August 22, 1957

Copy to Milton Freeman

Gero v. S. Gasvernitz
c/o Aspiasu
Casilla 710
Guayaquil, Ecuador

Dear Gero :

When you were here the last time you asked me for an opinion in the following question: Can a naturalized citizen attack the constitutionality of the provision of the law according to which he loses his American citizenship after taking residence for two years in his country of origin or for five years in any other country. I hesitated to answer your question for the simple reason that the Supreme Court of the United States under the leadership of Justice Frankfurter appeared to be very reluctant to interfere in any action of Congress on account of constitutionality or any other reason. In the meantime, a new majority begins to show itself in the Supreme Court, and for this reason I do not hesitate anymore to answer your question.

As I told you, the general opinion that the McCarran Act (Act of 1952) has anything to do with the risk of naturalized citizens to lose their citizenship on account of residence abroad is entirely mistaken. We have to keep in mind the following history of this problem. Already before the establishment of the German Empire, in a number of cases people asked for diplomatic protection in U.S. consular offices in German states, f.i., Wuerttemberg, when they were called for selective service. They argued that they once came

to the United States and became a U.S. citizen at a time when it was not required to stay five years. The United States entered a number of treaties with the German and other states when Mr. Bancroft was Secretary of State wherefor these treaties are called Bancroft Treaties. Under these treaties the United States waived the right to grant deplomatic protection to people who were former citizens of the German state, became U.S. citizens and then returned to the German state for a period longer than two years.

When in 1907 the rules on naturalization were embodied into a statute (Act of March 2, 1907), it was provided in Section 2 that it is "presumed" that a person lost his American nationality when he stays longer than two years in his country of origin. For some time the meaning of this presumption was very much of a dispute. In any case it can be stated that between 1926 and 1940 the courts and the State Department recognized that the presumption can be overcome at any time when the naturalized person returns to the United States, even if such a return takes place much later than two years after the taking up of residence at his place of origin. Under the interpretation of Section 2 of the Act of 1907 an American naturalized citizen lost only his right for diplomatic protection. Even this right he could maintain if he could present evidence to U.S. diplomatic or consular offices showing that he stays in the country of his origin on account of health or in connection with American business interests or for a number of special occupations enumerated in the instructions of the Department of State. These general rules of law were based on the decision Stein v. Fleischman Co., 237 F.679 (S.D.N.Y.1916). Compare also 3 Hackworth p. 294.

In 1940, under the obvious pressure of the war, the Department of State asked for a substantial change of the law. The Department wished that not only the right to diplomatic protection is lost as a result of residence in the country of origin but the citizenship itself. As a matter of fact, the Department succeeded in this demand, and the Act of 1940 (Nationality Act) provides in Section 404 that the citizenship is automatically lost if a person stays longer than two years in his country of origin. However, this principle became only effective in 1946 for the purpose to give all naturalized American citizens who lived abroad the chance to return within a period of six years.

The Act of 1952 (McCarran Act) brought a number of improvements, especially by exempting World War II veterans from the application of the entire rule; furthermore people are exempted who take up residence abroad after their 60th birthday, provided they were residents of the United States for a period longer than 25 years.

The problem offers itself whether Congress has the power to distinguish between naturalized citizens and native citizens. Chief Justice Marshall stated in Osborn v. Bank of the United States, 9 Wheat 737,827 (1924), that a naturalized citizen is distinguishable from a native citizen in nothing except as far as the Constitution makes this distinction itself. In Lapides v. Clark, 167 F.2d 619 (D.C.C.1949), certiorari denied 338 U.S. 860 (1949), this argument was presented indeed. Lapides was born in Austria and resided in Palestine between 1934 and 1947. He had become an American citizen on the basis of a rather doubtfully short period of residence in the United States. In 1947 he returned to the United States and demanded

admission as a citizen but was excluded as an alien. Lapides argued the unconstitutionality of the act on account of the unjustifiable distinction between naturalized and native citizens. The court stated that this distinction was just as justifiable as a distinction between male and female which exists insofar as a women may lose her American citizenship by marriage with a foreigner. This provision was declared lawful by the Supreme Court of the United States in McKenzie v. Hare, 249 U.S. 299 (1915). The Supreme Court denied certiorari in the Lapides case.

It is apparent that the facts in the Lapides case were as unrepresentative and as uninviting as possible. The fact that the Supreme Court denied certiorari does not mean a decision of the Supreme Court on this point.

I believe that a very strong argument can be presented to the court to the effect that the Fifth Amendment of the Constitution protects a naturalized citizen against being deprived of his American citizenship by any other rule than the law provides for all citizens. I would like to discuss with you a detailed argument as to this point.

An even stronger case could be presented by someone who became an American citizen before 1940 since he could argue that he acquired citizenship with the understanding that he can take up residence wherever he wishes to do so, while later he was deprived of this right.

You yourself seem to have the exception of the war veteran on your side. Therefore you are not a good test case. You should select very excellent people with highest reputation as plaintiffs in this case. Furthermore, the case should be presented by the best possible authority to the court in the form of briefs as well as of oral arguments. It would be ideal if you could obtain the support of Mr. A. Fortas, of Arnold, Fortas & Porter, Washington,

and of Mr. John Lord O'Brien. If you wish to be successful, something unique has to be presented, and that would be the cooperation of these two men.

About all this, we talk when you are back here.

With kindest regards, I am

Yours,