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 12, 1975

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

Petitioners : No. 73-1596

v.

MOW SUN WONG ET AL.

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Washington, D. C.

Monday, January 12, 1976

The above-entitled matter came on for argument at 11:05 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

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

EDWARD H. STEINMAN, ESQ., School of Law, University of Santa Clara, Santa Clara, California 95053
(Appointed by this Court)
For Respondents

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, Harper against Wong.

Mr. Solicitor General.

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 Court of Appeals for the Ninth Circuit.

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

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

The District Court, on the government's motion dismissed for failure to state a claim. The Ninth Circuit reversed, holding that the regulation violates the Equal Protection principle of the due process clause of the Fifth Amendment.

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

must be shown.

The Court of Appeals relied, as we believe mistakenly, on the cases of this Court in Graham against Richardson and Sugarman against Dougall.

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

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

My first submission is that the equal protection principle has no application to the Federal Government's dealings with aliens as aliens.

I want to be quite clear about that.

The equal protection principle obviously applies to persons which includes, of course, aliens and it protects them from a variety of inequalities; for example, inequalities on account of race, inequalities on account of religion -- but my submission is that the equal protection principle does not apply to a pure alienage classification.

QUESTION: In other words, Mr. Solicitor General, the Congress could make it a criminal offense for an alien to rob a bank but only -- it's a criminal offense only if he is an alien. Is that correct?

MR. BORK: I think that might be the case. The

Congress could make substantive rule. The Congress could not deprive the alien of due process of law, trial and so forth. The Congress could make it --

QUESTION: No, but it could describe and create and define the offense as an offense only if committed by an alien.

MR. BORK: In effect, I think some of the things, many of the statutes on the books are offenses only for aliens.

QUESTION: And they can do that with bank robbery or interstate transportation of a stolen car or stealing from the mail or any of the normal federal offenses with which we are familiar .

MR. BORK: Yes, I have a little difficulty imagining the situation in which those are not made offenses also for citizens but they certainly are the argument I am making which I think, taken to its logical extreme, would lead to that result and I think one need not, in practice, anticipate that particular result.

QUESTION: But that is -- excuse me, that is the thrust of your argument, isn't it?

MR. BORK: The contention is that the aliens have the explicit guarantees of the Constitution. For example, Congress could not provide ex post facto punishment for an alien who had robbed a bank. Congress could not

deprive an alien of due process of law. Congress could not deprive the alien of his First Amendment right to speak or to worship.

Congress could do none of those things and Congress may not treat an alien differently from other persons on the grounds that he is black or white or yellow or female but I think Congress has plenary power with respect to alienage.

QUESTION: Why is it that the equal protection is taken out and all the others are left in?

MR. BORK: Well, precisely, Mr. Justice Marshall, because whereas the states -- in the cases we dealt with, in Sugarman against Dougall and Graham against Richardson and In Re Griffiths and so forth, have no power given to them by the Federal Constitution over aliens as a class.

The Federal Government has plenary power, extraordinary power over the alienage -- the aliens as a class; not only the power coming from Article I, Section 8, Clause 4, which gives explicit power to legislate with respect to immigration and naturalization but indeed, the inherent powers arising out of the power to conduct foreign policy, the power of national defense and so forth.

And, indeed, the Constitution itself, in many places, Article IV, confines privileges and immunities specifically so that for purposes of federal legislation,

alienage is not only not a suspect classification, it is an inevitable classification. The Federal Government has not only the power but the duty to legislate with respect to aliens as a class.

QUESTION: But that could be said, so long as within the equal protection clause. There would be nothing contrary about that, would there?

MR. BORK: Well, my alternative submission --

QUESTION: It is internally inconsistent to say that.

MR. BORK: I think it is internally inconsistent to say it to this extent: the Respondents' claim here, and I think the only way Respondents can prevail, is that alienage is a suspect classification, which I think is quite wrong in this context and therefore, we must show the most compelling governmental need to classify with respect to alienage.

If that were true, I don't see how any federal legislation with respect to alienage is going to survive.

I don't know of a statute offhand that has ever survived the strict judicial scrutiny test.

QUESTION: No, it's just a way of announcing the conclusion in advance.

MR. BORK: I think so, Mr. Justice Stewart, so that if we say that a compelling governmental interest must

be shown, I doubt that it will ever be shown with respect to any of these statutes and we have, in our brief, in the Appendix and in our supplemental brief in the Appendix, over 200 statutes in the Federal Code, 200 provisions in the Federal Code which classify one way or another by alienage.

QUESTION: Did Congress --

MR. BORK: And that -- pardon me.

QUESTION: Go ahead, finish.

MR. BORK: And that doesn't even deal with Title VIII, which is the main codification of the rights and liabilities of aliens.

Pardon me, Mr. Chief Justice.

QUESTION: Could Congress, Mr. Solicitor General, enact a statute now that hereafter all aliens admitted to this country must apply for citizenship within five years or be deported?

MR. BORK: I have no doubt, Mr. Chief Justice, that that legislation would be well within Congress' power.

QUESTION: Could they apply it then to persons who had been in the United States before the enactment of that statute?

MR. BORK: I have no doubt that that is true also, Mr. Chief Justice. We certainly had the deportation cases which were much more severe than that in which persons who had joined the communist party at a time when it was

not illegal to do so were subsequently deported because of an after-enacted statute so that I have no doubt --

QUESTION: Are those illustrations of the kind of plenary power that you suggest Congress has over aliens as aliens?

MR. BORK: They are indeed, Mr. Chief Justice.

QUESTION: But Mr. Solicitor General, has Congress done anything with respect to the eligibility of aliens for federal employment?

We are not really dealing with a statute, are we, here?

MR. BORK: Mr. Justice Stevens, we are dealing with a regulation taken under the Civil Service Act of 1883 and Congress --

QUESTION: But the statute itself is silent with respect to the discrimination involved, is it not?

MR. BORK: The statute itself is silent. The legislative history of the statute is not silent, Mr. Justice Stevens.

QUESTION: Is it not also true that any executive order is also silent with respect to this particular area?

MR. BORK: I don't believe that is true, Mr. Justice Stevens. In the second part of our brief, our main brief, it is quite clear, not only that Congress, in enacting the federal, the Civil Service statute and in its

various amendments later.

It is also quite clear that President Arthur required in his order citizenship and that President Theodore Roosevelt extended the category from not only citizens but to persons who owe allegiance, so the two Presidents dealt with the citizenship requirement in a knowing way.

No, I think insofar as we are talking about a deliberate policy, Mr. Justice Stevens, the legislative history -- which is cited in our brief -- and the two Presidents and the executive order 10577 -- which is also in our brief -- refers to citizenship so I think this is just about as deliberate a policy as one could seek.

Well, I --

QUESTION: Let me put a question that I was leading up and I am not sure it is appropriate but I have it in mind.

Supposing the paragraph of the regulation of the Civil Service agency, whatever its proper title is, requiring citizenship as a condition of eligibility were simply repealed so there was nothing in words that required that an applicant for employment be a citizen and then take it a step further and suppose the Postmaster in Chicago had to take on extra help for the Christmas season or something like that and he put into effect a regulation for

his own office requiring everyone to be a citizen. Would you contend such a regulation would be valid?

He, of course, speaks for the Federal Government within his own office.

MR. BORK: Yes. As a matter of fact, of course, the Post Office now does hire aliens.

QUESTION: I understand they do.

MR. BORK: But in this case, if the regulation were repealed, I would think, if we were dealing with a part of the competitive Civil Service, that the repeal of the regulation and the failure to exclude citizens would be in contravention of the executive order and in contravention of the intent of Congress.

Now, I don't know -- I suppose --

QUESTION: You really haven't answered the question I mean to put.

Suppose the statute is silent. The executive order is silent and the top regulation is silent and just a local branch of the Federal Government decides for itself it would like to employ citizens only. Could they do so?

MR. BORK: Oh, I think there is no doubt, Mr. Justice Stevens, that if all of those expressions of policy are made silent that the local branch of government certainly could.

QUESTION: Could make the discrimination.

MR. BORK: I would prefer not to use the word "discrimination."

QUESTION: Well, but you say it is made, you know, it is inherent in the system. It is inherent in the system.

MR. BORK: It is the Federal Government's power to do this, to classify in this way is inherent in the system. The Federal Government need not classify --

QUESTION: And that includes the power of any federal officer unless explicitly prohibited.

MR. BORK: I would think so. I would think so.

Indeed, there are sections of the government which do have the power to hire aliens and do so.

QUESTION: How do you justify that under the regulation, under the executive order?

MR. BORK: Oh, well, there --

QUESTION: Does it come under the two exceptions which are specified?

MR. BORK: I believe so, Mr. Justice Blackmun. There is a --

QUESTION: I am thinking of the Post Office Department. I am thinking of NASA and others.

MR. BORK: Well, I think they are not under the competitive Civil Service now, are they? The Post Office?

They are not and I think there are statutory

exceptions for certain places like the Defense Department which, by nature of its work may wish often to hire aliens and may wish to make the individualized determination that -- and finds it worthwhile to expend its resources making --

QUESTION: I suppose the Atomic Energy Commission is under that blanket, too, wouldn't it be?

MR. BORK: I am not particularly aware of the --

QUESTION: Weren't there aliens employed in the Atomic Energy Commission?

MR. BORK: Oh, you can get exceptions made, certainly, Mr. Chief Justice and the Atomic Energy Commission undoubtedly for that kind of work would have had to make that exception at the time when the European scientists came to this country.

QUESTION: Sometimes the most sensitive areas are the exception areas.

MR. BORK: Oh, Mr. Justice Blackmun, I don't think the reason for this regulation is necessarily the sensitivity of the work involved.

That is one reason -- one thing that requiring residence in this country for five years does is to give in the ordinary case a track record for the person applying and a way of checking about him.

In a situation where you badly need some kind of talent, somebody hasn't been here five years, you expend

the resources to do the checking or take your chances and that seems to me in no way to cast doubt upon the general rule that the Federal Government sees fit to follow.

But my main point is that we have here an exercise by the Civil Service Commission of a delegated, combined power of Congress and the President and those are powers relating to naturalization, to foreign policy, to national defense and to treaty-making.

And, in fact, I think, what has been exercised is a power that is inherent -- without even respect to the constitutional provision of the very idea of a nation-state which possesses sovereignty. Every nation-state distinguishes between those who owe allegiance to it and those who do not and so obvious is that that I think every nation or virtually every nation in the world makes that distinction.

And I think so obvious is it that it has been exercised and gone uncontested for over 90 years in this country in this explicit form and I think that is constitutionally a relevant factor because it gives this practice all the support that long-continued and universally-accepted usage confers.

So I think those are what makes this case different from the state cases, Sugarman and Graham.

Respondents' only argument in this connection is,

I think, a simplistic and a mechanical one. That argument runs as follows:

Whenever an equal protection principle has been formulated in a case involving a state, that principle must automatically be applied against the Federal Government.

Their example is the formulation of the equal protection principle in Brown against Board of Education applied against the Federal Government in Bolling against Sharpe and I think that argument is patently fallacious because that progression from state to federal cannot be made when the Constitution explicitly gives the Federal Government the power and, as I say, the duty to legislate about aliens.

States are not independent sovereigns. They do not have the power to naturalize. They do not have the power to conduct foreign affairs, to make decisions about national defense, to make treaties. They have none of the powers which gives Congress power over aliens -- over alienage.

When we move from state cases like Sugarman and Graham against Richardson, we really move into a whole new framework -- cases like the Chinese Exclusion case; cases like Harisiades against Shaughnessey, Kliendienst against Mandel, cases that show an extraordinary degree of federal power in this field.

I think it is incontestable, as the Chief Justice's question a moment ago pointed out, that Congress has the power to exclude aliens from this country altogether and that as a corollary of that power, it can attach such conditions to entry as it sees fit.

QUESTION: Well, now, that goes a bit further than the argument you made earlier --

MR. BORK: It does indeed, sir.

QUESTION: -- because it would follow that aliens could be excluded on the ground that they would be granted none of the rights granted other people in our country by the Bill of Rights and the Constitution.

MR. BORK: Well, I had meant to say --

QUESTION: And under that condition.

MR. BORK: I had meant to say also earlier, Mr. Justice Stewart, that aliens could not be deprived of the explicit protections of the Constitution.

QUESTION: But could they be admitted on the condition that they be given none of the benefits?

MR. BORK: No, I think not.

QUESTION: Well, why not? If your argument is --

MR. BORK: Well, because when we are dealing with unconstitutional conditions, Mr. Justice Stewart, we are dealing with explicit guarantees that are asked to be given up by the aliens.

Here, I am merely suggesting that they could have been admitted on the condition that they not apply for federal employment until they were naturalized, which I think is not an unconstitutional condition and my claim is much less broad than it may have seemed when I began that line of development.

But, for example, Congress now excludes aliens from entry to perform certain kinds of labor, skilled or unskilled, unless they get a certification from the Secretary of Labor that they are not taking away a job of an American citizen and if any of them violates that, I am sure he may be deported. That is the kind of condition I am talking about that could be attached to the shore and therefore I think that this kind of condition about not seeking federal employment could be attached at the shore but that is not essential to my argument because in any case the federal power to admit or to exclude or to deport is plenary and it is necessarily intertwined with decisions about the aliens rights and obligations while he is in this country.

There is no way the two can be separated.

QUESTION: Well, you could certainly separate them by simply not going so far as you do in saying that Congress' power has to do with the exclusion and deportation of aliens and not with all these other things you have

talked about and not with what is involved in this case, that this has not had to do with exclusion or deportation.

QUESTION: Well, Mr. Justice Stewart, again, what I meant by the fact that they are inevitably intertwined -- I think that is right and I think it is right, not because of a legal point but simply because Congress' decision about how many people to admit will necessarily be affected by the power they have over aliens here so that the less power Congress has to classify alienage in this country, that may affect -- indeed, in some cases will affect Congress' decision about time for naturalization, degree of numbers entering and so forth.

And it is because it is intertwined, I think, that historically, we have view Congress as having such power over aliens in this country.

Now, Congress has been very liberal in provisions for aliens but I think that there is absolutely no constitutional necessity that the package of rights and obligations that they provide for aliens be of equal value to the package possessed by citizens and I think to begin now to require Congress -- or to take away from Congress effectively by applying this compelling governmental interest test, would be to take away from Congress almost all its power in this field and I think that would be a constitutional innovation for which I can find no warrant in

the text or in the history or, indeed, of the policy of the Constitution and that is why I say I think the only fully satisfactory formulation of the law with respect to resident aliens is that it protects aliens as persons but not in their status as aliens.

Now, I think that is a logical answer to this case but I would like to move on to the -- if this Court disagrees and thinks that the equal protection analysis is to some degree relevant, as we have discussed, there are, of course, two degrees of severity with which that analysis applies and I think the proper test here because of the federal powers in this field is, at most, the rational basis test. Anything more would take Congress almost out of the game.

I think in the context of a federal case involving federal power, it is appropriate to note that alienage is not like race or sex in immutable characteristics.

The disability imposed by this regulation is temporary and it is limited. Naturalization and the privileges of citizenship are available in five years or three years if the alien marries a citizen.

Now, in fact, the utter inappropriateness of calling alienage a suspect category in this case is demonstrated by a fact of which I have been informed by the Immigration and Naturalization Service, and that is that two

of the Respondents in this case, have now applied for and received citizenship.

All four of them are eligible -- the last time this case was argued -- in fact, Mow Sun Wong, the leading plaintiff, I am informed, was naturalized in January 7th, 1975, which was five days before this case was argued last term.

And Mr. Mok was naturalized on September 16th, 1976 -- 1975, I am sorry.

Now, the fact that they can choose, all of them can choose to be citizens -- and two of the Respondents have acquired citizenship and all of the rights that go with it, seems to me to illustrate dramatically how unrealistic it is to speak of aliens in a federal context as a suspect classification whose rights must be protected because they are persons who are discriminated against as persons who are discriminated against on grounds of race.

They can move out of the category easily. Two of the four Respondents here have. I trust if the other remaining two do become citizens before this case is decided, the counsel of Respondents will tell us, will tell the Court but there is simply no reality to the claim of suspect classification.

Now, turning to the rational relation test just very briefly I want to say this.

If this regulation must pass the rational relationship test, I think it does so quite easily and I will mention just three relationships it has to a permissible governmental purpose.

In the first place, it offers an inducement for resident aliens to acquire knowledge of this country, our language, something of our government, to proclaim allegiance and to become citizens and I think Congress may legitimately wish to induce aliens living here to integrate themselves into our national life and our political communities by becoming citizens.

One of the Respondents, as we discussed last time, has now been here for over 29 years and has not troubled to apply for citizenship. And I see no reason why Congress may not have a policy to induce such a person to declare that integration in our political community, that an application for and the receipt of citizenship implies and shows.

I don't think that this is a matter to be taken lightly. It is a force, an actual force and a symbolic force of some importance in making for the cohesion of the political community to which it belongs.

There was, I think, last time we discussed this case, some mention of xènophobia. I don't think that is here at all. This country traditionally and today is more

hospitable to aliens and makes naturalization easier than most. If xenophobia were involved, Congress would simply bar all aliens from our shores.

This legislative and Presidential purpose alone, I think, is that of integrating people into the national political community and strengthening the cohesion of that community symbolically and actually. I think that is sufficient to justify the regulation.

But if I were to go on to another point, I would say that there is an administrative burden. Obviously aliens may be kept from some kinds of positions. Obviously, aliens may be kept from even menial positions in some kinds of federal facilities. Obviously, it is more difficult to check an alien's background if he has not been here some sufficient period of time to have established a record in this country.

I take it that the government is entitled, as suggested in other cases recently, to make a broad rule to take care of administrative difficulties of that kind and not have to follow aliens about to make sure they aren't transferred to the wrong place to keep reclassifying jobs as the situation changes.

And finally, I would suggest that in the federal context it is important to note and legitimate to note that the federal payroll has become an important means for

implementing social policies.

Federal affirmative hiring programs have helped to counterbalance discrimination in the private sector and I think Congress may wish to maximize the effectiveness of the federal payroll in this function by confining it to citizens.

None of the three objectives I have mentioned is impermissible. None of them, I think, is evil. Each of them bears a rational relation to the regulation of the commission which means that the regulations do not offend the equal protection principle of the Fifth Amendment and we ask that the judgment of the Court of Appeals be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Steinman.

ORAL ARGUMENT OF EDWARD H. STEINMAN, ESQ.

ON BEHALF OF RESPONDENTS

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

The government today, as it has done in the past, is trying to paint this case for what it is not. The government is trying to paint this case as one involving plenary power of Congress. This case does not, although as we shall argue later, even if it does, the government's

actions are not immune from constitutional strictures.

The plenary power of Congress stems, over this area which we are discussing, stems from the Constitution, Article I, Section VIII, clause four. The only words in the Constitution are naturalization, Congress' plenary power over naturalization.

This Court, in cases as recent as Sugarman and Griffiths, has interpretated that to mean Congress' plenary power over immigration and naturalization and as it has been pointed out today, immigration connotes entry to this country, deportation and naturalization.

Issues where national security, foreign affairs and this country's sovereignty are inevitably intertwined, that is not involved today.

QUESTION: What would be your answer to the hypothetical about the power of Congress to enact the statute that required aliens, (A), to learn the language of the country so that they could pass a test within five years and apply for citizenship within five years or be deported at the end of that time?

MR. STEINMAN: Naturally we already have the language requirement to become a citizen, your Honor. I think that if Congress is dealing in areas of naturalization, and I emphasize that it is Congress, as Mr. Justice Stevens says, we don't even have a statute today really dealing with

aliens but if Congress was acting in regard to naturalization, that would be a clear indication that it was an exercise of plenary power and in that area, this Court's role is not eliminated but the test is quite different.

I think the Court then gives far greater deference.

The notion that somehow this case is going to lead to this Court automatically striking down 200 statutes is just not correct.

First of all, many of those statutes involve appointed officials and I think that aliens may have difficulty raising standings.

Many of those statues only involve a mere few people, not the millions involved here.

Most importantly, many of those statutes involved issues of national affairs, security, the sovereignty of this country and regardless of what test this Court utilizes, whether this Court talks about the status of aliens, a suspect class; whether this Court talks about conditions not being rationally related; whether this Court talks about presumptions being irrebuttable or not, the fact is that this Government surely has the right in certain circumstances to clear, precise, tailored circumstances not to allow aliens to do certain things.

The problem in this case, of course, as the

problem in other cases this Court has dealt with is total blanket exclusion and one of the interesting points which, as your Honor mentioned, is that the government has explicitly, in other areas, and the Atomic Energy Commission example, your Honor, is in the statute. It is noted at page 84, note 72 of the government's brief, the government, in areas involving the essence of national security, the Atomic Energy Commission, the Department of Defense, NASA, highest officials in the executive branch, has, by statute allowed aliens to work in those departments -- again, an example of tailoring.

For I do want to emphasize that this case does not involve integration and does not involve plenary power. What it involves is a blanket exclusion against individuals who have been lawfully admitted -- and if I may quote this Court, a decision of this Court in 1970, once an alien lawfully enters and resides in this country, he becomes invested with the rights guaranteed by the Constitution to all people within their borders.

These rights are unalienable and guard against any encroachment by federal or state authorities. That decision is Hellenic Lines versus Rhoditis. It appears at page 39 of our brief.

One of the problems that I have with the Solicitor General's argument is that he concedes to this

Court that certain particular rights in the Constitution apply to aliens, resident aliens. He conceded today that the First Amendment applies, that due process applies.

Mr. Justice Marshall asked him, why doesn't equal protection apply? Why is the government allowed to be selective?

The fact that equal protection may involve inherent classification is not an answer. Consider the hypothetical of Congress saying that aliens do not have First Amendment rights. I submit to you that that is the classification between aliens and citizens but as the Solicitor General Conceded today, under the Court's decision, resident aliens clearly have First Amendment rights.

I think it is important to emphasize in this case the facts of what these people were seeking and by the way, your Honor, I did not know that last year one of my clients had become a citizen and I was aware that another had but it is very clear from these courts' decisions that one does not have to become a citizen to take advantage of constitutional rights.

Mr. Justice Powell in the Griffiths case, recognized that the person in that case chose not to exercise the right to be a citizen.

In Sugarman versus Dougall, two of the

aforenamed appellees had been here long enough to qualify.

In Graham versus Richardson, Mrs. Graham had been here much longer than the requisite period of time to become a citizen. This Court did not require the individuals there to exercise that option. This Court did not require it here.

What my clients were seeking was to work as a janitor, a file clerk, loading and unloading mail at the Post Office and as evaluator of educational programs and one of the ironies, of course, is that three of them at one time worked for the Federal Government -- two in a California state program which paid their salaries, one, Respondent Lui, who inadvertently got a job at the Post Office.

QUESTION: But no one has questioned, that I am aware of, the power of the United States Government to hire aliens if they want to. That is not involved here, is it?

MR. STEINMAN: Well, I point the irony because they actually got around, if you will, to regulation involved here -- although they didn't get around to totally -- and that they worked outstandingly, according to the Appendix, the evaluations of their supervisors, and yet because of this blanket exclusion -- in the regulation, not the statute, they had to leave federal employment and I think also it should be noted that the exclusion in the federal regulation says that to work for the Federal

Government, you must be a citizen or owe permanent allegiance.

Unfortunately, the Federal Government has taken the position -- which I have never seen justified -- that owing permanent allegiance means only individuals from American Samoa -- I point you to the government's brief, page 81, note 67.

I do not know why owing permanent allegiance cannot be extended to others.

For example, three of my four-named plaintiffs at the time this case had been brought, filed declarations of intent to become a citizen. It is too bad that they had to wait five years to exercise their option to become citizens before they became open to federal employment.

Now, what I would like to emphasize to this Court is that, given the nature of the jobs that they sought, not involving national security -- given that they had performed outstandingly, there is no justification to exclude them.

Clearly, the court below relied on compelling interests.

We, as Mr. Justice Powell indicated in the Griffiths case, we are not concerned with labels, whether this Court calls it overriding interest, important interest, compelling interest -- whether this Court uses the rational

relationship test, whether this Court uses irrebuttable presumption, as clearly this regulation creates an irrebuttable presumption.

We are concerned with the facts that aliens, solely because of their status, are excluded from federal employment.

Mr. Bork said that in regard to the Federal Government, aliens are not a suspect classification. I submit that they strongly are.

This Court has said continually that aliens are inherently suspect. They are a discrete and-- an example of a discrete and insular minorityfor whom such heightened judicial solicitude is appropriate in Kraemer(?) Grainer and Sugarman. They are inherently suspect even if it is the Federal Government. They are examples of discrete and insular minorities even of the Federal Government.

The fact that the disability is not one that is long, the fact that these appellees can become citizens, is not relevant. It was not relevant to this Court in Graham. It was not relevant in Sugarman. It was not relevant in Griffith.

The point is that the suspect classification remains the same. What is different in this case is the interest which the government can assert.

That is why the lower court did not say that

Sugarman and Graham were dispositive. It found them helpful but not squarely controlling. What one must do is analyze the interests that are involved.

As we submit, the government must be required to show the strongest possible interest.

But even if you don't require that, even if you use the traditional rational relationship test, I submit to you that the rationals offered by the government are very, very weak.

For example, the government says that one of the rationals is that we want to induce aliens to become citizens.

Well, first of all, there are numerous statutes which allow non-citizens to work for the Federal Government, including the most sensitive positions.

Clearly, those are not inducements to become citizens.

QUESTION: But those statutory exceptions are for the benefit of the United States' own interests, are they not?

That is, if we want to hire, the United States wants to hire Wehner Von Braun or other scientists, the United States surely has plenary powers to waive these considerations, do they not?

MR. STEINMAN: I totally agree but, of course,

there are no facts in this case that showed that it was in Congress' mind;since the statute is silent I don't know that we can say that it was in Congress' mind.

There are no facts to say that it was in the mind of the Civil Service Commission that the reason for the regulation was to induce citizenship.

Obviously, one of the ways this Court could have answered that in Sugarman versus Dougall was to say that the states might have requirements that to work for the state Civil Service, you must be a citizen, would be enhancing the congressional role in inducing citizenship.

QUESTION: But the Solicitor General says that is the difference between the state and the Federal Government.

MR. STEINMAN: I agree with him.

QUESTION: I assume you agree.

MR. STEINMAN: I agree that there is a difference, but as this Court stated last term -- if I may quote directly from Weinberger versus Weisenfield, that is 95 Supreme Court 1228 No. 2, this Court's approach to the Fifth Amendment equal protection claims has always been precisely the same as the equal protection claims under the Fourth Amendment.

QUESTION: Is that the case of aliens?

MR. STEINMAN: No, it is involving --

QUESTION: His point is that alien is in a different category.

MR. STEINMAN: Well, I think that alien is in a different category in regard to what interest the government is allowed to assert.

QUESTION: They are in a different category, period.

MR. STEINMAN: In regard to the Federal Government.

QUESTION: Period.

MR. STEINMAN: I respectfully disagree, your Honor.

QUESTION: Well, aliens can be excluded from this country, but you can't exclude American-born from this country.

MR. STEINMAN: If you were talking about issues of injury, naturalization, deportation --

QUESTION: No, no, no.

MR. STEINMAN: -- then I cannot disagree with you.

QUESTION: Once you come in the country, you still are alien until you become a citizen.

MR. STEINMAN: Right, and when that --

QUESTION: And there is a difference between a resident alien and a citizen, right?

MR. STEINMAN: There are several differences. Citizens, of course, are not subject to requirements of

entry. Citizens are not subject to naturalization deportation. Any congressional law which says because you are a citizen, you cannot hold a federal job would be struck down automatically.

What we are suggesting here is that when the Federal Government is dealing with resident aliens, it has many powers, but its powers must be tested by the principles of this Court and whether those principles require strong compelling interest, rational relationships, presumptions are not rebuttable. Aliens are deserving of the protections carved out under the Fifth Amendment.

I totally agree with your Honor that aliens are and have been treated differently than citizens. One of the things that we are not going to do in this case if we prevail is to wipe out the distinction between citizens and aliens.

QUESTION: Do you think it would have helped -- or would it help this regulation of the Civil Service Commission if, as Congress often does, it recited a series of preambles, considerations for enacting the regulations -- one, for example, that it wanted to encourage people to apply promptly for citizenship.

Two, that it wanted to reserve federal employment for American citizens because at the present time, studies have shown that there are 10 or 11 illegal aliens

in the United States and in addition to many aliens legally in the United States.

And, third, that Federal Government programs of affirmative action to remedy past discrimination will be served by limiting federal employment to naturalized or native-born citizens.

Would that take care of the flaws you see in this regulation?

MR. STEINMAN: Well, I don't think that it would take care of the flaws, but it would surely aid our understanding of what Congress is doing. I would not concede --

QUESTION: Congress -- this is, I am going to your point that Congress has not done this.

MR. STEINMAN: Right, and I --

QUESTION: The Civil Service Commission has done it.

MR. STEINMAN: I still emphasize that the proper test would not be rational relationships. But if that test were applied, then I think that some of the reasons articulated by your Honor would not be sufficient; for example, wanting to keep federal jobs only for citizens. That smacks of the special public interest doctrine which this Court has consistently struck down in the last 10 years.

Wanting to induce people to become citizens, I

would think that that might be partly closer to the process of naturalization and if that would be deemed by this Court to be Congress exercising its powers of naturalization, then I would concede in that situation plenary power applies and this Court could probably give far greater deference to the Congress' decision.

Unfortunately, we have no reasons offered in this case. We have no reasons that would at all justify, even under the Court's minimal test, excluding millions of resident aliens solely because of their status from seeking all types of federal jobs.

The Congress has numberable reasons that it can offer why aliens should not hold certain types of employment, issues of national security, issues of foreign affairs.

As this Court has pointed out in Sugarman, government has the right to require citizenship to vote, to hold elective office, to hold important offices, to hold offices where policy-making and executive-making decisions are made.

Those rights would continue after this case and to the extent that Congress exercises its rights, it will make sure that certain jobs only go to citizens.

My clients are dealing, unfortunately, with a blanket umbrella. They can't even show that they are competent. They can't even show that they would make a

good mail clerk or a good janitor. They are foreclosed at the door.

QUESTION: Mr. Steinman, may I interrupt a minute?

I am not completely clear on your answer to the Solicitor General's argument that the incentive to become a citizen is a rational basis for a rule such as this. I am not sure whether you are saying that that is not the real reason and we don't know what the reason is.

Or are you saying, even if it could be demonstrated that that is why the regulation was adopted it would not be a valid reason.

MR. STEINMAN: Well, again, it has not been stated here and under a stricter test then, rational relationship would not be valid.

Under the rational relationship test, I would argue, clearly, that Congress, when it is touching upon issues of naturalization, inducements to become a citizen, has far greater rights and can assert interests which this Court should give greater deference to.

I think one of the problems with the Congress articulating that rationale, your Honor, is that there are so many other statutes, there are so many other areas where Congress does not have that similar inducement and I would like the Congress to explain to the Court --

QUESTION: I am not sure I understand your

answer.

MR. STEINMAN: I'd like to --

QUESTION: You are saying that if Congress had articulated this as its real reason, it would be a sufficient reason. That is what you seem to be saying.

MR. STEINMAN: Well, it would be a sufficient reason if Congress could explain, at least to me, your Honor, but quite possibly not to yourself, why it is rationally related to induced citizenship for Civil Service positions but not for all the other positions where citizenship is not required.

If your hypothetical suggests that Congress has given that reason, I think I have a much weaker case. I'll agree to that.

QUESTION: Well, that is wholly contrary to conventional protection clause analysis, isn't it? We don't require a given reason. The ordinary approach has been to define whether any conceivable rational reason exists. We don't -- it has never been the analysis to stick Congress with a reason they gave or to require them to give a reason or anything along similar lines in conventional equal protection clause analysis.

MR. STEINMAN: I think the conventional analysis, your Honor, if the cases would be looked at, did not involve the situation as in here, where we have important

governmental interests that are being curtailed, whether or not we use the notion of suspect classification or rational relation.

QUESTION: Why is this a suspect classification when it is a classification that is in the 14th Amendment of the United States, that was an Amendment that came after a good deal of national trauma, of civil war and a proposal and adoption of that amendment and that defines citizenship of the United States?

It must have some meaning and it mustn't be -- why is it invidious and suspect and irrational?

MR. STEINMAN: Well, I think for the same reasons that the Court indicated in the Rodriguez case -- what the indicia are or a suspect classification, individuals who have suffered long disabilities, who have had a history of unequal treatment, who have been in a position of political powerlessness.

In the Griffiths case, Mr. Justice Powell outlined some of the hostile treatment that resident aliens have suffered in this country.

I think these were the reasons that led this Court in the Graham case and in Sugarman to hold that, like other suspect classifications, aliens are needful of the heightened judicial solicitude. I think that one of the reasons, of course, is that aliens can't vote and maybe are

politically powerless. I am not saying that aliens have the right to vote. I think clearly this Court has made it clear and I think that under the Constitution, the Congress and the states can foreclose aliens from voting.

QUESTION: Well, the 14th Amendment virtually says so, doesn't it?

MR. STEINMAN: I think that the interpretation is correct. But we are not seeking voting. We are not seeking things that relate to the country's sovereignty. We are seeking jobs with the Federal Civil Service and to the extent that issues of the national sovereignty, issues of loyalty and security are present in the federal jobs, then we willingly concede that aliens should not be in those positions.

The problem is that now we can make no determination.

QUESTION: You don't think that the affirmative action programs are sufficient consideration even though, presumably, every time an alien fills a Civil Service position, it is one less position available for either American citizens or for American citizens perhaps subject to the affirmative action program?

MR. STEINMAN: I have two responses, one legal, one factual.

I think legally this Court has said that

descriptions like that, of favoring citizens over non-citizens, is the type of special public interest doctrine which this Court went out of its way in both Graham and Sugarman to repudiate.

I think factually, your Honor, we have filed amicus briefs which show that the unemployment rate among resident aliens, unfortunately in the San Francisco Bay area, is three to four times that of citizens and although clearly, if a resident alien gets a job he replaces a citizen, I think the amici show that it is far easier for a citizen, at least where I come from, to get employment than resident aliens.

But, again, Congress has not said this and as Mr. Justice Stevens recognized, Congress has not even discussed aliens. I don't wish at this time to repeat what is in my brief concerning our non-constitutional arguments. I think it is very clear.

I think that the executive order, 10577, does, Mr. Justice Stevens, mention citizenship. But what at present it requires the Civil Service Commission to do is to establish criteria with relation to citizenship.

I submit that if the President thought that the criteria was going to be blanket exclusion of all non-citizens, that would have been a rather vain and idle justice. Unfortunately, the Civil Service Commission has

not established any criteria. What they have done is issued a blanket order.

One other response I would like to make is that we are faced, clearly, with the policy that it has been in existence a long time, although I clearly submit to you that there is no statutory authorization.

I would hope that as this Court has recognized in the area of constitutional law, that the fact that a policy has existed for a long time does not immunize it from constitutional protection.

Likewise, the fact that the Civil Service Commission has for many decades foreclosed aliens from the federal employment should not immunize it from the test that this Court has laid down in relation to the explicit, specific authorization that Congress must give an executive or administrative body when dealing with important interests such as are at stake here.

Again, I hope that my brief is adequate on that point.

QUESTION: Are you saying, Mr. Steinman, that limiting federal employment, the employment in government, to citizens of the sovereign is not an attribute of sovereignty, or are you saying that, assume that it is -- there has been no action taken by the sovereign to so declare that is the national policy?

MR. STEINMAN: I would answer to your first part, no, it is not an action of sovereignty and the reason that I would is --

QUESTION: Not an attribute of sovereignty?

MR. STEINMAN: Attribute. And the reason that I would is that this Court has made it very clear that the plenary power deals with matters of entry, naturalization and deportation, as the quotation I read from the 1970 case of Hellenic versus Rhoditis stated.

Once the alien is lawfully in this country, absent naturalization issues, absent issues of deportation, the alien does get full and complete treatment of the Constitution.

But, your Honor, if you are correct, if it was an attribute of sovereignty, then my position --

QUESTION: I didn't state it. I asked you for your view.

MR. STEINMAN: If the hypothetical is correct, excuse me, that it was an attribution of sovereignty, then I would submit that the fact that Congress' plenary powers are involved does not mean that this Court gives absolute okay to what is going on.

This Court still has a role to play. Our brief enunciates the numerous cases, using the war powers, where this Court has said that, "the talismanic incantation of

the plenary power cannot immunize Congress' action under the Constitution.

Clearly, though, if the plenary power is present, I would concede that the Court's test is more deferential.

But as I stated here, I do not believe that the plenary power is present.

In closing, I would like to say that the only justification or reason that really exists for the total exclusion of resident aliens from all federal employment is that they are aliens.

To state that would confess discrimination. Hence, the Petitioners are silent.

I submit that such silence can no longer immunize constitutional violations.

As this Court said in Graham versus Richardson, the Congress does not have the power to authorize individual states to violate the equal protection clause.

I would submit that when Congress is not acting in areas of deportation, naturalization and immigration, Congress itself cannot authorize its own violation of equal protection guarantees of the Fifth Amendment.

QUESTION: Well, why isn't a limitation of government employment to citizens an act of the government relating to naturalization?

MR. STEINMAN: Well, I have a couple of answers.

First of all, this Congress has clearly never stated that and I don't think it is just because it is not in the Title VIII of the United States Code.

Secondly, the fact that it may be related to naturalization does not explain, then, why everything else is not related to naturalization.

For example, a resident alien exercising Fifth Amendment rights. We want to encourage resident aliens to become citizens. Hence, we deny them for five years First Amendment rights. This Court would not accept such an argument.

QUESTION: That is so obvious that I don't think it needs -- it doesn't constitute an answer to my question.

MR. STEINMAN: Well, I think that outside the area of deportation, naturalization and immigration, where it clearly relates to that plenary power, the problem -- the reason that it is obvious, your Honor, I think is because the Constitution does treat resident aliens under the Fifth Amendment protection, that we would not tolerate saying a resident alien does not have First Amendment rights.

That is why I say we should not tolerate that a resident alien does not have equal protection rights.

What is different vis-a-vis the citizen is that the governmental interests and the way those interests are balanced will be quite different for the resident alien than

they are for citizens.

Thank you very much.

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

Do you have anything further, Mr. Solicitor General?

REBUTTAL ARGUMENT OF ROBERT H. BORK, ESQ.

MR. BORK: Just a scattering of points, Mr. Chief Justice. The reference has been made to whether or not Congress intended this. I would like to refer you to our main -- refer the Court to our main brief, page 71, and the following pages.

And it must be quite plain, for example, footnote 63 on page 78, Senator Hawley said, when they were setting up this commission, "It will be among the duties of the Commission to devise rules for conducting examinations. There will be requirements. Anybody can think of a few in a moment. The applicant must be a citizen of the United States," and on and on with other quotes from Congress. It is quite clear Congress intended this and it is also quite clear that Congress need not, in intending such a classification, make a statement of their rational purpose, which is satisfactory to Respondent's counsel.

QUESTION: I, for some reason or other, don't seem to find it. Page 71 of your main brief?

MR. BORK: Of our initial brief, your Honor. It is

page 78, footnote 63 there. I just cited that because it is an extraordinarly clear statement by Senator Hawley that Congress assumed citizenship in this area as, indeed, everybody had.

On the question of the --

QUESTION: Mr. Solicitor General, they did assume it but they didn't explicitly require it in the statute.

MR. BORK: The statute does not say there must be citizenship. Congress assumed, apparently, that anybody carrying that out would naturally require citizenship and Congress had been aware of this practice over the years and legislated in light of it and in the Public Works Act, which we discuss at page 83 of our brief, they have been saying that salaries may not be paid to aliens in this country with certain exceptions, if they work for the government so that this is a Congressional policy, there is no doubt about that, as well as a Presidential policy, which is why I said the policy came to us with the combined weight of the Congress and the Presidency.

But on the question of the suspect classification, I would like to direct the Court's attention to Johnson against Robison, decided in 1974, in which conscientious objectors who are, one assumes, will always have the record of a conscientious objector, has held -- conscientious objectors are held not to be a suspect classification

and I would think if that is the case, then aliens who can leave the category certainly do not qualify.

In this case, essentially, we are being told by Respondent's counsel that they don't like any imposition of obligations upon aliens whichever way we do it because we are told that this statute or regulation is overbroad.

We are required to make individualized determinations.

I think Weinberger against Salfi suggests that we are not so required, if there is good reason not to require us to expend resources to make individualized determinations.

But on the other hand, it is held against us by Respondent's counsel that in some areas of government, the government finds it useful to make individualized determinations and to hire aliens so that we are attacked with both overbreadth and underbreadth.

I submit that this is a traditional power, clearly a constitutional power of government. There is no inequity involved and it would be extraordinary to change a constitutional power and practice of this sort for these reasons at this time.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:59 o'clock a.m., the case was submitted.]