

2014

## Force and Effect: A Look at the Passport in the Context of Citizenship

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### Recommended Citation

Claire Benoit, *Force and Effect: A Look at the Passport in the Context of Citizenship*, 82 Fordham L. Rev. 3307 (2014).  
Available at: <http://ir.lawnet.fordham.edu/flr/vol82/iss6/22>

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## NOTES

### FORCE AND EFFECT: A LOOK AT THE PASSPORT IN THE CONTEXT OF CITIZENSHIP

*Claire Benoit\**

*Citizenship provides benefits, guarantees, and protections of great value and emotional significance. The vast importance of citizenship has been referred to as the very “right to have rights.” The law creates a complex framework for how one becomes a citizen, proves citizenship, and potentially loses citizenship. This Note focuses on three documents purporting to establish proof of citizenship: the passport, the certificate of citizenship, and the certificate of naturalization. These three documents are at the center of 22 U.S.C. § 2705, a foundational proof of citizenship statute.*

*Courts are split on whether § 2705 allows a person to conclusively prove citizenship with a passport. The Fifth, Eighth, and Ninth Circuits have interpreted § 2705 to designate a passport as conclusive proof of citizenship; the Third Circuit, however, held that § 2705 designates a passport as conclusive proof of citizenship only if the passport had been issued to a U.S. citizen. This Note argues that § 2705 unambiguously denotes a passport as conclusive proof of citizenship. Nevertheless, this Note also argues that this area is ripe for legislative change based on an ineffective revocation procedure, differing levels of scrutiny, and the potential for conflict created by the three documents.*

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#### INTRODUCTION

Claudia Marquez Moreno was born in Mexico and later adopted by a U.S. citizen.<sup>1</sup> In 1994, Moreno was convicted of possession with the intent to distribute a controlled substance and felony false imprisonment.<sup>2</sup> She was then removed from the United States to Mexico.<sup>3</sup> She reentered the United States a year later without obtaining consent.<sup>4</sup> Although Moreno was issued a U.S. passport, it was issued in error.<sup>5</sup> She stated on her

1. Brief for Appellee, *United States v. Moreno*, 727 F.3d 255 (3d Cir. 2013) (No. 12-1460), 2012 WL 1985755, at \*2.

2. *Id.* at \*2–3.

3. *Id.* at \*3.

4. *Id.*

5. *Id.* In 2008, U.S. Border Patrol in Texas confiscated Moreno's passport. *Id.* In 2011, she applied for a replacement passport stating it had been lost. *Id.* at \*4. The circumstances behind the passport being issued in error are disputed. The government contended Moreno stated that her place of birth was New Mexico on her passport application, but the accompanying documents reflected her actual place of birth was Mexico. *Id.* Moreno argued that it was undisputed that the Department of State granted the passport based on Moreno's birth certificate and not any personal assertion Moreno made that she was born in New Mexico. Reply Brief for Appellant, *Moreno*, 727 F.3d 255 (No. 12-1460), 2012 WL 2564508, at \*1–2.

passport application that her place of birth was New Mexico even though she was born in Mexico.<sup>6</sup> Two years later, Moreno applied for a certificate of citizenship.<sup>7</sup> The Department of Homeland Security (DHS) denied her application for a certificate of citizenship, informing Moreno that she was not a citizen.<sup>8</sup> A year later Moreno was in the custody of U.S. Immigration and Customs Enforcement (ICE) pending deportation, when it was discovered that she had been issued a passport.<sup>9</sup> She was informed she was being released but not because she was a U.S. citizen.<sup>10</sup> While on vacation in St. Thomas, Moreno was questioned by a customs agent regarding her citizenship.<sup>11</sup> During a conversation with another agent, Moreno was elusive and gave three conflicting explanations as to why she only had a photocopy of her passport.<sup>12</sup> The agent determined he could not decipher her status and needed to conduct a more thorough investigation.<sup>13</sup> Upon her return to the United States, she was arrested for falsely representing herself to be a U.S. citizen in violation of 18 U.S.C. § 911.<sup>14</sup> Was this not clearly a false representation—considering Moreno knew she was born in Mexico, had once been deported, and had been informed by ICE she was not a U.S. citizen? Should Moreno’s passport be considered conclusive proof of her citizenship?

The facts presented above are the government’s version.<sup>15</sup> Moreno disputed these facts and presented a different case.<sup>16</sup> The following is her version of the facts.

Moreno was born in Mexico, adopted at a young age by a U.S. citizen, and lived the rest of her life in the United States.<sup>17</sup> Even though Moreno had a valid U.S. passport, knowing her immigration history was unclear, she decided it was best to hire an immigration attorney before going on

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6. Brief for Appellee, *supra* note 1, at \*3.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* Moreno was released pending further investigation into her status and passport. *Id.*

11. *Id.* at \*4–5. Moreno presented the agent with a New Mexico driver’s license. *Id.* at \*5. After, Moreno showed another agent a certificate of live birth from New Mexico, which identified her place of birth as Mexico. *Id.* Additionally, she disclosed a photocopy of her passport and a DHS-issued “Certificate of Identity” that identified her nationality as Mexican. *Id.* She informed the agent that she had been deported in 2006 but was now a U.S. citizen. *Id.*

12. *Id.* Moreno stated that her passport was lost, confiscated, and her fiancé had turned it over to the U.S. Border Patrol. *Id.* The agent found that Moreno’s three conflicting explanations were inconclusive as to the actual status of her passport. *See id.* at \*6.

13. *Id.*

14. *United States v. Moreno*, 727 F.3d 255, 258 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1278 (U.S. 2014). Moreno was charged with knowingly, willfully, and falsely representing herself to be a U.S. citizen when she was not a U.S. citizen at the time of her representation. *Id.*

15. *See* Brief for Appellee, *supra* note 1.

16. *See* Brief for Appellant, *Moreno*, 727 F.3d 255 (No. 12-1460), 2012 WL 1408677.

17. *Id.* at \*4. Moreno was adopted at the age of nine and attended American schools. *Id.* She later had two children of her own who were both born in the United States. *Id.*

vacation to St. Thomas with her fiancé.<sup>18</sup> Moreno's attorney made a Freedom of Information Act (FOIA) request on her behalf requesting DHS documentation about Moreno's citizenship status.<sup>19</sup> DHS responded a mere few weeks before Moreno's trip that her citizenship was "United States."<sup>20</sup> But on Moreno's return trip from vacation in the Virgin Islands, a customs agent stopped and questioned her citizenship.<sup>21</sup> She cooperated with the agent, but the agent determined that he could not decipher her status and needed to conduct a more thorough investigation.<sup>22</sup> Moreno was released.<sup>23</sup> Upon her return to the United States, she was arrested for falsely representing herself to be a U.S. citizen in violation of 18 U.S.C. § 911.<sup>24</sup>

At trial, the government argued that her passport was obtained through fraud.<sup>25</sup> But the State Department's fraud investigator conceded that an official at the State Department had misinterpreted the New Mexico birth certificate and not that it had been altered or obtained through fraud.<sup>26</sup> Was Ms. Moreno at fault for believing she was a U.S. citizen when she held a valid U.S. passport, had a letter from DHS confirming her status, and was innocently traveling with her fiancé on vacation? Should Moreno's passport be considered conclusive proof of her citizenship?

The facts in *United States v. Moreno*,<sup>27</sup> as conveyed by both parties' highly contrasting briefs, underline some of the relevant considerations in answering whether a passport should be conclusive proof of citizenship.

Part I of this Note examines citizenship in a broader sense and the background of 22 U.S.C. § 2705, the statute at issue in *Moreno*. Part II then discusses the split that emerged after the Third Circuit's decision in *Moreno*, which interpreted 22 U.S.C. § 2705 to mean that a passport is only

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18. *Id.*

19. See Brief for Appellant, *supra* note 16, at \*5–6.

20. *Id.* Based on the opposing briefs and case facts, it is unclear whether the response to the FOIA request stated that Moreno was a U.S. citizen or not. While the appellant's brief states the response was that Moreno was a U.S. citizen, the appellee's brief states that Agent Armendariz of DHS informed Moreno she was not a U.S. citizen and referred her passport for further investigation and possible revocation. Brief for Appellee, *supra* note 1, at \*4. The case facts do not shed light on the truth of these two conflicting arguments because the report was not submitted into evidence. *Moreno*, 727 F.3d at 258. The district court judge found the report "was cumulative and could confuse the jury." *Id.* What is clear, however, is that DHS was given the notice and opportunity to look further into Moreno's citizenship prior to her trip.

21. Brief for Appellant, *supra* note 16, at \*4.

22. *Id.* at \*5. She voluntarily proceeded through customs and informed the agent that her status was convoluted. *Id.* at \*4–5. She presented the agent with her New Mexico birth certificate, adoption papers, driver's license, and a copy of her passport. *Id.* She informed the agent that she had once been deported and convicted of illegal reentry. *Id.* at \*5.

23. *Id.*

24. *Id.* The agent admitted that Moreno never attempted to flee and never said anything indicating that she did not honestly believe she was a U.S. citizen. *Id.*

25. *Id.* at \*10.

26. Reply Brief for Appellant, *supra* note 5, at \*2. It is undisputed that the State Department based its citizenship determination on Moreno's birth certificate and not any statements she made. *Id.*

27. 727 F.3d 255 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1278 (U.S. 2014).

conclusive proof of citizenship if it was issued to a U.S. citizen.<sup>28</sup> Before the Third Circuit's decision in *Moreno*, the jurisprudence that a passport is conclusive proof of citizenship was undisputed.<sup>29</sup> Part III argues that the Third Circuit incorrectly interpreted an unambiguous statute that gives passports the force and effect of conclusive proof of citizenship. Part III then argues that this is an area for legislative change based on an ineffective revocation procedure, differing levels of scrutiny, and the potential for contradictory determinations.

### I. THRESHOLD QUESTIONS

This Part begins by discussing the meaning of citizenship in order to put the rest of the policy considerations into context. It then discusses the roots of citizenship within the Constitution. Next, it explains three ways to obtain citizenship, and the ways of proving citizenship. Finally, it looks more closely at the statute in question, 22 U.S.C. § 2705, considering prior cases that may shed light on the statute's meaning regarding passports.

#### A. What Does It Mean To Be a Citizen?

*Black's Law Dictionary* defines a citizen as "a person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections."<sup>30</sup> The more specific definition of who constitutes a citizen of the United States is outlined in the U.S. Constitution, as discussed below.<sup>31</sup>

What then does it actually mean to be a citizen? Some argue that the status of citizenship is actually of little importance.<sup>32</sup> In support of this argument, they point to the Constitution's apparent indifference toward citizenship.<sup>33</sup> They note that the Bill of Rights applies its protections to persons rather than citizens.<sup>34</sup> Another school of thought, however, finds citizenship as powerful as "the right to have rights."<sup>35</sup> This argument is

28. *Id.* at 260.

29. See *Magnuson v. Baker*, 911 F.2d 330 (9th Cir. 1990), *superseded in part by statute*, 8 U.S.C. § 1504 (2012). The holding in *Magnuson* that is relevant to this Note was unaffected by 8 U.S.C. § 1504.

30. BLACK'S LAW DICTIONARY 278 (9th ed. 2009).

31. U.S. CONST. amend. XIV, § 1.

32. See Jon B. Hultman, *Administrative Denaturalization: Is There "Nothing You Can Do That Can't Be [Un]done"?*, 34 LOY. L.A. L. REV. 895, 898–99 (2001) (describing this school of thought); see also Natsu Taylor Saito, *Alien and Non-alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 272 (1997) ("[T]he U.S. Constitution extends many protections to 'persons' rather than citizens, and, except in the immigration context, alienage has been considered a 'suspect classification' requiring strict scrutiny.")

33. Hultman, *supra* note 32, at 899 n.19.

34. *Id.*; see also discussion *infra* Part I.B.1 (pointing to the few places where the Constitution refers to citizenship).

35. Hultman, *supra* note 32, at 900 (quoting *Perez v. Brownwell*, 365 U.S. 44, 64 (1958) (Warren, C.J., dissenting)); see also *Afroyim v. Rusk*, 387 U.S. 253 (1967) (discussing the value of U.S. citizenship); Jonathan Weinberg, *The End of Citizenship?*, 107 MICH. L. REV.

grounded upon rights found both within and outside of the Constitution that are dependent upon citizenship.<sup>36</sup> Encompassed within this “right to have rights” are many legal privileges and emotional values.

From a legal perspective, citizenship is a source of rights and protections under the U.S. legal framework.<sup>37</sup> One of the most substantial rights made expressly dependent on U.S. citizenship is the right not to be removed (deported).<sup>38</sup> While noncitizens are entitled to certain but limited due process rights, a U.S. citizen cannot legally be removed.<sup>39</sup> Additionally, citizenship affords a person many other benefits, such as access to the social safety net, educational rights, employment-related rights, and political participation.<sup>40</sup>

Just as important to many, citizenship is emotionally linked to a sense of personal identity, feelings of belonging, and heritage.<sup>41</sup> Citizenship signifies an allegiance to a country and, in return, grants the citizen the protections of that country.<sup>42</sup> With citizenship also comes the sought-after ability to pass citizenship along to future generations.<sup>43</sup>

The importance of citizenship and the rights it provides are significant considerations. It is in large part due to the essential rights gained by citizenship and the strong connections one establishes in her home country that a court’s interpretation of a proof-of-citizenship statute can have a domino effect, impacting the lives of many.

931, 936 (2009) (reviewing PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION*) (discussing the important rights that come with citizenship and rebutting the argument that globalization has made citizenship less valuable).

36. *Id.* at 899–900. The distinctions in rights between citizens and noncitizens are prevalent in statutory and regulatory schemes. *Id.*

37. See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1373–74 (5th ed. 2009).

38. Hultman, *supra* note 32, at 900–01. “Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.” *Afroyim*, 387 U.S. at 262.

39. Hultman, *supra* note 32, at 901. While citizens are entitled to complete procedural protection under due process rights, noncitizens are subject to the plenary power of Congress. See *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 603 (1889).

40. See KEVIN R. JOHNSON ET AL., *UNDERSTANDING IMMIGRATION LAW* 460 (2009). For example, for one immigrant, Sergio Garcia, citizenship would mean utilizing his law degree and finally being able to become a member of the California bar. Paul Elias, *Immigrant Fights To Become California Lawyer*, ASSOCIATED PRESS, (Sep. 4, 2013, 5:11 PM), [bigstory.ap.org/article/immigrant-fights-become-california-lawyer](http://bigstory.ap.org/article/immigrant-fights-become-california-lawyer).

41. LEGOMSKY & RODRÍGUEZ, *supra* note 37, at 1373–74.

The Founding Fathers themselves were aware of the need to create nationalist feelings of belonging as the basis for creating a common life in accordance with the Constitution in the United States. The Founding Fathers spoke of “nationalist spirit” and “nationalist character” of a people who can live as citizens. Yaffa Zilbershats, *Reconsidering the Concept of Citizenship*, 36 TEX. INT’L L.J. 689, 708 (2001).

42. JOHNSON ET AL., *supra* note 40, at 460.

43. *Id.* Ways in which citizenship can be passed along at birth are further discussed below. See discussion *infra* Part I.B.2.

### B. How Does One Acquire Citizenship?

This section describes where the right to citizenship is granted in the law and the many ways that the law has provided for one to be judged a citizen of the United States. This section begins by considering citizenship in the context of the U.S. Constitution and then looks at some of the more intricate requirements provided by statute and regulation.

#### 1. Constitution

The U.S. Constitution references citizenship in a broad sense.<sup>44</sup> Article I authorizes Congress “to establish a uniform Rule of Naturalization.”<sup>45</sup> In addition, the Fourteenth Amendment grants full national citizenship for “all persons born or naturalized in the United States.”<sup>46</sup> Besides these two sections, the Constitution is largely silent in regard to citizenship.<sup>47</sup> As a result, this area of law has been filled in by statute and regulation.<sup>48</sup> Congress has exercised its Article I power to create a system for lawful immigrants to be naturalized and become citizens.<sup>49</sup> Thus, statutory law has filled in many of the blanks that the Constitution left open, creating the three main categories of citizenship discussed below.

#### 2. Citizenship at Birth, Derivative Citizenship, and Naturalization

Those born within the United States and subject to its jurisdiction acquire citizenship at birth.<sup>50</sup> This category includes persons born to noncitizens within the United States.<sup>51</sup>

Derivative citizenship, or citizenship by descent, can also be automatically acquired.<sup>52</sup> There are, however, different requirements based on one’s residence. A person born abroad and living *in* the United States can automatically acquire citizenship through derivation if: (1) the person is born to at least one parent who is a U.S. citizen, whether by birth or naturalization; (2) the child is under the age of eighteen at the time the parent acquired citizenship; and (3) the child resides with the parent in the

44. See U.S. CONST. amend. XIV, § 1.

45. *Id.* art. I, § 8, cl. 4.

46. *Id.* amend. XIV, § 1. This portion of the Fourteenth Amendment was enacted to eliminate the denial of citizenship to freed slaves under *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 528 (1856). See JOHNSON ET AL., *supra* note 40, at 92.

47. JOHNSON ET AL., *supra* note 40, at 92. The Constitution refers to citizenship in Article II, Section 1, Clause 4, stating, “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 the President.” U.S. CONST. art. II, § 1, cl. 4. There are other enumerated and implied powers that have been interpreted as granting power to regulate citizenship. JOHNSON ET AL., *supra* note 40, at 92–101.

48. See JOHNSON ET AL., *supra* note 40, at 93; see also discussion *infra* Part I.B.2.

49. JOHNSON ET AL., *supra* note 40, at 93.

50. 8 U.S.C. § 1401(a) (2012). This group also includes other variations, including those born to certain tribes and in U.S. outlying possessions. *Id.* § 1401(b)–(c).

51. *Id.* § 1401(a).

52. See *id.*



United States as a lawful permanent resident.<sup>53</sup> A person born abroad and living *outside of* the United States can acquire citizenship through derivation if: (1) the person is born to at least one parent who is a U.S. citizen, whether by birth or naturalization; (2) the citizen parent has been present in the United States for at least five years, two of which were after attaining the age of fourteen; (3) the child is under the age of eighteen at the time the parent acquires citizenship; (4) the child is living outside of the United States in the custody of the citizen parent; and (5) the child is temporarily lawfully present in the United States.<sup>54</sup>

A person can also acquire citizenship through naturalization (nationality conferred after birth). As discussed above, the Constitution grants Congress the authority to establish a uniform rule of law for naturalization.<sup>55</sup> Congress exercised this authority by creating eight statutory categories for naturalization: (1) lawful permanent residence; (2) residence and physical presence; (3) good moral character; (4) age; (5) English language; (6) knowledge of civics; (7) political or ideological requirements; and (8) attachment of the principles of the U.S. Constitution.<sup>56</sup> These eight requirements have been frequently tightened or loosened in response to national feelings toward immigration and certain events.<sup>57</sup> Once conferred, citizenship through naturalization is a constitutional right equal to that of citizenship at birth.<sup>58</sup> To illuminate this point, the U.S. Supreme Court defined naturalization as “the act of adopting a foreigner, and clothing him with the privileges of a native citizen.”<sup>59</sup>

Once citizenship is obtained, events may arise that require proof of one’s citizenship.

### C. How Does One Prove Citizenship?

This section looks at the different application procedures to obtain proof of citizenship. It then considers the revocation process. Finally, it presents 22 U.S.C. § 2705, equating the force and effect of a passport with that of a certificate of naturalization and a certificate of citizenship. Interpretations of this statute are the focus of the conflict discussed in Part II.

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53. *Id.* § 1431(a).

54. *Id.* § 1433(a). To acquire citizenship this way, the citizen parent must fill out the application on the child’s behalf. *Id.*

55. *See supra* Part I.B.1.

56. *See* 8 U.S.C. § 1427; *id.* § 1423. The purpose of these requirements is “to promote and maintain cohesion within the national community, as well as to promote the political assimilation of foreign nationals into U.S. democracy.” JOHNSON ET AL., *supra* note 40, at 475–76. There are many other ways that a person can be naturalized that are beyond the scope of this Note. *See* LEGOMSKY & RODRIGUEZ, *supra* note 37, at 1315.

57. JOHNSON ET AL., *supra* note 40, at 475.

58. *Id.* One exception to this is that naturalized citizens cannot become President. U.S. CONST. art. II, § 1, cl. 4.

59. *Boyd v. Nebraska*, 143 U.S. 135, 162 (1892).

### 1. Obtaining Proof

Those born within the United States who obtained a U.S. birth certificate are able to use this certificate as proof of citizenship.<sup>60</sup> However, a birth certificate is not applicable to all citizens and, in some instances, cannot be garnered.<sup>61</sup> Therefore, other forms of proof are necessary.

#### *a. Certificate of Citizenship and Certificate of Naturalization*

A certificate of naturalization is granted to a person whom the government determined has naturalized.<sup>62</sup> A person applying for a certificate of naturalization is, in effect, applying for citizenship.<sup>63</sup> The person must show that they have met the statutory requirements and would like to be granted the status of citizen.<sup>64</sup> Alternatively, a person applying for a certificate of citizenship is also applying for proof of citizenship based on a status that he or she already claims to have.<sup>65</sup> The DHS website advises that a certificate of citizenship is only provided to those who are “born abroad but are U.S. citizens at birth through their parents, or who became citizens after birth but before the age of 18.”<sup>66</sup> Lastly, a passport applicant is also applying based on a status they already claim to have. However, he or she is likely applying to obtain a travel document, not proof of citizenship.<sup>67</sup>

The U.S. Attorney General and DHS are entrusted with making regulations that prescribe the scope of the examination of an applicant for naturalization and that person’s eligibility for citizenship.<sup>68</sup> An employee

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60. U.S. DEP’T OF HOMELAND SEC., A4, I AM A U.S. CITIZEN, HOW DO I GET PROOF OF MY U.S. CITIZENSHIP? (2013), available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/A4en.pdf>.

61. See discussion *supra* Part I.B.2.

62. U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS POLICY MANUAL ch. 3 (2014), available at <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartK-Chapter3.html> (explaining that the application for the certificate confirms the naturalization process). “The term ‘naturalization’ means the conferring of nationality of a state upon a person after birth, by any means whatsoever.” 8 U.S.C. § 1101 (2012).

63. See Form N-400, Instructions for Form N-400, Application for Naturalization (Sept. 13, 2013), available at <http://www.uscis.gov/sites/default/files/files/form/n-400instr.pdf> (listing eligibility requirements).

64. *Id.*

65. See Form N-600, Instructions for Form N-600, Application for Certificate of Citizenship (Dec. 16, 2012), available at <http://www.uscis.gov/sites/default/files/files/form/n-600instr.pdf> (advising who should file this form).

66. *N-600, Application for Certificate of Citizenship Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/forms/n-600-application-certificate-citizenship-frequently-asked-questions> (last visited Apr. 26, 2014). A certificate of citizenship is a substitute for proof, as a birth certificate is for a person born within the United States.

67. *First Time Applicants*, U.S. DEP’T ST. U.S. PASSPORTS & INT’L TRAVEL, <http://travel.state.gov/content/passports/english/passports/new.html> (last visited Apr. 26, 2014).

68. 8 U.S.C. § 1443(a)–(b) (2012). For the remainder of this Note, references to the attorney general can be substituted with DHS. In response to the terrorist attacks of September 11, 2001, the federal government passed the Homeland Security Act of 2002,

designated by the attorney general must conduct a personal investigation of the applicant in the vicinity of where the applicant has lived and worked.<sup>69</sup> In accordance with the eight statutory requirements discussed above, the attorney general's examination is limited to considering the applicant's residence, physical presence in the United States, good moral character, understanding and attachment to the principles of the Constitution, fluency in English, and other legal qualifications.<sup>70</sup> An applicant must file with the attorney general a sworn application in writing and a declaration of intention.<sup>71</sup>

To apply for a certificate of naturalization, an applicant must fill out a Form N-400.<sup>72</sup> This form requires supplementary information, such as the person's Permanent Resident Card, photographs, and tax data.<sup>73</sup> Additionally, the form asks for evidence of a spouse's citizenship if that is the basis for naturalization.<sup>74</sup> The applicant is also asked if she has taken a trip outside of the United States for more than six months.<sup>75</sup> There are extensive requests concerning possible arrests and convictions.<sup>76</sup> The fee for this form is \$680.<sup>77</sup>

In order to apply for a certificate of citizenship, an applicant must fill out a Form N-600.<sup>78</sup> This form includes questions concerning eligibility, personal information, information about the applicant's biological or adoptive parents, possible military service questions, and questions regarding presence in the United States.<sup>79</sup> The typical fee for this form is \$600.<sup>80</sup>

Many of the questions on these forms and the examination itself require evidentiary proof.<sup>81</sup> Some of the suggested documents include a birth certificate, certificate of naturalization, certificate of citizenship, passport,

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Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C.). This act dismantled the former Immigration and Naturalization Service (INS) and created DHS. 6 U.S.C. § 111(a). DHS consists of three components, which replace the former INS: ICE, Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/about-us/our-history> (last visited Apr. 26, 2014).

69. 8 U.S.C. § 1446(a). The attorney general may use his discretion to waive this investigation in certain cases. *Id.*

70. *Id.* § 1443(a). The attorney general is also responsible for furnishing necessary forms, issuing certificates of naturalization or citizenship, and administering necessary oaths and depositions. *Id.* § 1443(c).

71. *Id.* § 1445(a).

72. Form N-400, Application for Naturalization (Sept. 13, 2013), available at <http://www.uscis.gov/sites/default/files/files/form/n-400.pdf>.

73. *Id.*

74. *Id.* This proof relates to the statutory eligibility requirements. See 8 U.S.C. § 1427.

75. Form N-400, *supra* note 72.

76. *Id.*

77. *Id.* There are exceptions where the fee is lessened or waived. *Id.*

78. Form N-600, Application for Citizenship (Dec. 16, 2012), available at <http://www.uscis.gov/sites/default/files/files/form/n-600.pdf>.

79. *Id.*

80. *Id.* There are exceptions where the fee is lessened or waived. *Id.*

81. See Form N-600, *supra* note 78 (listing types of proof); see also Form N-400, *supra* note 72 (same).

marriage certificate, and tax returns.<sup>82</sup> Additionally, supplementary proof, such as baptismal records, school records, census reports, and affidavits, can be used.<sup>83</sup>

A denied applicant seeking naturalization may request a hearing with an immigration officer.<sup>84</sup> Additionally, if a determination is not made before the end of a 120-day period after the date on which the examination is conducted, the applicant may bring the case before the district court in which the applicant resides for a hearing.<sup>85</sup> As discussed below, the only way to revoke citizenship of a naturalized U.S. citizen is provided in 8 U.S.C. § 1451.<sup>86</sup>

### *b. Passport*

The secretary of state has the exclusive power to issue passports under rules designated by the president.<sup>87</sup> In *United States v. Johnson*, the Ninth Circuit held that this power is broad.<sup>88</sup> Based on this power, the secretary of state created a uniform regulatory system for applying for a passport.<sup>89</sup>

A person applying for a passport must fill out Form DS-11, which requires a submission of proof of U.S. citizenship.<sup>90</sup> For a person born within the United States, this proof would be a birth certificate.<sup>91</sup> The applicant must also present identification, provide a passport photo, and pay the applicable fee.<sup>92</sup>

Additionally, a person born outside of the United States must submit evidence that he or she meets all of the statutory requirements for acquisition of U.S. citizenship or noncitizen nationality.<sup>93</sup> A national is either “(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”<sup>94</sup> Types of evidence that can be used include a certificate of naturalization, a certificate of citizenship, or a consular report of birth abroad.<sup>95</sup> Similar secondary evidence to certificates of citizenship and

82. See Form N-600, *supra* note 78; Form N-400, *supra* note 72.

83. See Form N-600, *supra* note 78; see also Form N-400, *supra* note 72.

84. 8 U.S.C. § 1447 (2012).

85. *Id.*

86. See, e.g., *Gorbach v. Reno*, 219 F.3d 1087, 1089 (2000) (deciding “whether the power to confer citizenship through the process of naturalization necessarily includes the power to revoke that citizenship”).

87. 22 U.S.C. § 211a.

88. *United States v. Johnson*, 735 F.2d 373, 375 (9th Cir. 1984) (“Although delegation of authority is not unlimited, the Secretary of State does have broad power to control the use of passports.”).

89. 22 C.F.R. § 51 (2014).

90. *First Time Applicants*, *supra* note 67. A different procedure is used to renew a passport than to obtain a passport for the first time. *Id.*

91. *Id.*

92. *Id.*

93. 22 C.F.R. § 51.43.

94. 8 U.S.C. § 1101(a)(22) (2012).

95. 22 C.F.R. § 51.43.

certificates of naturalization can be used for a passport application as well.<sup>96</sup>

The process of applying for a passport is often faster and less complex than applying for a certificate of naturalization or a certificate of citizenship.<sup>97</sup> A guide produced by DHS advises that one may apply for a certificate of citizenship but cautions “you may find applying for a passport to be more convenient because it also serves as a travel document and could be a faster process.”<sup>98</sup> The number of Americans who obtained passports from the years 1974 to 2004 increased by more than 300 percent.<sup>99</sup>

Over the past few years, the Government Accountability Office (GAO) voiced concerns about how easy it is to obtain a fraudulent passport.<sup>100</sup> A team of GAO investigators applied for seven passports using fraudulent information—and obtained five of them.<sup>101</sup> GAO was able to prove that the U.S. Department of State does not consistently use fraud detection procedures, such as data verification and counterfeit detection, in its passport issuance process.<sup>102</sup>

## 2. Losing Proof

Once documentary proof such as a passport, a certificate of citizenship, or a certificate of naturalization is obtained, there are limited means by which these documents can be revoked. Citizenship acquired through birth or naturalization can be lost through a process called loss of citizenship.<sup>103</sup> The Supreme Court considers loss of citizenship a loss of a right and

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96. *Secondary Evidence of Identification*, U.S. DEP'T ST. U.S. PASSPORTS & INT'L TRAVEL, [http://travel.state.gov/passport/get/secondary\\_evidence/secondary\\_evidence\\_4314.html](http://travel.state.gov/passport/get/secondary_evidence/secondary_evidence_4314.html) (last visited Apr. 26, 2014). The website recommends presenting as many forms of secondary evidence as possible. *Id.* The example listed is: “Social Security Card + Credit Card + Employee ID + Library Card.” *Id.* The website also lists requirements for using an identifying witness as proof. *Id.* This covers only the proof of citizenship portion of the application. *Id.* Additionally, an applicant must fill out Form DS-11, submit the form in person, present identification, submit a photocopy of the identification, pay the applicable fee, and provide a passport photo. *Id.*

97. U.S. DEP'T OF HOMELAND SEC., *supra* note 63.

98. *Id.*

99. *Passport Statistics: The Number of American Passports Issued and in Circulation*, U.S. PASSPORT SERVICE GUIDE, <http://www.us-passport-service-guide.com/passport-statistics.html> (last visited Apr. 26, 2014). In 1996, 5,547,693 passports were issued. *Id.* In 2012, as many as 13,125,829 passports were issued. *Id.*

100. See U.S. GOV'T ACCOUNTABILITY OFFICE, STATE DEPARTMENT: UNDERCOVER TESTS SHOW PASSPORT ISSUANCE PROCESS REMAINS VULNERABLE TO FRAUD (2009), available at <http://www.gao.gov/assets/130/125189.pdf>; see also John Solomon, *Undercover Feds Able To Easily Obtain Fraudulent Passports*, ABC NEWS (July 29, 2010), <http://abcnews.go.com/Blotter/undercover-fes-easily-obtain-fraudulent-passports/print?id=11274031>.

101. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 100. The State Department did not detect a fake driver's license, a sixty-two-year-old person using a recently obtained social security number, or fake identification using the name of a deceased person. Solomon, *supra* note 100.

102. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 100.

103. JOHNSON ET AL., *supra* note 40, at 484. This process was formerly referred to as expatriation. *Id.*

therefore affords it certain protections stemming from the Constitution.<sup>104</sup> A person loses citizenship status by voluntarily performing one of the following acts with the intention of renouncing U.S. nationality: (1) obtaining naturalization in another country; (2) taking an oath of allegiance for another country; (3) serving in the armed forces of a foreign state as an officer or in any capacity when those forces are engaged in hostilities against the United States; (4) accepting a government post with another state; (5) formally renouncing nationality with the United States; (6) making a written renunciation of nationality with the United States; or (7) committing treason or attempting to overthrow the government.<sup>105</sup>

In addition to loss of citizenship, a naturalized U.S. citizen may lose citizenship status through a procedure referred to as revocation of naturalization.<sup>106</sup> Revocation can occur through action taken by either the attorney general or by a naturalization court.<sup>107</sup> The statute 8 U.S.C. § 1451 governs the procedure for revoking certificates of naturalization and certificates of citizenship by a court of naturalization.<sup>108</sup> The revocation process takes place in the jurisdiction in which the naturalized citizen resides.<sup>109</sup> The statute 8 U.S.C. § 1453 governs revocation by the attorney general.<sup>110</sup>

Both statutes limit grounds for revocation to serious offenses.<sup>111</sup> Grounds for revocation include citizenship that has been “illegally procured or . . . procured by concealment of a material fact or by willful misrepresentation.”<sup>112</sup> The government has the burden of proving: “(1) that the naturalized citizen concealed or misrepresented a fact; (2) that the misrepresentation or concealment was willful; (3) that the fact was material; and (4) that the naturalized citizen procured citizenship as a result of the misrepresentation or concealment.”<sup>113</sup> Concealment means that the defendant in a denaturalization proceeding has sworn under oath that the person lacks a certain record or has never done certain actions.<sup>114</sup> This often occurs when the defendant failed to list a record or criminal action on the naturalization application.<sup>115</sup> Misrepresentation means that the person has lied or given false answers to a naturalization application.<sup>116</sup> It is

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104. *Afroyim v. Rusk*, 387 U.S. 253, 267–68 (1967) (“Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country.”).

105. 8 U.S.C. § 1481(a) (2012).

106. *Id.* § 1451.

107. *Id.* §§ 1451, 1453.

108. *Id.* § 1451(g).

109. *Id.* § 1451(a).

110. *Id.* § 1453.

111. *Id.* §§ 1451, 1453.

112. *Id.* § 1451(a).

113. JOHNSON ET AL., *supra* note 40, at 490.

114. *Id.*

115. *Id.*

116. *Id.*

sufficient that the defendant knowingly concealed or misrepresented information without needing to prove intent to defraud.<sup>117</sup> To be material, the concealment or misrepresentation must only “be predictably capable of affecting” or have a “natural tendency to influence” the agency’s determinations.<sup>118</sup>

As the Ninth Circuit pointed out, neither statute gives the governmental body the power to revoke a certificate merely because they have “second thoughts” about the initial issuance.<sup>119</sup> Citizenship should only be revoked when the evidence is “clear, unequivocal, and convincing” and does not leave “the issue in doubt.”<sup>120</sup> This strict procedural standard reflects the courts’ balancing of individual rights concerns against Congress’s naturalization powers.<sup>121</sup>

The secretary of state has the power to revoke a passport if the document was obtained through illegal, fraudulent, or erroneous means.<sup>122</sup> The governing statute is 8 U.S.C. § 1504.<sup>123</sup> The process under § 1504 requires notice and the availability of a prompt postcancellation hearing, but it does not require a prior hearing.<sup>124</sup>

These revocation procedures are important considerations in determining the force and effect of a passport, certificate of naturalization, and a certificate of citizenship.

### 3. The Statute Equating Force and Effect

This section discusses 22 U.S.C. § 2705, whose interpretation created the circuit split that is the focus of Part II. Section 2705 not only affects citizenship but also deals directly with the force and effect of the three documentary forms of proof discussed above.

Prior to the enactment of § 2705, a passport was regarded as some evidence of U.S. citizenship.<sup>125</sup> In *Peignand v. INS*, the court had to decide whether the respondent was estopped from denying the petitioner’s

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117. *Id.* at 491.

118. *Kungys v. United States*, 485 U.S. 759, 771 (1988). This standard stems from Justice Scalia’s plurality opinion. *JOHNSON ET AL.*, *supra* note 40, at 491. The case produced five different decisions that still leave the area of law a little unclear. *Id.*

119. *Magnuson v. Baker*, 911 F.2d 330, 335 (9th Cir. 1990), *superseded in part by statute*, 8 U.S.C. § 1504 (2012). The court found that this limitation reflected the importance of citizenship. *Id.* It observed that given all of the rights citizenship affords a person, it is rational that Congress would limit revocation of these rights. *See id.*

120. *Fedorenko v. United States*, 449 U.S. 490, 505 (1981) (quoting *Costello v. United States*, 365 U.S. 265, 269 (1961)). The Court uses this standard because of the valuable status of citizenship and the devastating consequences that ensue when it is revoked. *Id.*

121. *JOHNSON ET AL.*, *supra* note 40, at 490.

122. 8 U.S.C. § 1504(a).

123. *Id.* *Magnuson v. Baker* held that the Secretary of State can revoke a passport only if there is a prior hearing and the revocation is based on fraud, misrepresentation, or some other exceptional ground. *See Magnuson*, 911 F.2d at 334. However, this case was decided before § 1504 was signed into law. *Id.*

124. 8 U.S.C. § 1504.

125. *See Gillars v. United States*, 182 F.2d 962, 981 (D.C. Cir. 1950) (finding that a passport was some proof of citizenship but not conclusive).

citizenship based on his passport.<sup>126</sup> The court pointed to a history of cases finding that passports were “not competent evidence of the fact of citizenship.”<sup>127</sup> The court reasoned, “A passport is some, though not conclusive, evidence of citizenship.”<sup>128</sup> This decision was based on the statutory law at the time of the case, which did not provide for a uniform means of issuing passports.<sup>129</sup>

Section 2705 awards passports greater evidentiary weight than was given at the time of *Peignand*.<sup>130</sup> There is no legislative history pertaining to this statute.<sup>131</sup> *Moreno* noted that “the statute was enacted without controversy in 1982 after a Congressman sent a question to the State Department and received a response stating that the State Department and INS would support legislation to make a passport evidence of citizenship.”<sup>132</sup> In relevant part, 22 U.S.C. § 2705 states:

The following documents shall have the *same force and effect* as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction:

- (1) A passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States.<sup>133</sup>

This statute was enacted in 1998 and was consistently interpreted to give passports the same force and effect as certificates of citizenship and certificates of naturalization before the Third Circuit’s decision in *Moreno*.<sup>134</sup> The terms “force” and “effect” used in this statute purport to grant passports the same evidentiary weight as certificates of citizenship

126. *Peignand v. INS*, 440 F.2d 757, 760 (1st Cir. 1971) (quoting *Urtetiqui v. D’Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835)).

127. *Id.* The First Circuit cited in support of its position: *Urtetiqui*, 34 U.S. (9 Pet.) at 699; *Gillars*, 182 F.2d at 981; *Miller v. Sinjen*, 289 F. 388, 394 (8th Cir. 1923). The Supreme Court advised, “There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect. . . . [S]ome evidence of citizenship is required, by the secretary of state . . . . This, however, is entirely discretionary with him.” *Urtetiqui*, 34 U.S. (9 Pet.) at 699.

128. *Gillars*, 182 F.2d at 981.

129. See 22 U.S.C. § 212. Section 212 reads, “No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.” *Id.*

130. Compare *Magnuson v. Baker*, 911 F.2d 330, 336 (9th Cir. 1990) (finding a passport was conclusive proof of citizenship based on § 2705), *superseded in part by statute*, 8 U.S.C. § 1504 (2012), with *Peignand*, 440 F.2d 757 (finding a passport not competent evidence of citizenship), and *Gillars*, 182 F.2d 962 (finding a passport was some but not conclusive evidence of citizenship).

131. *United States v. Moreno*, 727 F.3d 255, 259–60 n.2 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1278 (U.S. 2014).

132. *Id.* (citing *Magnuson*, 911 F.2d at 334 n.8).

133. 22 U.S.C. § 2705 (emphasis added).

134. See, e.g., *Vana v. Attorney Gen. of the U.S.*, 341 F. App’x 836, 839 (3d Cir. 2009); *Magnuson*, 911 F.2d at 334; *Edwards v. Bryson*, 884 F. Supp. 2d 202, 205 (E.D. Pa. 2012), *rev’d* 536 F. App’x 217 (3d Cir. 2013); *United States v. Clarke*, 628 F. Supp. 2d 15, 22 (D.D.C. 2009); *In re Villanueva*, 19 I. & N. Dec. 101, 101 (B.I.A. 1984).



and certificates of naturalization.<sup>135</sup> The Third Circuit took a different approach in *Moreno*<sup>136</sup> and has since reaffirmed this interpretation in *Edwards v. Bryson*.<sup>137</sup> The law in this area is now unclear and a circuit split has resulted.

#### 4. Force and Effect of Certificates of Naturalization and Certificates of Citizenship

Section 2705 equates the force and effect of a passport with that of a certificate of naturalization and a certificate of citizenship.<sup>138</sup> Therefore, cases interpreting such documents shed light on the intended meaning of § 2705. The Board of Immigration Appeals stated that “unless void on its face, an administrative certificate of citizenship is conclusive proof of United States citizenship absent its direct cancellation.”<sup>139</sup> Similarly, numerous Supreme Court decisions have found that certificates of naturalization and certificates of citizenship can only be revoked through revocation procedures and cannot be collaterally attacked.<sup>140</sup> Therefore, both certificates of citizenship and certificates of naturalization are considered conclusive proof of citizenship unless the proper revocation procedures are taken.<sup>141</sup>

## II. IS A PASSPORT CONCLUSIVE PROOF OF CITIZENSHIP UNDER § 2705?

Part II of this Note focuses on a circuit split that arose when the Third Circuit, in *United States v. Moreno*, interpreted § 2705 in a way that contradicted the previous interpretation of the Ninth Circuit. The Third Circuit held that a passport is only conclusive proof of citizenship when the holder is a U.S. citizen. Previously, the Ninth Circuit held that a passport is conclusive proof of citizenship. Part II examines the analysis in these two cases creating the split, along with a gloss that the Eighth and Fifth Circuits added to the jurisprudence, as well as administrative decisions shedding light on the reasoning.

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135. *Magnuson*, 911 F.2d at 333.

136. 727 F.3d at 260 (finding a passport was only conclusive proof of citizenship if the holder was a citizen at the time of issuance).

137. 536 F. App'x 217 (3d Cir. 2013).

138. 22 U.S.C. § 2705 (2012).

139. *In re Villanueva*, 19 I. & N. Dec. at 101. This case is discussed at greater lengths in Part II. See discussion *infra* Part II.F.

140. See *Johannessen v. United States*, 225 U.S. 227 (1912); *Mut. Benefit Life Ins. Co. v. Tisdale*, 91 U.S. 238, 245 (1875); *Spratt v. Spratt*, 29 U.S. (4 Pet.) 393 (1830); *MacKay v. McAlexander*, 268 F.2d 35 (9th Cir. 1959), *cert. denied*, 362 U.S. 961 (1960).

141. *In re Villanueva*, 19 I. & N. Dec. at 102.

*A. Third Circuit: Only If*

The facts presented in the Introduction are based on the briefs used by each side in the Third Circuit case *United States v. Moreno*.<sup>142</sup> Customs agents stopped Moreno when she was entering the United States after a brief vacation in St. Thomas. When asked about her citizenship, she responded that she was a citizen and presented a certificate of live birth from New Mexico, a New Mexico driver's license, and a photocopy of her passport.<sup>143</sup> She was arrested upon return to the United States.<sup>144</sup>

In this case, Moreno appealed her conviction for falsely and willfully representing herself as a U.S. citizen in violation of 18 U.S.C. § 911.<sup>145</sup> The three elements of a § 911 violation are “(1) that the defendant knowingly and falsely represented herself to be a United States citizen, (2) that she was not a citizen at the time of her representation, and (3) that she made the false representation willfully.”<sup>146</sup> Moreno argued, on appeal, that her valid passport constituted conclusive proof of U.S. citizenship under 22 U.S.C. § 2705.<sup>147</sup>

Deciding whether a passport constitutes conclusive proof of citizenship under § 2705, the Third Circuit held that “a passport constitutes conclusive proof of citizenship under 22 U.S.C. § 2705 *only* if it has been issued to a U.S. citizen.”<sup>148</sup> In establishing this holding, the Third Circuit first looked to the statutory text.<sup>149</sup> The court found that the text indicated that two independent conditions are needed for a person to establish conclusive proof of citizenship: “(1) having a valid passport and (2) being a U.S. citizen.”<sup>150</sup> The Third Circuit, finding these two conditions independent of each other, held that Moreno only satisfied the first requirement and affirmed her conviction in the district court.<sup>151</sup>

While the Third Circuit acknowledged the long line of cases that Moreno used in support of her argument that her passport constituted conclusive proof of citizenship, the court found it was not bound by these cases.<sup>152</sup>

142. 727 F.3d 255 (3d Cir. 2013).

143. *Moreno*, 727 F.3d at 258. She was questioned upon arriving back to St. Thomas after taking a cruise to a neighboring island. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 259. Moreno argued that the district court should have granted her motion for acquittal based on her valid passport under 22 U.S.C. § 2705 and should have instructed the jury that her passport was conclusive proof of citizenship. *Id.*

148. *Id.* (emphasis added).

149. *Id.*

150. *Id.* at 260.

151. *Id.* at 261.

152. *Id.* at 260. One of the cases Moreno used to support her argument was a Third Circuit case that held that a passport was conclusive proof of citizenship. *Vana v. Attorney Gen. of U.S.*, 341 F. App'x 836, 839 (3d Cir. 2009). But the court observed that the unpublished decision was not precedential. *Moreno*, 727 F.3d at 264. Moreno also argued the following cases supported her position: *Magnuson v. Baker*, 911 F.2d 330, 333 (9th Cir. 1990), *superseded in part by statute*, 8 U.S.C. § 1504 (2012); *Edwards v. Bryson*, 884 F.

The Third Circuit instead found the statute unambiguous and observed that an alternative interpretation would read the phrase “to a citizen of the United States” out of the statute altogether.<sup>153</sup>

The court then looked past the text to the context and history.<sup>154</sup> The court concluded that the dissent’s interpretation would give the secretary of state power beyond that which it historically had in the context of determining citizenship.<sup>155</sup> The State Department historically had the authority to grant and revoke passports but not to determine citizenship.<sup>156</sup>

The dissenting judge argued that there were different reasons behind the majority’s conclusion.<sup>157</sup> Judge Smith accused the majority of rewriting the statute based on bad facts.<sup>158</sup> In addition to not agreeing with the majority’s underlying reasons, Judge Smith identified what he called a “critical flaw” in the majority’s holding.<sup>159</sup> “[A] person can use a passport as conclusive evidence that she is a U.S. citizen only if she first proves that she is a U.S. citizen. At that point, of course, conclusive evidence of citizenship is unnecessary, and so the statute becomes inoperative.”<sup>160</sup>

In response to the argument that his interpretation would read the phrase “to a citizen of the United States” out of the statute altogether, Judge Smith pointed out that passports are also issued to noncitizens “owing allegiance . . . to the United States.”<sup>161</sup> Therefore, this phrase is included to distinguish noncitizen nationals and those that the State Department determined were citizens.<sup>162</sup> The dissent then pointed out that no other circuit had held that the statute requires a showing that the passport holder is a U.S. citizen.<sup>163</sup> Lastly, Judge Smith argued that § 2705 strengthens the State Department’s authority over passports by taking discretion out of the hands of the courts, which would be consistent with congressional intent to centralize passport authority in the secretary of the state.<sup>164</sup>

Judge Smith acknowledged in his dissent that all of the judges on the Third Circuit agreed Moreno obtained her passport through fraud.<sup>165</sup> But he argued that this fact should not change the meaning of the statute.<sup>166</sup> Therefore, while the majority interpreted the statute to make passports conclusive proof of citizenship only if the holder is a U.S. citizen, Judge

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Supp. 2d 202, 206 (E.D. Pa. 2012); *United States v. Clarke*, 628 F. Supp. 2d 15, 21 (D.D.C. 2009); *In re Villanueva*, 19 I. & N. Dec. 101, 103 (B.I.A. 1984).

153. *Moreno*, 727 F.3d at 260.

154. *Id.* at 260–61.

155. *Id.* at 261.

156. *Id.*

157. *Id.* at 263–65 (Smith, J., dissenting).

158. *Id.* at 263. The suggestion that policy reasons may have played a part in this split is further discussed below. *See infra* Part III.

159. *Moreno*, 727 F.3d at 263 (Smith, J., dissenting).

160. *Id.*

161. *Id.* at 264 (quoting 22 U.S.C. § 212 (2012)).

162. *Id.*

163. *Id.* at 264.

164. *Id.* at 264–65.

165. *Id.* at 263.

166. *Id.*

Smith overlooked what he found to be clearly fraudulent behavior in obtaining the passport and concluded that a passport is conclusive proof of citizenship because of the text of the statute.<sup>167</sup>

The Third Circuit has since *reaffirmed Moreno's* holding in *Edwards v. Bryson*.<sup>168</sup> *Edwards* originated in the Eastern District of Pennsylvania and was initially decided contrary to *Moreno*.<sup>169</sup> On appeal, after *Moreno* was decided, the Third Circuit once again took the chance to reiterate its interpretation of § 2705.<sup>170</sup>

Both parties admitted that Edwards was not a citizen at the time he obtained his passport.<sup>171</sup> Instead, Edwards argued that he was a U.S. citizen based on his possession of a U.S. passport.<sup>172</sup> On appeal, however, the Third Circuit summarily reversed the district court's ruling, finding it inconsistent with the decision in *Moreno*.<sup>173</sup>

### B. Ninth Circuit: Conclusive Proof

Before the Third Circuit's ruling in *Moreno*, the Ninth Circuit's interpretation of § 2705 was influential and undisputed.<sup>174</sup> In *Magnuson v. Baker*,<sup>175</sup> the Ninth Circuit held that a passport is conclusive proof of citizenship.<sup>176</sup> While this case was primarily about revocation of passports, the Ninth Circuit's reasoning was based on the "force and effect" language from § 2705.<sup>177</sup> *Magnuson* was cited consistently in district court cases and administrative proceedings as the rule of law.<sup>178</sup> Even the Eastern District of Pennsylvania in *Bryson*, which was ultimately overturned by the Third Circuit in *Edwards*, relied on the holding from *Magnuson*.<sup>179</sup>

In *Magnuson*, the defendant, Myers, was born in Canada but fled to the United States after being convicted of tax evasion.<sup>180</sup> He based his claim of citizenship on derivative citizenship, arguing that his father was a

167. *Id.*

168. See *Edwards v. Bryson*, 536 F. App'x 217, 219 (3d Cir. 2013).

169. *Edwards v. Bryson*, 884 F. Supp. 2d 202, 205–06 (E.D. Pa. 2012), *rev'd*, 536 F. App'x 217 (3d Cir. 2013).

170. See *Edwards*, 536 F. App'x at 219.

171. *Id.*

172. *Id.*

173. *Id.* The district court ruling was inconsistent with *Moreno* because the district court had held the expired passport was conclusive proof of citizenship even though there was no evidence that Edwards was actually a citizen when the passport was issued. *Id.*

174. See, e.g., *Vana v. Attorney Gen. of the U.S.*, 341 F. App'x 836 (3d Cir. 2009); *Magnuson v. Baker*, 911 F.2d 330 (9th Cir. 1990), *superseded in part by statute*, 8 U.S.C. § 1504 (2012); *Edwards*, 884 F. Supp. 2d 202; *United States v. Clarke*, 628 F. Supp. 2d 15 (D.D.C. 2009); *In re Applicant*, 2006 WL 5915106, at \*1 (Admin. Appeals Office 2006); *In re Villanueva*, 19 I. & N. Dec. 101 (B.I.A. 1984).

175. 911 F.2d at 331.

176. See *id.* at 333.

177. *Id.* The court explained that the issue of the case was "whether Congress by section 2705 has placed any limits on the Secretary's power to revoke a passport which is evidence of citizenship." *Id.*

178. See *supra* note 174 and accompanying text.

179. *Bryson*, 884 F. Supp. 2d at 205–06.

180. *Magnuson*, 911 F.2d at 331.

naturalized citizen.<sup>181</sup> After the Seattle Passport Agency rejected Myer's application for a passport, Myers requested reconsideration.<sup>182</sup> Myers was issued a passport a year later.<sup>183</sup> An INS official expressed disapproval of the passport being issued and indicated that they were attempting to deport Myers.<sup>184</sup> The State Department then demanded the passport's immediate return.<sup>185</sup> Myers argued that once the State Department issues a passport, it does not have the authority to individually revoke the passport.<sup>186</sup> After the district court found for Myers, the government filed an appeal.<sup>187</sup>

The Ninth Circuit concluded that § 2705 had two consequences: (1) "Congress has vested the power in the Secretary of State to decide who is a United States citizen" and (2) "Congress authorized passport holders to use the passport as conclusive proof of citizenship."<sup>188</sup> Therefore, this statute made Myers's passport conclusive proof of citizenship.<sup>189</sup> The Ninth Circuit also found that Myers's passport could not be collaterally attacked by the INS.<sup>190</sup> Looking at the text and the common meaning of the words, the Ninth Circuit found that the statute is a "clear instruction from Congress to treat passports in the same manner as . . . certificates of naturalization in all respects."<sup>191</sup> The court reasoned that the use of the words "force," "same," and "effect" together compel this finding.<sup>192</sup> The Ninth Circuit reasoned that a difference in treatment of these documents would therefore contradict the "same force and effect" language.<sup>193</sup>

### C. Eighth Circuit: Vigor of Conclusive Proof Cabined

The Eighth Circuit has taken a middle approach between *Magnuson* and *Moreno*. *Keil v. Triveline*<sup>194</sup> was decided after *Magnuson* but before *Moreno*. *Keil* held that under § 2705, a passport is only conclusive proof of citizenship in administrative immigration proceedings.<sup>195</sup> In essence, the

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181. *Id.*

182. *Id.*

183. *Id.* at 332. The court notes in its discussion of the facts that the director of the Seattle Passport Agency who reconsidered Myers's passport request had significant experience in citizenship issues and was more than qualified to make the determination. *Id.* at 331.

184. *Id.* at 332.

185. *Id.*

186. *Id.* *Magnuson*'s holding with regard to revocation power was overturned by statute. 8 U.S.C. § 1504 (2012). The process under 8 U.S.C. § 1504 requires notice and the availability of a prompt postcancellation hearing but does not require a prior hearing. *Id.* The holding pertaining to interpreting 22 U.S.C. § 2705, however, has not been overturned.

187. *Magnuson*, 911 F.2d at 332.

188. *Id.* at 333.

189. *Id.*

190. *Id.*

191. *Id.* at 334.

192. *Id.*

193. *Id.* at 335. Although when the court makes this statement it is primarily referring to revocation procedures, similar analysis applies to the level of proof each document affords the holder. *Id.*

194. 661 F.3d 981 (8th Cir. 2011).

195. *Id.* at 987.

Eighth Circuit agreed with the reasoning of the Ninth Circuit, but limited its holding to the context of administrative immigration proceedings.

In October 2007, ICE began an investigation into a family-run theater in Missouri for allegedly hiring Samoan dancers to work under the wrong type of visas.<sup>196</sup> In November, agents took fourteen of the performers into custody for violating their visas.<sup>197</sup> The workers indicated that Keil was responsible for telling them that they could conduct other work.<sup>198</sup> Upon investigating Keil further, an agent discovered that Keil had entered the United States using a U.S. passport.<sup>199</sup> Yet his immigration records indicated he was not a U.S. citizen.<sup>200</sup> The agents arrested Keil for making a false claim of citizenship and misuse of a passport.<sup>201</sup>

While much of the case considered the issue of qualified immunity of the agents, the court also interpreted § 2705.<sup>202</sup> Keil argued that § 2705 makes someone holding a valid passport a citizen by operation of the law.<sup>203</sup> In making this argument, Keil relied on the holdings of *In re Villanueva*<sup>204</sup> and *United States v. Clarke*.<sup>205</sup> Both *In re Villanueva* and *Clarke* held that a passport was conclusive proof of citizenship.<sup>206</sup> The government, however, argued that this statute only means a passport is conclusive proof of citizenship in administrative immigration proceedings.<sup>207</sup> The court ultimately agreed with the government.<sup>208</sup>

The Eighth Circuit reasoned that no other court had held that possession of a passport precludes prosecution under 18 U.S.C. § 911 for making a false claim of citizenship or under 18 U.S.C. § 1544 for misuse of a passport.<sup>209</sup> To the contrary, the court pointed to a line of cases where

196. *Id.* at 983–84. The theater had recruited Samoan performers to come to the United States to work in a dance show. *Id.* The performers entered the United States under a performer visa, which did not authorize them to do other types of work such as food service. *Id.* at 984.

197. *Id.*

198. *Id.*

199. *Id.* Keil had been issued a U.S. passport numerous times since his arrival. *Id.*

200. *Id.* The agent contacted the U.S. Citizenship and Immigration Services (CIS) to request further analysis on Keil's citizenship status. *Id.* CIS determined that he was not a citizen and, although his mother was a citizen, the facts did not satisfy derivative citizenship requirements. *Id.* It is also noted that Keil applied for a certificate of citizenship twice, but both times did not follow through with requests, so he was not granted a certificate of citizenship. *Id.* at 984–85.

201. *Id.* at 985. These offenses violated 18 U.S.C. §§ 911 and 1544, respectively. *Id.*

202. *See id.* at 987. A month after being arrested, Keil discovered he actually was entitled to U.S. citizenship based on the naturalization of his father. *Id.* at 985. He then brought this action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court found for the agents, holding that they were entitled to qualified immunity. *Id.* Keil appealed and the Eighth Circuit was called upon to decide the issue of qualified immunity. *Id.*

203. *Keil*, 661 F.3d at 987.

204. 19 I. & N. Dec. 101 (B.I.A. 1984).

205. 628 F. Supp. 2d 15 (D.D.C. 2009).

206. *See infra* notes 225, 239 and accompanying text.

207. *Keil*, 661 F.3d at 987.

208. *Id.*

209. *Id.*

noncitizens in possession of passports at the time of their arrests had been convicted of violating § 911.<sup>210</sup> The Eighth Circuit found Keil failed to cite any authority stating the proposition that § 2705 precludes prosecution under § 1544 of a person who knowingly uses a passport when he or she knows they are not a U.S. citizen or national.<sup>211</sup> The court reasoned that *In re Villanueva*<sup>212</sup> was not helpful to Keil's argument because it was limited to its facts and the context of administrative proceedings.<sup>213</sup> The Eighth Circuit found *United States v. Clarke* similarly inapposite, interpreting *Clarke* to hold only that the possession of a U.S. passport is conclusive proof when citizenship status is an element of the offense.<sup>214</sup>

Like the Ninth Circuit, the Eighth Circuit interpreted § 2705 to mean that a passport is conclusive proof of citizenship.<sup>215</sup> However, the Eighth Circuit limited this holding to use of the passport as proof of citizenship in administrative immigration proceedings.<sup>216</sup> While the Eighth Circuit cabined the effect of § 2705 by limiting its application to administrative proceedings, the Eighth Circuit did not go as far as the Third Circuit.<sup>217</sup> The Eighth Circuit never held that a passport is only conclusive proof of citizenship in the hands of a U.S. citizen.<sup>218</sup>

#### *D. Fifth Circuit: Government Changes Its Tune in a Fourth Context*

The Fifth Circuit also weighed in on the meaning of § 2705 under yet another set of circumstances. In *Garcia v. Freeman*,<sup>219</sup> Garcia applied for a passport in 2009 and was denied.<sup>220</sup> She then filed an action under 8 U.S.C. § 1503(a) seeking declaratory relief.<sup>221</sup> But before the action was heard, the Department of State issued her a passport and moved to dismiss the case.<sup>222</sup> The Department of State's argument was that because she now had a passport, she no longer needed a declaration of citizenship.<sup>223</sup> Garcia

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210. *Id.* (citing *United States v. Maciel-Alcala*, 612 F.3d 1092 (9th Cir. 2010); *United States v. Gomez-Castro*, 605 F.3d 1245 (11th Cir. 2010)).

211. *Id.*

212. 19 I. & N. Dec. 101 (B.I.A. 1984).

213. *Keil*, 661 F.3d at 987.

214. *Id.*

215. *Id.*

216. *Id.* In limiting its holding, the court distinguished *In re Villanueva*, 19 I. & N. Dec. 101 (B.I.A. 1984), and *United States v. Clarke*, 628 F. Supp. 2d 15 (D.D.C. 2009). *In re Villanueva* is discussed below. See *infra* Part II.E.

217. Compare *United States v. Moreno*, 727 F.3d 255 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1278 (2014), with *Keil*, 661 F.3d at 987.

218. *Keil*, 661 F.3d at 987.

219. *Garcia v. Freeman*, 542 F. App'x 354, 355 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1499 (Mar. 3, 2014).

220. *Id.*

221. *Id.* Garcia filed the action under 8 U.S.C. § 1503(a), which provides for declaratory relief from a final agency determination denying "a right or privilege as a national of the United States . . . upon the ground that he is not a national of the United States." 8 U.S.C. § 1503(a) (2012).

222. *Garcia*, 542 F. App'x at 355.

223. *Id.*

argued that she still had an interest in the outcome and sought to overcome the Department of State's mootness argument.<sup>224</sup>

The Fifth Circuit found that under § 2705, Garcia's passport "may be used as evidence of Garcia's citizenship during its period of validity."<sup>225</sup> Since the Department of State issued Garcia a passport after determining she met the burden of proof establishing her citizenship, she no longer had a concrete interest in the case.<sup>226</sup> The Department of State won its motion to dismiss.<sup>227</sup>

The four circuit courts deciding the meaning of § 2705 all have slightly different interpretations, with two circuits diametrically opposed. While these are the only circuits that have weighed in on the issue, a few district court cases and administrative bodies have provided their interpretation of the statute.<sup>228</sup> The majority of cases have followed the holding of the Ninth Circuit in *Magnuson* and found passports to be conclusive proof of citizenship.<sup>229</sup> Some of the cases are touched upon in the next section in order to provide further development of the doctrine and additional context for the circuit decisions discussed above.

#### *E. Administrative Bodies: The BIA and Conclusive Proof*

Due to the nature of § 2705, administrative bodies have also weighed in on the statute's meaning. The Board of Immigration Appeals (BIA) decision below has been frequently cited.

In *In re Villanueva*,<sup>230</sup> the petitioner was a citizen of the United States and the beneficiary was a citizen of Mexico.<sup>231</sup> The petitioner submitted a visa petition on behalf of the beneficiary based on a marriage certificate.<sup>232</sup> It was denied because the petitioner had failed to establish that he was a

224. *Id.* The court found Garcia's interest to be essentially a request for an advisory opinion to be used in the case of a future challenge to her status. *Id.* While at first blush this argument may seem unpersuasive, upon considering the unsettled law surrounding § 2705, Garcia may have a sound interest.

225. *Id.* at 356.

226. *Id.*

227. *Id.*

228. *See infra* Part II.E. The D.C. District Court in *United States v. Clarke* found the *Magnuson* reasoning persuasive and held a passport to be conclusive proof of citizenship. *United States v. Clarke*, 628 F. Supp. 2d 15, 21 (D.D.C. 2009). Further, the court noted that "a passport does not become void or revocable by operation of law because of an alleged flaw in the record supporting it. Like a certificate of naturalization, it is presumptively valid until a process is undertaken to revoke it." *Id.* (citing *Magnuson v. Baker*, 911 F.2d 330, 335 (9th Cir. 1990), *superseded in part by statute*, 8 U.S.C. § 1504 (2012)). The court found it irrelevant to the proceeding whether the person in question was actually a citizen unless the passport was previously revoked. *Id.* at 24.

229. *See infra* Part II.E. The petitioner was applying for a visa on behalf of his spouse as an immediate relative under section 201(b) of the Immigration and Nationality Act. *See Clarke*, 628 F. Supp. 2d at 24; *see also* 8 U.S.C. § 1151(b)(2)(A)(i) (defining "immediate relative" for purposes of aliens not subject to numerical limitations).

230. 19 I. & N. Dec. 101, 101 (B.I.A. 1984).

231. *Id.*

232. *Id.* at 102.



U.S. citizen.<sup>233</sup> He then filed a new visa petition submitting various documents, including a passport.<sup>234</sup> The district director did not find the passport to be sufficient evidence of his citizenship and denied the petition.<sup>235</sup> On appeal, the petitioner argued that the district director failed to comply with § 2705 in finding his passport was not sufficient evidence of his citizenship.<sup>236</sup>

The BIA noted that prior to § 2705, a passport was regarded as only prima facie evidence of citizenship.<sup>237</sup> However, the statute now equates passports with certificates of naturalization and certificates of citizenship.<sup>238</sup> Therefore, the BIA continued by examining the force and effect given to certificates of naturalization and certificates of citizenship.<sup>239</sup> The BIA found that unless an administrative certificate is void on its face, it is conclusive proof of citizenship absent its cancellation.<sup>240</sup> Furthermore, administrative certificates are immune from collateral attack.<sup>241</sup> Therefore, the BIA held that a passport is conclusive proof of citizenship.<sup>242</sup> The case was then remanded to the district director in light of these findings.<sup>243</sup> The BIA found that unless the passport is invalid on its face, the passport constituted conclusive proof of the petitioner's citizenship in the visa petition proceeding.<sup>244</sup>

There are consequences that stem from the conflict between the Third Circuit and the BIA decision.<sup>245</sup> The BIA must follow the law of the circuit in which the administrative hearing is held, and petitions for review are heard by the court of appeals in such circuit.<sup>246</sup> Prior to the decision in *Moreno*, the BIA consistently followed its own holding in *In re Villanueva*.<sup>247</sup> Now, the Third Circuit decision will bind the BIA in matters

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233. *Id.* This meant the beneficiary could not be classified as an immediate relative under § 201(b) of the Immigration and Nationality Act. *Id.* at 101; *see also* Immigration and Nationality Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified in scattered sections of 8 and 29 U.S.C.).

234. *In re Villanueva*, 19 I. & N. Dec. at 102.

235. *Id.* at 103. The district director came to this conclusion based on the assumption that petitioner's passport had been issued based on his delayed Texas birth certificate. *Id.* at 102. This birth certificate was the same evidence that the director had previously determined was insufficient proof of the petitioner's citizenship. *Id.*

236. *Id.* at 103.

237. *Id.* at 102.

238. *Id.*

239. *Id.* This analysis is similar to that presented in Part I.C.4, *supra*.

240. *In re Villanueva*, 19 I. & N. Dec. at 103.

241. *Id.*

242. *Id.* "Accordingly, we hold that unless void on its face, a valid United States passport issued to an individual as a citizen of the United States is not subject to collateral attack in administrative immigration proceedings but constitutes conclusive proof of such person's United States citizenship." *Id.*

243. *Id.* The case was remanded to allow the district director to apply § 2705 as the Board of Immigration Appeals had interpreted it. *Id.*

244. *Id.*

245. *See* Petition for Writ of Certiorari at 11, *Moreno v. United States*, 727 F.3d 255 (3d Cir. 2013) (No. 13-457).

246. *Id.* at 10.

247. *Id.* at 11.

arising in the Third Circuit, and the Ninth Circuit decision will likewise bind the BIA in matters arising in the Ninth Circuit, creating inconsistent results within one administrative body.<sup>248</sup>

This BIA decision is controlling precedent for the Administrative Appeals Office of DHS.<sup>249</sup> *In re Applicant* is a decision by the Administrative Appeals Office of DHS.<sup>250</sup> While this case concerns an application for a certificate of citizenship, it represents how a passport being considered conclusive proof of citizenship under § 2705 can alternatively affect one's application for a certificate of citizenship or for a certificate of naturalization.

The applicant in this case was born in Peru and her mother became a naturalized U.S. citizen when the applicant was thirteen years old.<sup>251</sup> The applicant was then lawfully admitted to the United States as a permanent resident.<sup>252</sup> She applied for a certificate of citizenship under 8 U.S.C. § 1431.<sup>253</sup> This was denied based on a determination that the record did not fully establish that the applicant was living in the United States with her mother.<sup>254</sup>

The applicant appealed to the Administrative Appeals Office.<sup>255</sup> She submitted additional evidence that she lived with her mother in Miami, attended school in Miami, and volunteered at an organization in Miami.<sup>256</sup> While the Administrative Appeals Office considered this additional evidence, it found it did not need to address it and instead decided the case based on the applicant's valid passport.<sup>257</sup> Relying on *In re Villanueva*, the Administrative Appeals Office found that the U.S. passport that was already on the record established conclusively that the applicant was a U.S. citizen.<sup>258</sup>

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248. *Id.*

249. *Board of Immigration Appeals*, U.S. DEP'T JUST., <http://www.justice.gov/eoir/biainfo.htm> (last visited Apr. 26, 2014) (noting that the BIA is the highest administrative body for interpreting immigration laws).

250. *In re Applicant*, 2006 WL 5915106, at \*1 (Admin. Appeals Office 2006).

251. *Id.*

252. *Id.*

253. *Id.* This statute states that a person born outside of the United States becomes a citizen when the following conditions have been met: (1) one parent is a U.S. citizen, whether by birth or naturalization; (2) the child is under eighteen years old; and (3) the child lawfully lives in the United States in both the legal and physical custody of the citizen parent. 8 U.S.C. § 1431 (2012).

254. *In re Applicant*, 2006 WL 5915106, at \*1. This is relevant to the statute to satisfy the third condition of "residing in the United States in the legal and physical custody of the citizen parent." 8 U.S.C. § 1431(a)(3).

255. *In re Applicant*, 2006 WL 5915106, at \*1.

256. *Id.*

257. *Id.*

258. *Id.* "[W]e hold that unless void on its face, a valid United States passport issued to an individual as a citizen of the United States is not subject to collateral attack in administrative immigration proceedings but constitutes conclusive proof of such person's United States citizenship." *Id.*

The Board of Immigration Appeals expressed its opinion that a passport is conclusive proof of citizenship.<sup>259</sup> With this expression, the agency also pointed to how powerful a passport can be.<sup>260</sup> A passport not only gives the holder the right to leave and enter the United States and to maintain employment, but it is also “a sufficient basis in itself to terminate immigration proceedings.”<sup>261</sup>

Prior to the enactment of § 2705, passports were evidence, but not conclusive proof, of citizenship.<sup>262</sup> Section 2705, however, purports to equate passports with certificates of naturalization and certificates of citizenship.<sup>263</sup> This would mean all three documents constitute conclusive proof of citizenship. The Third Circuit, in *Moreno*, interpreted the text of § 2705 to mean that a passport is only conclusive proof of citizenship when it has been issued to a U.S. citizen.<sup>264</sup> The Third Circuit found the language of this statute unambiguous.<sup>265</sup> However, the Ninth Circuit also found the language to be clear and plainly state that a passport is conclusive proof of citizenship.<sup>266</sup> Somewhere in between the two holdings lies the Eighth and Fifth Circuit interpretations. The Eighth Circuit found that a passport is conclusive proof of citizenship, but limited its holding to administrative cases.<sup>267</sup> The Fifth Circuit dismissed a petitioner’s case (after the petitioner was issued a valid passport) as moot because § 2705 obviated the need for a judgment of citizenship.<sup>268</sup> A brief inquiry into administrative decisions on the matter indicates that after the enactment § 2705 but before the *Moreno* decision, passports were almost universally held to be conclusive proof of citizenship.<sup>269</sup>

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259. *In re Villanueva*, 19 I. & N. Dec. 101, 103 (B.I.A. 1984); see also *In re Barcenas-Barrera*, 25 I. & N. Dec. 40, 44 (B.I.A. 2009).

260. See *In re Barcenas-Barrera*, 25 I. & N. Dec. at 44.

261. *Id.*

262. Compare *Magnuson v. Baker*, 911 F.2d 330, 336 (9th Cir. 1990) (finding a passport was conclusive proof of citizenship based on § 2705), *superseded in part by statute*, 8 U.S.C. § 1504 (2012), with *Peignand v. INS*, 440 F.2d 757 (1st Cir. 1971) (finding a passport was prima facie evidence of citizenship), and *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950) (finding a passport was some evidence of citizenship, but not conclusive).

263. See *supra* note 133.

264. *United States v. Moreno*, 727 F.3d 255, 260 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1278 (2014).

265. *Id.* at 261.

266. See *Magnuson*, 911 F.2d at 333 (“The statute plainly states that a passport has the same force and effect as a certificate of naturalization or citizenship . . . . The holders of these other documents can use them as conclusive evidence of citizenship. Therefore, so can a holder of a passport.”).

267. See *Keil v. Triveline*, 661 F.3d 981 (8th Cir. 2011).

268. See *Garcia v. Freeman*, 542 F. App’x 354 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1499 (Mar. 3, 2014).

269. See *Edwards v. Bryson*, 884 F. Supp. 2d 202, 205–06 (E.D. Pa. 2012), *rev’d*, 536 F. App’x 217 (3d Cir. 2013); *United States v. Clarke*, 628 F.Supp. 2d 15 (D.D.C. 2009); *In re Villanueva*, 19 I. & N. Dec. 101, 103 (B.I.A. 1984); *In re Applicant*, 2006 WL 5915106, at \*1 (Admin. Appeals Office 2006).

### III. SHOULD A PASSPORT BE CONCLUSIVE PROOF OF CITIZENSHIP UNDER § 2705?

This Part argues that § 2705 unambiguously equates passports with certificates of citizenship and certificates of naturalization, making passports conclusive proof of citizenship. It therefore argues that the holding in *Moreno* contravened the plain text of the statute. However, Part III acknowledges that the Third Circuit in *Moreno* had valid reasons for holding that § 2705 makes a passport conclusive proof of citizenship only when the person holding the passport is a U.S. citizen. This Part explores some of the reasons why the Third Circuit's holding may be better policy, such as an ineffective revocation procedure, the limited level of scrutiny in the application process for passports, and the potential for conflict when different administrative bodies are responsible for providing proof of citizenship. Part III ultimately argues that the Third Circuit was incorrect in their interpretation of § 2705; even still, Congress should reconsider the implications of this statute.

#### A. Section 2705 Is Unambiguous

The text of 22 U.S.C. § 2705 is clear and leaves little room for ambiguity. It states,

The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction:

- (1) A passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States.<sup>270</sup>

Both the Third Circuit majority and dissent in the *Moreno* decision found the statute unambiguous, but they came out with different interpretations.<sup>271</sup> Part III argues that the statute is unambiguous and agrees with the dissent's reasoning in *Moreno*.

The majority in *Moreno* began with the text of the statute and found it unambiguous.<sup>272</sup> The majority argued, "By its text, § 2705 provides that a passport will serve as conclusive proof of citizenship only if it was 'issued by the Secretary of State to a citizen of the United States.'"<sup>273</sup> The majority found that this phrase indicated that the plain meaning of the statute is that a passport is conclusive proof only if its holder is actually a citizen of the United States.<sup>274</sup> Looking to context, the majority determined that an alternative interpretation would give the secretary of state too much

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270. See *supra* note 133.

271. See *supra* notes 153, 191 and accompanying text.

272. See *supra* note 153 and accompanying text.

273. *United States v. Moreno*, 727 F.3d 255, 260 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1278 (2014); see *supra* note 148 and accompanying text.

274. See *supra* note 152 and accompanying text.

power.<sup>275</sup> The State Department historically had only the authority to grant and revoke passports but not to determine citizenship.<sup>276</sup> Therefore, the majority grounded its holding in what it finds to be the unambiguous meaning of the text.<sup>277</sup>

The majority's strongest support in the text of the statute is the phrase, "to a citizen of the United States."<sup>278</sup> The dissent persuasively countered this argument by noting that citizens are not the only holders of passports.<sup>279</sup> The State Department can also issue a passport to a U.S. national, which is a noncitizen "owing allegiance . . . to the United States."<sup>280</sup> Therefore, this phrase simply distinguishes between those that the State Department concludes are citizens and those that are nationals.<sup>281</sup>

The dissent also argued that the majority's interpretation makes the statute inoperative, which is contrary to the canon of statutory interpretation that "[a] statute should be construed . . . so that no part will be inoperative or superfluous, void or insignificant."<sup>282</sup> The statute becomes inoperative under the majority's interpretation because a person can use a passport as conclusive proof of citizenship only if she first proves that she is, in fact a U.S. citizen.<sup>283</sup> This, of course, deprives the passport of any evidentiary value.<sup>284</sup>

The dissent then pointed out that no other circuit, district court, or administrative body, has held that the statute requires a showing that the passport holder is a U.S. citizen.<sup>285</sup> Even the Eighth Circuit, which limited the context of the statute to offer no protection in criminal cases, admits that passports would be conclusive proof of citizenship in immigration proceedings.<sup>286</sup>

Lastly, the dissent confronted the majority's argument that the dissent's interpretation would place power in the secretary of state beyond that intended in the context of determining citizenship. To counter this, the dissent argued that its interpretation was consistent with Congress centralizing passport authority in the secretary of state.<sup>287</sup>

Therefore, the proper inquiry is whether the Secretary of State found the person to be a citizen by granting them a passport. In this case, Moreno still had a valid passport, so the proper next step, if she was found in fact to not be a U.S. citizen, would have been revocation of the passport, not this

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275. *See supra* note 155 and accompanying text.

276. *See supra* note 156 and accompanying text.

277. *See supra* note 153 and accompanying text.

278. *See supra* note 153 and accompanying text.

279. *See supra* note 161 and accompanying text.

280. *See supra* note 161 and accompanying text.

281. *See supra* note 161 and accompanying text.

282. *United States v. Moreno*, 727 F.3d 255, 263 (3d Cir. 2013) (Smith, J., dissenting) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

283. *Id.*

284. *Id.*

285. *See supra* note 160 and accompanying text.

286. *See supra* note 216 and accompanying text.

287. *See supra* note 164 and accompanying text.

narrow interpretation of § 2705. The text of the statute unambiguously grants passports the same force and effect as certificates of citizenship and certificates of naturalization. This makes passports conclusive proof of citizenship because certificates of citizenship and certificates of naturalization are conclusive proof of citizenship.<sup>288</sup>

When a statute is unambiguous, a court should not reinterpret the statute based on “bad facts” or specific results.<sup>289</sup> The Supreme Court has stated, “Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship . . . . But in such case the remedy lies with the lawmaking authority, and not with the courts.”<sup>290</sup> Therefore, unless the results of the text of the statute would “shock the general moral or common sense”<sup>291</sup> the Third Circuit majority should allow the intent of Congress to remain intact.

This Note agrees with the dissenting opinion in *Moreno* and finds the text of § 2705 to unambiguously deem a passport conclusive proof of citizenship. The majority in *Moreno* erred in their holding, which contravened the plain text of the statute and therefore broke rules of statutory interpretation.

### B. Why Should Congress Change the Law?

While finding that the Third Circuit majority’s holding in *Moreno* circumvented the clear text of the statute, this Part also argues the Congress should revisit the implications of the statute. Three interweaving considerations support this argument.

#### 1. Ineffective Revocation Procedure

If the Supreme Court were to find that the Third Circuit erred, as Part III.A argues it should, it would leave intact the holding of *Magnuson*. *Magnuson* found not only that a passport is conclusive proof of citizenship, but also that the validity of a passport cannot be collaterally attacked.<sup>292</sup> If a passport cannot be collaterally attacked, and like in *Moreno* all of the judges agree that the passport was issued in error, the appropriate next step would be revocation of the passport.<sup>293</sup>

The revocation process is ineffective, in large part, because the problem needs to be brought to the attention of the administrative body before a revocation action can be taken. This likely will not happen until the person’s alleged fraudulent acts are brought into question, such as in many

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288. See *supra* Part I.C.4.

289. See *supra* notes 158, 290 and accompanying text.

290. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

291. *Id.*

292. See *supra* notes 189–90 and accompanying text.

293. See *supra* Part I.C.2 (describing the procedure and grounds for the revocation process).

of the contexts discussed above.<sup>294</sup> With the sheer volume of passports distributed each year, it would be very difficult for the State Department to follow up on such applications after the passport has been issued.<sup>295</sup>

Even in the cases surrounding the circuit split described in Part II, the revocation procedure failed to be an effective remedy.<sup>296</sup> In *Moreno*, it was undisputed that Moreno had obtained her passport through fraud.<sup>297</sup> It was also clear from the facts that Moreno's passport had been in question long before this case appeared before the Third Circuit.<sup>298</sup> Moreno was issued a passport in 2007.<sup>299</sup> Then, in 2008, the U.S. Border Patrol in El Paso, Texas, confiscated her passport but it was never revoked.<sup>300</sup> In 2010, Moreno was placed in ICE custody pending deportation but was ultimately released.<sup>301</sup> In 2011, Moreno wrote to DHS, and DHS informed her that she was not a citizen.<sup>302</sup> Despite the clear evidence that multiple agencies were aware Moreno, who was in possession of a U.S. passport, was likely not a citizen of the United States, no revocation procedure had been initiated when the case came before the Third Circuit in 2013.<sup>303</sup>

Therefore, in a case such as *Moreno*, the revocation procedure was likely the only appropriate remedy under § 2705. If the majority was unable to interpret the statute as they did because the meaning was unambiguous (as this Part argues), then the appropriate remedy would be revocation. The ineffectiveness of this process forces the court to make decisions contrary to the "bad facts" of the case and, ultimately, ignore obvious fraudulent actions.

## 2. Same Force and Effect, Differing Levels of Scrutiny

The previous section explained why the revocation process after one obtains a passport does not effectively deal with fraud. This section indicates why the process for obtaining a passport is flawed in light of the meaning of § 2705. The statute clearly equates a passport with a certificate of citizenship and a certificate of naturalization, giving the three documents the same evidentiary force and effect.<sup>304</sup> However, the process to obtain the

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294. *See supra* Part II.

295. *See supra* note 99.

296. It is, however, true that the revocation procedure is likely more effective than it was at the time *Magnuson* was decided. *See supra* note 186. *Magnuson* held that the secretary of state can revoke a passport only after a hearing and only on exceptional grounds such as fraud. *See supra* note 186. This was reversed by statute in 8 U.S.C. § 1504, which requires notice and the availability of a prompt postcancellation hearing but does not require a prior hearing. *See supra* note 186.

297. *See supra* note 165 and accompanying text.

298. *See supra* notes 5–14 and accompanying text.

299. *See supra* note 5 and accompanying text.

300. *See supra* note 5.

301. *See supra* note 9 and accompanying text.

302. *United States v. Moreno*, 727 F.3d 255, 260 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1278 (2014).

303. *See supra* notes 1–26 and accompanying text.

304. *See supra* note 133 and accompanying text.

three documents is not equal.<sup>305</sup> It is inconsistent to give a document the same force and effect as others when the level of scrutiny to obtain such a document is less exacting.

A person born within the United States is automatically a U.S. citizen and cannot apply for a certificate of naturalization or a certificate of citizenship.<sup>306</sup> A person, however, who applies for a certificate of naturalization is in effect applying for citizenship, and a person who applies for a certificate of citizenship is basing their status on an event other than birth in the United States.<sup>307</sup> But all three of these groups of applicants have an incentive and a reason to apply for a passport.<sup>308</sup> This discrepancy at the outset provides the attorney general with a reason to more often employ exacting scrutiny on applications for certificates of citizenship and certificates of naturalization, than the secretary of state has for passport applications.<sup>309</sup>

The documentary evidence required for passports, certificates of citizenship, and certificates of naturalization are similar.<sup>310</sup> While on its face the forms and documentary evidence are similar, the attorney general in reviewing an application for a certificate of citizenship or naturalization must conduct a personal investigation of the applicant in the vicinity of where the applicant has lived and worked.<sup>311</sup> An investigation of this sort is not required for a passport. Additionally, the applicant must file a sworn application in writing and a declaration of intent.<sup>312</sup> The extra scrutiny involved in the application for certificates of citizenship and naturalization, combined with the reality that this type of citizenship is often harder to prove than that of a natural-born citizen, creates a discrepancy in the levels of scrutiny applied to these three documents. The process of applying for a passport is also less difficult than for a certificate of citizenship or naturalization.<sup>313</sup> DHS concedes this fact on their online application brochures.<sup>314</sup>

The sheer volume of passport applications contributes to the discrepancy in levels of scrutiny. In 2010, the GAO obtained five of seven passports it had applied for using fraudulent information.<sup>315</sup> Through this investigation, the Government Accountability Office proved that the State Department did not consistently use fraud detection procedures such as data verification and counterfeit detection in its passport issuance process.<sup>316</sup> In addition, in *Keil*

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305. *See supra* Part I.C.1.

306. *See supra* note 68.

307. *See supra* note 68.

308. *See supra* note 68.

309. *See supra* Part I.C.1.

310. *See supra* Part I.C.1.

311. *See supra* note 69 and accompanying text.

312. *See supra* note 71 and accompanying text.

313. *See supra* note 97 and accompanying text.

314. *See supra* note 98 and accompanying text.

315. *See supra* note 101 and accompanying text.

316. *See supra* note 102.



*v. Triveline*, the court was in agreement that Keil was not a citizen but he had obtained several passports since arriving in the United States.<sup>317</sup>

Based on these arguments, the level of scrutiny applied to an application for a passport is much less strict than that applied to an application for a certificate of citizenship or a certificate of naturalization. Section 2705 purports to give these three documents the same force and effect. It is imprudent to give a document the same force and effect as others when the level of scrutiny applied to its issuance is less demanding compared to the other.

### 3. Potential for Conflict

There is a potential for conflicting decisions when multiple administrative bodies are issuing documents purporting to have the same force and effect. As Part III.B.2 discusses, the differing levels of scrutiny under each process can aggravate the problem of divergent results. While the attorney general or DHS has the power to grant certificates of citizenship and certificates of naturalization, the secretary of state grants passports.<sup>318</sup> For example, in *Moreno*, the defendant was issued a valid passport; however, when she contacted DHS to ask about her status, DHS stated that they informed her that she was not a citizen.<sup>319</sup>

Additionally, § 2705 equates these three documents and, in effect, allows holders of these documents to use them interchangeably as proof of citizenship.<sup>320</sup> When applying for a certificate of citizenship or a certificate of naturalization, one of the documents that can be used as proof is a passport and vice versa.<sup>321</sup>

The Administrative Appeals Office of DHS found an applicant's passport to be conclusive evidence of the applicant's citizenship, under § 2705, in regard to her application for a certificate of citizenship.<sup>322</sup> Therefore, the applicant was able to use her passport to obtain a certificate of citizenship.<sup>323</sup>

Section 2705 creates the potential for conflicting results with two possible consequences. First, because different agencies issue the documents under differing levels of scrutiny, there is the potential that one agency may decide to issue a document as establishing proof of citizenship while another may not. Second, the applicant potentially can use the issued document as proof to obtain the document the other agency did not see fit to issue.

Lastly, § 2705 has caused even the executive branch to be unsure of its meaning and, under differing circumstances, argue for different

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317. *See supra* note 199.

318. *See supra* Part I.C.1.

319. *See supra* notes 5, 8 and accompanying text.

320. *See supra* note 133 and accompanying text.

321. *See supra* note 82 and accompanying text.

322. *See supra* note 258 and accompanying text.

323. *See supra* note 258 and accompanying text.

interpretations. For example, in *Moreno*, the government argued that Moreno's passport could not insulate her from the action as proof of U.S. citizenship.<sup>324</sup> However, in *Garcia*, the United States argued that Garcia's case was moot because her passport was evidence of her citizenship.<sup>325</sup> This conflict calls for a decisive change to the statute that would clearly establish its meaning.

### C. Ripe for Legislative Change

This area of conflict invites legislative change. Section 2705 unambiguously grants passports the same force and effect as certificates of naturalization and certificates of citizenship and therefore makes passports conclusive proof of citizenship. The majority in *Moreno* interpreted the statute in a way that contravened the plain text. A court should not reinterpret a statute based on "bad facts" or to escape consequences. Instead, this is an area for Congress. If a passport is conclusive proof of citizenship, three potential problems arise. First, the existing safeguard, the revocation procedure, is ineffective. Second, differing levels of scrutiny upon issuance are applied to three different documents that have the same force and effect. Third, the differing levels of scrutiny and different administrative agencies granted the power to issue such documents create the potential for conflicting results. These problems, in conjunction with the possibility of courts being faced with bad facts that it cannot resolve, make § 2705 an area of the law ripe for legislative change.

Congress should look for a way to cabin these effects. The circuits have already begun to create ways to do just this. *Moreno* took the most extreme approach and found a passport to be conclusive proof of citizenship only if it was issued to a U.S. citizen.<sup>326</sup> The Eighth Circuit took a more mild approach and found a passport to be conclusive proof of citizenship only in administrative proceedings.<sup>327</sup> Whether Congress takes the more extreme approach of the Third Circuit or finds a temperate intermediate approach, such as the Eighth Circuit, the consequences of § 2705 should be cabined keeping in mind the three potential problems discussed.

### CONCLUSION

The opposing facts of the *Moreno* case demonstrate that the question of citizenship is not always clear and easily determinable. These facts contextualize the question of whether § 2705 does and should give a passport the same force and effect as a certificate of naturalization and a certificate of citizenship, the force and effect being one of conclusive proof of citizenship.

Part II introduced the conflict surrounding the interpretation of § 2705. The Third Circuit held that under 22 U.S.C. § 2705, a passport is conclusive

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324. See *supra* note 148 and accompanying text.

325. See *supra* note 224 and accompanying text.

326. See *supra* note 148 and accompanying text.

327. See *supra* note 213 and accompanying text.

proof of citizenship *only if* it has been issued to a U.S. citizen. Contrary to this holding, the Fifth, Eighth, and Ninth Circuits and the BIA held a passport is conclusive proof of citizenship. These decisions do not add the caveat that it must be issued to a U.S. citizen. Instead these courts find it conclusive that the secretary of state issued the holder a passport, thereby determining their citizenship status. The numerous rights, privileges, and liberties that coincide with citizenship intensify the need to resolve the question of whether § 2705 makes passports conclusive proof of citizenship without qualification. As the attorneys for Moreno explain in their petition for a writ of certiorari:

The continuing—and in many circumstances increasing—attention paid to whether a person is a United States citizen makes all the more important the issue presented here: whether the issuance by the Secretary of State of a passport in the “citizen” category serves as conclusive proof of that status or whether the citizenship determination made by the Secretary of State in issuing a passport is subject to collateral attack.<sup>328</sup>

Section 2705 is unambiguous and the text of the statute clearly deems a passport conclusive proof of citizenship by equating the force and effect of a passport with that of a certificate of citizenship and naturalization. However, due to inconsistencies and ineffective procedural protections, this is an area ripe for legislative change. Based on both the courts’ inability to change the plain text of a statute and the problems with the implications of the statute in its present state, including an ineffective revocation procedure, differing levels of scrutiny, and the potential for conflict, the best resolution of this conflict is legislative change.

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328. Petition for Writ of Certiorari at 13, *Moreno v. United States*, 727 F.3d 255 (3d Cir. 2013) (2014).