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ORIGINAL

In the

Supreme Court of the United States

EDMUND FOLEY, ETC.,

Petitioners,

VS

WILLIAM G. CONNELIE, ETC.,
ET AL.,

Respondents.

No. 76-839

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November 8, 1977

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Washington, D. C.

Tuesday, November 8, 1977

The above-mentioned matter came on for argument at
1:33 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 P. STEVENS, Associate Justice

APPEARANCES:

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Elderly Poor, 2095 Broadway, Suite 304, New York,
New York 10023, for the Petitioners.

JUDITH A. GORDON, ESQ., Assistant Attorney General
of the State of New York, Two World Trade Center,
New York, New York 10047, for the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-839, Foley against William G. Connellie.

Mr. Weiss.

ORAL ARGUMENT OF JONATHAN A. WEISS, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case involves the exclusion of all noncitizens from all jobs in the New York State Police Department, as troopers, etcetera. By such exclusion, various constitutional precepts are violated. First, there is the group at consideration, aliens. Aliens have been considered by this Court, and justly so, a discreet insular minority. They are, on the one hand, vulnerable because of their peculiar status, other hand, they contribute by their presence here to the country.

QUESTION: Who were the constituents in the discreet insular minority that Justice Stone referred to?

MR. WEISS: In that case, they were not aliens. They were -- You are talking about Footnote 4, I take it. It was any group that could be classified, particularly, as having discreet characteristics. It was a generic classification. In this case, we have what has been characterized by this Court as an example of that minority.

QUESTION: In fact, what were they in Justice Stone's

MR. WEISS: I don't recall at this moment, Your Honor. I do recall they were not aliens.

QUESTION: That was in the Caroline Products --

MR. WEISS: Yes. Footnote Number 4 in Caroline Products.

QUESTION: And I think the footnote was kind of not necessary, perhaps, to the decision in that case.

MR. WEISS: I agree, Your Honor. And I wasn't relying upon Footnote Number 4 of Caroline Products, but rather a description --

QUESTION: Justice Blackmun's opinion from the Court.

MR. WEISS: That's right. Which refers back to that and gives it cognitive content. That is the reference we made. I am aware of the dispute as to whether that is an appropriate reference back, but that is the law concerning aliens. These are, of course, individuals who have undergone federal scrutiny and are here pursuant to federal statute.

QUESTION: Do you think there is a difference between a discreet insular group, whether minority or otherwise, when they are, let us say, American Indians or Negroes or women or men who cannot change their condition? That's one kind of a discreet insular group. Do you think aliens fit into that kind of a definition of the group?

MR. WEISS: They can and they cannot. The question is when is that distinction important? In this case, for example, some of the aliens cannot change their status for the purpose of this case and rid themselves of the exclusionary burden. There are others who, perhaps, could. So, for the purpose of this case, that is not a functional distinction, but it could be a distinction that could come into play in other cases.

QUESTION: As I understand the record, a Mr. Foley could not become a citizen in time to meet the age requirement.

MR. WEISS: That's correct, Your Honor. And, therefore, this is a status which he, and others like him, are not able to change. There may be other individuals because the category is so broad that could, in fact, change their status and they, too, would fall under this rubric, but that distinction cannot be made for the purpose of this case. It might be made for different statutes in different considerations at different times.

I think it is also important to note what is at stake here, what right we are talking about excluding these noncitizens from.

QUESTION: Mr. Weiss, could I ask one question. Your client could not change his status in time to qualify, but this is a class action, is it not?

MR. WEISS: That's correct.

QUESTION: Is the class limited to plaintiffs who could not change their status because of the age qualification, or does it apply to all aliens?

MR. WEISS: It applies to all aliens, Your Honor, because that is how the statute sweeps and that includes those two, possibly distinguishable subclasses, those who can and those who cannot.

The right at stake here is employment. This Court has consistently held, particularly in conjunction with alien rights, that employment is a crucial right. In particular, this is employment in a police department. Whatever reasons may be evoked to justify such an exclusion, it would seem to frustrate rather further these purposes. To have an efficient police force you want to have the largest pool to select from of capable individuals. By excluding aliens whose contributions we welcome in other spheres, we cut down that possibility. We eliminate certain applicants who may be superior to those who would be accepted, when we eliminate this group. In particular, since we are a country of traditional immigrants and there are large foreign-speaking populations, it can even be suggested, as the amicus has, that there is a need to go into this pool of potential foreign speakers and people who have the ability to relate from time to time to Petitioner immigrant groups.

QUESTION: Are you suggesting that aliens who cannot speak English are also a discreet insular minority, or just --

MR. WEISS: I would suggest they are but not one that I would want on the police force. That was not the suggestion. The suggestion is that it is possible to recruit for particular skills, regardless of race, creed or color. For example, if you have a large Spanish-speaking population, you might want to recruit Spanish-speaking policemen, regardless of their race. But if you have excluded from the pool a large population which speaks Spanish as well as English you may, in fact, be limiting your ability to recruit 80 police officers with what you are looking for. What I am suggesting is that the amicus suggestion may have some validity, that there may be virtue even looking out for aliens to respond to particular community needs. However, there is no question the ultimate resolution has to be the merit of the individuals who serve on the police force. They must pass those tests and the more people we have applying with ability the more likely we are to have a better group to, in fact, carry out the law enforcement duties.

QUESTION: Various estimates made from time to time, some governmental and some private, are that we have from the range of 8 million to possibly as high as 12 million illegal aliens in this country. Would you think illegal aliens

are a discreet insular group?

MR. WELLS: Once again, Your Honor, I am sure they are, but not one I think we should have on the police force. The police force deals with people who must enforce the law and one of the screening characteristics we should have on the police force is to exclude those people who have committed illegal acts. We would not want the discreet minority of ex-convicts --

QUESTION: Obviously, whether it is 8 million or 12 million or 6 million, obviously this is a large group of people who need some attention from law enforcement people. To pursue your theory, if you went into the illegal aliens for policemen, for law enforcement people, you would have a group with some compatibility and empathy toward that group, thereby enlarging the pool, as you put it.

MR. WELLS: The argument could also be made that for that reason we ought to hire ex-felony convicts because they have some identity with the others --

QUESTION: It isn't my argument. It is your argument.

MR. WELLS: I am suggesting that there are certain standards which should be met. They should include very clear skills of handling weapons, language to understand the law and also, I would think, a policeman should, as a servant of the law, be expected to have lived up to the law, not

anybody who is tainted with illegality. The issue is --

QUESTION: Would it make any difference to the point you are making if the alien had been in the country for 10 years and just had ignored the opportunity to become a citizen?

MR. WEISS: Insofar as he continues to commit a crime --

QUESTION: No, no. I am not talking about illegals. I am talking about your man now, the person in your class, your client. If the person had been in the country 10 years with abundant opportunity to become a citizen, would that make any difference?

MR. WEISS: Would it make any difference in this case? In my opinion, it would not, because it would merely be a different plaintiff for the same class. We have these two classes that are covered by the statute, those who cannot change their status and those who can. I would also suggest that perhaps even for those individuals who can change their status the clear implications of Malclay are they too would be covered by this Court's decision, particularly since, as Your Honors suggested in Malclay the employment right is also a crucial factor in establishing whether or not something is an unconstitutional discrimination.

QUESTION: As to the illegal alien, isn't it true that when he shows up he will no longer be an applicant?

MR. WEISS: I would think that he would be an

applicant for deportation more likely than the state police force, yes.

QUESTION: You are really just speaking only of resident legal aliens, are you not?

MR. WEISS: Yes.

QUESTION: Secondly, we are concerned here with the so-called New York State Troopers, and as I understand it that is divided into three separate departments, the one assigned to the Governor, and so forth, and the other one highway patrol officers, and the third, the civilian guard detective force, the CID, or something.

Would your case be any different, would you be here if we were concerned only with the New York City Police Department? Would you be making the same arguments?

MR. WEISS: I would think after Sugarman v. Dougall the case would be very similar, yes. I think I would still be here on New York City, but New York State, because it has statewide application, breaks down, but I think I would have a similar case for the City, yes.

QUESTION: I ask this because you have referred to a class as "policemen," and that, for some reason, gives me a municipal reaction, rather than a state reaction. So you make the same argument.

Lastly, in New York State, is a permit to carry a gun under certain circumstances obtainable?

MR. WEISS: Do you mean for a private citizen?

QUESTION: Yes.

MR. WEISS: Yes, I believe in both New York City and New York State you can obtain them.

QUESTION: Is it restricted to citizens or may aliens also get them?

MR. WEISS: Your Honor, I do not know.

QUESTION: You have so many New York statutes that restrict everything to citizens I wondered.

MR. WEISS: Well, New York State, as we suggest in our brief, in one period passed a whole series of alien exclusion and alien discrimination statutes causing a whole, you might say, crazy-quilt of possibilities. We list some. I do not know about handguns. If the Court wants, I can submit a brief statement a couple of days after argument.

QUESTION: Do you know what's called the Sullivan Law? Is that a New York City ordinance or a state?

MR. WEISS: I believe that is a New York City ordinance, Your Honor.

QUESTION: It's a state law, I think. We can ask.

MR. WEISS: My impression, Your Honor, it is very clear it is the city and my learned counsel here agrees with me on that. I believe the New York City -- Sullivan Law prohibits carrying handguns. I do not believe it applies to the State. I can again clarify that.

QUESTION: But the Sullivan Law is a felony, isn't it?

MR. WEISS: I think the Sullivan Law is a misdemeanor, but I am not sure on that, but I am pretty sure it is a City law. I think it is carrying concealed handguns and I believe also it is a registration thing and various exclusions. Again, I am not familiar if that has an alien aspect to it. I think the exclusionary categories deal with character and past criminal convictions and the like.

QUESTION: Do aliens have the right to leave the United States without a passport. I suppose they have a passport from their own country.

MR. WEISS: I believe that an alien with a resident green card can, with permission from the consul, come and go from the United States.

QUESTION: Permission from the consul --

MR. WEISS: Consul of the United States, I believe. You have to notify them when you go and coming back, but if you go out for more than a particular period of time you surrender that status. You have to notify that you are leaving and get permission.

QUESTION: If an English alien, for example, wishes to go back to England for a holiday does he have to get permission from anyone?

MR. WEISS: I don't know, Your Honor. I believe

so. I do not know. I cannot answer that. I do know that you do have to maintain residence in connection with the United States for a period of time in order to retain your green card.

It is our central conceptual argument here that the conjunction of Sugarman v. Dougall which says you cannot exclude noncitizens from public employment in New York State, and In Re Griffiths which holds that you cannot prevent aliens from being lawyers, combined make an a priori case that you cannot exclude people who want to apply for various law enforcement jobs. A policeman or trooper carries out the law under supervision, under direction and in conjunction with a whole paramilitary organization, as has been characterized by the State.

QUESTION: On the other hand, isn't a member of your group expected to excel and to go up the scale of the hierarchy, so that before long, perhaps, he may be a captain or major, or whatever you call them, and be exercising a lot more policy decisions?

MR. WEISS: If it is possible for a policeman at the top to exercise policy decisions, it might be possible for one of this class to eventually be considered for that position. At that point, however, I believe, in addition, the head of New York State Police makes individual determinations as to who should be promoted. So if there were anything which could

conceivably be relevant in connection with his alienage, that would be considered at that time. But in any event, this statute does not speak to a specific narrow group of possible policy-makers in the New York State Police Department but, rather, to every single conceivable applicant to the New York State Police organization.

As a consequence, since this is such a broad exclusion, since it flies in the face of defining narrowly who can be excluded and for what reasons, since it frustrates the purposes of having a police force, since it falls against the whole line of precedents that this Court has issued and have been generated by this Court's decisions, we submit that the exclusion from the New York State Police Department for all noncitizens must be declared unconstitutional.

I would like to reserve whatever time I have for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Weiss.

Mrs. Gordon.

ORAL ARGUMENT OF JUDITH A. GORDON, ESQ.,

FOR THE RESPONDENTS

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

The issue presented for determination on this appeal is whether permanent resident aliens may be excluded from membership, the sworn officership status, of the New York

State Police, under New York Executive Law Section 215(3), consistently with the aliens' rights under the Equal Protection Clause.

Contrary to the suggestions in Appellant's brief and a portion of his argument here today, there is no issue with respect to aliens who are in the alleged dilemma of being caught between the federal five-year durational residence requirement for naturalization and the generally applicable 29 year old age requirement for appointment to the State Police.

QUESTION: You said there is none?

MRS. GORDON: There is no such issue, Your Honor, and that is for the reason that the case was brought as a class action of all permanent resident aliens. And I should note here, Your Honor, that, of course, there is no issue with respect to any other types of aliens, temporary resident aliens or illegal aliens. In any event, the class as defined and stipulated to by Appellant is of all permanent resident aliens who, but for the citizenship limitation in Section 215.3, would be eligible to apply for a position with the State Police, for membership in the State Police.

QUESTION: Did the District Court certify a class?

MRS. GORDON: Yes, Your Honor, and that is the class essentially as I have given it to you and it appears in the District Court opinion, a majority opinion, at pages A3

through 4 of the Appendix of the jurisdictional statement.

There is, of course, no reference in that definition of the class to the subjective expectations of the individuals involved, as to whether or not they would want to become citizens; likewise, there is no reference in that class action order to the probable -- or improbable likelihood of the frustration of those expectations, assuming that the individuals had them, by the operation of the general age requirement.

The record below, in addition, does not support any such alleged dilemma. The age --

QUESTION: What was the page number that you gave us?

MRS. GORDON: A3 through 4 of the Appendix to the jurisdictional statement.

Your Honor, I would call to your attention that in this case the opinions are contained in the Appendix to the jurisdictional statements and that the Appendix filed on this appeal, the beige copy, has some documents of records that were not previously filed.

QUESTION: Mrs. Gordon, this class is a little different, at least a little broader than the one you identified. This talks about the Plaintiff and all other alien residents of the State of New York who have applied or will apply for the position of State Trooper. Now that doesn't talk about permanent resident aliens, nor

legal aliens, nor anything else. That's all, I suppose, implied, but it is not stated.

MRS. GORDON: Your Honor, I think that is expressly implied and the -- I am just trying to find the original stipulation.

QUESTION: Perhaps, on A3 and A4, that's what it says.

MRS. GORDON: If Your Honor looks at the beige Appendix, D-22, Your Honor will find the stipulation so ordered by Judge Pollack, which defines the class as consisting of all permanent resident aliens who, but for the enforcement of New York Executive Law 215.3 would otherwise be eligible to compete for employment as State Troopers.

QUESTION: I suppose all permanent resident aliens implies that they are not illegal aliens?

MRS. GORDON: Yes, and that they are not temporary aliens, Your Honor.

QUESTION: Certainly, permanent means not temporary.

MRS. GORDON: Yes.

QUESTION: But there is nothing in here about legal.

MRS. GORDON: Right, and as I was indicating to you because the age of the Appellant was not raised below, because his entering status was not raised below, and because the date of his permanent residence status was not raised below, there was no dilemma hypothesized before the District

Court and, obviously, the District Court majority so proceeded. In fact, if you look at Judge Mansfield's dissent you will find the reference to the alleged dilemma footnoted in his opinion as a point raised in the Appellant's reply brief before that court after the case was --

QUESTION: And this class.

MRS. GORDON: And this class.

QUESTION: It would inevitably include some in that dilemma.

MRS. GORDON: It might very well include some in that dilemma, but the dilemma, the specific one the Appellant seeks to argue, even if you concede him the facts that he now alleges in his reply brief, namely, that he cured a permanent resident status in 1974 and that he will be 30 years old in 1980. He now alleges he was born in 1950.

QUESTION: But this class, by definition, of those who would otherwise be eligible to compete for employment would include all resident aliens up to age 29, and obviously would include, therefore, many who could not become naturalized citizens before they were too old to apply. Just inevitably.

MRS. GORDON: That's correct. That might be so, except with respect to this named Plaintiff it is not so because based on his new facts as alleged since he will not be 30 until 1980 and since he can become a citizen in 1979,

he could be fully qualified to compete in the next examination series. That is our point with respect to that issue.

QUESTION: If that becomes critical, at all, may there not be some problem with the breadth of the class certification?

MRS. GORDON: If that is the issue, Your Honor, there would be a problem with the breadth of the class certification, and it's our position here that that class certification cannot be modified to admit of what are essentially new allegations by the Plaintiff. However, I think that it is somewhat difficult for me to quite understand the force of Appellant's argument with respect to the alleged dilemma.

If Plaintiff were actually in a dilemma, it would connote that he wanted to become a citizen. The distinction that Appellant has attempted to draw throughout this litigation is that aliens qua aliens are excluded, and that is the kind of distinction that was made in Dougall, the kind of distinction that was made in Griffith and, indeed, the basis on which the District Court determined the issue.

QUESTION: What if this Court were to hold that although as to aliens who fulfill their residency requirement and could become citizens before their 29th birthday, there is no denial of equal protection worked by the New York statute as to those in the class that Appellant alleges he is in, those who can't become citizens by their 29th birthday.

There is a discrimination.

What does the Court do with the class certification?

MRS. GORDON: It would seem that the Court would have to avoid it, Your Honor, except that I think --

QUESTION: How do we avoid it?

MRS. GORDON: You would, obviously have to -- It was my view, Your Honor, that you could not change the class certification and that the class certification framed the issue in the case and, accordingly, this dilemma was not reached. If the class action certification had been modified, and frankly I don't think that is necessary to the determination of this case, because as Mr. Justice Stewart points out there are bound to be some individuals, this dilemma is illustrative of some potential class members, but if the certification were to be modified it would seem that the case would have to be remanded, Your Honor.

QUESTION: And if you win, you don't worry about it at all.

MRS. GORDON: That's right, Your Honor.

QUESTION: That's what I think you should be getting.

QUESTION: Could I ask one question about qualifications. Is 29 the maximum age at which you can become a State policeman or get on the list of those who can work up into becoming a State policeman?

MRS. GORDON: Technically, Your Honor, 29 would be

the age, 29 to the 30th year, would be the age for appointment from the list. However, the statute 215.3 in which that limitation is incorporated, provides discretion to the superintendent to extend the maximum age to 35 and, indeed, it makes mandatory for up to six years extensions by virtue of the performance of military service. And that is another aspect which we indicate in our brief would relieve Appellant of his dilemma.

QUESTION: All he has to do is join the Army in the meantime.

MRS. GORDON: Yes, that is one thing he could do, Your Honor, but he could also -- I mean it would be frivolous to think, Your Honor, that had Appellant pursued in a reasonable course his application for citizenship and had he taken the test and the time came for appointment and he was about to be 31 but could not be naturalized because of the formal proceedings which are incident to that, in other words, he was going to take his oath before a federal officer, it would be frivolous to think that the Superintendent would not extend his time, since he may stay the age up to 35 to accommodate what were delays not within the control of the Appellant.

QUESTION: But it is discretionary, even though he was on the list.

MRS. GORDON: It is discretionary. Your Honor, yes.

Your Honors, a state is sovereign because it both creates and enforces its own laws. A State Police officer performs sovereign functions in New York because he, in fact, enforces New York laws. His powers to arrest throughout the state on his own initiative for all crimes and offenses, his power to use force, including deadly force, his power to search, his power to stop and frisk and to issue commands to the general population which must be obeyed, which cannot be resisted by force, are extraordinary and are unique to his office. If the officer exercises these powers, his acts result in the forceable detention of an individual and the seizure of private property. In addition, his acts result in the initiation of the criminal justice process.

If he does not arrest, the officer has, like the juror at a criminal trial, acquitted a potential defendant on facts which in the judgment of another might constitute a crime or arrest. A police officer must decide which course of action to follow and he alone is responsible for his action. If his judgment is questioned, he is entitled to a defense only of the reasonableness of his acts and judged on the existing circumstances at the time his acts were placed in question. He cannot rely on superior orders and he has no such defense under New York State law.

QUESTION: Mrs. Gordon, you mentioned a juror. Are aliens allowed to sit on juries?

MRS. GORDON: No, Your Honor, aliens are not allowed to serve on juries.

QUESTION: That's in that whole bunch of statutes he was talking about?

MRS. GORDON: Well, quota aliens cannot be grand or petty federal jurors or grand or petty state jurors, the Court recently affirmed Perkins v. Smith, involving state court juror which had a citizenship requirement.

The State Police officer not only performs a governmental function when he protects and prevents crimes against private persons and property, but he performs specific functions in aid of the preservation of the state itself as a political entity. He must guard against civil disorder, insurrection, subversion and breach of the state's security. He guards the life of the Chief Executive and other dignitaries in the state.

In light of the importance of his functions and his identification with government, New York has designated him as a public officer, since exactly 1917 when the State Police were created.

Now, Appellant does not dispute that the powers we have just described are, in fact, the powers exercised by police.

QUESTION: Mrs. Gordon, you said the state designated him as a public officer. What follows from that? Is there a

definition somewhere in the Constitution of New York, or elsewhere, as to what follows from being a public officer?

MRS. GORDON: Well, it is of some interest, Your Honor, that in this Court's opinion in Dougall v. Sugarman the Court adopted a formulation of public officer which --

QUESTION: Tied somehow to the definition of New York State?

MRS. GORDON: Yes, well, in New York State a public officer is one who exercises a portion of the sovereignty of the state, that is, he is involved in the creation of the law, the enforcement of the law, like a judge in the interpretation of the law.

Now, as a historical matter, categories of public officers have eventuated in New York, essentially by accretion, other than in the common law tradition, other than the few public officers that are maybe designated in the Constitution or by statute, and the individual police officer, the State Police officer, is specifically designated to be that public officer because of these powers which invoke the sovereignty of the state.

QUESTION: Well, of course, in making an arrest, they certainly invoke the sovereignty of the state, do they not?

MRS. GORDON: That is correct, Your Honor, he is, in fact, the embodiment of the sovereignty of the state.

QUESTION: Even directing traffic, I suppose.

MRS. GORDON: When the officer pulls you over to the side, I think, perhaps, you could look at it this way, Your Honor. The response of the individual in society to the officer's command, whether it is in the arrest or whether it is in obedience to an order that he may give to a crowd, or whether it is because he pulled you over to the side of the road, that response, that obedience is given to him because he is in this set of circumstances the embodiment of the law. In that sense, he is the sovereign and in that sense his orders shall be obeyed.

QUESTION: There are some judicial opinions, I don't recall them at the moment, that have said, even if they were not holdings, that the police officers on their beat exercise a broader discretion than a judge on the bench.

MRS. GORDON: Absolutely, Your Honor, and that is one of our points here, because, for example, it is only the judge at a criminal trial who is both interpreter of the law and trier of facts, who exercises the complete panoply of incidents that the police officer exercises. The police officer's functions are discretionary because, given the law, he must interpret it and he must apply it to the facts. His guidelines, if you will, in that respect, are exactly the same as the criminal court judge and, indeed, less complete than the juror because the juror functions under instructions

and charges given to him by the judge, and indeed less complete than the grand juror who functions under judicial advice and prosecutorial advice.

QUESTION: Don't you think they are all very completely spelled out in our Fourth Amendment decisions?

MRS. GORDON: What is spelled out, Your Honor?

QUESTION: The guidelines.

MRS. GORDON: Yes, Your Honor, but the guidelines are no more spelled out for the police officer than they are for the judge, and I think that is the quintessence of it.

QUESTION: Wouldn't he be subject to exactly the same examination that anybody else to find out whether he knew what the law was, whether he knew how to conduct himself, and whether he knew how to act in the name of the state? Wouldn't he have to pass the exact same examination?

MRS. GORDON: Yes, Your Honor, he would have to pass

--

QUESTION: And if he passed it and he was ahead on the list, he couldn't get the job?

MRS. GORDON: That is correct, Your Honor, because the preeminent concern here, Your Honor, is whether the state when it seeks to enforce its sovereign powers, shall have the choice of selecting from members of its own political community or whether it shall be compelled to select from members who are strangers to that community and who are members of

another sovereign community. It is a question of --

QUESTION: Why were they strangers?

MRS. GORDON: Because by --

QUESTION: They pay the same taxes you do.

MRS. GORDON: That's correct, Your Honor.

QUESTION: And they live right next to you.

MRS. GORDON: That is correct, Your Honor.

QUESTION: And they go to school with you.

QUESTION: Mrs. Gordon, I take it -- I am repeating my question now to your opposition -- if we were concerned here with the New York City Police Department, you would be making exactly the same argument.

MRS. GORDON: Your Honor, I think that is correct, but I think that is the exact limitation to which I would go. For example, State Police officers are said to perform the highest law enforcement function because of their statewide jurisdiction, but they do enforce all of the penal law of the State of New York as well as some other criminal statutes. A police officer in a metropolitan police district, while his geographic area would be narrower, equally enforces the full panoply of the penal law within that jurisdiction.

QUESTION: Do you know whether the statutes, or whatever it is, that govern the New York City Police Department require that officers be citizens?

MRS. GORDON: Yes, Your Honor.

QUESTION: So, you wouldn't be disturbing that. Would you do the same thing with a two-man police force in some small town in upstate New York?

MRS. GORDON: First of all, Your Honor, the Administrative Code of the City of New York does, in fact, require police officers of the City of New York to be citizens, and there is a case pending called De Franco v. Bronstein on that issue in the State Courts at the moment.

I would argue that the limitation would be applied in this way: To the extent that the officer has full powers of arrest and must make judgments with respect to broad guidelines, such as are encompassed in the penal law, I would suggest that he would be an appropriate person -- you would define a class of positions from which aliens can be excluded although we do not, of course, necessarily reach that issue in this case. It is his powers of arrest, his powers of search --

QUESTION: I am very much aware we don't reach it in this case, but I am trying to find out the extent of your argument. There are other states that do not have this kind of a requirement, is that not so?

MRS. GORDON: Well, that is open somewhat to question, Your Honor. We performed a survey at the request of the Court and it appears that at least 34 states have the requirement, the original 29 listed in the opinions of the

lower court, plus New York and California, which were not included, plus several other states which operate by regulation. That is not to say that the balance of the states do not have similar limitations. It is only to say that, in the course of our endeavors and apparently as verified by the FBI, they were not in statewide statutes.

It is a subject of some interest, Your Honor, to point out that while there would appear to be some states that do not have that limitation, 91% of the aliens live in states that do, in fact, have that limitation. And, accordingly, I do not think that we could infer much from those states which do not operate police departments without the limitation when their alien population is so small as to not have a particular impact.

QUESTION: Do you know what the origin is of this vast number of New York statutes that prescribe citizenship for masseurs, barbers, everything else? Do you know the historical basis for this?

MR. GORDON: Your Honor, I had occasion to review most of those statutes following this Court's opinion in Dougall v. Sugarman, and it is my understanding that their backgrounds are various and that they are variously justifiable. This particular statute that we are concerned with is, it seems to me, a common sense matter of history and tradition. New York State has always required its police officers to be

citizens and I believe that the support for that --

QUESTION: I don't think that's responsive to my question. I am asking if you know the origin of these many multiple New York requirements. And I think the answer is you don't know.

MRS. GORDON: I do not, Your Honor.

QUESTION: The law was enacted in 1917.

MRS. GORDON: Yes, Your Honor.

QUESTION: In the middle of a World War and shortly before we entered it, correct?

MRS. GORDON: Yes, that is certainly the case and certainly the tradition of local police forces in the state naturally goes back much further and it is quite apparent the City of New York limitation, for example, much pre-dates --

QUESTION: You didn't have a State Police Force until 1917?

MRS. GORDON: No, not that I am aware of in the formal sense that we talk about here.

QUESTION: Mrs. Gordon, your answer to my brother Blackmun's question suggests that you would necessarily be dealing with a total of 50 state police forces similar to New York, with respect to alien requirement. I know of my own home State of Arizona which has vigorously eschewed the idea of any sort of a state police force. They have a state highway patrol which simply enforces traffic offenses, and it

is my understanding that there are other states like that, too, so that you don't have 50 states who have a state police force like New York.

MR. GORDON: That is correct. For example, California, which does require citizenship for its state police officers, apparently does not require citizenship for its state highway patrol.

In possible elaboration of Mr. Justice Blackmun's comment before, the Division of New York State Police is not divided into a highway patrol, a specialized division covering more significant matters than a uniform force. It is one division encompassing three functional units, namely, the uniformed force, which provides a first-line response, and it consists of officers who go out and arrest and search and perform all the functions we discussed. One of those units is a three-way patrol unit, but its functions are not limited to giving tickets on the New York State Thruway, rather it has the criminal jurisdiction for that Thruway and it arrests and searches and may stop and give highway tickets, but performs all functions of enforcement within that geographical area. In addition, I would comment that while the BCI, the Bureau of Criminal Investigation, is a plainclothes unit and it does have a specific state security function, its powers and its pursuit of its investigations, or the exercise of its powers in the pursuit of its investigations, is no different

than the response required of the uniform officer who makes up the uniform force.

One last aspect on that would be that the Governor's detail came to the Secret Service of the United States. It is, itself, a branch consisting essentially of uniform officers with several BCI personnel. So that there is no allocation of higher and lower functions within these three essentially functional units of the department.

QUESTION: If you do not prevail here, if your friend prevails and we reverse, do you think New York can keep these aliens off of juries, or do you see no connection between them?

MRS. GORDON: It seems to me, regardless of the outcome in this case, that New York would be able to keep aliens off of juries, as it has a law on that point because of this Court's decision in Perkins v. Smith.

QUESTION: How about voting?

MRS. GORDON: I was just going to say that, Your Honor. It calls into very serious question the basis for making analytical distinctions within governmental offices. For example, if, as this Court has at least impliedly held in its prior decisions, voting and legislating can be functions consigned to citizens, even though the voter is remote from the lawmaking process himself and his vote may be one in millions in any given state or general election, to hold for

the Appellant, it would appear to me, one would have to find that the police officer's exercise of these extraordinary powers, of his arrest, of his search, of his use of force, indeed deadly force, his power over life and death of any individual in the society in the name of the state, is somehow less important than that voter's vote. And I don't think that that can possibly be an analytically sound distinction, and accordingly it would appear to me, as we have argued, that once we have determined that the juror performs a governmental office such that citizenship may be required of him, we then must likewise find that the police officer similarly performs functions of significant and governmental nature, such that his class may likewise be closed to aliens.

I think, by the way, that this is one of the faults of the dissent below. The dissent characterizes voting and legislating as political. It eschews the same characterization, obviously, for the police force. And I don't think that that distinction again can be made, because in a government of three co-equal branches we cannot designate voting, especially under the circumstances as I outlined where it may have very little, if any, potential ramification, as more important than law enforcement. Nor, of course, can we designate it as more important than the judicial function of interpreting the law. And I think that this is one of the erroneous assumptions that the dissent below makes.

I would say several other points with respect to that dissent and, that is, with respect to the issue raised by Justice Mansfield and I think briefly by Justice Marshall before, that aside from the designation of a class of office holders, is there anything about the alien, by virtue of his status, which makes him peculiarly unsuitable to perform the functions of the police? And while we urge this as a secondary matter, we believe that there are in fact such situations. For example, the alien cannot vote. To call upon him then for the vigorous enforcement of the law, laws which he has no voice in creating, would appear to be egregiously anomalous. It appears --

QUESTION: That was true In Re Griffiths, that anomaly, if it be one.

MRS. GORDON: That is true, except we do not ordinarily consider the attorney qua attorney as a law enforcer, and for that reason he is not an officer. Certain attorneys may, indeed, be governmental officers but --

QUESTION: That would also apply to 70% of the electorate who don't vote.

MRS. GORDON: That is correct, Your Honor, but it is the capacity to be able to vote, rather that is at issue and aliens are incapacitated from doing so.

In addition, it is illustrative --

QUESTION: What about those state officers who

make the decision whether to prosecute or not?

MRS. GORDON: That may very well be one example of the attorney who is a governmental officer, but I do not think the attorney's, that prosecutor's decision not to prosecute in a case, seemingly, is akin to the police officer's decision not to arrest. Accordingly, if we were to say --

QUESTION: What about the decision to prosecute? If you've got the power to decide whether or not to bring a criminal charge that could result in life imprisonment or death, what about prosecutors, may they be aliens in your state?

MRS. GORDON: The issue has not been presented, but it would seem to me, Your Honor, that one could fairly argue that that class should be limited to citizens, because that power to -- the use of the coercive power of the state -- which is what the prosecutor does when he seeks an indictment or files some information would seem to me to be governmental, and arguably limited to citizens. However, judges are -- by law, both federal and state law, Your Honor, are public officers and are limited to citizens. However, I would call to Your Honor's attention that while the prosecutor's functions are drastic, perhaps, the police officer's functions are even more drastic. We do not normally have the situation where the prosecutor must make an assessment as to whether, as to how much force or deadly force to use in a given situation.

The State Police Officer exercises that function because he is, indeed, the representative of the state.

QUESTION: In other words, the prosecutor has no discretion to pull the trigger and shoot someone under any circumstances, but a policeman has it under many.

MRS. GORDON: Where that is the very activity or very power that is vested in the policeman, that is correct.

Returning for a moment to the other characteristics which aliens have which we believe makes them unsuitable, are those which evidence his citizenship to another sovereign and his subjection to the laws of that sovereign. For example, an alien in the United States may be conscripted by the country of his nationality. However, in the United States he may plead treaty exemption, he may plead international law, he may change his immigration status and avoid the draft and military service in the very country which people like Appellant suggest have the laws which they wish to enforce.

I think that's sufficient, Your Honors.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Weiss, do you have anything further?

REBUTTAL ORAL ARGUMENT OF JONATHAN A. WEISS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WEISS: Yes.

First, as to whether there are some police

departments who do not have the citizenship requirement, they are mentioned in Footnote 4 of Judge Mansfield's dissent. I would just like to focus briefly on the question of sovereignty and its relationship to taking an oath, which was discussed In Re Griffith. It should be noted, by the way, in passing, that aliens who are in the Army also serve in the Military Police there. So that aliens who pay taxes, are subject to the draft, who protect the Government's security also protect the internal security inside the Army. It would seem to be a fairly strong analogy, as good as --

QUESTION: Are you suggesting that the Army, the military services, could not exclude aliens from military police duty?

MR. WEISS: No, I am not suggesting that, I am saying they do not, Your Honor.

QUESTION: That's a matter of choice and discretion.

MR. WEISS: Yes, but it becomes an issue as to whether or not there were police departments which in fact continued because of a uniform policy across the country. This is an illustration of a sovereign, United States, that has chosen not to make this alien exclusion.

The issue presented to the Army would, of course, be a much more difficult issue than this case, being both federal and also national security. In terms of a congressional statement implicitly as to the reliability of aliens

who serve in the police force, this seems to be a fairly powerful implication.

The discretion that a police officer has is not a political discretion, is not a policy discretion. It is a discretion different in function and nature from those acts thought of in Dougall suggestion. What you have there are political decisions of a policy-making sort. What you have here are factual applications. It functions inside a given framework, rather than gives the framework. It functions in terms of facts rather than in terms of continued public policies.

As far as the representation of a sovereign by a police officer, I think it would be demeaning to this profession if it is suggested that a police officer is more of a representative of the law, thinks more of the law than a lawyer. A lawyer is an embodiment to the citizenry as the law. He speaks for the law to the citizen. He speaks through the law. He is an officer of the court. To whatever degree there could be some implication that the sovereign appearance, of people acting on behalf of the state should exclude aliens that would apply much more strongly to lawyers than to police officers, and that is a case which this Court has already included its opinion on.

QUESTION: Of course, lawyers can't make arrests, per se, can they?

MR. WEISS: They cannot, but police officers cannot be notary publics, file affirmations in court and do those sort of things.

QUESTION: They might, if they became notaries public.

MR. WEISS: They would have to have a different setup to do it. They still would not be able to make affirmations.

QUESTION: What's your view of the so-called citizen's arrest which has been part of our folklore if not our law? Would an alien not be able to make a citizen's arrest?

MR. WEISS: I would not know the answer to that. I would suggest that to whatever degree there is viability to the citizen's arrest, which I don't think there is much any more, that a lawyer would not have a particularly higher role in that than anyone else. If it is defined as citizenship, historically, I suppose an alien could not, but --

QUESTION: Do you think an alien could make a citizen's arrest?

MR. WEISS: I would think not, by definition.

I am not sure anybody can make one, but I would assume, by definition, not.

Thank you, very much.

MR. CHIEF JUSTICE BURGER: Thank you counsel.

The case is submitted.

(Whereupon, at 2:24 o'clock, p.m., the case in the above-entitled matter was submitted.)

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