12-3810

To Be Argued By:
SHANE CARGO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-3810

ABDO HIZAM,

Plaintiff-Appellee,

—v.—

HILLARY RODHAM CLINTON, Secretary of State, United States Department of State; UNITED STATES DEPARTMENT OF STATE; UNITED STATES OF AMERICA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

PREET BHARARA,
United States Attorney for the Southern District of New York,
Attorney for Defendants-Appellants.
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2711

SHANE CARGO,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Defendants-appellants Hillary Clinton, United States Secretary of State, the Department of State, and the United States (together, the "government") appeal from the judgment of the United States District Court for the Southern District of New York, entered in accordance with a July 27, 2012, memorandum and order granting summary judgment to plaintiff-appellee Abdo Hizam.

In 1990, the State Department erroneously issued a Consular Report of Birth Abroad of a Citizen of the United States ("CRBA") and a U.S. passport to Hizam. At the time, the State Department mistakenly concluded that Hizam, who was born in Yemen in 1980 to a Yemeni mother married to a U.S. citizen father, had acquired U.S. citizenship at birth through his father. In fact, Hizam's father did not meet the statutory requirements to transmit citizenship to Hizam because at the time of Hizam's birth, he had not resided long enough in the United States, a fact that Hizam does not dispute.

After detecting its error, the State Department in 2011 canceled Hizam's CRBA and revoked his passport. Hizam then brought this action seeking both a declaration that he is a U.S. citizen and an order compelling the State Department to return his CRBA and U.S. passport. Without finding that Hizam is a U.S. citizen, the district court ordered the State Department to reissue his CRBA.

The district court erred in granting Hizam that relief. Although neither Hizam nor his U.S. citizen father was responsible for the State Department's error, the indisputable fact is that Hizam did not acquire U.S. citizenship at birth or at any point thereafter. Accordingly, he is not a U.S. citizen even though the State Department erroneously issued him documents to which he was not entitled. Nor did the district court have the equitable power to order that Hizam be deemed a U.S. citizen or be issued a CRBA, a document that by statute serves as proof of U.S. citizenship.

In any event, the State Department acted well within its authority to revoke the erroneously issued documents based on its subsequent, and correct, determination that Hizam is not a U.S. citizen. The Supreme Court has recognized that inherent in the State Department's power to issue citizenship documents is the power to revoke them. And in 8 U.S.C. § 1504, Congress more recently codified the authority to cancel or revoke CRBAs and U.S. passports that were issued in error.

Although the legal principles at issue in this case require reversal of the district court's judgment, the government acknowledges that Hizam obtained his CRBA and passport due to the State Department's error rather than his own, and that the issuance of those documents followed by their revocation years later may have caused hardship to Hizam. For that reason, the State Department, which lacks authority to confer citizenship or other immigration status, has referred the matter to U.S. Citizenship and Immigration Services, and will support other lawful means to provide relief to Hizam, including a private bill in Congress if one is introduced. However, whatever unfairness has been occasioned to Hizam should be rectified through those lawful avenues, rather than by contravening the clear legal authority under which Hizam is not a U.S. citizen and the State Department has the power to revoke citizenship documents that were issued in error. For those reasons, the district court's judgment should be reversed.

Statement of Jurisdiction

The district court had jurisdiction over this action under 28 U.S.C. § 1331 as it arises under the laws of the United States, and under 8 U.S.C. § 1503(a) because Hizam was seeking, among other things, a declaration that he is a citizen of the United States. Final judgment was entered on July 31, 2012, and the government filed a timely notice of appeal on September 25, 2012. Accordingly, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether Hizam, who does not dispute that his father did not meet the statutory requirements to transmit U.S. citizenship to Hizam at birth, is nonetheless a U.S. citizen.

2. Whether the district court exceeded its authority under 8 U.S.C. § 1503(a) by ordering the State Department to provide Hizam proof of citizenship, the CRBA, even though Hizam did not acquire U.S. citizenship at birth and the district court did not grant the only relief authorized by § 1503(a), namely, a declaratory judgment that Hizam is a U.S. citizen or national.

3. Whether the State Department has the authority to cancel erroneously issued CRBAs and U.S. passports, either because of authority inherent in the State Department's power to issue such documents, or because of Congress's express codification of the authority to cancel them.

Statement of the Case

Hizam filed the complaint initiating this action on October 28, 2011. (Joint Appendix ("JA") 209). Hizam filed a motion for summary judgment on March 23, 2012, and the government cross-moved for summary judgment on April 13, 2012. (JA 211). On July 27, 2012, the district court issued a memorandum and order granting Hizam's motion for summary judgment and denying the government's cross-motion. (JA 158-79, 211). Judgment was entered four days later, on July 31, 2012. (JA 212). On August 21, 2012, the government filed a motion seeking a stay of the district court's order, and the court denied that application on September 20, 2012. (JA 212). On September 25, 2012, the government filed a notice of appeal of the district court's judgment. (JA 213).

Statement of Facts

A. Legal Background

A person born outside the United States acquires citizenship only as provided by an act of Congress. *Rogers v. Bellei*, 401 U.S. 815, 830 (1971). Citizenship of a person born abroad is determined by the law in effect at the time of birth. *Drozd v. INS*, 155 F.3d 81, 86 (2d Cir. 1998). In 1980, the year of Hizam's birth, 8 U.S.C. § 1401(g) provided that a child born in wedlock to one U.S. citizen parent acquired U.S. citizenship if the U.S. citizen parent was "physically present in the United States . . . for a period or periods totaling not less than ten years prior to the birth of the child." 8 U.S.C. § 1401(g) (Supp. III 1980).

The State Department is responsible for "the administration and enforcement of [the Immigration and Nationality Act] and all other immigration and nationality laws relating to . . . the determination of nationality of a person not in the United States." 8 U.S.C. § 1104(a). Under that authority, the State Department issues CRBAs to document that a person born abroad satisfies the statutory criteria for citizenship. 22 C.F.R. § 50.7(a). The State Department also has authority to issue passports to United States citizens. 22 U.S.C. §§ 211a, 212; 22 C.F.R. § 51.2(a). Both valid U.S. passports and CRBAs serve as proof of U.S. citizenship. 22 U.S.C. § 2705. The State Department has the power to cancel passports and CRBAs, a previously recognized authority codified in 1994 at 8 U.S.C. § 1504.

A person who has been denied a right or privilege on the ground that he is not a U.S. national may seek a declaration from a district court that he is in fact a U.S. national. 8 U.S.C. § 1503(a).[1]

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[1] The term "national" includes United States citizens as well as several categories of individuals either born or found at an early age in outlying possessions of the United States, or born to parents who themselves were non-citizen nationals. 8 U.S.C. §§ 1101(a)(22), 1408; *Marquez-Almanzar v. INS*, 418 F.3d 210, 217-18 (2d Cir. 2005). The only status as a U.S. national at issue on this appeal is U.S. citizenship.

B. Hizam's Birth and the State Department's Issuance of a CRBA and U.S. Passport

Hizam was born in Yemen in 1980. (JA 128-33, 159). His parents were married at the time, and his father, Ali Hizam, was a naturalized citizen of the United States, while his mother was a citizen of Yemen. (JA 46, 128-33, 135, 159).

In February 1990, Ali Hizam applied to the United States consulate in Yemen for a CRBA and U.S. passport for Hizam. (JA 137, 159). The statute in effect as of the date of Hizam's birth required that the U.S. citizen parent establish that he or she had been physically present in the United States for periods totaling at least ten years before the birth of the child. (JA 159-60). Ali Hizam's CRBA application listed several date ranges totaling approximately seven years' presence in the United States before Hizam's birth in Yemen. (JA 137, 159). Even though it was evident on the face of the CRBA application that Ali Hizam did not meet the requirements to transmit U.S. citizenship to Hizam at birth, a consular officer erroneously issued Hizam a CRBA and a U.S. passport. (JA 17, 137, 160).

Later in 1990, Hizam came to the United States, where he was raised by his grandparents. (JA 17, 46, 114, 160). In 1995, Hizam's grandfather applied for a renewed passport on behalf of Hizam, which the State Department erroneously issued in 1996. (JA 87-88, 90, 160). In 2001, the State Department again erroneously renewed Hizam's U.S. passport. (JA 91, 160).

In 2002, Hizam traveled to Yemen, where he married and had two children. (JA 48, 117, 161). At some point thereafter, Hizam returned to the United States, leaving his family in Yemen. (JA, 48, 117-18, 161). In 2009, Hizam again traveled to Yemen to visit his family, and there he applied for CRBAs and U.S. passports for his own children. (JA 50, 118, 161). At that time, the consular officer considering the citizenship claims of Hizam's children noted the original error and informed Hizam. (JA 50, 118, 161).

In 2011, the State Department informed Hizam by letter that he had not acquired U.S. citizenship from his father, and that, therefore, the State Department had issued Hizam the CRBA and U.S. passports in error. (JA 99-100, 119-20). In later correspondence, the State Department told Hizam that his CRBA had been canceled and his current U.S. passport had been revoked. (JA 102-03, 105-06). The State Department requested the return of the documents, and Hizam complied. (JA 51, 120).

C. Hizam's Complaint

In October 2011, Hizam commenced the action below seeking a declaration under 8 U.S.C. § 1503 that he is a citizen of the United States. (JA 1) ("This is an action seeking a declaratory judgment for Plaintiff affirming his status as a national of the United States pursuant to 8 U.S.C.A. § 1503."). Hizam also sought, in the alternative, (i) an order requiring the State Department "to adjudicate [Hizam's] citizenship status *nunc pro tunc*," on the basis that Hizam would have been eligible for citizenship by naturalization in 1996; and (ii) an order requiring the State

Department to immediately reissue his CRBA and U.S. passport. (JA 14). In 2012, Hizam moved for summary judgment, and the government opposed Hizam's motion and cross-moved for summary judgment.

D. The District Court's Decision

On July 27, 2012, the district court issued a memorandum and order granting Hizam's motion and denying the government's cross-motion. (JA 158-79). After reciting the background facts, the court noted that "[j]urisdiction exists in this case by virtue of 8 U.S.C. § 1503(a)," which "authorizes *de novo* determination of whether the plaintiff qualifies as a U.S. national." (JA 163 (citations omitted)).

Observing that the parties agreed about the material facts, the district court considered "the legal significance of those facts." (JA 166). First, the court stated that under 8 U.S.C. § 1104(a), the State Department does not have authority to grant or revoke citizenship; "rather, its authority is limited to determining an individual's nationality." (JA 166). But, according to the district court, before 8 U.S.C. § 1504 was enacted in 1994, no statutory authority permitted the State Department to "revisit" erroneous determinations of U.S. citizenship or revoke erroneously issued CRBAs and passports. (JA 166). Because § 1504, which the court noted grants authority to cancel erroneously issued passports and CRBAs, was enacted after the State Department issued those documents in 1990, the district court considered whether that provision properly could be applied retroactively. (JA 169-70). Finding no clear indication of whether

Congress intended the provision to apply to the erroneous issuance of documents before its enactment, the court concluded that allowing the State Department to rely on the statute would upset Hizam's "long settled expectations." (JA 170-73 (discussing *INS v. St. Cyr*, 533 U.S. 289 (2001); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994))).

The district court further observed that Congress had prescribed that CRBAs and valid U.S. passports have "'the same force and effect as proof of United States citizenship as certificates of naturalization.'" (JA 166 (quoting 22 U.S.C. § 2705)). The court found persuasive the Ninth Circuit's determination that § 2705 does not permit the State Department to revoke citizenship documents based on agency error because such revocation would not give those documents the same effect as certificates of naturalization, which can be revoked only on the basis of fraud or illegality. (JA 166-67 (discussing *Magnuson v. Baker*, 911 F.2d 330 (9th Cir. 1990))).

The district court recognized that it lacked authority to confer citizenship on Hizam under terms not authorized by Congress. (JA 169 (discussing *INS v. Pangilinan*, 486 U.S. 875 (1988))). But it concluded that an order requiring the State Department to issue citizenship documents to Hizam would not amount to improper naturalization but would, instead, reflect only a determination that the State Department had failed to "comply with Section 2705, which barred the agency from re-opening its prior adjudication of Mr. Hizam's status or revoking his citizenship documents based on second thoughts." (JA 177). Accordingly, the court ordered the State

Department to reissue the CRBA to Hizam, and it observed that because the CRBA has "'the same force and effect as proof of United States citizenship,'" plaintiff "can presumably apply for and obtain a new passport on that basis." (JA 178 (quoting 22 U.S.C. § 2705)).

This appeal followed. The government asked the district court to stay its judgment pending appeal, but the court denied the motion, and the State Department reissued the CRBA to Hizam. Using his CRBA as proof of U.S. citizenship, Hizam later applied for and obtained a passport.

Summary of Argument

Hizam is not a citizen of the United States because he did not acquire U.S. citizenship through his father at birth, he has never naturalized, and he does not meet any other criteria for deriving U.S. citizenship. *See infra* Point A. Given the indisputable fact that Hizam is not a citizen or national of the United States, he is not entitled to a CRBA or U.S. passport, both of which serve as proof of U.S. citizenship and may be issued only to U.S. citizens or nationals. And because Hizam is not a U.S. citizen, the district court exceeded its authority under 8 U.S.C. § 1503—which only confers the power to declare that a person is a U.S. national—by ordering the State Department to issue Hizam a CRBA. *See infra* Points B.1 & B.2.

Moreover, the State Department acted lawfully in canceling Hizam's CRBA and U.S. passport. In *Haig v. Agee*, 453 U.S. 280 (1981), the Supreme Court recognized that the government can revoke a U.S. passport for the same reasons it can deny one, and Hi-

zam's non-citizenship inarguably would have been a basis for the State Department to deny the CRBA and passport applications in 1990. In addition, Congress explicitly confirmed the State Department's authority by enacting 8 U.S.C. § 1504(a), which provides that the State Department may cancel CRBAs and U.S. passports that were—like Hizam's—"erroneously obtained."

The district court erred in concluding that the State Department has no such authority. First, the district court relied on a wrongly decided Ninth Circuit decision that misconstrued 22 U.S.C. § 2705 to require certain procedures to be followed before a passport can be revoked—procedures that Congress never mandated. Second, the district court erred in finding that § 1504 is impermissibly retroactive, as the statute merely confirmed preexisting authority, it did not take away any person's vested rights or impose substantive burdens, and it only applied prospectively. *See infra* Point B.3.

Accordingly, the district court's judgment should be reversed.

ARGUMENT

Standard of Review

This Court reviews the district court's ruling on cross-motions for summary judgment *de novo*. *Chandok v. Klessig*, 632 F.3d 803, 812 (2d Cir. 2011). Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any ma-

terial fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Hizam Is Not a Citizen or National of the United States, and Is Therefore Not Entitled to a CRBA or U.S. Passport

Hizam sought, and the district court ordered, the return of his CRBA, which the court said could be used to obtain a new passport. But only U.S. citizens or nationals are entitled to those documents—and it is beyond dispute that Hizam is not a citizen or national of the United States. The district court was therefore incorrect to direct the State Department to return Hizam's erroneously issued CRBA. Moreover, the only relief available under § 1503—the sole basis for Hizam's action—is a declaration that he is a citizen or national of the United States. Absent such a declaration, the court lacked authority to order the State Department to issue a CRBA. For those reasons, the judgment should be reversed.

A. Hizam Is Not a Citizen or National of the United States

Under the United States Constitution, there are "two sources of citizenship, and two only—birth and naturalization." *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898); *accord Miller v. Albright*, 523 U.S. 420, 423 (1998) (plurality). A person born outside the United States, such as Hizam, may acquire citizenship at birth only as provided by an act of Congress. *Rogers*, 401 U.S. at 828, 830-31; *accord Miller*, 523 U.S. at 434 n.11 (plurality) ("citizenship does not pass by descent" and therefore individual must "meet

the statutory requirements set by Congress for citizenship"); *id.* at 453 (Scalia, concurring in judgment) (absent a "congressional enactment granting [an individual] citizenship," that individual "remains an alien"); *see Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1425 (2012) (citizenship of foreign-born acquired "by virtue of congressional enactment"). In interpreting such a statute, courts must accord "[d]eference to the political branches" and apply "'a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.'" *Miller*, 523 U.S. at 434 n.11 (plurality) (quoting *Mathews v. Diaz*, 426 U.S. 67, 82 (1976)). Thus, "'[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with.'" *Rogers*, 401 U.S. at 830 (quoting *United States v. Ginsburg*, 243 U.S. 472, 475 (1917)).

Congress has provided the terms under which a child born abroad to a U.S. citizen parent or parents acquires automatic U.S. citizenship at birth. Citizenship of a person born abroad is determined by the law in effect at the time of birth. *Drozd*, 155 F.3d at 86. In 1980, the year of Hizam's birth, the Immigration and Nationality Act granted citizenship to a child born in wedlock to one U.S. citizen parent if that parent was "physically present in the United States . . . for a period or periods totaling not less than ten years prior to the birth of the child." 8 U.S.C. § 1401(g) (Supp. III 1980).[2]

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[2] Under current law, the physical-presence requirement has been reduced to five years. 8 U.S.C. § 1401(g).

Hizam does not dispute that his U.S. citizen father did not meet the physical-presence requirement. (JA 112 (Ali Hizam's physical presence was "less than 10 years . . . since Ali Hizam first arrived in the United States in 1973 and [Hizam] was born in 1980")). Accordingly, Hizam did not acquire U.S. citizenship at birth. Nor does he allege that he is a citizen by virtue of a different statutory provision conferring citizenship at birth, by birth in the United States, or by naturalization. Accordingly, it is beyond doubt that Hizam is not, and never has been, a U.S. citizen.[3]

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[3] Had Hizam's father filed an immediate-relative petition on Hizam's behalf in 1990, upon its approval and the issuance of an immigrant visa Hizam would have been eligible to become a lawful permanent resident of the United States. *See* 8 U.S.C. § 1151(b)(2)(A)(i) ("immediate relatives" of U.S. citizens, including children under 21, are not subject to numerical limitations for immigrant visas). Eventually Hizam likely could have naturalized as a U.S. citizen. *See id.* § 1427(a) (requiring, among other things, five years' continuous residence as lawful permanent resident in United States for naturalization). While Hizam, now over the age of 21 and married, can no longer benefit from an immediate-relative petition, Congress could grant him citizenship or status as a lawful permanent resident by enacting a private law. Alternatively, his father or U.S. citizen brothers could file a petition on his behalf for an immigrant visa, although Congress has imposed annual numerical limits on such petitions that may cause a substantial waiting time for Hizam. *See id.* § 1153(a)(3) (author-

B. Because He Did Not Acquire U.S. Citizenship at Birth or Through Naturalization, Hizam Is Not Entitled to a CRBA or U.S. Passport

Because Hizam is not a U.S. citizen, he is not entitled to a CRBA or U.S. passport.

1. Legal Authorities Governing CRBAs and U.S. Passports

Congress has charged the Secretary of State with the duty of "determining [the] nationality of a person not in the United States." 8 U.S.C. § 1104(a). Pursuant to that power, the State Department adjudicates the citizenship claims of persons born abroad and, where appropriate, issues CRBAs and U.S. passports. 22 C.F.R. § 50.7(a); *see* 8 U.S.C. § 1504(b) (CRBA is "issued by a consular officer to document a citizen born abroad"); *Zivotofsky*, 132 S. Ct. at 1436 (Alito, J., concurring in judgment) ("a CRBA is a certification made by a consular official that the bearer acquired United States citizenship at birth").

Like a CRBA, a U.S. passport may only be issued to a citizen or other national of the United States. 22 U.S.C. § 212; 22 C.F.R. § 51.2(a). Both a CRBA and a valid U.S. passport serve as proof of citizenship. 22 U.S.C. § 2705 ("same force and effect as proof of United States citizenship" as naturalization certificate or citizenship certificate).

While the State Department has the authority to make citizenship determinations in connection with

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izing immigrant visas for married sons and daughters of U.S. citizens), (4) (siblings of U.S. citizens).

adjudicating applications for citizenship documents, it does not have the authority to confer or revoke citizenship status itself. *See* 8 U.S.C. § 1421(a) ("The sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General."); *Perriello v. Napolitano*, 579 F.3d 135, 139-40 (2d Cir. 2009) (same).

2. The District Court Lacked Authority to Direct the State Department to Return the CRBA

Although Hizam is not entitled to a CRBA or U.S. passport because he is not a U.S. citizen, *see infra* Point B.3, as a threshold matter the district court lacked authority to direct the State Department to provide those documents.

Hizam brought this action under 8 U.S.C. § 1503. That statute provides that a person in the United States who "claims a right or privilege as a national of the United States," but is "denied such right or privilege . . . upon the ground that he is not a national of the United States," may "institute an action under [the Declaratory Judgment Act] against the head of [the] department or independent agency [that denied the claim of nationality] for a judgment declaring him to be a national of the United States." 8 U.S.C. § 1503(a). Neither Hizam nor the district court invoked any source of authority other than § 1503. (JA 1, 3 (relying solely on § 1503)); (JA 158, 163 (same)).

Thus, the district court's authority was limited to declaring that Hizam is a citizen or national of the United States. Yet the district court did not enter

such a declaration—presumably because it lacked any ground on which to do so, as Hizam is indisputably not a U.S. citizen or national. *See supra* Point A. Instead, the district court ordered the State Department to reissue a CRBA to Hizam—a remedy that the court had no authority to grant under § 1503.

Moreover, the district court had no other power to enter the order it did, which effectively required the State Department to violate Congress's statutory citizenship scheme by issuing proof of citizenship to a person who is not a U.S. citizen. "[T]he power to make someone a citizen of the United States has not been conferred upon the federal courts . . . as one of their generally applicable equitable powers," and therefore "'[o]nce it has been determined that a person does not qualify for citizenship, the district court has no discretion to ignore the defect and grant citizenship.'" *INS v. Pangilinan*, 486 U.S. 875, 884 (1988) (quoting *Fedorenko v. United States*, 449 U.S. 490, 517 (1981) (alteration omitted)); *accord* 8 U.S.C. § 1421(d) (naturalization may occur "in the manner and under the conditions prescribed in [the INA] and *not otherwise*" (emphasis added)). Thus, a court may not grant citizenship "by the application of the doctrine of equitable estoppel, nor by invocation of equitable powers, nor by any other means." *Pangilinan*, 486 U.S. at 884-85; *accord Mustanich v. Mukasey*, 518 F.3d 1084, 1088 (9th Cir. 2008) (statutory requirement for naturalization "cannot be ignored," even where agency misconduct alleged, because "[e]stoppel in these circumstances would amount to precisely the type of equity-based departure from the requirements of the immigration statutes that

Pangilinan prohibits"); *see Rogers*, 401 U.S. at 836 ("The proper emphasis is on what the statute permits [the appellee] to gain from the possible starting point of noncitizenship, not on what he claims to lose from the possible starting point of full citizenship.").

Although the district court did not explicitly order the government to confer citizenship on Hizam, it directed the State Department to issue a CRBA—a document that may be issued only to persons who acquired U.S. citizenship at birth according to the terms of a statute, and which (like a U.S. passport) has "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." 22 U.S.C. § 2705. Thus, the illogical and impermissible effect of the district court's order is that Hizam will be entitled to prove citizenship that he does not have. Additionally, on the basis of his court-ordered, nonrevocable CRBA, Hizam may enjoy most if not all of the benefits of U.S. citizenship, including obtaining a U.S. passport (which he has already done), filing an immediate-relative petition for his alien wife so that she may obtain an immigrant visa, and applying for CRBAs and U.S. passports for his children. The ultimate effect is the same as if the court had simply declared Hizam to be a U.S. citizen as a matter of equity, something it lacks authority to do. *Pangilinan*, 486 U.S. at 883-85. Because the district court's order was outside its lawful power, it must be reversed.

3. The State Department Acted Lawfully in Canceling Hizam's Erroneously Issued CRBA and U.S. Passport

In any event, the State Department acted lawfully in revoking Hizam's erroneously issued CRBA and U.S. passport.

a. The State Department Is Authorized to Cancel or Revoke Erroneously Issued CRBAs and U.S. Passports

As provided in 8 U.S.C. § 1504, the State Department may "cancel" a CRBA or U.S. passport "if it appears that such document was illegally, fraudulently, or erroneously obtained." 8 U.S.C. § 1504(a). Such a cancellation "shall affect only the document and not the citizenship status of the person in whose name the document was issued." *Id.*

Section 1504, enacted in 1994, codified the State Department's existing administrative authority to correct agency or other errors, specifically with respect to erroneously issued CRBAs and U.S. passports. As the Supreme Court recognized in *Haig v. Agee*, although the statute granting the Secretary of State the power to issue passports "does not in so many words confer upon the Secretary a power to revoke [or deny] a passport," "[n]either, however, does any statute expressly limit those powers." 453 U.S. at 290. The Court concluded that "[i]t is beyond dispute that the Secretary has the power to deny a passport for reasons not specified in the statutes," and that it was conceded that "if the Secretary may deny a passport application for a certain reason, he may revoke a passport on the same ground." *Id.* at 290-91. That the

power to revoke a passport inheres in the power to grant one has been "consistent[ly]" reflected in the State Department's regulations, promulgated pursuant to its "broad rule-making authority." *Id.* at 291 & n.20 (quotation marks omitted); *see also* Exec. Order 7856, ¶ 124 (Mar. 31, 1938) (granting Secretary of State "discretion . . . to withdraw or cancel a passport already issued"); Exec. Order 11,295 (Aug. 5, 1966) (superseding Exec. Order 7856 and delegating to Secretary of State power to promulgate "rules governing the granting, issuing, and *verifying* of passports" (emphasis added)).

More generally, agencies have inherent authority to correct their own errors. *NRDC v. Abraham*, 355 F.3d 179, 202-03 (2d Cir. 2004) (noting "power to reconsider decisions reached in individual cases by agencies in the course of exercising quasi-judicial powers"); *Dun & Bradstreet Corp. Foundation v. U.S. Postal Service*, 946 F.2d 189, 193 (2d Cir. 1991) ("It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review."); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360-61 (Fed. Cir. 2008); *Last Best Beef, LLC v. Dudas*, 506 F.3d 333, 340 (4th Cir. 2007). That inherent power applies even when the error is "inadvertent," and when several years pass before the error is detected. *American Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958) ("the presence of authority in administrative officers and tribunals to correct such errors has long been recognized—probably so well recognized that little discussion has ensued in the reported cases"). And it

applies as well even when a person has relied to his detriment on the agency error, for as the Supreme Court has recognized, because "Congress, not the [agency], prescribes the law," an agency's error cannot subvert federal statutory requirements. *Dixon v. United States*, 381 U.S. 68, 72-73 (1965) (agency "empowered retroactively to correct mistakes of law. . . even where a [person] may have relied to his detriment on the [agency's] mistake") (citing *Auto. Club of Michigan v. Comm'r*, 353 U.S. 180 (1957); *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129 (1936)).

The State Department properly exercised these inherent powers in this case. There is no doubt that the State Department could and should have denied the applications for a CRBA and U.S. passport for Hizam when they were submitted, because Hizam's father did not meet the statutory requirement for physical presence in the United States and therefore could not transmit citizenship to Hizam at birth. *See* 22 C.F.R. §§ 50.7 (CRBA issued only upon "submission of satisfactory proof"), 51.2 (passport may only be issued to U.S. national). Accordingly, as the Supreme Court recognized in *Agee*, the State Department has inherent authority to revoke those documents, thus correcting its initial error.

Additionally, the State Department acted properly under its § 1504(a) authority, which permits it to "cancel" CRBAs and U.S. passports if they were issued "erroneously." While Hizam argued in the district court that § 1504(a) only allows cancellation of citizenship documents if the applicant, rather than the agency, committed an error, that contravenes the plain text of § 1504, which contains no such limita-

tion. *See Friend v. Reno*, 172 F.3d 638, 640, 646-47 (9th Cir. 1999) (citizenship certificate may be revoked if obtained through agency error alone, even when applicant "fully disclosed" truthful but legally incorrect basis of claim to citizenship). Moreover, any rule that citizenship documents issued through agency error cannot be revoked is inconsistent with the fundamental principle that "there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship," and if those statutory conditions are not met the citizenship has been "'illegally procured,' and naturalization that is unlawfully procured can be set aside." *Fedorenko*, 449 U.S. at 506, *quoted in Friend*, 172 F.3d at 646-47; *see Dixon*, 381 U.S. at 72-73 (agency error cannot change statutory requirements).[4]

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[4] *Friend* also held that a citizenship certificate issued by agency error had been "'illegally procured'" and thus could be revoked under a statute allowing cancellation of the certificate if it was "'illegally obtained.'" 172 F.3d at 646-47 (quoting *Fedorenko*, 449 U.S. at 506, and 8 U.S.C. § 1453). To the extent Hizam will argue that the error referred to in § 1504 can only mean the applicant's error because the other two elements of the statutory phrase—"illegally, fraudulently, or erroneously obtained"—refer solely to the applicant's misconduct, that is inconsistent with *Friend*'s holding that a citizenship document may be "illegally . . . obtained" through agency error alone.

b. The District Court Erred in Rejecting the State Department's Authority to Revoke Erroneously Issued Citizenship Documents

In determining that the State Department has no power to revoke Hizam's CRBA and U.S. passport, the district court relied on two arguments. First, the court held that 22 U.S.C. § 2705, as interpreted by the Ninth Circuit, precludes the State Department from revoking those documents. Second, the court held that because statutes are presumed not to apply retroactively, § 1504 cannot be validly applied to the issuance of CRBAs and U.S. passports prior to its 1994 enactment. Both contentions are incorrect.

i. Section 2705 Does Not Preclude Cancellation of Citizenship Documents

First, § 2705—which provides that valid U.S. passports and CRBAs "have the same force and effect as proof of United States citizenship as certificates of citizenship issued by the Attorney General or by a court having naturalization jurisdiction"—does not address the State Department's authority to cancel documents issued in error to a person who is not a U.S. citizen. As is clear from the text of the statute itself, § 2705 concerns the evidentiary force and effect of CRBAs and U.S. passports, but says nothing about the State Department's ability to cancel or revoke them, or any procedures it must follow in doing so.

In concluding to the contrary, the district court relied on the Ninth Circuit's decision in *Magnuson v. Baker*, which held that by providing that CRBAs and

U.S. passports have the "same force and effect" as certificates of citizenship or naturalization, § 2705 thereby also incorporated the procedural and substantive requirements specified in separate statutes for the revocation of the latter certificates. 911 F.2d 330, 333-36 (9th Cir. 1990). But *Magnuson* was wrongly decided, and the district court erred in following it.

To begin with, *Magnuson* is inconsistent with the text of § 2705. As noted above, that text concerns only the evidentiary force and effect of the documents at issue. But the Ninth Circuit unreasonably inferred that by specifying the "force and effect" those documents would have as "proof" of citizenship, Congress also incorporated requirements for revoking those documents, such that revocation could only occur after a hearing and only on the grounds of fraud or illegality. *Id.* at 335. Had Congress intended to adopt those procedural and substantive requirements, it surely would have done so by saying so—as it did for certificates of citizenship and naturalization, *see* 8 U.S.C. §§ 1451, 1453—rather than requiring courts to discern those protections in language that does not mention them. Indeed, it would make no sense for Congress to specify procedures for the revocation of CRBAs and U.S. passports by reference to two other sets of procedures that differ significantly from each other, leaving courts to guess which of them must be applied. *See* 8 U.S.C. §§ 1451 (district court proceedings for revoking naturalization order and canceling naturalization certificate), 1453 (administrative proceedings for canceling certificates of citizenship or naturalization). The Ninth Circuit held that if it did not incorporate the procedures required for revoking

a citizenship or naturalization certificate into the process for canceling a passport, it would "accord those who use their passport as evidence of their citizenship less protection than those who use other documents as evidence denoting citizenship," contradicting § 2705. 911 F.2d at 335. But that confuses the ability to *use* a document, which is protected by § 2705, with the right to have it in the first place, a subject on which the statute is silent.[5]

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[5] That § 2705 is solely concerned with the use of U.S. passports and CRBAs as evidence—not procedures for canceling them—is confirmed by its sparse legislative history. The section was passed in 1982 (although the district court mistakenly wrote that it was enacted in 1956). Department of State Authorization Act, Fiscal Years 1982 and 1983, Pub. L. No. 97-241, § 117, 96 Stat. 273 (1982). The State Department sought the amendment because certificates of citizenship issued by the Attorney General were being afforded greater evidentiary weight than Reports of Birth, the precursor to CRBAs, prompting persons with consular reports to also apply for certificates of citizenship, resulting in duplicative work for the government. Letter from J. Brian Atwood, Assistant Secretary of State for Congressional Relations to Walter F. Mondale, President, U.S. Senate, Sept. 12, 1979. Consistent with the State Department's concerns, the House committee report notes that the amendment would serve to "correct an inconsistency in the law which has created serious problems over the years" for foreign-born Americans, and would recognize "the importance of passports and of reports of birth abroad

Moreover, both the *Magnuson* court and the district court misunderstood the nature of the documents they considered. As reflected in § 2705, a CRBA documents that a child born abroad acquired United States citizenship at birth. *See* 8 U.S.C. § 1504(b); 22 C.F.R. § 50.7(a); 75 Fed. Reg. 36,522, 36,525 (2010). But neither a CRBA nor a U.S. passport can confer U.S. citizenship upon a person who is not a citizen, and neither their issuance nor their cancellation has any effect on a person's underlying U.S. citizenship status. A child born abroad automatically acquires U.S. citizenship at birth if the statutory requirements are met, regardless of whether that person is ever issued a CRBA or U.S. passport. Just as a person who has never applied for or been issued a CRBA or U.S. passport could have nonetheless acquired citizenship at birth, a person, like Hizam, who was erroneously issued a CRBA does not become a U.S. citizen by virtue of that mistake. And if a person acquired U.S. citizenship at birth, that status is unaffected even if that person's U.S. passport or CRBA is revoked: as 8 U.S.C. § 1504 states, "[t]he cancellation under this section of any document purporting to show the citizenship status of the person to whom it was issued shall affect only the document and not the citizenship status of the person in whose name the document was issued."

Because CRBAs and passports have different functions from certificates of citizenship and naturalization, both the district court and *Magnuson* erred in

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as common travel documents." H.R. Rep. No. 97-102, at 20 (May 19, 1981) (Comm. on Foreign Affairs).

imposing the more rigorous procedures specified for revoking a naturalization certificate on the revocation of a CRBA or U.S. passport. To establish eligibility for a U.S. passport, a naturalized citizen must show that naturalization occurred, typically by producing a naturalization certificate. But a person born abroad who acquired U.S. citizenship at birth may simply prove that the requirements of the applicable citizenship transmission statute were met, regardless of whether he or she has previously been issued a CRBA or U.S. passport. There is, therefore, no need—or logical reason—to subject the cancellation of CRBAs (which only document the acquisition of citizenship) to the same standards as cancellation of naturalization certificates (which are effectively the only means of proving citizenship status). Contrary to the district court's conclusion, the State Department was not "taking away" Hizam's citizenship when it canceled his CRBA; it was only canceling the document it issued and correcting its own prior mistake. Those actions are not equivalent to loss of nationality or denaturalization. *See Kelso v. U.S. Dep't of State*, 13 F. Supp. 2d 1, 4 (D.D.C. 1998) ("Yet to admit that passports are evidence of citizenship is to say nothing about whether their revocation implicates the fundamental right of citizenship." (citing *Agee*, 453 U.S. at 309-10)).

In any event, even if § 2705 could be read as the Ninth Circuit did in *Magnuson*, such that the provision precludes the State Department from revoking a CRBA or U.S. passport without meeting the procedural and substantive requirements for canceling naturalization or citizenship certificates, the enactment of § 1504 four years later effectively overruled

that decision. By clearly confirming that the State Department has the authority to cancel CRBAs and U.S. passports that have been issued "erroneously," and to do so without a pre-cancellation hearing, Congress laid to rest any argument that either § 2705 or any other statute abrogates that preexisting power.

ii. Section 1504 Is Not Impermissibly Retroactive

Second, although the State Department's inherent authority to correct its error was alone sufficient to revoke Hizam's documents, its action was also justified by § 1504, which is not impermissibly retroactive.

As the Supreme Court held in *Landgraf v. USI Film Products*, although there is a presumption against retrospective application of statutes, "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 269-70 (citation omitted).[6] Only a statute that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." *Id.* at 269 (quotation marks omitted). In determining whether a statute

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[6] "The terms 'retroactive' and 'retrospective' are synonymous in judicial usage." *Id.* at 269 n.23 (quotation marks omitted).

should be subject to the presumption against retroactivity, a court should look to "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 270. Central to this analysis is whether a statute "impos[es] new burdens on persons after the fact." *Id.*

However, "[w]hen the intervening statute authorizes . . . prospective relief, application of the new provision is not retroactive." *Id.* at 273. Similarly, an intervening statute that "takes away no substantive right but simply changes the tribunal" is one that "speak[s] to the power of the court rather than to the rights or obligations of the parties" and is therefore not retroactive. *Id.* at 274.

Under these standards, § 1504 is not impermissibly retroactive. To begin with, the statute merely confirms preexisting authority—and, as the Court held in *Landgraf*, when "even before the enactment of [a statute]" the same or similar authority existed, the statute "simply 'did not impose an additional or unforeseeable obligation' " on any person. *Landgraf*, 511 U.S. at 277-78 (quoting *Bradley v. School Board of Richmond*, 416 U.S. 696, 721 (1974)). There is accordingly no bar to applying such a statute to pre-enactment conduct.[7]

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[7] In concluding that § 1504 "expanded the circumstances under which a passport or CRBA could be canceled," the district court relied on a notice the State Department published in the Federal Register, in which it said the statute " 'added new grounds for denying, revoking or canceling a passport, and for canceling a Consular Report of Birth.' " (JA 168, 172-

Even if the Court were to conclude that § 1504 did more than confirm the State Department's prior authority, it did not affect substantive rights or impose burdens. As the *Landgraf* Court noted, even when procedural rights and obligations of parties may have changed, it remains permissible to apply new rules to prior facts when those parties' underlying substantive rights and obligations are unaffected. 511 U.S. at 276. Thus, for instance, when "new hearing procedures did not affect either party's obligations under [a] lease agreement," those procedures can be applied to acts taken before the procedures were issued. *Id.* (citing *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 279, 283 (1969)). Similarly, here, Hizam's underlying right or lack of a right to citizenship was unaffected by passage of § 1504, which "speak[s] to the power of" the State Department rather than the rights of individuals. 511 U.S. at 274. Hizam either acquired US. citizenship at birth or he did not, an issue unaffected by the State Department's power to later correct errors in issuing documents.

Additionally, § 1504 cannot be seen as impermissibly retroactive because it "authorizes . . . prospective relief." *Id.* at 273, 276. While the statute con-

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73 (quoting 64 Fed. Reg. 19,713, 19,713 (Apr. 22, 1999))). The district court failed to note, however, that this quotation was only contained in the summary rather than the body of the notice. No such passing reference to a statutory provision can be read to reflect an agency's considered interpretation, nor, obviously, can it change the meaning of the statute itself.

firms the State Department's authority to cancel a CRBA or U.S. passport, it does not permit the government to impose damages, penalties, or other backward-looking relief (nor did the government seek to do so in Hizam's case); the statute only affects whether a person may hold a CRBA or U.S. passport in the future. And while Hizam may legitimately claim that the revocation of his CRBA and U.S. passport has upset his reasonable expectations grounded in the issuance of those documents, that alone is not a reason to conclude that the statute is impermissibly retroactive. *Id.* at 269-70 & n.24 ("Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct . . . ."); *see also Dixon*, 381 U.S. at 72-73 (agency has power to correct mistakes even when a person has detrimentally relied on that mistake).

In short, considerations of "fair notice, reasonable reliance, and settled expectations" do not preclude applying § 1504 to permit revocation of Hizam's CRBA, which was erroneously issued before the statute's enactment. The statute did not "take[] away or impair[] vested rights acquired under existing laws," 511 U.S. at 269 (quotation marks omitted), because Hizam had no vested right either to citizenship or to documents that would prove the citizenship he never had. For the same reason, the statute did not "create[] a new obligation, impose[] a new duty, or attach[] a new disability, in respect to transactions or considerations already past," *id.* (quotation marks omitted): Hizam was subject to precisely the same obligations as a non-citizen before and after the State Department acted to cancel his documents, and whatever burdens or disabilities he may have in-

curred are because he is not a U.S. citizen, not because he lacks documentation. There is no "potential for disruption and unfairness" in a statute that only confirms that the government may correct its own errors, and may take away documents that a person had no right to have in the first place. 511 U.S. at 268. And there is no reason to believe that the common-sense provision of § 1504 had a "retributive or other suspect legislative purpose." 511 U.S. at 282 (quotation marks omitted). There is, accordingly, no bar to applying § 1504 to allow cancellation of CRBAs and passports issued before that statute's enactment.

* * *

As reflected in the record before this Court, the State Department's mistake in issuing a CRBA and U.S. passport to Hizam occurred through no fault of either Hizam or his father, and may have caused him to lose an opportunity to obtain lawful permanent resident status and possibly U.S. citizenship. *See supra* note 3. The government recognizes the inequity of this situation, and although the State Department lacks any legal authority to confer citizenship or other immigration status on Hizam, it has brought the matter to the attention of U.S. Citizenship and Immigration Services, and will continue to support other lawful means to provide relief to Hizam, including a private bill in Congress should one be introduced.

Nevertheless, the unfairness occasioned in one particular case is no reason to undermine or disregard well-established legal rules grounded in important constitutional and policy concerns. As explained above, Congress alone determines the terms under which a person born outside the United States

acquires U.S. citizenship. *Rogers*, 401 U.S. at 830 (1971). The State Department cannot alter those terms by committing an error, nor can any court contradict or disregard them by granting U.S. citizenship for equitable reasons. Even though Hizam may have relied on the State Department's error for many years, the agency's power and duty to correct its mistake, and more specifically its power and duty to cancel a wrongly issued CRBA and U.S. passport, remain, and were lawfully exercised in this case. To affirm the district court here would call into question the State Department's authority to cancel any CRBA erroneously issued before 1994—a result that contradicts common sense as well as the Department's statutory obligation to deny CRBA applications of persons who did not acquire U.S. citizenship at birth. *See* 8 U.S.C. § 1104. For all those reasons, the judgment requiring the State Department to issue a CRBA to Hizam was contrary to the law and should not be permitted to stand.

Conclusion

The judgment of the district court should be reversed.

Dated: New York, New York
January 22, 2013

Respectfully submitted,

PREET BHARARA,
United States Attorney for the Southern District of New York,
Attorney for Defendants-Appellants.

SHANE CARGO,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys,
Of Counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 8339 words in this brief.

PREET BHARARA,
United States Attorney for the Southern District of New York

By: SHANE CARGO,
Assistant United States Attorney

ADDENDUM

8 U.S.C. § 1104. Powers and duties of Secretary of State

(a) Powers and duties. The Secretary of State shall be charged with the administration and the enforcement of the provisions of this Act and all other immigration and nationality laws relating to (1) the powers, duties and functions of diplomatic and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas; (2) the powers, duties and functions of the Administrator; and (3) the determination of nationality of a person not in the United States. He shall establish such regulations; prescribe such forms of reports, entries and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out such provisions. He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the department or independent establishment under whose jurisdiction the employee is serving, any of the powers, functions, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Department of State or of the American Foreign Service.

8 U.S.C. § 1503. Denial of rights and privileges as national

(a) Proceedings for declaration of United States nationality. If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by

any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this or any other act, or (2) is in issue in any such removal proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts.

8 U.S.C. § 1504. Cancellation of United States passports and Consular Reports of Birth

(a) The Secretary of State is authorized to cancel any United States passport or Consular Report of Birth, or certified copy thereof, if it appears that such document was illegally, fraudulently, or erroneously obtained from, or was created through illegality or fraud practiced upon, the Secretary. The person for or to whom such document has been issued or made shall be given, at such person's last known address, written notice of the cancellation of such document, together with the procedures for seeking a prompt

post-cancellation hearing. The cancellation under this section of any document purporting to show the citizenship status of the person to whom it was issued shall affect only the document and not the citizenship status of the person in whose name the document was issued.

(b) For purposes of this section, the term "Consular Report of Birth" refers to the report, designated as a "Report of Birth Abroad of a Citizen of the United States", issued by a consular officer to document a citizen born abroad.

22 U.S.C. § 211a. Authority to grant, issue, and verify passports

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic and consular officers of the United States, and by such other employees of the Department of State who are citizens of the United States as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports. . . .

22 U.S.C. § 212. Persons entitled to passport

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.

22 U.S.C. § 2705. Documentation of citizenship

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.

(2) The report, designated as a "Report of Birth Abroad of a Citizen of the United States," issued by a consular officer to document a citizen born abroad. For purposes of this paragraph, the term "consular officer" includes any United States citizen employee of the Department of State who is designated by the Secretary of State to adjudicate nationality abroad pursuant to such regulations as the Secretary may prescribe.