In the

Supreme Court of the United States

JULE M. SUGARMAN and
HARRY I. BRONSTEIN,

Appellants,

vs.

No. 71-1222

PATRICK McL. DOUGALL,
ESPERANZA JORGE,
TERESA VARGAS and
SYLVIA CASTRO, etc.,

Appellees.

Washington D. C.
January 8, 1973

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PATRICK Mc L. DOUGALL, ESPERANZA JORGE, TERESA VARGAS and SYLVIA CASTRO, etc. Appellees	:	

Washington, D. C.

Monday, January 8, 1973

The above-entitled matter came on for argument at 1:50 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

SAMUEL A. HIRSHOWITZ, First Assistant Attorney General of the State of New York, 80 Centre Street, New York, New York 10013 for the Appellants

LESTER EVENS, Esq., MFY Legal Services, Inc., 759 Tenth Avenue, New York, New York 10019

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1222.

Mr. Hirshowitz, you may proceed.

ORAL ARGUMENT OF SAMUEL A. HIRSHOWITZ, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. HIRSHOWITZ: Mr. Chief Justice, and may it please the court. This case involves the question of the validity of a section of the New York State Civil Service law, which a three-judge district court held invalid. The particular language that the court dealt with is found on page 91 of the record in a footnote, "Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States."

There is a second subdivision which doesn't appear in the record but which is discussed in the opinion, which provides that where the appointing authority cannot find any person to fill a position, he may apply to the local Civil Service Commission or to the state Civil Service Commission and if they are satisfied that there is no one available for that position, they may certify this appointment which lasts only until the end of the year and cannot be continued unless this appointee has taken steps to become a citizen by filing a declaration of intention.

The particular appellees here were appointed by the City of New York as provisional appointees. That means they never took any examination. As provisionals, they were entitled to hold their position at the discretion of the appointing authority for a period which is generally regarded as nine months provided that there was no eligible list and in this case, the answer of the City of New York shows that there was an eligible list established but in this case the appellees were terminated not because of the existence of the eligible list, but because of the existence of this statute, the City of New York found that they were not citizens.

The Civil Service system in New York, as this Court knows, is based on the merit system and the competitive tests which is established after examination and qualifications. One who is appointed after examination, obtains rights of tenure, seniority and promotional preferences together with pension benefits.

The appellees have been residents according to their affidavit -- have been residents in the City of New York for varying years, some six years, some 10 years and none of them have taken even the first step to obtain citizenship.

The first Appellee, McDougall, for instance, was a resident of the City of New York since 1964 and never took any steps to become a citizen.

None of the appellees, because of a question of

preemption -- which will be discussed -- none of the appellees were ever certified by the United States Secretary of Labor for the position he or she was filling. As a matter of fact, McDougall was the only one that took an examination. And let me point out that prior to 1968, the statute which I read provided that nobody could take an examination for a position, but that was altered and amended to provide that on one could be appointed, the difference being that one who was an alien could take the examination and in the meantime take steps to become a citizen.

As a usual process, it takes from six months to a year before the examinations are marked and a list established and a list, when established, is usually good for varying periods of three to five years.

The district court in this case sustained the appellees' challenge on both equal protection and supremacy clause grounds, relying principally on the case decided by this court, Graham against Richardson, which we are sure was misapplied. The Graham case has spawned a flood of litigation in various federal courts throughout the land. According to our computation, there are seven cases in various federal courts in various stages of litigation, raising questions as to the validity of discrimination against aliens.

Let me also point out that the Federal Government has equivalent practice which is as a result of authority

given to the Civil Service Commission to establish the conditions of employment and, by Executive Order, aliens have been barred from United States' employment except in the same way as New York does, certification where there is no available employee.

In addition to that, Congress, in the annual ap propriation bills, has specifically provided that no payment of compensation can be made to an employee if he is not a citizen of the United States. That is, an employee on American soil.

A copy of the federal provisions we have attached to our brief as exhibit one.

In this court here, the appellees have persisted in the claim that the right to travel of the aliens is being interfered with, as if they ever possessed such right, which is involved in this case and they have apparently, as we read their briefs, argued that the statute is over-broad, which was not a contention that was made below, in the sense that the lower grade of employees should not be barred by this statutory provision but the higher grade employees may be barred.

The first question that suggests itself is whether there is any question of equal protection available to the appellees; whether the court was right in considering equal protection at all.

We suggest that history, precedent and principle require this Court to hold that the states have not been divested of the power to limit its public employees to citizens and that this power is not affected by the equal protection clause of the Constitution.

This does not involve the consideration of the question of rights or privileges which is being blurred by the decisions of this Court as a question of any entitlement at all to consideration for employment, public employment.

The question was under considerati n in the Crane against United States and in that case the -- this court held valid the New York State statute which provided at that time that employment on public contracts could be limited to citizens and the question that disturbed the court in the discussion was the question not whether public employment could be limited to citizens but as to whether the public contractors were in effect the government when engaged in public contracts.

The district court relied to some extent on the Truax case which was decided by the same court at the same time and in the same volume of the reports. In the Truax case, the court stripped down an Arizona statute that forbid the employment of aliens generally.

At the same time, it was very careful to point out in its opinion that it did not -- that that case did not

involve the employment of citizens in public employment and in the Crane case on the question of equal protection, the court concluded with the words, "There is added to view that a distinction between aliens and citizens violates the principle of classification." We think this is also without foundation and in the Truax case, Chief Justice Hughes said that the challenge here is not limited to persons who are engaged in public work but that it bars from employment in the entire field of industry in all common occupations.

The Crane case came from the New York Court of Appeals and Judge Cardoza, who later sat on this court, distinguished the Truax situation and the Crane situation in this way. It must be evident that nothing in this opinion here gives confidence to the view that the government may deny to aliens the right to engage in any private trade or calling on terms of equality with citizens. It is true that in dealings between man and man, the alien and the citizen trade labor on equal terms. It is the denial of equal protection laws when the government, in its capacity as law-maker, regulating not its own property but private business, bars the alien from the right to trade and labor.

It is therefore our contention that the Crane case, in its present -- under the facts in this case -- is authoritative disposition by this Court for the view that the equal protection clause does not apply.

Q You mean the equal protection clause does not apply to state employees?

MR. HIRSHOWITZ: It does not apply to aliens seeking to obtain public employment.

Q But you do not take the position that the state is out from under the 14th Amendment when it hires its own employees?

MR. HIRSHOWITZ: The equal protection clause of course is applicable to the state.

But on the question of whether aliens are entitled to public employment, it is our first position that the equal protection clause does not apply because of the 10th Amendment to the Constitution. When the Constitution was adopted, in historic times, the states were obtained and continued with the right to run their own government except insofar as expressly interfered with by the United States Constitution, and there is nothing in the United States Constitution and it would appear to me to do violence to the government of the states or either by judicial decree or by Congressional Act, to interfere with the government of the states and to provide that aliens must be employed by the state. Now, this is not a novel -- in Oregon against Mitchell, Chief Justive Black in discussing the 18-year-old vote case said, in part, "It cannot be successfully argued that the 14th Amendment was intended to strip the states of their power

carefully preserved in the original Constitution to govern themselves." The 14th Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection.

And in Maryland against Wirtz, Mr. Justice Douglas said, in connection with the bill which -- a law which, as this Court will remember dealt with minimum wages of certain classes of state employees -- Mr. Justice Douglas said in his dissent that it would snuff out state sovereignty if all this can be done, then the national government could devour the essentials of state sovereignty, though that sovereignty is attested by the 10th Amendment, and then he went on to quote Mr. Justice Stone in the case, New York against United States where Chief Justice Stone said, "The national government may not interfere unduly with the state's performance of its sovereign functions of government. It may not impair the state's functions of government."

Now, below, the three-judge court in its opinion disregarded the fact that the -- that this country and its various subdivisions is not only a government of the people, it is a government by the people and "by the people" means the citizens of this land and this includes -- this excludes the right to compel aliens to be employed by the state or its subdivisions.

Q Mr. Hirshowitz, are you going to come to the

case of Graham against Richardson, which I guess the three-judge district court below relied on?

MR. HIRSHOWITZ: Yes -- yes, Graham against Richardson -- did not involve any practice in New York. New York, as the papers show, has paid welfare to aliens from the beginning of the welfare system.

As we read the Graham case, this court was dealing with indigents and in that case there the state involved was trying to establish a crude economic preference. The citizen was being provided with the necessities of life while the alien was not, although the alien -- although alien status bears absolutely no relationship to the aliens' needs as a recipient or to his contributions as a taxpayer. In contrast to welfare, Section 53, the statute under discussion, it is concerned soley with maintaining the national character and the integrity and efficiency of the career Civil Service.

Now, even if this court holds that equal protection was properly made an issue below, it is our position that the right of the state to run its government by its own citizens by itself furnishes sufficient basis whatever test of equal protection is applicable.

All nations and states conduct their affairs through the agency of public employees and thus practically every nation and state requires its agents, including the career civil servant, be citizens. As this Court recognized

in such cases as Afroyim against Rusk, citizens, not aliens, are members of state.

Q Mr. Hirshowitz, what do you -- how do you define a term that you have employed, "career Civil Service?"

MR. HIRSHOWITZ: There are -- there are three grades of employment under New York State Civil Service and I think it is generally the rule. You have the competitive class where appointments are made after examination and then there is the exempt class, exempt category where appointments may be made by the appointing officer without regard to examinations and then there is the noncompetitive class where there's a position of unusual character but which examination cannot provide the suitable employee.

Q Well, now, in New York City, is trash collected by the city?

MR. HIRSHOWITZ: It is for residents, yes.

Q And is the statute one that would require then the municipally-employed trash collector to be a citizen of the United States?

MR. HIRSHOWITZ: Every employee of the city must be a citizen unless, as I said, coming within the exceptions of certification and incidentally they have only been, in the City of New York there have been only 27 certifications of waiver of this citizenship requirement. But it doesn't make any difference. I think in the Mitchell case this court said

it was difficult -- almost impossible to draw a distinction between various grades of employees. The clerk that is in the village office and takes your tax receipt, as far as the public is concerned, he or she is government and we are entitled to insist that such employees be citizens of the United States.

In addition to which the career employee who starts at the bottom level under the merit system in New York is entitled to promotion and the same person who starts at the bottom level as the garage collector -- the garbage collector -- will be entitled to take an examination and be appointed to the senior position up to the top positions, up to the top. There is no way of stopping that. It has been suggested by our opposition, as I said towards the beginning, that maybe the bottom garbage collector, as far as he is concerned, the law is bad. But that promotion opportunities should be precluded for aliens. Well, that would be in violation of the whole Civil Service system.

Q Do you read Mr. Lombard's concurrence as, in effect, a characterization of the court's opinion generally? When he says, "Nothing in our decision should be construed to mean that a sate may not lawfully maintain a citizenship requirement for those positions where citizenship bears some rational relationship to the specific demands of a particular position." Do you feel the other judges concur

in that statement?

MR. HIRSHOWITZ: I don't know. I don't think they did. Lombard -- Judge Lombard was troubled by the decision. As I have indicated there, he was troubled by the fact that there are many positions on the higher level in the Civil Service system that he himself conceded should be kept only for citizens and he finally rationalized that, but that wouldn't mean if you follow Judge Lombard you would have to in each individual case justify the preclusion of aliens.

I want to say a word about preemption.

The second ground upon which the district court relied for its decision was the question of preemption. Now, that was discussed in the Graham case also, but let me point out that none of the appellees were ever certified by the United States Secretary of Labor for these particular positions, so that the claim that the certification by United States Secretary of Labor somehow interfered with the validity of the statute has no basis in fact.

The Secretary of Labor certifies all immigrants only upon entrance pursuant to the statute. These certifications do not purport to cover public employment at all and I have read the minutes of the Congressional hearings, both with reference to the 1952 law and the revision in 1965 and nowhere is there any indication that Congress intended by the law to cover public employment.

We think that the statute is entitled to the presumption of constitutionality that was accorded to the Congressional Act in the Oregon against Mitchell case and we submit that the Civil Service employee who is an alien would present special problems to the state and to the Federal Government.

In Rogers against Bellei, which was recently decided by this court, this court referred to the problems that arise from dual nationalities there and referred to a case by Mr. Justice Douglas in which he said "One who has a dual nationality would be subject to claims from both nations, claims which at times may be competing or conflicting, that circumstances may compel one who has a dual nationality to do acts which would not be compatible with the obligations of American citizenship.

Q Does that apply to the trash collector?

MR. HIRSHOWITZ: It does, your Honor. It applies to anyone.

Q He would have a dual citizenship problem?

MR. HIRSHOWITZ: Not so long ago in Laner against Casey, this court held that --

Q What problem would he have? What problem would the trash collector have?

MR. HIRSHOWITZ: The trash collector could create as much problems as the conductor in Laner against Casey

where this Court held that a subway conductor was obligated to fill out a loyalty oath. Where do you stop when you --

Q At Truax against Raich, that's where you stop.

MR. HIRSHOWITZ: No, Truax against Raich merely held, as I have pointed out, it applies to persons in common occupations and as I indicated --

Q Do you say that the State of New York could not pass a law prohibiting the employment of aliens by anybody? They couldn't pass that law?

MR. HIRSHOWITZ: No, sir.

Q But they could pass a law that we will not employ aliens in our state government?

MR. HIRSHOWITZ: Yes, your Honor.

Q And you don't see any problem?

MR. HIRSHOWITZ: No problem at all because it is the -- that is the way this country runs there. This country could not be run by aliens in addition to which, Mr. Justice Marshall --

Q I'd say this country could exist if every trash collector in New York was alien. I think this country could exist.

MR. HIRSHOWITZ: Any case --

Q That is just my personal view.

MR. HIRSHOWITZ: Yes. In any case, you can pick

out random situations, but the fact is that all employees should be citizens and it doesn't present any bar to them from employment. These people here who have been in New York City at least six to ten years made no effort to become citizens there. It is no bar to them, whether it is trash collectors or whether, in this case, McDougall was a senior, had a senior job post in the poverty program.

Let me also say, Mr. Justice Marshall, that the State of New York and the City of New York is now engaged in trying to reevaluate the merit system in order to provide a better means of testing the entrance of a million and a half Puerto Ricans and about two million black citizens in the competitive class system.

Q Thank you for eventually getting around to it.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hirshowitz.

Me. Evens.

ORAL ARGUMENT OF LESTER EVENS, ESQ.,

ON BEHALF OF THE APPELLEES

MR. EVENS: Mr. Chief Justice and may it please the Court:

I really, frankly, don't know where to begin. I was extremely troubled by the brief submitted by the appellants and, frankly, very troubled by the argument today.

There are references that are made -- apparently made by the appellees that state that we would not object

if certain jobs were eliminated and others were included. I don't recall ever making any such statement and if I had, I certainly would take this opportunity to clarify the point that we certainly consider this the most rank form of classification in violation of the equal protection clause and/it would apply across the board regardless of the positions involved.

When I attempted to read the brief of the appellents -- and, frankly, I had a great deal of difficulty in doing so.

Q Do I understand by your opening statement that you, therefore, disagree with the concurring opinion in this case?

MR. EVENS: Yes, I do. I do, quite clearly. I think that without any characterization about Judge Lombard's decision, I do think that his opening paragraph essentially recited or restated the law as it should be and was in concurrence with the opinion that was written and then seemed to have diluted it or vitiated the impact of the original decision without any basic justification.

If I may point out, as Mr. Hirshowitz has indicated, the New York State Civil Service statute is broken down into two major categories, the classified and the unclassified. Included in the unclassified are elective offices from the governor through the legislators. It also includes a number

of other very essentially important positions, such as heads of departments and appointments made directly by the Governor, either with or without the consent of the state senate.

Any discussions about positions of policy or having an essential impact upon the running of the government of the state certainly would seem to fall primarily within this class and yet, this very class makes no reference to citizenship whatsoever.

Q What, the elective?

MR. EVENS: What I am saying is, it includes elective plus heads of departments and appointments --

Q The Governor of New York?

MR. EVENS: -- by the Governor directly, executive appointments and it includes appointments by the legislature for various jobs.

Q So far as the law of New York goes, the Governor of New York could be a citizen of --

MR. EVENS: Must be a citizen.

Q -- could be a citizen of Japan, could he?

MR. EVENS: No, he is required to be a citizen under the Constitution. I am referring specifically to the Constitution of the State of New York requires all those in elective office to be citizens of the United States.

Q Everybody in elective office?

MR. EVENS: In elective office.

Q At every level?

MR. EVENS: At every level.

Q To be a citizen of the United States --

MR. EVENS: Of the United States.

Q -- and of the State of New York?

MR. EVENS: And of the State of New York, residency of the State of New York in varying degrees depending upon the position involved, but for the Governor, the requirement is the longest.

Q But none can be a resident alien?

MR. EVENS: None can be a resident alien under the Constitution of the State of New York. However, under the unclassified designation within the Civil Service statute, there are a number of other positions enunciated in that statute other than elective office.

They enunciate heads of various departments. They enunciate appointments by the Governor directly either with or without the consent of the Senate to positions that the Governor would appoint to in running the executive branch of the government.

They refer to certain positions appointed by the legislature itself. Now, it would seem to me that if issues of policy and loyalty and of that nature would be involved, it would clearly be the people that would have these very

responsible positions both with the executive branch of the state and the legislative branch and, particularly, heads of departments, yet -- I'm sorry --

Q Well, may the state exclude aliens from running for office in New York?

MR. EVENS: It would seem to me quite clearly under the Constitution of the State of New York that you are required to be a citizen, Justice.

Q Well, I know that is what the State Constituion would have. How about the validity of that division under the equal protection clause?

MR. EVENS: My personal attitude is that I have difficulty with that, that I think that --

Q How about aliens voting?

MR. EVENS: I think that aliens certainly should have the right to vote, certainly aliens --

Q They don't have the right to vote?

MR. EVENS: They do not have the right to vote in New York State.

Q And assume those provisions for voting and for running for office are valid under the equal protection clause, does that make your case any tougher?

MR. EVENS: No, I really do not think so because I think that, again, to refer back to the brief of the appellenats in this proceeding, I think there was a confusion

concerning the elements necessary under the equal protection clause. It is my understanding that it is essential -- there are essentially two basic sections to the equal protection clause, the traditional one for which there can be an application of a rational relationship, the other being any classification which might be based on race, which would be an invidious classification which would require very strict judicial review and --

Q Do you find that in the language of the 14th Amendment, Mr. Evens?

MR. EVENS: No, I find that in the cases and I refer specifically, the most recent case being Graham versus Richardson and I would like to point out that I believe that the equal protection argument was raised in Lindsay versus Normet and in that case, I believe Mr. Justice White had stated that a reasonable application of a summary kind of proceeding in which the parties were limited in terms of the kinds of defenses they could raise was very rational and reasonable because the statute was intended to overcome the consequences which were much more dire, yet nevertheless there was an issue of due process that could have been involved in that proceeding and sustained the statute in Oregon.

Q Let's assume that the requirement that a person be a citizen to vote is valid under the equal protection clause.

MR. EVENS: Yes.

Q And the justification is that you do not want the political apparatus to be in control of aliens. Or don't want aliens to participate in governmental decision-making. Now, is it such a long step to say that they also shouldn't be able to work for the state? To participate in the administrating of the state business?

MR. EVENS: The initial position --

Q Uou might even say that a fortiori they shouldn't be entitled to it.

MR. EVENS: Except if I may just point out, we are here challenging Section 53 of the New York State Civil Service statute. Section 53 is the merit section, the competitive section of the Civil Service statute. As I tried to point out earlier, there are various sections within the Civil Service statute which involved, in fact, very important policy positions in which there are no restrictions concerning citizenship and in fact the Governor could appoint aides and people who would assist him in making very important policy decisions of the state and there would have to be no regard, there need not be any regard as to the issue of citizenship.

Q That is a matter of choice by the state, is it not?

MR. EVENS: Pardon?

Q That is a matter of choice by the state.

MR. EVENS: Or by the executive who has this, certainly that prerogative to exercise.

Q We are talking about the compulsion of the 14th Amendment.

MR. EVENS: However, Mr. Chief Justice, I believe that is relevant to exactly the issue that is involved here. The state is endeavoring, by the statute, to legislate the elimination of an entire class from public employment with an apparatus where if there was a foundation or a basis for determining that certain individuals were not competent to hold jobs, perhaps an alien coming to this country holding a publicly-elected office.

But certainly the Civil Service Commission is more than competent to deal with this. This would not require the kind of legislative situation that an elective office might require.

Q What about the federal statute that has been reproduced at page 40 of the -- your friend's brief? What do you have to say about the constitutionality of that statute?

MR. EVENS: Is that the statute that was recently amended in 1970 or 1971?

Q It is 1972, it would appear.

MR. EVENS: 1972. I believe that that is the

statute that may have been involved ultimately in the matter of Jalil versus Hampton in which this court denied a writ of certiorari, I think that it would equally apply to this statute as it would to the state --

Q You think this federal statute is unconstitutional?

MR. EVENS: Yes, your Honor, I do.

Q Mr. Evens, let me follow through with one thing more. I take it from your answer to Justice White that you were troubled by the provisions of the New York Constitution requiring that elective office holders be citizens, troubled in the light of the 14th Amendment?

MR. EVENS: Yes, your Honor, I am troubled in terms of the broad scope of the exclusion. To analagously recite the requirements of the Immigration and Naturalization Law, which sets forth very particular detail regarding political affiliations and character and so forth, I think that does not disturb me as being violative of the equal protection clause, but I do think that with regard to just generally and broadly saying that an entire class of people should not be permitted to hold office in and of itself, out of any particular context, does disturb me.

Q Well, now, in the Federal Consstitution, we have citizenship requirements --

MR. EVENS: Yes.

Q -- for the President and members of the Congress, both Senate and House.

MR. EVENS: Yes, Senate and House.

Q Are you equally troubled by those provisions in the light of the more, the later enacted 14th Amendment?

MR. EVENS: Well, in that situation I would have to respond, and I don't mean to be evasive, that I don't see the mechanism or the device to do anything concerning that other than the method of repeal. I do think that this court could review the Constitution of the State of New York.

I think that perhaps -- essentially what I am trying to say, Mr. Justice Blackman, is that the traditional classical roles of citizenship seem to be changing and perhaps changing for the better and I do think that conceivably if such a matter could be approved by the citizenry of the United States, it might want to change. I don't see the apparatus beyond repeal that could in any way change the United States' Constitution.

Q Would you be relying on the 14th Amendment to repeal the provision that the President of the United States must be a native-born American citizen?

MR. EVENS: Well, I have -- I must confess that --

Q When you start down that road, suppose a citizen of Venezuela who came up here and liked the country but wanted to keep his citizenship in Venezuela filed for

President of the United States and the issue might arise when he was trying to run in the state primary, let us say; now, then, on your theory, the 14th Amendment could be read as having repealed.

MR. EVENS: If I may, it is my position that I am endeavoring to take in this is that there are other qualifications that can be imposed that a mere broad classification involving alienage raises very, very serious questions.

I think that the brief of the appellants in and of itself, their arguments, seem to substantiate that this is essentially a discriminatory device.

I would like to, in response to what you are saying, I'd like to point out -- Mr. Dougall's name was mentioned that he had come here in 1964 and never made any effort to become a citizen of the United States. Mr. Dougall came here from British Guiana. He came here as an expatriot, as, essentially, a political refugee. As long as the government in British Guiana never changes, Mr. Dougall has no intentions whatsoever of returning to British Guiana.

However, Mr. Dougall has made it very clear that if there is a change in government that would make it possible for him to return, he would at that time return.

Nevertheless, he has been and continues to be, a viable resident of the State of New York, has always

endeavored to work, has paid taxes, has done all of the other things, in fact has a family and children and, quite incidentally, his children have been born in the United States because he has been married since he has been here.

Q Does he want to keep his options open?

MR. EVENS: No, no, your Honor, he has never said he wanted to keep his options open. He has clearly said, "I always wnat to return to British Guiana but I cannot return to the government that is there now because it is that very government that has been so hostile to me that I have been forced to leave."

I should point out that two of the other named plaintiffs in this proceeding are refugees from Cuba. They are incidentally very young. They came here at a very young age with their families. It is impossible for them to return to the very same government that exists in Cuba that they ran away from.

Now, incidentally, one of them has applied for American citizenship. All three of the named women plaintiffs are all around the age of 21 or slightly older and one of them has definitely -- one of the Cuban citizens has applied for citizenship. The other has not. But however it is impossible for them to return at this time. Whether or not they would return if the government would change I don't know. I do know in the case of Mr. Dougall that he

definitely would return. It isn't a question that these people are endeavoring to take advantage of both sides of the argument or have their cake and eat it. It is a question, really, they have very few options. But certainly they should have the right and the prerogative to decide where they wish to be citizens.

Q On your theory, you have just told us, I thought, that they should be entitled to vote --

MR. EVENS: Yes.

Q -- and be entitled to run for public office.

MR. EVENS: Yes.

Q Isn't that keeping options open?

MR. EVENS: It may keep options open, but I certainly do not think that it is necessarily their intention to keep these options open. The brief seems to state that they are going to try and get the best of all possible worlds, that aliens have some great advantage over citizens of the United States. Yet the courts have repeatedly said, the language in the Caroline case, in which the court has repeatedly said that they are a disadvantaged group and require special consideration of the judiciary in reviewing classifications that are made against them.

Q What about an alien who came here and then returned to his native land. Would you say he was entitled to vote -- in your view -- by an absentee ballot?

MR. EVENS: I would again say that this person --

Q Is there a difference between a resident and a nonresident alien, on your theory?

MR. EVENS: I -- I -- there is a distinction between a resident and a nonresident alien.

Q On your theory?

MR. EVENS: Yes.

Q I know there is in law, but what is your theory of the difference?

MR. EVENS: Our theory has been that the resident aliens involved, the named plaintiffs and the class they represent in this proceeding are people who are participating as viable members of the State of New York, have lived there legally and lawfully, have designated New York as their residence and that they should have the right and the entitlement to participate in all of the activities of that state, including the right to not have doors of employment closed. Now, if Mr. Dougall --

Q Is there anything that you can think of, any right that a citizen could possibly have that you wouldn't urge that an alien would also have?

MR. EVENS: It would be very difficult for me to answer that question. I can't see --

Q Then pray tell, what is the benefit of American citizenship?

MR. EVENS: Well, the benefit of American citizenship, for one, essentially, is set forth a political benefit. If I may say --

Q Political? I thought I thought you said they should havethe right to politic?

MR. EVENS: What I am saying -- what I am saying is that this is a country that has granted refuge to political refugees and the -- well, let me withdraw that.

I would respond in a sense by answering the question, does citizenship require any special benefit? And I have trouble with that. I don't think that citizenship necessarily confers --

Q If I follow your position to the bitter end, then we didn't need the 14th Amendment.

MR. EVENS: If people were not discriminated against and if their equal protection rights were not violated.

Q The 14th Amendment gives citizenship to people, so you did need that. You did need a grant of citizenship in this country.

MR. EVENS: It was my understanding, yes, but from my understanding of the 14th Amendment says that we will--

Q I think it is marvelous how far you go away from the issue that is in this case.

MR. EVENS: Well, I do not intend to go away from

the issue of this case. It is my intention to spell out that on questions of employment that the state cannot justify in any way any petition, nor have they, that in any way could not be performed by a lawful resident alien of the state as -- than by anyone else.

Now, if I am asked questions such as "Should aliens be allowed to be on petit or grand juries,"which they are not allowed to be in the State of New York, or "Should they be allowed to vote?" or "Should they be allowed to hold public office?" these are highly hypothetical questions which are very difficult for me to answer because it means that I must take a position which is really quite removed from the case before us.

These situations do exist. There are obviously differences where it is applicable. I think, however, that the cases have clearly indicated -- and it was clearly pointed out in Shapiro v. Thompson and in Graham versus Richardson that when there is a classification that discriminates against aliens, it is tantmount to discriminating against a class because of race and if we were to make rules that black people from the south coming to New York could or could not do things simply because they were black and from the south, that would be objectionable and I believe totally unconstitutional, if there are any such statutes enacted.

Q Would it make any difference what their race

was if they were coming from the south to the north?

MR. EVENS: Well --

Q If they were people here?

MR. EVENS: If they came from -- if they came from adjoining states of Connecticut and New Jersey or Pennsylvania. If they were black and the statute said that blacks could not be Civil Service employees because they were unstable and because they are disloyal or they have loyalty to the state that they came from, this would be unquestionably --

Q Of course, that doesn't have anything to do with this case, does it?

MR. EVENS: It does in the sense that the classification concerning aliens is tantamount to a classification concerning race.

Q Where did this Court ever say that?

MR. EVENS: It is my understanding that that is exactly what the Court said in Graham v. Richardson --

Q For purposes of --

Q Pardon me.

MR. EVENS: For purposes of the degree of judicial scrutiny on the equal protection clause.

Q It said these are suspect classes --

MR. EVENS: Yes.

Q -- which is nothing more or less -- as I think Chief Justice Warren said -- that we scrutinize the

line drawing and the basis of the classification very carefully.

MR. EVENS: Yes, more particularly than if it would be a matter not of race.

Q One factual distinction, Mr. Evans, is that your clients presumably have it within their own power to change their status, don't they, to become citizens?

MR. EVENS: Yes, they do.

Q If they so choose.

MR. EVENS: All of my clients are now over the age of 21 and could qualify to become citizens. There are questions of whether or not they choose to take that option, and as I pointed out, some of them really are here as political refugees. They fully intend to return.

It should be pointed out, too, incidentally, that these people were wmployed by the City of New York and were fired. These people were not seeking positions and when they were employed by the City of New York, they were informed that they would maintain the status that they always had before. They worked for a nonprofit corporation which happened to have been funded by the Office of Economic Opportunity and the Office of Economic Opportunity cut off the funding for the particular positions that they were working in and the City of New York said, we will incorporate this now into one of the departments within the City of

New York and you will be permitted to continue to work and you will be permitted to continue to maintain the same position you have at the very same salary. And very shortly thereafter they were informed by letter that the only reason they were being fired was because of their citizenship and not because of any questions of competence or character or anything else.

Now, it was pointed out by my adversary during argument that the prevailing law today concerning public employment is Crane and Heim and he cited Mr. Justice Blackmun's decision in Graham v. Richardson as sustaining this position.

It was my understanding in reading that decision that what the Court said is, "We are not dealing with the issue of employment and public employment at this time. We are dealing with an issue of welfare benefits."

As Judge Tenney in the district court in writing the opinion in this case below stated, "The time has arrived. The Dougall case has now presented that time where the issue of employment has now come up concerning aliens and that it is very appropriate to review that and in light of the decision in Graham v. Richardson, this is a classification that requires strict judicial scrutiny and the appellants in this proceeding have not sustained or met that requirement."

Q Would you think, Mr. Evens, or what would you

think if the statute of the State of New York had a limitation to the employment of people in these categories who had signified their intention to become citizens by having filed the first application? Do you think that would equally violate the 14th Amendment?

MR. EVENS: If that requirement were in there?

Q Yes.

MR. EVENS: I -- I -- incidentally, there is a statute that does -- I believe the second half of 53 that we have before us has some such reference to it, the filing of declaration of intent to become a citizen.

I personally -- I have trouble with it if the reason the State of New York has set forth this classification it was for an unconstitutional reason and I believe it was for an unconstitutional reason. It was discriminating against a class and I would like to point out that in the brief of the appellants in this proceeding, they indicate that aliens are unstable. There is no evidence of their instability. They indicate that even if an alien took an oath, as might be required of Civil Service employees, we wouldn't necessarily believe them anyway.

Q We haven't found on any of the reasons that are argued.

MR. EVENS: No, I understand that.

Q The three-judge court didn't rest on any

such laws.

MR. EVENS: No, it didn't, but the reason that I point this out is that even using a close judicial examination, what was the purpose of the legislation really does not permit the statute to survive the requirements of the equal protection clause and that the examples for the arguments made by the appellants are themselves invidious. The implication --

Q Mr. Evens, one of the fact situations that you describe is that of Mr. Dougall, who plans, if the government changes in Guiana, to return. Now, isn't there at least something that might commend itself to a reasonable legislature in the argument that here is a man whom we can provide a good job for in the Civil Service who we could expect to be there rather indefinitely if we kept promoting him if he were a national, but this man is subject to a, you know, in his eyes, very legitimate outside pull that a citizen just wouldn't be subject to?

MR. EVENS: However -- however, I am not so sure that a citizen might not be subject to it. I think that today --

Q Don't be silly. No citizen is going back to Guiana.

MR. EVENS: No, but a citizen might go back to New Jersey. or to Washington, D. C. There is certainly no

requirement to be a resident of the State of New York.

Q No, but most people haven't left New Jersey or Connecticut to come to New York as political refugees.

MR. EVENS: No, no, but they certainly have come to New York to get employment, it is probably the focal point of employment for the northeast area or perhaps even for the country and that, in fact, we live in a society where our population is very mobile and to make any kind of argument to say that aliens are more unstable than the rest of the population, without any foundation or basis for it is a specious argument. It -- it -- a young person graduates from school, as is so typical, and comes to Washington, D. C. or comes to the city of New York to seek employment and perhaps to develop something in a career and never fully intending to stay permanently. Should that person be denied the right to Civil Service employment, presuming that it is a person born and living outside the State of New York who is a citizen of the United States?

The statute does not discriminate against that person nor do, I think, it should. And I cannot see any distinction between nonresidents of the State of New York in terms of the arguments that the appellants make and aliens who are lawful residents. The very people that we are talking about as the named plaintiffs in this proceeding admittedly have been living here for a substantial period of time,

doing all of those things. All of them have worked. They haven't been themselves indigent or forced to seek other forms of sustaining themselves. They have been working people.

Q I recall that you do make a distinction between resident and nonresident aliens.

MR. EVENS: Yes. Yes, and as a matter of fact, Judge Tenney, I believe, judged as well when he wrote the opinion of the court below.

Q You accept that?

MR. EVENS: Yes, because I do believe that we have many, many categories of aliens. People come here on short-term visas as tourists and I certainly don't think that they would certainly be entitled to the kinds of prerogatives that a citizen or a resident alien would be entitled to.

The requirements imposed by the Immigration and Naturalization Act are much more stringent than they are for someone who comes here to take advantage of our -- the marvelous country, its natural resources, visiting the parks, et cetera and leave within a short time.

Q Should the state or the national government exclude aliens, exclude your clients from military service? Disqualify them from serving in the Army?

MR. EVENS: Under the present law? Oh, could they

enact a law saying aliens --

Q Just say that they are just disqualified from working for the government in the military services.

MR. EVENS: Well, it sounds very similar to a Civil Service statute. You know, my approach to military -- the military service has always been the fact that aliens are required to serve.

Q I agree with you.

MR. EVENS: And now using it from the other point of view, I would have to presume that to be a form of government employment or public employment.

Q Exactly, it is.

MR. EVENS: And, therefore, I think it would be equally objectionable.

Q And just right across the board, as far as government employment is concerned?

MR. EVENS: Provided -- provided -- as long as the statutes of the State of New York say that the person closest to the Governor, the closest advisor to the Governor need not be a citizen and certainly nobody else should have to be required to be a citizen and the statute in effect says that.

Q So your position is limited to the peculiarities of the New York law? If the New York law didn't have those exceptions in it, would you still be here?

MR. EVENS: Yes.

Q Yes.

MR. EVENS: I would.

Q So it really doesn't make much difference about the Governor's --

MR. EVENS: No, I am just trying to point out the anomalies in the argument of the appellant, that how can they argue -- how can they argue the necessity for making policy decisions by someone who on the one hand -- to use the analogy the court has used today of the garbage collector, or the analogy on the other hand, a biologist who happens to be working with fungus on, let's say, tobacco leaves or whatever.

Q Can you imagine a governor of a state in this country today appointing somebody to high government office who wasn't a voter?

MR. EVENS: Who is not a citizen?

Q No, was not a voter was my case.

MR. EVENS: He'd appoint him to high government office?

Q Yes, sir.

MR. EVENS: Who is not a voter?

Q Yes, sir.

MR. EVENS: Do you mean an office such as to fill a vacancy on the bench or to fill --

Q Any.

MR. EVENS: He could not, to fill a vacancy on the bench or could not to fill a vacancy in the legislature.

Q You said there were some high positions that the government could appoint an alien to?

MR. EVENS: Yes.

Q And I am asking you, will you name me the position that any governor would appoint a nonvoter to?

MR. EVENS: I know no governor who would do that. There are many other reasons. I'm saying the statutes allow him to. That is all I am saying.

Thank you very much.

Q Would your constitutional objections to this statute disappear, then, if the statute said that this could be waived under certain circumstances?

MR. EVENS: The -- the -- my objection is to the classification and it would exist regardless to what modifications there might be by legislation. I think that this is an intent and an endeavor to take a large segment of the population of the State of New York and to say to those people, you cannot work in certain jobs.

Q Well, all New York has said about these governor's aides that -- the hypothetical people you are talking about --

MR. EVENS: Yes.

Q -- are that the Governor may appoint someone

if he wants to.

MR. EVENS: Yes.

Q Now, what if in the Civil Service they said that the head of the agency may appoint some aliens who rank in the first degree of Civil Service, if they want to? Wouldn't that be the same situation?

MR. EVENS: I have some difficulty with that because I think that once we get into qualifications in making divisions, then we are no longer performing a judicial funcition. We are -- apparently are performing an administrative or executive function or legislative function which can very well be handled by a very, very sophisticated and substantial body, the Commissioner, and his department, of Civil Service. And that certainly he could set forth reasonable criteria of any kind.

If I may point out, Mr. Chief Justice, this statute was originally amended to exclude noncitizens in 1939. The statute had been on the books for many years before that without any reference to it. However, the Commissioner, on his own, had been discriminating against aliens and in fact it was recommended that this particular law be passed, the amendment requiring citizens to be in the competitive Civil Service class because the Commission had been doing something all along which the legislature had not mandated.

Now, this was one of the letters that we found in

the bill jacket.

Now, it seems to me that if we had before us today the 1939 law before it was amended, and the Commissioner himself was discriminating broadly against an entire class, we would be making the very same argument, whether it was enacted or not.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you.

Thank you, Mr. Hirshowitz.

The case is submitted. We will hear arguments next in -- oh, pardon me. Your time was entirely used, but we allowed Mr. Evens a little extension.

I'll let you comment on that.

REBUTTAL ARGUMENT OF SAMUEL A HIRSHOWITZ, ESQ.

MR. HIRSHOWITZ: With reference to the discussion as to the appointments by the Governor, the Public Offices Law requires all department heads to be citizens.

In the discussion with reference to the exempt employees and the noncompetitive employees, while it is true that the department head who makes the appointment has no similar Civil Service restriction, I know of no alien that has ever been appointed to any of those positions. No such information appears in the record. In the Department of Law we have about eight non-certified -- non-competitive employees. None of them are aliens and of course we have

about 400 lawyers who are all citizens who are in the exempt class so that the discussion as to non-competitive and the exempt class -- the distinction between that and the provision as to the competitive Civil Service is really remote from the controversy.

One other point My adversary has conceded that the statutory provision passed in 1939 was merely a legislative declaration of a practice by the state Civil Service Commission that went back many years. Moreover, as a matter of fact, in the City of New York, the practice by local law went back to 1890, so it is not a new provision that was passed in 1939 and the practice in New York State, let me say, is not peculiar because there are at least 27 states that have identical or substantially identical statutes and at many localities in other states such as Miami which is a subject of a federal law suit which has a similar statute.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hirshowitz.

The case is submitted.

(Thereupon, at 2:56 o'clock p.m., the case was submitted.)