In the

Supreme Court of the United States

CASPER W. WEINBERGER,
Secretary of Health, Education,
and Welfare,

Appellant,

v.

SANTIAGO DIAZ, et al.,

Appellees.

No. 73-1046

Washington, D. C.
January 13, 1975

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v.	:	No. 73-1046
SANTIAGO DIAZ, et al., Appellees.	:	

Washington, D. C.,

Monday, January 13, 1975.

The above-entitled matter came on for argument at 1:08 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

MRS. HARRIET S. SHAPIRO, Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Appellant.

ALFRED FEINBERG, ESQ., Legal Services of Greater Miami, Inc., 395 Northwest First Street, Suite 203, Miami, Florida 33128; on behalf of the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in 73-1046, Weinberger against Diaz.

Mrs. Shapiro, you may proceed whenever you're ready.

ORAL ARGUMENT OF MRS. HARRIET S. SHAPIRO,

ON BEHALF OF THE APPELLANT

MRS. SHAPIRO: Mr. Chief Justice, may it please the Court:

This case is here on direct appeal by the government from a decision of a three-judge District Court in Florida.

Like the previous case, it involves a challenge to the federal government's power to classify on the basis of alienage.

The appellees here are three aliens who wish to enroll in a subsidized federal medical insurance program for the elderly.

This program is part of the over-all Social Security Insurance System for people over 65. That system consists of three parts:

First, there's the basic retirement insurance, which is Old Age and Survivor's Insurance. Eligibility for that insurance is based on age and work in covered employment. Citizenship or alienage has almost nothing to do with it. And almost all employment in this country is covered.

Second, there's hospitalization insurance, which is referred to as Medicare Part A. And eligibility is based primarily on entitlement to the basic retirement insurance.

The third category is the one involved in this litigation, that is Medicare Part B, supplemental medical insurance.

Part B is a voluntary program. Those who enroll currently $6,70 a month, which the government matches. The fund created by these contributions pays 80 percent of covered medical expenses, and they are mainly doctor's fees and medication.

Appellees are all over 65. They want to enroll in Medicare, sub part B, but they were refused because Part B insurance is available only to persons who are eligible for Part A insurance, to citizens, or to aliens admitted for permanent residence who have actually been residents for five years.

All three named appellees entered this country in 1971, so they don't meet the five-year residence requirement.

In addition, two of the appellees were admitted under the special Cuban Refugee Program and not for permanent residence. So, on that ground also, they are ineligible for Medicare Part B.

The Cuban Program does permit a retroactive adjustment of status, so that by the time these two appellees

have been here for five years, they probably will be eligible for Medicare Part B, since their status will have been adjusted to that of permanent resident aliens.

This is a class action. And the court below defined the class as all immigrants denied enrollment in sub part B, because they are not lawfully admitted for permanent residence, and have not met the five-year residency requirement.

It also established a sub class represented by single appellee, Espinosa, of those denied benefits solely because they could not meet the durational residence requirement.

The court held that the durational residence requirement denied appellees equal protection because it was not rationally related to any valid congressional purpose.

It also held that the durational residence requirement was not separable from the requirement that the alien be lawfully admitted for permanent residence. And therefore it stuck all the alienage provisions from the Medicare sub part B eligibility provision.

We've discussed the separability issue in our brief, and I don't propose to discuss that further this afternoon.

It is our contention here, as it was in the preceding case, that equal protection analysis is simply inappropriate when considering federal statutes dealing with alienage, in view of the basis and extent of Congress' broad

powers over immigration.

And the Solicitor General presented that view this morning, and I don't propose to go into that again.

I do want to point out that the Medicare eligibility provision at issue here is closely related to immigration policy. As a matter of fact, the court below rather surprisingly indicated that it had doubts about the constitutionality of the admitted for permanent residence requirement part of the statute, precisely because it was so closely related to the policy expressed in the Immigration Act.

The Immigration Act provides that one of the qualifications for admission as an immigrant is that the applicant not be likely to become a public charge.

Now, the practical effect of that requirement, particularly for people over 60, the only ones that are affected by this Medicare provision, is that they must either be economically independent or have someone in this country who is willing to assume responsibility for their support.

The Medicare limitation simply defines the extent of the support obligation. The effect of the immigration statute and the Medicare statute, taken together, is the same as if Congress had explicitly provided in the Immigration Act that elderly immigrants must undertake to provide for their own medical needs for five years after they enter, either by private insurance or by having the financial capability of

doing it independently of insurance.

Congress could certainly have done -- made that provision directly in the Immigration Act. We submit that Congress has an equal right to do it indirectly through the Medicare Act.

It's the essence of congressional power over immigration to decide which groups it will encourage to immigrate and which discourage. And also to decide how much encouragement it will offer.

An elderly person considering immigration will normally consider the cost of living in this country. Part of that cost is the cost of medical care. If subsidized government insurance is available, the cost will be lower than if it is not. And if it's available after five years, the cost is less than if it's not available at all.

Immigration is thus encouraged by making the insurance available, but it's not encouraged as much as it would be if the insurance was available immediately on entry.

Congressional judgments concerning immigration policy are entitled to great judicial deference. And this Medicare eligibility provision is an expression of congressional immigration policy. As such, it's entitled to great judicial deference.

For that reason, even if this judgment is subject to review on equal protection grounds, the Court need do no more

than assure itself that there's a rational justification for the restrictions on alien eligibility. And there is such a justification in this case.

The Part B Medicare program is part of the over-all Social Security Insurance Program. That program is not basically a welfare program, in which payments are based on current needs. There's no means test for eligibility.

Instead, the insurance is available to those to whom Congress has determined that the country owes an obligation. This Court has in fact recognized that that sense of obligation is the basis of the original Social Security Program, which is, of course, the rootstock of the whole federal social insurance program,particularly for the elderly.

If I may quote from Flemming v. Nestor, the program is based on a legislative judgment that those who, in their productive years, were functioning members of the economy, may justly call on that economy in their later years for protection from the rigors of the poorhouse.

In setting up the Part B eligibility provisions, Congress went somewhat further. It extended the benefits to all citizens and to aliens with a substantial relation to this country; but the theory remained the same.

Congress simply recognized that resident aliens, like citizens, pay taxes, are subject to military service, and contribute in myriad other ways to our national community.

Citizens,who, in the overwhelming majority of cases, make these contributions throughout their lives, may not enroll in sub Part B until they are 65. An alien, who makes his myriad contributions in his country of origin during his working life, may retire and come here and after only five years of contributing to this community, he's eligible to enroll in Medicare sub Part B on the same basis as a citizen.

That's not, certainly, an unreasonable discrimination against the alien. In fact, the only person that's more favorably treated would be a U. S. citizen who had never lived in this country and then returned in his old age and was immediately eligible for the Medicare sub Part B. And that, we submit, is such a small group that it's really de minimis.

QUESTION: Well, wouldn't it also -- wouldn't an American citizen who hadn't been under the Social Security Act or the Railroad Retirement Program, and who reached 65, be more favorably treated?

MRS. SHAPIRO: No, because the principle there is that he has been a participating member of this community.

QUESTION: But not of any Social Security Program.

MRS. SHAPIRO: Not of a Social Security Program.

But my point is that he has been living here, and he has been subject to --

QUESTION: Well, maybe he -- but we don't know if

he's been a net asset or a net liability to American society.

MRS. SHAPIRO: Well, the theory of the Act is --

QUESTION: He's been living here, and that may be --

MRS. SHAPIRO: He's been living here and he's been contributing --

QUESTION: Well, --.

MRS. SHAPIRO: -- as a member of the community.

Congress decided that five years of participation in the national community is enough for eligibility for Medicare Part B. It could have made the period longer, or it could have made it shorter. It drew the line at five years.

Under traditional equal protection analysis, this Court should not decide whether that was the best place to draw the line. The line is, however, consistent with the Immigration Act, which also uses five years as the period in which the alien is in some ways here on probation. His native country remains more responsible for him during that period than it is after five years.

For ex ample, he ordinarily can't be -- or he can be deported for indigency within five years, or for a single crime which involves moral turpitude committed within that time.

Of course, too, he may not ordinarily be naturalized until he has been here for five years, so that until that time there can be no full assumption of the rights of citizenship,

nor total dissolution of the bond with his native country.

We submit, therefore, that the distinction between citizens and aliens in the Medicare program is not unreasonable. It also serves the rational fiscal purpose of reducing the amount of the federal subsidy required for the program.

The court below thought that the government did not benefit financially from postponing the eligibility of aliens, except to the extent that they died.

It made two assumptions not supported by the record.

First, it assumed that no elderly aliens returned to their native country before five years are up.

And second, that they postponed needed care, which it further assumed made the eventual cost to the government of the insurance as great as if they were eligible immediately.

The Immigration Service does not have records of how many elderly immigrants leave the country within five years.

And the second assumption is pure speculation.

Of course, if it's true, it's equally irrational to deny benefits to those who have not yet reached 65, because they, too, will postpone necessary care which could have been provided more cheaply before they reached 65.

Anyway, we submit that these are certainly legislative judgments. This is a novel program, which has

been under constant legislative review, and it is up to Congress to evaluate all these factors and decide whether and how much to liberalize eligibility for Medicare.

I'd like to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Feinberg.

ORAL ARGUMENT OF ALFRED FEINBERG, ESQ.,

ON BEHALF OF THE APPELLEES

MR. FEINBERG: Mr. Chief Justice, and members of the Court:

It seems to me that Mrs. Shapiro's argument rests primarily on Mr. Bork's original argument, which was that the Fifth Amendment notions of equal protection do not apply to aliens.

If that is true, and that is what this Court holds, then I think this case folds for me, for my clients. I think the case argued previously folds.

But I don't believe that that is true, because that is such an overwhelmingly inconsistent and novel argument that implicit within it are the following:

That a classification which this Court has now held three times, explicitly once but implicitly two other times, and many other courts have followed, that is, a classification of aliens is not inherently suspect when that classification is made by the federal government rather than the States.

Two, that the normal test of whether a classification is justified or not justified, a classification involving individual worth as opposed to classifications involving economics and taxes. And we're dealing here with individual worth.

The normal test, which has to do with the relationship of the classification to the objective of the statute, is inapplicable, and in fact this wasn't even spoken about here.

The reason it wasn't spoken about is because of the submission by the government to this Court twice now this morning that the federal government can discriminate against aliens as aliens in any way they see fit.

QUESTION: Well, I don't think the argument went quite that far.

MR. FEINBERG: Well, I think Mr. Bork's argument did, and in the brief that was filed by the government in this case, the argument repeated at least four times was that the government has made the discrimination in this case against aliens, has made the classification in this case against aliens, and indeed in virtually all of those statutes which are listed in the appendix attached to the Wong brief, the government's Wong brief, because the aliens have not shown a, quote, "substantial and enduring connection with the United States sufficient for the United States Government to grant

them the benefits that are granted to citizens under each of those particular provisions." The one we're talking about here are Medicare B provisions.

Well, substantial and enduring connection with the United States is really saying aliens, and when you compare aliens with citizens, citizens have an absolute and enduring connection with the United States. So those who do not have -- relative to citizens, those who do not have a substantial and enduring connection with the United States are aliens. Now, if that's the basis of the discrimination, and it is asserted repeatedly, in fact it has said it is the theme of the discrimination, the theme of the classifications in each of these cases, is that the underlying -- the underlying theme, I think the words are used, are that they do not have a substantial and enduring connection with the United States.

Well, this is advancing a new test of legislation which creates classifications, because the test, the traditional test -- and I'm not talking about the test now that is used for suspect classifications, or where there are fundamental interests involved, or any special circumstances, just the traditional test -- is the one articulated in a case which did not involve a suspect classification, it involved the question of whether a conscientious objector could receive the same benefits as a veteran after having finished his conscientious objector service.

And he said that he was discriminated against because he served his country just as veterans who had fought in the war.

This Court upheld that discrimination in that classification in that case.

But the Court went on to say that:

"Our analysis of the classification proceeds on the basis that, although an individual's right to equal protection of the laws 'does not deny ... the power to treat different classes of persons in different ways'... it denies the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'."

Now here we are told that there is a new test, we do not look at the object of the statute. In Medicare the object of the statute is to take care of retirement-age individuals' medical problems.

In this case, Medicare Part B is related to physician services generally. I give you some idea. There are home health care services, podiatrist services, outpatient services; those kind of services are the kind of services that are

involved in the Medicare Part B. There's some more of them, but you can get the idea of those services.

To distinguish from Part A, really, which deals with hospitalization benefits; Part B, they usually talk about medical benefits, which are doctor's services.

QUESTION: Both Part A and Part B are available only to people over 65 years old, is that right?

MR. FEINBERG: That is correct. But there is a substantial difference in the way they are funded, which is very interesting.

Part B is funded from the general revenues of the Treasury of the United States. That is the tax dollar. That is the money that comes from income taxes and however else the revenues of the United States receive its moneys.

It does not come from Social Security taxes.

QUESTION: And those are matching funds in Part B; right?

MR. FEINBERG: Match -- yes --

QUESTION: Fifty-fifty.

MR. FEINBERG: Because every applicant for Part B must pay a premium, --

QUESTION: Right.

MR. FEINBERG: -- which is matched by the Treasury of the United States, --

QUESTION: From the general revenue funds.

MR. FEINBERG: -- from the general revenue funds. That is correct.

QUESTION: Unh-hunh.

MR. FEINBERG: And so, while it is true that Part B, and it is natural that Part B should follow Part A and it is called the Medicare program, and it is within the purview of the Social Security Act, which is all of Title 42, is called a Social Security provision. In reality, Social Security has very little to do with it, the Social Security to the man in the street.

It has to do with somebody's choosing to participate -- it's a voluntary program, somebody who is 65 years old choosing to seek insurance that is available pursuant to congressional enactment, for which a premium is paid by the applicant, and a like premium or an equal premium, part of the premium is paid by the taxpayers.

Those taxpayers not only include aliens, but the children of aliens, and anybody related to aliens who are living in the United States.

So the argument that an alien is here only for five years and is contributing only for five years is a specious argument, particularly when we look at -- and the problem in this case really arose, definitionally. The classification here that we're talking about is: An alien lawfully admitted for permanent residence, who has resided in the United States

continuously during the five years immediately preceding the month in which he applies for the benefits.

So we have two residency requirements here: a durational residency requirement and a status residency requirement.

The status being that of permanent resident.

And forgetting for a moment about the durational residency requirement, which was declared unconstitutional by the District Court in this case, and going to the question of the status residency requirement for a moment, it is to be noted that the problem arises because of the nature of, or the manner in which Cuban refugees were allowed to come into the United States. Indeed, "allowed" is a very conservative word.

Those of us who have lived in this country for the last ten years know that President Eisenhower made a speech in which he beseeched the Cubans who wanted to escape from Castro's Cuba -- Castro taking over in Cuba in 1959; this speech was made, I believe, in 1961 -- to come into the United States, inducing them to come into the United States, to the point where we started sending planes during the 1960's to pick up anybody who Castro would allow onto those planes, to bring them into the United States.

So, here we begged these people to come into the United States. And thousands and thousands and thousands of

them came. Indeed, it is estimated that approximately 600 to 700 thousand came.

And of those numbers, approximately 250,000 to 300,000 -- the figures are inaccurate -- they were coming in such great numbers that they were overwhelming the agencies that were taking care of them. And coming from Miami, Florida, I am quite familiar with the chaos that was caused by these enormous numbers of Cubans coming into the community.

The bureaucratic problems of counting them, for example, and analyzing what their status was, and figuring out how to allow them into the United States under the then current laws of the United States was a very serious problem.

At the beginning, when they were trickling in, they came in as non-immigrants. And when the non-immigrant visa ran out, they were then subject to deportation proceedings.

During the deportation proceedings, they claimed political asylum and it was granted to them. This was a very cumbersome process.

When they claimed political asylum, they became immigrants. Once they became immigrants, they qualified for the Medicare Part B provision, because the definition of "immigrant" is "a person admitted for permanent residence."

So those who were fortunate enough to be defined as immigrants, which was just fortuitous, depended on when and how they came into this country, are qualified for Medicare

Part B.

But as the numbers increased and they became -- they started coming in by the thousands, a more efficient way had to be found to allow them to come in. And the more efficient way was to choose to allow them to come in under the parole powers of the Attorney General of the United States, which are -- which give the Attorney General the power to allow virtually any foreigner into the United States, any alien into the United States under any conditions.

He has -- this power is given to him by Congress, and it is very, very wide and broad power -- a wide and broad power. And so approximately 250 to 300 thousand people came in.

Now, the problem with those people coming in is what brings us before this Court. Because they came in as -- their classification was parolee. And a parolee, as we point out in our brief, is neither an immigrant nor a non-immigrant; he is in a special status of parolee.

And the term which is used, referring now to the statute term, resident -- "an alien lawfully admitted for permanent residence" does not cover parolee. The historical development of the definition of that term does not cover parolee.

So now we have, it's estimated by the lower court and my calculations are about the same, on the basis of the sketchy figures that we have, we have somewhere in the neighborhood of

20,000 individuals who are parolees.

QUESTION: Is your real complaint that he's designated as a parolee rather than a resident alien?

MR. FEINBERG: That is one of the complaints. If he was designated as a resident --

QUESTION: Yes. What good is that complaint when certainly Congress has the right, under its immigration laws, to decide which is which? Isn't that one of Congress's rights?

MR. FEINBERG: To be --

QUESTION: That he's either admitted as a resident alien or parolee.

That's a right of immigration, and naturalization.

MR. FEINBERG: My answer to that is that -- I have a twofold answer to that.

No. 1, that you must -- when that classification if used --

QUESTION: You admit your complaint is that he's a parolee rather than a resident alien.

MR. FEINBERG: No. My complaint is that the classification is used to exclude him from Medicare Part B.

QUESTION: Well, this --

MR. FEINBERG: That's my complaint.

QUESTION: If he was a resident alien, he would be all right.

QUESTION: That is one law -

QUESTION: Right.

QUESTION: -- perhaps he's admitted for permanent residence.

QUESTION: Right. Right.

MR. FEINBERG: Right. That's right. The complaint is --

QUESTION: So your complaint is that when he was admitted, he was given the wrong status.

MR. FEINBERG: Not the wrong status. He could be admitted --

QUESTION: Well, if you took that position, I think you're in a whole lot of trouble.

MR. FEINBERG: No. That's not the wrong status. He could have been admitted under any status. The question is what they did with that status after he was admitted.

And I'm submitting to the Court that the status of parolee does not fit within the objective and purpose of Medicare Part B, which is the test of the classification.

Now, I have no argument with him being a parolee. My argument is utilizing that parolee classification to deny him the benefits of Medicare Part B.

What is the relationship between taking care of a retirement-age alien who resides in the United States and the fact that he is a parolee? There is no relationship. The only relationship is that he is an alien, and their argument

is a circular argument. Their argument is he is an alien, and we can do whatever we want with aliens, regardless of the relationship between the objective of the statute which excludes him and the fact that he is an alien.

Those -- those two facts; one,that the person is an alien or is a parolee or has any condition of alienage, and, two, that the object of the statute is to take care of individual's medical problems when they reach retirement age, are totally unrelated. And this is why this is not discussed in the government's brief.

Because if the true test of determining whether a class is a proper classification, a classification that can be sustained constitutionally, is whether it's related to the objective of the statute, we find that the classifying aliens are totally unrelated to the objective of the statute. The objective of the statute is set out in the statute; it's to take care of people's medical problems when they're 65 years old.

What does that have to do with whether somebody is a citizen or an alien? That's not discussed by the government, because there's no argument that can be made relating the objective of the statute to the classification that's created.

What I am saying is that the problem that has brought me to the Court is the fact that they have utilized the

parolee, the government has utilized the parolee status of these people, to exclude them irrationally and arbitrarily from a program which has nothing to do with their status as parolee.

That's like excluding garbagemen and policemen or plumbers.

There's an arbitrary exclusion from this statute. And their argument --

QUESTION: Are you suggesting that there's some plenary power in Congress to deal with garbagemen and plumbers, to take your illustrations, that's comparable to that over immigration?

MR. FEINBERG: I was using that example to talk about the arbitrariness.

What I'm saying is that the so-called plenary power of Congress that has to do with aliens must be related -- and this argument has already been made already -- must be related to naturalization, deportation, admittance into the United States, even citizenship.

QUESTION: Do you agree with the somewhat provisional concession that Mr. Steinman made in the previous case, that the United States could simply exclude all aliens, and say that no one could come into this country?

MR. FEINBERG: I don't think that that --

QUESTION: Is that it?

MR. FEINBERG: I don't think that would be provisional.

I think that the same degree as --

QUESTION: I said his provisional concession --

MR. FEINBERG: No, I think you misworded that completely.

QUESTION: Because he withdrew it. He gave it with his right hand and took it back with is left. He said when that case came up, he'd take the other position.

MR. FEINBERG: If Your Honor please, I think -- I think what he said was that if you allowed aliens to come in under certain conditions, that he might question those conditions. But I don't think he would challenge a statement that Your Honor has just made, and that is that the United States simply can close its doors to aliens. I think that --

QUESTION: But in any event, you don't challenge it, do you?

MR. FEINBERG: I don't -- I don't challenge it at all.

QUESTION: Yes.

MR. FEINBERG: I think the United States certainly can close its doors to aliens. But it hasn't. And it hasn't tied these conditions to naturalization or admittance or deportation.

QUESTION: So, if it had, suppose that Congress were to do that, what would your view be of that?

MR. FEINBERG: I'd give the same provisional agree-

ment that Mr. Steinman gave. I think the cases that have been b efore this Court, where -- such as Flemming vs. Nestor, for example, which was mentioned by my worthy opponent -- where you tie -- I pick that case because it's a very controversial case, and I think it was a four-to-three decision, which -- the validity of which has been questioned through the years.

But there's a case in which, seemingly a very arbitrary exclusion from it, a deportation took place, and this Court upheld that.

Well, that's because that was tied to deportation. And that's where the plenary power of Congress comes in: deportation. Immigration in terms of naturalization --

QUESTION: I thought Flemming v. Nestor was a suspension of Social Security payments.

QUESTION: For a deportee.

MR. FEINBERG: For -- incident to a deportation, yes.

QUESTION: Based on membership in the Communist Party.

QUESTION: Right.

MR. FEINBERG: That is correct.

QUESTION: But he had to be a deportee.

MR. FEINBERG: Yes, but he was a deportee. And when -- they said when he got deported to another country he would lose his Social Security benefits.

But it was tied to deportation. And there is not one

case, not one of all these cases, and I have read them all carefully, that is cited by the appellants in this case, which justifies the proposition of imposing conditions upon aliens within this country that are unconnected with naturalization or deportation or related matters, such as national sovereignty, powers of citizenship, --

QUESTION: What about provisions against becoming an indigent?

MR. FEINBERG: The -- that's tied to naturalization. Yes.

They say that if you come into this country as an indigent, then you have violated the Naturalization -- you've committed a fraud because you can't come into this country as an indigent unless you post a bond.

But that's a condition of Naturalization. I am agreeing with -- that if you tie it to a condition like --

QUESTION: Well, the government makes the argument here -- the government makes the argument that the provision in the Social Security laws is tantamount to, it's the same -- it's just as though they had made it a condition of entry into the country.

And you say it isn't.

MR. FEINBERG: But the fact of the matter is that it isn't. They have not --

QUESTION: No, it isn't in the --

MR. FEINBERG: There's nothing -- not only is it not in there, in literal words of the statute, which are in the Social Security Act, but it is not even there or mentioned in the legislative history. They don't talk about the question of naturalization or admittance into this country or anything related to that in the passage of this provision, or, indeed, in the passage of most of the Acts which are listed in the Appendix to the government's Wong brief.

QUESTION: So this -- this prohibition against sharing in the Schedule B benefits, this is unconstitutional because it's in the Social Security Act rather than in the Immigration Law?

MR. FEINBERG: I would give my provision pertaining to that. That's not the question before this Court. The question -- the test of the constitutionality -- again I'll relate: The test of the constitutionality of a classification is related to the object of the benefit conferred by the legislation. That's been the traditional test that this Court has used time and time again, unrelated to the fact that a classification may be inherently suspect, which we have here, unrelated to the fact that a fundamental right is involved here, such as medical care; unrelated to any of those matters.

The traditional and consistent test has been whether or not the classification is related to the object or purpose

of the statute from which the class is denied benefits, and that is not the test that the government would urge this Court to use in this case.

The test that the government urges this Court to use is simply to say that since these people are aliens, the government has a right to exclude them from any benefits conferred on citizens.

QUESTION: Mr. Feinberg, does your argument cover a person with a temporary visa?

MR. FEINBERG: No, it would not; for the simple reason that --

QUESTION: Why not?

MR. FEINBERG: -- the class -- that this case covers --

QUESTION: He's an alien.

MR. FEINBERG: But he is a non-immigrant alien. And this case covers only immigrant aliens, conditional entrants, --

QUESTION: Now we're down to immigrant aliens.

MR. FEINBERG: I'm sorry, that's what the lower court did when they classed -- when they created the class that's affected by this case.

QUESTION: I'm not talking about the lower court; what's your position?

MR. FEINBERG: Excuse me, sir?

QUESTION: Your position is that these immigrant aliens are the same as resident aliens?

MR. FEINBERG: No. My position is that you cannot alienage as a basis for discriminating against aliens who come to this country and --

QUESTION: Well, have you made any effort to change the status to resident alien?

MR. FEINBERG: Excuse me, sir?

QUESTION: Have you made any effort to change these people's status to resident aliens?

MR. FEINBERG: These people are not in a position, because of the laws of the United States, to seek that change until they have been here, in theory for two years, in practice for four years; and they have not been here for that length of time.

QUESTION: So this is close to the visitor's visa, isn't it?

MR. FEINBERG: No. On the contrary, there's a whole section in my brief which addresses itself to that question. It is much closer to an immigrant. For several reasons.

I direct the Court's attention to --

QUESTION: I was misled by your argument about all those who came in in President Eisenhower's time.

MR. FEINBERG: Right.

QUESTION: I find now you're arguing about those who

came in last week.

Am I right?

MR. FEINBERG: My argument is directed at those who -- about 250,000 who came in between 1965 and the present. Those are the people who are --

QUESTION: Well, couldn't they have had their status adjusted by now?

MR. FEINBERG: Some could have. The particular plaintiffs in this case could not until next year.

QUESTION: Because they haven't been here long enough. They just got here.

MR. FEINBERG: That's -- no, they've been here since 1971, but it takes four years before they can qualify to become immigrants, which is permanent resident.

QUESTION: So what is all that argument about President Eisenhower got to do with them?

MR. FEINBERG: Because -- because -- but for the fact that all of these Cubans were invited into this country and are here now. The provisions of Medicare Part B would not affect that many people.

QUESTION: Well, isn't an immigrant affected, from the standpoint of your case?

MR. FEINBERG: Well, it does -- it did to Congress, and that's the point. Because Congress, in a related provision, in the SSI statute, took up the question of the alien

who comes in as a parolee, and here we're talking about indigents, whereas in the case before the Court we're not necesarily talking about indigents.

And what Congress did was, they said the following -- this is an Act of Congress that I'm reading from.

Congress has authorized welfare payments to the indigent, blind, aged, and disabled individual who is, and I quote now, "either (i) a citizen or (ii) an alien lawfully admitted for permanent resident, or otherwise permanently residing in the United States under color of law", continuing the statute, "including any alien who is lawfully present in the United States as a result of the provisions of Section 1153(a)(7)" which is conditional entrant, which is in the class that's included by the lower court in this case, "or section 1182(d)(5)" which is parolee.

So, in other words, what Congress has done here is include in the SSI provisions of the Social Security Act coverage for the persons who are excluded from the Medicare B provisions of the Social Security Act.

And no doubt it was an inadvertent failure on the part of Congress to do that, but we are submitting that it is possible for this Court to construe the admittance for permanent residency requirements as covering Cuban parolees, because of the fact that they are covered here, because of the fact that since 1971 they must not only have registered for the military

service, but are subject to induction in the military service, as are citizens, and because of the fact that they are entitled to retroactive adjustment of status, which non-immigrants are not entitled to generally, with some exceptions; after two years present in the United States they can make an application for retractive adjustment of status to become immigrants. Actually it takes four years to get that retractive adjustment, and that's why I said my clients could not receive it. They came in 1971, and we haven't -- the four years hasn't elapsed yet.

QUESTION: Your clients are residents, are they not?

MR. FEINBERG: My clients are --

QUESTION: They are not visitors.

MR. FEINBERG: That is correct.

Not only that --

QUESTION: I mean, how about even in the contemplation of law. What is the definition of a parolee? Is he a resident of the United States or not?

MR. FEINBERG: Well, the problem is that we have two definitions now. Under contemplation of law prior to the provision that I just read, he would be considered a non-resident of the United States, a legal fiction, as it were.

QUESTION: He's here and he's here for an indefinite period, but in contemplation of law he's a non-resident.

MR. FEINBERG: Right.

But here we have an oct of Congress which talks about them, and talks about them in these terms. An alien lawfully admitted for permanent residence. That's not our clients.

QUESTION: That's not your end.

MR. FEINBERG: Or otherwise permanently residing in the United States under color of law. And then it goes on to specifically say that it includes parolees.

QUESTION: And that would be your --

MR. FEINBERG: So I'm saying that the congressional definition now has changed what has been the traditional definition, and we now have people who are parolees, who, in contemplation of law enacted by Congress, in another statute, admittedly, but a parallel statute, within the Social Security Act, by the way, supplemental security income, are permanently residing in the United States under color of law. That's the language, that's the statutory language that's used.

And that's on page 42 of the brief.

QUESTION: And it also says he shall not legally, within the United States.

MR. FEINBERG: Excuse me, sir?

QUESTION: It does not ordinarily place him, quote, "legally within the United States". That's what your lower court decision says.

MR. FEINBERG: That is the traditional definition

of parolee.

What I'm saying is that Congress has changed that.

QUESTION: I see. Okay.

QUESTION: Mr. Feinberg, this is probably totally unimportant, but I'm interested in the compliance with the three-judge court statute.

Originally Judge Fulton was designated as the receiving judge, and then was replaced by Judge King. Do you know the reason for that?

MR. FEINBERG: Not only do I not know the reason for that, I don't even recall that happening, sir.

QUESTION: Well, it's very definitely in the Appendix, and --

MR. FEINBERG: Judge Fulton is the Chief Judge. I -- my guess would be that he just simply assigned it to Judge King. That would just be a guess.

QUESTION: Well, the statute's pretty specific, you see.

MR. FEINBERG: I'm sorry, I cannot illuminate the Court on that subject.

QUESTION: Was this heard after Judge Fulton moved up to West Palm?

MR. FEINBERG: My guess is yes, but I cannot be absolutely sure. That could have been the reason.

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

Do you have anything further, Mrs. Shapiro?

REBUTTAL ARGUMENT OF MRS. HARRIET S. SHAPIRO,

ON BEHALF OF THE APPELLANT

MRS. SHAPIRO: I --

QUESTION: Do you know the answer to the question Mr. Justice Blackmun asked?

MRS. SHAPIRO: I'm sorry, I don't.

All I wanted to emphasize was that Congress has drawn lots of lines in establishing immigration policy. The Cuban parolees are -- or parolees in general are admitted on a temporary basis, and they're not considered to be permanent -- entered to establish permanent residence.

The Medicare provisions, which included this immigration policy, went into effect in 1966, and these aliens came in in 1971, on the basis of the policy that was established in 1966. So that when they entered, they were -- they entered under the conditions that had -- that were in effect then, in the Medicare Act as well as in the Immigration Act.

QUESTION: Mr. Feinberg called this a fundamental right, that is, the right to have medical care. You're -- from what you say, I take it, your response to that would be that it's a right only as defined by the Congress.

MRS. SHAPIRO: This is -- certainly it's a -- what's involved here is subsidized insurance.

QUESTION: And five-year residency is one of the

conditions.

MRS. SHAPIRO: Is one of the conditions under which these people were admitted; after five years they would be entitled.

QUESTION: Unh-hunh. Because they're getting a substantial subsidy from the Treasury of the United States.

MRS. SHAPIRO: The -- yes, the --

QUESTION: Fifty percent; the fifty percent contribution.

MRS. SHAPIRO: Well, the basic principle is that after they have been here for five years, they have made the contribution, or that they have been here for long enough so that it is rational to assume that they have that kind of a connection, that it's appropriate for them to be entitled to this insurance.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, --

QUESTION: Mr. Feinberg, I think it's important to find out the reason for the substitution of Judge King for Judge Fulton. Would you ascertain that and let the Court know by letter?

MR. FEINBERG: I certainly will. And I will inform the Court.

MR. CHIEF JUSTICE BURGER: And send a copy to Mrs. Shapiro, of course, to the Solicitor General's Office.

MR. FEINBERG: Yes, sir.

MR. CHIEF JUSTICE BURGER: Very well.

The case is submitted.

[Whereupon, at 1:57 o'clock, p.m., the case in the above-entitled matter was submitted.]

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