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Legal nature of statutory citizenship

The statutory United States citizenship of persons born in Puerto Rico was first extended to Puerto Rico by Congress under the Jones Act of 1917, and continues under 8 U.S.C. 1402 during the current period in which the territory has a commonwealth structure of local government. It is important to note that adoption of the local constitution in 1952 pursuant to Public Law 81-600 did not alter the allocation of Constitutional authority nor change the state of U.S. law regarding the citizenship status of residents of the territory.

While the U.S. citizenship of persons born in Puerto Rico is expressly recognized in the local constitution, the current citizenship of persons born in the territory is not created, defined or guaranteed by the local constitution or the commonwealth structure of local self-government. Rather, the current U.S.citizenship of persons born in Puerto Rico is created and defined by Congress in the exercise of its Territorial Clause power and in implementation of Article IX of the Treaty of Paris.

In the exercise of its authority and responsibility toward Puerto Rico Congress has determined to define persons born in Puerto Rico as U.S. citizens subject to the laws of the U.S. regulating U.S. nationality and citizenship. Thus, the citizenship of such persons is as set forth in 8 U.S.C. 1402, which is part of the immigration and nationality law of the United States approved by Congress in the exercise of its authority under Article I, Section 8 of the U.S. Constitution. The earlier citizenship provisions of the Foraker Act and Jones Act cited above have been superseded by 8 U.S.C. 1402.

For example, a Congressional Research Service (CRS) legal analysis in 1990 confirmed that establishment of separate Puerto Rican sovereignty would appear to provide the legal basis for Congress to withdraw statutory citizenship without violating due process. See, Legal Memorandum of John H. Killian, Senior Specialist, American Constitutional Law, CRS, American Law Division, November 15, 1990.

However, rather than automatic termination in every case of the statutory U.S. citizenship of those born in Puerto Rico in the event that the unincorporated territory status of Puerto Rico is resolved in favor of separate sovereignty, on an individual basis persons already enjoying statutory U.S. citizenship rights will be able to retain that status for life by election or entitlement, as provided by Congress.

Thus, in a separate sovereignty scenario U.S. nationality and citizenship would no longer be conferred on persons born in Puerto Rico as of the date U.S. sovereignty ends, or perhaps even earlier during the transition period. Only those persons who acquired U.S. nationality and citizenship under the Treaty of Paris and statutes implementing its provisions during the territorial period would be able to elect to retain that status for life.

The Bellei case cited above establishes that Congress can place conditions precedent or subsequent on such statutory citizenship. To ensure the successful succession of state to nationhood for Puerto Rico

and avoid the impairment of U.S. and Puerto Rican sovereignty that would inevitably result from a grant of mass dual citizenship, the Committee expects Congress to include in any status legislation for Puerto Rico the provisions in H.R. 856 which end continued statutory U.S. citizenship based on birth in Puerto Rico during the territorial period upon acquisition of any other citizenship, including that of Puerto Rico. This approach would not prevent dual citizenship on an individual case-by-case basis if the U.S. citizenship of the person was acquired on a legal basis other than birth in Puerto Rico or a relationship to a person whose U.S. citizenship is based on birth in the territory. It will, however, prevent conversion of the current statutory U.S. citizenship into automatic dual citizenship as a result of a change of status to separate sovereignty.

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Finding 2.

Article IX of the Treaty of Paris provided that the inhabitants of the territory of Puerto Rico were held to have ``nationality of the territory.'' In Gonzales v. Williams (192 U.S. 1 (1904)), the U.S. Supreme Court stated with respect to the status of Puerto Rico that under the terms of the treaty of cession the ``nationality of the island became American.''

In Gonzales the court ruled that under the terms of the treaty the inhabitants of Puerto Rico had no foreign or separate nationality, were not ``aliens'' under the immigration act of 1891, and were under the ``protection'' of the United States.

In an exercise of its Territorial Clause authority, Congress implemented Article IX of the Treaty of Paris by conferring the status of ``citizens of Puerto Rico'' on the inhabitants of the territory under Section 7 of the Foraker Act of 1900, and prescribing the rights of persons having that status. It is clear that the umbrella of U.S. nationality had been extended to the territory, and that the status of ``citizens of Puerto Rico'' constituted a form of citizenship which was a subset of U.S. nationality. There is no basis for the assertion that separate Puerto Rican nationality was created because a separate class of citizenship had been established pursuant to the treaty of cession and the Territorial Clause.

In Section 5 of the Jones Act of 1917 Congress extended U.S. citizenship to Puerto Rico, with less than 250 people availing themselves of the right to remain ``citizens of Puerto Rico'' by complying with prescribed procedures within six months of the effective date of the Jones Act. Again, all U.S. citizens, whether residing in one of the states, the U.S. territories including Puerto Rico, as well as those who remained ``citizens of Puerto Rico'' under the Jones Act, had one ``nationality'' regardless of the legal basis and classification of their ``citizenship'' under applicable law.

Since the enactment by Congress of Section 202 of the Nationality Act of 1940, followed by the enactment of Section 302 of the Immigration and Nationality Act in 1952, now codified at 8 U.S.C. 1402, all persons who were U.S. citizens or ``citizens of Puerto Rico'' under the Jones Act have the status of U.S. citizens, as well as the underlying U.S. nationality established by Article IX of the Treaty of Paris.

The status of ``citizen of Puerto Rico'' is not a separate Puerto Rican nationality, a substitute for, or an alternative to the U.S. citizenship status established for the inhabitants of Puerto Rico under 8 U.S.C. 1402, much less the underlying nationality arising from the Treaty of cession.

The citizenship provisions of the Foraker Act no longer apply to persons born in Puerto Rico, and no longer define the status of any person. The term ``citizen of Puerto Rico'' under 1 LPRA Sec. 7 (based on Section 10 of the Political Code of Puerto Rico), now has a meaning equivalent to local citizenship or residency in the States. Rather than being a form of citizenship based on or having the same meaning as nationality conferred by a national sovereign, ``citizenship'' of Puerto Rico is a status created under the limited jurisdiction of the local government. It is no different than the residency status defined by Congress for Puerto Rico in 48 U.S.C. 733a.

H.R. 856 does not deny Constitutionally permanent citizenship to people born in Puerto Rico. Instead, it honestly recognizes that Puerto Rico has not yet achieved Constitutional integration with the U.S. sufficient to secure for persons born there the same or equal citizenship status and rights as Americans born or naturalized in the States of the Union. As a permanent feature of U.S. Constitutional law, the 14th Amendment protections which make U.S. citizenship irrevocable only apply in the case of person born or naturalized in one of the States of the Union.

Of course, under the Territorial Clause Congress can approve a statute extending any provision of the Constitution and laws of the United States to Puerto Rico or any other unincorporated territory. However, a future Congress will not be bound by the statute, and can repeal the law. Admission of a territory to statehood under Article IV of the Constitution is the only way to bind Congress forever to political union and application of the Constitution and laws of the United States on the basis of permanent equality.

As discussed earlier, in the 1970 case of Rogers v. Bellei (401 U.S. 815), the Supreme Court of the United States limited to persons whose citizenship is based on birth or naturalization in the States of the Union. In ruling that the 14th Amendment does not make citizenship permanent or irrevocable in the case of persons born outside the U.S. whose citizenship is conferred by statute, and that Congress can terminate U.S. non-constitutional citizenship by the same power through which it is granted, the court stated that:

The central fact, in our weighing of the plaintiff's claim to continuing and therefore current United States citizenship, is that he was born abroad. He was not born in the United States. He was not naturalized in the United States … All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth Amendment first-sentence citizen. His posture contrasts with that of Mr. Afroyim, who was naturalized in the United States …

Thus, the U.S. Constitution has been judicially interpreted by the high court of last resort to establish that persons born outside the U.S. in a foreign country who acquire statutory U.S. citizenship based on the U.S. citizenship of parents do not have the permanent and Constitutionally-guaranteed citizenship that people acquire upon birth in a State.

This is the same situation in which people born in Puerto Rico find themselves. The statutory citizenship of Bellei was established under 8 U.S.C. 1401 based on birth outside the States to U.S. citizens parents. The U.S. citizenship of persons born in Puerto Rico was established under 8 U.S.C. 1402, based on birth in an unincorporated territory. In the case of both nationality of parents or location of birth in an area under U.S. jurisdiction and sovereignty but not a State, there is no Constitutional protection under the 14th Amendment.

Rather, as the Supreme Court stated in Bellei about the type of citizenship granted under 8 U.S.C. 1401, ``That type, and any other not covered by the Fourteenth Amendment, was necessarily left to proper congressional action.''

Unlike a person who U.S. citizenship arises from birth to an American parent overseas, persons whose statutory U.S. citizenship is based on birth in Puerto Rico are ``subject to the jurisdiction of the United States.'' This means that in addition to having citizenship that is not Constitutionally guaranteed, persons born in Puerto Rico live under U.S. laws enacted in a political process in which they have less than equal political rights.

Thus, just as the Supreme Court says in the Bellei case that Congress could return to the situation before the current immigration laws were adopted, in which persons born outside the U.S. to an American parent did not automatically acquire U.S. citizenship, ``proper congressional action'' in the case of Puerto Rico could include a return to the arrangement in the 1900 through 1917 period before Congress made birth in Puerto Rico a basis for statutory citizenship.

Under the 1922 case of Balzac v. People of Puerto Rico (258 U.S. 298), the U.S. must exercise its powers consistent with the fundamental due process rights that constrain our government wherever it acts. In the case of citizenship in Puerto Rico, this means Congress would have to repeal 8 U.S.C. 1402 by a subsequent statute for what Congress determines to be legitimate Federal purposes.

The recognition by Congress of a separate Puerto Rican nationality or sovereignty would provide the basis for such an action, as would a determination by Congress that full incorporation and statehood is not intended. That is what Congress decided in the case of the Philippines in 1916.

The application of due process to the actions of the Federal Government in the exercise of U.S. sovereignty in Puerto Rico does not mean Congress cannot determine the citizenship of people born there as it deems consistent with the national interest. The only way to secure Constitutionally-protected citizenship is to complete the process of Constitutional integration so that people born in Puerto Rico also will be born in a State of the Union for purposes of the 14th Amendment.

As the Supreme Court stated in the Bellei decision, the attempt to transform the permissive statutory citizenship into an irrevocable status binding on the U.S. in perpetuity… would convert what is congressional generosity into something unanticipated and obviously undesired by Congress