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SESSIONS V. MORALES-SANTANA: THE PROBLEMS OF LEVELING DOWN

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On June 12, 2017, the Supreme Court issued its decision in *Sessions v. Morales-Santana*, holding that the different treatment of unmarried mothers in INA §309(c), 8 U.S.C. §1409(c), was unconstitutional as a violation of equal protection. Unfortunately, while the Court agreed with the Court of Appeals for the Second Circuit that there had been such a violation, the Court selected a different remedy for this violation that appears not to have helped Mr. Morales-Santana himself or, at least from a concrete perspective, anyone else. This decision creates a number of problems, some obvious and some less so.

Luis Ramon Morales-Santana was born in the Dominican Republic in 1962 to a Dominican mother, Yrma Santana Morilla, and a U.S. citizen father, José Morales, who had been born in Puerto Rico in 1900. "After living in Puerto Rico for nearly two decades, José left his childhood home on February 27, 1919, 20 days short of his 19th birthday," as the Supreme Court explained, in order to work "for a U.S. company in the then-U.S.-occupied Dominican Republic." José and Yrma were married in 1970, and Luis Ramon Morales-Santana moved to Puerto Rico when he was 13 and then to the Bronx later in his childhood.

Mr. Morales-Santana was placed in removal proceedings in 2000 based on several criminal convictions, and his claim to U.S. citizenship was rejected by an immigration judge on the basis that his father did not have sufficient physical presence in the United States prior to Morales-Santana's birth to transmit U.S. citizenship to him. Under INA §301, 8 U.S.C. §1401, and specifically the provision of that statute which was formerly INA §301(a)(7) and now appears at INA §301(g), an unmarried U.S. citizen father, or a married U.S. citizen parent of either gender, must have accrued a relatively lengthy period of physical presence in the United States (or constructive physical presence based on

certain qualifying employment by them or by their parent) in order to transmit citizenship to a child whose other parent is not a U.S. citizen or national. The version of INA §301(a)(7) in effect when Morales-Santana was born in 1962 required that the father have been present for ten years, five of which had to have been after the age of fourteen, and so José Morales was held to have fallen short by 20 days, having left the United States 20 days before his nineteenth birthday. The current version of INA §301(g) requires only five years of physical presence by the U.S. citizen parent, two of which must be after the age of fourteen, but it does not operate retroactively and so was no help to Morales-Santana.

If Morales-Santana had been born to an unmarried U.S. citizen mother rather than an unmarried U.S. citizen father, however, the applicable rule under the statute would have been different. Under INA §309(c), as it existed at the time of Morales-Santana's birth and as it exists (at least in the statute books) today, a U.S. citizen mother need only have one continuous year of physical presence in the United States in order to transmit citizenship to her out-of-wedlock child. José Morales would easily have satisfied this requirement.

Before the Second Circuit, Morales-Santana argued first that he was actually entitled to U.S. citizenship under the statute as written, because his father's time working for a U.S. company in the U.S.-occupied Dominican Republic should count towards the physical-presence requirement, and second that the distinction between the §301(a)(7) requirement for unmarried fathers and the shorter §309(c) requirement for unmarried mothers was unconstitutional gender discrimination. The Second Circuit rejected the former argument, holding that José Morales's employment with the South Porto Rico Sugar Company was not the sort of employment with the U.S. government or a public international organization that would qualify as constructive physical presence under §301(a)(7), and that the Dominican Republic was not a U.S. possession for these purposes in 1919 even though it was occupied by the U.S. military. It accepted the latter argument, however, and held that to remedy the gender discrimination inherent in the statute, Morales-Santana should receive the benefit of §309(c) and be deemed a U.S. citizen as of his birth.

The Supreme Court in *Morales-Santana* agreed that the different treatment of unmarried fathers and unmarried mothers with regard to the required length of physical presence was an equal-protection violation, but disagreed with the Second Circuit on the appropriate remedy for this violation. Rather than

choosing to extend the benefits of INA §309(c) / 8 U.S.C. §1409(c) to Mr. Morales-Santana and others disadvantaged by the equal-protection violation, what commentator Michael Dorf referred to as "levelling up", the Court determined that "levelling down" and withdrawing the benefits of §309(c) from those to whom it applied was more consistent with Congressional intent, because §309(c) was merely an exception to the broader and stricter rule of INA §301(a)(7) / 8 U.S.C. §1401(a)(7). "Going forward," the Court said, "Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender." Until Congress does so, however, the Court held that "n the interim . . . §1401(a)(7)'s now-five-year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers." It seems very likely, although the decision did not make this explicit, that prospective application in this context refers to children born after the date of the Court's decision, since those born before the decision to whom §309(c) applied would already have acquired citizenship at birth as a matter of law, whether this citizenship had yet been recognized by any administrative agency or not.

The Court's choice of remedy, which Professor Ian Samuel described as "the mean remedy", has attracted a great deal of commentary, much of it critical. This commentary is worth the reader's time, but it is my hope that I may have some additional observations which have not previously been addressed by other commentators.

One problem caused by the Court's choice of remedy in *Morales-Santana*, which has been hinted at in some other commentaries but not fully explored, is that the specific equal-protection violation at issue in the case has not actually been remedied by the Court's decision. If Mr. Morales-Santana had been the out-of-wedlock child of a woman named Josephine Morales rather than a man named José Morales, but every other fact of his case had remained the same, then he would be a citizen today. Sons and daughters born in 1962 to unmarried women who met the one-year physical presence requirement are now citizens, under existing law. But Mr. Morales-Santana is not a citizen. He, or his father, has in a very real sense been denied the equal protection of the laws, and nothing about the Court's decision changes this.

The difficulty is that true leveling down was not feasible in *Morales-Santana* as a matter of practicality or justice. The Court could not reasonably have declared that every person who gained U.S. citizenship under §309(c), or even every

person who did so after Morales-Santana himself was born, was no longer a citizen. The U.S. citizenship of such people has already engendered truly immense reliance interests in many cases, and taking it away, after those people have structured their lives for decades based on the knowledge that they are U.S. citizens, would be a travesty. The resulting chaos and disruption would be horrific. This is presumably why the Court declared that its revision of the statute would operate only prospectively. As a result, however, Mr. Morales-Santana, or perhaps more precisely his father, continues to suffer from gender-based discrimination relative to children born to unmarried women before 2017 and their mothers. Other similarly-situated people continue to suffer from this gender-based discrimination as well.

A more subtle problem is that it is not completely clear when, exactly, the new rule displacing INA §309(c) is supposed to take effect. Does it apply to all children born to unmarried women after June 12, 2017? To all children born after the precise time that day that the Supreme Court announced its decision from the bench and handed out copies of the slip opinion to the press, if that time was even tracked by the Court or any other government agency? (There is precedent for looking to time of birth to determine whether citizenship has been acquired: see *Duarte-Ceri v. Holder*, 630 F.3d 83 (2d Cir. 2010).) To all children born after the Supreme Court issues its mandate in the case, which will occur after the disposition of any timely-filed petition for rehearing? To all children born after the final version of the opinion is published in the U.S. Reports?

Also, whenever the new rule takes effect, how exactly are pregnant unwed U.S. citizens supposed to learn of it? The statute itself still contains INA §309(c). The State Department's Foreign Affairs Manual (FAM), specifically 7 FAM 1133.4-3, still describes it as applicable. Anyone who has not themselves been reading Supreme Court slip opinions, and is not being advised by a lawyer who has done so, will not know that the rule has changed. This is significant because a pregnant U.S. citizen might in many cases have the option of traveling to the United States to give birth, making her child a U.S. citizen under INA §301(a) and Section 1 of the Fourteenth Amendment to the U.S. Constitution. One who relies on the statute to say what it means, or even checks the FAM or speaks to a consular officer who checks the FAM, will not know of the necessity of giving birth in the United States, and may give up the opportunity to bestow U.S. citizenship on her child because she is unaware that such citizenship will not

pass automatically.

The Court justified its choice of remedy in *Morales-Santana* partly by indicating that, if §309(c) were extended to unmarried fathers, that would still leave possibly unconstitutional discrimination, in that instance against all married parents as compared to all unmarried parents. But there would be a relatively straightforward solution to that problem: the Court could remedy that unconstitutional discrimination by holding §309(c) to be an option available to all parents, married or unmarried, unless and until the statute were changed by Congress. Going forward, Congress would still be free to choose a different requirement applicable to all genders and all marital statuses.

As this author has previously explained, the text of INA §301 and §309 and the administrative interpretations of those statutes that existed before the Supreme Court's decision give rise to many potential serious anomalies. There is a good argument to be made that the text should be revised, going forward, to fix these anomalies. The Supreme Court's choice of judicial alteration to the statute in the interim, however, creates more problems than it solves.