



U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

August 25, 2000

Patricia Mack Bryan, Esq.
Senate Legal Counsel
Senate Hart Office Building
Room 642
Washington, D.C. 20510-7250

Re: Breyer v. Meissner, No. 98-1842 (3d Cir.)

Dear Ms. Bryan:

I am writing to advise you that I have determined not to file a petition for a writ of certiorari in the above-captioned case.

This case involves the constitutionality of Section 1993 of the Revised Statutes of 1874 (R.S. § 1993), and Section 101(c)(2) of the Immigration and Nationality Technical Corrections Act (INTCA), Pub. L. No. 103-416, 108 Stat. 4306 (1994). R.S. § 1993 provided that the children of United States citizen fathers born overseas were citizens at birth. The relevant statutes did not, however, provide for transmission of citizenship to children born abroad based on the United States citizenship of the mother. That distinction was eliminated by a statutory amendment enacted in 1934. That 1934 amendment was not made retroactive, however, and the disparity between children of citizen fathers and children of citizen mothers therefore remained in effect with respect to persons born overseas before 1934.

The INTCA, passed in 1994, made the 1934 amendment to R.S. § 1993 retroactive, thereby extending citizenship at birth to persons born to a United States citizen mother before the effective date of the 1934 amendment. Section 101(c)(2) of the INTCA states, however, that the Act "shall not confer citizenship on * * * any person who * * * was excluded from, or who would not have been eligible for admission to, the United States under the Displaced Persons Act of 1948."

Johann Breyer, the plaintiff in this case, was born in Czechoslovakia in 1925. His mother was found by the district court at an earlier stage of the case to have been a United

States citizen; his father was not. From February 1943 to August 1944, Breyer served in the Waffen SS and in the Death's Head Battalion guard unit at Buchenwald and Auschwitz. The gravamen of his suit is that R.S. § 1993 and INTCA § 101(c)(2) unconstitutionally discriminate against his deceased mother by denying her the right to transmit citizenship to her child on the same basis as citizen fathers.

The district court dismissed the suit. The court held that Breyer was covered by INTCA § 101(c)(2) because his prior service as a concentration camp guard rendered him ineligible for admission under the Displaced Persons Act. The court also held that INTCA § 101(c)(2) does not violate the equal protection component of the Due Process Clause because it is rationally related to legitimate government objectives.

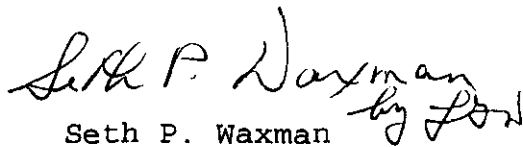
The court of appeals reversed the district court's ruling on the equal protection issue. The court found that the gender-based distinction contained in R.S. § 1993 was subject to heightened scrutiny and that the government had failed to demonstrate a sufficient justification for the disparity. The court also held that INTCA § 101(c)(2) perpetuates the discriminatory aspect of R.S. § 1993. The court explained that a child of a citizen father acquires citizenship at birth and retains that status unless he commits an expatriating act with the intent of renouncing his citizenship. Under INTCA § 101(c)(2), however, the child (born abroad before 1934) of a citizen mother may be denied citizenship based on acts that were performed without the intent to renounce citizenship.

The court of appeals also held, however, that Breyer's wartime acts might have effected a voluntary renunciation of United States citizenship, notwithstanding the fact that Breyer was unaware of his right to citizenship at the time those acts occurred, because the distinction between citizen fathers and mothers in R.S. § 1993 had not been held unconstitutional and presumably was not vulnerable to challenge under prevailing constitutional doctrine at that time. The court therefore remanded the case to the district court to determine whether Breyer's service in the Waffen SS and Death's Head Battalion constituted a repudiation of all loyalty to the United States.

In light of the current interlocutory posture of the case, I have decided not to file a petition for certiorari at the present time. Under the court of appeals' remand order, the United States may be able to establish that Breyer's service as a concentration camp guard constituted a voluntary renunciation of United States citizenship. If after the proceedings on remand the court of appeals issues a final decision holding that Breyer is currently entitled to United States citizenship, the government will have an opportunity to petition for certiorari at that time, and in such a petition challenge the court of appeals' ruling at this interlocutory stage of the case that R.S. § 1993 and INTCA § 101(c)(2) are unconstitutional as applied to Breyer.

The time for filing a petition for a writ of certiorari expires on September 4, 2000. I have enclosed a copy of the court of appeals' opinion for your information. Please let me know if I can be of further assistance in this matter.

Sincerely,


Seth P. Waxman
Solicitor General

Enclosure