

PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: LORELYN PENERO MILLER, Petitioner v. MADELEINE  
K. ALBRIGHT, SECRETARY OF STATE

CASE NO: 96-1060 C. I

PLACE: Washington, D.C.

DATE: Tuesday, November 4, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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LORELYN PENERO MILLER, :  
Petitioner :  
v. : No. 96-1060  
MADELEINE K. ALBRIGHT, :  
SECRETARY OF STATE :  
- - - - -X

Washington, D.C.  
Tuesday, November 4, 1997

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:06 a.m.

APPEARANCES:  
DONALD R. PATTERSON, ESQ., Tyler, Texas; on behalf of  
the Petitioner.  
EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
the Respondent.

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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 96-1060, Lorelyn Miller v. Madeleine K.  
5 Albright.

6 Mr. Patterson.

7 ORAL ARGUMENT OF DONALD R. PATTERSON

8 ON BEHALF OF THE PETITIONER

9 MR. PATTERSON: Mr. Chief Justice, and may it  
10 please the Court:

11 The Court granted certiorari in this case on one  
12 issue only, whether the gender discrimination provisions  
13 in 8 U.S.C. section 1409 violate the Constitution. The  
14 court of appeals felt that this Court's opinion in Fiallo  
15 v. Bell was a controlling precedent. It is our position  
16 that Fiallo can be distinguished, but that if the Court  
17 feels that it applies, that Fiallo is out of step with the  
18 Court's more recent decisions that refuse to sanction  
19 official actions that close a door to opportunity based on  
20 overbroad generalizations concerning the abilities, or  
21 personalities or such, of males and females.

22 The Immigration & Nationality Act draws some  
23 clear distinctions between the naturalization of an  
24 individual about whom alienage is not in dispute and those  
25 persons who are citizens at birth. Naturalization is the

1 conferring of nationality of a State upon an individual  
2 subsequent to their birth. Persons who are born overseas  
3 to a U.S. citizen are citizens and nationals of the United  
4 States at birth.

5 QUESTION: Am I right, Mr. Patterson, in  
6 thinking that your client has never set foot in the United  
7 States?

8 MR. PATTERSON: My client has set foot in the  
9 United States, in fact is presently in the United States,  
10 but not at the time that this case was filed and  
11 originally came forth, Your Honor.

12 QUESTION: Thank you.

13 MR. PATTERSON: Unlike the person who is seeking  
14 naturalization or immigration, Ms. Miller seeks to  
15 establish her citizenship by virtue of her birth. The  
16 deference accorded the Congress power over admissions of  
17 aliens is inapplicable in dealing with a situation where  
18 someone claims citizenship from birth, and we feel there  
19 is a clear distinction here, that she has been denied her  
20 equal protection rights, and she seeks a finding that she  
21 is a citizen at birth, and thus Fiallo can be  
22 distinguished.

23 QUESTION: But how do you say Fiallo is  
24 distinguishable in that regard?

25 MR. PATTERSON: Fiallo dealt with a situation

1 where there was no question concerning the alienage of the  
2 persons involved. In this case, we claim that my client  
3 should have been entitled to citizenship at birth, and  
4 therefore it is not an immigration matter but a  
5 citizenship matter, and could be distinguished on that  
6 basis.

7 Fiallo could be left to apply in cases in which  
8 they were purely immigration. This case is not so much  
9 based on the immigration powers of Congress as it is upon  
10 the gender discrimination that is established in this  
11 provision.

12 QUESTION: But you have to have a part of a law  
13 of Congress declared unconstitutional in order to  
14 establish your client's citizenship, do you not?

15 MR. PATTERSON: That is correct, Your Honor. We  
16 feel that --

17 QUESTION: You say there's no deference to  
18 Congress in this respect?

19 MR. PATTERSON: Your Honor, while the Court  
20 gives deference to Congress in many areas, the Court has  
21 held that it does not -- deference does not mean  
22 abdication, and that if a statute is violative of the  
23 provisions of the Constitution, then that statute cannot  
24 stand.

25 QUESTION: Yes, but I think some of -- there's

1 language in some of our cases that say in the field of  
2 immigration and nationality we give extraordinary  
3 deference to what Congress has decided.

4 Now, you're saying, I guess, that when you're  
5 talking about nationality as opposed to immigration the  
6 Congress gets no special deference.

7 MR. PATTERSON: I think Congress always gets a  
8 certain amount of deference, Your Honor, in any case,  
9 because I think the Court normally approaches that they  
10 are -- Congress is entitled to do what is within its  
11 realm, but if it violates -- if it provides a provision  
12 that deprives people of the equal protection of the  
13 Constitution, then that statute cannot stand, and dealing  
14 with --

15 QUESTION: May I just interrupt with a question?  
16 I'm not sure I understood. Are you saying there is a  
17 constitutional entitlement to citizenship at birth?

18 MR. PATTERSON: There is not a constitutional  
19 entitlement of citizenship at birth unless you are born in  
20 the United States.

21 QUESTION: Okay.

22 MR. PATTERSON: However, the Congress has  
23 created a statute which provides that children of U.S.  
24 citizen parents are entitled to citizenship at birth, but  
25 then they have in effect taken away that right as to those



1 children who are illegitimate in that section 1401  
2 establishes a broad general statement that all children  
3 born to U.S. citizen parents in the world are U.S.  
4 citizens at birth. Then in 14 --

5 QUESTION: Well, let me just interrupt with a  
6 simple question to be sure. Would it be constitutional  
7 for Congress to pass a statute saying that any child born  
8 abroad of American parents shall become a citizen at the  
9 age of 10, regardless of who the -- which parent was  
10 the -- the male or female parent?

11 MR. PATTERSON: I think it would be.

12 QUESTION: Okay.

13 MR. PATTERSON: The Congress has tremendous  
14 powers. Congress probably could decide --

15 QUESTION: Okay.

16 MR. PATTERSON: -- that no one born outside of  
17 the United States was a citizen.

18 QUESTION: All right.

19 QUESTION: Mr. Patterson, on that line, you  
20 don't take issue with Judge Wald's statement, do you, that  
21 I see no problem with the requirement that a U.S. citizen  
22 parent take some action to acknowledge parentage or  
23 responsibility for a child before the child reaches age  
24 18?

25 If -- suppose Congress said, mothers, fathers,

1 they're both parents, and if a child is born abroad, one  
2 of them has to say, I will take responsibility for this  
3 child till she's 18.

4 MR. PATTERSON: I would have no problem with  
5 that, Your Honor. However, that's not what Congress has  
6 done. Congress on the one hand has established a  
7 situation where the mother has to do nothing except be the  
8 mother, and her children become a U.S. citizen. But then  
9 it has placed very strict requirements on a father for his  
10 children to become a U.S. citizen.

11 QUESTION: Well --

12 QUESTION: It's interesting, is it not, that  
13 from 1790 till 1934, there was, as I understand the  
14 statutes, no way that a mother could fit under them. It  
15 all depended on fatherhood.

16 MR. PATTERSON: That is my understanding, Your  
17 Honor, and as to children born prior to 1934, it's only  
18 been recently that Congress has gone back to correct that  
19 situation.

20 QUESTION: So that was unconstitutional, from --

21 MR. PATTERSON: Sir?

22 QUESTION: And that was unconstitutional, from  
23 1796 to whatever?

24 MR. PATTERSON: I feel that under the present  
25 interpretations of the Constitution, that it would be

1 found to be unconstitutional.

2 QUESTION: We're talking about 1790 to 1934, and  
3 under the precedent that then existed --

4 MR. PATTERSON: Under the precedent that then  
5 existed, I would assume that it was not unconstitutional,  
6 but I feel that under the precedents that exist now, it  
7 would be considered unconstitutional.

8 QUESTION: I see. But you're still talking  
9 about the same Constitution.

10 MR. PATTERSON: Yes, Your Honor.

11 (Laughter.)

12 QUESTION: Mr. Patterson, you mentioned a moment  
13 ago that the way you view the relationship between 1401  
14 and 1409 is that 1401 first provides citizenship on  
15 individuals like your client, and then 1409 in effect  
16 takes it away, but that does not seem to me a fair  
17 characterization of the statute, because 1409, in its  
18 subsection (a) seems to me to make it pretty clear that  
19 1401 simply does not apply to individuals like your client  
20 in cases of illegitimacy unless certain conditions are  
21 satisfied, so I don't see how you can start your argument  
22 by assuming that 1401 gives you something which is then  
23 taken away on a disparate criterion.

24 MR. PATTERSON: Well, Your Honor, we feel that  
25 1409 as it exists now is an unconstitutional

1 discrimination based on gender, and --

2 QUESTION: Well, that's the -- maybe I  
3 misunderstand you, but I think that's a separate argument.  
4 I thought you -- the question was, you know, how do you  
5 get into court in the first place, and you say, well -- or  
6 I guess the question was on deference, and you say, well,  
7 the deference issue is different here because my client in  
8 effect is given citizenship to begin with, so that she  
9 starts as a citizen claimant in a way that the other  
10 plaintiff did not.

11 But it seems to me that if your reason for that  
12 is the provision of 1401, your argument fails, because  
13 1409 says 1401 doesn't apply unless you meet these  
14 conditions.

15 MR. PATTERSON: Your Honor, basically, though,  
16 1409 we view as being a gender discrimination issue, and  
17 that in this situation, that if it did not apply my client  
18 would be, under the general terms of 1401, a citizen, and  
19 we feel that there is a distinction between a situation  
20 where someone is purely an alien, no question about it  
21 all, of their alienage, and a situation where there is a  
22 relationship, a tie to the United States through a citizen  
23 parent, and that the rules as to the citizen parent should  
24 be the same whether the parent is a woman or a man.

25 QUESTION: Let me interrupt you there, because



1 is it not the fact that most of the cases we're concerned  
2 with probably are illegitimate children of service people  
3 abroad, and isn't it also a fact that the vast -- maybe  
4 not the vast majority, but the preponderant number of  
5 those would probably be of a male parent rather than a  
6 female parent?

7 MR. PATTERSON: Well, Your Honor --

8 QUESTION: And isn't it also true that at the  
9 time of birth, when it's a female parent there's no  
10 question about what's going to happen to that child,  
11 whereas at the time of birth of a child of a male parent  
12 by a female alien, when the male parent may not be on the  
13 spot at all, or even within the general area, there are a  
14 lot of questions that have to be resolved in the future?

15 MR. PATTERSON: All right. There are some  
16 questions, Your Honor, but my understanding is that  
17 statistically there are more female U.S. citizens abroad  
18 than male U.S. citizens. I do know that within the Armed  
19 Forces that now the percentage is somewhere like 13 or 14  
20 percent of all the Armed Forces are now female.

21 QUESTION: Right.

22 MR. PATTERSON: So while we may have had a  
23 problem with one situation in the past, I think the  
24 situation is -- has the potential to change.

25 QUESTION: Well, but 13 percent is quite

1 different from 87 percent.

2 MR. PATTERSON: Right. That is correct, Your  
3 Honor, but I think that also the question or the issue we  
4 have here is that the requirements are placed on the male  
5 to do something. All that the woman has to do is be the  
6 parent.

7 QUESTION: That's right, and -- which is  
8 established at the moment of birth, no matter where the  
9 birth takes place, if there's any hospital record to  
10 establish --

11 MR. PATTERSON: Right. If there's any hospital  
12 record --

13 QUESTION: With regard to the male parent, there  
14 are a lot of questions that are unanswered at the time of  
15 birth.

16 MR. PATTERSON: But there -- the answers as to  
17 the male parent can be established with modern technology.  
18 The --

19 QUESTION: They cannot be established as  
20 promptly in the routine case as they can with regard to  
21 the woman, if you're talking about situations abroad where  
22 personnel are transferred from location to location within  
23 6-month periods.

24 MR. PATTERSON: That is true, Your Honor.  
25 However --

1 QUESTION: Servicemen being overseas and shipped  
2 back to this country.

3 MR. PATTERSON: Right. There are potential  
4 problems, but the problems can be dealt with. We feel  
5 that the only requirement should be that there be proof  
6 submitted that this is the child of a U.S. citizen.

7 Now, what that proof may be, because there's --

8 QUESTION: Would you say that it would be fair  
9 to say the proof must be submitted within 36 hours after  
10 birth, and if you treat both sexes equally, the only  
11 requirement is that parentage must be established within  
12 the first 2 weeks after birth? I think --

13 MR. PATTERSON: I think --

14 QUESTION: -- you'd have many, many children of  
15 male, unmarried parents who would not be able to comply  
16 with that requirement.

17 MR. PATTERSON: That is correct, Your Honor, and  
18 I feel that while there have been some other areas where  
19 this Court has determined that it is not necessary to have  
20 an immediate determination of the parentage of a child for  
21 the child to ultimately be able to proceed in terms of  
22 inheritance and this sort of thing, in a sense this is an  
23 inheritance. This is an inheritance of a citizenship, and  
24 we would like to see the tables leveled as to both the  
25 male and female as to what takes place.

1 QUESTION: But only in one way, only in one  
2 direction.

3 Let me ask you this. Does your client have  
4 standing to assert the father's gender discrimination  
5 claim?

6 MR. PATTERSON: Your Honor, we feel that she --

7 QUESTION: I hadn't thought so. He was in the  
8 case at one point.

9 MR. PATTERSON: Right, Your Honor, and the  
10 Government in a motion said that the rights and benefits  
11 of U.S. citizenship he already enjoys simply have not been  
12 injured by the denial of Lorelyn Penero Miller's  
13 application. The rights, if any, which have been injured  
14 are those of Lorelyn Penero Miller, the true plaintiff in  
15 this action.

16 And so while he was in the case the  
17 Government --

18 QUESTION: Well, the short answer is, the father  
19 is no longer before us, is that right?

20 MR. PATTERSON: That is correct, Your Honor.

21 QUESTION: And does this petitioner, can she --  
22 does she have standing to raise any claims that he might  
23 raise on gender discrimination?

24 MR. PATTERSON: We feel that under the criteria  
25 that the Court has set out for third party plaintiffs to



1 proceed are based on third party claims, that there has to  
2 be an injury, which there is, there has to be a  
3 relationship, which there is.

4 The only issue that the Government has raised in  
5 its brief is the issue of a hindrance, and we would say  
6 that there is a hindrance created by the Government in  
7 their motion to remove him from the case, that they took  
8 him out --

9 QUESTION: When the Government moved to dismiss  
10 the father and then coupled that with a motion to transfer  
11 the case from Texas to the District of Columbia, I assume  
12 that if the Government thought that there was no -- well,  
13 what did the Government tell the district court in Texas  
14 about why the father had no standing?

15 MR. PATTERSON: Basically their argument in  
16 their motion, Your Honor, was as I said, that he had not  
17 made application for U.S. citizenship; he was not denied  
18 any rights; he had his citizenship; that the denial --

19 QUESTION: Then the case got shipped to the  
20 district court in D.C.

21 MR. PATTERSON: That is correct.

22 QUESTION: Was there an effort made by the  
23 father to appeal his dismissal from the case?

24 MR. PATTERSON: No, Your Honor, there was not an  
25 attempt to appeal.

1 QUESTION: Would there have been a -- the  
2 problem of the transfer intervening, where would the  
3 father have brought that appeal? Once the case is shipped  
4 out of the district court in Texas, they lose -- that  
5 circuit loses authority over it.

6 MR. PATTERSON: I am not certain, Your Honor,  
7 and I would think that that was -- one of the factors that  
8 entered into us not appealing was the fact that it was  
9 moved to another circuit, that the principal issues were  
10 still before the court in the District, and we felt that  
11 we could go forward and proceed there, that --

12 QUESTION: I'd like you to clarify one earlier  
13 point, because there were references to many, many  
14 qualifications, but I think -- am I right about this --  
15 that you were relying at least alternately on the prior  
16 version of 1409, when there was no requirement of a  
17 written acknowledgement of support, when all that was  
18 required was an acknowledgement, a legitimation of the  
19 child by the father saying yes, I am the father. There  
20 was not this additional requirement, as there is now,  
21 about a written undertaking to support.

22 MR. PATTERSON: That is correct, Your Honor.

23 QUESTION: So we don't have before us the  
24 question of the residency requirement, because he  
25 satisfies that, so that's an academic question.

1 MR. PATTERSON: Right.

2 QUESTION: We don't have before us the written  
3 support obligation, because that wasn't required at the  
4 relevant time.

5 MR. PATTERSON: That is correct.

6 QUESTION: So it's only one --

7 MR. PATTERSON: The only issue is the issue of  
8 the legitimation and my client, though subsequent to the  
9 age of 21, or that was required under the prior statute,  
10 went into court in Texas, filed a voluntary paternity --  
11 or her father, my client's father went into court in  
12 Texas, filed a voluntary paternity action, and was  
13 determined by the courts of Texas that he is the father of  
14 Ms. Miller, and ultimately, so far as Texas is concerned,  
15 legally his child and his heir.

16 QUESTION: I have one --

17 QUESTION: You're relying here on the Fourteenth  
18 Amendment, which -- you have the equal protection  
19 provision, which was surely directed most immediately not  
20 to sex discrimination but most immediately to race  
21 discrimination.

22 Now, Congress, however, under its immigration  
23 policies, can certainly discriminate on the basis of race,  
24 can't it, all the time? I mean, it says, you know, you  
25 can immigrate if you're coming from Ireland, but not if

1 you're coming from Italy or Greece, or whatever. It's  
2 done this from the beginning.

3 QUESTION: That's national origin, which --

4 QUESTION: Well, okay.

5 QUESTION: -- is what the immigration act is all  
6 about.

7 QUESTION: Just a minute. Let him answer  
8 Justice Scalia's question.

9 QUESTION: I'm sorry.

10 QUESTION: Consider it race, consider it  
11 national origin, whatever you want. The two are --

12 MR. PATTERSON: Well --

13 QUESTION: The two are closely allied, and --

14 MR. PATTERSON: Your Honor --

15 QUESTION: -- much closer to the Fourteenth  
16 Amendment than sex. Now, how can it be that Congress can  
17 do that?

18 Could Congress say that the children of American  
19 fathers who are born in, let's say, Somalia can immigrate  
20 to the United States and be United States citizens, but  
21 those children of American fathers born in Ireland cannot?  
22 Could Congress say that?

23 MR. PATTERSON: I am -- my reaction is that  
24 whether Congress could do it or not, it would be wrong.  
25 Now --



1 (Laughter.)

2 MR. PATTERSON: My feeling, though, is that  
3 basically --

4 QUESTION: Well, everything that's wrong is not  
5 necessarily unconstitutional. I mean, that's --

6 MR. PATTERSON: But basically, Your Honor, I  
7 think that the issue here has to do with the cases, and --  
8 such as Mississippi University for Women, et cetera, where  
9 they have said that distinctions based on gender have  
10 to --

11 QUESTION: Mr. Patterson, may I just vary my  
12 colleague's question and say, suppose Congress said that  
13 the children of citizen fathers -- citizen fathers who are  
14 Caucasian are citizens at birth, but that children of  
15 citizen fathers who are not Caucasian, people born in the  
16 United States, fathers born in the United States but not  
17 Caucasian, the children of those fathers born abroad shall  
18 not be considered citizens at birth?

19 MR. PATTERSON: I think, Your Honor, that if we  
20 take the Government's argument, accept it in toto,  
21 Congress could do that. We feel that would be wrong, and  
22 we feel that it is wrong --

23 QUESTION: I don't think that's the Government's  
24 argument at all. They have not argued that would be  
25 rational. They have argued there's a -- there are good

1 reasons for the distinction in this case, and your  
2 suggestion is there's no justification for differentiation  
3 on the basis of the sex of the parent in -- when there's  
4 an illegitimate birth. That's really the question we  
5 have.

6 MR. PATTERSON: Your Honor, we feel that there  
7 is a matter of discrimination here based on gender, and we  
8 feel that if you take it to the logical extreme that the  
9 Government espouses, that the Court should defer to  
10 Congress' decisions in anything having to do with  
11 immigration, citizenship, et cetera.

12 If you take it to that -- to the extreme, then  
13 the suggestion by the Justice would be permissible.

14 QUESTION: But you surely don't have to take it  
15 to that extreme to try and figure out whether there is  
16 some sensible basis for drawing a distinction between a  
17 single parent abroad in the military -- I think of the  
18 military because I know there are many, many cases that  
19 arise this way, when it's the mother on the one hand and  
20 when it's the father on the other.

21 It seems to me there are quite obvious  
22 differences, and I -- at least justifying some  
23 differential in treatment.

24 MR. PATTERSON: Well, I think that, Your Honor,  
25 basically the issue is one of who is entitled to

1 citizenship at birth, and Congress has decided that as a  
2 general rule, anybody born to a U.S. citizen parent is  
3 entitled to be a citizen at birth.

4 QUESTION: Any legitimate person.

5 MR. PATTERSON: I didn't hear the question.

6 QUESTION: I say, Congress has decided that any  
7 person born legitimately is so entitled. That's as far as  
8 Congress has gone.

9 MR. PATTERSON: Well, they then have decided  
10 that any person who is born illegitimately to a mother who  
11 is a U.S. citizen is a citizen at birth. The only  
12 distinction that is --

13 QUESTION: Well, if the mother has lived in the  
14 country for a year. Let me go to that point, because I  
15 wanted to ask you this question anyway.

16 Two of the Government's justifications for  
17 drawing the distinction that it draws are these. One,  
18 there are differences in problems of proof, and your  
19 answer to that is, well, in this day of genetic testing,  
20 those problems really have evaporated, and I'll assume  
21 that for the moment.

22 The second major justification that the  
23 Government brings up is that there is a difference,  
24 depending on whether the single citizen parent is male or  
25 female, depending -- which affects the likelihood of the

1 attachment of the child to the country.

2 The Government says, look, most children stay  
3 with their mothers when they're young, just as a matter of  
4 fact. That's the way it happens. If, in fact, the mother  
5 is a citizen, then the child is likely to be in the  
6 company of an American citizen, and I suppose most  
7 American citizens tend to, sooner or later, come back to  
8 the United States, even if they were abroad at some point.

9 So the Government's argument is, the likelihood  
10 is that the child who is born to the female citizen will  
11 in fact, because of the mother's company and because of  
12 the mother's probable residence, gain an attachment to the  
13 United States, whereas that will not necessarily be so if  
14 in fact the mother is an alien and it's the father who in  
15 Justice Stevens' example comes back from the service  
16 assignment at some point.

17 Is there something unsound factually about the  
18 Government's argument, and is there something  
19 illegitimate, constitutionally, to the Government's  
20 argument?

21 MR. PATTERSON: All right. Your Honor, on the  
22 one hand they talk about attachment, but there's nothing  
23 in the statute that requires any showing of attachment or  
24 the mother do anything, other than have the child. If the  
25 mother had the child and abandoned it immediately, the

1 child would still be eligible for citizenship regardless  
2 of whether --

3 QUESTION: But the point is that as a  
4 generalization, the attachment will exist in the one case,  
5 and as a generalization it will not exist in the other.  
6 Now, what's your response to that, that this is a --

7 MR. PATTERSON: I believe --

8 QUESTION: -- an unconstitutional stereotyping,  
9 or what? Is it true or false?

10 MR. PATTERSON: I think, Your Honor, in other  
11 contexts the Court has said that you deal with  
12 individuals, not with generalizations, and while this may  
13 be true as a generalization, it is not true in all  
14 circumstances.

15 QUESTION: Every law is based on a  
16 generalization. You really want us to adopt the  
17 proposition that Congress cannot generalize when it makes  
18 laws?

19 MR. PATTERSON: Obviously, Congress can to some  
20 extent, but where they discriminate against a group based  
21 on generalizations that are based on stereotypic, archaic  
22 ideas, then --

23 QUESTION: It may not be archaic. The -- I  
24 think the classifications this Court was confronted with  
25 in the Frontiero case, in the Wiesenfeld -- those weren't



1 archaic. They did represent the way the world was for  
2 most people. Most men supported most women, and yet the  
3 Court did say that in this category sex discrimination,  
4 you could not rely on those generally true propositions.

5 MR. PATTERSON: I would agree with Your Honor on  
6 that.

7 QUESTION: I did want to ask one question about  
8 this statute that does draw a distinction that's different  
9 for men and women. That is, the very first requirement,  
10 that blood relationship between the child and the father  
11 be established by clear and convincing evidence. Are you  
12 challenging the constitutionality of such a requirement?

13 MR. PATTERSON: I think, Your Honor, that for  
14 anyone there would have to be some clear and convincing  
15 evidence that they were the parent, be it the mother or  
16 the father.

17 QUESTION: But suppose the statute, all it said  
18 was that. That was the only distinction that was drawn on  
19 the basis of sex. It says, in the case of the father, the  
20 blood relationship must be established by clear and  
21 convincing evidence.

22 MR. PATTERSON: I don't believe I would have any  
23 problem with that, Your Honor, because I feel that to me  
24 would be a prerequisite regardless, though it is not  
25 spelled out that there has to be clear and convincing

1 evidence that the mother was the mother of the child for  
2 the child to be able to claim U.S. citizenship.

3 QUESTION: I have one question, which is a very  
4 preliminary nature. I take it as a general rule that if  
5 you're a person outside the United States you do not have  
6 capacity to sue for a violation of the Constitution, and  
7 this is -- you say this is different because the claim at  
8 issue is citizenship?

9 MR. PATTERSON: I feel that that is a  
10 distinction that could be drawn. However, I think --

11 QUESTION: I was just curious to know, do you  
12 have some precedent for that?

13 MR. PATTERSON: I have some precedents, and I  
14 was trying to find it, that the Constitution is not  
15 limited to the boundaries of the United States.

16 QUESTION: But Rogers v. Belli, the Court said  
17 that foreign-born children of citizens have no  
18 constitutional right to citizenship. We'd have to disavow  
19 that, wouldn't we?

20 QUESTION: It's limited at least to the soil of  
21 the United States and the blood of the United States. I  
22 mean, you're either applying jurisdiction on the basis of  
23 territory or on the basis of blood, and --

24 QUESTION: Let me put it --

25 QUESTION: -- your client here is neither on the

1 territory of the United States nor a United States  
2 citizen, so that you could say her actions are governed  
3 abroad by United States law.

4 MR. PATTERSON: Your Honor, in United States,  
5 and I'm not sure of the exact pronunciation, V-e-r-d-u-g-  
6 o -- U-r-i-q-u-i-d-e-z, at 494, 259, 278, in a concurring  
7 opinion, Judge Kennedy indicated that the Government may  
8 only act as the Constitution authorizes whether the  
9 actions in question are foreign or domestic.

10 QUESTION: Yes, but you see, there there was a  
11 citizen -- there was a person who was being tried in a  
12 United States criminal court, but here your client has  
13 never been in the United -- for -- just for our purposes,  
14 at this time the suit was filed was outside the United  
15 States.

16 Well, perhaps the Government will address that  
17 briefly.

18 QUESTION: I would like you to, because I  
19 thought Rogers supported you. That is, I thought Rogers  
20 was a case where a person claimed citizenship. He was  
21 wrong on the merits, but the Court permitted him to raise  
22 the claim.

23 MR. PATTERSON: I think --

24 QUESTION: Because had he won, he would have  
25 been a citizen.

1 MR. PATTERSON: Right.

2 QUESTION: And there -- so is -- but don't say  
3 yes if I'm not right, because -- because it won't do any  
4 good.

5 (Laughter.)

6 MR. PATTERSON: Well, I believe that is my  
7 recollection, but I -- it's been a while since I have read  
8 that, but I do know that it raised the issue, and --

9 QUESTION: So Rogers is the precedent, you say?

10 MR. PATTERSON: I believe so. I'd have to check  
11 to be sure, Your Honor.

12 QUESTION: And you're still relying on the third  
13 party standing that you cited Craig v. Boren, that if the  
14 beer seller could raise the boy's equal protection rights,  
15 then the daughter can raise her father's rights.

16 MR. PATTERSON: Yes, Your Honor.

17 Mr. Chief Justice, may I reserve the rest of my  
18 time, if there are no further questions?

19 QUESTION: You have no time left.

20 Mr. Kneedler, we'll hear from you.

21 ORAL ARGUMENT OF EDWIN S. KNEEDLER

22 ON BEHALF OF THE RESPONDENT

23 MR. KNEEDLER: Thank you, Mr. Chief Justice, and  
24 may it please the Court:

25 The Naturalization Clause of the Constitution

1 commits to Congress the power that is inherent in any  
2 sovereign nation to determine which aliens abroad will be  
3 granted United States citizenship.

4 As this Court said in the Ginsberg decision, no  
5 alien has the slightest right to naturalization unless all  
6 statutory conditions are satisfied, and by the same token,  
7 the Court has said in the Rogers v. Belli decision that  
8 was just cited, no United States citizen has a right to  
9 transmit citizenship by dissent.

10 Now, to be sure, where the interests of the  
11 United States citizen are properly before the Court, and  
12 in this case we suggest that they're not, but where they  
13 are, such as in Fiallo or Kleindienst v. Mandel, this  
14 Court has declined to hold that Congress' judgments in  
15 this area are wholly beyond judicial review.

16 QUESTION: Mr. --

17 QUESTION: Mr. Kneedler, why did the Government  
18 move to dismiss the father when he was in this case?

19 MR. KNEEDLER: The motion to dismiss in Texas,  
20 there were really two grounds. One was essentially, while  
21 couched as a standing ground was essentially a merits  
22 argument, and that is that his argument of gender-based  
23 discrimination was foreclosed by Fiallo v. Bell.

24 The Government also argued essentially that  
25 because the claim to citizenship was that of the



1 petitioner here and not his own, that he effectively had  
2 no ability to insist that the Government confer  
3 citizenship on her. That is more in the nature of a  
4 standing argument.

5 Now, again, in Fiallo, where the -- there were  
6 rights of -- both citizen plaintiffs and alien plaintiffs  
7 were before the Court, and the Court then, because of that  
8 presence, addressed the constitutional question because of  
9 the presence of the alien parent, even though the -- I  
10 mean, the citizen parent, even though the citizen parent  
11 couldn't have required in a sense to have --

12 QUESTION: If Fiallo was controlling, it should  
13 have been controlling on her claim as well as his, so it's  
14 a little odd that the Government moved only to dismiss  
15 him.

16 MR. KNEEDLER: The -- it is --

17 QUESTION: And not her.

18 MR. KNEEDLER: Well, it did -- it moved to  
19 dismiss her also on a ground that she could not claim his  
20 equal protection rights.

21 QUESTION: And third party standing.

22 MR. KNEEDLER: Right. Right.

23 QUESTION: But the Government -- if the  
24 Government's position was Fiallo v. Bell, then it's very  
25 difficult to understand why it didn't -- they didn't do

1 that across the board. They chose to do it only with  
2 respect to the father and with respect to her said she has  
3 no third party standing.

4 MR. KNEEDLER: Well, the Government certainly  
5 did argue that Fiallo was controlling across the board,  
6 but I think our -- the point here is that whatever the  
7 label attached to it, the father was dismissed from the  
8 case, essentially rejecting his claim under Fiallo, and he  
9 did not appeal either from the Texas ruling at the time or  
10 from the final judgment at the time it was rendered in --

11 QUESTION: But it is sort of ironic. The  
12 Government argued he didn't have standing, it was her  
13 claim, and here you're arguing that she doesn't have  
14 standing, it's his claim.

15 MR. KNEEDLER: Right.

16 QUESTION: That's a little hard to swallow.

17 MR. KNEEDLER: I acknowledge that the standing  
18 argument in Texas may not have been properly couched as a  
19 standing argument. The fact remains, though, that that is  
20 a past ruling in the case.

21 QUESTION: May I ask just that you refer to the  
22 Texas proceeding? What evidence was taken on the issue of  
23 parentage? Was it just his testimony?

24 MR. KNEEDLER: You mean in the Texas State court  
25 proceeding?

1 QUESTION: How was his -- how do we know he's  
2 the real father?

3 MR. KNEEDLER: Well, the record in this case  
4 does not disclose what was before the Texas court at the  
5 time. It's not clear that it consisted of much more than  
6 his statement that he is the father, but of course, under  
7 the immigration statute, and the naturalization statute we  
8 have at issue here, that's all that would have been  
9 required as well to establish paternity, given -- in light  
10 of the 1986 amendments.

11 Prior to that time, he would have needed a  
12 formal legitimation such as the court decree here, but  
13 under the 1986 amendments all that was required was an  
14 acknowledgement before the State Department of his  
15 paternity.

16 QUESTION: Mr. Kneedler --

17 QUESTION: He had much more, though. He is  
18 the -- he has become a legitimate father, has he not?

19 MR. KNEEDLER: As a matter of State law, yes.  
20 My only point is that we have not acknowledged in this  
21 case that he has satisfied all the requirements as a  
22 matter of Federal law.

23 If the legitimation decree was -- had been  
24 entered before she was a teen, or before she was 21 under  
25 the prior version of this statute, that official

1 determination would have been controlling, but if that  
2 decree is simply relied on as evidence of blood  
3 relationship, then we do not think it is controlling on  
4 the State Department.

5 The State Department was not a party to that  
6 case, so insofar as she is applying on the basis of events  
7 that happened before age 21, or before age 18, we think  
8 she would have to carry that burden of proof before the  
9 State Department.

10 The State Department did not reach that  
11 question, as you pointed out in this case. The basis for  
12 the State Department's rejection for a claim in this case  
13 was really the failure to establish the formal parent-  
14 child relationship prior to the age 18 or, under the prior  
15 statute, age 21, so really the issue before this Court and  
16 before the district court was whether Congress can  
17 properly impose a limitation of that sort on the time in  
18 which the father of a child born out of wedlock can take  
19 steps to legitimate the child.

20 QUESTION: But then we take --

21 QUESTION: Just before we get to --

22 QUESTION: Yes.

23 QUESTION: I'm sorry.

24 QUESTION: Just one more moment on the standing  
25 and the transfer. How would the father, or where would

1 the father have appealed that dismissal? The case had  
2 been transferred to the district court in the District of  
3 Columbia. There was the father, left at the post back in  
4 Texas. Where would he -- where would that -- his appeal  
5 go?

6 MR. KNEEDLER: I think he probably could have  
7 done either of two things. One would be to ask for a Rule  
8 54(b) certification in Texas and taken immediate appeal  
9 then, perhaps, or, with the case transferred, once the  
10 final judgment was entered here, I assume that the father  
11 could have -- that Mr. Miller could have appealed from the  
12 final judgment at that time.

13 QUESTION: In the District of Columbia?

14 MR. KNEEDLER: Yes, I think so. I'm --

15 QUESTION: Because my understanding was that  
16 once the case gets transferred, the transferor court loses  
17 authority over it.

18 MR. KNEEDLER: Right. Yes. No, I meant if a  
19 54(b) certification or an interlocutory appeal request had  
20 been filed before the case was actually transferred,  
21 but -- and he presumably could have requested the district  
22 court in Texas to say, before you actually transfer the  
23 case -- I know that's what the Government has asked for,  
24 but before you actually do that, afford me the opportunity  
25 to take an interlocutory appeal, or appeal of the final



1 judgment insofar as the case would -- the decision would  
2 finally dispose of my claim.

3 But he didn't do that. The case was transferred  
4 to the District of Columbia, and I don't think he would  
5 have been foreclosed from --

6 QUESTION: You ordinarily would get 60 days if  
7 the Government's on the other side. How much time did he  
8 have between when the case was ordered transferred and  
9 when it left Texas and went to the District of Columbia?

10 MR. KNEEDLER: I'm not sure of that timing. I  
11 think that once there is the order of transfer, I think it  
12 would be entry of the order of transfer that would  
13 transfer it to the District of Columbia, but again, I  
14 don't believe that would have terminated his right to take  
15 an appeal, because --

16 QUESTION: But it would have shortened what is  
17 the usual time one has.

18 MR. KNEEDLER: In Texas. My point is that I  
19 think he was a party to this case when it was filed.  
20 There was no final judgment. Once the case got to the  
21 District of Columbia, I don't know a reason why he  
22 couldn't have appealed from the final judgment here.

23 The case was transferred along, I assume with  
24 all interlocutory orders that led up to that, and one of  
25 those orders was the dismissal of him as a party, so I

1 think once the final judgment was entered here -- this has  
2 not been an issue in the case, but that has been my sense.

3 QUESTION: I don't want to delay you any longer  
4 in getting to the merits, subject to one question. Rogers  
5 v. Belli, is that the precedent that we look to to see  
6 that this petitioner has standing to invoke the assistance  
7 of the Federal courts when she's -- and of the  
8 Constitution when she is outside the jurisdiction?

9 MR. KNEEDLER: No, I think it's not. In Rogers,  
10 there was a situation where there was a conferral of  
11 citizenship subject to a subsequent loss of divestiture,  
12 on failure to satisfy conditions subsequent, so at that  
13 point we think that the person had her foot in the door,  
14 or his foot in the door towards citizenship, in fact was  
15 granted citizenship, and it was about to be taken away.

16 And this situation is very different. The  
17 question is whether the petitioner is entitled to  
18 citizenship in the first instance and, as this Court  
19 pointed out many years ago in the Wong Kim Ark decision,  
20 the conferral of citizenship on anyone who is not born  
21 within the United States is an act of naturalization.

22 Whether that's done at the time of birth or  
23 whether it's done by procedures in the United States  
24 later, or whether it's done by categories in conquered  
25 territory or whatever, that is all an exercise of

1 Congress' naturalization power.

2 QUESTION: And she says she's a citizen by  
3 virtue of 1401, and you say well, that can't be until you  
4 knock out 1409, and you can't do that because --

5 MR. KNEEDLER: No, we don't believe she could --  
6 that 1401 would grant citizenship at all, because 1409 --

7 QUESTION: Well, I mean, that's her position.

8 MR. KNEEDLER: That's her position, but we think  
9 that's an incorrect interpretation of the statute. 1409  
10 is the only subject -- section of the act that deals with  
11 the subject of children born out of wedlock, and  
12 Congress -- it was a very difficult subject for Congress  
13 to address in the Nationality Act of 1940 and ever since  
14 then, and there was considerable debate leading up to the  
15 passage of the 1940 act about how to deal with a situation  
16 of one citizen parent, one foreign parent, and in  
17 particular, how to deal with the problem posed where you  
18 had a child born out of wedlock where you have a U.S.  
19 citizen parent and an alien parent.

20 QUESTION: Mr. Kneedler, do you -- when this  
21 case began, at least, the petitioner here was outside the  
22 jurisdiction of the United States. Do you take the  
23 position that she was a person within the meaning of the  
24 Fifth Amendment for bringing the equal protection kind of  
25 claim that she brings at that time?

1 MR. KNEEDLER: No. Our bottom line is that the  
2 Due Process Clause does not apply to her.

3 Whether that comes from interpreting the word  
4 person or whether it is just a broader consideration of  
5 the territorial scope of the Fifth Amendment, I'm not sure  
6 much turns on that, but in this Court's decision in  
7 Johnson v. Eisentrager, which was reiterated in the  
8 Verdugo decision, the Court said that aliens outside the  
9 United States have no rights under the Fifth Amendment.

10 Whether she has since come to the United States  
11 is irrelevant for these purposes, because --

12 QUESTION: Didn't Johnson v. Eisentrager make a  
13 distinction between one who was an alien and, I think the  
14 words of the decision were, if a person makes a claim to  
15 U.S. citizenship, and distinguish the person who said, I'm  
16 an alien and would like the opportunity to become a U.S.  
17 citizen, and someone who was making a claim to U.S.  
18 citizenship.

19 MR. KNEEDLER: I believe that was with respect  
20 to access to courts, where another aspect of Johnson v.  
21 Eisentrager was whether habeas corpus jurisdiction would  
22 lie.

23 We're not suggesting that she has no right of  
24 access to the U.S. courts to make her claim. All we're  
25 saying is that her claim fails on the merits because both,



1 we think as an attribute of the sovereignty of the United  
2 States, someone outside the United States who is not a  
3 citizen has no constitutional right to claim it, but also  
4 because the Fifth Amendment, which is the clause of the  
5 Constitution on which she specifically relies, that that  
6 does not apply outside the United States.

7 QUESTION: Mr. Kneedler, can I --

8 QUESTION: Is there anything -- I take it  
9 there's nothing peculiar about the equal protection nature  
10 of the claim that she's bringing that you invoke to  
11 support your position that she's not a person.

12 MR. KNEEDLER: No.

13 QUESTION: The reason I ask the question, I  
14 mean, under the Fourteenth Amendment it refers to the --  
15 to persons within the jurisdiction, so I suppose you would  
16 be making the argument, if this were somehow a claim  
17 against a State, that she would not, as an alien living  
18 abroad, be such a person for that peculiar reason, and  
19 that's not your argument.

20 MR. KNEEDLER: Or in another State under --

21 QUESTION: Yes. Yes. Yes.

22 MR. KNEEDLER: Under the Fourteenth Amendment.  
23 But we believe that aspect -- and, again, it's an inherent  
24 aspect of the sovereignty of the United States.

25 The Constitution is a compact among the people



1 of the United States, and Congress is the political branch  
2 responsible for determining who can be admitted and assume  
3 the rights and responsibilities of being a member of that  
4 society, so we think that this is a proposition that  
5 inheres in the nature of sovereignty, and is not trumped  
6 by the Fifth Amendment, particularly with respect to an  
7 alien abroad.

8 QUESTION: Can I ask you a question on the  
9 merits?

10 MR. KNEEDLER: Yes.

11 QUESTION: I've two questions, actually, on the  
12 merits, and what I'm thinking of is not the problem of  
13 proving paternity. I'm assuming that out with genetic  
14 testing. Perhaps it's the same. Assume that's so.

15 You have a separate argument that I think  
16 Justice Souter addressed earlier, and it's on pages 25,  
17 26, 27, 28 of your brief, and basically you're arguing, I  
18 think, that there is more likely to -- you want a  
19 substantial tie with the parent.

20 MR. KNEEDLER: That's correct.

21 QUESTION: A substantial tie, or something like  
22 that, a personal tie, and that's more likely to be there  
23 in the mind run of cases with the mother than it is with  
24 the father, and that's why we need the extra proof.

25 MR. KNEEDLER: Well --

1 QUESTION: That's the argument I'm thinking of.

2 MR. KNEEDLER: Right.

3 QUESTION: Basically. And I thought at first  
4 that's a pretty good argument, and then I realized that  
5 the reason I'm thinking that is in my mind I'm dividing  
6 parents into caretaker parents and noncaretaker parents,  
7 and that argument makes a lot of sense if you compare the  
8 noncaretaker citizen father with the caretaker citizen  
9 mother. Of course it's true then. It's true by  
10 definition. 5 minutes before the patient died he was  
11 still alive.

12 But suppose you switch to what I'd think would  
13 be the relevant comparisons. Those are my two questions.

14 First let's think of the noncaretaker parents  
15 who are both citizens. They're in the United States, the  
16 baby's over in the Philippines, and my first question is,  
17 why is there any reason in the world to believe that a  
18 noncaretaker father has less of a personal tie than a  
19 noncaretaker mother who's abandoned the child?

20 And now my second question looks at it just the  
21 other way. Let's imagine now that both citizens are  
22 caretakers, and what reason in the world is there to think  
23 that a caretaker mother has more of a connection with the  
24 child than a caretaker father, who after all is trying to  
25 bring up the child by himself?

1                   Now, those seem to me to be the two relevant  
2       comparisons, and as soon as I think of those comparisons,  
3       it seems to me this distinction is irrational, or close to  
4       it.

5                   MR. KNEEDLER: With all respect, we think it is  
6       quite soundly rational, and if I may just preface my  
7       response --

8                   QUESTION: Well, I'm trying to get you to  
9       respond.

10                  (Laughter.)

11                  MR. KNEEDLER: With a -- preface it with an  
12       important point that I think sometimes gets overlooked in  
13       this. The point is not simply what tends to be true  
14       factually. What -- the steps that a father can take, are  
15       formal, recorded steps that are parallel to what happens  
16       when a child is born in the hospital.

17                  Where there's a birth certificate, you have a  
18       witnessed birth, there will normally be no question  
19       whatsoever as to who the mother is, and by virtue of that  
20       you have an established legal relationship from the moment  
21       of birth. Not -- we're not getting to the question of  
22       caretaker or anything. You have an established legal  
23       relationship from the moment of birth that follows the  
24       profound experience of carrying and bearing the child.

25                  At that point, it is reasonable to assume that a

1 parent, mother or father, but in this case it is only the  
2 mother, because the child was born out of wedlock, who has  
3 the legal relationship, will follow through with the  
4 caretaking relationship, with the love and  
5 responsibilities that come in the case of only one parent,  
6 and that is the situation that is addressed by 309(c).  
7 There may be other --

8 QUESTION: Mr. Kneedler, I understand that very  
9 well with respect to your first criterion, where you say  
10 you can't claim father status unless you show by clear and  
11 convincing evidence that you are the father.

12 But for the rest, for the life of me -- if  
13 you're going to say, yes, only the woman can bear the  
14 child, there's no doubt that men will never be able to  
15 have that great joy, but --

16 (Laughter.)

17 QUESTION: -- just as only women can bear  
18 children, so both parents can care for children, and  
19 increasingly fathers are beginning to recognize the joy  
20 and the obligation of parenthood.

21 So your division for purpose of, am I a parent,  
22 I understand that, but after the birth, and after the  
23 paternity is established, the rest of it, just as in  
24 Justice Breyer's case, I have great difficulty following.

25 MR. KNEEDLER: The question, Justice Ginsburg,

1 is not am I a parent, but am I a parent in contemplation  
2 of law, and citizenship is a formal relationship between  
3 the United States and a person. It is a permanent  
4 relationship, and Congress is entitled to insist on an  
5 element of formality and legal acknowledgement in doing  
6 that.

7 The question is not whether Mr. Miller had an  
8 established personal relationship with petitioner during  
9 her minority, although there's no --

10 QUESTION: Accepting that standard as a legal  
11 standard, clear and convincing evidence is lawyer talk.  
12 Clear and convincing evidence that he's the father, that's  
13 a legal standard, and that relates to birth, who is the  
14 parent of this newborn child.

15 After that this talks about written obligation,  
16 written undertaking to support, all that, and why is that  
17 only one way, and I would like to ask in that connection  
18 whether the Government is now retreating from something it  
19 told the Court just 2 years ago over and over again, I  
20 think to the annoyance of some people because it was  
21 repeated so often at the oral argument and in the brief.

22 The Government said in the University of  
23 Virginia, United States v. Virginia said, differences in  
24 treatment based on sex are suspect. Even when stereotypes  
25 reflect current realities, courts have condemned them



1 because the law must not restrict men and women by  
2 reflecting and reinforcing patterns of historic  
3 discrimination. The Government said that over and over.

4 MR. KNEEDLER: We have certainly not retreated  
5 from that. You've asked me several questions, if I could  
6 just take a moment and respond to them.

7 First of all, in the -- as this Court's decision  
8 in Fiallo made clear, Congress' power over immigration and  
9 naturalization is quite different from something that  
10 would happen in the domestic context, and there are a  
11 variety of reasons why that's so.

12 One of the parties to the transaction is an  
13 alien abroad, not even protected by the Constitution at  
14 all. There are questions of sovereign authority, of  
15 foreign relations, of Congress taking into account  
16 conditions abroad. That's both fact-finding and meshing  
17 U.S. law with foreign law. So the circumstances we think  
18 are very different.

19 There's another big difference in the way that  
20 just what's at stake in this case and in the VMI case.  
21 There, the Court was dealing with a categorical exclusion  
22 of women from the institution, and the Court was concerned  
23 with closing the door and denying opportunities to men and  
24 women, as the Court put it.

25 Here, there is no denial -- no categorical

1 exclusion, no denial of opportunities. All Mr. Miller had  
2 to do, if he had the sort of relationship that you were  
3 describing, is to take the simple step of making that  
4 relationship formal and legal during the child's minority.

5 QUESTION: May I ask you if you would answer the  
6 question that was asked before in the context of not  
7 national origin, but race.

8 Suppose the United States took the position, we  
9 know as a matter of statistics that there are many more  
10 white fathers that take responsibility for their children  
11 than nonwhite fathers. Therefore, we're going to have  
12 this written acknowledgement of an obligation to support.  
13 That will be required of citizen fathers who are nonwhite,  
14 but not citizen fathers who are white, and we're basing  
15 that on solid, empirical evidence of who provides support  
16 for children.

17 Would that be constitutional because it's in the  
18 immigration and nationality area?

19 MR. KNEEDLER: Needless to say, this case  
20 doesn't go that far, but the question under Fiallo, the  
21 standard, is whether the justification advanced is one  
22 that is facially legitimate and bona fide, and in this  
23 country's history of race relations it would be difficult  
24 to imagine what a proper justification would be under  
25 parallel, I suppose, to those sorts of things that might

1 be proffered for compelling justification, but here --

2 QUESTION: But you -- compelling justification  
3 doesn't fit with --

4 MR. KNEEDLER: No, I'm saying in terms of what  
5 sort of justifications one could imagine, and I -- this  
6 country --

7 QUESTION: The justification is the practical  
8 one that I gave you, the statistics will show that  
9 disproportionately nonwhite fathers don't accept the  
10 support obligation.

11 MR. KNEEDLER: Well, in -- again, given this  
12 country's history of race relations, and if there was a  
13 U.S. citizen claiming an effect on his ability to transmit  
14 because of that, it may be that under the phrase, facially  
15 legitimate, this Court would conclude that that is not a  
16 legitimate justification.

17 But there's a very different -- if I may just  
18 go -- explain what's different about this case, this -- I  
19 think it is clear that at the moment of birth there is a  
20 categorical difference between the mother and the father  
21 of the U.S. citizen and the mother because, as I described  
22 earlier, in the child born out of wedlock, the mother has  
23 a legal relationship with the child from the moment of  
24 birth.

25 The father does not, unless the father or

1 someone else takes a step in law to establish that  
2 relationship. It isn't just the question of clear and  
3 convincing evidence of proof 20 or 30 years later as to  
4 whether in fact the man was the father. The question is,  
5 was that legal relationship established during the child's  
6 minority, because the legal relationship is not just  
7 important in its own right. It is emblematic and often  
8 fostering of a deeper personal relationship.

9 QUESTION: Let's go to the emblematic issue,  
10 because that's part of your argument with the converse  
11 argument with respect to the more lenient treatment of the  
12 child of the citizen mother.

13 One step in that argument, as I understand it,  
14 is that because the mother is the citizen, the child will  
15 be with the mother, the mother has an attachment to the  
16 United States, therefore ultimately that will foster an  
17 attachment of the child to the United States.

18 My question is, should we take that argument  
19 seriously when in fact the statute requires of the  
20 citizen's mother that she have an attachment only to the  
21 extent of once at any time having lived for 1 year prior  
22 to birth in the United States?

23 That doesn't seem to me to be a criterion that  
24 calls for very much sense of attachment and if, in fact,  
25 that's the low value that the United States is willing to



1 put on this attachment concept, isn't the argument a very  
2 weak argument, if not perhaps a sham?

3 MR. KNEEDLER: No. No. With all respect, I  
4 think that very situation shows why Congress has  
5 particularly broad deference in this area, because what --  
6 Congress has to judge not only the situation in the United  
7 States and the U.S. citizen who may have a stake in it,  
8 but what is the situation abroad in the foreign country  
9 where, after all, the child was born?

10 And as we explain in our brief, Congress was  
11 very concerned, and the legislative history makes this  
12 quite clear, that a child born to a U.S. citizen on  
13 foreign soil, and this remains true in the Philippines,  
14 that child does not have citizenship of the country where  
15 she is born, so there's a very real problem of  
16 statelessness.

17 So what Congress is weighing there is perhaps a  
18 weaker tie to the United States, but perhaps no legal  
19 status at all in the country of birth, and so what  
20 Congress did there is to say, in that situation, because  
21 we are concerned for the child and for the mother of the  
22 child, who is a U.S. citizen, we are prepared to accept a  
23 somewhat weaker link to the United States in that  
24 situation because of the counterbalance.

25 QUESTION: Is that on record somewhere?



1 MR. KNEEDLER: Pardon me?

2 QUESTION: I mean, can I find that reasoning  
3 somewhere in the legislative history?

4 MR. KNEEDLER: Yes. It's -- we quote it in  
5 the -- in the 1952 report in our brief, and there is  
6 discussion --

7 QUESTION: Do you have the cite? I didn't  
8 remember it.

9 MR. KNEEDLER: I'm sorry.

10 QUESTION: No, if you don't have it right at  
11 hand, I don't want to take your time looking for it.

12 MR. KNEEDLER: On page 34 of our brief.

13 QUESTION: Okay. Thank you.

14 MR. KNEEDLER: We cite the Senate report.

15 QUESTION: By the same token, if this child had  
16 in fact lived with her father, suppose he went -- took  
17 him -- took a ship, took her back to the United States,  
18 she's a teenager, she proves to be trouble, so he says,  
19 out with you, back, I don't want anything to do with you.  
20 She would have had all her growing up years in the United  
21 States and yet, under this statute, she could not qualify  
22 as the child of a U.S.-born citizen.

23 MR. KNEEDLER: All the father had to do during  
24 her minority was to take the step of either legitimating  
25 the child --

1 QUESTION: I'm just asking the question about  
2 the tie to the United States, so that becomes irrelevant.  
3 Even though this child grew up in the United States,  
4 that's --

5 MR. KNEEDLER: It's conceivable there could be  
6 an as-applied challenge to this statute, but in the  
7 immigration area in particular Congress is entitled to  
8 legislate by categories, and Congress is entitled --

9 QUESTION: In social and economic legislation,  
10 too. See, that's really the problem that I have with it.

11 It used to be for years and years social and  
12 economic legislation is anything goes, what Congress wants  
13 to do, and yet all the precedent in the gender cases were  
14 made in that area which traditionally has been a largely  
15 judicial hands-off, so I'm frankly puzzled about why the  
16 Government, after saying all gender classifications are  
17 subject to heightened scrutiny, now says we found an  
18 exception, so I'd like to know, are there other  
19 exceptions?

20 MR. KNEEDLER: No. The exception and whether  
21 there might be another one I can't address. What we have  
22 here is a very different context. At the time the Court  
23 decided Fiallo this Court has already decided Craig v.  
24 Boren and concluded that gender distinctions in the  
25 domestic context have to be justified as having a

1 substantial relation to an important governmental  
2 interest, and also applied heightened scrutiny with  
3 respect to illegitimacy.

4 But right contemporaneously with that -- and  
5 this case is really about children born out of wedlock,  
6 and as in this Court's decision in *Lehrer v. Robertson*,  
7 where the Court said the statutory scheme is not likely to  
8 omit many responsible parents, we think that is exactly  
9 true here.

10 Anyone who wanted to establish the requisite  
11 relationship during the child's minority, and that's the  
12 period that Congress was focusing on, all that person had  
13 to do prior to 1986 was to provide for legitimation of the  
14 child. Congress in 1986 liberalized that, not requiring a  
15 formal court to create it, not requiring the father to go  
16 to another country.

17 All he had to do was file a statement with the  
18 State Department acknowledging the paternity of the child  
19 and assuming an obligation equivalent to that of the  
20 mother that flows from that, even in the absence of a  
21 legal relationship, the acknowledgment, the promise to  
22 support that would flow from the mother's preexisting  
23 legal relationship with the child.

24 And if I may, with respect to the suggestion of  
25 the irresponsible parent, or the parent who may abandon, I

1 don't think Congress is required to establish a statutory  
2 scheme on the possibility that someone in the other  
3 category may not live up to the legal responsibilities  
4 that the law prescribes, but in any event, this statute  
5 applies equally as to both categories.

6           The mother who bears the child and either  
7 abandons or gives the child up a week later, that child is  
8 a citizen. The same is true for a father who acknowledges  
9 or legitimates a child. If that father does not  
10 subsequently remain responsible, that child remains a  
11 citizen. The question is simply the timing of when the  
12 father steps forward to assume his responsibilities for  
13 the child abroad.

14           And one other point to bear in mind, in many  
15 cases -- and this is not a generalization about the nature  
16 of men and women. It's a statistical legal fact that in  
17 the cases of a child born out of wedlock, when you have a  
18 U.S. citizen mother, that will very often be the only  
19 parent. Where you have a U.S. citizen father who takes  
20 the steps to legitimate and the other steps, that means  
21 there are two parents with a legal relationship, one  
22 parent here and one parent in the other country.

23           So this is a situation which, in fashioning  
24 these categorical schemes, Congress necessarily has to  
25 balance the different considerations that arise, and so

1 it's not just the question of the U.S. citizen parent.

2 CHIEF JUSTICE REHNQUIST: Thank you,  
3 Mr. Kneeder. The case is submitted.

4 (Whereupon, at 12:06 p.m., the case in the  
5 above-entitled matter was submitted.)  
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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

LORELYN PENERO MILLER, Petitioner v. MADELEINE K.  
ALBRIGHT, SECRETARY OF STATE  
CASE NO: 96-1060

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna Marie Fedele-----

(REPORTER)