

Supreme Court of the United States

OCTOBER TERM, 1970

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In the Matter of:

Docket No. 24

----- X
WILLIAM P. ROGESS, SECRETARY
OF STATE,

Appellant

vs.

ALDO MARIO BELLEY,

Appellee
----- X

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Secretary of State

3

O. John Rogge, Esq., on behalf
of the Appellee

22

Richard N. Gardner, Esq., on behalf
of the Association of American
Wives of Europeans and the American
Bar Association, as Amicus Curiae

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* * * * *

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

WILLIAM P. ROGERS, SECRETARY
OF STATE,

Appellant

vs

No. 24

ALDO MARIO BELLEI,

Appellee

Washington, D. C.

The above-entitled matter came on for argument at
10:05 o'clock a.m., on November 12, 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, Associate Justice
POTTER STEWART, Associate Justice
BYRON O. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY M. BLACKMUN, Associate Justice

APPEARANCES:

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6 The American Bar Association,
7 As Amici Curiae
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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.
ORAL ARGUMENT BY ERWIN M. GRISWOLD,
SOLICITOR GENERAL OF THE UNITED STATES,
ON BEHALF OF WILLIAM F. ROGERS, SECRETARY
OF STATE.

MR. GRISWOLD: Mr. Chief Justice and may it please
the Court: This case comes here on a direct appeal from a
three-judge court in the District of Columbia. The legal
question involved is the constitutional validity of an Act of
Congress relating to the citizenship of a child born abroad,
one of whose parents is an American citizen.

The statutory provision in question is Section
301 (a) 7 and 301 (b) of the Nationality Act of 1952. These
are set forth, beginning at the bottom of page 45 of the
Government's brief and continuing on to page 46. I would like
to read the important portions of the statute.

Beginning at the bottom of page 45, "The following
shall be nationals and citizens of the United States at birth:
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, whom,
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

1 which were after attaining the age of 13 years.

2 And then 301(b): "Any person who is a national and
3 citizen of the United States at birth under paragraph 7 of sub-
4 section A of this section shall lose his nationality and
5 citizenship unless he shall come to the United States prior to
6 attaining the age of 23 years and shall immediately, following
7 any such coming, be continuously physically present in the
8 United States for at least five years, provided that such
9 physical presence follows the attainment of the age of 14
10 years and precedes the age of 28 years.

11 And I may add that there is another statute which
12 provides that the continuous presence is not broken by absences
13 which do not exceed one year. So that it's perfectly possible
14 to go back for visits but he must have five years without more
15 than a one-year break.

16 The case arises on the following facts which were
17 stipulated and thus are not the subject of any dispute: the
18 Appellee, Aldo Mario Bellei was born in Italy in 1939. His
19 father is an Italian, a native and citizen of Italy. Aldo
20 Mario Bellei became an Italian citizen at birth and he is an
21 Italian citizen today, and thus there is no question of
22 statelessness here.

23 The Appellee's mother was born in the United States
24 and has always been an American citizen. The father and
25 mother were married in Philadelphia on March 14, 1939; a few

1 days later they left for Italy where the Appellee was born
2 in December, 1939 and the family has since resided in Italy.

3 At the time of the Appellee's birth, an Act of 1934
4 was in effect. This is printed on page 44 of my brief. It
5 was an amendment to Section 1993 of the Revised Statutes and it
6 provided that a child under these circumstances is declared to
7 be a citizen of the United States, but the rights of citizen-
8 ship shall not descend to any such child unless the citizen
9 father or citizen mother, as the case may be, has resided in
10 the United States previous to the birth of said child, and
11 then it goes on to provide that when one of the parents is an
12 alien the right of citizenship shall not descend unless the
13 child comes to the United States and resides therein for at
14 least five years continuously, immediately previously to his
15 18th birthday and unless within six months after the child's
16 21st birthday he or she shall take an oath of allegiance to
17 the United States of America as prescribed by the Immigration
18 and Naturalization Service.

19 That statute of 1934 was amended in 1940, liberaliz-
20 ing the time period and casting it not in terms that citizen-
21 ship shall not descend, but in terms of the statement that he
22 is a citizen but that he shall lose his citizenship if the
23 condition is not met and the time provision was further ex-
24 tended by the 1952 statute which is the one now in effect and
25 before the Court.

1 Under this statute, as I have indicated the child
2 born abroad with one parent as citizen may retain or perfect
3 his citizenship by residing in the United States for five
4 continuous years sometime between his 14th birthday and his
5 28th birthday. And that means that if he has not started to
6 do that residence by his 23rd birthday then there is no
7 possibility, if the statute is valid, that he can retain his
8 citizenship under the statute.

9 The Appellee here has lived in Italy most of his
10 life, and recently he took up residence in England. He has
11 made five brief visits to the United States, but he has never
12 established residence in this country. On his first two trips
13 in 1948 and 1951 he traveled on his mother's American passport.
14 On his next two trips in 1955 and 1962 he traveled on his own
15 United States passport and this was periodically renewed until
16 December 22, 1962.

17 In connection with the last two renewals of his
18 passport he was expressly advised of the need to establish
19 residence in the United States prior to his 23rd birthday if
20 he wished to retain his American citizenship. When he failed
21 to do so, the Department of State notified him that he had
22 lost his United States citizenship, he came thereafter to the
23 United States in 1955, using an Italian passport and was ad-
24 mitted as an alien visitor. That, too, was a temporary visit.

25 Two years later in 1967 the Appellee brought this

1 suit, contending that the conditions for the retention of
2 citizenship prescribed by the Immigration and Nationality Act
3 are unconstitutional and that he has not lost his citizenship.
4 When this contention was sustained by the Three-Judge District
5 Court, the case was brought here for review on direct appeal.

6 The decision below is, I think, one which shows the
7 result of an unduly conceptual approach to the problem in this
8 area. There are, indeed, two absolutes which have dominated
9 thinking in this field. One is reminded in the consideration
10 of this problem of the reference by Judge Cardozo nearly fifty
11 years ago in the nature of the judicial process to the tendency
12 of a principle to expend itself to the limit of its logic or
13 to Holmes's references to carrying things to a dryly logical
14 extreme.

15 One of these absolutes is that all United States
16 citizens are exactly alike as far as their citizenship is con-
17 cerned. Under this view there can be no variations whatever
18 in any aspect of the citizenship of a citizen. A citizen is a
19 citizen is a citizen.

20 The other absolute is that no citizen can be de-
21 prived of his citizenship except by some action which he not
22 only takes intentionally, but takes for the very purpose of
23 terminating his citizenship. It is clear, I think, that these
24 absolutes find some support in the opinions of this Court in
25 the cases of Schneider against Rusk in 377 U.S. and Afroyim

1 against Rusk in 387 U.S. on which the court below relied.

2 If these propositions are true absolutes then this
3 appeal must fail. My effort will be to show that this con-
4 ceptual approach is not a sound one and that there is no
5 appropriate reason to hold that citizenship cannot be qualified
6 in certain circumstances or that citizenship may be extended in
7 some cases, including this one in a tentative or preliminary
8 manner which will not come to full maturity if certain re-
9 quirements are not met.

10 After all, here is a statute which is entirely fair,
11 rational, understandable and feasible. Why it should be
12 thought to be unconstitutional or what provision of the con-
13 stitution it violates is hard to see.

14 It is wholly clear, I believe, that Congress could
15 have provided a condition preceding, rather than a condition
16 subsequent. That is: Congress could have provided that a child
17 born abroad with one parent a citizen could not acquire citizen-
18 ship at birth, but that he would become a citizen by coming
19 to the United States and residing here for five years between
20 the ages of 13 and 28. That would have been niggardly and it
21 would have presented really practical problems. If the child
22 wanted to come here he would have to come as a foreigner; he
23 would travel on a foreign passport; he would have to get a
24 visa, even though special provisions might be made for visas in
25 such cases.

1 When he got here, he would have to register as an
2 alien; if over 18 or 21 he could not vote. If a problem like
3 the problem in this case, arose in the fields of mathematics
4 or the natural sciences it would be called a boundary problem.
5 We want to be generous in our citizenship but there has to be
6 a line somewhere; in this case it's close to that line.

7 Until 1922 a situation like this was unlikely to
8 arise; until that year husband and wife were generally regarded
9 as having the same citizenship and that was the husband's. As
10 early as 1780 Congress provided that a child born abroad would
11 be a citizen if his father was a citizen. At least in 1907
12 it was the American law that a wife lost her citizenship if
13 she married an alien. And this Court upheld the validity of
14 that result in Mackenzie against Hare in 239 U.S.

15 Q Mr. Solicitor General, where has Mr. Bellei
16 been living since this suit started?

17 A I understand he has been living most recently
18 in England; he has not been living in the United States. I
19 believe that appears in the stipulations, although the stipula-
20 tion was entered into close to two years ago and I don't know
21 where he has been living since that time but there is nothing
22 to indicate that he has been in the United States.

23 When both parents are citizens the family is likely
24 to be an American family and it is appropriate that the child-
25 ren should be American citizens even though they are born

1 abroad, but the situation gets closer to the line when only
2 one parent is a citizen. If the father is foreign and the
3 family lives in his country, as was the situation here, the
4 chances are that it is essentially a foreign family. At any
5 rate, the case for citizenship is not as clear or may well
6 have seemed to Congress not to be so clear.

7 In mathematics and the natural sciences it is well-
8 recognized that when a situations approach a boundary of one
9 sort or another, rules which otherwise seem absolute may no
10 longer be absolute. If one examines the water in many
11 different temperatures he may well conclude that the density
12 of water increases as the temperature decreases and at a fixed
13 indefinite rate. This is more or less a constant and is known
14 as the coefficient of expansion. But, it's well-known that
15 when the temperature of water gets down to 4 degrees centigrade
16 the rule no longer applies. In the area just short of the
17 freezing boundary the density of water decreases as the tem-
18 perature goes down.

19 Sometimes at or near the boundary things become
20 stretched out, attenuated. Even in the case of Fourth Amend-
21 ment rights this Court has recognized that the relation of a
22 person to the premises or the contractors involved may make the
23 effect of a violation so attenuating that the constitutional
24 provision is no longer applicable.

25 The rule or concept that citizenship is an absolute

1 surely has a very general validity. Of course citizenship in
2 every aspect is always subject to the Due Process and the Equal
3 Protection Clauses. It may never be taken away arbitrarily,
4 but it does not necessarily follow that there cannot be
5 qualifications or conditions with respect to citizenship,
6 depending on the circumstances of its acquisition.

7 As to two classes of citizen, the situation is con-
8 stitutionally clear. These may be called "14th Amendment
9 Citizens." In the words of the first sentence of the 14th
10 Amendment they are, "All persons born in the United States and
11 all persons naturalized in the United States." There can be
12 no conditions or qualifications on their citizenship because
13 the constitution gives them that citizenship as this Court has
14 held in Kennedy against Mendoza-Martinez with respect to a
15 native-born citizen and in Schneider against Rusk and Afroyim
16 against Rusk with respect to naturalized citizens.

17 The provisions in the 14th Amendment, however, made
18 no reference to the citizenship of children born abroad of
19 American parents, the type of citizenship which is involved
20 here. In this it followed the Civil Rights Act of 1866. In
21 the brief of amici curiae at page 9 it is said: "Since at that
22 time there were doubtless no Negro Americans overseas the
23 amendment contained no reference to foreign-born Americans."

24 But, I think it may well be suggested that this
25 was not so and that the omission may have been intentional.

1 There was the American Colonization Society which undertook to
2 settle Liberia with Negro Americans. The constitution of
3 Liberia was written by Professor Simon Greenleaf at the Harvard
4 Law School.

5 Under the Civil Rights Act of the 14th Amendment, the
6 Negroes who went to settle in Liberia were American citizens,
7 although I know of no evidence one way or another, it may have
8 been the intention not to provide that their children could be
9 citizens.

10 This case does not involve a person born in the
11 United States. With respect to persons born abroad we may take
12 alternative positions. We may contend in the first place if
13 citizenship in such cases is not acquired by naturalization,
14 but by an independent power of Congress, the power in Congress
15 to grant citizenship according to its judgment; a power which
16 Congress has exercised from the time of the first Congress.

17 Over seven years ago Congress granted citizenship to
18 Sir Winston Churchill. Obviously that cannot be rested on the
19 power of Congress to establish a uniform rule of naturalization.
20 And Congress has passed many acts granting citizenship to
21 individuals whose citizenship was doubtful, particularly in the
22 case of women who married foreigners and then returned to the
23 United States. Such a special act was once passed for the
24 daughter of President Grant. Does anyone think that these
25 statutes were beyond the power of Congress?

1 Similarly, Congress has granted citizenship to all
2 the people in Puerto Rico and the Virgin Islands and before
3 that to all the people in Hawaii and Alaska, except Indians
4 in Alaska who were excluded in the 1867 statute.

5 At the last argument of this case it was asked if
6 Congress could give citizenship to all the people of Canada.
7 I have no doubt that it could; indeed, some 60 years ago there
8 was some talk of merger between the United States and Canada,
9 and if that had progressed further, a grant of citizenship
10 would obviously have been a part of it.

11 We have a clear example in the Citizenship Clause of
12 the Civil Rights Act of 1866 which overruled the Dred Scott
13 case and gave citizenship to a large group of citizens whom
14 this Court has said were not citizens before.

15 Q Am I correct in my recollection, Mr. Solicitor
16 General, that Congress has given United States citizenship to
17 all the descendants of General Lafayette?

18 A Mr. Justice, I thought that was true and I
19 tried to bring it in as one of my illustrations, but apparently
20 it was the States of Maryland and Virginia which gave citizen-
21 ship to the Marquis de Lafayette and his descendants and we
22 could not find any Congressional statute to that effect. Of
23 course, that illustrates that an element in this case, there
24 were no provisions in the constitution for the granting of
25 citizenship and to a large extent, citizenship was thought of

1 as a state matter. Indeed, many years ago, when going through
2 some old papers of a law firm that asked me to look through
3 them to see which should be burned and which should be kept,
4 I came across a passport issued by the Commonwealth of Massa-
5 chusetts in 1844 and apparently at that time that was the
6 normal way. You got a state passport because you were a state
7 citizen.

8 I wish I could find the Lafayette Statute and whether
9 the Marquis' descendants are now citizens, I don't know.

10 So, Congress has the power to grant citizenship, a
11 power which we believe it can be said it has exercised in
12 enacting Section 301(a) 7 and 301(b). This is not 14th Amend-
13 ment citizenship and there was no reason, verbal or theoretical,
14 why it must be subject to all the absolute conceptions which
15 have been attached to 14th Amendment citizenship.

16 So, for good reasons, reasons which are surely valid
17 as far as the Due Process Clause is concerned, Congress has
18 attached the conditions of Section 301(b). Our law is full of
19 such conditions. This can be called "in-court" citizenship,
20 or preliminary citizenship or conditional citizenship. There
21 is no reason why Congress could not vest it with great force
22 and significance unless and until the condition is complied
23 with. There is no reason for not giving effect to that condi-
24 tion, except the concept that citizenship is in all cases and
25 situations, absolute.

1 Q Mr. Solicitor General, certainly that is not
2 in this case, but what about a fellow who didn't have the money
3 to come from Italy here; is there any leeway in this statute?

4 A No, Mr. Justice; unless he can get here for
5 five years between the ages of 13 and 28 he will lose his
6 citizenship. I would venture the fact that a young man with an
7 intense desire to establish his connection with the United
8 States or to preserve his citizenship would find a way to do
9 it. Millions of people have come to this country with no
10 money and have established here.

11 I think, theoretically we can make the case of a man
12 who not only has no money but has no initiative, who can't make
13 it, but if he has the initiative I think he can make it without
14 the money.

15 Q Well, that's certainly not this case?

16 A Not this case; no question about that in this
17 case.

18 But, whether citizenship is an absolute is the issue
19 here. To decide the case on that ground is to beg the question.
20 There is no case decided by this court which requires that
21 resolution and there is certainly no wording in the constitu-
22 tion which requires it.

23 Both Schneider against Rusk and Afroyim against Rusk
24 involve regular naturalized citizens whose citizenship was
25 guaranteed by the 14th Amendment and who obtained it only after

1 five years of residence here as required by the naturalization
2 provisions.

3 Moreover, it's clear that the privileges of citizen-
4 ship are not necessarily uniform and absolute. Some can be
5 President and some cannot; some can be Representatives or
6 Senators and some cannot, until they have resided here for the
7 precise time. Some citizens can vote and some cannot vote,
8 depending upon whatever the age requirement is.

9 Naturalized citizenship can be taken away for fraud.
10 Such persons are citizens. They would not commit a crime if
11 they voted, for example, but their citizenship is subject to
12 a condition subsequent.

13 Citizens who are in the military are treated dif-
14 ferently than other citizens.

15 In *Johannsen against the United States* in 225 U. S.,
16 this Court said that a grant of citizenship was closely anala-
17 gous to a public grant of land and this was quoted in the
18 *Schneiderman* case in 320 U. S. But, of course, a grant of land,
19 including a grant of public land can be made conditional. A
20 mining claim is a grant of public land and it gives substan-
21 tial vested rights but such claims have long been subject to
22 a condition of work performed.

23 There is a similar condition with respect to home-
24 stead claims. The homesteader loses his rights if he does not
25 live upon the land and work it.

1 But, beyond that, let us look at this very statute:
2 under Section 301(a), 7 citizenship can be transmitted only
3 through a citizen parent "who, prior to the birth of the child
4 was physically present in the United States or its outlying
5 possessions for a period or periods totaling not less than ten
6 years, at least five of which were after attaining the age of
7 13 years."

8 Thus, if this Court holds that the Appellee is a
9 citizen he will not be a citizen with exactly the same qualifi-
10 cations as most other citizens, or as his mother, for she can
11 transmit citizenship and he cannot unless and until he meets
12 the requirements.

13 This qualification goes completely back to 1790, an
14 Act of the first Congress and it was sustained by this Court
15 in *Weedin* against *Chin Bow*, in an opinion by Chief Justice
16 Taft without dissent. Unless this qualification is allowed it
17 would mean that the constitution requires that American citizen-
18 ship may be transmitted endlessly through a single parent,
19 generation after generation, even though there is no trace of
20 any connection with the United States or any allegiance to the
21 United States. It seems an unnecessarily bizarre result.

22 Yet, if the condition of residence of the parent is
23 sustained, not every citizen has the same qualifications and
24 status.

25 And let me give another example, though a small one:

1 we are dealing in this case with Section 301(a), 7.
2 Immediately before it is Section 301(a), 6 which provides for
3 citizenship at birth for (6) "a person of unknown parentage
4 found in the United States while under the age of five years.
5 Until shown, prior to his attaining the age of 21 years, not
6 to have been born in the United States." Now, this is a sen-
7 sible and humane provision, yet if it is valid, and I hope it
8 is, we have another instance of citizenship to a condition
9 subsequent.

10 The only other way to look at this problem is to say
11 that Sections 301(a), 7 and (b) are an exercise by Congress of
12 its power to establish a uniform rule of naturalization, but
13 that like other naturalizations, this is a process which takes
14 time. It requires substantial proof of prospective allegiance
15 and the individual is involved and not naturalized until the
16 conditions are met.

17 In ordinary naturalization of foreigners within the
18 United States, a five-year period of residence is required.
19 In the situation involved in this case many of the incidents
20 of citizenship are conferred at birth, but the naturalization
21 process is not completed until the residency requirement is
22 met and it is that process in its entirety to which reference
23 is made in the 14th Amendment.

24 It's true, of course, that the wording of the statute
25 as it stands now, speaks in terms of citizenship and not of the

1 naturalization process. But, if a process of naturalization is
2 the hope and effect of the statute it should be given that
3 effect in law. That this was the purpose is shown by the his-
4 tory of the statutory provisions. A precedent may indeed be
5 found in the Lodge case decided last term. The problem there
6 was to make the statute valid in the light of this Court's
7 view of the constitutional requirements of the First Amendment.
8 The situation here is exactly parallel, if the Court does find
9 that there are constitutional difficulties here under the
10 14th Amendment.

11 In 1939 when the Appellee was born the statute then
12 in effect was that of 1934 printed on page 44. I have already
13 called attention to the fact that that statute was in terms of
14 the right of citizenship shall not descend unless the child
15 comes to the United States, and in addition takes an oath of
16 allegiance. This sounds like a condition precedent rather than
17 subsequent. And moreover, and of first importance, isn't it
18 unduly formalistic to make this case turn on whether the
19 condition is precedent or subsequent? It's like talking about
20 conditional remainders and screening users (??)

21 When the intention of Congress is perfectly clear
22 there is no due process violation in giving effect to that in-
23 tention and no reason except a solely conceptual one for
24 denying it. The relevant statute was amended in 1940; this
25 puts it in a condition of subsequent terms and this was carried

1 forward in the 1952 revisions involved here; that there is
2 nothing to indicate that this was anything other than a verbal
3 or stylistic change or that Congress contemplated that it was
4 changing the law as far as it was applicable in this case.

5 Moreover, there are some provisions in the naturali-
6 zation part of the statute which are applicable to a child born
7 abroad with one parent a citizen.

8 Under Section 320 of the Nationality Act, such a
9 child is naturalized if the alien parent is naturalized while
10 the child is under 16 and the child is resident in the United
11 States. And under Section

12 And under Section 322, such a child under the age of
13 18 years may be naturalized upon the application of a citizen
14 parent if both are resident in the United States.

15 Can it be supposed that Congress would have made pro-
16 vision for naturalization of such children within the United
17 States if it was the understanding of Congress that they were
18 full citizens already? Does this not support the view that
19 Sections 301(a), 7 and (b) can be fairly and properly construed
20 as, in essence, naturalization statutes providing for a process
21 by which such a child becomes a full citizen on completion of
22 the conditions prescribed, conditions which are fully appro-
23 priate for a naturalization statute.

24 Finally, I would suggest the question of separability.
25 If Section 301(b) is invalid is it clear that Congress would

1 have enacted Section 301(a), 7, as it did? If Congress could
2 have achieved its purpose by passing Section 301(a), 7 in
3 terms of a condition subsequent, is it not clear that it would
4 not have enacted Section 301(a) 7 as it now stands without
5 enacting Section 301(b) at the same time? In that event,
6 should not Section 301(a), 7 fall if Section 301(b) falls?

7 I submit that it should, thus giving Congress a
8 clean slate to write on in the event that its purely form and
9 choice of words led to constitutional difficulty.

10 The judgment below should be reversed and the con-
11 stitutional validity of Sections 301(a), 7 and 301(b) should
12 be sustained.

13 Q Mr. Solicitor General, if this Court should
14 affirm, do you anticipate that Congress might repeal these
15 statutes?

16 A It's difficult for me, Mr. Justice to know what
17 Congress might do in the future. I think it's very likely that
18 there would be a recommendation that these statutes be reworded
19 and then be reenacted to provide that such a person becomes a
20 citizen if he comes to the United States for five years between
21 the ages of 13 and 28 and that in the period before he comes to
22 the United States, he shall have certain rights of citizenship,
23 such as the right to enter free of quotas and to have perhaps
24 some kind of a special document, not a passport, indicating
25 his potential citizenship in the United States.

1 I think that to me it is perfectly plain that the
2 results sought by Congress here can be achieved in all its
3 detail, or virtually all its details, by formal, verbal changes,
4 even though this Court holds Section 301(b) invalid and I
5 would anticipate that Congress would proceed in that line and
6 not to abandon citizenship the parent born abroad entirely,
7 but to subject it to a condition precedent, rather than a
8 condition subsequent, would seem to me to emphasize the essen-
9 tial formal detail, verbal nature of the issue which is raised
10 here.

11 ORAL ARGUMENT BY O. JOHN ROGGE, ESQ.

12 ON BEHALF OF THE APPELLEE

13 MR. ROGGE: Mr. Chief Justice Burger and may it
14 please the Court: I will divide the time on behalf of the
15 Appellee with Professor Gardner of the Columbia Law School,
16 who did the able brief on behalf of the amici curiae Associa-
17 tion of American Wives Married to Europeans and the American
18 Bar Association.

19 Counsel, I suppose, in their role of advocates, no
20 matter how objective they try to be are going to state facts
21 a little bit differently.

22 Now, the Solicitor General stated that Revised
23 Statute 1993 as amended by the Nationality Act of 1944 was
24 amended -- 1934, was amended in 1940. I think a more correct
25 statement would be that Section 1993 as amended was repealed by

1 the Nationality Act of 1940; that there was a saving clause
2 which provided that this repeal shall not terminate nation-
3 ality heretofore lawfully acquired.

4 The Solicitor General referred to five brief visits.
5 If I were stating that on behalf of Appellee I would say that
6 he made visits here which were substantially about three
7 months or more. He came here from April 27, 1948 to July 31,
8 1948. This was to visit his grandparents.

9 His mother was born and raised in Philadelphia; she
10 lived there until after her 24th birthday. She married the
11 Appellee and a few days later went to Italy. She has always
12 been an American citizen. She has prized that, as has the
13 Appellee. He registered for selective service in Italy; he
14 passed his test; he was due to be inducted but he was working
15 on a NATO defense program, as a result of which he was deferred
16 and then he was later on told: "We have taken your American
17 citizenship away."

18 Now, Mr. Justice Harlan, in answer to your question:
19 at the time of drafting the stipulation he was in England
20 working on a NATO defense project for a company called "NAJCO
21 Limited." He is at present back in Italy.

22 But, further on his visits, there was another visit
23 from July 10, 1951 to October 5, '51; there was another visit
24 from June of '55 until October of '55. These aren't brief
25 visits; these are visits for substantial periods of time and

1 they were to visit his maternal grandparents.

2 When he married in Italy he wanted to come over here
3 a fifth time and this time they told him, "Well, your American
4 citizenship has expired." He again wanted to come here to
5 visit his maternal grandparents. For 12 years Aldo Mario
6 Bellei had his own United States passport as an American
7 citizen: from 1952 until 1964. This is what the government
8 now says that without his consent they can take away from him.

9 I, too, read these statutes, but with a slightly
10 different emphasis. As the Solicitor General pointed out they
11 are in the Government's brief at pages 45 and 46 and the way
12 that now reads it says "The following shall be nationals
13 and citizens of the United States at birth." And when it comes
14 to taking the nationality away it's an expatriation statute.
15 It says "any person who is a national and citizen of the United
16 States at birth" under the section I just read, "shall lose
17 his nationality and citizenship." That's an expatriation
18 statute.

19 Now, the Solicitor General asked what provision was
20 violated: the Due Process Clause of the 5th Amendment, and I
21 am not asking for any absolute here; I'm relying upon Schneider
22 against Rusk which I say is precisely in point. Now, Angelica
23 Schneider was not a 14th Amendment citizen; Angelica Schneider
24 never stood up in any United States Court and raised her hand
25 and swore an oath of allegiance. No; her mother did that, and

1 then a statute said and that statute, to be found in 8 United
2 States Code, Section 1432 or, immigration and nationality
3 lawyers would refer to that as Section 321 of the Immigration
4 and Nationality Act of 1952 and it says in its very action:
5 "automatic citizenship."

6 So, what I'm relying on as the case being precisely
7 in point is Schneider against Rusk and I submit to this Court
8 that Angelika Schneider was just as much a statutory citizen,
9 if that's what the Government wants to draw the distinction
10 between statutory and Fourth Amendment, Angelika Schneider was
11 just as much a statutory citizen as Aldo Mario Bellei and if
12 Schneider against Rusk is to be followed, the court held that
13 the section which involved Angelika Schneider to have her
14 citizenship taken away because she returned to the country of
15 her origin for three years, I say by a parity of reasoning if
16 that provision was held unconstitutional as it was on the
17 grounds that moreover while the First Amendment contains no
18 Equal Protection Clause it does forbid discrimination that it
19 is so unjustifiable as to be violative of due process.

20 If that decision is correct, then the provision
21 requiring Aldo Mario Bellei to come here and be here for five
22 years between the ages of 14 and 28 likewise violates the Due
23 Process Clause of the Fifth Amendment.

24 I am asking for no absolute, but I am asking on the
25 basis of Schneider against Rusk that where this Government has

1 given citizenship at birth, it can't come along under the cir-
2 cumstances of this case and take it away without the voluntary
3 act of the one who got citizenship.

4 Q Supposing the statute rephrased the terms,
5 making it a condition preceding these requirements, what would
6 your position then be?

7 A Mr. Justice Harlan, I would look at the due
8 process clause and I would apply that in the same manner in
9 which Your Honor thinks it should be applied; namely: what
10 constitutes fundamental fairness at the time of the decision
11 and I would probably, as a lawyer, and lawyers are careful in
12 their phrasing; I would probably say it would make a difference
13 We lawyers are supposed to be careful at draftsmanship and I
14 think it would make a difference whether it was phrased in
15 terms of a condition subsequent or a condition precedent.

16 I think it would make a difference in the case where
17 Congress had said: "You're not a citizen; you are going to be a
18 citizen under the performance of certain conditions." That
19 would be one thing.

20 I think I would draw the difference and would say
21 that where it's a condition precedent, that's one thing, but
22 where it is a condition subsequent, where Congress says as it
23 did in this case: "You are a citizen at birth," I would then
24 say you can't come along later under the Due Process Clause of
25 the Fifth Amendment, and say, "Oh, by the way, because you

1 didn't come here for five years we are now going to take it
2 away." I would say it makes a difference; yes.

3 Q But then I take it it would follow that you
4 agree that Congress need not vest a person in his position with
5 citizenship if it chooses not to do so?

6 A That is correct, Mr. Justice Blackmun.

7 Q And then, however, having granted it, it is
8 your position that Schneider against Rusk is controlling?

9 A Precisely in point, if Your Honor please.

10 Q I'll ask of you, then, the same questions I
11 asked the Solicitor General: do you think if this case is
12 affirmed that Congress might repeal this statute if its inten-
13 tion was as the Solicitor General indicated?

14 A In that connection, I think Mr. Justice White
15 had a question in the same area. I can call the Court's
16 attention to the fact that on December 4, 1969 Senator Kennedy
17 on behalf of himself and 23 other Senators, introduced S.3202
18 in the 91st Congress, First Session -- it's in the Second
19 Session now -- a bill to revise the Immigration and Nationality
20 Act. That bill was referred to the Senate Committee on the
21 Judiciary.

22 Now, respecting Section 21 of this bill, Senator
23 Kennedy stated this as found at 115 Congressional Record, page
24 15612 of the daily edition: "This important segment of public
25 policy has been ignored and overlooked by the Congress since

1 the codification and amendment of nationality and naturaliza-
2 tion laws in 1952. There is little doubt that many provisions
3 in the basic statute are products of a harsher period in our
4 nation's history and should have no place in the public
5 policy of a free society."

6 "But, aside from this, court decisions in recent
7 years have altered the statute considerably. The situation
8 clearly demands a comprehensive review and evaluation of our
9 nationality and naturalization policy."

10 So that answering that question, of course, one
11 can't say what Congress is going to do but my feeling would be
12 that if Congress did act it would, as it has done a number of
13 times in the past, ameliorate the situation and bring about the
14 result that I am asking this Court for right now in affirming
15 the judgment of the Court below on the basis of *Schneider*
16 against *Rusk*.

17 So that I say that citizenship as an absolute is not
18 an issue in this case; the precise question here, as sharpened
19 by Mr. Justice Harlan's question is whether, having given
20 American citizenship at birth, and there is no doubt that
21 that's what the statute did, whether Congress can then come
22 along with a condition subsequent and make what the called in
23 *Schneider* against *Rusk*, "second class citizens" out of such
24 persons?

25 And I submit that that could not be done consistent

1 with the Due Process Clause of the Fifth Amendment.

2 Q Of course, in Schneider against Rusk, the
3 Appellant was naturalized in the United States at the age of
4 16 and so she came within the literal provisions of the 14th
5 Amendment, just as did the Appellant in Afroyim.

6 A I don't read that case that way, Mr. Justice.--

7 Q -- that sure was a matter of fact --

8 A Her mother took the naturalization oath;
9 Angelika never did.

10 Q Yes, but she became a citizen when she was
11 physically in the United States at the age of 16.

12 A By virtue of the statute.

13 Q Yes. And so she was naturalized in the United
14 States and therefore within the literal language of the 14th
15 Amendment.

16 A That depends now on what the language,
17 "naturalized in the United States," means. If "naturalized in
18 the United States," means that a person has to stand up in a
19 District Court, as they do, raise their right hand and take
20 the oath of allegiance, if that's what "naturalized in the
21 United States" means under the 14th Amendment, then as I read
22 Schneider against Rusk, Angelike Schneider never did that; her
23 mother did.

24 Q But, whatever it may mean, it probably doesn't
25 mean "naturalized in Italy," does it?

1 A I am not claiming either naturalization under
2 the 14th -- I'm not claiming under the 14th Amendment.

3 Q No; I didn't think you were.

4 A No; I'm placing mine plainly and simply on
5 the Due Process Clause of the Fifth Amendment. And I do say
6 that if my understanding of Schneider against Rusk is correct,
7 namely: that Angelika Schneider never stood up and took the
8 oath of naturalization, that this is what I think "naturaliza-
9 tion in the United States" means; Angelika Schneider never did
10 that; her mother did.

11 And, as far as protecting the interests of this
12 country in the dissenting opinion there in Schneider against
13 Rusk by Mr. Justice Clark, this is the way he describes the
14 Appellant there. He says, "and here the Appellant has been
15 away from the country for ten years, has married a foreign
16 citizen, has continuously lived with him in her native land
17 for eight years, has borne four sons who are German Nationals
18 and admits that she has no intention to return to this country."

19 We have quite a different situation with dual
20 nationals such as are involved in the present case. And I
21 cannot see why Schneider against Rusk isn't directly in point
22 because I don't think Angelika Schneider was naturalized
23 within the United States within the meaning of the 14th Amend-
24 ment; her mother was.

25 And then a statute, and I have called attention to

1 it, has the caption under which she gets citizenship. This is
2 8 U.S.C., Section 1432, says conditions for automatic citizen-
3 ship, but that's a statutory provision; just as much statutory
4 as the one that said Aldo Mario Bellei is a citizen at birth.

5 Q If, in Schneider against Runk, the person
6 hadn't been a naturalized citizen she wouldn't have lost her
7 citizenship at all, because that's the only people who would
8 lose their citizenship, were naturalized citizens. And both
9 the majority and the dissent referred to Angelika Schneider
10 as a naturalized citizen and the very provision which was
11 claimed to have forfeited her citizenship refers only to
12 naturalized citizens.

13 A Well, as I read this section under which I
14 think Angelika Schneider was a citizen is 8 U.S.C., Section
15 1432 and it says, "Conditions for automatic citizenship."

16 Q Well, the provisions by which she was supposed
17 to -- was supposedly going to lose her citizenship says a
18 person who has been a national by naturalization. This section
19 wouldn't even apply if you are right. There wouldn't have been
20 any problem in the whole case.

21 A Well, my difference with Your Honor is that I
22 cannot see my way clear -- I beg your pardon --

23 Q I'm not sure we have a difference; we just
24 read the statute -- I guess to that extent we may have a
25 difference.

1 A I find it difficult to say that Angelika
2 Schneider was a statutory citizen just as Aldo Mario Bellei
3 was. I can't feel that she comes within the 14th Amendment.
4 The statute says that because your mother was naturalized we're
5 going to call you a naturalized citizen.

6 Q What difference does it make to you if the
7 Due Process Clause had this whammy you wouldn't care whether
8 she was a naturalized citizen or not; would you?

9 A Under -- well, the Government draws a great --

10 Q If she was a naturalized citizen you would
11 make the same argument.

12 A I would -- well, the Government draws the
13 distinction, Mr. Justice White, between one who is born or
14 naturalized in the United States and --

15 Q Yes, but why should you? Why should you, if
16 the Due Process Clause has this much impact, it would reach
17 naturalized citizens as well as non-naturalized citizens.

18 A Well, you might say that where you are a
19 citizen by the constitution, that is something which cannot be
20 taken away at all and you don't get to the Due Process Clause.

21 Q I know, but if you had to you easily could;
22 I mean, you could make the same argument about the Due Process
23 Clause.

24 A Mr. Justice, I have a great feeling for the
25 Due Process Clause either of the Fifth or the 14th Amendment

1 and I would find myself very ready in almost any situation
2 where a client of mine had a grievance to make an argument
3 under the Due Process Clause.

4 Q But, a fortiori, you could make it if she
5 was a naturalized citizen.

6 A Under the 14th Amendment -- Oh, right. Yes,
7 I could then make an a fortiori case.

8 Q What difference does it make to you whether
9 or not Schneider was a naturalized citizen -- well, excuse me
10 -- I'm sorry.

11 A No; I want to follow this through. I might
12 say if I felt it was truly under the 14th Amendment there is
13 a situation where I would say it violated the 14th Amendment
14 and I didn't have to rely on the Due Process Clause of the
15 Fifth Amendment.

16 Q That may well be true, but if you can rely on
17 the Due Process Clause in this case, surely you could in the
18 other.

19 A You're right; I would say it was a fortiori,
20 but then I think as I reflect on it more, I wouldn't rely on
21 it because if I had a 14th Amendment citizen, whether by birth
22 or naturalization, under those circumstances I would say I
23 don't have to rely on the Due Process Clause.

24 But, in this situation where I think it's precisely
25 controlling, I do rely on it.

1 Q You certainly would if the dissenters had
2 prevailed on the --- on one point of the case in Schneider
3 against Rusk you most certainly would have had to rely on the
4 Due Process Clause.

5 A Well, if I had to rely on it, I would and I
6 do rely on it in this case and I do say that Schneider against
7 Rusk is directly in point.

8 Now, I would --

9 Q As I understand it you implicitly concede that
10 your client is not a so-called "14th Amendment citizen." Am I
11 mistaken about that?

12 A I have never placed this on 14th Amendment
13 citizenship, if Your Honor please, and that is one reason why
14 I could see we have a tussle with the Government here. But, I
15 --- even though my client is not a 14th Amendment citizen, he
16 is a citizen at birth by statute and I think under Schneider
17 against Rusk and even if Schneider against Rusk were not there,
18 I'd say on the basis of fundamental fairness this Government
19 can't come along to someone who wants his citizenship, who had
20 his passport for 12 years, as an American citizen and say, "Oh,
21 by the way, we're now taking that away from you," and seek to
22 do that without his consent.

23 Q That's purely a matter of fundamental fairness
24 under the substantive reach of the Due Process Clause of the
25 Fifth Amendment?

1 A Absolutely.

2 Q Is that your only argument?

3 A Yes, Mr. Justice Black.

4 I would now like to turn the balance of the time over
5 to Professor Gardner.

6 MR. CHIEF JUSTICE BURGER: Professor Gardner.

7 ORAL ARGUMENT BY RICHARD N. GARDNER, ESQ.

8 ON BEHALF OF THE ASSOCIATION OF AMERICAN WIVES
9 OF EUROPEANS AND THE AMERICAN BAR ASSOCIATION,
10 AS AMICUS CURIAE

11 MR. GARDNER: Mr. Chief Justice and Mr. Justices,
12 may it please the Court: the Amici Curiae in this case are the
13 American Bar Association and American Wives of Europeans.

14 The one organization is a group based in Paris of
15 American women married to European husbands. These women
16 share a common bond of allegiance to this country: they
17 organize American educational and cultural programs and most
18 important of all, they are concerned to protect the American
19 citizenship of their children, which is at issue in this case.

20 They do not agree with the Solicitor General that
21 this residence requirement is, as he put it this morning:
22 "fair, rational and sensible." On the contrary, they regard it
23 as unfair, irrational and not sensible. They do not appear
24 here to vindicate what the Solicitor General calls an unduly
25 conceptual approach, rather they are here to vindicate

1 fundamental human rights and to eliminate an invidious dis-
2 crimination against a class of American citizens which works
3 very substantial human hardship to themselves and their child-
4 ren.

5 Q Professor Gardner, when you say "fundamental
6 human rights," you concede, as I take it your co-counsel here,
7 that Congress need not have gone so far as to grant citizen-
8 ship here?

9 A That is correct.

10 Q Well, to that extent, then it is not a funda-
11 mental human right?

12 A The right not to have their citizenship with-
13 drawn once it has been granted.

14 Q You would have to take that second step?

15 A That is correct.

16 Q All right.

17 In the last 36 years since this residence requirement
18 was adopted, the number of Americans living abroad has increased
19 from less than 100,000 to close to 2 million. This includes
20 nearly 1 million military servicemen and their dependents;
21 92,500 U. S. civilian government employees and their dependents;
22 and approximately 940,000 other persons.

23 And, among these really, 2 million Americans abroad,
24 are many thousand children whose citizenship will be affected
25 by your decision in this case. Among these, to give some

1 examples, are the daughter of the Director of the American
2 Library in Paris; a boy who is a direct descendant of Commodore
3 Perry and whose family has served in the U. S. Navy for
4 generations, going back to the Revolution --

5 Q How old is he?

6 A I think he's approximately ten or eleven
7 years of age.

8 Q Then he has plenty of time --

9 A That is correct, but only at a price which we
10 argue is an excessive price in terms of the hardship worked on
11 the family as I will seek to show in a moment.

12 Q Do you object to taking the oath of allegiance
13 to the United States Government?

14 A I would not object if the Congress in its
15 wisdom, required that these children born abroad at the age of
16 21, reaffirm their allegiance to this country by Article 21.

17 Q What do you mean "reaffirmed?" When did they
18 affirm it before?

19 A Affirmed.

20 Q Thank you.

21 A Yes.

22 Q I imagine they could do it in the foreign
23 language of that country?

24 A I think it would be appropriate to have them
25 do it in English; most of them speak it.

1 Q Well, what about those that don't?

2 A Well, I would want to consider that further,
3 Mr. Justice. I think that affirmation of the citizenship would
4 be appropriate and would not cause a constitutional problem.

5 Q Would it be good if they had a little knowledge
6 of American history?

7 A Yes.

8 Q Suppose they didn't have?

9 A The overwhelming majority of these foreign-
10 born children do have such knowledge.

11 Q How do you know that?

12 A Because there are 350 schools, primary and
13 secondary schools now all over the world, not counting the
14 schools maintained by the U. S. military establishment and the
15 American Wives of European Husbands conducted surveys in Paris
16 which indicate that the majority, overwhelming majority, speak
17 English and are brought up in an American cultural tradition in
18 their homes.

19 Q It's rather self-serving; isn't it?

20 A Well, it's --

21 Q I'm talking about the party which you repre-
22 sent.

23 A That is correct.

24 Q If I understand your answer to Justice
25 Marshall's question, if you would have no objection to the

1 requirement that they take an oath of allegiance at age 21?

2 A That is correct.

3 Q Is this, then, a condition subsequent?

4 A No, it would not be; it would be a means of
5 Congress perhaps avoiding any difficulty that might be invol-
6 ved in dual nationality or other problems which might be felt
7 to be caused by this.

8 Q But would failure or refusal to take such an
9 oath result in noncontinuation of citizenship? Is that the
10 import of Justice Marshall's question as you understood it?

11 A Well, I would -- we are claiming that any con-
12 dition subsequent which takes away the citizenship without the
13 consent of the person is unconstitutional.

14 Q Then you have to revise your answer to Justice
15 Blackmun; don't you?

16 A I suppose -- I wouldn't want to concede the
17 point.

18 Q Well, take this man up to age 21 and he refuses
19 to go to the American Embassy or whatever the regulations would
20 provide, to take the oath. Since it is a condition subsequent
21 you say that they cannot impose that --

22 A Well, we're making essentially two arguments,
23 Mr. Chief Justice --

24 Q -- I don't think there was really any argument;
25 I was really asking a question.

1 A There are two possible arguments that could
2 be used to sustain our position: one is that Congress has no
3 power to take away citizenship without consent. If that
4 argument is the one which this Court affirms today and we
5 believe that is what it said in Afroyim, then no condition sub-
6 sequent, even of the kind that was put to me, is possible.

7 Alternatively, the Court might wish to go less far
8 and say that if there is a condition subsequent it must be one
9 which bears directly on the intention of the person with res-
10 pect to his citizenship. We claim the residence requirement
11 is unreasonable because in Schneider the Court said there:
12 residence is not a badge of allegiance.

13 In answer to the question on that ground it would
14 seem to me that no condition subsequent would be appropriate
15 even the oath of allegiance although it would be possible to
16 distinguish that from the residence requirement in this case.

17 Among the American children that are subject to this
18 residence requirement, is a daughter of a retired colonel in
19 the U. S. Army, a young lady who is presently in California in
20 an attempt to comply with this requirement, whose parents
21 cannot join her because her grandparents are ill in Paris and
22 her father, retired from the Army, is employed there.

23 And finally, in this class of persons affected by
24 this decision is a young man or rather three persons, three
25 young people who are the great grandchildren of Charles Evans

1 Hughes.

2 So, at issue today are the citizenship of the direct
3 descendants of people who helped build America, of youngsters
4 of value who will contribute to the future of America and of
5 children of American citizens who have spent their productive
6 years in the service of America.

7 Q Has your organization made any effort to get
8 Congress to change the laws?

9 A No, sir. But, I'm not informed on that; they
10 may have done it but I'm not informed of it. I'm informed by
11 my co-counsel that there has been an attempt there by some of
12 the members to do that.

13 I submit that these foreign born children are the
14 victims of invidious discrimination. A child of two alien
15 parents who happens to be born in the United States during a
16 brief visit of those parents can go back to their native land,
17 grow up in a home in which English is not spoken, in a foreign
18 home and remain an American citizen for the rest of his or her
19 life without any residence requirements.

20 Q And what's the source -- by virtue of what
21 does that occur?

22 A The 14th Amendment.

23 Q So that it isn't an Act of Congress; is it?

24 A That is correct. But, we're claiming that this
25 is a discrimination which violates the Fifth Amendment; it's

1 unjustifiable and it seems to me indefensible that the child
2 of those alien parents be considered an American for the rest
3 of his life without a need of residence here that the child
4 of naturalized American parents can reside, under Schneider
5 versus Rusk for the rest of his or her life abroad without a
6 residence requirement, but this class of Americans is subjected
7 to this residence requirement.

8 This seems to us precisely a discrimination so un-
9 justifiable so as to be violative of due process under
10 Bolling versus Shaw.

11 Now, this discrimination imposes great hardship as
12 we have tried to develop in our brief, because it means that
13 the child can only retain his or her citizenship by coming
14 back here either during the early school years, which would be
15 harmful in educational terms and a great expense, with long
16 separation from family or at the university level and we know
17 what the costs of education are; this could mean four or five
18 or more thousand dollars per year; or it would mean giving up
19 the possibility of post-graduate studies or jobs or careers
20 immediately after graduation from the university.

21 It is a discrimination that bears particularly heavily
22 upon middle and low income families who cannot afford to fly
23 the mother back here to have the child brought in this country
24 or send the child back for schooling for five years in this
25 country.

1 To give one example only, or perhaps two examples
2 of the unfairness of this provision, it has been brought to
3 our attention that there are cases where a child was born
4 abroad of an American father and an alien mother; the mother
5 subsequently became naturalized in this country; the child
6 could not become naturalized because the child was already a
7 citizen at birth and thus that child is subject to a disability
8 to which it would not have been subject had it become natur-
9 alized with the mother.

10 Another anomaly is that here we have people who have
11 in a number of cases, as in the Bellei case, been willing to
12 serve in the Armed Forces of the United States and uncondition-
13 ally make the supreme sacrifice for their country and yet they
14 can be told even if they do serve, that they are no longer
15 citizens of this country.

16 Q If I may interrupt you on that last comment,
17 because I saw it in the brief also; isn't this demanded of
18 resident aliens just as much as of citizens?

19 A Military service?

20 Q Yes.

21 A That is correct.

22 Q Hence I fail to see the significance of this
23 comment.

24 A We make the comment because the Government
25 seeks to suggest that we are persons who have no allegiance to

1 this country and I am seeking to show that they are not con-
2 ditional citizens; they regard themselves as unconditional
3 citizens; they accept the burdens of citizenship as well as
4 the rights of citizenship and it seems to us unjust after 23
5 years of accepting those burdens as well as those rights, to
6 take their citizenship away from them.

7 Now, we claim that this discrimination is unconsti-
8 tutional, very briefly, for two reasons: in the first place
9 this Court has held in Afroyim versus Rusk that Congress has
10 no power to take away the citizenship of an American without
11 his consent and that is our case today.

12 Q Well, that involves 14th Amendment citizenship,
13 does it not? The reliance upon that opinion was put squarely
14 upon --

15 A But in the closing paragraph of that opinion
16 it was said, "We hold that the 14th Amendment was designed to
17 and does protect every citizen of this nation against a
18 Congressional forcible destruction of the citizenship whatever
19 his creed, color or race. And we submit that one cannot read
20 Afroyim as leaving outside the constitutional protection this
21 important class of citizens.

22 And there is a second reason for our submission: the--

23 Q Well, you don't think that Mr. Rogge's relying
24 on the Fifth Amendment, then?

25 A We would rely on both. And we would rely --

1 Q Afroyim you say is a 14th Amendment case and
2 Schneider against Rusk is a Fifth Amendment case?

3 A Afroyim --

4 Q Either way; either way.

5 A Yes, and indeed, there is a third argument
6 which is made in Afroyim by this Court and that is that Congress
7 has no power quite apart from the 14th or Fifth Amendment to
8 take away citizenship without the consent of the person, and
9 we rely on that, too.

10 Now, the Solicitor General seeks to say --

11 Q May I interrupt you once more, Mr. Gardner.
12 Going back to this military service thing, wouldn't you be
13 making the same argument here whether or not your client was
14 willing to perform military service? If you prevail as you
15 have, your client is an American citizen and he may never come
16 back here and hence I ask how could military service on his
17 part ever be compelled?

18 A Well, I would make the argument whether or not
19 he was willing to enter the service of his country, but the
20 fact is that in this case he did and in many of these foreign
21 born Americans are prepared to accept this obligation.

22 Q I guess this brings me back again to inquire
23 whether the argument, then, has any particular merit in this
24 context as to whether he is willing or is not willing, because
25 if you prevail you benefit either class.

1 A Yes; well, I don't -- it's not a fundamental
2 point.

3 Q Right.

4 Q Do you think, Professor Gardner, that Congress
5 could constitutionally provide that upon failing to report for
6 induction after reasonable notice that citizenship under these
7 circumstances could be terminated? Or is that the same kind
8 of condition subsequent that you were challenging before?

9 A Well, I think we would say under our theory
10 that Congress cannot take away citizenship for any reason that
11 under that line of argument that condition subsequent would
12 fail and I would think under the Mendoza-Martinez case there
13 might also be problems and other cases decided by this Court.

14 Q That tends to undermine, at least to some ex-
15 tent, doesn't it, your argument on having all the burdens of
16 citizenship?

17 A Well, I don't think so, Your Honor --

18 Q Well, if it rejects the burdens and you say the
19 United States Government can do nothing about it, it has re-
20 jected one quite important burden; hasn't it?

21 A That is correct; that is correct; but there are
22 other burdens such as subjection to judicial process under the
23 Blackmer case, the paying of taxes and other things. There are
24 a whole collection of burdens here which would be very difficult
25 for these foreign-born Americans their first 23 years to avoid.

1 May I deal very briefly with this fundamental
2 question which was raised by the Solicitor General that is
3 to say that if a -- if it were possible for the Congress to
4 lay down a condition precedent it must thereby be possible for
5 the Congress to apply a condition subsequent. In our view,
6 the difference is fundamental.

7 It is one thing, and we would not concede the
8 reasonableness of this -- it would be one thing for the Congress
9 to say that these people are not citizens but can become
10 citizens at age 21 upon complying with the residence require-
11 ment is a very different thing to strip them of their citizen-
12 ship and reading the decisions of this Court over the years
13 one sees two fundamental reasons for this: first, the unfair-
14 ness of taking away citizenship once vested, given the willing-
15 ness, the fact that the people have accepted for 23 years
16 rights and obligations, and second that the danger of taking
17 away the civil liberties of Americans through the back door
18 by involuntary expatriation. That, it seems to me is the dis-
19 tinction between the condition precedent and the condition
20 subsequent.

21 And finally, if it please the Court, the second
22 pillar of the argument we're making is that the Court held in
23 *Schneider versus Rusk* that a residence requirement for
24 naturalized Americans violates the Fifth Amendment because it
25 involved discrimination unjustifiable and that is the kind of

1 discrimination which is the case before us.

2 MR. CHIEF JUSTICE BURGER: Thank you, Professor
3 Gardner.

4 MR. GRISWOLD: I have no rebuttal.

5 MR. CHIEF JUSTICE BURGER: Thank you very much, Mr.
6 Solicitor General, Mr. Rogge and Professor Gardner. The case
7 is submitted.

8 (Whereupon, at 11:20 o'clock a.m. the argument in
9 the above-entitled matter was concluded)