In the

Supreme Court of the United States

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION ET AL,

Petitioners

v.

MOW SUN WONG ET AL

No. 73-1596

Washington, D. C.
January 13, 1975

Pages 1 thru 49

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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v.	:	No. 73-1596
MOW SUN WONG ET AL	:	

Washington, D. C.

Monday, January 13, 1975

The above-entitled matter came on for argument at 11:12 o'clock a.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:

ROBERT H. BORK, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530
For the Petitioners

EDWARD H. STEINMAN, ESQ., School of Law, University of Santa Clara, Santa Clara, California 95053

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 next in No 73-1596, Robert E. Hampton against Mow Sun Wong.

Mr. Solicitor General, I think you may proceed.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.

ON BEHALF OF PETITIONERS

MR. BORK: Mr. Chief Justice and may it Please the Court:

We are here on writ of certiorari to the Ninth Circuit.

Respondents are four aliens who have been denied employment with the Federal Competitive Civil Service by reason of the Commission's -- the Civil Service Commission's regulation requiring that applicants for most positions be either citizens of the United States or persons owing allegiance.

Respondents filed a class action challenging the regulation on constitutional and other grounds.

The District Court, on the government's motion, dismissed the action for failure to state a claim. The Court of Appeals reversed, holding that the regulation violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment.

The Court said that alienage is a suspect classification so that the compelling governmental interest

must be shown to justify treating the aliens differently than citizens with respect to federal employment.

The Court of Appeals relied, we believe mistakenly, on the rationale of this Court's decisions in Sugarman versus Dougall and Graham against Richardson.

Those cases concerned, of course, state restrictions on the eligibility of aliens for state employment and sate welfare benefits.

It is our contention that the Civil Service Commission's regulation is a valid exercise of the national power and I reach that result in alternative ways.

My first submission is that the Equal Protection principle has no application to the Federal Government's dealing with aliens as aliens. It has application, of course, to them in other capacities. I wish to be quite clear about this.

The Equal Protection principle applies to persons who are aliens and it protects them from a variety of inequalities such as inequalities imposed on the grounds of their race or religion but the Equal Protection principle does not apply, we think, to a pure alienage classification such as that before us.

QUESTION: That is, the Equal Protection principle of the Fifth Amendment Due Process Clause.

In other words, when it is the Federal Government

that is making the classifications.

MR. BORK: That is entirely correct, Mr. Justice Stewart. When it is -- everything I am talking about now is in the federal context.

QUESTION: Right.

MR. BORK: And I am at some pains to point out what apparently has not been fully understood by Respondents, that we are not saying that the Equal Protection principle does not apply against the Federal Government to a person who is an alien. Of course it does.

We are only saying it does not apply to him in his capacity as alien. It may apply to him in his capacity whether it is race or religion or sex --

QUESTION: Or age.

MR. BORK: Or age or some other way in which the Equal Protection principle applies and, of course, other constitutional protections apply to aliens so we are not contending any such --making any such broad claim.

The reason we think that the Equal Protection component of the Due Process Clause of the Fifth Amendment can't apply is because of the plenary powers of the national sovereign with respect to alienage.

Our Constitution does not forbid alienage classifications. On the contrary, the Constitution requires the Federal Government, though not the states, to employ

alienage classifications.

Now, my alternative submission will be that at most -- at most, the Equal Protection Clause principle has a very attenuated application to distinctions between citizens and aliens when those distinctions are made by the Federal Government.

To employ the compelling governmental interest standard, as the Court of Appeals did, is, I think, effectively to destroy the distinction between citizens and aliens contained in the Constitution or much of it and certainly to destroy much of the great mass of legislation which distinguishes between citizens and aliens.

Some indication of that mass of legislation is contained in the Appendix to the government's brief.

For the Federal Government, alienage cannot be a suspect classification because the Constitution gives the Federal Government the power and, indeed, the duty to make that classification and to legislate with respect to it and that is a power and a duty that, of course, the states do not have.

This necessarily means, I think, that if the Equal Protection principle has any application here -- and I think it does not -- it is satisfied by meeting the Rational Basis test and I will argue later that the challenged regulation here clearly meets the Rational Basis Test.

But first I want to argue that we ought not to apply the Equal Protection test at all in this case. We have here an exercise by the Civil Service Commission of the delegated combined powers of the Congress and the President and those powers, of course, relate to naturalization, foreign policy, national defense, treaty-making and so forth.

And, in fact, what has been exercised here seems to me a power inherent in the idea of the sovereignty of a nation's state, the power to distinguish between those who owe an allegiance and those who do not. And so obviously is this power to differentiate between those who owe allegiance and those who do not an attribute of sovereignty that the practice in question here is followed by every nation in the world.

And so obviously is this an attribute of sovereignty that it has been exercised and gone uncontested for more than 90 years which fact, I think, gives the regulation all the support that long-continued and universally-accepted usage can confer.

These factors seem to me to make this case completely different from Sugarman versus Dougall and Graham against Richardson. States are not independent sovereigns. They have no power to regulate naturalization, no power to conduct foreign affairs, to decide what is

required by national defense, no power to make treaties.

Nothing in the Constitution gives them the right explicitly granted to the Federal Government of treating alienage as a proper classification for legislation.

If alienage is a suspect classification for state law, it is constitutionally made a proper and, indeed, an inevitable classification for federal law.

QUESTION: Mr. Bork, has Congress passed an Act giving the states the right to discriminate against aliens?

MR. BORK: No, I think not, Mr. Justice Marshall, because that would be, if Congress passed a law giving the states the power of what they wished to do with respect to aliens, that would not be a federal policy with respect to aliens, that would be simply turning over to state policy a subject that does not belong to state policy.

QUESTION: So there is a limitation on Congress' authority over aliens?

MR. BORK: Oh, there are many limitations, Mr. Justice Marshall, over the Congress' power over aliens; not only may it not turn the power over to the states but it must exercise itself as a national power but, obviously --

QUESTION: Could Congress authorize the Civil Service Commission to pay aliens less than they pay citizens?

MR. BORK: I would think that they could, Mr. Justice Marshall, I would --

QUESTION: They could?

MR. BORK: I would think that they could. I --

QUESTION: Well, could Congress pass a law that says you can pay female aliens less than you pay other --

MR. BORK: No, I think not, Mr. Justice Marshall.

QUESTION: Why not?

MR. BORK: Well, that's my point. The Equal Protection principle does apply to all persons and, therefore, it applies to persons who also happen to be aliens. I am not contesting that and if an alien is discriminated against on the grounds of his race or sex or age, then he will be treated by the Equal Protection principle just as a citizen would be.

I am merely suggesting -- arguing -- that the alienage classification is not one to which the Equal Protection principle applies.

That is, when Congress legislates as to all aliens, Equal Protection does not apply. When it legislates as to aliens who are women, it does apply.

QUESTION: So you say that the work laws of the United States do not apply to aliens?

MR. BORK: I think it can, Mr. Justice Marshall. Indeed, we have a variety --

QUESTION: Doesn't your little niche that they can do whatever they want on employment but not anything else?

MR. BORK: I hadn't thought of it that way and I -- I don't believe, your Honor, that I am -- that I am dividing it by employment as against something else.

I hadn't -- I hadn't thought of it that way and of course much of the legislation about aliens is not legislation about employment.

QUESTION: One of the first cases was about employment, Truax, wasn't it?

MR. BORK: Yes, the -- that was a state regulation upon employment. I think we have never had a --

QUESTION: Was there any case before that that had anybody else in a suspect classification? Wasn't the alien the first one that they made suspect?

MR. BORK: Well, I don't know if the language was used before that, Mr. Justice Marshall, but it seems to me that we have always known, from the inception of the 14th Amendment, that race was the primary suspect classification in our Constitution.

Now, I don't know about when the rhetoric of suspect classification began. I do not know. And when that particular formulation of the --

QUESTION: Umn hmn, right.

MR. BORK: -- problem began I do not know.

But I think the distinction between the state and the federal is shown by when you look at the -- when you

move from state law to federal law, you also move from cases like Sugarman and Graham to cases like Harisiades against Shaughnessy, Kleindienst against Mandel and so forth, cases that uphold the most severe kinds of restrictions upon aliens and from the early cases on we have known this Court has said that Congress has power in this field and, in fact, it has as much or more power in this field than it has in other legislative fields.

There is no place where Congress' power is more complete than in this one. Now --

QUESTION: That language, that -- not only language but those thoughts you find basically in immigration and deportation cases.

MR. BORK: That is entirely correct, Mr. Justice Stewart, and I am fully aware, of course, that the power of Congress is at its strongest when it is choosing to exclude a class of immigrants or to deport but I think that decision to admit or exclude is necessarily intertwined with decisions about aliens' rights and obligations here.

For one thing, this case could be recast, if Congress so desired, I would suppose, to say that the condition of entry into the United States is not to apply for federal employment until you have been naturalized and that we would then have the same thing.

In fact, I am not sure that for that reason this

regulation doesn't have all the force that law would have.

For another thing, decisions about how many to admit, under what terms and so forth, the standards for naturalization are necessarily influenced by Congress' ability to control the package of rights and obligations that the alien has while here and again, we see that in the Constitution itself, indeed, in the 14th Amendment which gives birth to the Equal Protection principle in our constitutional jurisprudence, there is a distinction between aliens and citizens which is a distinction made as to aliens and citizens in this country, not for purposes of immigration.

And I will leave the discussion of that distinction to our brief and merely point out that Congress has adjusted this package of rights and obligations that aliens and citizens have again and again, throughout our history and I think that now, to begin to apply for the first time the Equal Protection principle in the way that the Respondents ask would severely hamper Congress' power, destroy it in many respects and it would be a major Constitutional innovation without any warrant in the Constitutional text, in its history or, indeed, in policy.

There is for that reason, I think, only one fully satisfactory formulation of the law with respect to resident aliens and I would say it is this and I have said it before but I will stress it as I leave the point: The Equal

Protection principle applies to persons who also are aliens but it does not apply to them in their status as aliens. In any other status they occupy, the Equal Protection principle may apply to them which is to say that Congress may not impose burdens upon resident aliens because they are white or black or yellow or because of their religion but it may differentiate between aliens and citizens.

Now, Congress may not deprive aliens of specific rights guaranteed elsewhere in the Constitution. I am not arguing that it may.

It obviously may not imprison an alien without due process. It may not subject him to cruel and unusual punishment and so forth but the one principle which is manifestly inappropriate when the government -- the Federal Government addresses alienage as a subject is Equal Protection because inherent in the Constitution, inherent in the idea of nationhood, is a fundamental inequality between citizens and aliens.

QUESTION: What about the right to vote, Mr. Solicitor General?

MR. BORK: Well, I would think that would be one of the last rights that could be opened to aliens, Mr. Chief Justice. That certainly is --

QUESTION: Well, it can be denied and is denied, isn't it?

MR. BORK: It is denied, indeed.

QUESTION: Well, that is up to the states pretty much, isn't it?

MR. BORK: Yes, it is up to the states.

QUESTION: That doesn't involve the Federal Government.

MR. BORK: Well, I -- I don't think, Mr. Justice Stewart --

QUESTION: And some states in the past have allowed aliens to vote.

MR. BORK: There have been places where aliens have been allowed to vote and I think it might be a delicate Constitutional question, which I hope I need not embark on here whether the Federal Government would have, in that circumstance, if the qualifications --

QUESTION: The power to overrule the judgment of the state.

MR. BORK: The power to overrule --

QUESTION: It has never exercised it.

MR. BORK: No.

QUESTION: In this area.

MR. BORK: That is right, Mr. Justice Stewart.

QUESTION: With respect to aliens.

MR. BORK: And I think -- I think I would reserve that as a possibility but it has no bearing I think upon our

present inquiry.

Now, I think this is the logical answer to our case but should this Court determine that the Equal Protection principle is applicable, I continue nonetheless to believe that this Commission regulation is valid.

Under the current doctrinal formulation, the Equal Protection applies with one of two degrees of severity. The federal power I have just sketched means, I think, that the strict scrutiny mode of analysis, or the test of compelling governmental interest is plainly inappropriate to this subject matter.

To apply them is to effectively destroy Congress' and the President's undoubted powers in this field and it is to destroy, I think, very nearly destroy, without any warrant, the distinction between citizen and alien.

In this context, the federal power, at least, it seems to me appropriate to note that alienage is not by any means a permanent or immutable characteristic like race or sex. This disability imposed by this Commission regulation is both temporary and it is quite limited.

Naturalization and the privileges of citizenship are available in five years to an alien and in three if the alien marries a citizen.

Now, each of the Respondents in this case has now been here -- not when they started the case but now -- has

now been here long enough to qualify for citizenship. As far as I know, to date, none of them has applied.

One Respondent has been here for 28 years and has not troubled to apply for citizenship and I fail to see why, in cases like that, the benefits should be obtained through a lawsuit rather than through a proclamation of allegiance.

QUESTION: Well, now, as far as that point goes, the Court wasn't very much moved by that argument in the Griffiths case, where it was pretty clear that that alien had decided she didn't ever want to become an American citizen for reasons of her own.

MR. BORK: That is quite true, Mr. Justice Stewart. The Griffiths case, of course, was, again, a state restriction.

QUESTION: I know it was but I am talking about the argument you are now making.

MR. BORK: Well, I would think if there is any place in our policy and in our law where we are entitled to say, a benefit is available if you choose to proclaim allegiance but it is not available otherwise, it would be precisely in the area of federal employment.

QUESTION: But this regulation makes no distinction between aliens who are longtime aliens and aliens who --

MR. BORK: No. No, it does not.

QUESTION: -- hope as promptly as possible to

become citizens, does it?

MR. BORK: It does not. That is quite correct.

QUESTION: Right. And I don't know, has Mrs. Griffiths been appointed by the federal court, under the Criminal Justice Act?

MR. BORK: I do not know, Mr. Justice Stewart.

QUESTION: Uh huh. Do you know if any aliens have? Any alien lawyers?

MR. BORK: I do not know. I don't think there are that many of them but perhaps they have. I do not know.

But it seems to me that there is good reason why this regulation does not distinguish between aliens who intend to become citizens and aliens who do not intend to do so and why it covers both classes of aliens and I think I will briefly explain -- try to point to some of the factors that lead me to think that this regulation, if it must pass a rational relationship test, passes it with high marks.

And I will cite a few things that this regulation does which seem to me valuable and which Congress and the President might rationally think would be valuable.

In the first place, it offers an inducement for resident aliens to acquire knowledge of this country, to acquire the language, to proclaim allegiance and to become citizens and it seems to me that it is quite legitimate for

Congress to wish to induce aliens living here to integrate themselves into our national life and into our political community in this process of becoming citizens.

That seems to me to be in fact a rather obvious exercise of the power to make rules with respect to naturalization.

Two, it does avoid a rather large and complex administrative burden that would be entailed by a system in which all federal jobs were classified according to whether or not they entail any aspect of the formulation or execution of policy and then we had the tag --

QUESTION: Isn't that the result of Sugarman and Richardson on the state side?

MR. BORK: It is the result on the state side, Mr. Justice Blackmun. I think it need not be the result on the federal side because -- as I have said, because of the very strong federal power that exists in this area and if we come to a rational relation test rather than a compelling governmental interest test which was applied in Sugarman, then I think this reason becomes important.

It may not have been enough against a compelling governmental interest test. I think it is -- if I am correct -- that, at most, a rational relationship test applies here because the Federal Government, which has many, many employees, millions, would have to tag, I suppose, aliens so that they

were not by accident or inadvertence moved to sensitive facilities or into posts that might properly be reserved for citizens if we had to meet this administrative burden and I suppose there would be a great deal of litigation about that.

And, third, the federal payroll, I think it is proper to note, has become an important means for implementing solutions to economic and social problems.

Minority groups, for one example, have been benefited by federal affirmative action hiring that helps to counterbalance some discrimination in the private sector and I think it might be irrational for Congress to wish to maximize the effectiveness of the federal payroll in this function by confining it to citizens.

So I offer three reasons. Others could be educed. The inducement to apply for citizenship and to integrate onself in the national life and, indeed, in the political community of this nation, the administrative burden and the use of the federal payroll as a social implement.

None of these objectives is impermissible or evil. Each of them bears a rational relation to the regulation promulgated by the Commission which means, I think, that the regulation does not offend the Equal Protection principle.

So I come back at the end to where I began. The

Compelling Governmental Interest Test can hardly be used with respect to federal legislation or federal regulation.

That is, where the Federal Government has so much power.

If the Equal Protection principle applies, I think it is satisfied here.

If it does not apply, clearly the regulation is valid and we believe that the judgment of the Court of Appeals should be reversed.

QUESTION: Mr. Solicitor General, do the Federal Civil Service regulations accord any preferential status to veterans now?

MR. BORK: I am not sure about veterans in general. Of course, I think they -- yes, they do. They do. But I can't give you the details of it, Mr. Justice Powell.

In addition to that, of course, an alien who serves has his ability to become a citizen accelerated, if he serves honorably and there is, I believe, a veterans perference but I can't give you the details of how it operates.

QUESTION: General Bork, would it be a disaster if this case and the next one were decided oppositely?

MR. BORK: Mr. Justice Blackmun, years of predicting the sky falling in and it never falls in has led me to believe that very few things turn out to be unqualified disasters.

I think I can speak for myself and for the government attorney, Mrs Spiro, who follows me, in saying that it would be infinitely preferable if both of these cases were decided as we ask.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Steinman.

ORAL ARGUMENT OF EDWARD H. STEINMAN, ESQ.

ON BEHALF OF RESPONDENTS

MR. STEINMAN: Mr. Chief Justice and may it Please the Court:

Counsel for the Government is suggesting that the Ninth Circuit's opinion has carved out a novel Constitutional argument.

His argument concerning the non-applicability of Fifth Amendment protections to aliems, when the classification is on alienage, I would submit is the most novel of arguments.

I think it is important to understand that the four Respondents in this case were initially seeking jobs that did not involve foreign affairs, did not involve national security, did not involve some of the issues of sovereignty and some of the issues of executive policy-making which was the concern of this Court in Sugarman.

QUESTION: Do you think -- do you think that that approach necessitates striking the regulation down on its

face? If you sought certain jobs, let's assume you are right. Why would the regulation be invalid on its face?

MR. STEINMAN: Well, I think the vice of the regulation is similar to the vice of the regulation that has confronted this Court in Sugarman, admittedly a state case and, as the lower court found, not squarely controlling.

The vice was the overbreadth that while there are clearly jobs which possibly --

QUESTION: That may be, but we are construing a federal regulation here. You don't strike -- ordinarily, if you can narrow a regulation or a statute, you don't strike it down on its face.

MR. STEINMAN: I agree.

QUESTION: We don't do that with respect to state statutes or regulations.

MR. STEINMAN: I would agree that it would be obviously best not to strike down a statute but the interpretation of the regulation has been to automatically foreclose at the stage of submitting the application any non -- any resident alien.

I'd like to make one correction of the opening remarks. The regulation in question says that you must be a citizen or owe permanent allegiance. As the government's brief, page 81 note 67 of its brief indicates, the government has interpreted permanent allegiance to only apply to

American Samoans.

Now, possibly, Mr. Justice White, if the government was more liberal in interpreting permanent allegiance, we could say the regulation.

It has chosen not to do so.

One of the ironies of this case is that three of the four main Respondents actually at one time worked for the Federal Government.

Respondent Wong and Respondent Mok were involved in a federal state manpower program and were placed with the General Services.

QUESTION: It is certainly true that there are many aliens working for the Federal Government, are there not, in other cases, in NASA and --

MR. STEINMAN: The laws indicate that there are exceptions for many branches of government, including the Department of Defense, Atomic Energy Commission and NASA, departments which arguably --

QUESTION: But that is the choice of the Federal Government, is it not?

MR. STEINMAN: Clearly.

QUESTION: And here we are talking about the Civil Service Commission.

MR. STEINMAN: Exactly and the point I am wishing to make is that these individuals performed competently and

performed as the Service wishes to promote the efficiency of the service while working on other programs and yet, although their supervisors of the record indicate -- said they performed -- one performed outstandingly and the other performed most satisfactorily, when the time came when the government program ended, they were foreclosed totally from seeking and continuing their jobs solely on their status as aliens.

Mr. Justice Powell raised another issue which I would like to address your attention to on the record. He asked about veterans' preferences.

There is evidence in the record of a gentleman named Mr. Bor. It appears at the Appendix, page 31 and is discussed at page 6 of our brief.

Mr. Bor arrived in this country as a child. He was drafted as the America -- into the military, served for 18 months, 14 of which were in Korea, achieved the rank of Sergeant E-5, received an honorable discharge.

And yet when he left the military and tried to apply, just apply, for a job with the Postal Service -- to which had he been a citizen he would have received veteran's preference -- he was denied the opportunity to apply and as he states in his affidavit, "Although I am qualified and loyal enough to serve my country for two years in the military, I am not qualified and loyal enough to work for the Post Office."

QUESTION: But he didn't apply for citizenship.

MR. STEINMAN: Pardon?

QUESTION: He did not apply for citizenship?

MR. STEINMAN: At that time he had not. Three of the named -- of the four named Respondents --

QUESTION: Well, wouldn't it be automatic if he applied for it as a veteran?

MR. STEINMAN: It would have been under the rule.

QUESTION: It would have been no trouble, would it?

MR. STEINMAN: He chose not to. Three of the four Respondents in this case have filed declarations of intent to become citizens. Obviously, at the time the case was filed, they were not eligible because they had not lived here the requisitenumber of years.

The Postal Service has now changed its regulations now that it is no longer under the umbrella of the Civil Service Commission. It now allows non-citizens to apply on the same basis for almost all positions in the Postal Service. I submit that, to respond to Mr. Bork's argument that it might be administratively impossible or inconvenient to do so.

The Postal Service has more than one-half million employees and yet it had chosen, last May, to change its regulations to now allow non-citizens to apply for and hold most jobs.

As far as the Equal Protection Clause, clearly,

this Court has recognized that the Bill of Rights, although not explicitly containing Equal Protection statements, contains Equal Protection principles.

This Court said, on the same day that it issued the decision in Brown versus Board of Education, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government than it imposes on the states.

This Court has continued to make sure that such an unthinkable anomaly does not occur and throughout the last two decades has applied the same type of standards and the same type of approaches in regard to federal discrimination that would have applied had the discrimination been practiced by the states.

Last term, Mr. Justice Brennan, speaking for this Court said, "In Johnson versus Robison, if a classification would be invalid under the Equal Protection Clause of the 14th Amendment, it is also inconsistent with the Due Process requirement of the Fifth Amendment."

Mr. Bork, however, contends that the Equal Protection Clause does not apply because this case involves the Federal Government classifying aliens on the basis of their alienage.

Unfortunately, such a statement ignores the clear holdings of this Court in the last four years that classifications based on alienage are enherently suspect, not just

sometimes suspect, but inherently suspect, that, "Aliens as a class are a prime example of a discreet and insular minority for whom heightened judicial solicitude is appropriate."

I think it is important to emphasize why this Court reached that conclusion.

This Court has described the indicia that are common to all the classes which are deemed suspect. In the Rodriquez case, this Court said that such heightened judicial solicitude was needed because these individuals are, "Saddled with such disabilities or subjected to such a history of purposeful inequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from majoritarian political process."

Mr. Justice Powell, in the Griffiths case, delineated some of the historic hostility that has been heaped upon non-citizens, the scorn. They have been treated as constitutional outcasts.

This Court has recognized that most states today do not allow non-citizens to vote, that they have been denied the franchise. Likewise, the fact that non-citizens can become citizens if they wish to exercise the option given to them by Congress did not dissuade this Court in other cases.

In Sugarman, two of the four Appellees chose not to exercise the right to become a citizen.

Mr. Justice Powell in Griffiths explicitly stated that Mrs. Griffiths chose not to file a declaration of intent.

Even in Graham versus Richardson the Appellee Richardson had been in this country far longer than necessary to become a citizen, yet the fact that she chose not to become a citizen also was of no import to this Court.

What I am saying is that the classification based on alienage does not change because it is the Federal Government.

This Court has continued to recognize that when the Federal Government itself practices discrimination it is bound by the same standards and the same protections which have been put on the states in similar discrimination.

In the Griffiths case, Mr. Justice Powell said that the interest has been characterized, what the government must show, in many ways, overriding, compelling, important, substantial.

I am not worried about pigeon-holing this case under anyone -- I mean, under any of those words. As the Court said, we attribute no particular significance to these variations in diction.

What is important is when such discrimination exists, the government has a duty to show something more than

just some rational basis although, as we contend, even under that more deferential standard that the Ninth Circuit found in this case, the government has not satisfied its duty.

Now, I'd just like to make one remark in that area. The test is whether or not the government has employed means which rationally relate to some governmental purpose.

There is only one purpose in this case. "The purpose is to best promote the efficiency of the Civil Service."

That is a direct quote from 5 U.S.C. 3301.

The purpose of the Civil Service System is to overcome the spoils which historically, unfortunately, attach to government employment.

The purpose of the Government Civil Service system is not to hire citizens. The Court has long discarded the old notion of a special public interest.

The purpose is to have an efficient government and there is nothing about being a non-citizen -- about being a resident alien which means that a person will not be efficient, will not be a competent employee.

Unfortunately, my client and other resident aliens throughout the country are not even given the right to apply, are not even given the right to go through the normal investigative screening processes which show what individual

is efficient for the job, to show whether the individual may be loyal. I do not deny that sometimes a person, because of his non-citizen status, may not be loyal.

This government spends millions of dollars each year and employs tens of thousands of people to check on the loyalty of citizens for certain positions.

My clients want to be treated equally in that sense.

QUESTION: Will your clients be willing to take the oath to support the Constitution of the United States and defend it?

MR. STEINMAN: To the extent --

QUESTION: One of them did.

MR. STEINMAN: Three of them have.

QUESTION: I say, one of them certainly did.

MR. STEINMAN: Three of them have --

QUESTION: So there is no objection on their part to that.

MR. STEINMAN: No. The fourth has not, for her own purpose or her own religious reasons, her own political reasons and I don't think that she would sign it.

The Congress does not require -- in the past, until 1952, Congress required that resident aliens coming into this country sign a declaration of intent to become a citizen. The 1952 laws erased that requirement so the Congress itself does not do it.

I would think that probably a large percentage of resident aliens would be willing to sign that oath but unfortunately the regulation and its interpretation by the Civil Service Commission preclude that possibility.

QUESTION: Could you expand on your comment that your one client refused for her own religious and political reasons? Tell us what that means.

MR. STEINMAN: When I say refused, she has not chosen the option which Congress has given her. It is not in the record so I am going out of the record but what she has told me is that she feels that she is a citizen of the world and that she doesn't feel that she owes any more or less loyalty to any country.

She chooses -- she was -- her name is Miss Lum. She was sought by HEW to be an evaluator of education programs. She has 15 years of teaching experience. She has one Master's Degree and has studied at many universities including Stanford and Seton Hall.

They asked her to apply. She couldn't. Her point - I asked her why don't you become a citizen? She said initially she didn't for political reasons because it might have harmed her family in China.

Over the years she has said that she likes her status of being a citizen of the world.

Congress, until 1952 required --

QUESTION: Well, she is a citizen of the world but of what nation, in fact, is she a citizen?

MR. STEINMAN: I don't think that -- I think that she feels that she is a resident of the United States but in our conversation she has not stated that she was a citizen of any one country.

QUESTION: Where was she born? In China? Mainland China?

MR. STEINMAN: Yes.

The other three named Respondents have filed declarations of intent to become citizens although, as I said, the Congress no longer requires it.

Counsel for the Government has said there are -- even if you apply, as he assumes, the more deferential test, he said that it is satisfied by various interests to induce people to become citizens.

Well, I would assume also that we can induce people to become citizens by now allowing them to work for state governments. Such a factor was raised before this Court and obviously not found dispositive.

Also, the notion of administrative burdens. I would submit that administrative burdens are both legally and factually irrelevant.

This Court has very strongly said that the Constitution requires higher values in speed and efficiency,

that, quote -- this is from the Frontiero case decided in 1973 -- "There can be no doubt that administrative convenience is not a shibboleth, he mere recitation of which dictates constitutionality."

I would also point this Court to page 28 of our brief, a long quote from Mr. Justice Black in Reid versus Covert where he said that "To allow an argument of administrative convenience is a very dangerous doctrine and if allowed to flourish, would destroy the basis of a written Constitution and undermine the basis of our government."

I also submit that administrative inconvenience is factually irrelevant. Although there are millions of jobs in the Federal Civil Service, very few involve the type of policy-making issues, involve the type of responsibilities which this Court recognized in Sugarman might best be reserved to citizens.

I also submit that the fact that the U. S. Postal Service, which employs more than a half million people itself has found that it could change its regulations is another example that administrative inconvenience, even if legally relevant, which we do not agree --

QUESTION: Well, aren't we talking about constitutional power here? If the government wanted to, in any particular department, assuming that Mr. Bork, the Solicitor General's position is entirely correct, they can

waive it with respect to any particular department or employment.

MR. STEINMAN: That is right, but they have chosen not to. They have chosen to -- to issue a blanket exclusion.

QUESTION: Now what about your argument on discrimination? Do we not discriminate against aliens when we classify them in a way that they must apply for citizenship so that the very denial of citizenship benefits until they take some steps which a native-born American need not take is a form of discrimination, is it not?

MR. STEINMAN: Yes. I think the answer, though, stems -- well, the problem which you have raised stems from the confusion. The plenary power of the United States Government is not over aliens. Last -- in Sugarman, at page 646, this Court said, "Its comprehensive power over immigration and naturalization," and to the extent that decisions are made concerning who enters this country, the conditions of naturalization, who is deported, that is to what the plenary power addresses itself.

But as this Court stated in 1970 -- and I quote, it is at page 39 of the brief, the case is Hellenic Lines versus Rhoditis, this is a quote: "The Bill of Rights is a futile authority for the aliens seeking admission for the first time to these shores but once an alien lawfully enters and resides in this country, he becomes invested with the

rights guaranteed by the Constitution to all people within border," and I'll skip a few sentences and go on to the last.

"The Constitution extends the inalienable privileges to all persons and guards against any encroachment on those rights by federal or state authority."

The plenary power argument --

QUESTION: What kind of a case was that?

MR. STEINMAN: This was a case concerning benefits under the Jones Act for Seamen but the argument was made that because the person was only a lawfully resident alien, he was not entitled to certain of the benefits.

QUESTION: What do you have to say about the Solicitor General's point that Congress would have plenary power to attach conditions to the original entry?

MR. STEINMAN: I would think that is probably correct. I would think -- I would also make this Court aware that Congress, in 1965, by statute, took away any powers that it might have -- though it need not do so -- to discriminate against incoming aliens on the basis of race, creed or religion and according to my research and according to the Handbook on Immigration Law by Mr. Gordon and Mr. Rosenfield, there are currently only two laws on the books which condition -- put any conditions on aliens entering.

One is a bond for those who might become dependent on the welfare system. The other relates to aliens who might otherwise be inadmissible.

I agree with you that under the decisions of this Court -- although I personally might not like that -- Congress can attach any conditions it wishes on those who have not yet entered the country.

One of the key factors is whether or not someone is lawfully here.

QUESTION: Including excluding them entirely.

MR. STEINMAN: I would think so and I would also think that Congress could even say that you enter the country on the condition you can't work for the state or federal -- for the state government.

The issue in this case involves people who are lawfully here.

QUESTION: To the extent, Mr. Steinman, you say Congress has plenary power over conditions of naturalization, to the extent your argument were followed here I take it Congress would not have a great deal to do in that area if there is very little it can do to distinguish between people who are naturalized and people who are simply resident aliens and haven't started naturalization.

MR. STEINMAN: I think there are many distinctions between naturalized and native-born citizens and resident

aliens.

First of all, obviously, decisions concerning immigration and deportation could only be made in regards to resident aliems. Citizens are not covered by that.

Second of all, although, as this Court recognized, the Constitution applies to both citizens and non-citizens, there is a difference in how the Constitution applies.

If you are an alien, the government, as it is trying to do in this case, can suggest possible compelling or overriding interests why an alien can be discriminated against.

If you are a citizen, there is no interest that would allow the government to discriminate against you on your status as a citizen.

Because you are a citizen, you cannot be denied the right to vote, the right to employment. You may be denied it for other reasons.

Because you are an alien, you may, under the Constitution, be denied those rights if the government can show a compelling interest.

QUESTION: Well, has this Court ever found that the government was able to show a compelling interest where the compelling interest test was applied?

MR. STEINMAN: I am not aware of that but I would think that in the Sugarman case, you explicitly suggest that

in the area of voting, in the area of holding high public office, in the area of holding positions of public policy and confidential components, that the government might be able to satisfy -- the state government might be able to satisfy the compelling interest test.

QUESTION: In other words, the Justice is really asking whether the choice of the test doesn't dictate the result?

MR. STEINMAN: I think in this case it doesn't because I think that the Respondents prevail under either test.

To the extent that the choice of the test dictates the result, that is because the Constitution is very zealous to make sure that members of suspect classes have heightened judicial protection.

The problem in this case, of course, is not whether or not the Federal Government can, for certain jobs, require citizenship. We don't object to that. We think it can.

The problem here is the blanket exclusion and obviously, the vice of overbreadth is very serious.

QUESTION: You say the government or the Congress could impose conditions on entry, including a condition that you wouldn't work for state government.

I take it you suggest it just hasn't exercised that power here?

MR. STEINMAN: That's right.

QUESTION: But if it had -- if it had, you wouldn't be here.

MR. STEINMAN: Well, I am not sure I wouldn't be here, but I think the test would be quite different and I think this Court would give more deference to the Congressional power.

As our brief suggests, we don't think that, even if plenary power exists, that it is something which automatically means the government wins.

QUESTION: Well --

MR. STEINMAN: In this context, the Court has said that you cannot invoke plenary power as "A talismanic incantation to support the exercise of any Congressional power."

But clearly, if we are in the area of the plenary power in regard to decisions concerning the immigration or deportation, I would think that the government would have a much easier burden to satisfy.

QUESTION: How do you categorize the federal power to exclude or to deport an alien if he commits a crime?

MR. STEINMAN: That is under the plenary power under the Constitution which gives Congress -- the Constitution only says plenary power regarding naturalization.

This Court has said that implicitly contains

plenary power over decisions in regard to immigration and deportation. That is where the plenary power is. The plenary power is not totally over aliens.

QUESTION: So you would say that -- you would say that if a -- if the government can deport a person for committing a crime the government could, if it said so clearly, deport him for trying to work for the government or for working for the government.

MR. STEINMAN: This Court has -- over the last two decades -- carved out some substantive procedure, some substantive due process protections for those being deported.

I am not sure that the example you give would satisfy the Court's protection.

QUESTION: But this is a fairly big difference, for example, between a citizen and an alien.

MR. STEINMAN: I totally agree and, fortunately, this case does not involve resident aliens who are doing something wrong, but involves resident aliens who wish to work for the government and use the skills that they brought with them in the best ways.

QUESTION: So you think this case really -- really involves -- from one point of view, only an argument over whether the Congress has exercised powers that it obviously has?

MR. STEINMAN: Well, I think that Congress exercises

power. I don't think that it has exercised powers in the area of plenary powers which this Court has carved out.

I think that one way to think of the plenary powers argument is that when this Court has focused on issues of immigration and deportation, it is because they involve issues of national security. They involve issues of foreign affairs. They involve issues of the sovereignty of this country and when those type issues are intertwined, it becomes more important for this Court to recognize Congress' power as given by the Constitution.

Applying for federal employment as a janitor or applying for federal employment as a file clerk raises no issue of national security. It raises no issue of foreign affairs and I think that is the distinction which has to be made.

QUESTION: Well, what kind of employment did your fourth client apply for, the one who is the citizen of the world?

MR. STEINMAN: She was -- she sought, HEW asked her if she was interested in being an evaluator of education programs and on their request, she sought to file an application and was not permitted to file an application.

And should it turn out, Mr. Justice Blackmun, that the position that she sought might involve issues of national security, might involve the type of executive policy-making

which was of concern to this Court in the end of the Sugarman decision and quite properly, she might be foreclosed from that position.

The problem is that the regulation as it reads now does not permit that decision to even be made. It cuts her off at the start before anyone can inquire into her qualifications or ability.

QUESTION: This regulation is common to most of the nations in the world, isn't it?

MR. STEINMAN: Yes.

QUESTION: I suppose your point is that they don't have the Constitution of the United States and they can indulge in all the xenophobia they want to.

MR. STEINMAN: Well, this Court has said repeatedly, the Reid case, Mr. Justice Black said the United States is entirely a creature of the Constitution and its power and authority have no other source.

My one observation, I think, is important, that we -- had we looked to international law, this Court would have decided the Sugarman and Griffiths cases totally the other way because international law does not permit non-citizens to work in the states of various countries.

QUESTION: Well, most countries are not federal systems such as ours.

MR. STEINMAN: But those that are would not reach

decisions that this Court reached in Sugarman.

Likewise, the government has properly said that this type of regulation has been on the books for nearly 100 years.

Well, clearly, as this Court has said, no one requires a vested or protected right in violating the Constitution.

Mr. Justice Burger, in 1970, in the Williams versus Illinois case, I think said it best: "New cases expose old infirmities which apathy or absence of challenge have permitted to stand but the constitutional imperative of the Equal Protection Clause must have priority over the comfortable convenience of the status quo."

We feel very strongly that the Ninth Circuit was entirely correct in striking down this regulation as being unconstitutional. We also feel strongly, as our brief indicates, that the Ninth Circuit could have avoided the constitutional issue by finding that this regulation was not authorized by either the United States Congress or by the President of the United States.

This Court has required, when sensitive individual rights are involved, that there be explicit authorizations when the Executive Branch issues a regulation, that the substantial restraints and employment opportunities which raise issues of constitutional dimension require explicit

and specific authorization.

This is from Greene versus McElroy.

In this situation, there is no Congressional authorization. The statutes since 1883 are totally silent on citizenship. They are specific, though, about a myriad of other employment criteria. They authorize the President to ascertain the fitness as to age, health, character, knowledge, ability for employment sought.

The specificity with regard to these five criteria, I would submit, indicate that other criteria were not intended and, given the fact that the whole operation of the Civil Service program is to best promote the efficiency of the Civil Service, it can best be promoted by a larger pool of employees, not a smaller pool.

QUESTION: Well, the government has solved that problem by picking and choosing which aliens it wants in the past, has it not?

MR. STEINMAN: Not under the --

QUESTION: It doesn't deny itself the pool. It picks and chooses Werner von Braun or various other people when they have a great need for the particular services.

MR. STEINMAN: Unfortunately, my clients are not of the status of Mr. von Braun and my clients fall under the competitive Civil Service.

The Federal Government has chosen the non-competitive

Civil Service.

MR. CHIEF JUSTICE BURGER: We'll resume there after lunch.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:03 o'clock p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Steinman, you have a few minutes left.

MR. STEINMAN: Thank you.

Mr. Chief Justice Burger, and may it Please the Court:

My remarks ended concerning our arguments that the regulation is not authorized by the Congress or the President and that the regulation also conflicts with two Executive Orders.

I feel that our presentation in the brief adequately covers that.

I'd like to conclude by remarking that under the Constitution of the United States, the Congress has many alternatives, many paths it can take. It can, as suggested by this Court's decision in Sugarman, issue regulations, statutes which say that particular positions, because of issues of sensitivity, because of issues of national security, because they involve the formulation, the execution, the review of broad public policy, may only rest with non-citizens or may only rest with citizens.

Likewise, it was suggested this morning, Congress, if it chooses -- and it has not so chosen yet -- can impose certain conditions on those who enter, those who have not yet achieved the status of lawful resident aliens, those who have still not touched upon this soil or the country.

The point is that Congress has not chosen to do that.

QUESTION: I need to make -- to get that clear.

Does a condition that Congress might impose, does it end when they finally admit him to the country?

MR. STEINMAN: According to the decisions of this Court, the importance that attaches when a person becomes a lawful resident alien that has entered this country as a resident alien to be here on a permanent basis, that is when the person's rights under the Constitution as a person comes into effect.

QUESTION: Well, you suggest then that if you admit a person to this country for permanent residence or even for temporary residence, that the condition -- you cannot impose a condition that while he is here he not work for the Federal Government.

MR. STEINMAN: No, I am suggesting that once he is here that condition not be imposed. If that is imposed as a condition of his entry into the United States --

QUESTION: I see.

MR. STEINMAN: -- that is an entirely different matter.

QUESTION: And you say that has not been done here?

MR. STEINMAN: That has not been done here, no, it has not and as I have suggested, the Congress has only in two different areas imposed conditions on those who enter the United States.

This is not this case here.

QUESTION: Well, if that condition were imposed upon his entry and he violated the conditions, what is the government's sanction?

MR. STEINMAN: The government obviously can potentially -- if that is one of the grounds for deportation, the government has chosen first not to impose the condition and second of all, the government has not utilized deportation for violation of certain types of laws but the government would always have the powers of deportation subject to, of course, constitutional constraints that are placed on that.

QUESTION: And it could disqualify the alien from working for the government.

MR. STEINMAN: Yes.

QUESTION: Well, then, aren't you really -- if you prevail here, aren't you really opening the door to just

this kind of action by Congress and, if it is taken, are not your clients worse off than they are today?

MR. STEINMAN: Clearly. My clients wouldn't be because they are resident aliens but, possibly, future immigrants to this country might have conditions imposed on them.

My point is that, for purposes of argument in this case I will concede that Congress has it. As an attorney, if that case came before me, I would like to be back before this Court and argue the point.

QUESTION: You'd say that wasn't a constitutional condition.

MR. STEINMAN: I would say that.

QUESTION: Sure.

MR. STEINMAN: But I am trying to say that at this point, Congress -- the vehicle that Congress has chosen now, a blanket regulation that only deals with resident aliens, is not a proper vehicle under the Constitution.

In Graham, this Court said, "The Congress does not have the power to authorize the individual states to violate the Equal Protection Clause."

What I am suggesting in this case is that Congress doesn't itself have the power to authorize itself to violate the Fifth Amendment.

Whatever test this Court employs, the compelling

interest test, the rational relation, et cetera, the Congress has violated the Constitution.

Should Congress choose other vehicles -- and I would hope the Congress would take the lead that Mr. Justice Blackmun suggested in Sugarman that possibly identify those types of positions where maybe we'd wish to have citizen formulation, execution and review of broad public policies, that Congress take the lead of the Postal Service where the Postal Service has identified that certain sensitive positions still must be held only by citizens.

But that for the broad mass of people such as the jobs that my clients are seeking -- unfortunately not seeking the jobs held by Mr. von Braun -- that citizenship is clearly not relevant to that.

Thank you very much.

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

Mr. Solicitor General, do you have anything further?

MR. BORK: I have nothing further, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 1:08 o'clock p.m., the case was submitted.]