



## Office of the Attorney General

Washington, D. C. 20530

October 15, 1993

Honorable Michael Davidson  
Senate Legal Counsel  
United States Senate  
Washington, D.C. 20510-7250

Dear Mr. Davidson:

In Wauchope et al. v. United States Department of State, 985 F.2d 1407 (9th Cir. 1993), the United States Court of Appeals for the Ninth Circuit held that Section 1993 of the Revised Statutes of 1874, as in effect prior to its amendment in 1934, violated the constitutional guarantee of equal protection. Pursuant to 2 U.S.C. 288k(b), I write to advise you that the Solicitor General decided not to file a petition for a writ of certiorari requesting the Supreme Court to review the decision in Wauchope, and to invite your attention to several pending cases that present the same constitutional issue.

The basic facts of the Wauchope case are set forth in the opinions of the district court and the court of appeals, both of which are attached. Briefly, the case involves two women born outside the United States, before 1934, to mothers who were United States citizens and fathers who were foreign nationals. Prior to 1934, Section 1993 of the Revised Statutes provided only that U.S. citizen fathers could pass on citizenship by descent to legitimate children born outside the United States; by its silence, the statute denied the same privilege to U.S. citizen mothers. Montana v. Kennedy, 366 U.S. 308, 311 (1961).

In 1934, Congress amended Section 1993 to remove the distinction between citizen mothers and fathers. That amendment also included new requirements that any foreign-born child with one alien parent must reside continuously in the United States between the ages of 13 and 18, and must take an oath of loyalty, in order to retain U.S. citizenship. The amendment applied prospectively only.

In 1989, the United States District Court for the Northern District of California held that the pre-1934 version of Section 1993 was unconstitutional. Elias v. Department of State, 721 F. Supp. 243 (1989). As the Department of Justice informed your office at the time, the government did not appeal from the adverse judgment in that case because of concerns about how the issues had been framed before the district court. The Wauchope case was filed shortly after the decision in Elias, and it was heard and decided by the same district court. The government did appeal in Wauchope, and the United States Court of Appeals for the Ninth Circuit upheld the district court's determination that the statute is unconstitutional. The court of appeals also affirmed the district court's judgment declaring the plaintiffs to be citizens of the United States and ordering that they be issued passports by the Department of State.

The district court and the court of appeals both rejected the government's arguments that the plaintiffs did not have third-party standing to assert their mothers' constitutional right to equal protection, and alternatively that their claims were barred by laches. On the merits, the courts accepted the government's position that the appropriate standard of review was that applicable to immigration and naturalization statutes generally: whether Congress had a "facially legitimate and bona fide" reason for the distinctions drawn in the statute. Applying that test, the courts rejected the factual premises of the primary rationale proffered by the government -- that the statute's gender distinction was related to reducing instances of dual nationality -- and therefore held that the government had "failed to set forth a facially legitimate and bona fide reason to justify the statute's unequal treatment of citizen men and women." 985 F.2d at 1416.

The court of appeals also rejected, over one dissent, the government's argument that the courts had no equitable power to remedy any constitutional violation by entering an order declaring the plaintiffs to be U.S. citizens. The court recognized that INS v. Pangilinan, 486 U.S. 875 (1988), precludes courts from granting citizenship, otherwise than in accordance with statutory authority, in order to remedy governmental violations of a naturalization statute. The court held, however, that Pangilinan has no application to remedies for constitutional violations.

After extensive consideration, the Solicitor General decided not to file a petition for a writ of certiorari requesting the Supreme Court to review the Wauchope decision. The Ninth Circuit's ruling on the merits is consistent with modern developments in the Supreme Court's jurisprudence concerning

statutory distinctions based on gender.<sup>1</sup> We do have significant continuing concerns about the Ninth Circuit's rulings on the standing and laches questions, and particularly on the power of a court to declare a person to be a citizen when Congress has not so provided. The Solicitor General decided, however, not to file a petition raising only those issues.

The issues resolved against the government in Wauchope are also presented in a number of other cases now pending in various courts. These include four cases pending in the Ninth Circuit<sup>2</sup> and one pending in the First Circuit.<sup>3</sup> The Ninth Circuit cases are, of course, controlled by Wauchope. In light of the Solicitor General's decision not to seek review in that case, the government's Ninth Circuit appeals will be dismissed on or before the due date of any government brief. The government's opening briefs in Jalbuena, Flewitt and Catenacci would be due on October 15, 1993; the opening brief in Jackson-Brown would be due on December 20.

In light of his decision not to seek Supreme Court review in Wauchope, the Solicitor General has determined that he will not authorize appeal on the merits of the equal protection issue in the Bondarenko case now pending before the First Circuit. No decision has yet been reached on whether to maintain the appeal in that case on the standing, laches and remedy issues. The Justice Department has sought and obtained an extension of time,

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<sup>1</sup> In addition, under the particular facts in this case, it appears that each plaintiff's mother may have been subject, at the time of the plaintiff's birth, to a presumption established by Section 3 of the Cable Act of 1922, 42 Stat. 1022, that the mothers had relinquished their U.S. citizenship by marrying foreign nationals and residing for two years in their husbands' countries of nationality. If the plaintiffs' mothers (like the plaintiffs' fathers) were not citizens at the time of the plaintiffs' births, then even a gender-neutral version of Section 1993 would have had no application to them. The Cable Act presumption, of course, raises constitutional and other questions in its own right, and the issue of its application to this case was not in any event raised before or considered by the lower courts in this case.

<sup>2</sup> Jalbuena v. United States Dep't of State, No. 92-15553; Flewitt v. United States Dep't of State, No. 92-16949; Catenacci v. United States Dep't of State, No. 92-16951; and Jackson-Brown v. Department of State, No. 93-16702.

<sup>3</sup> Bondarenko v. United States Dep't of State, Nos. 93-1915. There are also at least four cases involving the constitutional issue pending before district courts in the Third, Seventh, Ninth and D.C. circuits.

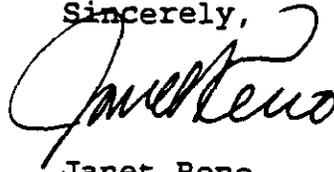
until November 24, 1993, within which to file the government's opening brief. If the Solicitor General decides not to authorize the appeal in Bondarenko on issues other than the constitutionality of the pre-1934 version of Section 1993, then the appeal will be dismissed before November 24 -- unless, again, you notify us that you propose to take some action in the case.

As is evident, the Solicitor General's decision not to seek Supreme Court review in the Wauchope case raises difficult questions about how to proceed in other pending cases, and about how the Department of State and the Immigration and Naturalization Service should respond administratively to claims of U.S. citizenship by similarly situated persons throughout the world. The prospect of applying different rules to persons outside the Ninth Circuit creates particular concerns in light of the Constitution's provision for Congress "To establish an uniform Rule of Naturalization \* \* \* throughout the United States." U.S. Const., Art. I, Cl. 8, § 4 (emphasis added). The best solution, I believe, would be for Congress to address the matter by legislation. Indeed, the government's request for an extension of the briefing schedule in Bondarenko was based in large part on the possibility of imminent legislative action.

I note in this regard that bills to eliminate the statutory gender distinction at issue in this case on a retroactive basis have been introduced in the last three Congresses. One such measure is presently pending, as part of H.R. 783, before the House Committee on the Judiciary. The Department of State supported enactment of the relevant portion of H.R. 783 in testimony before that Committee's Subcommittee on International Law, Immigration and Refugees, which we understand has reported the measure favorably to the full Committee. I also understand that that Department has recently reiterated its support for the relevant provision, and has suggested that its enactment be expedited by attaching it to S. 1197, a bill already passed by the Senate which has been referred for consideration to the Judiciary Committee of the House. I fully endorse both the provision in question and the suggestion for its expedited passage. Enactment of that legislation would dispense with the standing and laches issues presented by cases such as Wauchope. It also would eliminate the dilemma now faced by the Department of State and the INS in deciding how to respond administratively to claims of U.S. citizenship by persons outside the Ninth Circuit in light of Wauchope, and moot the question of judicial usurpation of Congress's constitutional prerogative to confer citizenship. In the event that such legislation is not enacted, it will be necessary for this Department and the Department of State to consider whether to recognize the citizenship of all persons situated similarly to the plaintiffs in Wauchope.

Because of the difficult questions arising in Wauchope and related litigation, I urge both Houses of Congress to give careful consideration to the expedited passage of such legislation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Janet Reno".

Janet Reno

cc: The Hon. Charles Tiefer  
Acting General Counsel to the Clerk  
United States House of Representatives  
Washington, D.C. 20515