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IN THE SUPREME COURT OF THE UNITED STATES

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TUAN ANH NGUYEN AND :
JOSEPH BOULAIS, :
Petitioners, :
v. : No. 99-2071
IMMIGRATION AND NATURALIZATION :
SERVICE :
- - - - - X

Washington, D.C.
Tuesday, January 9, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:14 a.m.

APPEARANCES:
MARTHA F. DAVIS, ESQ., New York, New York; 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 (10:14 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Tuan Anh Nguyen and Boulais versus Immigration and
5 Naturalization Service. Ms. Davis.

6 ORAL ARGUMENT OF MARTHA F. DAVIS

7 ON BEHALF OF THE PETITIONERS

8 MS. DAVIS: Mr. Chief Justice, and may it please
9 the Court:

10 This case raises the question of whether
11 differential treatment of mothers and fathers under
12 federal citizenship law violates the equal protection
13 component of the due process clause of the Fifth
14 Amendment. Joseph Boulais has raised his out of wedlock
15 son from infancy. Under 8 USC Section 1409, an out of
16 wedlock mother of a foreign-born child can establish her
17 child's citizenship at birth upon proof of three things:
18 U.S. nationality at the time of the child's birth,
19 parentage of the child, and prior physical presence in the
20 United States.

21 Joseph Boulais meets all of these criteria.
22 However, solely because he's the male parent, the law
23 imposes two additional criteria. First, Mr. Boulais, as a
24 father, must produce a signed statement that he will
25 support the child until his 18th birthday. The father

1 here supported his son, but he never signed a statement.

2 Second, the father must before his child's 18th
3 birthday, either legitimate, adjudicate paternity or
4 formally acknowledge paternity, and here the father has
5 formally acknowledged paternity, but not until his son was
6 in his 20s.

7 QUESTION: Miss Davis, is this an as-applied or
8 a facial challenge?

9 MS. DAVIS: Justice O'Connor, this is a facial
10 challenge. We do not believe there is any constitutional
11 basis on which this statute could be applied to
12 individuals.

13 QUESTION: How do you deal with the Fiallo case?

14 MS. DAVIS: Your Honor, the Fiallo case concerns
15 the situation of some individuals who are citizens
16 applying for special immigration preferences for children
17 of those citizens or relatives of those citizens. The
18 Court here ruled that that was covered by the plenary
19 power. Here the issue concerns only citizens applying for
20 trying to transmit citizenship at birth, benefits to -- to
21 parents, and so the difference is the question of what the
22 extent of plenary power is. And we believe that plenary
23 power should stop, at the very least, before it reaches a
24 situation where a citizen, here Mr. Boulais, is seeking to
25 transmit citizenship benefits to a child who, as the

1 statute indicates, once citizenship is recognized will
2 relate back to the date of birth.

3 So I guess there are two basic distinctions.
4 One, that there's a relation back issue, so the citizen's
5 child -- the child here, once his citizenship is
6 recognized, will have been deemed to have been a citizen
7 from birth, and therefore there isn't any of the concern
8 about transfer of allegiances that's the case in
9 naturalization or also potentially the case in immigration
10 sorts of situations.

11 QUESTION: Well, wait. Why is there no problem
12 with transfer of allegiances? I mean, it's fine to make
13 it retroactive as far as the law is concerned, but that
14 doesn't change the reality of it. The reality of it is
15 he's not an American citizen until these conditions are --
16 are met, and he's proclaimed to be such. Prior to that
17 he's not an American citizen, is he?

18 MS. DAVIS: As soon as those conditions are met,
19 then his citizenship is recognized at the time of birth.
20 That's recognized under statute --

21 QUESTION: But he was a citizen of some other
22 country before then.

23 MS. DAVIS: And once his citizenship is
24 recognized, he will be deemed to have been a dual citizen
25 of the country from the date of birth, but the statute

1 itself recognizes that there isn't a transfer of
2 allegiances by virtue of the fact that there isn't an oath
3 of allegiance that's required for, to establish
4 citizenship at birth, unlike naturalization, where that's
5 a substantive requirement of the -- of the recognition of
6 the status.

7 QUESTION: Miss Davis, do I take -- do I
8 understand correctly the point you're making is that the
9 people who are being brought in or sought to be brought in
10 in Fiallo were coming in as aliens who might never become
11 citizens, they were not coming in as citizens? They were
12 coming in as preference, preference-eligible aliens, and
13 now you're saying, the distinction that you're making, if
14 I grasp it correctly, is these people, if you are correct,
15 will never come in as aliens. The application is that the
16 citizenship should be recognized immediately. That's the
17 distinction you're making?

18 MS. DAVIS: That's correct, Your Honor.

19 QUESTION: No, but Miss Davis, you're not
20 suggesting that there's a constitutional right to have
21 your citizenship conferred on an American, the child of an
22 American parent brought abroad?

23 MS. DAVIS: Not at all, Your Honor. What we're
24 saying is the immigration statute makes a distinction
25 between citizenship at birth and other forms of

1 immigration status, and that because of that distinction,
2 the plenary power that shields in some instances
3 immigration actions from full constitutional review should
4 not apply here. It should stop short of barring full
5 constitutional review or ordinary constitutional review of
6 transmission of citizenship from a citizen to a plenary
7 citizen.

8 QUESTION: But the plenary -- can you explain to
9 me why, why that is? I assume that the plenary power has
10 its basis, its rationale in the interest that the United
11 States has with its relations with foreign powers. And
12 why is that inapplicable in -- in any case arising under
13 this particular statute?

14 MS. DAVIS: Justice Kennedy --

15 QUESTION: And why -- to say that plenary power
16 stops puzzles me.

17 MS. DAVIS: Yes. Justice Kennedy, this Court
18 has never extended plenary power to every statute that
19 potentially implicates foreign relations. There's only --
20 there are many, many that do that, including child support
21 and environmental laws. This Court has also never
22 extended plenary power to every action under even the
23 Immigration Nationality Act in INS versus Chadha, for
24 example.

25 QUESTION: What's the rationale for extending

1 plenary power to the alien cases?

2 MS. DAVIS: The rationale that this Court has
3 offered is the idea that foreign relations is directly
4 implicated, I presume in part because of this transfer of
5 allegiances.

6 QUESTION: You say -- you say Fiallo would have
7 come out differently if these aliens were not only
8 admitted but having been once they are admitted are
9 proclaimed to have been American citizens from birth?
10 That would wash out the plenary power of the federal
11 government?

12 MS. DAVIS: Your Honor, then they would be in
13 the same category as the citizens here. They would have
14 been citizens from birth.

15 QUESTION: That doesn't make any sense to me.
16 If -- if -- if -- if you admit them without making them
17 citizens from birth, you have plenary power, but if you do
18 even the greater thing, admit them and make them citizens
19 from birth, suddenly your plenary power disappears. It
20 seems to me, if anything, it ought to be the opposite.

21 MS. DAVIS: Your Honor, here what we base our
22 argument on is the structure of the statute as well as the
23 long history of jus sanguinis citizenship, and this
24 Court's ruling in Rogers versus Bellei which also
25 indicated that citizenship at birth was subject to

1 ordinary constitutional scrutiny, even though there isn't
2 a right under the Fourteenth Amendment to that
3 citizenship, even though Congress could change the rules
4 of citizenship tomorrow, still the statute itself, the
5 history of jus sanguinis citizenship and this Court's
6 construction of that, of that law in Rogers versus Bellei
7 we believe supports limiting the extension of plenary
8 power authority to a situation where a citizen here is
9 seeking to transmit citizenship to his child who will be a
10 citizen at birth at the time that citizenship is
11 recognized.

12 QUESTION: Let's assume the statute was slightly
13 different and the citizenship to be conferred did not
14 recognize -- did not relate back to birth. Would you then
15 say that the statute with that one change in it exceeded
16 Congress' plenary power under the naturalization clause?

17 MS. DAVIS: Your Honor, I guess I'm --

18 QUESTION: Maybe it would be simpler if I asked
19 the -- I think I can ask the question a different way. Do
20 you think that the -- the -- the act of recognizing
21 citizenship here for children born abroad is
22 naturalization within the meaning of the naturalization
23 clause?

24 MS. DAVIS: Yes, Your Honor, it is
25 naturalization within the meaning of the constitutional

1 naturalization clause. However, Congress, in implementing
2 that clause, has made choices about how to implement it
3 that we believe --

4 QUESTION: Right, that's what I wanted to get
5 at.

6 MS. DAVIS: -- that we believe implicate the
7 extent of the plenary power.

8 QUESTION: So that Congress, so far as the
9 clause is concerned, Congress could do this, leaving aside
10 equal protection. Congress can do this if it simply did
11 not have the relation back provision?

12 MS. DAVIS: That's -- that's correct.

13 QUESTION: Yeah.

14 MS. DAVIS: Your Honor, I mean, we certainly
15 wouldn't be able to argue that the transfer of allegiances
16 and those issues no longer implicated foreign relations,
17 and that's a critical part of our argument here.

18 Let me turn --

19 QUESTION: Well, I wonder, suppose there were no
20 naturalization clause, suppose it didn't exist. Wouldn't
21 Congress still have the power to enact this statute? No
22 one is being naturalized. They are simply stating who is a
23 citizen. Just as, after all, no one in 1789 had been born
24 in the United States of America or very few, and there had
25 to be rules as to who was a citizen and who isn't --

1 MS. DAVIS: Your Honor --

2 QUESTION: -- so what is this to do with
3 naturalization?

4 MS. DAVIS: Your Honor, this Court has held in
5 the past, most notably in Rogers versus Bellei, that the
6 authority to grant citizenship at birth, jus sanguinis
7 citizenship, derives from the naturalization clause. Now,
8 whether in the absence of that clause Congress could still
9 go forward I don't know because we, you know -- the Court
10 hasn't had to confront that issue.

11 QUESTION: If Congress said everyone in 1780 who
12 has been born in the United States is a citizen of the
13 United States, would that have been naturalizing
14 everybody?

15 MS. DAVIS: Your Honor, I think it would depend
16 upon what the term naturalization meant even at that time.
17 We know what it means now because Congress itself has
18 defined it in the statute to apply only to those
19 individuals who have citizenship that is prospective only,
20 and here Mr. Boulais and his son come forward with a claim
21 for citizenship that relates back to birth, so it's
22 clearly not in the same category as naturalization is
23 defined under the current statute.

24 QUESTION: But it is -- it is naturalization in
25 the broader sense of referring to the constitutional

1 authority?

2 MS. DAVIS: That's correct, but in implementing

3 --

4 QUESTION: And to that extent I think it makes
5 it somewhat difficult to distinguish Fiallo. Are you
6 arguing that we need to reverse Fiallo if necessary?

7 MS. DAVIS: Your Honor, we don't believe that
8 Fiallo must be reversed in order to rule in our favor
9 because of the distinction that we just discussed.
10 However, as we indicate in our brief, there are reasons to
11 reassess Fiallo, given, in particular, the subsequent
12 development of equal protection law that might suggest
13 that the result in that case is one that the Court would
14 no longer --

15 QUESTION: But if you were to reexamine Fiallo,
16 I suppose under your view, the amendment in 1986 to the
17 statute involved in Fiallo that adopted the position of
18 the dissenters in Fiallo would also be unconstitutional
19 because it basically followed the same pattern as this
20 statute does.

21 MS. DAVIS: That's correct, Your Honor, yes,
22 because it retains the sex-based classifications. Of
23 course, there the Congress was not responding to a finding
24 on constitutionality, so they weren't bound by that kind
25 of a ruling.

1 QUESTION: Miss Davis, may we go back a few
2 steps because you said something that surprised me. I
3 know that the Solicitor General took the line in its brief
4 that there are only two kinds of citizens -- born in the
5 United States, and everybody else for constitutional
6 purposes is naturalized.

7 My grandson was born in Paris of U.S. citizen
8 parents. I had never considered him a naturalized citizen
9 of the United States, but is that his correct status?

10 MS. DAVIS: Your Honor, we don't quarrel with
11 the construction that Rogers versus Bellei adopted, which
12 is that citizenship at birth is a form of naturalization.
13 However what we argue is that the Congress in implementing
14 that power has made a distinction between naturalization
15 under the statute and citizenship at birth under the
16 statute, and the implications of that distinction are that
17 the plenary power of Congress to regulate immigration does
18 not extend to citizenship at birth because citizenship at
19 birth relates back to the date of birth because
20 naturalization is defined to be prospective only because
21 there isn't a requirement of an oath of allegiance in
22 order to have citizenship at birth acknowledged.

23 QUESTION: Can such a person be denaturalized?

24 MS. DAVIS: Your Honor, I believe that that
25 person would be covered in the same way that those

1 citizens concerned in Afroyim and those cases whereby the
2 Constitution for denaturalization purposes, that person
3 could have additional conditions placed on citizenship
4 that would not be appropriate for a jus soli citizen. Or
5 -- yes, for a jus soli citizen.

6 So, for example, the conditions placed on the
7 individual in Rogers versus Bellei, who was a citizen at
8 birth, the residency conditions are permissible under the
9 Constitution even though if those conditions are not
10 filled, the individual will lose citizenship at the time
11 that they fail to comply with those conditions.

12 QUESTION: Miss Davis, I gather your position
13 would be different if in addition to the three conditions
14 that you mentioned there were a fourth condition, and that
15 is that the child of the American father swear allegiance
16 to the United States.

17 MS. DAVIS: If the child of the American?

18 QUESTION: Yes, yes. Before he could
19 retroactively be deemed a United States citizen from
20 birth, in addition to the other three factors, he must
21 swear allegiance to the United States.

22 MS. DAVIS: Your Honor, no, our argument would
23 not be different. I'm raising that because it's an
24 indication of the fact that Congress --

25 QUESTION: Well, I thought your argument hinged

1 entirely upon the fact that there's no problem about
2 changing allegiances, and this would require him to change
3 allegiance, to swear allegiance to the United States over
4 whatever other country he had come from.

5 MS. DAVIS: Yes. No, Your Honor, our argument
6 doesn't hinge entirely on that, no, but I raise that --

7 QUESTION: I don't know what opinions -- it
8 seems to me so artificial to say that simply because you
9 make the admission retroactive and say he shall be deemed
10 to have been a citizen from birth, somehow the power of
11 Congress to make people who are not born in this country
12 and therefore automatically citizens, citizens somehow
13 becomes abridged. I don't -- I just don't see how the
14 retroactivity -- it's such an artificial device. Congress
15 could make it retroactive or not retroactive.

16 MS. DAVIS: Your Honor, I believe that the
17 argument that I'm making reflects the construction of the
18 statute. The statute itself makes a distinction between
19 citizenship and citizenship at birth and naturalization.
20 It lists in the section 1401 jus soli citizenship along
21 with citizenship at birth.

22 QUESTION: I understand that, but we're not
23 talking about the statute. I can agree that you can --
24 you can make a statutory distinction between those two
25 situations, but does that convert into a constitutional

1 distinction? And that's what you're arguing before us,
2 that there is some things you can constitutionally do when
3 you make the person retroactively from birth a United
4 States citizen or things that you can't do when you do
5 that that you could do if you didn't make him
6 retroactively.

7 MS. DAVIS: Yes, Justice Scalia, the issue is
8 the extent of the plenary power doctrine, which this Court
9 has, as I suggested earlier, has not always applied in the
10 immigration area, and we believe that --

11 QUESTION: And has never been applied in that
12 whole line of cases. They are all cases of people who are
13 admitted as aliens, so if it were to extend to such a
14 case, it would be an extension.

15 MS. DAVIS: That -- that's correct, Your Honor.
16 Applying it to citizens and citizens at birth, would
17 extend the plenary power doctrine beyond where it has ever
18 been extended in the -- in the past.

19 QUESTION: Well, that assumes the person is not
20 an alien simply because Congress says the person shall be
21 retroactively deemed a citizen. But for constitutional
22 purposes, it seems to me, as opposed to statutory
23 purposes, whether the person is an alien or not should
24 depend upon whether the person is a natural born citizen
25 of the United States or whether citizenship must be

1 conferred by Congress.

2 MS. DAVIS: Right. Well, in fact, Your Honor,
3 you mentioned natural born citizen, and many commentators
4 believe that citizens at birth are deemed to be natural
5 born citizens, so this is a category of citizenship that
6 traditionally has had a different status than naturalized
7 citizenship for many, many years, for centuries.

8 QUESTION: The debate over whether someone born
9 abroad could be a candidate for President?

10 MS. DAVIS: President, correct, Your Honor.

11 QUESTION: But someone -- someone born abroad is
12 not in the same class as someone born jus solus here in
13 the United States, which they are citizens by virtue of
14 the Fourteenth Amendment, are they not?

15 MS. DAVIS: That's correct, Your Honor. However,
16 the statute, the immigration and naturalization statute,
17 treats those jus soli citizenship -- citizens and citizens
18 at birth in the same section, so they clearly are
19 contemplating that many of the same protections are going
20 to apply to those citizens.

21 QUESTION: May I just clarify one thing? Your
22 view is the statute is invalid on its face, which, as I
23 take it, means that the requirements as to the children of
24 female parents have to be applied in the same way to
25 children of male American citizen parents born abroad?

1 MS. DAVIS: That's correct.

2 QUESTION: So that anyone anywhere in the world
3 at any time can prove that his parent, his father was an
4 American citizen, has been a citizen since that person's
5 birth, even if it was 60 years ago?

6 MS. DAVIS: Your Honor, there -- according to
7 the remedy that we've proposed, there would still be some
8 criteria to be met, yes, but the remedy --

9 QUESTION: Okay, criteria other than those
10 applied to children of mother -- of mother -- whose mother
11 was an American citizen.

12 MS. DAVIS: A mother currently can sponsor a
13 child, transmit citizenship at any time during the child's
14 life.

15 QUESTION: Correct.

16 MS. DAVIS: Our argument is that a father, that
17 --

18 QUESTION: Has precisely the same right?

19 MS. DAVIS: Should have the same right, the
20 remedy that this Court should impose should be one that
21 gives the --

22 QUESTION: Well, he doesn't have the right.
23 It's whether he has -- he has already done it, merely by
24 virtue of being a citizen and by having lived in the
25 United States for a certain period of time.

1 MS. DAVIS: What this Court has indicated, both
2 in Rogers v. Bellei and also in a majority of the justices
3 in the Miller case --

4 QUESTION: But that's your position is all I
5 wanted to --

6 MS. DAVIS: -- stated that it's recognition of
7 existing citizenship and continuing citizenship.

8 QUESTION: Well, if we agreed with your equal
9 protection argument, I suppose we would have the
10 alternative to say not simply that the father is pushed
11 into the same favorable position as the mother, but the
12 mother is pushed into the same unfavorable position as the
13 father.

14 MS. DAVIS: Your Honor, that would remedy the
15 equal protection issue, but we believe that it would run
16 contrary to what we know about the Court's principles in
17 crafting a remedy.

18 QUESTION: Has the Court ever in those extension
19 versus invalidation cases, has it ever taken the route of
20 lessening the benefits instead of equalizing up? Has it
21 ever equalized down instead of up?

22 MS. DAVIS: We have not been able to find a case
23 where there has been equalization down, as you say.

24 QUESTION: But there is always a first time.

25 QUESTION: In this case the government's

1 argument, the stateless person problem, takes much more
2 prominence than it did in our earlier case, and that would
3 seem to state a rational basis for this distinction.
4 Would you comment on the government's argument in this
5 regard?

6 MS. DAVIS: Certainly. I mean, our position is
7 that they need to meet the heightened scrutiny standard.
8 But even --

9 QUESTION: Well, and I think it might meet that
10 as well, but would you comment on that?

11 MS. DAVIS: Sure. The issue is whether or not
12 -- well, to start out, we believe that that issue is not
13 properly in the case because we haven't challenged the
14 physical presence requirements here, and the government as
15 well as Congress have indicated that the way they have
16 dealt with statelessness, concerns about statelessness is
17 to have differential physical presence requirements for
18 mothers and fathers. Mr. Boulais doesn't have standing to
19 challenge those. He meets both those physical presence
20 requirements. If the remedy that we seek is imposed,
21 those physical presence requirements will remain and will
22 continue to do the job that the government says they are
23 needed for in terms of addressing the potential for
24 statelessness, but even beyond that, even assuming that it
25 is in the case, the risk of statelessness is not gender

1 specific.

2 The -- there are a number of nations that -- and
3 this is set out in the Equality Now amicus brief which was
4 submitted to the Court, there are a number of countries
5 which have laws that are gender neutral so that there
6 isn't any greater risk of statelessness for children of
7 mothers than there is of fathers. Some of those laws are
8 avail --

9 QUESTION: Well, but there are some nations that
10 are not in that classification, are there not?

11 MS. DAVIS: There are some nations that are not
12 at that level. There are some nations where there's a
13 greater risk of statelessness for children of fathers, and
14 those children are currently not getting the benefit of
15 the generous physical presence requirements.

16 For example, Canada has a provision that says
17 that if a child is born abroad and doesn't maintain
18 connections with Canada that they will lose their
19 citizenship by age 28. Well, by age 28, the child of a
20 U.S. father, the father can no longer transmit the
21 citizenship to the child, so in fact that child of U.S.
22 father is at much greater risk of statelessness than a
23 child of a U.S. mother who had a child with a Canadian
24 citizen abroad.

25 So the government could much better address its

1 concerns about statelessness by either having a more
2 generous physical presence requirements across the board
3 because it's -- any requirement increases the risk of
4 statelessness, so it could have more generous require --
5 more generous provisions across the board or it could have
6 one that's tailored to the specific countries where
7 statelessness is at issue for mothers or for fathers
8 instead of --

9 QUESTION: Do I understand though that we are
10 now engaged in an academic discussion? Because in this
11 case he has no standing to raise that problem since he
12 amply meets the residence requirements, so he can't raise
13 somebody else's case.

14 MS. DAVIS: Exactly right. I mean, the remedy
15 that we seek -- the Court would have to go beyond the four
16 corners of the complaint or of the issue here, the case
17 here in order to address the physical presence
18 requirements.

19 QUESTION: And the things that hold him back,
20 the two things, seem to me to have nothing to do with the
21 statelessness concern anyway, the formal acknowledgment of
22 paternity and proof of support, of 418.

23 MS. DAVIS: That's correct, Justice Ginsburg.

24 QUESTION: It has nothing to do with
25 statelessness.

1 MS. DAVIS: And as I said, in fact, may increase
2 the risk of statelessness because any barrier that's
3 placed on transmittal of citizenship increases the risk of
4 statelessness, especially absolute cutoff at age 18.

5 QUESTION: Are you saying that children of
6 American parents born abroad, of whom there are millions
7 and millions, are naturalized citizens and could never be
8 President like George Romney couldn't have run for
9 President?

10 MS. DAVIS: I'm sorry, the children of parents
11 born abroad are naturalized?

12 QUESTION: Yes, I mean, their -- their
13 citizenship is conferred by statute, and they are citizens
14 from birth, and there are probably tens of millions of
15 them, and George Romney was one of them, and I had not
16 thought that they were naturalized citizens. I thought
17 they were citizens who were citizens by virtue of their
18 birth, and they're citizens from birth, but you were
19 saying they're the same as naturalized. Or maybe I
20 misunderstood.

21 MS. DAVIS: Yes. Your Honor, the wording of the
22 Constitution is natural born citizens for purposes of
23 being President or Vice President. And what -- I haven't
24 done the research myself. What commentators say is that
25 natural born is the equivalent of -- includes, encompasses

1 jus soli and jus sanguinis. But that's a different term
2 than naturalized.

3 QUESTION: If that's so, then those who -- then
4 those who are born abroad of an American parent are
5 natural born citizens in your view?

6 MS. DAVIS: That's correct.

7 QUESTION: Contrasted with naturalized citizens
8 who would have been aliens who previously were aliens and
9 would have become citizens by virtue of a naturalization
10 law; is that right?

11 MS. DAVIS: Your Honor, I guess the question is
12 whether the term naturalized in the Constitution also
13 encompasses natural born citizens. In Rogers versus Bellei
14 suggested that it did.

15 QUESTION: Well, I -- for present purposes what
16 we're interested in is what standard of review to apply,
17 and whether the extremely deferential standard applies to
18 these natural born citizens.

19 MS. DAVIS: I think it's -- I think it's totally
20 clear that jus sanguinis citizenship has a different
21 history than naturalized citizenship and has traditionally
22 by this Court as well as by Congress been treated
23 differently.

24 QUESTION: But has not been called natural born
25 citizenship? I mean, isn't it clear that the natural born

1 requirement in the Constitution was intended explicitly to
2 exclude some Englishmen who had come here and spent some
3 time here and then went back and raised their families in
4 England? They did not want that. They wanted natural
5 born Americans.

6 MS. DAVIS: Yes, by the same token --

7 QUESTION: That is jus soli, isn't it?

8 MS. DAVIS: By the same token, one could say
9 that the provision would apply now to ensure that Congress
10 can't apply suspect classifications to keep certain
11 individuals from aspiring to those offices.

12 QUESTION: Well, maybe. I'm just referring to
13 the meaning of natural born within the Constitution. I
14 don't think you're disagreeing. It requires jus soli,
15 doesn't it?

16 MS. DAVIS: No, Your Honor, I do disagree with
17 that. I believe that it encompasses jus sanguinis
18 citizenship.

19 QUESTION: And any academic right is -- there's
20 a debate over that?

21 MS. DAVIS: Is a debate over it, that's correct
22 --

23 QUESTION: There is a debate over whether my
24 grandson is a natural born citizen. I think he is.

25 MS. DAVIS: -- whether he can be Vice President.

1 QUESTION: Of course the interesting thing about
2 that provision, it requires that he be natural born at the
3 time of the adoption of the Constitution. That's what it
4 literally says.

5 (Laughter.)

6 MS. DAVIS: To return to that issue briefly, I
7 want to make sure that the Court understands that applying
8 heightened scrutiny does not mean that the government then
9 does not get to make its case, that the concerns about
10 dual citizenship or concerns about statelessness might
11 meet heightened scrutiny. They can still come forward and
12 in those unusual instances where they can establish that
13 they meet that standard, apply classifications that would
14 otherwise be suspect. We believe those would be rare
15 cases, but it's not that there is no review. What it
16 means is simply that you're saying, or that the citizens
17 transmitting citizenship would be able to invoke the same
18 constitutional standards as are usually invoked. I
19 reserve the remainder of my time for rebuttal.

20 QUESTION: Very well, Miss Davis. Mr. Kneedler,
21 we will hear from you.

22 ORAL ARGUMENT OF EDWIN S. KNEEDLER

23 ON BEHALF OF THE RESPONDENT

24 MR. KNEEDLER: Mr. Chief Justice, and may it
25 please the Court, the naturalization clause of the United

1 States Constitution commits to Congress the plenary power
2 inherent in the sovereignty of every nation to determine
3 which aliens will be granted United States citizenship.

4 As this Court said in the Ginsburg case, no
5 alien has the slightest right to naturalization unless all
6 statutory requirements are complied with.

7 QUESTION: Well, you've heard all these
8 arguments this morning that this isn't a case of
9 naturalization and not part of Congress' plenary power
10 when a child is born of a parent that's a U.S. citizen.

11 MR. KNEEDLER: With respect to that, I think
12 this Court's decision in Wong Kim Ark is dispositive.
13 There the Court traced the history of United States
14 citizenship with reference to the common law of England
15 prior to the adoption of the Constitution, and in that
16 case the Court pointed out that at common law, in order to
17 be a citizen at common law, it was necessary for the
18 person to be born in England. The citizenship conferred
19 on people who were born abroad to British subjects was
20 conferred only by statute. In other words, it was not
21 regarded historically in England as a fundamental --

22 QUESTION: That's not so. I mean, you're right
23 in saying by statute. Normally in all countries
24 citizenship was conferred by statute. The Fourteenth
25 Amendment was passed to the problem of slavery. But

1 statutes traditionally transmitted citizenship most cases
2 through blood. Isn't that true? And so would you say
3 that when the United States passes a statute like any
4 other country that transmits citizenship through blood
5 that they treat that person who results as a citizen the
6 same way precisely as a naturalized citizen?

7 MR. KNEEDLER: Yes, I'm not disputing that. The
8 point I'm making is that this Court held in Wong Kim Ark
9 and also held in Rogers v. Bellei that the conferral of
10 citizenship on someone born abroad to a United States
11 citizen is encompassed in the naturalization clause, and
12 the important thing about Wong Kim Ark is the Court
13 distinguished persons born to U.S. citizens abroad not on
14 the ground that that was a more fundamental form of
15 citizenship, but if anything, a less fundamental form of
16 citizenship.

17 QUESTION: So, in other words, in your view, the
18 hundreds of millions of people by now who may have been
19 born abroad of American parents are suddenly subject, when
20 their constitutional rights are at stake, to a less basic
21 review by the courts than citizens who are born in the
22 United States?

23 MR. KNEEDLER: No, once --

24 QUESTION: Citizens of service people, citizens
25 of millions of people who have lived abroad?

1 MR. KNEEDLER: Once the person is a citizen, of
2 course, then that citizen, like every other citizen, is
3 entitled to all the rights of a citizen under the United
4 States Constitution. But the question here is who will be
5 entitled to enter the citizenship of the United States to
6 begin with, and in that respect we think this case is
7 identical to -- at least as strong as Fiallo versus Bell,
8 and, if anything, stronger, because it is not merely the
9 question of who will be entitled to physically enter the
10 United States, but who will be regarded as a member of our
11 society on a permanent basis. Citizenship is essentially
12 irreversible. An alien can be expelled. A citizen is a
13 permanent member of the community.

14 QUESTION: Mr. Kneedler, when you say, when you
15 say in effect that all citizens are treated alike,
16 certainly a naturalized citizen in the nonargumentative
17 use, someone who has been an alien and comes here, can
18 have his citizenship revoked.

19 MR. KNEEDLER: Oh, absolutely. No, I didn't
20 mean to suggest -- yes. It's absolutely clear that a
21 naturalized citizen can have his naturalization revoked.
22 For example, if it was procured by fraud, but the other
23 important -- and this was significant in Rogers v. Bellei,
24 which had to do with the constitutionality of a condition
25 subsequent for a citizen, a person who was born abroad to

1 United States citizens. In that case, it was the parallel
2 provision here in 1401 (g) until, I believe, it was 1978,
3 someone in that situation had -- the child had to reside
4 in the United States for some period of time after birth
5 in order to establish the requisite connection with the
6 United States, and that was challenged on the ground that
7 the person having been declared a citizen at birth, there
8 could not be a condition subsequent to perfecting it.

9 And this Court upheld that provision in *Rogers*
10 *v. Bellei*, and importantly, it did so by distinguishing
11 the children of U.S. parents born abroad from those who
12 are born in the United States with the suggestion that
13 Congress has greater latitude with respect to the
14 naturalization of those persons than it does to others,
15 precisely because they are not encompassed by the terms of
16 the Fourteenth Amendment.

17 The Fourteenth Amendment refers to citizens who
18 are born or naturalized in the United States, and the
19 Court pointed out that persons who are born to United
20 States citizens abroad do not fall within that description
21 and therefore are not citizens for Fourteenth Amendment
22 purposes.

23 QUESTION: So, if any -- may I ask just a
24 question. Are there any statistics anywhere that tell us
25 the size of either of the classes of children born abroad

1 of an unmarried female parent and those born abroad of an
2 unmarried male parent? Do we have any idea how many
3 people are going to be affected by this decision?

4 MR. KNEEDLER: I'm sorry, I do not know the
5 totals. I think the statistics that were cited in this
6 Court's opinion in Miller v. Albright suggest that the
7 pool is probably larger for the U.S. citizen, children of
8 U.S. citizen fathers rather than mothers, which I think,
9 by the way --

10 QUESTION: That's unquestionable, isn't it? And
11 isn't that perhaps one of the reasons behind the
12 differentiation in this statute? There are large
13 populations of children of United States servicemen in the
14 Far East and in Germany, and -- service personnel. And I
15 expect very few of these are the children of female
16 service personnel.

17 MR. KNEEDLER: I think that's true. And one
18 point I wanted to make, Justice, an aside here, that goes,
19 that would go critically to the question of remedy in this
20 case. If we were --

21 QUESTION: Mr. Kneedler, before we get to that,
22 why would it? You said it in your brief. It seems to me
23 you have a tremendous hurdle in the beginning. If the
24 notion is that there are these men out there who are being
25 Johnny Appleseed around, to prove by clear and convincing

1 evidence that they are the father, for the person to even
2 -- the woman even to identify this person seems to me an
3 -- but most of the cases of men who don't want to be
4 fathers who have in fact have sired children abroad, it
5 isn't difficult at all to escape that obligation. All
6 they have to do is say, you know, I have nothing to do
7 with this person. I met her once, and that was it.

8 MR. KNEEDLER: Well, I think there is probably a
9 wide variation of the fact pattern. I took the question
10 to mean --

11 QUESTION: I thought we were assuming it was not
12 -- I thought we were assuming with modern techniques that
13 it's very easy to establish the relationship now. What is
14 our assumption, it's difficult or it's easy?

15 MR. KNEEDLER: Well, I took the question to be
16 identifying the father who is --

17 QUESTION: Once we find out who he is --

18 MR. KNEEDLER: Right, right, and even --

19 QUESTION: It may even take an awful lot of
20 resources to find out who he is, to get him to take it.

21 MR. KNEEDLER: It may or may not, but if the
22 possibility of citizenship was available to people who had
23 no prior assumption that they had any claim to United
24 States citizenship, it is valuable enough in the world
25 community that we would expect people to look for it.

1 QUESTION: In many, many cases, all the child
2 would have to do is ask his mother.

3 MR. KNEEDLER: In many cases that is correct. I
4 would like to go back to the point about Fiallo v. Bell
5 because, as I said, I do believe this case is controlled
6 by Fiallo v. Bell, if anything, the reasons for the
7 deference to congressional powers are stronger here than
8 they were in Fiallo v. Bell.

9 QUESTION: Before you do that, Mr. Kneedler, you
10 did say something. I keep worrying about this grandson of
11 mine. You said that he's not a citizen for purposes of
12 the Fourteenth Amendment, but I assume he had the same
13 equal protection rights and due process rights --

14 MR. KNEEDLER: Absolutely. Once a person is a
15 citizen, they are a member of our national community and
16 entitled to all of the rights of any other citizen.

17 QUESTION: But you think he might be
18 denaturalized, the way a naturalized citizen could be?

19 MR. KNEEDLER: There would have to be, certainly
20 as a statutory matter and perhaps as a constitutional
21 matter, some defect in the original naturalization or the
22 original --

23 QUESTION: But there was no naturalization.

24 MR. KNEEDLER: No, but that's why I think the
25 prospect -- I mean, I suppose if in a situation like this

1 the child was recognized as a U.S. citizen on the ground
2 that the parent was a U.S. citizen and then it turned out
3 that the parent was not a U.S. citizen after all, then the
4 child's citizenship could be revoked on the ground that it
5 was fraudulently or improperly procured, so it would be a
6 situation with a factual predicate for the grant of
7 citizenship in the first place.

8 QUESTION: The problem with those things is
9 usually, is insofar as you get a lesser degree of, for
10 example, procedural protections, in certain instances
11 there are conflicts about what the facts are, and insofar,
12 if it is ever true that a person who is involved in
13 naturalization gets less than full judicial review, would
14 that same be true of, say, my daughter or millions of
15 others, say, servicemen's children who are born abroad and
16 who the children of servicemen and women who are abroad
17 and not born in the United States?

18 MR. KNEEDLER: I would think --

19 QUESTION: Naturalized people get lesser
20 protection, less than full review.

21 MR. KNEEDLER: I believe that if the question
22 ever arose of the denaturalization of someone who was born
23 abroad to United States citizens, the same standards would
24 apply to anyone who was naturalized in the United States
25 and therefore is a Fourteenth Amendment citizen, and I

1 believe the standard for denaturalization is clear and
2 convincing evidence. I'm not sure of that, but I believe
3 that's correct.

4 QUESTION: I'm concerned that your time will
5 expire before you've addressed either point that may be
6 critical here -- the application of Fiallo and if we
7 disagree with you and think there's some equal protection
8 problem, what about the remedy? Will you try to touch on
9 both of those.

10 MR. KNEEDLER: I will. In fact, with respect to
11 Fiallo, we think that all of the reasons why deference to
12 the political branches in this area applied to immigration
13 in Fiallo apply equally here, first of all in Fiallo
14 itself, the Court lumped together immigration and
15 naturalization at page 79, I believe it's 792 of its
16 opinion, in describing Congress' plenary powers. And also
17 first of all a reason why Fiallo applies is it's a
18 question of who is going to enter our society. Certainly
19 the children or parents in Fiallo were seeking to come
20 into the United States with the hope eventually of being
21 citizens. In Fiallo it was a two-step task. Here it's a
22 one-step, but we don't think that the analysis in Fiallo
23 should change on that.

24 And therefore deciding who should be a citizen
25 is also an aspect of who is an alien. They are flip side

1 to the same question. And Congress has plenary power to
2 control which aliens will be entitled to enter the United
3 States.

4 Third, it's intimately tied up with foreign
5 relations, and again this is a point that was made in
6 Fiallo itself. There the Court rejected the proposition
7 at page 730 that the concerns about foreign relations only
8 have to do with situations where there are grave threats
9 to the national security or the general welfare of the
10 United States. The Court said it had never deferred to the
11 branches depending upon whether there was some threat of
12 that nature or some more individualized determination as
13 to who will be entitled to enter the United States.

14 QUESTION: Mr. Kneedler, I have this problem
15 with it. You would surely have a huge statelessness
16 problem if you didn't recognize that the child born abroad
17 to U.S. citizens is a U.S. citizen because, as you point
18 out in most countries in the world, they go by blood, not
19 by land of birth. So -- but you don't have that situation
20 with -- an alien coming to our shores is a citizen of
21 someplace. So the -- you call the child born abroad an
22 alien, but in most places in the world that child would
23 not be a citizen of the place in which that person is
24 born; isn't that so?

25 MR. KNEEDLER: Well, again, that may depend. I

1 mean, if you have a child born abroad to two U.S. citizen
2 parents, that may be true, it may not be true, depending
3 on the country.

4 QUESTION: Well, I thought you said in your
5 brief that in most places, and I think it's right, they do
6 not go on just solely, they go on the parentage.

7 MR. KNEEDLER: Yes, there are countries that go
8 both ways, but what --

9 QUESTION: But the person coming in in Fiallo is
10 a citizen of someplace.

11 MR. KNEEDLER: That is true, and of course
12 someone declared to be a citizen under this statute may
13 also be a citizen of someplace else as well. There are
14 questions of dual nationality that can arise.

15 QUESTION: But you brought up the problem, you
16 said one of the reasons for this is that the child and the
17 mother will be a citizen of no place if not of the United
18 States.

19 MR. KNEEDLER: That is the justification for the
20 shorter residency requirement because that is apt to be
21 true in many cases, but the broader point --

22 QUESTION: And on that point, you heard
23 obviously the colloquy between me and the petitioner's
24 counsel. Petitioner's counsel indicates, oh, well, there
25 are statements, problems on the side of the father, too,

1 just as great.

2 MR. KNEEDLER: They are certainly not just as
3 great. There may be an isolated country here and there
4 where the problem would arise, but your question and
5 Justice Ginsburg's questions highlight another reason for
6 deference to Congress in that area, and that is that
7 Congress has to strive to make the laws of this nation
8 with respect to immigration and naturalization respond or
9 make sense vis-a-vis the laws of not just one other
10 nation, but many, many other nations.

11 QUESTION: Mr. Kneedler, if Congress went back
12 to the way it when was everything was determined by the
13 father's citizenship, go back before 1934, suppose
14 Congress accepts your argument or we accept your argument
15 and say plenary power, they can do whatever they damn
16 please, so they say children born abroad of fathers who
17 are U.S. citizens can become U.S. citizens, but not
18 children who are born abroad of U.S. citizen mothers where
19 the father is an alien. That's the way it used to be in
20 the bad old days. I take it from your argument if
21 Congress wanted to go back to that, it would not offend
22 anything in the U.S. Constitution to do so.

23 MR. KNEEDLER: It would be subject to judicial
24 review, and under the facially legitimate bona fide
25 standard of *Kleindienst v. Mandel* and *Fiallo*, it would be

1 necessary to ask what Congress was up to in a situation
2 like that, so we are not suggesting that there is --

3 QUESTION: Suppose Congress wants to restore the
4 way it was, the way it was for most of our Nation's
5 history, that the father's citizenship gets transferred to
6 the child, not the mother's?

7 MR. KNEEDLER: Given the developments of equal
8 protection under the law in this country, this Court might
9 well conclude that it would not be facially legitimate for
10 Congress simply to decide to go back to as you described
11 it, the bad old days where all rights were thought to
12 derive from the father or the husband. So we are not
13 suggesting that. But this law, this law is fundamentally
14 different from the situation that you are positing. This
15 law --

16 QUESTION: You said that might violate equal
17 protection, but even under some plenary power notion.

18 MR. KNEEDLER: The standard that the Court
19 applied in *Fiallo v. Bell* was that -- was the facially
20 legitimate standard drawn from *Kleindienst v. Mandel*. The
21 law is subject to scrutiny, and whatever rationale is
22 posited has to be regarded by this Court as legitimate.

23 QUESTION: Is there any case in all the area
24 where they do apply the lesser standard that has ever come
25 out against the government, against the classification

1 that Congress made?

2 MR. KNEEDLER: I believe the Wauchope decision
3 that struck down the provision that you're referring to,
4 the pre-1934 decision, if I'm remembering correctly, the
5 Ninth Circuit decision I believe invalidated it under that
6 standard.

7 QUESTION: Could the statute we're considering
8 here meet heightened scrutiny to think that applied?

9 MR. KNEEDLER: We believe it could because
10 fundamentally what this is about is trying to put fathers
11 of children born out of wedlock abroad in a position where
12 they can do the same thing that a mother can in order to
13 put them on an equal plane with women. It is not a
14 product of trying to discriminate. It is a product of
15 trying to put men or fathers in a position where they can
16 do the same thing that mothers can do. And let me explain
17 why --

18 QUESTION: Why wouldn't the simpler way to do
19 that be simply to have one uniform support or recognition
20 standard? I mean why do you have to have differential
21 standards in the statute if that's all you want to do? On
22 your -- on the factual assumptions that you are making,
23 which may well be true, it would be easier for the
24 children of American mothers born abroad to satisfy the
25 standard, but that doesn't seem to be an argument for

1 having differential standards.

2 MR. KNEEDLER: Well, if I may explain what, as
3 we understand it, is going on here precisely, and that is
4 that Congress made a judgment that it wanted, while the
5 child is still a minor, for there to be established a
6 legal, formal recognized relationship between parent and
7 child.

8 After the child is no longer a minor, at that
9 point the child is an adult and can seek citizenship in
10 his own right. In this very case, petitioner Nguyen could
11 have applied for citizenship in his own right after he
12 became an adult and did not do so.

13 The idea is that under these naturalization --
14 this naturalization provision, while one is still a child,
15 one is under the care of the parent. After adulthood,
16 that's not so. So what Congress was focusing on was not
17 just biological paternity, but a recognized formal
18 relationship that outside people could look at and say,
19 yes, that is a father-child or mother-child relationship.

20 QUESTION: So why not have the same criteria to
21 determine whether that relationship, if proven, is
22 adequate for citizenship purposes?

23 MR. KNEEDLER: We believe that -- let me start
24 by explaining what the situation is for married parents.
25 When you have a child born to married parents, you have a

1 legal relationship with mother and father at the moment of
2 birth. With the mother by virtue of the birth and with
3 the father by virtue of the marriage to the mother. That
4 marriage legitimates the child and establishes a legal
5 father-child relationship. Where you do not have married
6 children, there is no lawful relationship -- or legal
7 relationship between man and woman, that in turn creates a
8 legal relationship between father and child. Something
9 else needs to be done.

10 In the case of the mother, the mother's
11 relationship to the child, the legal relationship is
12 established at the moment of birth in the same way as it
13 is for a married mother. The mother's name will typically
14 be on a birth certificate or, at the very least, the birth
15 will be witnessed by all present. There will not be any
16 question, just to the biological maternity --

17 QUESTION: But all goes to, it seems to me that
18 this all goes to matters of proof. What you're pointing
19 out is that it would be much easier for the child of the
20 American mother to prove the things that perhaps we would
21 all agree should be proven if citizenship is to be
22 recognized, but I don't see how it goes to the
23 justification of the differential standards.

24 MR. KNEEDLER: Well, it's not a differential
25 standard. With all respect, it is an attempt by Congress

1 to equalize two situations that start out quite unequal
2 because, as I described, at the moment of birth the mother
3 has a legal relationship with the child, that is true in
4 the United States. It is true virtually throughout the
5 world. The child is born to the mother, the mother has
6 custody as a legal matter, and before that child can be
7 taken away from the mother, the mother would have to give
8 it up, relinquish rights, legal rights, or they would have
9 to be taken away from her.

10 In the case of the father that is not true until
11 paternity is established in some formal or legal way, and
12 all that Congress has done here is said that that has to
13 be done before the age of 18, and as this Court's --

14 QUESTION: You're talking to children not born
15 to a marriage because --

16 MR. KNEEDLER: Yes.

17 QUESTION: It used to be in the old days, even
18 though the mother bore the child, she was not the parent
19 that counted.

20 MR. KNEEDLER: Right. Prior to 1986 the only
21 way that that legal relationship could be established with
22 respect to the child who was born out of wedlock was by
23 legitimization, and --

24 QUESTION: Why before 18?

25 QUESTION: 1986.

1 MR. KNEEDLER: Because Congress --

2 QUESTION: Either way.

3 MR. KNEEDLER: Because Congress decided that
4 derivative citizenship from a U.S. citizen should only
5 apply while the child is, in fact, a child. You have the
6 formal legal relationship which can then be a springboard
7 for a practical relationship between parent and child, but
8 not only that, citizenship itself is a formal relationship
9 between the citizen and the country, and Congress could
10 reasonably conclude that in order to recognize a formal
11 legal relationship between a child in the United States, a
12 central element of that, the relationship of the child to
13 parent should have a comparable formality and recognition
14 so that it is recognized by the father and child and by
15 those looking at that relationship as not just a
16 biological relationship, perhaps even a deep biological
17 relationship, but a lawful, formal recognized one that the
18 rest of the world and this country can look to, because
19 citizenship, in fact, carries rights and responsibilities
20 on behalf of both the citizen and the nation, rights of
21 protection, rights of duties to serve in the Armed Forces,
22 and Congress could reasonably decide that it is not
23 sufficient that out there somewhere during a child's
24 minority there was someone who was a biological parent.
25 It is necessary that the formal legal relationship be

1 regarded as in existence during the minority.

2 QUESTION: This presupposes that the father
3 accepts all this, I mean, but just doesn't do it in the
4 way that it's said, or suppose a mother. I mean, you
5 understand the problem. You can create situations where
6 the mother is not the caretaker, where the father is the
7 caretaker, and you get everything the other way around.
8 What is the answer to that? I mean, what's the -- or you
9 could be in a country where it doesn't descend one way or
10 you could be in a state where they have different
11 relationships. I mean, why not tie it to the relation or
12 the statelessness or to the thing you're aiming at rather
13 than to gender?

14 MR. KNEEDLER: Well, one of the things that
15 Congress is aiming at is the existence of the legal
16 relationship by 18. That's set forth explicitly in the
17 statute.

18 QUESTION: We do that even domestically, don't
19 we? I mean, we do not treat biological fathers as
20 necessarily having any rights, whereas we do treat
21 biological mothers as having rights from the outset.

22 MR. KNEEDLER: That is correct, unless and until
23 the father's paternity is formally established.

24 QUESTION: Isn't that the crucial point? Isn't
25 it the case that if you were arguing this case 20 years

1 ago before DNA testing had become current, one of your
2 arguments and one that we might well accept would be,
3 there's a terribly difficult problem of proof here, and
4 one of the interests of the United States is to avoid
5 fraud in claims of citizenship. But that issue is gone
6 now, isn't it?

7 MR. KNEEDLER: It's not entirely gone because
8 while DNA -- it's important not to focus solely on the
9 domestic situation in the United States in looking at this
10 law, and that goes both with respect to assumptions about
11 proving paternity and assumptions about what the law is or
12 ought to be. The other nations in the world are not
13 necessarily living under the same availability of medical
14 care, the same --

15 QUESTION: Well, if that's the case, then the
16 proof of the relationship is simply going to be much more
17 difficult for the child who is in this other country
18 without the benefit --

19 MR. KNEEDLER: That's true, but the age 18 --

20 QUESTION: And how does the United States suffer
21 simply because under a nondifferential standard the child
22 abroad without a DNA lab nearby is going to have a tough
23 time proving the relationship?

24 MR. KNEEDLER: Yes, although the age 18 would
25 help to deter some fraudulent claims, but that's not our

1 principal submission here. Our principal submission is
2 that the recognition of the legal relationship is itself a
3 legitimate interest, and in this respect we think this
4 case is very similar --

5 QUESTION: And isn't the answer to that then
6 require the indicia of recognition to be the same for
7 mothers and fathers?

8 MR. KNEEDLER: Well, Congress could reasonably
9 conclude that with respect to mothers, and this is true of
10 both mothers in wedlock and out of wedlock, that the legal
11 relationship is established at the moment of birth. This
12 Court pointed that out Lalli decision and pointed it out
13 -- we quoted page 34 of our brief from this Court's
14 decision in Lehr v. Robertson which we think is very
15 instructive. There the Court said the mother carries and
16 bears the child. In this sense her parental relationship
17 is clear. The validity of the father's parental claims
18 must be gauged by other measures. And again this is not
19 just proof.

20 QUESTION: That simply means that Congress has
21 nothing to lose by a differential standard. It simply
22 means that the child of the mother is going to have an
23 easier time proving it.

24 MR. KNEEDLER: But if Congress could conclude
25 that in virtually every case that requirement is satisfied

1 at the moment of birth, it would be unnecessary to require
2 the mother to go through that, and in fact if that sort of
3 requirement would be imposed now there could be all sorts
4 of children of U.S. citizen mothers who would never have
5 taken a step like that.

6 QUESTION: Mr. Kneedler, your time is almost up.
7 Not a word yet about remedy.

8 QUESTION: Well, he's had no choice with all the
9 --

10 QUESTION: I know, but I think we need to talk
11 about it briefly if we could in any time remaining.

12 MR. KNEEDLER: Yes.

13 QUESTION: Suppose we think there is an equal
14 protection problem and remedy has to be addressed.

15 MR. KNEEDLER: On the remedy --

16 QUESTION: You have a severability clause, so --

17 MR. KNEEDLER: There is a severability clause,
18 but we think the proper remedy would be to sever 1409 and
19 put the ball in Congress' court to decide how to deal with
20 this particular problem. We think that's true for several
21 reasons.

22 For one thing, if this Court were to broadly
23 declare that a whole new category of persons were United
24 States citizens there may be some question as to whether
25 Congress could undo that. That, coupled with the point

1 that this Court made in Ginsberg and Pangilinan that it's
2 questionable whether a court can ever declare someone to
3 be a citizen when Congress has not so declared, we think
4 way powerfully in the direction of striking section 1409
5 and letting Congress decide what is the proper remedy in
6 the situation.

7 QUESTION: Mr. Kneedler, how does that differ
8 from the clause of the Constitution that says no money
9 shall be drawn from the treasury but in consequence of
10 appropriations made by law, no money, and yet you know the
11 whole line of cases from Frontier out to Wescott that this
12 Court thought was compatible with that clause. I don't
13 see any difference, frankly, between those two.

14 MR. KNEEDLER: Because in our view the admission
15 to citizenship is so central to the formation of our
16 society and -- our society under the Constitution that it
17 is fundamentally different, and this Court says --

18 QUESTION: No money shall be drawn from the
19 treasury but in consequences of appropriations made by
20 law.

21 MR. KNEEDLER: Right, and in the situations
22 you're describing, you're describing situations that arise
23 wholly in the domestic context. Here we have --

24 QUESTION: May I ask you just one brief
25 question. After our decision in Miller against Albright,

1 did anyone in Congress raise this issue for further
2 consideration, to your knowledge?

3 MR. KNEEDLER: I'm not aware whether a bill was
4 introduced. I did want to point out one further, one last
5 thing on the question of remedy. If one thing is clear
6 from 1940 until 1986, it is Congress did not want U.S.
7 citizenship to pass solely by virtue of mere biological
8 paternity. Congress insisted on something more in 1940
9 and 1952 and 1986, in 1952.

10 In all of those situations, Congress moved to
11 make things easier for U.S. citizen fathers to transmit
12 citizenship. From 1952 to 1986, only legitimization,
13 which often meant marrying the mother, was adequate. In
14 1986 Congress tried to ease things to make it easier for
15 U.S. citizen fathers to put themselves in the same
16 position as U.S. citizen mothers, by providing for the
17 acknowledgment of the child in writing so that it would
18 not be necessary to resort to the varying state laws
19 regarding legitimization or elsewhere.

20 The last point I would like to make with respect
21 to -- two other points. One, this is a transaction that
22 occurred abroad, not in the United States. It involved
23 one alien and one U.S. citizen. This is not a situation in
24 which the heightened scrutiny under our Constitution would
25 ordinarily be thought to apply because of a solely

1 domestic setting, but I should point out that --

2 QUESTION: Thank you, Mr. Kneedler. Ms. Davis,
3 you have two minutes remaining.

4 REBUTTAL ARGUMENT OF MARTHA F. DAVIS

5 ON BEHALF OF THE PETITIONERS

6 MS. DAVIS: Thank you. First, in response to
7 Justice Stevens' question about whether or not any bill
8 was introduced in Congress, no, there was not.

9 Mr. Kneedler spent a great deal of time talking
10 about the legal relationship which he asserts is
11 automatically established at the time of birth between a
12 father and child. In fact, as this Court knows, that to
13 the extent that that exists, it's a legacy of coverture
14 and common law discrimination which this Court has
15 previously condemned in *Frontiero* versus --

16 QUESTION: Do you think *Lehr* against *Robertson*
17 was correctly decided?

18 MS. DAVIS: I'm sorry?

19 QUESTION: Do you think *Lehr* against *Robertson*
20 was correctly decided?

21 MS. DAVIS: Your Honor, I think it can be
22 distinguished from this case, aside from my view of its
23 propriety. This -- in *Lehr* versus *Robertson* the issue
24 required the state to decide between competing parents,
25 and to do that quickly because of the emotional trauma

1 involved with the adoption.

2 Here there isn't any need to create a hierarchy
3 between parents, any need to create those kind of
4 classifications to make that decision proceed quickly, and
5 so therefore, the government interests are different --

6 QUESTION: Is there a problem for the child in
7 Lehr? Lehr, one of the grave concerns I thought was
8 holding up an adoption, holding up placing a child in a
9 secure setting. Here you have none of that. It would
10 benefit the child, surely, to be a U.S. citizen. You're
11 not hurting the mother. It's worlds different from Lehr.

12 MS. DAVIS: Right. Exactly, Your Honor. And so,
13 no, I don't believe that a ruling in our favor in this
14 case would require this Court to reassess the decision in
15 Lehr.

16 In addition, the Court asked about the question
17 of the numbers that would be involved here, and there's no
18 indication in the legislative history that the Congress
19 has been concerned about that in looking at this statute,
20 as Mr. Kneedler just indicated.

21 In fact, the statute has progressively gotten
22 more liberal, and I think that that underscores the fact
23 that in -- as this Court looks at the intent of Congress
24 in crafting a remedy that the Court should take into
25 account, that Congress has progressively gotten more

1 liberal in addressing this issue.

2 Most recently in 1986, the Congress eliminated
3 the -- or reduced the ten-year residency requirement down
4 to five years. Now, that had presumably a significant
5 effect on the additional numbers of individuals who could
6 seek transmission of citizenship under this law. Yet,
7 there was no mention of that in the legislative history as
8 being a factor that was influencing in any way Congress'
9 view of this.

10 In addition, there are other indicia of
11 Congress' intent. One is that Congress has itself moved
12 away from this notion --

13 CHIEF JUSTICE REHNQUIST: Thank you, Miss Davis.
14 The case is submitted.

15 (Whereupon, at 11:14 a.m., the case in the
16 above-entitled matter was submitted.)

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