In the

ORIGINAL

Supreme Court of the United States

In the Matter of:

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.,

Petitioners

v.

ANTHONY M. ROSSI ET AL

No. 80-1924

Washington, D. C.

February 22, 1982

Pages 1 - 52

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Washington, D.C.

Monday, February 22, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

MS. BARBARA E. ETKIND, ESQ., Office of the Solicitor General, Washington, D.C.; on behalf of the Petitioners.

RANDY M. MOTT, ESQ., Washington, D.C.; on behalf of the Respondents.

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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

CHIEF JUSTICE BURGER: We will hear arguments first this morning in 80-1924, Weinberger against Rossi.

Ms. Etkind, you may proceed whenever you're ready.

ORAL ARGUMENT OF BARBARA E. ETKIND, ESQ.,

ON BEHALF OF THE PETITIONERS

MS. ETKIND: Thank you, Mr. Chief Justice, and may it please the Court:

This case is here on the petition of the Secretary of Defense and the Secretary of the Navy to review a decision of the United States Court of Appeals for the District of Columbia circuit.

The statute involved is Section 106 of Public Law 92-129, which was enacted in 1971 and which forbids discrimination against United States citizens or dependents by the Department of Defense in its employment of civilians on military bases overseas unless "prohibited by treaty."

The single question presented by this case is whether the word "treaty" as used in that statute refers to all finding international agreements to which the United States is a party, or is limited solely to those agreements that have been approved by the Senate pursuant to Article II, Section 2 of the Constitution.

In 1944 Congress authorized the President by such means as he should find appropriate to withhold or to acquire and to retain such military and naval bases as he deemed necessary for the mutual protection of the United States and the Philippines. The means the President found appropriate were two international agreements: the 1947 Military Bases Agreement between the United States and the Philippines, and the Supplemental 1968 Base Labor Agreement, which is at issue here. Neither of these agreements was ever submitted to the Senate for its advice and consent.

In the Military Bases Agreement the United States obtained, among other things, the 99-year use of several designated military bases located in the Philippines, as well as the right upon only notice to the Philippines to the use of additional facilities there as required by military necessity.

The major military facilities currently used by the United States in the Philippines are the Clark Air Base and the naval facility at Subic Bay.

Article I of the Base Labor Agreement provides that the United States Armed Forces in the Philippines will fill its needs for civilian employment on these bases with Filipino citizens except when the needed skills are found not to be locally available, or for

reasons of security or special management needs. In those --

QUESTION: Ms. Etkind, as of this date has that agreement been amended?

MS. ETKIND: The Base Labor Agreement has not been amended, no.

QUESTION: Okay. Thank you.

MS. ETKIND: In those cases, United States nationals may be employed.

When Section 106 was passed in 1971 there were in existence approximately a dozen additional such agreements in which the United States provided some form of employment preference for local nationals in exchange for the use of valuable strategic facilities located abroad.

In March 1978 four of the respondents in this case were notified that their jobs as game room managers at the United States naval facility at Subic Bay were being converted into local national positions in accordance with Article I of the Base Labor Agreement, and that they would be discharged from their employment with the Navy.

The four respondents subsequently were discharged, and after exhausting their administrative remedies, they filed this action in the United States

District Court for the District of Columbia, claiming that their discharges violated Section 106, among other provisions.

Approximately 30 additional plaintiffs joined in this suit, alleging either that they had expressed interest in civilian employment with the United States Navy in the Philippines but had failed to obtain such employment because of the local national employment preference contained in the agreement, or that they had been rejected for a specific civilian position with the Navy in the Philippines because the positions for which they had applied were reserved for local nationals under Article I of the Base Labor Agreement.

The District Court denied Respondents' claim and granted summary judgment for the Petitioners on the ground that the word "treaty" as used in Section 106 encompasses all binding international agreements, including the Base Labor Agreement.

QUESTION: Is it accepted by everyone that that's a binding agreement?

MS. ETKIND: Yes. That hasn't been challenged in this case.

QUESTION: Well, is it a valid agreement without Senate approval?

MS. ETKIND: There's no question that the

executive does have the right to enter into executive agreements other than treaties.

QUESTION: Well, does it have -- how can you tell the difference between an agreement and a treaty, on whether he seeks Senate confirmation or not?

MS. ETKIND: Well, executive agreements are defined in the restatement, the requirements for an executive --

QUESTION: In the restatement?

MS. ETKIND: The restatement of foreign relations in the Vienna Convention on Laws.

QUESTION: Does that bind us?

MS. ETKIND: Bind this Court?

QUESTION: Yes.

MS. ETKIND: No, but it has been looked at as persuasive authority. There's never been --

QUESTION: Do we have some -- do we have some cases on executive agreements?

MS. ETKIND: Oh, certainly, yes.

QUESTION: Like what?

MS. ETKIND: Belmont and Pink, in which this Court upheld an executive agreement by which the courts -- by which the executive settled outstanding claims of national -- in the Dames and Moore case recently an executive agreement was involved.

QUESTION: And how about this kind of agreement though?

MS. ETKIND: An agreement for --

QUESTION: Is there some way of telling at a glance whether an executive agreement has to have Senate approval before it becomes binding or --

MS. ETKIND: No, no. There really isn't a way. As we point out in our --

QUESTION: Well, what about this one?

MS. ETKIND: This one follows -- almost all of the agreements that -- Base Labor Agreements that provide for national employment preferences are in the forms of congressional executive authority.

QUESTION: Well, is there any authority to say that those are agreements, valid agreements, rather than treaties, or is that just -- that's just the view of the United States, I suppose.

MS. ETKIND: They've always been recognized as such.

QUESTION: Ms. Etkind, in this particular instance did not Congress in 1944 pass specific legislation authorizing the President to negotiate this agreement with the Philippines?

MS. ETKIND: Clearly. And that is why I referred to it as a congressional executive agreement,

which is accorded somewhat more status than an executive agreement entered into solely on the basis of presidential authority.

QUESTION: Well, Congress couldn't waive the necessity to have Senate approval for a treaty, could it?

MS. ETKIND: I'm sorry?

QUESTION: Congress couldn't waive the necessity for having Senate approval for a treaty, could it?

MS. ETKIND: No, for something that had to be --

QUESTION: Well, my question was whether this is a treaty or not.

MS. ETKIND: This is -- it is a treaty in the sense of an international agreement which is between countries which deals with broad subject matters that is the types of things other than contracts between individual parties within other nations.

QUESTION: Well, I guess the issue -- nobody has raised the issue in this case anyway, so I'm sorry to have interrupted you.

MS. ETKIND: No one has raised it. Thank you.

QUESTION: Well, I gather anyway the question is whether when Congress used "treaty" in this statute it intended to include what have come to be known as

executive agreements, isn't that it?

MS. ETKIND: That's exactly the question in the case, yes. The District --

QUESTION: Is it not possible that in some contexts the use of the word "treaty" in a statute might include exactly these agreements made without the approval of the Senate and in other contexts it might not.

MS. ETKIND: Certainly, yes. And in holding that --

QUESTION: Is this basically any different from construing a statute as to the intent of Congress?

MS. ETKIND: No. That's exactly the question here.

QUESTION: Isn't that what we're confronted with?

MS. ETKIND: What did Congress intend by the use of the word "treaty" in Section 106.

QUESTION: Well, it would be a fairly unusual situation in which Congress passed legislation authorizing the President to enter into a treaty in the sense of a document that requires confirmation and ratification by the Senate, too, isn't it?

MS. ETKIND: That would be very unusual, because that way the Senate already would have some

control.

In holding that --

QUESTION: May I ask another question? Isn't it also a question of what the word "prohibited" means?

MS. ETKIND: That's --

QUESTION: Because the treaty surely doesn't prohibit the discrimination it refers to, does it?

MS. ETKIND: Well, no. Even the Court of Appeals though that held against us construed the word -- the phrase "unless prohibited by treaty" to mean unless permitted or provided --

QUESTION: The word "prohibited" we should construe to mean "permitted." Is that the position of the Government?

MS. ETKIND: No. Well --

QUESTION: It is, isn't it?

MS. ETKIND: It is, in effect, but by parsing the statutory language carefully you can see that in fact what it is is a double negative.

QUESTION: It wouldn't make any sense otherwise, I agree, but that's exactly, it seems to me, exactly what you're arguing: "prohibited" means "permitted."

MS. ETKIND: Well, except to the extent that you said that it's -- it's -- what is prohibited is not

to discriminate.

QUESTION: Well, but there's nothing in the statute -- well -- or is it required, unless required by treaty? Is it required or permitted? What is it that the word means, "prohibited" is supposed to mean?

MS. ETKIND: Well, in this case certainly it's required and permitted by the treaty.

QUESTION: So "prohibited" means either "required" or "permitted."

MS. ETKIND: We point to that use of the word "prohibited" as an example of how Congress was not really focusing in and being terribly specific when it enacted the statute.

In ruling for us, the District Court relied primarily on the concededly sparse legislative history which the court found argued against Respondents' contention that Congress intended to ban all discrimination on military bases abroad, even when pursuant to an agreement between nations.

The Court of Appeals reversed. While it agreed with Petitioners that the mere use of the word "treaty" is not dispositive and that the meaning of the word ultimately depends on Congress' intent in enacting the particular provision in which the term appears, it concluded that Congress had used the word "treaty" in

Section 106 in its constitutional sense, and that it accordingly had intended sub silentio to place the United States in breach of all existing international agreements containing local national employment preferences.

QUESTION: How many of those did you say there were, Miss --

MS. ETKIND: Excuse me. At the time Section 106 was enacted there were about 12.

QUESTION: How many are there today?

MS. ETKIND: There's about the same number because five were enacted subsequently, but the five that were with Taiwan have been abrogated.

As the Court of Appeals recognized, the mere invocation of the word "treaty" is not dispositive of whether the term is being used in its narrow constitutional sense or whether it is intended to encompass all binding international agreements to which the United States is a party.

QUESTION: Does the legislative history tell us how much of the problem at that time was the result of local agreements by commanding officers as opposed to some kind of executive agreement resulting in the problem?

MS. ETKIND: Well, the only example that is

pointed to in the sparse legislative history is that of a commanding officer. That was only by -- it was by one commanding officer, General Phipps, who was the commanding general of the entire European Exchange System. He had within his -- he was trying to change 4,000 jobs that Americans had been holding to local national positions.

QUESTION: Both this Court and other courts have construed the word in its later international relations sense where the context within the term was used indicated that it was intended to carry that broader meaning. Congress even has used the word "treaty" to refer solely to international agreements other than Article II treaties, and when Congress intends to refer exclusively to Article II treaties, it can be quite explicit. Congress employed no such precision in its drafting of Section 106.

QUESTION: Well, it certainly used -- sloppily used a word here, didn't it, that has a distinct impression. Do you know whether any constitutional treaty, any treaty in the constitutional sense has ever covered an agreement of this kind?

MS. ETKIND: As far as I know, no Article II treaty has covered an agreement giving local hiring preferences.

QUESTION: So these local hiring things have always been by --

MS. ETKIND: International agreements other than Article II treaties.

Accordingly, the word "treaty" in Section 106 must be interpreted in light of the purposes Congress sought to serve by the enactment of that provision. In our view, given the sparse and largely superficial legislative history of Section 106, it is conceivable that Congress' purpose in enacting that statute could have been the drastic one of placing the United States in breach of all non-Article II agreements that contained local national employment preferences.

Section 106 was only a very small part of what became Public Law No. 92-129, an act to amend the Military Selective Service Act of 1967 to increase military pay and for other purposes. Very little legislative debate was devoted to the provision, and only a few Senators addressed themselves to what became Section 106. Indeed, the only consequence of the measure that was considered was a salutary one of improving the financial circumstances and therefore the morale of American service members overseas.

But as I alluded to earlier, at the time Section 106 was enacted, there were in existence 12

non-Article II agreements to which the United States was a party and which provided some form of employment preference for local national in exchange for the United States' right to use military facilities located in the host country.

To many of the countries with which we have such agreements, particularly to the Philippines, the United States' satisfaction of its needs for civilian employment of local nationals is a significant quid pro quo for the host countries permitting the United States to use facilities located on its sovereign territory; yet nowhere in the legislative history is even one of these international agreements mentioned, much less did Congress express any concern for the drastic consequences that a statute placing the United States in breach of such agreements could have on this nation's continuing access to necessary strategic facilities or on the United States' relations with the contracting countries in general.

QUESTION: Do you question the power of Congress to do this if we were to interpret it as the Respondents would have us do so?

MS. ETKIND: No, we do not. Congress clearly had the power to do it.

No consideration was even given to the impact

that such a statute would have on the credibility of the United States in the larger international arena. In our view Congress could not have intended to upset relations with several other nations and risk the loss of valuable military facilities abroad without devoting some consideration and discussion to those consequences.

Decision after decision by this Court has counseled against lightly attributing to Congress an intent to place the United States in breach of its international obligations. We can think of no more appropriate occasion for the application of that well-settled canon of construction than in the present case.

This is not a case in which the two provisions at issue are irreconcilable. To be sure, if they were entirely inconsistent, the earlier international obligation would have to give way to the subsequent statute, notwithstanding any possible military or international repercussions.

But here, where there are two equally reasonable constructions of the word "treaty," that usage should be chosen which will place the United -- which will not place the United States in violation of international obligations that Congress expressed absolutely no intention to breach.

Our construction of the word "treaty" renders Section 106 fully capable of meeting the goals Congress sought to serve by its enactment. The most obvious of them was the prevention of discrimination against Americans or their dependents by virtue of directives by individual officers such as the unilateral order of Charles Phipps, then the commanding general of the European Exchange System in Europe, to fill European Exchange System positions with local nationals instead of American dependents.

In addition to the legislative debate's focus on the action of General Phipps, which we have detailed in our brief, the very fact that all of the examples listed in Section 106 -- officers clubs, postal exchanges, and commissary stores -- are nonappropriated fund activities, as were the positions within General Phipps' control, suggests that it was indeed his action Congress had in mind when it enacted that provision.

Since Congress' enactment of Section 106, the executive branch has continued to negotiate and enter into non-Article II agreements that provide some form of local national preference. Each of these agreements has been transmitted to Congress pursuant to the Case Act, and no member of Congress has expressed concern to the Department of State that either these later agreements

or any of the pre-existing agreements runs afoul of Section 106.

Moreover, subsequent Congresses have encouraged the executive branch to review and attempt to renegotiate existing international agreements in order to enhance employment opportunities for United States citizens and dependents overseas, but only to the extent feasible. Nowhere is there any suggestion that this prodding of the executive branch is based on any perception that the continued employment of local nationals pursuant to non-Article II treaties violates Section 106.

To the contrary, these exhortations assume the continuing existence and vitality of non-Article II agreements providing for local national preferences, notwithstanding Section 106; and they nearly urge the executive branch to do what it can within the recognized constraints on it to ameliorate the shortage of jobs available to American citizens and dependents overseas.

This post-enactment legislative history suggests that another purpose Congress may have had in enacting Section 106, a purpose that also fully comports with the use of the word "treaty" in its broader sense, was simply to let the executive branch know that Congress was concerned there were more -- I'm sorry --

that there were not more jobs available to United States citizens and dependents on military bases abroad.

By the treaty exception contained in Section 106 Congress recognized the necessity in some cases for the executive to offer the quid pro quo of local national employment in order to secure the use of strategically necessary military facilities. Nevertheless, Congress was sending the executive branch a message which it was to repeat in the future, to the effect that were possible, it should attempt to avoid reducing the number of jobs available to Americans.

Construing the word "treaty" in Section 106 as extending to all binding international agreements renders both the ban on employment discrimination contained in that provision and the treaty exception to it reasonable and meaningful. By contrast, to construe the word "treaty" as limited to Article II treaties, as Respondents urge, would vitiate the treaty exception altogether since, as Respondents concede, there were no Article II treaties that provided for local national employment preferences at the time Section 106 was enacted, and any subsequent Article II treaty that might do so could supersede a previous inconsistent statute.

QUESTION: Without the proviso that begins Section 116, couldn't it?

MS. ETKIND: Yes. But most significantly, to construe the word "treaty" in its narrow constitutional sense when the equally reasonable, broader construction is available is unnecessarily to attribute to Congress a purpose to bring about drastic international and military consequences that Congress never once indicated it intended.

If the Court has no more questions, I'll reserve my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Mott.

ORAL ARGUMENT OF RANDY M. MOTT, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The case before the Court today is unique in one important respect. The four lead plaintiffs in this action in the District Court actually had jobs at the U.S. Naval Station Subic Bay. They were all Americans. One was a retired Navy enlisted person, one was a resident American in the Philippines, and two were American dependents. They all received notices that they were losing their job, not because of their performance on the job but because their job had been changed because they were U.S. citizens, and the job was now going to be labeled a local national job, and they

could no longer keep the job.

They perhaps more graphically --

QUESTION: Most of our cases here are just the reverse, that you can't get a job because you're not a citizen.

MR. MOTT: That's right. As Senator Schweiker pointed out in the history of this measure, this is perhaps unique in the annals of certainly the western world that a country would discriminate against its own citizens.

I think that --

QUESTION: Isn't there some difference in the setting in which that distinction occurs and the reasons for it?

MR. MOTT: The distinction being?

QUESTION: If we couldn't get bases in foreign countries on any other terms, is there any question about the soundness of doing it that way, laying aside the statute?

MR. MOTT: No. And, of course, our position would recognize that. In fact, in any case such as that the executive would be free to submit to the Senate a version for agreement. In the event this Court should affirm the Court of Appeals, the executive could simply take the agreements it deems essential and submit them

to the Senate for approval. There's no prospective --

QUESTION: Well, that could only be for the future, though, couldn't it?

MR. MOTT: Excuse me?

QUESTION: I mean this -- this Philippine one. If we agree with you, I gather it's completely ineffective, isn't it?

MR. MOTT: As it is now, that's right.

QUESTION: And it could be effective, I gather, under your submission only for the future, if it went to the Congress and the Congress then modified it.

MR. MOTT: That's right. And, of course, we are not -- and I would add to this, in the event the practice was determined unlawful, there's no District Court order on relief here. I would imagine just as under Title VII in race and sex cases there wouldn't be wholesale bumping out of the incumbent employees. There would be some equitable arrangement worked out. So I -- our position is the -- prospectively there are a lot options open to the executive, and clearly nothing that --

QUESTION: I think your colleague said that there were about 4,000 jobs at stake, is that right?

MR. MOTT: No. I believe that's inaccurate. We have determined from the materials cited in the brief

for the Government, a DOD circular summarize manpower strengths, that is, as of the end of June there were 114,000 local nationals employed by the Department of Defense overseas. Counting the countries --

QUESTION: Are all of them pursuant to agreements like this?

MR. MOTT: No. Counting Germany where there was a question of whether the status of forces agreement applied and required this, about 70,000 of those jobs would -- local national jobs would be in countries where there would be agreements construed to require preference.

Now, of course, not all those jobs -- there would not be dependents of Americans available for all those jobs. In the Philippines, prior to the Base Labor Agreement of 1968 and prior to a preference reserved by agreement, there was in fact a very large number, the preponderant number of those employees were local national anyway. We're talking really about a fine tuning off that number, but it is a large base number to begin --

QUESTION: You mean there just weren't that many Americans in any event available to fill the jobs.

MR. MOTT: That's right. That's right. And as you may well realize, of course, the number of

dependents that are overseas, while it is large, usually includes small children and other people who would not be interested in the work.

QUESTION: Well, does this only apply to Subic Bay in the Philippines, because there are a whole lot of Americans in other jobs over there. In Manila, for example, there are thousands.

MR. MOTT: No. The agreement --

QUESTION: Does this agreement apply to them, too?

MR. MOTT: Right. Every --

QUESTION: Everybody in the Philippines.

MR. MOTT: Every U.S. facility maintained by the Department of Defense in the Philippines. There are separate arrangements, I understand, for the Department of State on local national hiring that aren't at issue here.

The --

QUESTION: Counsel, does the record tell us whether since the passage of Section 106 there are no more local agreements entered into by commanding officers? Do we know that?

MR. MOTT: Well, we know as follows. We know that the Department of Defense told Senator Schweiker in the hearings on the 1971 measure that it was the policy

of the United States to encourage the hiring of U.S. citizens, not local nationals; that there had been some trouble with it in the past but that they were embarking on a new frontier, and they actually anticipated giving dependents a preference over others. That was in 1971, in the legislative history of the measure that became the Schweiker amendment.

We know that Senator Schweiker in the floor debates said that what had happened in Europe, the one example in the legislative history cited by the government had been corrected. The Court of Appeals unanimously felt that that one incident had already been rendered moot and had by the executive's own position at the time been inconsistent with the position of the Department of Defense. So there is no indication whatsoever as of 1971 or any time since that commanders are given the discretion to do this.

The DOD instructions, which we have included in the -- a couple of passages from in the -- in our brief, the DOD instruction from 1974, for example, says that dependents are to get a preference only to the extent of treaties and agreements requiring local national preferences. So that's there no option, at least on paper, in the Department of Defense for local commanders to do this and apparently never has been.

The key, though, is even internally in the Department of Defense there's a distinction between treaty and other agreements, and in particular, the 1961 policy that was in effect and was the circular in effect at the time of this legislation, provided -- and I think this is extremely important to keep in mind -- the policy at the time provided the military departments will, consistent with status of forces agreements, country to country agreements and treaties, make the maximum feasible reduction in the number of local national employees for nonappropriated fund activities.

That was in 1961 and was the policy then in effect for the Department of Defense. So there was no policy of local commanders being allowed to create side arrangements whereby there were local national preferences. Everything that was done was done, if it was done consistent with DOD policy, was done either by status of forces agreements, country to country agreements and treaties. And what Congress did in referring to the March 1962 memo, it said we're only going to allow one of those exceptions, treaties. If you continue to need to discriminate against our own people as a quid pro quo for a base, come back to us and do it in the form of a treaty, and the Senate will authorize it.

QUESTION: How do you know that in using the word "treaty" they were referring to the March 1962 memo, when Congress enacted this statute?

MR. MOTT: Well, I'm making one jump there. The memo is included in the legislative history. It is referred to --

QUESTION: You jumped from there to the conclusion that that's what Congress meant?

MR. MOTT: Well, there is additionally more. Maybe I should get immediately into that.

QUESTION: Before you do, you referred to nonappropriated fund activities. Now, that's post exchanges essentially, isn't it?

MR. MOTT: And -- and related --

QUESTION: Employees in the staff headquarters, civilian employees in staff headquarters and so forth are not covered by that phrase --

MR. MOTT: That's correct.

QUESTION: -- "Nonappropriated fund activities."

MR. MOTT: That's correct. And, of course, the local national preferences had been most strongly done in practice, and there's a larger number of them apparently in the nonappropriated fund activities area because it's recreational.

QUESTION: That would be the Officers' Club. another example.

MR. MOTT: Right. And if it was a civilian employee in the headquarters of NATO or something in Brussels, there would be -- there are -- many of those positions are regular U.S. civil service positions, and people are --

QUESTION: But I gather PX employment is all nonappropriated funds?

MR. MOTT: Right.

An important one that is included in the Philippines, however, the other way is nurses. There is a local -- the local national preference is given to nurses; so if a dependent comes in who's a nurse, and several of the 42 individual plaintiffs are, they couldn't get a job.

QUESTION: But there still will be a problem if we upheld the Court of Appeals, wouldn't there, an international problem?

MR. MOTT: No. I don't --

QUESTION: Between the Philippines -- well, are you going to tell the Philippines that the agreement is no good? They negotiated it, didn't they?

MR. MOTT: Well, and it's been --

QUESTION: Didn't they?

MR. MOTT: Yes, that's right.

QUESTION: Well, wouldn't -- you mean they're just going to sit quietly by?

MR. MOTT: Well, it will have to go back to negotiations. That's the -- the posture --

QUESTION: It'll be a pretty good problem, won't it?

MR. MOTT: I don't think necessarily. All we have is rhetoric to look at that. There's no facts in the record. Let me give you an example.

QUESTION: Well, the rhetoric goes back a little ways.

MR. MOTT: Well, that's what I was going to do.

QUESTION: Fifty years.

MR. MOTT: Well, I was going to go back to --

QUESTION: Where there's --

MR. MOTT: Well, in 1976 the Philippine union called for an abrogation of the Base Labor Agreement, and so depending on which the winds blow --

QUESTION: Well, wasn't there within the last year a problem that they might not renew the whole agreement?

MR. MOTT: It was --

QUESTION: That Marcos said he wasn't going to do it?

MR. MOTT: Well, the public statements were made to that effect.

QUESTION: That's right.

MR. MOTT: The agreement was renewed.

QUESTION: Sure.

MR. MOTT: And a significant --

QUESTION: Well, that's the same kind of rhetoric that starts wars.

MR. MOTT: Well, we do know that when that agreement was being negotiated, the executive branch told the Senate that the agreement would be submitted to the Senate for approval, and that the agreement would in fact cover the local national preference.

The real policy issue here is not whether we can keep our base or even whether we can continue preferential hiring if we need to to keep the Philippines happy. The issue is how do we do that.

The real objection of the executive in the Government's brief in its Footnote 21 is that if you had to submit these things as Article II treaties, it would be time consuming and reduce negotiating flexibility. That's the issue. Any arrangement -- and Senator Percy in the military appropriation debates in December pointed out for this current fiscal year he need to continue to have some of these agreements. He's

Chairman of the Senate Foreign Relations committee. I'm sure they could get expedited approval of any agreement if Justice Marshall's scenario were the facts. However, let me point out one thing.

QUESTION: Well, we are -- you want the protection for a double dipper, and there are some people in the Philippines, 80 percent, who from the time they're born until they die they never see a doctor or a nurse. You know, they need a little something, too.

MR. MOTT: Well, I understand as one -- the most recent base agreement we provided several hundred million dollars of economic aid as part of the package to satisfy the Republic of Philippines.

QUESTION: Well, this man's already -- he's living on -- he's got retirement money, and he's taking a job that otherwise would go to a native. Right?

MR. MOTT: No, not -- no. As a matter of fact, no. The lead claimant, Mr. Rossi, did not. Many of these people don't.

But this exactly the point that Congress has addressed, and I think this is a policy prerogative for the Congress to address, not this Court. Congress has consistently supervised for years the manpower requirements of the Department of Defense at overseas bases, including the mix between local nationals and

U.S. citizens.

QUESTION: Well, I doubt you'll find any dispute that the question is one for Congress to address. The question is what has it said. And it strikes me that your construction of the word "treaty" could be an implied proviso to every act of Congress, because everybody knows that a treaty will supersede a statute if it's inconsistent.

MR. MOTT: Well, the problem with that is that the language has been -- has required clear inconsistency and some other phrases such as even going back to Cherokee Tobacco. The point Congress -- and why Congress excluded -- included the treaty proviso in this, you have to look at what was happening in the 82nd Congress.

They were lamenting that the executive was doing too much by executive agreement and not enough by treaty, and by saying that, they were contemplating there might have to be exceptions to the rule, and they were making explicit what might have been otherwise implicit, but they were saying if you need to do it and need to have local national preferences, come back to the Senate for approval. And I don't think that the language is superfluous. In fact, the -- if anything, it reflects some wisdom because the executive has never

come back with anything despite these invitations to do so.

QUESTION: Well, supposing that this Section 106 didn't have the language "unless prohibited by treaty" but simply had the provision no person shall be discriminated against by the Department of Defense or any other officer or employee thereof. Now, if Congress later -- the Senate later ratified a treaty containing just the language of the base agreement with the Philippines, certainly that would supersede this, would it not?

MR. MOTT: That's correct. I think that the language, however, in the 82nd Congress which passed the Case --

QUESTION: Are you talking about the 92nd Congress?

MR. MOTT: Ninety-second, excuse me. They encouraged the -- by the Case Act the filing of executive agreements with Congress. They encouraged the two base agreements to be submitted as treaties in lieu of executive agreements. There were a lot of pronouncements about whether the executive should act by treaty or executive agreement, particularly at that time in the early '70s, and I think this is just a continuation of that.

The key phrase, though -- and I do take considerable difference with the Government's characterization of the record as containing no reference to agreements -- the key phrase by Senator Hughes, relied on by Judge Wilkie in the Court of Appeals, never has really been explained by the Government, and I think it's critical.

Senator Hughes noted that dependents of enlisted personnel are denied the opportunity to work on overseas bases by agreement with the countries in which they are located and are forced to live in poverty. And as a matter of fact, there was no independent commander nexus with discrimination at that time. The Department of Defense had said its policy was to the contrary, and the only example was exhorted as a mutation from the main policy of not doing it internally. The commanders didn't have the discretion to do it. So Senator Hughes' statement is exactly accurate. The reason why the people couldn't get the jobs was the agreements.

Now, the Government tries to say Senator Hughes, who was a sponsor of the legislation and helped presumably work on its language, didn't know what he was talking about and might be referring to some other kinds of agreements. But the agreements which perpetuated discrimination were in effect then, were executive

agreements, and Senator Hughes says the people can't get jobs because of agreements.

Now, unless you're assuming that Senator Hughes made a mistake, there isn't any other way to read that.

QUESTION: Or unless he was referring to area commanders agreements.

MR. MOTT: However, the key to the --

QUESTION: I know you don't think he was --

MR. MOTT: Right.

QUESTION: But that's a possible --

MR. MOTT: Right, right. And the key is the Court of Appeals addressed was -- the point is these were not commander agreements with the foreign government. The Phipps memo, which was included in the Congressional Record, was an internal memo of the European exchange system, not any arrangement the base commander had made directly with the host government.

QUESTION: You are arguing, Mr. Mott, in effect that Congress really intended to amend or to eliminate provisions that existed in a dozen agreements. Is there any indication in the legislative history that Congress was aware of the consequences of its action if the action was intended to do what you say?

MR. MOTT: Of the consequences, no. There are

two references, though, that were not mentioned by the Government that I think they're important, then I'd like to get back to the consequences.

The two --

QUESTION: Mentioned in the legislative history?

MR. MOTT: Right. The first was in the Senate report that originated the provision, and it said the purpose of this amendment is to correct the situation of discrimination in favor of local nationals and against American dependents -- to correct the situation, not to take care of a hypothetical where another commander might do something, but to correct an existing situation. That language was repeated -- to correct a situation -- in the Conference Committee report. The situation, everyone concedes, was continued by these executive agreements, and the intent was to get out of it.

Now --

QUESTION: Was there any testimony on this subject presented to the Senate committee?

MR. MOTT: Yes, there was.

QUESTION: That related specifically to the base agreements?

MR. MOTT: No. As a matter of fact, what had

happened is apparently there was a new -- the Assistant Secretary of Defense, Mr. Kelly, indicated that in fact there was no constraint on employing U.S. citizens, and that the policy of the Department of Defense was to employ them wherever they could. That was in the supplemental hearings on the Senate side at page 76 and 77. So the Government was constantly saying it's not us doing it internally; it is not the Department of Defense's policy. And they did not discuss in there the agreements. But in the floor debates we see Senator Hughes referring to the agreements.

I think the chief point to realize, and I think the basis for the Court of Appeals decision, is the fact that if the treaty exception is blown out to include any kind of international agreement, then the section just folds up and self-destructs. It does absolutely nothing.

QUESTION: Well, Mr. Mott, does it not prevent by congressional enactment the possibility of a changed defense policy that would allow local commanders to enter into such agreements?

MR. MOTT: That would be --

QUESTION: It would at least accomplish that, would it not?

MR. MOTT: If that were to happen

hypothetically. Of course, the legislative history --

QUESTION: And you don't always have the same policy makers --

MR. MOTT: Right.

QUESTION: -- Governing the Department of Defense.

MR. MOTT: But the legislative history says the purpose was to correct the situation, not to prevent future occurrences, so --

QUESTION: Can you think of any other situations in which Congress was held to have invalidated, without even mentioning the fact, a number of international agreements?

MR. MOTT: Yes. There are several, and I think that that is an extremely salient point, because really the Government creates I think an artificial burden of persuasion here to say that the intent has to be specific, there has to be specific evidence of intent to abrogate. That has never been done by this Court before. That would be new law.

In Cherokee Tobacco there was an Internal Revenue act that just said all tobacco in the United States is taxed. There was a treaty with the Cherokees that said tobacco produced in the Cherokee nation would not be taxed. This Court said the act of Congress must

prevail as if the treaty were not an element to be considered. There was no evidence that Congress in passing this general revenue measure even thought that the Cherokees grew tobacco. There was no reference whatsoever.

In Sanchez v. the United States in 1910 this Court in the case of a Puerto Rican who claimed he had a government quasi-public position, which was a property right under the treaty with Spain and Puerto Rico, this Court -- what happened is the military governor abolished the position, and then Congress passed the Foraker Act preserving the law of Puerto Rico at that time as modified by military decree. So the position was abolished by the -- and blessed by the Foraker Act. And this Court held that the act of Congress in stating the military order superseded the treaty with Spain, and this Court commented on page 175 and 176, "Congress did not intend by the" -- "Even if Congress did not intend by the Foraker Act to modify the treaty, if that act were deemed inconsistent with the treaty, the act would prevail."

The point is not that the intent be clearly expressed to abrogate but only that there be clear inconsistency. And that is a similar position in Chae Chan Ping v. United States in 1898, in Edye v. Robertson

in 1884, in United States v. McBratney in 1881. The point in all those cases, there was absolutely no intent to abrogate evidence in the record of the act, and in fact, in Chae Chan Ping this Court said it's wholly immaterial whether the departure from the treaty was accidental or designed. If it's clearly inconsistent, the statute prevails.

I think the point here is largely confused by the Government bringing in the repeals by implication notion which applies to statutes, and we cited Professor Henkin in our brief, and I think he more adequately describes the relationship. And that is that Congress legislates without regard to international obligations. If the clear effect of that legislation is inconsistent, then for domestic law purposes the agreement has to be superseded.

QUESTION: Let's see if I fully understand you, Mr. Mott. When you say that Congress intended by 160 to correct a situation, now, define what that situation is that was corrected.

MR. MOTT: The situation was, as Senator Hughes and the committee report described it, economic hardship by military families overseas since dependents could not get jobs. And as the Government points out, this was a critical transition in 1971 between the draft

and the all-volunteer force, and they were attempting --

QUESTION: Of course. But part of the situation, I gather, at the the time of the enactment of 160, you say, is there were already outstanding a number of executive agreements.

MR. MOTT: That's correct.

QUESTION: How many?

MR. MOTT: The Court of Appeals indicated 12. That figure came from the trial court records.

QUESTION: Well, now, what is there in the legislative history to say that in correcting the situation by 160 Congress intended to supersede those agreements?

MR. MOTT: Well, there are two things. First -- well, there are three. If I can first say, the plain meaning of the term "treaty" usually in the United States means Article II. The Government goes --

QUESTION: Well, Waltman said differently, didn't it?

MR. MOTT: Where it -- where --

QUESTION: Well, Waltman did treat "treaty" differently, did it not?

MR. MOTT: Right.

QUESTION: So that was on the books when all this happened.

MR. MOTT: Right. No indication it was brought to anybody's attention.

QUESTION: Well --

MR. MOTT: -- For jurisdiction and only when the purpose of Congress would be frustrated by giving it the normal meaning.

QUESTION: I know. But "treaty" was construed more broadly than just Article II treaties.

MR. MOTT: That's right. And for jurisdictional purposes the Court of Claims in the Hughes case did the same thing. But both those it wouldn't have made any sense to --

QUESTION: Now, that's your one. What's the other two?

MR. MOTT: The second one is the references by Senator Hughes in the floor debate to agreement with the countries. He said dependents of enlisted personnel are denied the opportunity to work on overseas bases by agreement with the countries in which they are located.

QUESTION: Is that the only recognition in the history of the existence of agreements with countries?

MR. MOTT: There's a second one by implication, I think, and that is Senator Schweiker pointed out that most civilian jobs in U.S. installations in Europe are held by local nationals or

by persons from another European country. These jobs are classified as local national jobs, and American dependents cannot fill the jobs because of their classification.

Now, the only thing --

QUESTION: And you say that would be true only under those agreements?

MR. MOTT: Right. Because, for example, in the Phipps example he did not reclassify the jobs as local national; he simply said he wanted all European Exchange System elements in months ahead to emphasize recruitment of local nationals and de-emphasize recruitment of U.S. dependents. So he wasn't classifying jobs saying -- and literally that's what happens in these jobs. If you apply you get a letter back saying I'm sorry, you're a U.S. citizen, you can't apply. It's a classification. That is done by these agreements.

As the legislative history indicates, the policy since 1961 had been that DOD did not have that policy of classifying and restricting jobs. So the only thing that classified jobs were these agreements. The only discrimination referred to in the Congressional Record or anybody knows about that was going on in 1971 against U.S. citizens was by these agreements. The

policy of the Department of Defense was to encourage people to the extent they could except where the specified types --

QUESTION: I gather for us to adopt your submission we'd have to agree with you, don't we, that "correct situation" included superseding those agreements, do we not?

MR. MOTT: That's right. And I really hasten to emphasize that nowhere has this Court ever required specific intent to abrogate, and the case law is fairly extensive and included in our brief. The --

QUESTION: Mr. Mott, did not the same Congress that passed Section 106 use the same term "treaty" in another act where it's been determined that they used it in the broader sense?

MR. MOTT: No. I think to the contrary. The Court of Appeals relied on Senate Resolution 214 and on the Case Act.

QUESTION: The Case Act.

MR. MOTT: And in both those cases they used it very specifically. They said, in the Case Act, submit international agreements other than treaties to Congress.

Now, it's interesting that all these agreements entered into after 1971 had been submitted

under the Case Act, which by definition only applies to things that aren't treaties. If the Government was really right that the same 82nd Congress that set up the Case Act requirement would consider these things to be treaties, it wouldn't have to file them under the Case Act at all.

And the point is this elaborate distinction between treaties and other international arrangements only exists really for purposes of this case. The government's own internal memos, the State Department procedures on when you -- how you conclude international agreements, the very memos that talk about the policy on preferential independent hiring always make the distinction between treaties and other agreements and always use treaties in the constitutional sense.

So when it comes time to defend an action whereby nothing has ever been submitted as a treaty and the exhortations of Congress, as the Government characterized them, have been ignored, the notion of a non-Article II treaty emerges in the Government's brief. And that's the only time this ever has come up as an administrative construction.

QUESTION: Did the Government take any position on this legislation while it was in Congress?

MR. MOTT: No, it did not.

QUESTION: -- What you're saying.

MR. MOTT: No, it did not. No, it did not. The only position was the one I referred to in which they said their policy --

QUESTION: You can't blame them then, can you?

MR. MOTT: Well, the President signed it. Legislation has to be signed. They did enact it. And they have contemplated, as I mentioned, since then that they would submit these kind of things as treaties.

QUESTION: Well, wouldn't you think that Congress would have objected when they were submitted if in fact they were simply international agreements?

MR. MOTT: There is no vehicle for Congress to object per se, but Congress has protested in a couple of different ways. First, the GAO, the legislative agency of Congress, indicated these were illegal under 106 and rendered and opinion to that effect in 1976. Second, there is extensive oversight hearings in which the practice is criticized. And actually, in FY 1982 the House threatened to withdraw all funding for new local national hiring, and the provision was stricken in conference.

In the --

QUESTION: So there really hasn't been any action by Congress as a whole to overturn the

Government's position on this.

MR. MOTT: I don't know of a way Congress could.

QUESTION: It could pass a law.

MR. MOTT: It already passed a law. Any new law it passed would have the effect of admitting the first law was inadequate and that --

QUESTION: Well, certainly if Congress is concerned about what the government is doing here it can simply pass a law and say we want to remove all ambiguity.

MR. MOTT: Well, that would imply there was ambiguity the first time all around, and all the victims in the interim period would have another legal obstacle to recovery, that the Congress felt the first law was not adequate.

There is a reference also in the 1977 House Report 95-68 at page 25 to the fact that there weren't at that point any pending lawsuits to challenge this, and it was an apparent -- I -- we read that as evidence that Congress was waiting for a case like this to come along to challenge the construction given by the executive.

This gets really to the separation of --

QUESTION: Mr. Mott, may I ask you one other

question about the Senate report or the Conference Comittee report about correcting the situation? They said the situation primarily in Europe, and how many of these 12 agreements which were then in effect affected Europe and how many affected other parts of the world?

MR. MOTT: No more than a couple affected Europe, but if you look at the numbers, there are -- of the -- I don't know what it was in '71, but I think it was comparable; we haven't changed our allocation much except for Vietnam -- but as of '81, of the 114,000 local nationals employed overseas, 50,000 were employed in Germany, so Germany by far has been the lion's share of our local national hiring, and that was done --

QUESTION: But there's no executive agreement affecting Germany, was there?

MR. MOTT: Well, there was the NATO status of forces agreement which the Germans interpreted until the recent German Labor Court decision as requiring --

QUESTION: And that, of course -- that, of course, was ratified by the Congress.

MR. MOTT: There is some controversy of whether --

QUESTION: It wasn't the status of forces agreement?

MR. MOTT: The original one. There are

supplements, and there's a question of whether --

QUESTION: Oh, I see.

MR. MOTT: -- Whether all of the supplements that provided the language the German unions rely on were actually approved by the Senate.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Ms. Etkind?

MS. ETKIND: I just have a few points to make.

ORAL ARGUMENT OF BARBARA E. ETKIND, ESQ.,

ON BEHALF OF THE PETITIONERS -- Rebuttal

MS. ETKIND: The fact that the discrimination that occurred as a result of General Phipps' action was done in contravention of then existing law leaves room for Section 106 to apply in the future to other examples of discrimination that could be done also in contravention of existing law.

Although -- while it's true that the same 92nd Congress that enacted Section 106 also enacted the Case Act, number one, the Case Act was referred to in the conference, in the report on it as only for informational purposes; and moreover, there's no hint whatsoever in any of the legislative history of Section 106 that there was any concern behind that legislation with any presidential abuse of the executive agreement

power.

With respect to your question, Justice Stevens, the only agreement in Europe at the time Section 106 was passed was an agreement with Iceland, and that -- no, Iceland did not arise in the discussion of Section 106. In fact, the discussion centered around discrimination that was going on in Germany. And as we pointed out before, the NATO SOFA which controlled the German situation did not provide any local national employment preferences, nor did it classify jobs as local national or other position.

In effect, what General Phipps was doing was exactly to classify jobs as local nationals, because he took 4,000 positions that had been held by Americans and said he wanted to have them filled by local nationals.

Just to clarify, the exhortations by Stevenson were in the legislative history, the subsequent legislative history, not in the legislative history of Section 106 itself. And indeed, the exhortation to hire more dependents was one within the constraint of existing agreements.

Also, with respect to the need -- the point we have made for a need for a showing of intent to abrogate, we agree where two enactments are clearly inconsistent, irreconcilable, then there's no question

that the earlier must give way to the later; but whereas here there are two possible constructions, then you do look for an intent to abrogate, and in the absence of such an intent, then you try to read the two statutes together.

With respect to the Case Act provision and why if we believe our agreements are treaties within the meaning of Section 106 we submit those agreements under the Case Act, the Case Act would have no meaning unless international agreements were what was supposed to be submitted under it, international agreements other than Article II treaties, because the Senate at least would already have been aware of Article II treaties.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 10:55 a.m., the case in the above-entitled matter was submitted.

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Caspar W. Weinberger, Secretary of Defense, Et Al., Petitioners
v. Anthony M. Rossi ET AL

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Ryan Connelly