

MEMORANDUM FOR HOWARD WILLENS

SUBJECT: U.S. Citizenship Versus U.S. Non-Citizen Nationality

Every person in the United States may be classified either as an alien or a national.

-- An alien under the present law is "any person not a citizen or national of the United States."^{1/} [As the quotation suggests, the term national is used sometimes in a way to distinguish between citizens and non-citizen nationals. This memorandum will use the term "national" in the statutory way cited below -- i.e., encompassing both citizens and non-citizen nationals.]

-- A national is a citizen or any other person who "owes permanent allegiance to the United States."^{2/} Since permanent allegiance seemed to connote irrevocability and thus to be inconsistent with the right of expatriation, the statutes permit the relationship to be "permanent" even though it "may be dissolved eventually at the instance either of the United States or of the individual, in accordance with the law."^{3/}

1/ 8 U.S.C. § 1101(a) (3).

2/ 8 U.S.C. § 1101(a) (22).

3/ 8 U.S.C. § 1101(a) (31).

The primary purpose of this memorandum is to delineate the advantages and disadvantages of being a U.S. citizen versus a U.S. non-citizen national. The possibility of some other states -- e.g., a Marianas citizenship -- is not discussed.

SUMMARY

The direct legal implications of a choice by the Marianas between U.S. citizenship and non-citizen nationality can be easily structured so that they are not very significant. Unlike citizenship, the choice of non-citizen nationality would essentially mean that the individual would not be subject to the military draft if he resided in the Marianas. Furthermore, the individual would have to go through formal, though simple, procedures if he desired to become a citizen -- e.g., if he moved to a state. Finally, unless somehow prohibited by the terms of the agreement between the U.S. and the Marianas, the U.S. could revoke the status of non-citizen nationals; in contrast involuntary loss of citizenship is most difficult, if not impossible.

The more important implications of the choice are less direct. First, it might affect the attitude of the U.S. Congress and/or Executive as to whether special restrictions would be allowed on non-Marianas people who wish to conduct a business or own land in the Marianas. (This will be

discussed in a separate memorandum.) Second, non-citizen nationality might be viewed by the Marianas people or the United Nations as an unacceptable second-class status.

DISCUSSION

Before proceeding with the analysis, it should be noted that not all an individual's rights, privileges, immunities, and duties arise from his status as a citizen, non-citizen national, or alien. Instead, the Constitution contains many provisions whose applicability to the Marianas people would depend on the islands' political status (e.g., an unincorporated territory) rather than on the inhabitants' status. For example, the Sixth Amendment guarantee of jury trial is not a fundamental right which applies automatically to unincorporated territories.^{1/} A complete list of those provisions which apply would depend on the theory of incorporation and other theories underlying a particular political status.^{2/} This is discussed further in a separate memo.

A good starting point on the issue of citizenship versus non-citizen nationality is to distinguish between the individual's situation with respect to foreign countries and with respect to the U.S.

1/ Virgin Islands v. Bodle, 427 F.2d 532 (1970).

2/ See Note, "A Macrostudy of Micronesia: The Ending of a Trusteeship," 18 N.Y.U.L.F. 139 (1972); A. Leibowitz, "The Applicability of Federal Law to the Commonwealth of Puerto Rico," 56 Geo. L.J. 219, 241-43 (1967).

1. Foreign Relationships

U.S. non-citizen nationals are apparently treated the same as citizens in most external (i.e., foreign) relationships.

-- They are entitled to American diplomatic protection abroad. ^{1/}

-- They may enter the U.S. under the same conditions as citizens. ^{2/}

2. Domestic Relationships

Without offsetting legislation, U.S. non-citizen nationals are not entitled to certain rights, privileges and immunities of citizens. On the other hand, they are not subject to some duties of citizenship. The analysis needs to distinguish between federal citizenship and state citizenship.

A. Federal Citizenship

Until recently the constitutional rights, privileges and immunities of federal citizenship were limited to those resulting from the interpretation of the privileges and immunities clause of the Fourteenth Amendment -- i.e., "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States . . .

1/ See Koessler, "'Subject,' 'Citizen,' 'Nationals,' and 'Permanent Allegiance,'" 56 Yale L.J. 58, 70 (1946).

2/ The immigration sections refer only to aliens, 8 U.S.C. § 1101(a)(15), and nationals are not aliens. Residence requirements for naturalization can be fulfilled by time spent in outlying possessions. 8 U.S.C. § 1436.

These rights, privileges, and immunities were initially construed very narrowly and only recently have shown much growth. The Supreme Court has held that they, inter alia, include: the right of access to the offices of the federal government and the federal courts,^{1/} the right to demand federal protection and care of life and property, the right to peaceably assemble and petition for redress of grievances, the privileges of the writ of habeas corpus, the right to use navigable waters, and rights gained by virtue of treaties with foreign powers.^{2/} And, though the Supreme Court has vacillated on its Constitutional source, the right to travel has sometimes been attributed to the Fourteenth Amendment privileges and immunities clause.^{3/}

1/ Crandell v. Nevada, 73 U.S. (6 Wall.) 35, 43-44 (1868).

2/ Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79-80 (1873). (The rights gained by treaties would usually apply in the cases of non-citizen nationals; see earlier discussion.) Mr. Justice Douglas suggested in a concurring opinion in Bell v. Maryland that the clause should include the right to be afforded public accommodation without discrimination. 378 U.S. 226, 250 (1964).

3/ This right has been attributed variously to the Fourteenth Amendment privileges and immunities clause, Edwards v. California, 314 U.S. 160, at 181 (Douglas, J. concurring), 183-85 (Jackson, J. concurring); the rights of so-called "national citizenship," Crandell v. Nevada, 73 U.S. (6 Wall.) 35, 48-49 (1868); the commerce clause, United States v. Guest, 383 U.S. 745, 757 (1964); etc. See Note, "The Supreme Court, 1971 Term," 86 Harv. L. Rev. 50, 113 (1972).

Recent cases have suggested that the right of federal citizenship may not be limited to the privileges and immunities clause.^{1/} These cases have emphasized the effective participation in the political processes of government, an area yet undefined, as one of the components of federal citizenship. These cases include the one-man one-vote cases.

Though the case law is often lacking or ambiguous, non-citizen nationals already enjoy in practice many of these rights, privileges, and immunities which are associated with federal citizenship. For example, American Samoans, who are non-citizen nationals, report no difficulty in travel throughout the U.S. and, through special statute, have a Delegate-at-Large in Washington who represents them with the Federal Government.^{2/} Moreover, in the legislation defining the new U.S.-Marianas relationship, and the internal government of the Marianas, these rights, privileges, and immunities could be insured by explicit provisions. [This might be researched further. Cf. American Samoa and Philippines cases.]

About the only aspect of federal citizenship which a non-citizen national could not possess is the citizenship

1/ Afroyim v. Rusk, 387 U.S. 253 (1967); Morgan v. Katzenbach, 384 U.S. 641 (1966); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962).

2/ Telephone conversations with Mr. A.U. Fuimaono, Delegate-at-Large for American Samoa, April 5, 1973, and Mr. Misi Maga, Department of the Interior, April 5, 1973.

itself. This can be obtained at the present time by six-months' residency in the states of the United States, completion of an application, passing a simple test, and the near-automatic approval by the naturalization court.^{1/}

The duties of federal citizenship are difficult to delineate. Paying federal income taxes is not one of them.^{2/} For males, U.S. citizenship makes them eligible for the military draft.^{3/} In contrast, non-citizen nationals are not eligible unless they are in the United States, which is defined as the several states, the District of Columbia, Puerto Rico, the Virgin Islands, or Guam.^{4/} Hence, American Samoans in Samoa are not eligible.^{5/}

As for loss of citizenship versus non-citizen nationality, recent Supreme Court cases suggest that it is very difficult, if not impossible, for the United States Government to take away an individual's citizenship against his will.^{6/} In contrast, on the basis of the experience with

1/ Ibid. [NB: The statutes need be checked on this.]

2/ For example, the federal income tax does not apply to Puerto Rico (whose people are U.S. citizens).

3/ 50 U.S.C. App. § 453.

4/ 50 U.S.C. App. § 466(b).

5/ Telephone conversations noted in fn. ____, p. ____.

6/ Afroyim v. Rusk, 387 U.S. 253 (1967).

the Philippines, non-citizen nationals apparently may be denationalized en masse by act of Congress.^{1/}

B. State Citizenship

Besides federal citizenship, most individuals in the United States also are citizens of a particular state. The rights, privileges, immunities, and duties of such individuals vary, of course, from state to state. One right of state citizenship is the right to vote for voting Representatives and Senators to the U.S. Congress and for the President.^{2/}

However, with two exceptions (discussed below), the choice of the Marianas people between citizenship and non-citizen nationality would generally not affect their individual status in this area. Regardless of their choice, the affirmative legislation establishing the new political status of the Marianas could provide for most of the aspects of an individual's status associated with state citizenship.

Other aspects of state citizenship are a function of a state being a "state" and the Marianas' choice between the two individual status alternatives (citizen or non-citizen national) is irrelevant. An example is the right to vote for

1/ Cabebe v. Acheson, 183 F.2d 795 (9th Cir. 1950) (Philippine nationals became aliens by proclamation of Philippine independence).

2/ The Twenty-Third Amendment allowed the District of Columbia to vote also for the President and Vice-President.

representatives to Congress and for President. Note that affirmative legislation could provide some relief here. For example, like Puerto Rico, Guam and the Virgin Islands, the Marianas might seek to have a non-voting Delegate to the House of Representatives. In such a case, the selection of citizenship rather than non-citizen nationality might make the U.S. Government more amenable to the proposal.^{1/}

The first exception to the conclusion that the choice does not make much difference is in the right to take up citizenship in another state. If someone from the Marianas were a U.S. citizen, he could easily establish residency in a state and be entitled to the rights, privileges, immunities and duties of a citizen from that state. If the person were a national, he could travel freely to any state but would have to become a U.S. citizen before he could be a state citizen. However, it apparently requires only six months and a simple procedure to become a citizen.^{2/}

The second exception is the possible application of interstate privileges and immunities clause of the U.S. Constitution. Article IV, Section 2, Clause 1 of the U.S. Constitution provides: "The Citizens of each State

^{1/} American Samoa does not have a non-voting Delegate to the House of Representatives, rather it has only a Delegate-at-Large to the U.S. Government.

^{2/} See discussion earlier at p. ____.

shall be entitled to all Privileges and Immunities of Citizens in the several states."

The exact scope of this clause is unclear. As Chief Justice Vinson wrote for the majority in Toomer v. Witsell:

" . . . [T]he privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also . . . be conducted with due regard for the principle that the States should have considerably leeway in analyzing local evils and in prescribing appropriate cures." 1/

This Constitutional provision will not apply automatically to the Marianas since it refers to "States."^{2/}

However, the U.S. might seek to incorporate this provision some way into legislation providing for the new political status of the Marianas. This was the procedure followed in the cases of Puerto Rico, Guam, and the Virgin Islands.^{3/}

1/ 334 U.S. 385, _____ (1948). In this case, the Court ruled unconstitutional several South Carolina statutes which discriminated against non-resident fishing vessels and non-resident ports; the out-of-state vessels were charged a much higher license fee and vessels licensed to trawl for shrimp in South Carolina had to dock and unload at South Carolina ports.

2/ The clause was given statutory effect in Puerto Rico, Guam, and the Virgin Islands. 48 U.S.C. §§ _____, 1421b(u), 1561.

3/ Ibid.

And, the U.S. Commonwealth proposal to the Micronesians on May 1970 would have similarly applied the provision to Micronesia.^{1/} (Incidentally, the proposal went only one way -- giving non-Micronesian U.S. citizens all privileges and immunities in Micronesia but not saying anything about Micronesian U.S. citizens having these privileges and immunities in the states.)

Whatever its choice between citizenship and non-citizen nationality, the Marianas should oppose the application of the privileges and immunities clause in the area of restrictions on holding land and possibly on operating businesses. The islands' concern about "outsiders"^{2/} dominating land ownership and business might very well necessitate legislation protecting the Marianas people, legislation which might not withstand the test of the privileges and immunities clause. The Marianas opposition could either be through complete refusal to allow the clause to apply or by obtaining specific exceptions which allow these restrictions.^{3/}

1/ Section 201(m).

2/ The Marianas will need to define "outsiders." Does it include: Residents of the Marianas who are Micronesians but not of Marianas descent (e.g., Yapese)? Residents of the Marianas who are U.S. citizens and of Marianas descent? Residents of the Marianas who are U.S. citizens and not of Marianas descent? Non-resident U.S. citizens? Resident aliens? Non-resident aliens?

3/ For example, the Hawaiian Statehood Act contains a provision in the nature of a compact between the United States and the State of Hawaii pursuant to which the Home Lands legislation became a part of the Constitution of the United States.

The Marianas should most obviously oppose the clause if the Marianas people become non-citizen nationals since the provision would protect U.S. citizens from other states against discrimination by the Marianas without providing any protection to the Marianas people in their dealings with the states. (The same reasoning would apply, even if the Marianas people were citizens, if the provision was aimed only toward the Marianas and did not involve a parallel undertaking by the states.^{1/})

Even if the Marianas people decide to become U.S. citizens, the net effect of applying the privilege and immunities provision -- at least in the special areas mentioned earlier -- would be against the interests of the Marianas people. Most of the Marianas people will be far more concerned about business and land ownership in the Marianas. Moreover, each state apparently has few, if any, discriminatory laws against U.S. citizens who are not citizens of another state; the privileges and immunities clause has apparently had the spillover effect of protecting all U.S. citizens.

^{1/} This is apparently the way it applies now to Puerto Rico, Guam, and the Virgin Islands. (See fn. __, p. __.)

3. Two General Considerations

Besides the issues discussed above, there are two general considerations. The first, and an overriding one, is whether the choice between the two individual status alternatives will affect substantially the ability of the Marianas to put restrictions on land alienation or the conduct of business by non-Marianas individuals. Based on the analysis above, the choice between individual status alternatives will not directly affect whether such restrictions are legal or not. Their acceptability will turn instead on either the choice of political status (e.g., unincorporated territory versus commonwealth) or on the attitude the U.S. Congress and the Executive Branch toward such restrictions. (For example, the attitude will be less permissive if the Marianas people receive the "benefits" of citizenship.) These issues are discussed in a separate memo.

The second general observation about the decision between citizenship and non-citizen nationality concerns the general perception of the status of non-citizen national. Although the American Samoans have rebuffed suggestions that they change as a group to U.S. citizenship,^{1/} non-citizen nationality is generally viewed as a less desirable status.

^{1/} Telephone conversations cited at fn. ___, p. ___.

For instance, one article concluded:

"The only non-citizen nationals remaining under the present law are the inhabitants of American Samoa and Swains Island. The diminishing use of the classification may indicate a recognition of the undesirability of maintaining a politically mute, second-class citizenship, even for inhabitants of underdeveloped territories."1/

The psychological impact on the Marianas people of such a prevailing attitude must be assessed. Moreover, a choice of non-citizen nationality would probably lead the U.N. to subject the termination of the trusteeship to even greater scrutiny.

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1/ Note, "Developments in the Law - Immigration and Nationality," 66 Harv. L.R. 342, 703-4 (1953).