



THE CITIZENSHIP RIGHTS OF AMERICAN CHILDREN BORN OVERSEAS

A PLEA FOR MORE EQUITABLE TREATMENT OF THE HUMAN RIGHTS OF U.S. CITIZENS LIVING OUTSIDE THE USA

SUMMARY

- *Current U.S. legislation makes it very difficult for many American parents to transmit U.S. citizenship to their children born abroad. Each year this now results in some children born to an American parent being born stateless.*
- *This paper explains the history and evolution of U.S. citizenship legislation dating back to the first Congress in 1790, and how this most fundamental of all human rights, the sharing of the same citizenship by a parent and a child, has become such a complicated problem today. Our recommendations, and the legislative language to achieve these results, are included.*
- *In sum, we believe that all U.S. citizen parents, no matter where they live, should be able to share their U.S. citizenship with all of their children at birth.*
- *We hope that when you finish reading this paper you too will agree with us, and help us accomplish this goal. It would be to the credit and honor of the United States to finally bring about this long overdue change.*

1. **INTRODUCTION:** During the latter half of the 20th Century, the question of how to better promote and protect the human rights of everyone all over the world became an issue of concern not only at the national level in many countries but also at the international level as well. While much progress was made in terms of trying to define more generously and more clearly how the relations between parents and children could be protected right from the moment of birth, not all countries pursued this progress in the same positive direction. Surprisingly, a number of changes that were made in U.S. citizenship laws starting in 1940 put the status of the connection between a U.S. citizen parent and a child born abroad into much greater complexity and peril that had been the case during the first 150 years of the existence of the United States as a sovereign independent country. This paper takes a brief look at what has happened in the United States and concludes with some specific recommendations for how to strengthen the legal bonds between parents and children no matter where they are born.

2. **IN THE BEGINNING:** The authors of the Constitution of the United States declared that in creating this new form of government their purpose was to "*ensure the blessings of liberty to ourselves and our posterity*". On behalf of "*we the people of the United States*", they then "*ordained and established*" this document. Obviously this was not seen as just an ordinary legislative act. By this extraordinary ordination they believed that this document should and would be and remain a sacred covenant extending forward into future generations. Do we have any inklings that they were already thinking about how these mutual pledges might extend to citizens living abroad?

3. **WHO WAS A CITIZEN?:** In 1789, while the Constitution itself was silent on the definition of who was to be considered a citizen of the United States, it did empower the Congress in Article I, Section 8, to "establish a uniform Rule of Naturalization". In Article II, it was stated that "No person except a *natural born Citizen*, or a Citizen of the United States at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have Attained to the age of thirty-five Years, and *been resident fourteen Years* within the United States". This language is intriguing because it implies that Americans could well be living overseas.

4. **THE FIRST LEGAL DEFINITION OF CITIZENSHIP AND ITS ACQUISITION**

ABROAD: When the first citizenship law was enacted by the First Congress in 1790, the definition of citizenship embraced the status of children born abroad to a U.S. citizen parent. This is what was said:

"And the children of citizens of the United States that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States". (Act of March 26th, 1790, 1 Stat. 103).

Citizenship would be transmitted at birth to a child born abroad to a U.S. citizen father *provided only* that the father had ever previously "*been resident*" in the United States. Even more noteworthy is that all such children were to be considered "natural born" citizens at birth abroad.

Thus, while the Constitution itself was mute on the intent of the country's founders in terms of who was to be defined as a citizen at birth, a majority of the Members of the First Congress made it clear that such citizenship could be acquired both at home and abroad. Given that many of the Members of this First Congress had been active participants in the drafting and adoption of the Constitution, there can be little doubt that what they were doing was fully congruent with the implications of the Constitution too.

5. **THE FIRST DEFINITION OF CITIZENSHIP IN THE CONSTITUTION:** Citizenship was defined for the first time in the Constitution following the Civil War when the Fourteenth Amendment was ratified in 1868. The opening lines of this amendment state:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (14th Amendment, Section 1, ratified July 9, 1868).

Congress subsequently continued to define the citizenship of children born abroad in a manner similar to that adopted by the First Congress until eventually, in 1934, U.S. citizen mothers also achieved parity with U.S. citizen fathers.¹ The Congress then carried out a major overhaul of U.S. citizenship laws in 1940 and for the first time took away from overseas Americans many of the human rights guarantees that they had enjoyed up until then. The law became much more complicated, much less uniform, and various new forms of overt discrimination were introduced, many of which linger on until today. It is the legacy of this major change in a negative direction that is still causes considerable problems for the several million U.S. citizens living and working abroad at the present time.

¹ See the second annex entitled "*U.S. Citizenship Law and Overseas Americans: An Historical Summary*" at the end of this paper.

6. THE DEMOGRAPHIC DIMENSION: The only known detailed survey ever carried out by the U.S. State Department on the citizenship status of children born abroad, was done at the request of a Member of Congress in 1982. This showed that in 1981 approximately 40,000 children had been born abroad to a U.S. citizen parent. Of these: 21,600 (54%) were successful in acquiring U.S. citizenship at birth abroad via parents who were both U.S. citizens; 14,400 (36%) via only one U.S. citizen parent; but 4,000 (10%) were denied U.S. citizenship at birth because a U.S. citizen parent did not meet the then current transmission requirements. Thus in 1981, one out of every ten children born to a U.S. citizen parent abroad was denied U.S. citizenship at birth. The citizenship transmission problem is therefore obviously not a trivial one. Some of these babies were undoubtedly born stateless too, although the actual number is unknown because this was not a specific target in this study. There were an estimated 2 million U.S. citizens living abroad in the private sector in 1981. Today, the State Department estimates that there could be more than 4 million U.S. citizens living outside of the United States, and the number of children born abroad who are officially recognized as U.S. citizens at birth has now grown to about 46,000 per year.

7. THE BAD NEWS OF THE 1940 LEGISLATION THAT BROUGHT WITH IT AN AGGRESSIVE NEW DOPPELGÄNGER OF "NEXUS": While the complex new immigration and nationality statute of 1940 did not specifically mention the term "*nexus*", it hovered over the text like an impatient and nagging virago. Different categories of prior residence and physical-presence requirements in the United States were established before citizenship could be transmitted to a child born abroad, and for the first time the ability to share U.S. citizenship with a child born abroad now also depended on the nationality of both parents rather than just one. Other complex issues were also introduced, including the type of work being done abroad, the identity of the overseas employer, etc. While many of these new criteria subsequently morphed into new forms and quanta during the last seventy years, the basic need for citizens to now accumulate differing types and volumes of "*nexus*" still infects U.S. citizenship legislation down to the present day.

8. THE KEY ELEMENTS OF THE CURRENT LAW: To better understand what is being discussed, here are the key provisions of the current Immigration and Nationality Act.

Sec. 301. [8 U.S.C. 1401] Nationals and Citizens of The United States At Birth

The following shall be nationals and citizens of the United States at birth:

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 1 of the International Organizations Immunities Act (59 Stat. 669; 22 U.S.C. 288) by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 1 of the International Organizations Immunities Act, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date;

Sec. 309. [8 U.S.C. 1409] – Children Born Out of Wedlock

(a) The provisions of paragraphs (c), (d), (e), and (g) of section 301, and of paragraph (2) of section 308, shall apply as of the date of birth to a person born out of wedlock if

- (1) a blood relationship between the person and the father is established by clear and convincing evidence,
- (2) the father had the nationality of the United States at the time of the person's birth,
- (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
- (4) while the person is under the age of 18 years-
 - (A) the person is legitimated under the law of the person's residence or domicile,
 - (B) the father acknowledges paternity of the person in writing under oath, or
 - (C) the paternity of the person is established by adjudication of a competent court.

(b) Except as otherwise provided in section 405, the provisions of section **301(g)** shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth, if the paternity of such child is established at any time while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

9. THE MAJOR NEXUS QUESTIONS IN THE CURRENT LAW: Here are some of the key questions that arise from this "nexus" issue as it is implied in the law today.

A. Which is More Important, Territorial or Blood Nexus? While many Americans believe that the human "nexus" between a parent and a child is so sacred that it should be promoted and protected by the laws of every country, and that nothing should ever be done in law or in practice to imperil this natural bond, the U.S. Government still rejects this argument by assigning a higher rank to the "nexus" of latitude and longitude of a birth than to that blood relationship.

B. Nexus for a Birth in the United States: "Nexus" for those giving birth at home in the United States boils down to a very simple affair. The 14th Amendment to the Constitution takes care of this by guaranteeing that "All persons born in or naturalized in the United States, and subject to the laws thereof, are citizens". Under these simple "jus soli" rules, the citizenship of the parent(s) at the time of a child's birth is irrelevant, and so is the question of whether or not these parents are married. The "nexus" is met simply by virtue of the location of the birth. There is no requirement for either parent to have ever previously lived in the United States for even one day, nor to have ever professed any allegiance to the United States.

C. Nexus for a Birth Abroad: "Nexus" becomes much more elusive and quixotic, however, if a child is born abroad. While some U.S. citizen parents can easily acquire sufficient amounts of it to transmit citizenship automatically to their children at birth abroad, others cannot. And the necessary amounts of "nexus" any given overseas American parent may require can depend upon a plethora of factors, including marital status, the choice of a marriage partner, a present or former employer, the present or former employer of a parent, how much time has previously been spent in the United States, at what age, etc. Here are a few iconic variables determining the quanta of "nexus" required today.

D. The Impact of a Marriage on "Nexus" Abroad: There is no specific mention of "marriage" per se in the text of the law pertaining to requirements that a U.S. citizen parent must meet to transmit U.S. citizenship to a child born abroad. And because of this, many overseas Americans have long assumed that the basic provisions concerning citizenship transmission abroad in Section 301 apply equally to all parents, whether married or single. But apparently that is no longer the case. Today, according to the State Department's interpretation of the law, there is one large set of options for citizenship

transmission if you are married but only one very specific and narrow test in Section 309 if you are not married, however marriage may be defined.

E. The Impact of the Choice of an Employer on “Nexus” Abroad: Another mutation of “nexus” comes into play when a U.S. citizen parent serves, or had previously lived abroad in the household of a person who had served, in the Armed Forces of the U.S., or works or worked abroad for the U.S. Government or an international organization mentioned on an *officially approved* list, for at least five years, two of which must be after the age of 14. This employer driven “nexus” arises even if there never was any real prior physical presence in the United States. If, however, a citizen U.S. parent died, or retired on the wrong date, or made the unacceptable mistake of changing to a job into the private sector, but continued to live abroad, this “nexus” clock comes to an abrupt halt. There is thus a bonus for working for the U.S. Government, or for certain international organizations, or for having had a parent with such prior employment abroad, but a real penalty for being an entrepreneur or for working in the private sector abroad.

F. The Apparent Irrelevance of “Patriotism” to “Nexus” Abroad: Since Congress sets a wide range of “nexus” tests in granting citizenship to children born abroad, one might expect to find some form of bonus for an overt manifestation of patriotism, and especially the willingness to risk one’s life for one’s country, but this is not the case. Sufficient “nexus” can be acquired by an alien by merely being present on U.S. soil for only a few minutes prior to the birth of a child. An alien parent could be in the United States as an avowed enemy of everything the U.S. stands for and this still doesn’t matter at all. The Fourteenth Amendment makes all of these factors otiose. Conversely, as shown below, one can be serving in the armed forces overseas, or even die in combat, and this can trigger severe “nexus” complications. Such children would actually have been better off if their parent had not been so patriotic.

10. CURRENT QUANTA PACKAGES OF “NEXUS” REQUIRED ABROAD: Here are some of the different quanta packages that are mandatory minimum “nexus” requirements to transmit U.S. citizenship to a child born abroad.

A. One Day “Nexus”: If both parents are U.S. citizens, a child born abroad is a U.S. citizen at birth today if either of these parents has ever “*had a residence*” in the United States. The original law in 1790 had said they had to have previously “*resided*” in the USA. This difference between having had a residence and having ever resided can lead to subtle new obstacles to the acquisition of citizenship abroad because of the ambiguity of the definition of just what “*having a residence*” is now deemed to mean. There is no minimum specified period of time of prior residence in this section of the law. But what does it really say? Does it imply that you have to have previously owned a house for a minimum period of time, or rented a house, or can a stay with a relative, or in a hotel, or in a car, for one night suffice? So, can there ever be really clear criteria for making such a judgment, or must this inevitably depend on the whim of the person making the citizenship call in each case?

B. Five Year “Nexus”: In the case of parents one of whom is a citizen and the other an alien, the law provides that the child will be a U.S. citizen at birth abroad only if the U.S. citizen parent has previously lived in the United States for five years, at least two of which after the age of fourteen. While Section 301(g) does not specifically say this, the State Department maintains that his provision applies only to married parents. But while it might have been simple in intent, this provision of the law has some unusual implications. A U.S. citizen parent could have previously lived for more than fifteen years in the United States and still not qualify to transmit citizenship to a child born abroad. Compared to the special one year indulgence offered to unmarried mothers, Congress seems to have wanted to impose a significant “nexus” penalty for being married to an alien abroad. In compensation, there are of course the provisions of constructive prior residence time for mothers or fathers by virtue of their choice of a current or former employer by their parents abroad, or their own current or former employer, and in this case they benefit from an advantage that is allegedly not enjoyed by an unmarried mother. It is all a very convoluted reasoning process to say the least.

C. One Year “Nexus”: Under a special indulgence allegedly introduced to try to avoid any child ever being stateless at birth abroad, Section 309 states that a child born overseas to a U.S. citizen mother will be automatically a U.S. citizen at birth if this mother has previously lived in the United States for one continuous year, at any age. This was long understood to be an extra protection for unmarried mothers who were unable to meet the five year nexus test of Section 301(g), but not the only way an unmarried mother could transmit citizenship abroad. But apparently that interpretation is now less

certain too. This "nexus" requires 365 uninterrupted days without ever stepping over the border to another country. But the right accorded by Section 301(g) to other mothers who are married or being able to accumulate necessary "nexus" time by having previously lived abroad in the household of an employee of the U.S. Government, or of an approved international organization, or to be an employee oneself of such an entity, is not available to a mother who is not married under Section 309. Thus what was alleged to be a special positive benefit in some circumstances can turn out to have a very ugly negative side to it instead. Because if an unwed mother fails this uninterrupted prior physical presence test, and is denied the same transmission rights that are given to a married mother, then her child may not be an American citizen at birth abroad, it may very well be stateless. This is yet another bizarre prejudicial aberration in the law that seems to serve no meritorious purpose at all.

11. THE CAPRICIOUS AND MALICIOUS ROLE OF THE QUANTUM DIMENSION OF "NEXUS" IN REAL LIFE:

Meeting a specific "Nexus" test requires precisely defined quanta of time that must be meticulously measured and documented. For some fortunate parents this can be accomplished instantaneously. For others it can take merely 1 day, or perhaps 365 days, but for those at the back of the bus in can take at least 1,825 days. You can be short by just one day, and your "nexus" simply isn't there. Given the peculiar nature of these requirements, a U.S. citizens who is married to an alien can actually have lived in the United States for more than 5,839 days (fifteen years, eleven months and 30 days) and still fail to have acquired enough prior "nexus" to transmit U.S. citizenship to a child born abroad. Finally, consider the extraordinarily dilemma of an American mother in her twenties or thirties who has lived her entire life in the United States, minus just one day each year when she went across the border for a holiday. She will still not be able to transmit U.S. citizenship to a child born abroad if she is not married. "Nexus" is indeed a truly quixotic and paradoxical phenomenon.

12. SOME SPECIFIC CASES OF "NEXUS" IN ACTION: Current U.S. law not only lacks uniformity and consistency in the way "nexus" has to be tabulated by different parents, it also produces some striking anomalies in real life. Here are some memorable examples of how the devil can crawl into the details.

A. The "Nexus" Inadequacy of a Soldier Serving Abroad: A story in "Stars and Stripes" a few years ago told how an alien serving in the U.S. Army, married to an alien wife, had a child born while he was on duty in West Germany: When he went to the U.S. Consulate to register the birth of the child, the child was denied U.S. citizenship at birth and became stateless. He and his wife had failed the "nexus" tests then being used. Had he not volunteered to serve in the Army, and had he and his wife simply remained in the United States, his child would have been born a U.S. citizen. He made a serious mistake volunteering to service in the military if he wanted to start a family. He had no control over where he would be assigned, and the Army sent him into harms way from a human rights point of view. Given the growing need for more alien volunteers to fill the ranks of our armed forces today, this is not a great recruitment incentive. Paying a penalty for serving in the Army when this penalty could be avoided by not serving in the Army is a strange way of compensating someone for this service. This "nexus" infirmity simply doesn't make any sense at all.

B. The "Nexus" Inadequacy of a Man Who Gave His Life For His Country: The untimely death of a soldier on a battlefield can also trigger a subsequent "nexus" problem for his progeny. A Master Sergeant in the U.S. Army died in combat in Vietnam in 1966. He had earned two Purple Hearts, several Army Commendation Medals, a Presidential Citation, and the Air Medal. He volunteered to return to Vietnam for a second tour because he was such a dedicated soldier and loved his country so much. This time he did not return alive. Several years later, when his daughter gave birth to a child abroad, and went to the U.S. Embassy in Switzerland to register the birth, she was told the child was not eligible to be a U.S. citizen. Although she had lived in the household of her father for seventeen and a half years as an Army dependent, five of those years had not been after the age of fourteen, as the law then required. Her father had inopportunately died before she turned nineteen. The years after his death when she lived abroad with her widowed mother were no longer positive "nexus" years. When his heart stopped her "nexus" clock stopped too. He gave his life for his country. His country said thanks, but this was not enough to earn sufficient "nexus" for your grandchild. This situation is also rather difficult to comprehend or accept as equitable.

C. The "Nexus" Inadequacy of a Woman Who is Raped but Keeps the Child: An even more grotesque case can arise if an unmarried U.S. citizen woman is raped abroad and decides nevertheless to give birth to a resultant child. If she can only qualify to transmit citizenship to her child under the

special provisions for an unwed mother, she could face statelessness for her child simply because she **did not marry** the rapist before the child was born. While her decision to give birth to such a child is morally highly commendable, her subsequent treatment and that of her child under current U.S. law will be extraordinarily perverse.

13. AMERICAN NEXUS REQUIREMENTS IN AN INTERNATIONAL CONTEXT: Another perspective on how the U.S. Government currently treats the human rights of U.S. citizens living abroad is to compare this treatment with the major commitments that the U.S. Government and the governments of many other countries of the world have undertaken in major international declarations and conventions dealing with human rights in recent years.²

14. WHY THIS IS BECOMING AN INCREASINGLY IMPORTANT ISSUE TO RESOLVE: When the human rights philosophy currently incarnated in U.S. citizenship legislation was first adopted, more than sixty years ago, the question of the human rights of children born to unmarried mothers was not a major issue. The percentage of births out of wedlock was quite modest. That is no longer the case. In 2004, of the 4.11 million births registered in the United States, 1.47 million were to unmarried mothers, accounting for 35.7% of the total. This number has been rising for more than two decades now. And, the percentage of births out of wedlock is even higher in many countries of Europe and elsewhere in the world. Thus the question of protecting the human rights of children born out of wedlock, and their rights to share the same nationality with their mothers, has become a matter of much greater concern to U.S. citizens living abroad. That is why the overseas American community believes a major overhaul of U.S. citizenship legislation is now necessary and urgently so.

15. IN CONCLUSION: Every country faces a major challenge in enacting and then interpreting its citizenship legislation. And in all such deliberations, the final result depends on the choice of what is the most important objective to be accomplished by the legislation. Should it be to respect equal human rights for all parents and children and therefore to ensure that all parents will be able to share their citizenship with their children, no matter where they are born, because this is a natural tie of such fundamental significance that no government should ever intercede to imperil it? Or is there some other factor of such importance that it overrides this parental-child link and can then lead to situations where a parent and a child cannot share the same nationality at the birth of the child and where the child might well find itself stateless. These are choices and the consequences are very serious for all concerned.

During the last sixty years, this subject has been the focus of much deliberation at the international level, leading to a Universal Declaration of Human Rights which is now accepted by most countries, including the United States, and a Declaration of the Rights of a Child. These documents enshrine the special nature of parental ties to children as among the most precious nexus of all, and the most deserving of legal protection by all nations.

Sadly, and inexplicably, the human rights of U.S. citizens living abroad today are not being protected appropriately by the laws of the United States. There are no guarantees that a child born abroad to a U.S. citizen will be able to share the same citizenship as the U.S. parent at birth, and the current law now leads to statelessness for a number of children born to a U.S. citizen parent each year. No valid purpose is being served by legally severing this human rights tie between a parent and a child at birth.

We who live abroad strongly believe that all U.S. citizens, no matter where they live, should enjoy the same basic human rights under the laws of the United States, and especially those concerning the sharing of their citizenship and nationality with a child at birth, at home or abroad. And we urge the Congress to bring about such a change of direction as soon as possible.

16. HOW CAN WE SOLVE THIS PROBLEM?: Legislation that attempted to guarantee all Americans an equal right to transmit U.S. citizenship to all of their children at birth, whether they are born at home or abroad, was drafted more than two decades ago, and most recently introduced as HR 6189 on October 6th, 1992, during the 2nd Session of the 102nd Congress.

² See the first annex on "*How Current U.S. Citizenship Legislation Compares to Major International Commitments to Human Rights*".

An updated version of this legislative proposal is shown on the following page. It has been adapted to also ensure that all parents, married or unmarried, would henceforth enjoy the same human rights guarantees.

What needs to be done now is simply to get this legislative language introduced once again and then not let up on our efforts until this finally gets enacted and signed into law.

Each and every one of you can play a very big role in this process by asking your Members of Congress to co-sponsor, promote and adopt this fundamentally important human rights legislation this year.

This is one of those rare and wonderful win-win opportunities for everyone, and most especially for each and every child born to a U.S. citizen parent anywhere in the world.

17. THE LEGISLATIVE LANGUAGE THAT WOULD SOLVE THIS PROBLEM: The following draft legislative language would solve all of the problems outlined above and once enacted thereafter guarantee to each and every child born to a U.S. citizen parent anywhere in the world that U.S. citizenship would be acquired automatically at birth, no matter where on this planet the birth occurs.

***The Equal Human Rights for All American Children
Act of 2007***

H.R. _____

***IN THE HOUSE OF REPRESENTATIVES
110TH Congress, 1ST Session
_____, 2007***

*Mr./Ms _____ introduced the following bill; which was referred to the
Committee on the Judiciary*

A BILL

To amend sections 301 and 309 of the Immigration and Nationality Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Human Rights for All American Children Act of 2007".

Sec. 2. Section 301 (8 U.S.C. 1401) is amended by inserting "natural born" after "nationals and".

Sec. 3. Subsection (a) of section 301 (8 U.S.C. 1401(a) is amended by inserting ", or in an outlying possession thereof" after "United States".

Sec. 4 Subsection (b) of section 301 (8 U.S.C. 1401(b) is amended by inserting ", or in an outlying possession thereof" after "United States".

Sec. 5. Subsection (f) of section 301 (8 U.S.C. 1401(f) is amended-

- (a) by inserting ", or in an outlying possession thereof" after "found in the United States"; and
- (b) by striking out "twenty-one" and inserting in lieu thereof "six".

Sec. 6. Subsection (g) of section 301 (8 U.S.C. 1401(g) is amended-

- (a) by striking out "one of whom is an alien and the other" and inserting in lieu thereof "at least one of whom is"; and
- (b) by striking out all after "a citizen of the United States"
- (c) by inserting ", married or unmarried," after "of parents".

Sec. 7. Section 301 (8 U.S.C. 1401 is amended by repealing subsections (c), (d), and (e), and by redesignating subsections (f) and (g) as subsections (c) and (d) respectively.

Sec. 8. Section 301 (8 U.S.C. 1401) is amended by inserting the following new subsection after new subsection (d):

- "(e) This section shall apply to persons born on or after May 14, 1934, to the same extent as if it had become effective in its present form on that date."

Sec. 9. Sec. 309. (8 U.S.C. 1409) is amended by deleting the entire section.

17. **HOW THE NEW LAW WOULD READ:** After the enactment of this legislation, the revised law would read as follows:

INA: ACT 301 - NATIONALS AND CITIZENS OF THE UNITED STATES AT BIRTH

Sec. 301. [8 U.S.C. 1401] The following shall be nationals and natural born citizens of the United States at birth:

(a) a person born in the United States, or in an outlying possession thereof, and subject to the jurisdiction thereof;

(b) a person born in the United States, or in an outlying possession thereof, to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c) a person of unknown parentage found in the United States, or in an outlying possession thereof, while under the age of five years, until shown, prior to his attaining the age of six years, not to have been born in the United States;

(d) a person born outside the geographical limits of the United States and its outlying possessions of parents, married or unmarried, at least one of whom is a citizen of the United States.

(e) This section shall apply to persons born on or after May 14, 1934, to the same extent as if it had become effective in its present form on that date."

INA: ACT 309 - CHILDREN BORN OUT OF WEDLOCK

Sec. 309. (8 U.S.C. 1409) would be deleted.



HOW CURRENT U.S. CITIZENSHIP LEGISLATION COMPARES TO MAJOR INTERNATIONAL COMMITMENTS TO HUMAN RIGHTS

1. **The International Dimension of Important Human Rights Issues Raised by Current U.S. Citizenship Laws**: The complexity of current U.S. citizenship legislation and how it is now being interpreted should also be considered in the light of recent international declaration and conventions that set the common worldwide standards for the protection of human rights for parents and children. A brief discussion of these international standards and how they compare with current U.S. citizenship legislation is offered here.

2. **The Compatibility of U.S. Citizenship Legislation With the Spirit and Letter of the Universal Declaration of Human Rights**: While the United States played a widely recognized and greatly admired role in the drafting and adoption of this Declaration by the General Assembly of the United Nations on 10 December 1948, it has yet to amend U.S. legislation to conform to all of these noble commitments.

The most relevant sections of this Declaration, for U.S. children born abroad, are:

*"All human beings are born free and **equal in dignity and rights**." (Article 1)*

*"**Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction** of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, **birth** or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty". (Article 2)*

*"All are equal before the law and are entitled without any discrimination to equal protection of the law. **All are entitled to equal protection against any discrimination in violation of this Declaration** and against any incitement to such discrimination." (Article 7)*

*"**Everyone has the right to a nationality**. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". (Article 15)*

*"Motherhood and childhood are entitled to special care and assistance. **All children, whether born in or out of wedlock, shall enjoy the same social protection**." (Article 25)*

These promises still remain unfulfilled in current legislation defining how U.S. citizenship can be transmitted to a child born outside the United States.

3. **The Compatibility of U.S. Legislation to the Spirit and Intent of the UN Convention on the Rights of the Child**. The United States played an important role in the drafting of this Convention on the Rights of a Child, which was adopted by a unanimous vote of the UN General Assembly on 20 November 1989. Although the U.S. Government never subsequently ratified this Convention, the commitments it contains to protect the rights of newborn children all over the world are nonetheless still very germane to putting into an international perspective how the United States treats its own children born abroad.

The key relevant clauses of this Convention are:

*"The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. **States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.**"*
(Article 7)

"States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference." (Article 8)

These promises have yet to be enshrined in U.S. citizenship legislation.

4. Major Obstacles That Still Impede The Implementation of These Commitments to The Rights of a Child: One of the major infirmities of these two international human rights agreements is the lack of a clear definition of which government is to be held ultimately responsible for guaranteeing these rights to all of the children born to expatriates outside of the territorial limits of their home countries. Is it supposed to be the home country of origin of every parent, or the host country of the place of birth of every child, or perhaps both?

There is also, unfortunately, no universally recognized common legal definition of how a parent transmits citizenship to a child at birth today anywhere in the world. Some countries prefer to use a *jus sanguinis* standard which recognizes the blood ties binding the parent and the child. Others prefer to use a *jus soli* standard whereby citizenship is determined by the location of birth. Some, like the United States, prefer a complex combination of both of these standards.

Because of the confusion and lack of precision that can be engendered by a highly complex mix of both of these two principles, the result can be laudable and generous protection for the human rights of some citizens while simultaneously subjecting others to treatment that is much more harsh and demeaning.



U.S. CITIZENSHIP LAW AND OVERSEAS AMERICANS

A BRIEF HISTORICAL SUMMARY

1790 First Congress, Act of March 26th, 1790, 1 Stat. 103.

"And the children of citizens of the United States that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States".

1795 Act of January 29, 1795. Section 3, 1 Stat. 414, 415. (Same general provisions as above).

1802 Act of April 14, 1802. Section 4, 2 Stat. 153, 144. (Same general provisions as above).

1855 Act of February 10, 1855. Section 1, 10 Stat. 604.

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

1878 Revised Statutes of 1878. Section 1993. (Same general provisions as 1855 Act).

1907 Act of March 2, 1907, Section 6, 34 Stat. 1228, 1229.

"That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority."

1934 Act of May 24, 1934, Section 1, 48 Stat. 797.

"Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of birth of such child is a citizen of the United States, is declared to be a citizen of the United States: but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

1940 The Nationality Act of 1940, Section 201, 54 Stat. 1137.

"Section 201. The following shall be nationals and citizens of the United States at birth:

"(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: Provided, That in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: Provided further, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934."

1952 **The Immigration and Nationality Act of June 27, 1952**, 66 Stat. 163, 235, 8 U.S. Code Section 1401 (b). (Section 301 of the Act).

"Section 301. (a) The following shall be nationals and citizens of the United States at birth:

"(1) a person born in the United States, and subject to the jurisdiction thereof;

"(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States, who prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State(s) for at least five years: Provided, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934: Provided, however, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this Act, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended."

1956 ***Fee v. Dulles*** (236 F.2nd 855 (C.A. 7, 1956), (355 U.S. 61)). A child born abroad on or after May 24, 1934, who acquired U.S. citizenship through one citizen parent had to comply with certain conditions for establishing American residence in order to retain his American citizenship. In ***Fee v. Dulles***, the lower courts upheld the original administrative position that a person who had not complied with the conditions prescribed by previous statutes had lost his citizenship and derived no benefit from the more generous retention provisions of the 1952 act. However, upon consideration of this issue when it reached the Supreme Court the Solicitor General confessed error, taking the position that a person who could comply with the terms of section 301 (b) and (c) would retain his American citizenship, even though he had not fulfilled similar provisions of the earlier statutes. The Supreme Court reversed the lower court, and thus adopted the view projected in the Solicitor General's confession of error.

1956 **The Act of March 16, 1956**, (70 Stat. 50), provided as follows:

"That section 301 (a) (7) of the Immigration and Nationality Act shall be considered to have been and to be applicable to a child born outside of the United States and its outlying possessions after January 12, 1941, and before December 24, 1952, of parents one of whom is a citizen of the United States who has served in the Armed Forces of the United States after

December 31, 1946, and before December 24, 1952, and whose case does not come within the provisions of section 201 (g) or (i) of the Nationality Act of 1940".

1957 **Act of September 11, 1957** (71 Stat. 644), provides as follows:

"Section 16. In the administration of section 301 (b) of the Immigration and Nationality Act, absences from the United States of less than twelve months in the aggregate, during the period for which continuous physical presence in the United States is required, shall not be considered to break the continuity of such physical presence."

1961 **Montana v. Kennedy** (366 U.S. 308 (1961)). The court ruled that a child born abroad prior to May 24, 1934, to an American citizen mother did not acquire American citizenship at birth, since at that time citizenship at birth was transmitted only by a citizen father. Although subsequent legislation conferred upon American women the power to transmit citizenship to their children born abroad, such legislation was not retroactive and did not bestow citizenship on persons born before the enactment of such legislation.

See also: **Wolf v Brownell** (253 F.2nd 141 - (C.A. 9, 1958)-certiorari denied (358 U.S. 859)). and **D'Alessio v. Lehmann** (289 F.2nd 371 - (C.A. 6, 1961)-certiorari denied (368 U.S. 822)).

1964 **Schneider v. Rusk** (377 U.S. 163 (1964)). Mrs. Schneider, a German national by birth, acquired United States citizenship derivatively through her mother's naturalization in the United States. She came to the USA as a small child with her parents and remained there until she finished college. She then went abroad for graduate work, was engaged to a German national, married in Germany, and stayed in residence there. She declared that she had no intention of returning to the United States. In 1959, she was denied a passport by the State Department on the ground that she had lost her United States citizenship under the specific provisions of Paragraph 352 (a)(1) of the Immigration and Nationality Act, 8 U.S.C. Paragraph 1484 (a)(1), by continuous residence for three years in a foreign state of which she was formerly a national. The Court, by a five-to-three vote, held the statute violative of Fifth Amendment due process because there was no like restriction against foreign residence by native-born citizens. The dissent (Mr. Justice Clark, joined by Justices Harlan and White) based its position on what it regarded as the long acceptance of expatriating naturalized citizens who voluntarily return to residence in their native lands; possible international complications; past decisions approving the power of Congress to enact statutes of that type; and the Constitution's distinctions between native-born and naturalized citizens.

1966 **Act of November 6, 1966** (80 Stat. 1322), amended Section 301 (a) (7) of the Immigration and Nationality Act of 1952 to read as follows:

"Section 301 (a) (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: **Provided***, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 1 of the International Organizations Immunities Act (59 Stat. 669; 22 U.S.C. 288) by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 1 of the International Organizations Immunities Act, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date.

1967 **Afroyim v. Rusk** (387 U.S. 253 (1967)). Mr. Afroyim, a Polish national by birth, immigrated to the United States at age 19 and after 14 years in the USA acquired United States citizenship by naturalization. Twenty-four years later he went to Israel and voted in a political election there. In 1960, he was denied a passport by the State Department on the ground that he had lost his

United States citizenship under the specific provisions of Section 349 (a)(5) of the Immigration and Nationality Act of 1952 (8 U.S.C. Section 1481(a)(5)), by his foreign voting. The Court, by a five-to-four vote, held that the Fourteenth Amendment's definition of citizenship was significant; that Congress has no "general" power, express or implied, to take away an American citizen's citizenship without his assent," (387 U.S. at 257); that Congress' power is to provide a uniform rule of naturalization and, when once exercised with respect to the individual, is exhausted, citing Mr. Chief Justice Marshall's well-known but not uncontroversial dictum in **Osborn v. Bank** of the United States (9 Wheat. 738, 827 (1824)); and that the "undeniable purpose" of the Fourteenth Amendment was to make the recently conferred "citizenship of Negroes permanent and secure" and "to put citizenship beyond the power of any government unit to destroy," (387 U.S. at 263). **Perez v. Brownell** (356 U.S. 44 (1958)), a five-to-four holding within the decade and precisely to the opposite effect, was overruled. In dissent (Mr. Justice Harlan, joined by Justices Clark, Stewart and White) took issue with the Court's claim of support in the legislative history, elucidated the Marshall dictum, and observed that the adoption of the Fourteenth Amendment did not deprive Congress of the power to expatriate on permissible grounds consistent with "other relevant commands" of the Constitution. (387 U.S. at 292).

1971 **Rogers v. Bellei** (401 U.S. 815 (1971)). Bellei challenged the constitutionality of Section 301 (b) of the Immigration and Nationality Act of 1952, which provided that one who acquires United States citizenship by virtue of having been born abroad to parents, one of whom is an American citizen, who has met certain residence requirements, shall lose his citizenship unless he resides in this country continuously for five years between the ages of 14 and 28. A three-judge District Court held the section unconstitutional, citing **Afroyim v. Rusk** and **Schneider v. Rusk**. The Supreme Court, in a five-to-four decision, held that Congress has the power to impose the condition subsequent of residence in the country on Bellei, who does not come within the Fourteenth Amendment's definition of citizens as those "born or naturalized in the United States", and its imposition is not unreasonable, arbitrary or unlawful. Justice Black filed a dissenting opinion in which Justices Douglas and Marshall joined. Justice Brennan filed a dissenting opinion in which Justice Douglas joined.

1972 **Act of October 27, 1972** (87 Stat. 1289), amended the Immigration and Nationality Act of 1952 by changing section 301 (b) to the new text below; by repealing Section 16 of the Act of September 11, 1957; and by adding the new section 301 (d) below.

"Section 301 (b) Any person who is a national and citizen of the United States under paragraph (7) of subsection (a) shall lose his nationality and citizenship unless (1) he shall come to the United States and be continuously physically present therein for a period of not less than two years between the ages of fourteen years and twenty-eight years; or (2) the alien parent is naturalized while the child is under the age of eighteen years and the child begins to reside permanently in the United States while under the age of eighteen years. In the administration of this subsection absences from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence."

"Section 301 (d) Nothing contained in subsection (b) as amended, shall be construed to alter or affect the citizenship of any person who has come to the United States prior to the effective date of this subsection and who, whether before or after the effective date of this subsection, immediately following such coming complies or shall comply with the physical presence requirements for retention of citizenship specified in subsection (b) prior to its amendment and the repeal of section 16 of the Act of September 11, 1957."

1978 **Act of October 10, 1978** (92 Stat. 1046) repealed subsections (b), (c) and (d) of section 301 of the Immigration and Nationality Act of 1952, effective as of October 10, 1978. It also struck out "(a)" after "Section 301" and redesignated paragraphs (1) through (7) as subsections (a) through (g) respectively.

1980 **Vance v. Terrazas**: upheld the constitutionality of Section 349(c) of the INA. Under this provision, the party claiming that citizenship has been lost has the burden of proving such loss by a preponderance of the evidence. Moreover, a person who commits a statutory act of expatriation is presumed to have committed the act voluntarily, but the presumption may be overcome upon a showing, by a preponderance of the evidence, that the act was not performed

voluntarily. The Court expressly rejected the contention that expatriation must be proved by clear and convincing evidence.

The Supreme Court reaffirmed and explained its holding in *Afroyim v. Rusk* that in order to find expatriation, "the trier of fact must conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship". The court declared that it would not be consistent with *Afroyim* "to treat the expatriating acts specified in the statute as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen". As the Court explained: "In the last analysis expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct."

1986 Act of November 14, 1986 (PL 99-653) amended section 301(g) (8 U.S.C. 1401(g)) by striking out "ten years, at least five" and inserting in lieu thereof "five years, at least two". This reduced the prior residence time in the United States necessary for a U.S. citizen married to an alien to be able to automatically transmit U.S. citizenship to a child born abroad from the former period of ten years, five of which after the age of 14, to five years, two of which after the age of fourteen years.

This act also: (a) amended Sec 340(d) of the code reducing the period of time after naturalization before a naturalized citizen can reside abroad from five years to one year; (b) amended section 349 of the code so that a child who obtained a foreign nationality upon the application of the parent before the child reached age 21 years, no longer has to return to the United States to establish permanent residence in the United States prior to age 25; (c) amends section 349 so that a U.S. citizen who is a national of a foreign country and who performs an expatriating act under the provisions of section 349 is no longer presumed to have acted "voluntarily" if the individual has resided in this foreign country more than ten years. This reinforces the importance of the individual's intent in performing such an act as a deliberate intent to lose U.S. citizenship, rather than a mere automatic presumption that such intent existed.

1994 The Immigration and Nationality Technical Corrections Act of 1994 amended several sections of the Immigration and Nationality Act, and took effect on March 1, 1995.

Amended Section 322 permits children born overseas of a U.S. citizen parent to be eligible for a certificate of citizenship if either their U.S. citizen parent or a U.S. citizen grandparent had been physically present in the United States for at least five years, two of which after the age of 14, prior to the child's birth abroad. This provision also applies to a child adopted abroad.

Amended Section 301 (h) gives back U.S. citizenship to a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States.

Amended Section 324 (d) (1) allows former U.S. citizens who lost their citizenship through failure to meet the former conditions of physical presence in the United States to retain their citizenship to regain their citizenship without having to file an application for naturalization.

The law also allows U.S. citizen parents to apply for U.S. citizenship from abroad for their foreign-born children under the age of 18, provided the child is physically present in the United States pursuant to a lawful admission when the citizenship is granted.

1998 Miller vs. Albright (decided April 22, 1998), the Supreme Court in a 6:3 decision held that it was constitutional for Section 309 of the Immigration and Nationality Act (8 U.S.C. Section 1409) to give U.S. citizen mothers more rights to transmit U.S. citizenship to a child born out of wedlock abroad than to U.S. citizen fathers. There were three separate opinions on the majority side and two opinions on the dissenting side.

2000 PL 106-365, "The Child Citizenship Act of 2000" (or Delahunt Act) signed on 30 October 2000, and which takes effect on 27 February 2001 modifies the Immigration and Nationality Act by making it easier for minor children of US citizens (both foreign-born and adopted abroad) to

become citizens of the US. The law has the following effects: (a) A child adopted abroad becomes a US citizen immediately upon entry into the US as a lawful permanent resident; and (b) A child born abroad to parents, one or both of whom are US citizens, but who is not recognized as a US citizen for various reasons, can also benefit from the new law, i.e. that child also becomes a US citizen immediately upon entry into the US as a lawful permanent resident. In the case of US parents residing permanently abroad with no immediate intention of returning to the USA with their children (either natural or adopted), it is also possible to file from abroad for immediate naturalization under a revised Section 322 of the Immigration and Nationality Act (also modified by the new law). This procedure enables Americans abroad to obtain US citizenship for their children, not otherwise eligible to be citizens at birth abroad, through a special naturalization procedure, which does not require that they move back to live permanently in the United States. All the papers are filed from abroad, and the American parent and child/children then travel to the chosen District Office in the United States to finalize the process on the day of a previously arranged appointment.

* * * * *

This paper was written by Andy Sundberg and Warren Furth.

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