

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

13-5272
(C.A. No. 12-1143)

LENEUOTI FIAFIA TUAUA, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

Federal Appellees the United States of America, United States Department of State, John Kerry, in his official capacity as Secretary of State, and Janice Jacobs, in her official capacity as Assistant Secretary of State for Consular Affairs (the "Government"), by and through undersigned counsel, respectfully move for summary affirmance of the Honorable Richard J. Leon's June 26, 2013 Memorandum Opinion and Order (attached hereto as Exhibits 1 and 2) granting the Government's motion to dismiss Appellants' complaint. After careful consideration of the parties' filings and lengthy oral argument, the District Court properly concluded that Appellants failed to state a claim, primarily because the contention underpinning their entire complaint – that the Fourteenth Amendment to the Constitution confers automatic citizenship on those born in American Samoa

– was without merit. Summary disposition is appropriate in this case because the “merits of this appeal are so clear as to make summary affirmance proper.” *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 994 (1980); *accord Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987) (per curiam); *Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982).

I. BACKGROUND

Appellants are a group of U.S. nationals born in American Samoa and a not-for-profit California social services organization serving the Samoan community in the Los Angeles, California area. (*See generally* R.1.¹) Appellants, despite acknowledging that Congress expressly addressed their status in 8 U.S.C. § 1408(1) and that every federal court to address arguments similar to theirs has found them wanting, asserted that they should have been granted automatic U.S. citizenship by virtue of their birth in American Samoa. Additionally, Appellants (as U.S. nationals) were eligible for citizenship through naturalization, and did not allege that any of the individual Appellants had applied for naturalization and been denied citizenship. (*See* R.1 ¶ 47.) Rather, Appellants claimed that 8 U.S.C. § 1408(1), violates the Fourteenth Amendment on its face and as applied to the

¹ “R.” and a number refer to the docket entry number for documents in the District Court record.

individuals through the State Department's policy and practice of imprinting endorsement code 09 (correctly noting that the bearer is a U.S. national, but not a U.S. citizen), on the passports issued to persons born in American Samoa to non-U.S. citizen parents. (R.1 ¶¶ 67-69.)

A. Relevant History of American Samoa

American Samoa is a portion of an archipelago in the South Pacific and is an unincorporated territory or "outlying possession" of the United States. 8 U.S.C. § 1101(a)(29). The United States acquired possession of American Samoa from Germany and Great Britain after ratification of a treaty on February 16, 1900. 31 Stat. 1878. Next, Congress accepted, ratified and confirmed the voluntary cessions of territory signed by Samoan chiefs retroactive to April 10, 1900 and July 16, 1904, by the Ratification Act of February 20, 1929, 45 Stat. 1253, which provided that until Congress should provide for the government of such islands, all civil, judicial and military powers should be vested in such person or persons and exercised in such manner as the President of the United States should direct, with power in the President to remove officers and fill vacancies.

The President, through Executive Order No. 125-A, directed the Department of the Navy to exercise control over and administer the islands comprising American Samoa. Subsequently, the President, by Executive Order No. 10264,

effective July 1, 1951, 48 U.S.C. § 1431 (note), transferred the administration of American Samoa from the Secretary of the Navy to the Secretary of the Interior, directing that the latter “take such action as may be necessary and appropriate, and in harmony with applicable law, for the administration of the civil government in American Samoa.” The administration of American Samoa by the Department of the Interior continues today.

Finally, the people of American Samoa have drafted, voted on, and implemented a constitution to govern them. *See* Const. of Am. Samoa, *available at* <http://faleomavaega.house.gov/american-samoa/historical-documents/revised-constitution-of-american-samoa> (last visited Oct. 23, 2013). This constitution contains several critical provisions distinct from the U.S. Constitution, including, but not limited to, Section 3 of Article I, which memorializes the responsibility of the government of American Samoa to preserve the traditional American Samoan way of life. *See* Const. of Am. Samoa, art. I, § 3.

B. Relevant Legal Framework

Appellants’ claims below, despite sounding in a constitutional attack on federal laws, specifically challenged the Department of State’s usage of the endorsement code 09 on their passports. (*See generally* R.1.) The Department of State’s authority to grant and issue passports is set forth in 22 U.S.C. § 211a.

Under the law, “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. § 212. Additionally, the Immigration and Nationality Act (“INA”) § 101(a)(29), 8 U.S.C. § 1101(a)(29), designates American Samoa as an “outlying possession” of the United States.² Persons born to non-U.S. citizen parents in an outlying possession of the United States on or after its date of acquisition are nationals, but not U.S. citizens at birth. INA § 308(1), 8 U.S.C. § 1408(1).

To implement applicable statutory mandates like the ones outlined above, the Department of State’s Foreign Affairs Manual (“FAM”)³ sets forth guidance on a variety of topics, including the issuance of passports. The FAM instructs: “American Samoa and Swains Island *are not incorporated territories*, and the citizenship provisions of the Constitution do not apply to persons born there.” 7 FAM 1125.1(b) (emphasis added). The FAM also outlines current law under the INA applicable to nationality of those born on American Samoa.

² The term “outlying possession” of the United States is contrasted with “State” under the law. In fact, INA § 101(a)(36), 8 U.S.C. § 1101(a)(36) specifies that the term “State” includes the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands and the Commonwealth of the Northern Mariana Islands. Further, INA § 101(a)(38), 8 U.S.C. § 1101(a)(38) defines the term “United States” as the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the U.S. Virgin Islands and the Northern Mariana Islands.

³ The current FAM is publicly available at www.state.gov/m/a/dir/regs/fam/.

C. The District Court's Opinion

After the Government moved to dismiss Appellants' complaint, the District Court granted full briefing, including accepting an *amicus curiae* brief from the people of American Samoa's elected representative to Congress, Eni Faleomavaega. Congressman Faleomavaega argued vigorously in favor of the Government's position, noting that the relief Appellants sought was not only improper legally, but could jeopardize the unique nature of American Samoan life or the *fa'a Samoa*. The *fa'a Samoa* is so important that the American Samoan constitution expressly mandates its preservation, including the tradition of communal ownership of ancestral lands by large, extended families. (R.24 at 3.) Additionally, the District Court requested lengthy oral argument from the parties and from *amicus* on the merits of the Government's motion to dismiss.

After reviewing all of the filings and oral advocacy presented to it, the District Court concluded that Appellants' complaint failed to state a claim. (R.24 at 9.) The District Court held that the Citizenship Clause of the Fourteenth Amendment did not guarantee birthright citizenship to the Appellants based on the plain language of the Constitution, Supreme Court and other federal jurisprudence, longstanding tradition and history, and pragmatic considerations. (*Id.*)

D. Appellants Statement of Issues

In their Statement of Issues, Appellants have identified only two issues for this Court's review: (1) whether the District Court erred when holding that the Fourteenth Amendment does not guarantee citizenship to persons born to non-U.S. citizens in American Samoa; and (2) whether the District Court erred by dismissing Appellants' complaint without making a formal finding that it would be "impractical and anomalous" in the context of "the situation as it exists in American Samoa today," *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975), to declare that persons born in American Samoa to non-U.S. citizen parents are automatically U.S. citizens.

II. ARGUMENT

The District Court's dismissal of Appellants' complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure was plainly correct and based on the text of the Constitution, binding precedent, historical tradition, and practicality. Because the authorities to which the Court looked overwhelmingly supported the Government's position and contradicted the arguments set forth by Appellants, the District Court's decision should be summarily affirmed.

A. All Controlling Precedents Prevent Appellants from Stating a Claim.

The District Court carefully reviewed all arguments asserted by the parties and the allegations made by Appellants. The first source to which the District Court turned was, appropriately, the Constitution. The plain language of the Citizenship Clause of the Fourteenth Amendment limits citizenship to “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. Const. amend. XIV, section 1. Because American Samoa is an unincorporated, outlying territory, those born there could, at most, be considered subject to the jurisdiction of the United States, but cannot be considered as born or naturalized in the United States. (R.24 at 9.) Thus, the main contention underpinning Appellants’ entire complaint was directly contradicted by the plain text of the Constitution, and the District Court properly declined to strike down the statutes at issue, 8 U.S.C. § 1101(a)(29) and § 1408(1). (*See* R.24 at 9 n.8 (“The [District] Court is also guided by the familiar principle that ‘[p]roper respect for a coordinate branch of the government requires that we strike down an Act of Congress only if the lack of constitutional authority to pass [the] act in question is clearly demonstrated.’” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (additional citation and quotation omitted).)

The District Court further supported its rejection of Appellants' claims with binding case law. First, the Supreme Court has distinguished "incorporated" territories from "unincorporated" territories and found that Congressional action is what shifted a territory from "unincorporated" to "incorporated." *Downes v. Bidwell*, 182 U.S. 244, 312 (1901); *Dorr v. United States*, 195 U.S. 138, 143 (1904); *see als Eche v. Holder*, 694 F.3d 1026, 1031 (9th Cir. 2012). Further, the Supreme Court has consistently held that only certain fundamental constitutional rights extend to the inhabitants of unincorporated territories. *Dorr*, 195 U.S. at 148-49; *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922). The Supreme Court has also suggested that automatic, birthright citizenship was not the type of fundamental right applicable to unincorporated territories. *Downes*, 182 U.S. at 251, 282; *see Barber v. Gonzales*, 347 U.S. 637, 639 n.1 (1954); *Miller v. Albright*, 523 U.S. 420, 467 n.2 (1998).

In fact, every federal court to address the issue since *Downes* has held that those born in unincorporated territories to non-U.S. citizen parents do not receive automatic, birthright citizenship. *See Nolos v. Holder*, 611 F.3d 279 (5th Cir. 2010) (person born in Philippines during period which it was unincorporated U.S. territory); *Valmonte v. INS*, 136 F.3d 914 (2d Cir. 1998) (same); *Lacap v. INS*, 138 F.3d 518 (3d Cir. 1998) (same); *Rabang v. Immigration & Nat. Serv.*, 35

F.3d 1449 (9th Cir. 1995), *cert. denied*, 515 U.S. 130 (1995) (same); *Licudine v. Winter*, 603 F. Supp. 2d 129, 132-34 (D.D.C. 2009) (same); *Ballentine v. United States*, 486 F.3d 806, 813-14 (3d Cir. 2007) (Congress within its authority to determine U.S. Virgin Islands was unincorporated and therefore person born there was not automatic citizen who could vote in U.S. presidential election); *Eche v. Holder*, 694 F.3d 1026, 1030-31 (9th Cir. 2012) (persons born or who lived in the Northern Mariana Islands during the period that it was unincorporated U.S. territory not birthright citizens nor did their residence in the islands during that period count towards naturalization). Each of these decisions makes sense, particularly when considering that Congress has not hesitated to make specific pronouncements in each instance. For example, Congress has explicitly defined what constitutes the “United States” for purposes of, among other things, birthright citizenship, *see* 8 U.S.C. § 1101(a)(38), and adjusted that definition based upon its conferral of such citizenship. *See, e.g., Eche*, 694 F.3d at 1027.

Finally, the District Court followed the historical precedents of similar territories to American Samoa. In every case, Congress had exercised its expressed, constitutional authority to determine whether persons born in unincorporated territories to non-U.S. citizen parents were birthright citizens. *See*

Const., art. IV, § 3, cl. 1 (allowance of a territory's admission as a state into the Union); *see also* Const., art. IV, § 3, cl. 2 (Congress's duty to make rules and regulations for the territories). Specifically, Congress affirmatively acted to bestow automatic, birthright citizenship on: (1) Puerto Rico, 8 U.S.C. § 1402; (2) the Panama Canal Zone during its period as a U.S. territory, 8 U.S.C. § 1403; (3) pre-statehood Alaska, 8 U.S.C. § 1404; (4) pre-statehood Hawaii, 8 U.S.C. § 1405; (5) the U.S. Virgin Islands, 8 U.S.C. § 1406; and (6) Guam, 8 U.S.C. § 1407. The longstanding practice of Congress to exercise its constitutional authority to provide birthright citizenship on certain (but not all) unincorporated territories was therefore given appropriate recognition by the District Court. While not explicitly stated by the District Court, the intervention of the people of American Samoa's elected representative to Congress as *amicus* in support of the Government's position also counseled against judicial intervention in the political and legislative process. Therefore, the District Court's decision was amply supported by all relevant constitutional, statutory, and judicial texts and was plainly correct.

B. The District Court Did Not Need to Make a Formal Finding of the Impracticality and Anomalous Nature of the Relief Appellants Sought

Appellants' second issue presented on appeal, that the District Court failed to make a required finding of the impracticality and anomalous nature of automatic, birthright citizenship for American Samoans in light of this Court's

decision in *King*, 520 F.2d 1140, misinterprets that decision and overlooks not only the facts in *King*, but the District Court's analysis of that case in its decision below. Thus, Appellants' second issue presented is no reason to deny summary affirmance.

First, in *King* this Court analyzed whether the right to a jury trial for crimes committed in American Samoa was a fundamental right that extended onto the territory *for a U.S. citizen*. *Id.* at 1141, 1146. In that context, this Court remanded the issue to the District Court to determine whether the jury trial system would be "impractical and anomalous" to impose on American Samoa. *Id.* at 1147. This analysis would not only be unnecessary, but superfluous, because the determination of whether a U.S. citizen's right to birthright citizenship for the citizen and his/her progeny traveled with him/her to American Samoa is directly answered affirmatively in other portions of the INA. 8 U.S.C. § 1401(c)-(e).

Next, Appellants ignore both this Court's decision in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 830 F.2d 374, 384-86 (D.C. Cir. 1987), and the District Court's analysis of that decision's effects on Appellants' claims. In *Hodel*, this Court analyzed a claim for trespass against an American Samoan family who intruded onto a tract of land the Church had purchased. *See id.* at 375. After the High Court of American Samoa

found in favor of the American Samoan family and held that the land in question was actually communal land, the Church brought an action in the District Court alleging error by the High Court and violation of due process. *See id.* Upon reviewing the Church's claims, this Court held that for unincorporated territories such as American Samoa, which has "wholly dissimilar traditions and institutions," *Reid v. Covert*, 354 U.S. 1, 14 (1957), the Supreme Court has determined that "the guarantees of the Constitution apply only insofar as its 'fundamental limitations in favor of personal rights' express 'principles which are the basis of all free government which cannot be with impunity transcended.'" *Hodel*, 830 F.2d at 385. Further, this Court found that the Secretary of Interior's plenary authority over the Territorial judiciary authorizes the Secretary to review decisions of the High Court for conformity with constitutional requirements and, therefore, no due process claim existed. *See id.* at 383 n.58 (citing *King*, 520 F.2d at 1144).

Thus, this Court re-affirmed in *Hodel* the unique nature of American Samoa and the limitations of the application of the U.S. Constitution to the unincorporated, outlying territory. Based on its reading of this Court's binding precedent, the District Court correctly applied the holding in *Hodel* as reinforcing the doctrine that, based on the Congressional determinations set forth in INA § 308(1), 8 U.S.C. § 1408(1) and INA § 101(a)(29), 8 U.S.C. § 1101(a)(29), those

born on American Samoa to non-U.S. citizen parents are U.S. nationals, but not U.S. citizens by virtue of birth on American Samoa. Therefore, Appellants' second issue presented not only overlooks the specifics of this Court's decision, but also the District Court's reasoned analysis of this Court's holdings in *King* and *Hodel*. Because the District Court did not err by omitting a finding, its decision should be summarily affirmed.

CONCLUSION

For the foregoing reasons, the District Court's judgment should be summarily affirmed.

RONALD C. MACHEN JR.
United States Attorney

R. CRAIG LAWRENCE
Assistant United States Attorney

/s/ Wynne P. Kelly
WYNNE P. KELLY
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of October 2013, the foregoing Motion for Summary Affirmance has been served by this Court's Electronic Case Filing System ("ECF") on all counsel of record.

/s/ Wynne P. Kelly _____

WYNNE P. KELLY

Assistant United States Attorney

Judiciary Center Building

555 Fourth Street, N.W.

Washington, D.C. 20530

(202) 252-2545