ORIGINAL

In the

Supreme Court of the United States

CYRUS R. VANCE,
SECRETARY OF STATES, ET AL.,

APPELLANTS,

V.

HOLBROOK BRADLEY, ET AL.,

APPELLEES.

No. 77-1254

Washington, D. C.
November 27, 1978

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CYRUS R. VANCE, Secretary of State, et al., Appellants,	
v.	No. 77-1254
HOLBROOK BRADLEY, et al., Appellees.	

Washington, D. C.,

Monday, November 27, 1978.

The above-entitled matter came on for argument at 10:03 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:

WADE H. McCREE, JR., ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of the Appellants.

MRS. ZONA F. HOSTETLER, ESQ., 1526 Eighteenth Street, N. W., Washington, D. C. 20036; on behalf of the Appellees.

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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 first this morning in 1254, Vance, the Secretary of State, against Bradley.

Mr. Solicitor General, you may proceed whenever you're ready.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

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

This appeal presents the question: Whether Section 632 of the Foreign Service Act of 1946, which requires that persons covered by the Foreign Service Retirement System to retire at age 60, violates the equal protection component of the Fifth Amendment to the United States Constitution?

Appellees are six former and four current Foreign Service employees in the Department of State or the International Communications Agency, formerly the United States Information Service, and an organization representing such employees. They filed this action to challenge the validity of the Act. They make statutory as well as constitutional claims, and sought a declaration of invalidity, injunctive relief, back pay and reinstatement.

The district court dismissed the primary nonconstitutional claims, including the Age Discrimination in Employment

claim; and appellees abandoned the remaining nonconstitutional claims.

A three-judge court was then convened to consider the constitutional contentions.

Appellants contended that the constitutional issue was a question of law, and moved for summary judgment. Appellees argue that the resolution of the constitutional issue required the presentation of evidence, to show that there was no rational basis for distinguishing between Foreign Service employees, who must retire at age 60, and Civil Service employees who, at that time, could continue to work until age 70.

QUESTION: Mr. Solicitor General, what is the present retirement age for a general officer in the military service, if you know?

MR. McCREE: I'm unable to furnish that information, if the Court please.

QUESTION: It is less than 70, though?

MR. McCREE: There is a compulsory retirement age, and it is less than 70. As a matter of fact, the Armed Services have -- well, at least on the naval side -- have an up-or-out program, and a person is retired or selected out if he isn't promoted within a certain number of years.

QUESTION: At a given age.

MR. McCREE: At a given age.

This Court considered that in Schlesinger vs. Ballard not very long ago. And upheld in that case a distinction between male and female officers. Male officers, I believe, had to move up or out after nine years in grade, and female officers 13 years. And this Court found that there was a sufficient difference in their circumstances, because of the different nature of assignments; so that the female officer had fewer chances for promotion and therefore she might be given 13 years in grade instead of nine.

And of course that impinges upon the issue here, as we will argue subsequently.

At the time this action was brought, Civil Service employees were required to retire at age 70, but on April 6, 1978, Congress enacted the Age Discrimination in Employment Act amendments of 1978, repealing the statute requiring most civil servants to retire at age 70. And currently, effective September 30, 1978, there is no compulsory retirement age for most civil servants.

QUESTION: Does that mean that if this Court were to affirm the judgment of the district court there would simply be no retirement age for Foreign Service officers?

MR. McCREE: It would appear that that would follow.

QUESTION: We certainly couldn't substitute "70" out of the air, I take it, if there is no congressional 70-year-old requirement at the present time.

MR. McCREE: Well, that's certainly so. The court below thought at one time that a challenge was made to age 60, but that appellees would accept age 70; and in fact, in a footnote, the court indicated that it was satisfied that an age 70 mandatory retirement for Foreign Service officers would be valid.

QUESTION: This wasn't a settlement conference, though, I take it?

MR. McCREE: Pardon me?

QUESTION: This wasn't a settlement conference, I take it, it was with --

MR. McCREE: Oh, no, this was in the court's opinion. It later struck from its opinion the footnote that indicated that appellees had failed to show that age 70 was not rationally related to a legitimate government purpose, although it had held that age 60 was not rationally related. But after the amendment came along, it struck this portion of its footnote and now, as the court suggests, a Foreign Service officer or other persons in the Foreign Service Retirement Program apparently would have indefinite service, as do other civil servants.

QUESTION: Your sister on the other side, Mrs. Hostetler, disagrees with that, at least in the brief -- disagrees with that conclusion, at least in her brief.

MR. McCREE: That they would have indefinite

service?

QUESTION: Yes. As I read it. We can hear from her perhaps on this. Perhaps I misunderstood it.

MR. McCREE: I believe I recall that, but it would seem logical to me that, as Mr. Justice Rehnquist has suggested, we couldn't pull age 70 out of the air --

QUESTION: Right.

MR. McCREE: -- and impose it.

On the basis of affidavits from both sides and submissions in response to the court's request for supplementation of the record, the court treated the case as if it had been submitted on cross-motions for summary judgment, and declared the mandatory retirement provision unconstitutional.

We submit that the court correctly recognized that neither fundamental rights nor suspect classes are involved in the distinction between Foreign Service employees and Civil Service employees, and that therefore the rational basis test is the appropriate one. And that the statute, therefore, is presumptively valid, and the challengers have a heavy burden of proving invalidity.

Nevertheless, although it applied, as we suggest, the proper standard, the court held, "on the record established in this case, the early mandatory retirement cannot survive even this minimal scrutiny."

The court, in considering the proffered justifica-

tions, first, that the special stresses and unique burden of employment in the Foreign Service is the result of frequent and extensive changes in environment, often accompanied by exposure to unfamiliar and unfavorable living conditions, and, second, the implementation that it afforded to the personnel management program for Foreign Service officers, did not discuss the legislative history at all, of these two purposes; but made its own assessment of the employment conditions of Foreign Service and Civil Service employees.

And in doing so, it concluded that "less than ten percent of the American civilians who work overseas for the government are forced to retire at age sixty" and that many of the overseas personnel not subject to mandatory retirement have jobs similar to those of the Foreign Service personnel, and may be stationed also in hardship posts.

Accordingly, it held, upon this determination, that a system under which some federal employees working abroad are singled out for early retirement is "patently arbitrary and irrational" and it invalidated the legislation.

We contend that the district court erred in not considering the legislative history and in substituting its judgment for the decision of the Congress to create a separate Foreign Service with its own combination of benefits and obligations.

QUESTION: Mr. Solicitor General, did I miss it?

AID discussed here at all?

MR. McCREE: Yes, if the Court please. The Agency for International Development is involved in the Foreign Service Retirement Act.

QUESTION: Right.

MR. McCREE: It and the former United States Information Service that's now the International Communication Agency, and the Foreign Service --

QUESTION: But AID is also in there?

MR. McCREE: Yes, if the Court please.

QUESTION: And it includes all of the -- or at least many of the staff jobs, the secretarial jobs, the jobs like that, doesn't it?

MR. McCREE: It now includes them as well as the Foreign Service officers, persons with officer grade or reserve officer grade as well.

This Court held in Usery vs. Turner, Alper & Miney(?) that the constitutionality of an Act of Congress may be sustained by looking solely to concerns expressed in the congressional hearings and debates. Because in that case the three-judge court refused to accept evidence, and this Court satisfied itself with the rational relationship by merely looking at the congressional history.

This Court also, in Whalen vs. Roe in 1977, considered a challenge to a New York drug prescription computer

scheme. That was a scheme under which a physician, dispensing certain Schedule II drugs, which were opium derivatives and cocaine, was required to prepare in triplicate a report indicating the name of the physician who prescribed the drug, the name and address of the patient, and the quantity of the drug prescribed, and then to turn this over to the State Government, which then would place it into a computer bank, and the intention was to determine whether there was a recurrence of prescription by certain physicians, or the filling of prescriptions unduly by certain pharmacists, or the acquisition of narcotics by certain patients.

This was challenged, and the Court said this: that the State's interest in the control of narcotic drugs is valid, and the scheme is reasonably related, and the fact that the district court held that the State had failed to demonstrate that it was working was not invalidated; it said it was enough to see that there was a rational relationship between the scheme and the objective, which was the control of the narcotics traffic.

QUESTION: But, Mr. Solicitor General, that wasn't an equal protection case.

MR. McCREE: It was not an equal protection case, but it is illustrative, we submit here, in showing that the failure of proof to show that a scheme works doesn't destroy a determination that it's rational and doesn't therefore require

the Court to invalidate it.

And that seems to be what happened here. The district court entertained evidence and determined that large numbers of civil servants were living abroad under circumstances which it found indistinguishable, at least legally indistinguishable from those of the Foreign Service people who are under this mandatory retirement; and, for that reason, determined that there was no rationality to the program.

We suggest that if the rationality is demonstrated, evidence that it doesn't include everyone or that it might be done in another way, or that it just doesn't work, does not invalidate it.

As a matter of fact, in Whalen vs. Roe, the Court quotes from Mr. Justice Brandeis, who suggests that the States must be given latitude to experiment in methods of solving the problems with which it's confronted. And if the program is rationally related, the State should be given an opportunity to see whether it works, and it shouldn't be invalidated just because it cannot demonstrate on a challenge that it is working.

Another quotation from that, if I may,"the New York statute challenged in this case presents a considered attempt to deal with such a problem; it is manifestly the product of an orderly and rational legislative decision."

And we submit that the language "it is manifestly the product" means that this Court will apply its experience

and its general knowledge to determine rationality, and it doesn't require evidentiary proof of a relationship. But that is exactly what the court below did in substituting its judgment.

The legislative history of this provision goes back to 1924, when a single Foreign Service was first established. The Foreign Service Act of 1924, sometimes known as the Rogers Act because of Congressman Rogers, I believe of Massachusetts, who was its principal sponsor. And since this is the only direct legislative history, I would ask the indulgence of the Court to permit me to read from a colloquy on the Floor of the House of Representatives, when the principal sponsor of the 1924 legislation, Representative Rogers, explained that Foreign Service officers would be required to retire five years earlier, at that time age 65, than Civil Service employees who, just four years earlier, were first brought under a mandatory retirement at age 70. Because, as he said, Foreign Service officers, like military personnel, but unlike most Civil Service employees, commonly were rotated among remote posts overseas and frequently experienced disruptive changes in their way of life.

Mr. Rogers said, "I think the analogy of the Foreign Service officer to the Army officer and to the naval officer is much more complete than to the Civil Service employee in Washington. The Foreign Service officer is going hither and

yon about the world, giving up fixed places of abode, often rendering difficult and hazardous service of prime importance to the United States."

QUESTION: But a good many things have happened, both in the world and in our country, since 1924, haven't they? Both in terms of where Civil Service employees might be employed, that is, where they might be located in their employment, and also in terms of developments like air-conditioning, fast transportation and communication and so on.

MR. McCREE: That's exactly so, and in fact the location of hardship posts have changed, but there are still hardship posts. One of the changes that has occurred, of course, is the emergence of the new nations, principally in Africa, in Sub-Saharan Africa, and which normally did not have members of our Foreign Service, because they would attend the seat of government of the nation that had colonized these now emerged nations.

QUESTION: We would have consular officers in those colonies and protectorates, wouldn't we?

MR. McCREE: To the extent that there was commerce and intercourse with those nations to justify it; but -- with those colonies to justify it.

QUESTION: Yes.

MR. McCREE: But just as what might have been a hardship post in 1924, when Representative Rogers spoke, is

now in those new posts which may even present more hardships.

I'd also like --

QUESTION: In any event, Mr. Solicitor General, are those considerations which we are entitled to take into account, or are those considerations for the Congress?

MR. McCREE: Well, Mr. Chief Justice, you anticipated my very next remark.

QUESTION: Excuse me.

MR. McCREE: I was going to -- I thank you for it -- I was going to suggest that in Schlesinger vs. Ballard, the case that we earlier discussed involving the naval officers, in footnote 12, which is the very last footnote to the opinion of the Court, the Court says exactly that, that it's for the Congress to decide when conditions no longer justify a distinction that was valid at the time it was imposed.

And we would submit that that is peculiarly a legislative judgment to be made.

QUESTION: Mr. Solicitor General, can I pursue this a moment, because you really are raising quite a fundamental point, that I am not sure the Court has ever squarely addressed.

Do you suggest that the test to the constitutionality of the statute is totally dependent on the conditions at the time the statute was enacted, or is it conceivable, say in the area of sex discrimination, that a discrimination that was perfectly reasonable when adopted -- because very few women

worked, for example -- might, 75 years later, be totally irrational because there's no distinction any more in employment? Could a statute which was originally reasonable, or satisfied equal protection principles, become unconstitutional merely by the passage of time?

MR. McCREE: Well, I would have to concede the possibility that it might. But I think, unless it was manifestly unconstitutional, --

QUESTION: Well, as soon as you've conceded that, then aren't we just confined to looking at rationality as of today? Because if it's totally irrational, why, then, of course, it's bad whenever the irrationality arises, if I understand you correctly.

MR. McCREE: Well, I think if there is any question whether it still bears a rational relationship, we must then indulge the Congress's right to make that determination. I think only when we would find that it was irrational, that it bore no relationship; but, in that event, I would agree with the Court, that the Court could make the determination itself.

But we suggest that here that isn't so at all, because --

QUESTION: Well, I understand that. But let me just be sure I've your position clearly in mind. You do concede that if the Court concluded that today the statute was

irrational, then you would lose?

MR. McCREE: Oh, I think I would have to lose.

QUESTION: Yes. All right.

MR. McCREE: But I would say that it would have to be manifestly so, and the Congress -- and the Court would have to conclude that its rationality could not be maintained on any basis at all, such as the Court said in McGowan vs. Maryland, it would have to -- particularly in a case like this where we're using -- where we don't have a fundamental right involved, nor do we have a suspect class involved.

QUESTION: In that analysis, Mr. Solicitor General, made by the Court in the consideration of the case, would the Court -- should the Court take into account that Congress is indicating a very great alertness in recent years to age discrimination, gender discrimination, and other such factors, with a view to --

MR. McCREE: Oh, I would agree that this is something of which the Court should take notice, just as I suggested that the Court should have looked at the earlier legislative history of this.

However, if it did look, it would see that in the Age Discrimination in Employment Act the Foreign Service was excluded from the lifting of the age 70 ceiling.

Now, there is some suggestion that perhaps it was excluded because there was some haste in getting the matter

through the Congress, and they didn't want to route it through a Committee different -- the Foreign Service Committee, which would be a committee different from the committee that considered the Age Discrimination in Employment Act amendments; but it's significant that the Congress did accept and did recognize that it was still different.

QUESTION: General McCree, following up on my brother Stevens' question, if we are to consider rationality or irrationality as of the present day, are we then entitled to take into consideration the subsequent legislation by Congress such as the up-or-out promotional system which was not a part of the enactment in 1924, but certainly if you put it in the matrix of the present day, is a part of the Foreign Service law in determining rationality?

MR. McCREE: Thank you for the question. And I would certainly say yes, the Court should take that into consideration. That was the second justification that was offered to the three-judge court, that this implemented the up-or-out program that the Foreign Service uses.

That also would indicate that it still has -- that it still bore a rational relationship to a legitimate aim.

QUESTION: General, if I could back up a minute, with your permission. If there were a showing that there were no more "hardship" posts in the future, the statute goes out.

Would that be a change of sufficiency?

MR. McCREE: That would be a significant change, but there might be other factors, factors other than just being stationed in a hardship post. One of the factors might be the recurrence of change, the fact that a person could hardly sink his roots in one place --

QUESTION: I'd hate to see the statistics of the number of people that change their town for employment purposes now as compared to '24.

MR. McCREE: That is so. We would suggest that perhaps the differences within the United States --

QUESTION: I mean, they movedwhole departments of Civil Service employees to Mississippi last year.

MR. McCREE: I would certainly agree with the Court that that is the phenomenon of our current lifestyle, but I would suggest that being moved from one continent to another or being subject to removal is a more traumatic upheaval.

QUESTION: I don't see any difference in moving from one swimming pool to another one.

MR. McCREE: If those were the circumstances attendant to all posts; the news recently has had a sensational story and a very tragic story that included the death of a member of the Congress investigating a situation in Guyana, one of the recently emerged nations in South America. With Congressman Ryan and shot was Richard Dwyer, who was age 47, was under the mandatory retirement age considerably, and he

was the Deputy Chief of Mission in Georgetown, and his duties required him to accompany persons to dangerous sites, and he had, we presume, the vigor of a person 47 years old, and was subjected to this risk of his life. And so we would submit that the day of the hardship posts, the day of the extraordinary risk, the day of the exposure to more than ordinary civil service experience has not passed.

QUESTION: But terrorism, vulnerability to terrorism doesn't have much to do with chronological age, does it?

MR. McCREE: It does not, and the Court reminds me that at the last Olympiad there was a terrorist incident.

But we suggest that that is further evidence that there is a rational relationship of having persons with the physical vigor and stamina to be able to rise to these problems, which can occur any place, because one would hardly call Munich a hardship post in terms of the creature comforts that it affords.

If the Court please, I believe I have about two minutes left, and I would like to reserve that for rebuttal, if I may.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Solicitor General.

MR. McCREE: Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Hostetler.

ORAL ARGUMENT OF MRS. ZONA F. HOSTETLER, ESQ.,

ON BEHALF OF THE APPELLEES

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

This case turns on facts. It presents one simple narrow issue to this Court, and that is: Was the court below, which studied the facts, wrong when it concluded that there's no rational basis for mandatorily retiring before age 70 the particular group of white-collar employees involved in this case?

QUESTION: Do you think that court was in any better position to make that evaluation than we are now?

MRS. HOSTETLER: Well, it's certainly within the prerogative of this Court to review the record and to determine whether the court below was mistaken; but that --

QUESTION: What I'm trying to get at is whether the review here is any different from the review, in quotation marks, made by that court?

MRS. HOSTETLER: No, but I submit that the facts will show, if this Court looks at those facts, that there is in fact no rational basis for the statute at issue.

And, Mr. Justice Burger, you inquired about the Armed Forces. I want to make it very clear that all that is involved in this case is the question of whether this particular group of white-collar office workers are unable to perform

the particular jobs that they are assigned in the Foreign Service between the ages of 60 and 70, or are less to perform them than are employees under the age of 60.

To affirm the court's decision below will not require this Court to upset its decision in Murgia, nor will it require this Court to hold that mandatory retirement can never be applied to people such as the uniformed policemen in Murgia, who have physical jobs and for whom an earlier mandatory retirement age can be said to have a rational basis to the particular job that they have to perform.

And certainly in the Armed Forces we all know that our military men and women must be in combat-readiness and must be either fighting wars or prepared to fight wars.

I might point out, however, that in the Defense Department, all of the civilian employees, large numbers of whom travel throughout the world and, in fact, spend 15, 20 and 25 years in service overseas, are not subject to early mandatory retirement, but in fact are treated as Civil Service employees.

Mr. Justice Rehnquist, to refer to the point you raised with Mr. Solicitor General, this case will raise only the issue of whether the employees in the Foreign Service between the ages of 60 and 70 were able to perform the work of the Foreign Service, the court below asked us on several occasions whether we were claiming that mandatory retirement at any age is unconstitutional; and we made it very clear that

we were not making that claim.

And the evidence that we submitted went primarily to show that employees between the ages of 60 and 70 are able to perform the particular jobs of the Foreign Service. We really did not try to introduce evidence or to make the argument that employees over the age of 70 can also perform that work. I think that argues --

QUESTION: Well, Mrs. Hostetler, what then is the state of the law if this Court affirms the judgment of the district court? Are Foreign service officers required by law to retire at 70 now? And if so, by what law?

MRS. HOSTETLER: No. The court's order below has been stayed and so at the present time they are still required to retire at age 60.

QUESTION: Well, I presume if we affirmed it, we would dissolve the stay. So that if it were affirmed and the litigation was closed, would they be required by law to require --

MRS. HOSTETLER: I don't believe so, because the court below very clearly said in its opinion that the Foreign Service could not retire employees before the age of 70, that they were entitled to work until age 70.

QUESTION: But what --

MRS. HOSTETLER: The court's opinion below doesn't say that they may work after 70.

QUESTION: But is the right of a Civil Service employee to work or not to work in the face of a congressional proscription or mandatory retirement dependent on the opinion of a three-judge district court?

MRS. HOSTETLER: If it is affirmed by the Supreme Court.

QUESTION: But this was a constitutional attack, at least as it survived here.

MRS. HOSTETLER: That's right.

QUESTION: Originally there were some statutory issues, but now it's purely based upon the so-called equal protection component of the Fifth Amendment. And that attack must be that Foreign Service officers and Civil Service officers are equivalent and therefore it violates the Constitution for the Congress to treat them differently.

MRS. HOSTETLER: Well, there are --

QUESTION: And if they are equivalent, where does the age 70 then come into the picture, now that Congress has repealed that with respect to Civil Service employees?

MRS. HOSTETLER: Well, there are Civil Service employees who are required to retire before age -- that are still mandatorily required to retire. Law enforcement personnel, for example; air traffic controllers, for example.

In other words, the question turns on the particular job and whether or not there is a rational basis. Now, it is

true that there will still be left open for a constitutional litigation another day whether Foreign Service employees should have the right to work without any mandatory retirement age at all. I'm not suggesting that that issue isn't there, I'm only say that we did not litigate that issue in this case. And it's only fair to bring to your attention that we did not, and that the Court did not focus on that issue, and that there's no evidence in the record, or very little evidence going to the point of whether or not a statute requiring mandatory retirement at some age over 70 is or is not rational.

QUESTION: What does the Secretary of State do when a member of the Foreign Service Corps reaches age 70, if the judgment is affirmed by this Court? Does he retire him pursuant to the Act of Congress, or does he just go back to court and ask for instructions?

MRS. HOSTETLER: Well, we have ten years until someone reaches 70, and I would suppose that in that period of time the State Department will decide what it wants to ask Congress to do in light of the fact that a provision of the statute has been declared unconstitutional. This circumstance often happens when a provision of a statute is held unconstitutional.

QUESTION: But usually there is some other statute that will be held to be governing, and it's the comparison

between people governed by the other statute and the people governed by the statute held unconstitutional and struck down, so there's an automatic reversion to the statute that is still valid.

MRS. HOSTETLER: Well, there would be no automatic reversion to the Civil Service statute, because the Civil Service statute simply doesn't apply to Foreign Service employees.

No, the Foreign Service statute will still be a separate statute, totally apart from the Civil Service statute --

QUESTION: Yes, but not if it's invalidated.

MRS. HOSTETLER: -- and from the Age Discrimination in Employment Act.

QUESTION: But this provision of it won't remain if it's invalidated. If the district court is affirmed --

MRS. HOSTETLER: That is correct, and then there would be no provision in the Foreign Service Act as to Foreign Service employees.

QUESTION: For retirement at any age.

MRS. HOSTETLER: There will be retirement at any age unless Congress chooses to impose another mandatory retirement age over 70. Let's suppose Congress imposes an age of 72 or 73, then it is still open to question whether that age is constitutional, whether there is a rational basis

for retiring Foreign Service employees at age 72.

QUESTION: Whether that age as such is constitutional, or whether that age compared to Civil Service employees is constitutional, under the --

MRS. HOSTETLER: Well, there's two ways to look at the classification in this case.

QUESTION: I know.

MRS. HOSTETLER: One is that the Foreign Service statute itself makes the classification. It puts in one category Foreign Service employees who are under the age of 60 and able to -- and in another category Foreign Service employees over the age of 60. And in one instance it allows the Foreign Service employees below the age of 60 to continue to work, so long as they are able to perform; and in the other it does not.

Another way to look at the classification is --

QUESTION: With some exceptions.

MRS. HOSTETLER: With some exceptions.

QUESTION: For instance the people of Ambassadorial range.

MRS. HOSTETLER: That's right, Ambassadors are not subject to mandatory retirement.

QUESTION: But you've made no equal protection attack upon that.

MRS. HOSTETLER: No, I have not.

QUESTION: Based upon that differentiation.

MRS. HOSTETLER: We have not. You are correct.

QUESTION: Did I correctly understand your observation about Air Traffic Controllers for example, as one example you gave, that it is within the power of Congress to fix a low age for that category?

MRS. HOSTETLER: Absolutely. So long as the Legislature has a rational basis, so long as there is a rational relationship between the classification and the mandatory retirement age, at any age, and the objective of the State, it's certainly up to Congress to do that, and in fact there may be many, many classifications and many, many mandatory retirement statutes that will still exist.

Certainly the Armed Forces will no doubt continue to have lower mandatory retirement age.

QUESTION: Mrs. Hostetler, this prompts me to ask you a rather basic question about the theory of your case. As you point out, there are two separate classifications created by this statute, one between persons working for the Foreign Service who are over 60, and the other under 60; and, secondly, a classification of Foreign Service versus Civil Service. Which of the two do you rely on as making this statute unconstitutional?

Or do you rely on both?

MRS. HOSTETLER: We rely on both.

QUESTION: In other words, do you contend then that if all government employees had to retire at age 60, the statute would still be unconstitutional?

I didn't so understand your brief, but I'd like to know whether you so contend.

MRS. HOSTETLER: No. If all employees had to retire at age 60, we would still contend that the statute was unconstitutional. We would make somewhat different arguments.

Let me put it another way: If there were no Civil Service employees working overseas --

QUESTION: Just say you have everything exactly the same, but just everybody has to retire at age 60; would you still say the statute is unconstitutional?

MRS. HOSTETLER: Yes, because societal patterns, the societal norm today is to allow people to work until age 70. The Age Discrimination in Employment Act allows persons in the private sector to work until age 70 and, indeed, makes it wrong for employers to fire people before age 70.

QUESTION: Well, if you're right on that, we don't even have to look at the comparison with the Civil Service.

MRS. HOSTETLER: I beg your pardon?

QUESTION: On this theory, we don't even have to look at what happens to Civil Service.

MRS. HOSTETLER: That is correct, you do not have to

look at the Civil Service. The fact that Civil Service employees worked until age 70 at the time this suit was brought and now work until they choose to retire, and the fact that some Civil Service employees work overseas in the same kind of jobs is simply cumulative evidence to the evidence in the record that there is no rational basis for requiring Foreign Service employees, because of the nature of their job, to retire as early as age 60, an age which is far below the age accepted in society today as an age to quit working, an age which is below what all the medical and scientific evidence shows a person is able to work.

QUESTION: Mrs. Hostetler, you used the phrase "societal norms" and "accepted by society"; who sets those norms? What sort of norms are you referring to?

MRS. HOSTETLER: Well, the Age Discrimination in Employment Act --

QUESTION: The general public?

MRS. HOSTETLER: The Age Discrimination in Employment Act amendments that were recently passed now mean, as a result of those amendments, that if the Foreign Service employees can be retired at age 60, they will be virtually the only white-collar workers in the whole country --

QUESTION: Well, my question goes to who -- what entity -- what is the source of determining that something is a societal norm?

MRS. HOSTETLER: Well, we have to look at the --

QUESTION: Now, if you're talking about an Act of Congress, that's a better way to describe it.

MRS. HOSTETLER: No, we have to look at actual facts and data in society, many of which is reflected in this record. For example, we submitted uncontradicted evidence that corporations, non-profit organizations, churches, missionary groups work overseas, employ thousands of volunteers, hundreds of thousands of volunteers and employees, and employ them between the ages of 60 and 70. The undisputed evidence is that those employees are as able to work oversease, are as competent as employees under the age of 60.

In short, there is nothing in the record to show that employees working overseas between the ages of 60 and 70 are not competent to perform their work.

QUESTION: Mrs. Hostetler, supposing that Congress were to say that because of the high rate of unemployment no person should hold any government job for more than 30 years?

MRS. HOSTETLER: That's perfectly all right. I do not see any constitutional infirmity to that; in fact, the government now has changed the years in several of its agencies. For example, in the Peace Corps -- for different reasons. In the Peace Corps an employee may not work for more than five years. There is nothing wrong with insuring

turnover in an agency on a fair basis. A term of years applied across-the-board, equally to everyone is not discriminatory, is not irrational.

QUESTION: Do you have --

QUESTION: May I remind you that the Peace Corps is as far from the Civil Service as you can get.

MRS. HOSTETLER: That's correct. But a term --

QUESTION: Well. We're talking about Civil Service now, aren't we?

MRS. HOSTETLER: And the Armed Forces also have a term of years. All I'm suggesting, Mr. Justice Marshall, is that I don't see a constitutional infirmity in an agency or government imposing a term of years on government employment.

QUESTION: Isn't there justification for an up-or-out policy --

QUESTION: You're really going to get back to --

MRS. HOSTETLER: I'm sorry?

QUESTION: Isn't there a justification then for an up-or-out policy, that if you haven't made a certain level in the service by a certain age, then you must get out?

MRS. HOSTETLER: Well, that's the kind of system that we have in the Foreign Service, it's not linked to age so much, but year after year -- every year employees in the Foreign Service are evaluated and they are ranked in order of their class, those in the bottom percentages of their class,

which varies, and has ranged from seven to ten percent, are selected out.

QUESTION: You don't attack that?

MRS. HOSTETLER: No, we're not attacking the selection out at all; no. In fact, --

QUESTION: Mrs. Hostetler, are you going to get to Murgia?

MRS. HOSTETLER: Sure.

QUESTION: I was just wondering about how your time was going.

MRS. HOSTETLER: It's running.

We agree with the government that Murgia is a controlling case. We see nothing inconsistent with this Court's decision in Murgia with the decision below in this court.

QUESTION: Mrs. Hostetler, I know you're going to talk more about Murgia, and I don't mean to cut it out, but this -- I have another very basic question that troubles me. On the second half of the discrimination, not over 60 versus under 60, but Foreign Service versus Civil Service, you say that's a separate independent reason for holding the statute unconstitutional.

Now, I'd like to test the notion that the government has a constitutional obligation to treat all like employees equally. Do you say -- and you have a package of benefits

here -- if these people perform essentially the same work but were paid different salaries, would the lower-paid group have a lawsuit to get the same amount of compensation as the others?

MRS. HOSTETLER: Not at all. The government --

QUESTION: Why not?

MRS. HOSTETLER: The government may impose different terms of employment to any number of categories, so long as each term is not constitutionally invalid.

QUESTION: But say there's just no justification in terms of difference of employment, say they are secretaries with the same rate of speed, same skills, work the same number of hours, the same working conditions and all the rest, one group is paid $25 a week more than the others. Is there a constitutional violation?

MRS. HOSTETLER: Well, there might be if the conditions were precisely the same. And it's hard for me to imagine that working conditions in two different agencies would be precisely the same, and that the talents and requirements of the work force in each agency, in the respective agencies would be precisely the same.

QUESTION: Well, they could have different salary scales, different promotion policies, different vacation schedules; would those things violate a constitutional duty of the United States Government to treat all employees equally?

MRS. HOSTETLER: No. We're not --

QUESTION: Well, if not, then why is there any constitutional issue here at all?

MRS. HOSTETLER: We are not here claiming that Foreign Service employees must be treated exactly the same as Civil Service employees. We are simply saying that Foreign Service employees are being discriminated against because their livelihood, their work is being taken away from them at the age of 60, when there is no rational basis for that work being taken away. It assumes that older, that post-60-year-olds are simply unable to perform any longer.

QUESTION: Yes, but you must start, as I understand your theory, you must start from the premise that the United States Government has a duty to treat like employees equally. Is there a duty of equal treatment to employees?

And if there is, why does it just apply to mandatory retirement and not salary, vacation, and everything else? That, it seems to me, is something you have to be able to answer.

MRS. HOSTETLER: Well, if there were two employees in the Foreign Service, a man and a woman let us say, performing the same work, yes, it would be unconstitutional for the government to say, "We are going to pay the man more" or "We are going to give him greater vacation benefits".

QUESTION: Well, say they are both women. Let's say

they are both women. Don't introduce another element of difference.

MRS. HOSTETLER: All right. Both women. And let's suppose the government, the agency was being arbitrary and choosing to favor one woman over the other. But in most instances, Mr. Justice Stevens, I must say the government will offer some rational explanation for the distinction in treatment. It will say this person has a degree and the other does not. This person works late and the other does not.

QUESTION: But Justice Stevens' question, I take it, is based on the proposition that the government can't offer any explanation. What if the government can't?

MRS. HOSTETLER: If the government could offer --

QUESTION: Does it then give rise to a constitutional question?

MRS. HOSTETLER: I guess I misunderstood the question.

QUESTION: If the two women or two men doing the same work are not paid the same, what provision of the Constitution requires the Court to order them to pay them the same?

MRS. HOSTETLER: Well, that would be equal protection also. That would be the same claim, certainly.

The central point in this case is that although the

court below requested the government on several occasions to submit facts to show that there was a rational basis for the age 60 retirement, the government was simply not able to do so.

QUESTION: The government showed the legislative history instead, didn't they?

MRS. HOSTETLER: Well, I'm not sure that whether what it showed constitutes legislative history, they showed legislative statements in --

QUESTION: Well, the colloquy given by the Solicitor General, does that come under legislative history?

MRS. HOSTETLER: Well, that was the legislative history of a 1924 Act, not the legislative history of --

QUESTION: That's the one I'm talking about.

MRS. HOSTETLER: But that one --

QUESTION: That's the one I'm talking about.

MRS. HOSTETLER: All right, but that was enacted years before the 1946 Act, and it's just not relevant.

Moreover, the colloquy omits the context in which it occurred. If you will look at our brief, I believe on page 29 to 30 of our brief, you will see the full colloquy set forth, and you will see that in 1924 there was no retirement system whatsoever for consular and diplomatic officers. And the purport of the Rogers Act was to give, to set in place a retirement system. It was to give an oppor-

tunity for Foreign Service officers to retire and to receive a pension.

There was no consideration of whether or not Foreign Service employees had to retire at age 65, because they were no longer able to perform their work overseas.

In 1946, when this provision came into effect, the legislative history is silent; there is no discussion of the age 60 provision. In fact, it is curious that, as world health standards have improved and life expectancy has increased over the years, the retirement age in the Foreign Service has gotten lower and lower. Before 1924 there was no retirement age. In 1924, when life expectancy was 58, the retirement age was 65; and now, from 1945 to the present time, the age is lowered to 60, when the life expectancy is now 73 or 74. And we all know that world conditions have improved since 1924 and 1946. We now, for example, have jet transportation and modern medical facilities at virtually every Foreign Service post.

Moreover, the Solicitor General noted that Foreign Service employees are subject to terrorist attacks. However, there is no evidence that terrorist attack is age related. Foreign Service employees, moreover, are not armed, are not expected to resist or counter terrorist attack or other violence.

And, in fact, we send our Ambassadors, who are not

subject to mandatory retirement age, to some of the most violence-prone posts in the world. As we all know, Ellsworth Bunker served in Vietnam at the height of the Vietnam War at the age of 80.

QUESTION: Well, of course, Oliver Wendell Holmes stayed here until his nineties, but that doesn't prove we can all do it, does it?

MRS. HOSTETLER: Probably not.

Now, let's look at the facts underlying the government's argument that mandatory retirement is a necessary management tool which the government needs to make room for younger officers, thereby insuring competence at the Ambassadorial or other high levels of the officer corps. At the outset, let's keep in mind that 3,000 of these employees, or one-third of the 10,000 work force, are not even officers, they are librarians, schoolteachers and the like. The mandatory retirement of these employees hardly insures competence at the Ambassadorial level or other high levels of the officer corps.

Secondly, we are talking about a de minimis number of employees who are likely even to want to continue to work past the age of 60.

QUESTION: Do you think that Congress is entitled to take into account the importance of attracting bright, able, young people in, and to take into account the further fact

that unless they move people up and out at the senior levels, they aren't going to be able to offer as attractive a career?

MRS. HOSTETLER: Well, that's the point I was just beginning to make, Mr. Justice Burger. We're talking about the fact that only 50 employees, 44 officers are still on the employment rolls at the age of 59. The overwhelmingly most common age for retirement among social retirees today is age 62. Only five-thousandths of one percent of federal Civil Service employees even stay on the Civil Service rolls until age 70.

There is such a de minimis number of officers at age 60 who are likely to want to continue to work past 60 that it simply is not credible that they are going to clog up the upper levels of the Foreign Service or that they are going to in fact have an appreciable effect on morale or recruitment.

Moreover, keep in mind that in the Foreign Service, unlike the Civil Service, an employee is not hired to perform a particular job. A Foreign Service employee must accept assignment to any post in the world, and must perform any job given him, whether or not it is of a nature ordinarily performed by someone at that rank. In fact, it is quite common in the Foreign Service for employees to perform work that is not commensurate with their grade level.

The Foreign Service also has broad administrative

authority to assign its employees to other government agencies, State and local governments, to nonprofit organizations and to universities.

Thus, the Foreign Service has a variety of mechanisms to insure that there is turnover, both at the top level jobs and in every other job, to provide employees with new job assignments and new challenges, and to bring to any positions in the Foreign Service employees who have not previously served in them and who may have new ideas.

And let's look at the kind of employee that is likely to be in this group of 50 employees still on the employment rolls at the Foreign Service at the age of 60. Every year 11,000 applicants apply for the Foreign Service; only 100 to 200 are taken in. However they entered they are rank-ordered every year. The bottom portions of the classes are selected out. Those who are not promoted are selected out. Those who fail biannual medical examinations are selected out. There are voluntary retirements at age 50, beginning at age 50, with age 55 being the most common age of voluntary retirement; people resign shortly after they enter the Foreign Service, when they find that Foreign Service life is not to their liking. And thus, of the 44 officers who remain in the Service at age 59, they are presumably, by the Department's own criteria, the cream of the crop.

QUESTION: Don't you think that the mandatory retire-

ment provision may have some domino effect on the willingness or choice of voluntary retirement at age 55? That is, if people didn't know that they were going to have to retire at 60, they might not voluntarily retire at age 55?

MRS. HOSTETLER: Well, it no doubt does have some effect on that. But if you will read the House Select Committee on Aging Report issued this year, in connection with the Age Discrimination in Employment Act amendments, you will see that there are many factors that workers take today into account in deciding on an early retirement, and the fact that they are going to have to retire anyway at some point is but one of a large number of factors and certainly cannot be said to be the decisive factor.

QUESTION: I hope you're not forgetting Mr. Justice Marshall's question about Murgia. Or do you feel you've dealt with that enough?

MRS. HOSTETLER: No. We agree with the government that Murgia is the case most nearly on point, that it is in accord with Reed and Trimbel and Craig vs. Boren, and this Court's other decisions in recent years in the equal protection area; that it simply says to the courts below that they must look at the facts in the record to see if there is in fact a rational basis; whether there is a fair,not arbitrary, and substantial, not tenuous, relationship between the classification and the objective of the State.

You applied this reasoning in Murgia and you found that there was a rational basis.

The court applied the reasoning to the facts at hand and found that there was not a rational basis. There is nothing inconsistent with the Murgia decision and with the decision of the court below.

I submit that it should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Solicitor General, do you have anything further?

MR. McCREE: Mr. Chief Justice, we will submit our case on argument, unless the Court has questions.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

[Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.]

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