, this thing about coming here for  
10 five years really is a small thing; doesn't mean anything. It's  
11 a great hardship. A child living with his parents, it would  
12 mean if they wanted to give him an education they would have to  
13 have quite a few thousand dollars to send him over here at that  
14 period of his life in order to acquire it. It would draw a  
15 distinction between those who can afford to do this and those  
16 who can't.

17 Now, the government also takes the position that such  
18 a person has no meaningful connection with the United States.  
19 Well, I submit that this country has changed in the past 40  
20 years where Americans living abroad have increased 20-fold from  
21 some 100,000 a year to 2 million a year.

22 Q Are those permanent residents, you mean?

23 A They are residing abroad. I mean they are not  
24 just travelers. As a matter of fact, Mr. Dulles wrote a piece  
25 in which he was talking about the million in Europe to which

1 there are added a million tourists. I'm not talking about  
2 tourists. I'm not saying -- when you say permanently, Mr.  
3 Chief Justice,-- I mean residing there. This is --

4 Q Nontourists.

5 A Nontourists; yes.

6 In most of the big cities of the world you have large  
7 chunks of America today.

8 Q How many of those are military; does this  
9 record show?

10 A I think about half are military; half of the  
11 two million.

12 As a matter of fact, rather than worrying about having  
13 a meaningful connection with the United States, Europeans are  
14 worrying that we are Americanizing Europe.

15 A study was done of 25 families with American wives.  
16 All but two fathers spoke English; there were 47 children there;  
17 26 spoke English as a primary language or English and French  
18 with equal fluency; only five spoke French.

19 I submit that we should regard these international  
20 children as a valuable asset of this country.

21 Q Does this statute apply to the children of our  
22 military who are stationed abroad?

23 A This is another thing: If a child is born of  
24 two American parents, then there is no problem, but if this  
25 Court should hold that this statute is constitutional, then



1 another Congress can come along and say: Children born of two  
2 American parents, we're going to take that citizenship away,  
3 too.

4 And I submit completely --

5 Q The answer to my question is "yes;" is that it?  
6 This statute would, on the proper facts apply  
7 to the children born to our military stationed abroad?

8 A If there were two American parents -- I mean  
9 if the military abroad --

10 Q Take this situation, where the American is in  
11 our military.

12 Q An alien can be in our military.

13 A There would have to be, I mean the Immigration  
14 and Nationality Act is almost as complicated as income tax  
15 laws but I know the specific section with which I'm dealing and  
16 I do know that the child born of two American parents has no  
17 problem.

18 Q Yes.

19 A It's the child born of one American parent  
20 of which there is a problem and in the provisions with which I  
21 am familiar --

22 Q Well, why I was interested, Mr. Rogge, was that  
23 if this statute is applicable, and the one American parent is  
24 in our military and the child is born abroad, does this statute  
25 apply to affect that child's American citizenship; that is my

1 question.

2 A I'd almost feel like consulting the opposi-  
3 tion. I don't know.

4 (Laughter)

5 Well, I mean, take Mr. Charles Gordon over here, who  
6 does this all the time. I'd almost say to Mr. Charles Gordon,  
7 "Does he know of an exception for that situation?" I don't.

8 But, in connection with Your Honor's question, I do  
9 want to emphasize that if this statute is held constitutional  
10 then Congress has the power at some future session to come along  
11 and take away the American citizenship of a child born abroad of  
12 two American parents, on the government's interpretation here.

13 It is my point that in today's world of United  
14 Nations, and I haven't emphasized this, but I think it is im-  
15 portant, that we should regard the children as an asset. We  
16 now have diplomatic relations with over 100 foreign countries.  
17 We are members of more than 70 international organizations. We  
18 give military and economic assistance to over 50 foreign coun-  
19 tries. Our business enterprises have more than \$100 billion  
20 invested abroad.

21 Q Don't you think those are strong arguments,  
22 policy arguments, but do you think they bear on the constitution-  
23 al issue, which is our only job.

24 A On a due process question, I'd say yes, Mr.  
25 Justice Harlan, but I also say this: I'm trying to meet the

1 argument of the government where they think that these child-  
2 ren are not an asset; that they are a burden; we should get  
3 rid of them; they talk about no meaningful connection to the  
4 United States and I'd like to counter that by saying that this  
5 is an asset that this country should welcome, rather than say  
6 that they are a burden.

7 Q Well, I didn't understand the government to be  
8 arguing that. They were arguing as to whether this was a  
9 rational thing for Congress to do. We might disagree lots of  
10 times with what Congress does, but it's none of our business as  
11 long as they are acting within their powers.

12 A Well, I'd say on that I don't think it is  
13 rational thing for Congress to do with reference to someone who  
14 has American citizenship at birth, to come along with a condi-  
15 tion subsequent, subsequently imposed. In other words, the  
16 Aldo Mario Bellei got American citizenship in 1939 and he had it  
17 -- at least he had it until 1952 when the Immigration and  
18 Nationality Act came along and said, "Well, now you've got to  
19 come here and be here for five years between the ages of 14  
20 and 28. And those early years are the years, if he's in his  
21 own family context, unless you are a child of wealthy parents  
22 they can't afford to send him over here for education during  
23 that period. This is the year that he goes to college, the  
24 years when he goes to college.

25 Q Well, is Congress entitled to think that it

1 would be important for the person to go to college or spend  
2 those impressionable years in this country in order to lay a  
3 foundation for being a good citizen?

4 A Well, I'd say that if that's what they had in  
5 mind, Congress is mistaken in today's world, because --

6 Q As Justice Harlan said, that's their own right  
7 to make their own mistake; but can we correct it in assuming  
8 it's a mistake?

9 A Under the due process clause of the Fifth  
10 Amendment; yes, because this is an unreasonable requirement  
11 that's an unreasonable classification --

12 Q Then we don't "correct it," because it's a  
13 mistake, we deal with it because it offends the constitution?

14 A Yes. And my position is that this does  
15 violate the due process clause of the Fifth Amendment and I  
16 think Angelica Schneider against Rusk is directly in point and  
17 I think the Court's approach in Afroyim against Rusk is also  
18 in point.

19 But, as to the arguments that are made in the govern-  
20 ment's brief that these children are a liability, I think on  
21 the contrary, and in the context of today's world where you can  
22 make supersonic flights to Europe now in about six hours and  
23 they may even have colonies in Mars in a future century, where  
24 we are interdependent nations, I think we should regard these  
25 children as an asset --

1 Q Mr. Rogge, could, under your argument, could  
2 you reach the same result if Congress had said that children of  
3 one American parent born abroad will become a citizen, but only  
4 upon residing in the country for five years?

5 A It could be a different case when you put it as  
6 a condition precedent; that's not this case. In other words,  
7 if the Congress had said -- Congress didn't say that, but if  
8 the Congress said, "These steps must be taken before you can  
9 become a citizen," that's one thing.

10 Q But it could say, "You can't become a citizen  
11 until and unless you come here for five years between the ages  
12 of 14 and 28.

13 A I'd have more trouble with that case. That  
14 would be -- if it were put as a condition precedent, I could  
15 conceive it.

16 Q That wouldn't be irrational?

17 A Wouldn't be irrational, maybe, but that's not  
18 what Congress has done --

19 Q Well, I know, but you are making the argument  
20 about rationality, and I have some trouble seeing the difference  
21 between the two cases in terms of rationality.

22 Q This is what we require of the foreign-born  
23 alien; isn't it? The residence here for five years. We don't  
24 pinpoint it as to age.

25 A That's right.

1           Q       Is there a distinction because of the age  
2 factor on Justice White's question?

3           A       I think it's whether a condition precedent or  
4 a condition subsequent. If Congress had said that these child-  
5 ren -- and I may say that Congress has long said that a child  
6 born of an American father is a citizen at birth and there  
7 hasn't been any problem about that. And I don't know whether  
8 it was ever questioned one way or the other.

9                   And then when the statute was broadened to include  
10 American mothers it was then that you got these conditions in  
11 here.

12           Q       If you have any problem in answering Justice  
13 White's question on the constitutional side, then there is a  
14 problem with requiring the foreign-born nationals, aliens of  
15 another country to reside here five years before getting citizen-  
16 ship?

17           A       I said, I distinguish the two cases and Mr.  
18 Justice White was saying that if I answered correctly -- I  
19 thought I understood it that way, Mr. Justice White, that there  
20 was no distinction between the condition precedent and the  
21 condition subsequent; I think there is. And I think Congress  
22 could very well -- I mean I could go along with part of the  
23 premise, Congress might have the power to say that the child  
24 born abroad of an American parent, will not get citizenship  
25 unless they come here for five years as a condition precedent.

1 But that isn't what Congress did here. Congress gave the  
2 citizenship; there were some conditions subsequent, but even  
3 those were repealed.

4 Q But even if there isn't any difference between  
5 the two cases, you haven't lost your case yet? I mean, let's  
6 assume it's wholly rational. There is still a question of  
7 Congressional power.

8 A Yes. That's the simple question in this case,  
9 can Congress consistent with the due process clause of the  
10 Fifth Amendment, expatriate without consent?

11 Q I see. But your argument is purely a due  
12 process argument; is it not?

13 A Under the Fifth Amendment; yes.

14 Q And it's therefore one of rationality or --

15 A Yes, it has to be --

16 Q Fundamental fairness?

17 A Yes.

18 Q That's it; fundamental fairness.

19 A Yes, Mr. Justice Stewart. I have a great  
20 feeling for the concept of due process as fundamental fairness.  
21 I know that Mr. Justice Black has had a problem with that, but  
22 the due process as Mr. Justice Frankfurter expounded it, and as  
23 Mr. Justice Harlan would now expound it, that it has to be  
24 consistent with fundamental fairness and the conscience of the  
25 time and, to my mind --

1 Q Fundamental fairness according to five members  
2 of this Court.

3 A Yes, if Your Honor please. As far as I am  
4 concerned, I am prepared to take the judgment of what I think  
5 is one of the great institutions of the world; to take the  
6 minds, the trained minds of the members of this body, sitting  
7 down at any particular time with a problem and coming to a  
8 conclusion, and I'll be glad to abide by it.

9 Now, I'll go one step further: with that same con-  
10 cept and the concept of this country as a matured society; let  
11 us take, for instance, capital punishment. I have every con-  
12 fidence that some day in the future if the world survives, that  
13 this body is going to say that capital punishment violates due  
14 process.

15 Q Why do they have to say it if it does? If  
16 capital punishment just violates it, why do you hope that this  
17 Court will say it some day? Why don't you hope the constitution  
18 will be amended in the normal, constitutional way?

19 A My concept of due process, Mr. Justice Black,  
20 which I think, goes back to the law of the land in Magna Carta  
21 and to Braxton, who says that "The King was under God and the  
22 law." This concept, which is an evolving concept, I think the  
23 majority of this Court can determine at any time and place what  
24 that due process clause means.

25 Q Anything that they think is fundamentally



1 fair is unconstitutional?

2 A Yes.

3 Q What do you need with any other constitution  
4 but that?

5 A Well, this Court has done very well under this  
6 constitution, and for my part, my admiration goes with it. I  
7 am prepared to abide with what the majority of this Court says  
8 comports with fundamental fairness, which, in our constitution  
9 in two clauses: In the Fifth Amendment and in the 14th, is  
10 called due process.

11 Q You better wait and see what we decide first.

12 A I'll still abide by that, Mr. Justice Harlan.

13 Q Do you rely at all on the first sentence of the  
14 14th Amendment?

15 A No; I'd have to say no. I fix mine on the  
16 Fifth Amendment, but I say this: I think that --

17 Q Well, what about -- let me ask you: Do you  
18 think that the question of voluntary relinquishment -- where  
19 do you get this if you dont get it out of the first sentence  
20 of the 14th Amendment? The basic constitutional authority  
21 here is the power of the Congress to enact uniform naturaliza-  
22 tion laws.

23 A Well, it's either that or you have one there on  
24 foreign relations. I haven't gone into this because nobody has  
25 challenged the constitutionality of the statute giving American

1 citizenship at birth to the child born abroad of an American  
2 parent.

3 Q You are saying is your only argument is that the  
4 restriction is irrational and is void.

5 A Yes, under the due process clause.

6 Q Well, I thought you opened by saying something  
7 to us about "he couldn't lose it except by voluntary relinquish-  
8 ment."

9 A Yes. Congress cannot expect --

10 Q And you don't make that argument based on the  
11 first sentence of the 14th Amendment; but just as part of  
12 your irrationality argument; is that it?

13 A Due process clause of the Fifth Amendment.

14 Now, I would add this: I think that Angelica  
15 Schneider was just as much a statutory citizen as Aldo Mario  
16 Bellei, because she didn't go through any naturalization pro-  
17 cedures. There was a statute which said because her parents  
18 were naturalized, she was a citizen. And what's the difference  
19 between that statute and the one which declared Aldo Mario  
20 Bellei a citizen at birth? I think Schneider against Rusk is  
21 directly in point in this case.

22 Q One difference is in the residence of the parents,  
23 isn't there? Schneider's parents were here.

24 A Schneider's parents were here; yes. But, also  
25 a provision with reference to Aldo Mario Bellei's mother, that

1 she had to be here for ten years, at least five of which were  
2 after the age of 14. There is also a residence requirement in  
3 1993, as amended; and it's 10 years.

4 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rogge.

5 Mr. Connolly, do you have some more for us?

6 REBUTTAL ARGUMENT BY JOSEPH J. CONNOLLY,

7 ON BEHALF OF APPELLANT

8 MR. CONNOLLY: Yes, Mr. Chief Justice.

9 Q Mr. Connolly, would this reach the situation of  
10 the American parent who was in the military abroad?

11 A Mr. Gordon advises that the statute is applicable  
12 to the child of an American serviceman or woman overseas,  
13 married to an alien.

14 Q We must have a lot of situations like that, I  
15 guess?

16 A Yes, there are --

17 Q A lot of American military men are marrying  
18 German girls and Koreans and everything.

19 A Those situations provide no difficulty under this  
20 statute because, in the ordinary course of the marriage and the  
21 development of the child, the serviceman is rotated back to the  
22 United States. There is no intention in those cases to relin-  
23 quish American residency, as there was in this case.

24 Q Well, some of them are discharged abroad and  
25 reside there?

1           A     Yes; that's entirely possible, but in the great  
2 majority of cases they return back to the United States, the  
3 child is born and raised in the United States.

4           MR. CHIEF JUSTICE BURGER: You have about three  
5 minutes left, Mr. Connolly.

6           A     Sir?

7           MR. CHIEF JUSTICE BURGER: You have about three  
8 minutes left.

9           A     Mr. Rogge, I believe, assuming unintentionally,  
10 left the impression that the requirement of presence in the  
11 United States is imposed upon Mr. Bellei after conferral of  
12 American citizenship on him at birth. It was not quite  
13 accurate. He received his American citizenship pursuant to  
14 Section 1993, the revised statutes, as amended in 1934. And  
15 that statute is set forth on page 44 of our brief and it does  
16 provide for a period of residence in the United States; indeed,  
17 a more onerous period of residence in the United States than  
18 present law under which Mr. Bellei's situation is tested, be-  
19 cause it must be accomplished by the age of 13, I guess.

20           So, Mr. Rogge also interprets the government's  
21 position, if I may say, on the small world, if you will, of the  
22 children who are born overseas and who are subject to the re-  
23 quirements of this statute. We make no claim that these child-  
24 ren cannot be good American citizens, but we think that there is  
25 something much more to performing the duties of American

1 citizenship from watching American movies and American tele-  
2 vision overseas, and eating hot dogs and bubblegum. And what  
3 Congress was looking for and what Congress hoped to provide for  
4 by the period of residence in the United States, was the  
5 assurance that these children, these young adults, wherever they  
6 resided for the rest of their lives, and they could go back  
7 overseas, and had no restrictions on them whatsoever, would be  
8 persons who had some meaningful relationship to the United  
9 States, some ability, some personal understanding of how the  
10 institutions and people of the United States operate and some  
11 ability, if necessary, to contribute to the development of  
12 those institutions. A personal stake, in other words, in the  
13 institutions and people of the United States.

14 Another point that I would like to make in the very  
15 few minutes that I have left, is that Mr. Rogge invoked con-  
16 siderations of a shrinking world and expanding notions of  
17 nationality, but these notions run counter to a developing trend  
18 in international law which I am not entirely familiar with, but  
19 I have done some research on, which shows that because of the  
20 problem of dual nationality, international lawyers are strugg-  
21 ling with a concept similar to that of our own domestic conflict  
22 of laws, a defective nationality. Recognizing that persons may  
23 have citizenship in a number of states or usually two countries,  
24 where the rights of those citizens are to be asserted the test  
25 is where the real and effective citizenship of the individual is.

1 And one exercise in this development is the -- an article of  
2 the "Convention and the Conflict of Nationality Laws of 1930,"  
3 which I will not take time to read.

4 And another example is the decision of the Court of  
5 International Justice in the Watterbaum case in 1955.

6 For those reasons, Mr. Chief Justice, we submit that  
7 the judgment of the District Court should be reversed.

8 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Connolly.  
9 The case is submitted. Thank you, Mr. Rogge.

10 (Whereupon, at 2:15 o'clock p.m. the argument in the  
11 above-entitled matter was concluded)