In the

Supreme Court of the United States

F. David Matthews, Secretary Of
The Department Of Health, Education
And Welfare,

Appallant

v.

Santiago Diaz Et Al

No. 73-1046

Washington, D. C.
January 12, 1976

Pages 1 thru 40

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F. DAVID MATTHEWS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, Appellant	:	
v.	:	No. 73-1046
SANTIAGO DIAZ ET AL	:	

Washington, D.C.

Monday, January 12, 1976

The above-entitled matter came on for argument at 1:01 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

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

BRUCE S. ROGOW, ESQ., Fort Lauderdale, Florida
For 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 next in No. 73-1046, Weinberger against Diaz.

Mrs. Shapiro, you may proceed whenever you are ready.

ORAL ARGUMENT OF MRS. HARRIET S. SHAPIRO

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

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

Like the preceding case, it involves a challenge to the Federal Government's power to classify on the basis of alienage but this case challenges an alienage classification which limits eligibility to to a federal health insurance program for the elderly, Medicare part B., or supplementary Medicare medical insurance.

Part B is part of the Social Security system.

The major part of that system is, of course, Old Age and Survivor's Insurance. Eligibility for those benefits depends on age and past work in covered employment.

It is equally available to aliens and citizens.

This basic retirement insurance is supplemented by Medicare, parts A and B.

Part A provides hospitalization insurance and B

provides insurance covering certain other medical costs such as doctors' fees and medicines.

Since parts A and B were intended to supplement the basic retirement systems, both are made available to anyone, alien or citizen, who is entitled to Social Security benefits or, indeed, to Railroad Retirement benefits.

Appellees' complaint is that they are denied equal protection because sub-part B is also available to citizens without regard to their work in covered employment but to non-covered aliens, only if they have been admitted for permanent residence and lived here for five years.

Our principal answer to that complaint is that equal protection analysis is simply not relevant in considering the constitutionality of federal statutes which distinquish between citizens and aliens in their status as aliens and if equal protection analysis is relevant at all, the scope of judicial review in this case is extraordinarily limited -- certainly no more than the traditional rational basis test is appropriate.

Our arguments along these lines were thoroughly discussed this morning and I don't plan to go over that ground again.

Instead, I would like to focus on the Medicare statutes and show that if a rational basis test is to be applied, the statute is clearly constitutional.

But first, I want to speak briefly of the jurisdictional issues in light of this Court's recent decision on Weinberger v. Salfi.

Appellees are three aliens who brought this suit as a class action to challenge the Secretary's refusal to enroll them in Medicare Part B.

Clara and Diaz are Cuban refugees who were allowed to enter the country in 1971 under a special Immigration Act provision permitting the temporary entry of people in emergencies. They are thus parollees and have not, under the specific terms of the Immigration Act, been admitted for permanent residence.

Espinosa is a Colombian who was admitted for permanent residence in June of 1971.

Thus, none of the Appellees are entitled to enroll simply on the basis of their residence in this country as they would be, if they were citizens.

Clara and Diaz applied for enrollment. They were denied. Without asking for a rehearing, they brought this suit for judicial review of the denial, claiming jurisdiction under 42 U.S.C. 405G which, of course, is the same jurisdictional basis as was involved in Salfi.

Espinosa joined the suit and then filed a claim.

The three-judge district court found that the administrative exhaustion required by 405G would be futile.

It then certified as a class all immigrants who have been or will be denied enrollment in subpart B because they are not aliens lawfully admitted for permanent residence who have lived here for five years.

The court also established the subclass which was represented only by the Appellee, Espinosa, consisting of those who have been or will be denied enrollment solely because of their failure to meet the five-year residency requirements.

QUESTION: Was that certification without regard to whether the members of the class had individually made application to the Secretary or his delegates?

MRS. SHAPIRO: Yes, necessarily, because it included those who will be denied. There is no -- of course it was before Salfi. There was no indication.

They then -- the district Court then held the entire alien eligibility requriement for Medicare Part B unconstitutional and it permanently enjoined the Secretary from relying on that requirement to deny enrollment to the class members and after a short stay, the order became effective in August, 1973 so the entire class was enrolled and has been insured since that time.

As in Salfi, there was no allegation that the class members had even filed an application with the Secretary, much less that he had rendered any decision final

or otherwise, review of which was sought. Thus, as in Salfi, the class was improper.

QUESTION: Mrs. Shapiro, if you were to leave out the "will be" part of the class and just limit it to the "have been" would there be anyone in the class other than the named plaintiff?

MRS. SHAPIRO: The record doesn't show --

QUESTION: But wouldn't we have to assume as to them that there had been applications which were denied?

MRS. SHAPIRO: Yes, there certainly could have been but there certainly was no -- the district court made the determination themselves that it felt that further review by the Secretary would have been futile and felt, as we indicate, that the Secretary must make that determination.

QUESTION: What I really want to know is, is your only objection to the class to the "will be" portion of it? Or do you object to anything more than that?

MRS. SHAPIRO: Well, I don't really think that the class issue is a problem in this case.

For one thing, because there was no stay, the class members have been being paid -- have been enrolled and of course, the decision of this Court has jurisdiction because the district court held the statute unconstitutional -- the same way as it was in Salfi.

The Secretary has determined -- as in Salfi again --

that there was jurisdiction because there was a final decision over Clara and Diaz -- I mean, there was final administrative determination as to Clara and Diaz and this Court's determination will bind the Secretary for the future as to everybody.

QUESTION: Well, don't you argue that in any event, the injunction was improper? I gather at least two of these three were properly before the district court.

MRS. SHAPIRO: Right.

QUESTION: But even assuming that they were entitled to relief, I gather your submission is that the only relief is individually to have the Secretary's determination reversed. Is that right? And that under no circumstances were those two individuals entitled to any injunction. Is that right?

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

QUESTION: Well, suppose we disagree with you as to those two and say now that the three-judge court was right? In this circumstance, what do we do? Do we affirm the injunction or not?

MRS. SHAPIRO: As to those two?

QUESTION: Assume we conclude that the district court correctly found the statute unconstitutional, in the cases of those two individuals, Diaz and Clara. Then what do we do?

MRS. SHAPIRO: I don't think that we object so much to the form of the order; if the statute was unconstitutional as to those two, then they properly enrolled and --

QUESTION: But the injunction, then, I gather, is against the Secretary enforcing that provision as to anybody.

MRS. SHAPIRO: The injunction is as to his enforcing it specifically against the class members.

QUESTION: And you are content with that if we affirm.

MRS. SHAPIRO: As a practical matter, it doesn't really make any difference in this particular case.

Our main point, I suppose, on the class action aspect is that the error -- because the order wasn't stayed, the error has cost the government about $2 million, something over $2 million in 1975 alone but essentially that is water over the dam at this point.

QUESTION: But has that money been paid out on application for benefits?

MRS. SHAPIRO: Yes. Well, the way that figure was arrived at, the government pays $7.50 a month in premiums to match the $7.50 a month that -- I'm sorry, it is $6.70 a month that is paid by each alien and then at the end of the year, the government makes up any deficit in the trust fund that applies to this particular program.

And the total cost of the benefits, the premium costs and the make-up is $10.00.

QUESTION: No, what I was trying to get at is, what is the procedure by which the government learns it has to match the alien's -- a particular alien's $6.70?

MRS. SHAPIRO: Well, that's the statute.

QUESTION: I know, but how does the alien bring to the attention of the Secretary that there is a duty to match that $6.70?

MRS. SHAPIRO: Well, that is by virtue of there being an enrollment.

QUESTION: That is enrollment.

MRS. SHAPIRO: Umn hmn.

QUESTION: Well, Mrs. Shapiro, I am still not clear. Did the class include some persons who had in the past been denied what the district court felt they were entitled to but who had not in the past made some sort of application to the Secretary?

MRS. SHAPIRO: The class definition is on page 50 and 51 of the Appendix and it includes "All immigrants residing in the United States who have attained the age of 65 and who have been or will be denied enrollment in the supplemental medical insurance program."

So it doesn't say anything about when they have been denied.

QUESTION: I am thinking about whether or not this action is brought within 60 days after --

MRS. SHAPIRO: There is nothing about that, no.

QUESTION: Well, you object on that grounds then, I take it.

MRS. SHAPIRO: We think that the class was improper, yes, on that grounds. What happened after the stay was dissolved was that the social security -- the HEW paid under order -- or enrolled under the order everybody whose applications were in the pipeline at that time.

They didn't go back and pick up people who had been denied more than 60 days before.

I think when you are thinking about the retroactivity issue here, the whole class action issue, it is kind of important to remember that what is involved here is an application and then payment of a premium by the applicant and insurance from that point forward so that to go back and say, well, you enrolled and we denied you but we are going to reopen it and now you have to pay us the monthly premiums and get insurance for a period when you may or may not have been sick, it -- it is a rather peculiar kind of a retroactivity problem.

QUESTION: You wouldn't get many takers voluntarily, would you, on that?

MRS. SHAPIRO: Not unless they had been sick.

The situation as to Espinosa is a little more complicated. He didn't apply for enrollment until after he had joined the suit and because of the litigation and the district court's injunction against denying him enrollment, his application has, in fact, never been adjudicated. It is rather hard to see how there can have been a final decision as to him submitting review under 405G but the Appellees point out the Secretary has nevertheless, in effect, stipulated that his claim had been finally denied.

That may not be an entirely accurate reading of the stipulation originally made but we do agree that the district court and the parties assumed before Salfi that Espinosa's application was to be treated as if it had been finally denied by the Secretary.

The Secretary has concluded that but for the injunction, the application would have been denied solely because of Espinosa's failure to meet the alienage provisions.

As a technical matter, we don't believe that the stipulation here cures the lack of any decision, let alone a final one. But the circumstances of this particular case, especially the fact that it was litigated before Salfi, may justify reading the stipulation liberally and concluding that the Secretary is now foreclosed from denying that there had been a final denial of Espinosa's claim sufficient to satisfy 405G.

Perhaps the most important point here is the wisdom of Salfi's emphasis on the need for final administrative decisions because when adjudication of Espinosa's application was interrupted, there was some indication that he was entitled to enroll because he had worked in covered employment. In fact, he had not.

But Salfi recognizes that 405G and H protect the courts from being asked to consider constitutional issues until that kind of factual question has been finally settled administratively.

It is important that the Court not retreat from that principle here.

QUESTION: That is jurisdiction, isn't it?

MRS. SHAPIRO: It is jurisdictional and --

QUESTION: If it is, unless the stipulation can really be read as having been a denial by the Secretary, how can the district court have jurisdiction of the Espinosa claim?

MRS. SHAPIRO: Well, the record on the stipulation is really quite unclear and it is hard to read it as a stipulation that there had been a final denial but as I say, I think that it could perhaps be done.

And we would not object in this case to the --

QUESTION: Would the effect of that, Mrs. Shapiro, be then like the efforts to confer jurisdiction by

stipulation?

MRS. SHAPIRO: No, because what the stipulation, what you would be doing would be reading the stipulations as a stipulation that there was a final decision.

QUESTION: Which is the factual premise of jurisdiction.

MRS. SHAPIRO: Yes.

I turn now to the merits. This case --

QUESTION: Does it really matter? The merits are here anyway in the other two cases, aren't they?

MRS. SHAPIRO: Well --

QUESTION: In the Clara and Diaz cases?

MRS. SHAPIRO: They are --

QUESTION: Whether we reach it or not in Espinosa.

MRS. SHAPIRO: The merits are there in Clara and Diaz. If Espinosa is out of the case they may have somewhat more leeway in which ones of the various issues there are that you can decide and settle the case.

This case involves both an alienage classification and social welfare legislation. The Solicitor General explained this morning, why we believe that alienage classifications of the sort involved here are simply not subject to attack on equal protection grounds. He argued alternatively that if they are subject to such an attack, only the most attenuated rational basis test is appropriate

and a narrow rational basis test is also appropriate here because the case involves social welfare legislation and Salfi is the most recent expression of that principle.

In that connection I want only to emphasize that under the test reaffirmed in Salfi, and as Mr. Justice Stewart pointed out this morning, this Court need not consider whether the asserted justification actually motivated Congress in making the classification nor whether a different classification would have served equally well.

The enrollment limitations here are rationally related both to legitimate integration and social insurance policies.

First, it is rational in terms of both policies to treat aliens lawfully admitted for permanent residence differently from others who have not expressed their intent to remain here indefinitely and have not submitted to the screening necessary to establish their right to do so.

That distinction, we believe, is self-evidently reasonable when applied to most non-immigrant aliens -- people like illegal entrants, diplomats, visitors, members of crews of foreign ships.

Certainly Congress is not constitutionally required to provide subsidized medical insurance to such temporary residents in this country just because it does so for citizens.

It is also reasonable for Congress to conclude that parolees like Clara and Diaz should be treated like temporary residents until they have been admitted for permanent residence.

They were given refuge in this country without prior screening because of emergency conditions.

The statute under which they entered specifically requires their return to the country from which they came when the emergency ends. They apparently wish to remain here permanently since they have applied for adjustment of their status to that of permanent resident immigrants.

If they meet immigration standards, their status will be adjusted retroactive to the time at which they entered but until that has been done, they are here at the discretion of the Attorney General for the duration of the emergency and thus can reasonably be considered more like temporary visitors than permanent residents.

The five-year residence requirement is also a rational expression of immigration policies. It is the essence of congressional immigration policy to decide the extent to which immigration will be encouraged.

A person considering immigration will normally consider the cost of living in this country. Part of that cost is the cost of medical care and if subsidized government insurance is available, the cost will be lower

than if it is not.

If it is available after five years, the cost is less than if it is not available at all.

Immigration of the elderly is thus encouraged by making such insurance available to them but not encouraged as much as if it were available immediately on entry.

Even more explicitly, the Immigration Act expresses the policy that aliens who are likely to become public charges are not to be admitted as immigrants. The practical effect of that requirement for immigrants over 60 which is, of course, the people that are involved in the Medicare eligibility provision is that they must either be economically independent or have someone here who will assume responsibility for their support.

But the Medicare limitation simply defines the extent of that support obligation so the effect of the Immigration statute and the Medicare statute together is the same as if Congress had provided explicitly in the Immigration Act that elderly immigrants must undertake to provide for their own medical care for five years, either through private insurance or otherwise.

Congress could certainly have done that directly through provisions in the Immigration Act.

Congress has an equal right to do it indirectly through the Medicare Act.

We believe that the Court really need go no farther than that to reject the Petitioner's claim but the alien eligibility limitation also reflects valid social welfare policies.

The fact that Medicare part B is available to all citizens over 65 means that it supplements all the retirement systems in the country, principally, of course, social security, also the Railroad Retirement Act, the Civil Service and even the military retirement provisions.

Medicare can't reasonably be considered apart from the system. All are programs to provide for the elderly in their retirement years. All reflect a federal responsibility to those who have contributed to the country over their working years. All are based in part on the individual contributions of the workers and in part on taxes.

Since Medicate part B supplements all of them, the federal contributions reasonably come from general revenues rather than from taxes on individual employers, as they do in the individual systems.

In any case, the mechanics of funding should not obscure the fact that what is involved here is a supplement to retirement systems. Supplementary medical insurance, like the systems which it supplements, is made available in recognition of past contributions to the economy.

It is perfectly true that resident aliens, like

citizens, pay taxes and contribute in many other ways to our economy.

Citizens ordinarily do so over their working lives and when they become 65, they may enroll in Medicare Part B.

Congress concluded that an alien who has made similar contributions for only five years may also enroll in Medicare Part B at 65.

That is surely not discriminating against the aliens in the allocation of tax funds.

The district court was troubled by the fact that chronically indigent citizens, who may never have paid taxes or contributed in any way to the economy, are entitled to Medicare while aliens like Appellees are not.

There are two answers to that concern.

First, as Salfi reminds us, Congress may use broad classifications to avoid the administrative burdens of case-by-case determinations of eligibility. Since entitlement to Medicare is fundamentally based on entitlement to retirement benefits and citizens are far more likely to meet this requirement than aliens who are admitted within five years of their application, it is reasonable to require proof of eligibility only of the aliens and not of the citizens, even currently indigent citizens.

But there is another justification for permitting the enrollment of indigent citizens and not recent

immigrants.

Both provisions protect state welfare funds. The enrollment of indigents means that federal funds pay medical expenses the states would otherwise have to pay.

Denial of Medicare to recent immigrants discourages the entry of those most likely to become state charges.

The fact that the immigration laws have the same effect with regard to the immigrants simply means that the two acts are consistent. It certainly doesn't mean that either is irrational.

Appellees emphasize that an elderly alien's need for subsidized medical insurance is likely to be as great as that of an elderly citizen and that is undoubtedly true but they also claim that the only purpose of Medicare Part B is to provide medical insurance to those who need it and that is not true.

Legislative classifications in the social welfare field almost always are the result of many considerations but no social welfare classification can be made without balancing needs against costs and these will vary from statute to statute.

This, of course, means that the classifications made will vary from statute to statute. For instance, in the program providing for supplementary federal welfare payments for elderly blind and disabled indigents, Congress provided

more generously for aliens than it did in the Medicare statute and there it included all aliens who are in this country under color of law but the needs and the costs that were being evaluated in the welfare statute, at issue there, were different and so a different balance was struck.

This Court has always recognized that making that balance is a legislative function, not to be disturbed so long as there is a rational justification for it.

Here, the underlying justification is that the needs of those with a substantial relation to the country are recognized but the needs of those whose relationship is essentially temporary are not.

Congress drew a line which is reasonable in terms of that justification.

The district court's changing of that line is now costing the government over $2 million annually and that price will probably go up in the future.

Congress frequently reevaluates Medicare and it may someday decide that Appellees' needs justify that burden on the Treasury.

It hasn't done so yet. And that is not a decision for this Court.

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

MR. CHIEF JUSTICE BURGER: Very well, Mrs. Shapiro.

Mr. Rogow.

ORAL ARGUMENT OF BRUCE S. ROGOW, ESQ.

ON BEHALF OF APPELLEES

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

The argument as to jurisdiction is contained in our supplemental reply brief and I think after hearing Mrs. Shapiro this afternoon, I think we are basically in agreement. There is clearly jurisdiction as to Diaz and Clara and as I read Mrs. Shapiro's position, there is a concession that the government did stipulate to the finality of the decision regarding Mr. Espinosa and that stipulation as to finality therefore means that the Court has jurisdiction as to Espinosa.

The class matter, I think, is not really very important; if the statute falls in this case as to Espinosa, then it falls as to everyone.

But I think for the reasons I have pointed out in my supplemental brief, if you read the class as those who have been denied, then Mr. Espinosa and others who have applied and been determined not eligible would be included.

I think the important part of this case obviously has to do with whether or not Congress can treat aliens and discriminate against aliens in the way that the government would like to have us believe.

The government attempts to cast this case as one

in which Congress has exercised its plenary power over immigration and under the theory that the government advances, this, the statutory residence requirements in this case are somehow linked to the plenary power over immigrations.

They encourage or discourage immigration.

If the government is right, every one of the 200 and some-odd statutes that they have listed in their appendix to the Wong brief must then be read as somehow encouraging or discouraging immigration with nothing more, no other evidence to substantiate that, merely because they classify based upon alienage.

What is fatal to the government's theory is that that would require the court to indulge the assumption that all of these statutory classifications based upon alienage are somehow attempting to regulate admission or exclusion of aliens and I give the Court one example, which I think underscores the fallaciousness of that position.

Mrs. Shapiro referred to the supplemental security income statute, Title 42, United States Code, Section 1382.

In that statute, which provides aid to the aged, blind and disabled, the government has not drawn a line that precludes aliens from receiving those benefits. People here under color of law, conditional entrants and parolees can receive those benefits. Using the government's logic, that would mean that that statute in some way is seeking to

encourage immigration? Obviously not.

At the most, what can be said for these statutes is, that when they classify based upon alienage, that classification perhaps is in some way related to the benefits that the Government is extending.

In this case, for instance, I think quite frankly what the government is doing, what the Congress has done in this classification, is it has said that aliens with some ties to this country will be entitled to certain welfare benefits, certain health care benefits.

It hasn't said this is encouraging or discouraging immigration. It is not related at all to immigration and I think that if one then strips the constitutional cloak of immigration power, of plenary power from this case, we come up with a statute that in many ways resembles the statutes struck down by this Court in Graham versus Richardson, statues which provide important welfare or health care benefits and then discriminate against a class of people, aliens.

QUESTION: Now, Mr. Rogow, what about, what would you have to say about the class of people who are clearly illegally in the United States, smuggled in one way or another, which various reports have indicated are a very large number of people, whatever the figure may be.

MR. ROGOW: Mr. Chief Justice, those people certainly would not be included within those who would obtain

benefits under this statute. They are not people --

QUESTION: Then they are discriminated against, aren't they?

Their pains and their needs are the same, are they not?

MR. ROGOW: But those people are not in the country with any kind of legal status at all. They are illegal.

QUESTION: Well, then, your people that you are talking about here now, are here with a status but qualified by the very process that admitted them, are they not?

MR. ROGOW: Only Diaz and Clara I believe you are speaking of, Mr. Chief Justice. Mr. Espinosa is here lawfully admitted for permanent residence under the immunity of the immigration law.

QUESTION: I am speaking of the other two, in that class.

MR. ROGOW: Yes, sir. They are here in a special category but it is certainly not the same category as those who sneak in the country or those who jump ship and come into the country. Their category is one --

QUESTION: Well, you put considerable emphasis on the needs of people but you can't distinguish between the needs of an illegal alien and one who is here under conditional grant, can you? Or one who is here with no conditions at all.

MR. ROGOW: No, sir, the needs for medical care may be the same, but if we use the government's position, which is that there is some requirement that Congress can impose for there being some tie to the country, those people could legitimately be excluded: People who fall into what is known as the non-immigrant category, visitors, visiting journalists who are just on assignment to this country, those people have no ties to the country and perhaps it is -- we would agree that it is legitimate for Congress to draw a line in that way.

It is rationally related to the purpose of the program which is to provide medical care to those who have some ties.

QUESTION: What are the ties of this category of people who may be ejected from the country when political conditions in their point of origin permit it?

MR. ROGOW: The difficulties of --

QUESTION: What are the ties of such people? They are temporary, but the time frame is merely longer, is it not?

MR. ROGOW: No, I don't think the time --

QUESTION: Why are they different from a journalist who is over here to spend six months studying our welfare system?

MR. ROGOW: Because the journalist has his home elsewhere. These people have their homes here. These people

have their residences here.

QUESTION: Well, now, you say that, but they have homes elsewhere, too, even though those homes may have been confiscated.

MR. ROGOW: If one looks at the definition of residence under Title VIII, Section 1101 of the Immigration Law, residence means the place of general abode, the principal actual dwelling place in fact without regard to intent, by the way. But it is the actual dwelling place in fact and if one is going to look for definitions, one looks there, the refugees in this case have their principal places of abode here.

I don't want to get tied to Immigration Law in this case because it is not an immigration case. We are saying, Mr. Chief Justice, with regard to those special people, Diaz and Clara, we are saying that the lawfully-admitted provision as applied to them is unconstitutional because it is not rationally related to the purpose of the statute and the purpose of the statute, and the purpose of the statute is to provide medical care to the elderly who have some ties to the country.

They are excluded under the statute. That exclusion is irrational, given the purpose of the statute.

QUESTION: Well, now, you say and then restate that they have ties to the country. Their tie to the

country is conditioned, is it not, by the fact that they are admitted as temporary political refugees, subject to exclusion and return to Cuba when it is politically feasible for them to do so without danger. Isn't that a fair statement of their status here?

MR. ROGOW: Technically, it is a fair statement.

QUESTION: Well, non-technically, then, what --

MR. ROGOW: I don't think it is a fair statement. I don't think that the government --

QUESTION: Why not?

MR. ROGOW: Because I don't think that the Cuban refugees -- who have a very unique status in this country. There are many, many statutes providing all kinds of benefits, resettlement benefits to them, placement benefits, job training benefits --

QUESTION: Those are all express actions are they not?

MR. ROGOW: Yes, Mr. Chief Justice.

QUESTION: Here you have an express action that cuts the other way.

MR. ROGOW: It doesn't cut directly the other way as applied to them. It precludes them.

But in response to your question, Mr. Chief Justice, which is, are these people temporarily here and would they be excluded -- the hypothetical you gave me requires

me to indulge the assumption that they will be excluded when political conditions change in Cuba.

I don't think that I can agree with that assumption. I don't think that Mr. Diaz, who is 80 years old and Mr. Clara are going to be excluded from the country if the Castro regime falls in Cuba. I just don't think that, as a practical matter.

QUESTION: Well, how do you know that?

MR. ROGOW: I don't know that but --

QUESTION: Then we can't know it, either.

MR. ROGOW: I believe it is -- your question, Mr. Chief Justice, is whether or not they are here temporarily and are going to be excluded and I can't agree that I know that they will be excluded. My point is, they are here. Their home is here. Their ties are here and if we take the government's submission to the Court as being the proper one. that the government is requiring some ties, these people have the ties.

Now, I must say that that is only one part. There are two classes involved here.

There are aliens who have not been here for five years who are not in the same category as Messrs. Diaz and Clara.

I think that all of these people are entitled to the constitutional protections of the Fifth Amendment and

I think that when one looks at Graham versus Richardson, the reason why they are entitled to it becomes obvious because these people, who are in the country under color of law are the prime example of a discrete and insular minority.

That is the suspect classification test. We think the suspect classification test is right. We think that is one that should be applied to this group of aliens and Mr. Bork this morning, I think, tried to frighten the Court away from adopting the suspect classification test by saying that all of these statutes listed in his appendix to the Wong brief might then fall.

I think Mr. Bork was wrong and I think Mr. Bork's fears were unfounded. Many of those statutes may be justified as exercises of power over foreign affairs, as exercises of power to protect national security, as exercises of power to protect vital resources and so I don't think that utilizing suspect classification will result a fortiorari in the destruction of the constitutionality of those statutes.

Now, even if the rational basis test is the test that ought to be used in this case, we think that these statutory classifications do not pass constitutional muster.

Weinberger versus Salfi has been cited this afternoon and Weinberger versus Salfi is the case, the most recent case, which talks about the rational basis test and how it is utilized and I think that when one looks at

Weinberger versus Salfi and compares it to this case, one sees why the statutory residence requirements here fall and they did not fall in Salfi.

For instance, in Salfi, there was a long legislative history which showed that Congress was concerned with abuses of the social security system that resulted from sham marriages. Salfi involved the duration of relationship requirement. One had to be married for nine months in order to secure social security benefits if one's spouse died.

There was a presumption that if you were married for more than nine months, it was not a marriage entered into for the purpose of securing those benefits so there is that long legislative history that there has --

QUESTION: Well, I don't think it is a long legislative history at all. As I recall, it is about a paragraph, isn't it?

MR. ROGOW: My impression from your opinion, Mr. Justice Rehnquist, is that you certainly found that there was much testimony in the Congressional hearings that there had been abuses and people were entering into sham marriages.

QUESTION: Well, that factor was there but I think it was dealt with fairly shortly in the legislative history.

MR. ROGOW: But no matter how long it was, it was the legislative history that showed there were abuses and Congress was seeking to protect the system against those

abuses.

QUESTION: Do you disagree, then, with the import of Mr. Justice Stewart's question in the earlier case that the test is any conceivable set of facts that would support this distinction?

You say, in effect, that Congress must have manifested its concern.

MR. ROGOW: I say that because in every case the Court has looked to see if there is some way to conclude that Congress had some concern. I am not saying that Congress must have manifested it by coming out with a long preamble to a statute which says, this is why we did it, but there must be something in the record that justifies the congressional classification.

QUESTION: Well, but what do you do with the test in cases like McGowan against Maryland, which simply says, "If, on any conceivable hypothetical state of facts, this discrimination can be justified, it survives the equal protection test."

MR. ROGOW: McGowan versus Maryland, as I recall, is the Sunday Closing Law case and one distinction that I would make between McGowan versus Maryland is that, one, we have a little different -- two different things to consider here.

One is that there are people, aliens, a class

that is affected and it is not the same kind of thing that was was being affected in McGowan versus Maryland.

QUESTION: Well, then, are you saying that the rational basis test, when applied to people, as you concede it to be, is not the same test as when it is applied to merchants who have to close on Sundays?

MR. ROGOW: I see the difficulties in taking that position but quite candidly I think that there must be -- the rational basis test is not a very precise test. One cannot apply it mechanically to everything. I think one must take into consideration the factors that come into play and I think, yes, the factor there are people involved here and they are aliens and in fact, there are important health care benefits involved here that may be essential to the very life of these people.

QUESTION: Well, are the merchants somehow that were forced to close in McGowan less people than the aliens here?

MR. ROGOW: No, they are not less people but they don't form a class that this Court has, in the past, looked at very carefully whenever legislation has been implemented to dealing with it.

QUESTION: Well, by hypothesis, when you are applying the rational basis test, you have already said that it is not a suspect classification. If it is a suspect

classification, presumably you don't have to defend on the rational basis test.

MR. ROGOW: I agree but I think that once one recedes, if the Court says it is not a suspect classification, I still think there can be some heightened judicial solicitude.

QUESTION: You recede only step-by-step.

MR. ROGOW: Yes, sir, I do.

[Laughter.]

QUESTION: And how about the people who are customers of the stores who closed on Sunday? Have they no state injury? Are they entitled to no consideration?

MR. ROGOW: I think that they could shop on other days, other than Sunday and if there is a harm that befalls them, it is perhaps not as substantial as those who are denied important health care benefits when they are over 65 and need those benefits in order to protect their very life. I think there is a difference.

QUESTION: You don't think there are any substantial number of people who really can't do their shopping except on Sunday.

MR. ROGOW: Oh, there may be a number of people. I don't know how substantial, Mr. Chief Justice, but once again, I don't think --

QUESTION: Apparently it is enough to justify

most of the supermarkets staying open on Sundays now.

MR. ROGOW: I think it is. I think the purpose of that obviously is, not only to satisfy the needs of those people, but the economic needs of the supermarkets.

When one looks again at Salfi, and I think Salfi is very important in making our argument here, in Salfi there were other objective evidences which could be shown to avoid the presumption that the marriage was not a sham. That does not appear in this case at all.

In other words, in Salfi, if a person had children by the marriage or had adopted children by the marriage, no matter how short it may have been before the death of the spouse, then there was a way around that irrebuttable presumption in Salfi.

In this case, there is no way around it. People who do have ties to the country -- people who have come here have to wait five years no matter how strong the ties are to the country and so once again we have an example that Congress has not really been very precise in trying to meet the legitimate legislative roles that may have been involved and one final example of the preciseness in Salfi, which I believe led this Court to uphold the statute in Salfi is that Congress had reduced the requirement, the marriage requirement from one year to nine months because there had been evidence that some people who had been married for more

than nine months but less than a year were being excluded from social security benefits even though the marriages were not sham, another example of Congress trying to be precise and while it has power to draw lines, the Court looked at that power and said, the power was exercised in a very precise and definite way and the lines that were drawn were not irrational.

We think that using that analysis and applying it to this case, one must come to the conclusion that the lines are far too broad, cut much too harshly and are therefore irrational.

The argument we make, which is an argument really based upon --

QUESTION: Let me interrupt at this point.

MR. ROGOW: Yes, Mr. Justice Stevens.

QUESTION: I want to be sure I understood your colloquy with the Chief Justice.

As I understand it, you would not have attacked the first requirement of lawfully admitted for permanent residence if it were not for the words, "For permanent residence." You would agree that Congress could rationally distinguish between illegal and legal -- a legally-present alien.

MR. ROGOW: Yes, Mr. Justice Stevens.

QUESTION: And as to the five years, I take it

you would agree that Congress could have drawn a line of, say, six months?

MR. ROGOW: I think the six months requirement would be much more difficult for me to try to overcome.

QUESTION: Well, would you agree they could have drawn it at 30 days?

MR. ROGOW: Yes.

QUESTION: You would agree they could draw some lines?

MR. ROGOW: Yes, I think so.

QUESTION: And that line would be equally precise with the one that they did draw but it would just be a shorter line, that is all.

MR. ROGOW: But we would then be able to come to the conclusion that the line was drawn with some concern for the people who were going to be entitled to those benefits. Requiring 30 days, for instance, would perhaps show that Congress was trying to draw a fine line so that it would not harm people who were elderly who come to this country lawfully and were in need of --

QUESTION: Well, at this time fewer people because of the difference in five years and 30 days.

MR. ROGOW: That is right, Mr. Justice Stevens, and in Salfi there were some people who obviously were married less than nine months but were still going to be

precluded.

Congress does not have to meet every need of every person but it must at least draw the line in a narrow way so that it does not engage in the wholesale kind of exclusions which are here.

QUESTION: But the test, as I understand you, is the significance of the relationship between this country and the alien. Thirty days is all right, but a longer -- it is still the same yardstick, is it not?

MR. ROGOW: I am not happy with 30 days. I mean, I would have a great deal of difficulty in standing before the Court and objecting to the 30-day requirement. I think there is another way that could accomplish the purpose. Of course, this would be the way for Congress to do but for instance, one could draw the line between -- one could draw the line at those listed in a non-immigrant category under the Immigration Law which, by definition would exclude all of those temporary people.

But if, instead, Congress drew the line at 30 days, I would then have to say that in 30 days, of course, you probably couldn't even get enrolled in the 30-day period so that might not be such a bad law.

QUESTION: No, but within the 30 days, they do become persons entitled to the protection of the Fifth Amendment.

MR. ROGOW: Within one day of being admitted they become persons.

QUESTION: Correct.

MR. ROGOW: Yes, Mr. Justice Stevens.

The argument we are making is not --

QUESTION: You really mean there, in the first minute of the first hour of the first day, on your theory. You would have to say they are entitled to the protection of the --

MR. ROGOW: I certainly --

QUESTION: Isn't that true?

MR. ROGOW: I certainly believe, Mr. Justice, that a person who immigrates to this country, who on the moment he leaves Ellis Island and steps into New York, for instance and says, "I have cut off all ties with my homeland. This is my new land and I will make it my land for the rest of my life," that person has substantial and enduring ties.

Does Congress have to draw the line there? It would be nice if they did. It would most accurately reflect what the purpose that the government is suggesting is.

But if it didn't draw the line quite there, I would not be able to say that it would be totally irrational and of course, all of this discussion is premised on the assumption that a rational basis test is the appropriate one and not the compelling interest test, a point which I do

not, of course, agree with.

The argument we are making is not a novel one.

In 1886, in Yick Wo versus Hopkins, the Court held that aliens were entitled to the benefits of the 14th Amendment.

In 1896, in Wong Wing versus United States, the Court held that aliens were entitled to the benefits of the Fifth Amendment.

Our argument is an amalgam of the 14th and the 5th Amendments and we are saying that aliens today ought to be entitled to the Constitution, just as aliens of the past century were entitled to the benefits of the Constitution and we believe that the cases that this Court has decided recently dealing with aliens are most persuasive in affirming the decision of the court below.

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

Do you have anything further, Mrs. Shapiro?

MRS. SHAPIRO: No, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you.

The case is submitted.

[Whereupon, at 1:49 o'clock p.m., the case was submitted.]