

In the

ORIGINAL

# Supreme Court of the United States

CLARENCE E. CABEL, ETC., ET AL.,

Appellants,

v.

JOSE CHAVEZ-SALIDO ET AL.

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:

NO. 80-990

Washington, D. C.

November 3, 1981

Pages 1 thru 51

ALDERSON



REPORTING

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3 CLARENCE E. CABEL, ETC., ET AL.,       :

4                   Appellants,       :

5                   v.                       :     No. 80-990

6 JOSE CHAVEZ-SALIDO ET AL.               :

7 - - - - -:

8                                   Washington, D. C.

9                                   Tuesday, November 3, 1981

10               The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 10:00 o'clock a.m.

13 APPEARANCES:

14               WILLIAM F. STEWART, ESQ., Office of County  
15               Counsel, Los Angeles, California; on behalf of  
16               the Appellants.

17               MARY S. BURDICK, ESQ., Los Angeles, California;  
18               on behalf of the Appellees.

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on behalf of the Appellants	
MARY S. BURDICK, ESQ.,	
on behalf of the Appellees	24
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1

P R O C E E D I N G S

2

CHIEF JUSTICE BURGER: We will hear argument first  
3 in Cabel versus Chavez-Salido.

4

Mr. Stewart, you may proceed whenever you are  
5 ready.

6

ORAL ARGUMENT OF WILLIAM F. STEWART, ESQ.,

7

ON BEHALF OF THE APPELLANTS

8

MR. STEWART: Mr. Chief Justice, and may it please  
9 the Court, this case involves the validity of state  
10 citizenship requirements for certain specified classes of  
11 public employees. It is an appeal from a decision of a  
12 three-judge federal court holding that it was  
13 unconstitutional for California to require its probation  
14 officers to be citizens, and that further, California's  
15 statutory scheme which required peace officers in several  
16 enumerated categories to be citizens was unconstitutionally  
17 overbroad.

18

The plaintiffs in this case were all applicants  
19 for only one peace officer position, that of deputy  
20 probation officer with the County of Los Angeles. This is  
21 the second appeal in the case, the Court having granted the  
22 appeal and remanded it back to the three-judge court for  
23 reconsideration in light of its recently published decision  
24 in Foley versus Connelie. The second time around, the  
25 District Court again by a two to one vote held that it was



1 unconstitutional to require citizenship of deputy probation  
2 officers, and that the statute was unconstitutionally  
3 overbroad.

4           California's statutory scheme sets forth many  
5 enumerated and specific categories of peace officers, and  
6 also sets forth the qualification for peace officers, one of  
7 which is citizenship of the United States. The California  
8 statutory scheme also considers and imposes certain training  
9 requirements on the enumerated categories of peace officers.

10           This case calls once again on this Court to  
11 consider as it did in *Foley and Ambach* whether certain  
12 occupations, public occupations, in this case probation  
13 officers, are of such a nature that they can be  
14 constitutionally limited to citizens.

15           The second issue, of course, is whether or not the  
16 California statutory scheme was unconstitutionally  
17 overbroad. We believe that the three-judge federal court  
18 seriously erred when it concluded that the probation  
19 officer's position was not of a nature that citizenship  
20 could legitimately be required.

21           QUESTION: Mr. Stewart, when you say that the  
22 scheme was considered overbroad, I take it you are referring  
23 to the Court's language in *Sugarman* against *Dougall* that a  
24 narrowly tailored scheme would do. Do you think that has to  
25 do with statutory draftsmanship as to what positions are

1 included and what are not? Or just rather vague language in  
2 the statute itself?

3 MR. STEWART: I think that the Sugarman language  
4 should be limited to the context of that particular case in  
5 the sense that in Sugarman the New York statute struck down  
6 encompassed all classes of civil service servants in New  
7 York without distinction. That's the --

8 QUESTION: Well, didn't the Court's language, our  
9 Court, our language focus on the fact that it included  
10 garbage collectors?

11 MR. STEWART: That is right, Your Honor. It was  
12 overbroad because it included all categories of civil  
13 servants, from garbage collectors to clerk typists to  
14 perhaps police officers and the like.

15 QUESTION: The California statutes are just about  
16 as bad as New York, aren't they? You cover cemetery sextons  
17 and toll takers, and demand citizenship for those as well,  
18 don't you?

19 MR. STEWART: Well, we no longer demand  
20 citizenship of sextons, Your Honor.

21 QUESTION: Well, I am glad to hear that.

22 MR. STEWART: The California legislature in 1980  
23 took another look at the statute, and there were several  
24 categories that were eliminated, of which one category was  
25 cemetery sextons, custodial officers, and there were several

1 other categories, but the difference between the California  
2 statute and that of New York is that they specifically --  
3 for one thing, it deals with one generic class, that is, a  
4 peace officer. They all possess certain peace officer  
5 characteristics.

6           Secondly, each of the specific peace officer  
7 categories is specifically delineated in separate  
8 subsections of the code, so we have one section dealing in  
9 our case with probation officer, another dealing with  
10 sheriffs and police officers, another one dealing with  
11 highway patrol and various other categories.

12           QUESTION: Well, this case just deals with  
13 probation officers.

14           MR. STEWART: Precisely, Your Honor. This case --

15           QUESTION: Why should this person be entitled to  
16 say the statute is invalid because it applies to some other  
17 people, too?

18           MR. STEWART: That is exactly our point. The  
19 plaintiffs in this case, all three of them are applicants  
20 for only one of the classified statutory positions.

21           QUESTION: Do you think Sugarman held that  
22 somebody had standing to do that, or only that the  
23 overbreadth was evidence of -- was relevant to whether and  
24 what kind of a justification the state might claim? If you  
25 are claiming a certain justification, it is awful hard to

1 say that justification would apply to just everybody.

2 MR. STEWART: That is exactly right. We --

3 QUESTION: And if it purports to, it tends to  
4 impugn the justification. Isn't that what --

5 MR. STEWART: That is the position that we -- that  
6 is the way we read Sugarman, Your Honor.

7 QUESTION: Well, Mr. Stewart, if we were to agree  
8 that deputy probation officers as police officers cannot be  
9 required constitutionally to be United States citizens, do  
10 we have to reach this overbreadth argument at all?

11 MR. STEWART: I don't believe you do, Your Honor.

12 QUESTION: No.

13 MR. STEWART: I think that that question --

14 QUESTION: Even though it says peace officers, the  
15 second question, but since the only three applicants here  
16 are deputy probation officers ==

17 MR. STEWART: That is right. I don't think you  
18 need to reach the other argument.

19 QUESTION: What if we held that they may be  
20 excluded?

21 MR. STEWART: May be limited to peace officers. I  
22 think then that --

23 QUESTION: I mean, suppose we hold that the state  
24 may require probation officers to be citizens?

25 MR. STEWART: I think then that the Court need not



1 consider the overbreadth question, because in this  
2 particular case the applicants were just for the deputy  
3 probation officer position. Deputy probation officers are  
4 specifically declined as a precise class of peace officer in  
5 the statute. It is not a generic term. And that the other  
6 categories, if they are constitutionally defective, should  
7 be addressed in a separate suit with parties withstanding,  
8 and where the evidence could be developed as to the  
9 particular tasks involved in that -- in those jobs.

10           In this case, the trial court, by simply saying  
11 that the California statute was unconstitutionally  
12 overbroad, without consideration in detail of the  
13 sub-categories of peace officers, concluded that they were  
14 not legitimately restricted to citizens, and completely  
15 eliminated the citizenship requirements, some of which, for  
16 highway patrolman, police, and sheriff, this Court has  
17 already held are legitimate qualifications.

18           QUESTION: Well, then, Mr. Stewart, that is to  
19 suggest that no matter how we come out on Question One, we  
20 ought not answer Question Two.

21           MR. STEWART: I believe that is the position I  
22 take, Your Honor.

23           QUESTION: Yes.

24           QUESTION: Mr. Stewart, you have three persons  
25 involved here, don't you? One of them is now a probation

1 officer.

2 MR. STEWART: I don't believe so, sir. He left  
3 county service.

4 QUESTION: I thought the briefs indicated he had  
5 acquired his citizenship and was employed. Am I wrong?

6 MR. STEWART: No, I believe the second opinion  
7 indicated that he had left county service after he had  
8 acquired his citizenship. He is no longer a probation  
9 officer. But the Court in, I believe it was a footnote in  
10 their second opinion, stated that his cause was still right  
11 because he still had his claim for back pay and other  
12 damages.

13 QUESTION: What about the other two? Have they  
14 acquired citizenship?

15 MR. STEWART: No, they have not, Your Honor. Nor  
16 did they indicate any intention to acquire citizenship.

17 QUESTION: Just as a matter of information, you do  
18 have some peace officers in California authorized to carry  
19 arms who need not be citizens?

20 MR. STEWART: I do not know whether that is a  
21 fact, sir.

22 This Court in the Sugarman case --

23 QUESTION: I commend to you then California Penal  
24 Code Section 830.7.

25 MR. STEWART: Of course, not all peace officers,

1 Your Honor, are authorized to carry weapons in California.  
2 It is up to their particular --

3 QUESTION: That, of course, is not what it said.

4 MR. STEWART: It is up to their particular  
5 jurisdiction or the employer that allows them to carry  
6 weapons.

7 In Foley and Ambach, this Court in a more precise  
8 and narrow context applied its guidance in Sugarman. In  
9 Foley, the Court upheld the citizenship requirement for  
10 police officers, and in Ambach for teachers. The question  
11 then is whether or not the job characteristics of a  
12 probation officer fall on the Foley-Ambach side, which  
13 justifies citizenship.

14 Measured against the criteria the Court considered  
15 in Foley and Ambach, we believe that the deputy probation  
16 officer positions clearly perform significant governmental  
17 functions that would justify the imposition of a citizenship  
18 requirement. This Court perhaps other than attorneys are  
19 most familiar with the functions of a probation officer.

20 QUESTION: Under California law, in practice, do  
21 they give the sentencing judge a pre-sentence report?

22 MR. STEWART: Yes, they do. They are required to  
23 provide a pre-sentence report in all cases.

24 QUESTION: Do they recommend -- are they  
25 authorized to recommend revocation of probation?

1           MR. STEWART: Yes, they are, Your Honor. They  
2 possess in California, I believe, all of the essential  
3 probation officer powers that exist in most states and in  
4 the federal government. In fact, I believe on of the amicus  
5 for the Appellees indicated that there is really essentially  
6 no difference in the probation officer's powers in  
7 California between those exercised generally and also in the  
8 federal government. So they possess the power to --

9           QUESTION: Mr. Stewart, what is it about being a  
10 non-citizen, being an alien, that affects one's ability to  
11 prepare a pre-sentence report?

12          MR. STEWART: Well, if you zeroed in on just that  
13 one facet of the probation officer's functions, whether he  
14 was a citizen or not may not --

15          QUESTION: Well, then, what about recommending  
16 sentence as opposed to probation?

17          MR. STEWART: I think that is a significant  
18 factor, because by making that recommendation, it assumes  
19 that the court will take some cognizance of it. The  
20 probation officer is exercising a sovereign power of the  
21 government, making a recommendation as to the liberty of an  
22 individual, and it forms an extremely important part of our  
23 criminal justice process, which is bottomed on the concept  
24 of rehabilitation.

25          QUESTION: But do you think there is something



1 about being a non-citizen that means that that person can't  
2 do that job effectively?

3 MR. STEWART: Not perhaps in a technical sense,  
4 but the same type of qualification would apply to a deputy  
5 probation officer as the Court found existed in Foley and in  
6 Ambach, particularly in Foley, because the probation  
7 officers here are involved closely as an integral part of  
8 the criminal justice system. In a sense, they are almost an  
9 arm of the court.

10 QUESTION: In all of the others, the officer  
11 involved deals with the whole public. Isn't that true?

12 MR. STEWART: Involves the entire public, sir?

13 QUESTION: The officer can involve himself with  
14 anybody in the public, but the probation officer is limited  
15 to only probationers. Isn't that a difference?

16 MR. STEWART: I don't think it is a difference  
17 that is constitutionally significant because the probation  
18 officer --

19 QUESTION: Why not?

20 MR. STEWART: -- because the probation officer  
21 performs activities on behalf of society as a whole. There  
22 are many jobs in government that are significant, that  
23 perform significant governmental functions which do not on a  
24 daily basis meet all of the public. I think that is too  
25 narrow a concept for determining whether or not the job

1 performs significant governmental functions.

2           In the case of juveniles, the probation officer's  
3 capacity is much broader in California, because they come  
4 into contact with juveniles that may not be offenders, or  
5 have not got to the stage where they would be charged with  
6 some sort of criminal activity.

7           QUESTION: But they are only juveniles.

8           MR. STEWART: Pardon me, Your Honor?

9           QUESTION: They are only juveniles. They wouldn't  
10 come in contact with you or me, would they?

11          MR. STEWART: Not unless we were --

12          QUESTION: As long as we stayed out of trouble.

13          MR. STEWART: That's right, Your Honor.

14          QUESTION: So it is different from a state trooper.

15          MR. STEWART: It is more narrow in the sense of  
16 its contacts than a state trooper. That is correct.

17          QUESTION: Yes.

18          QUESTION: Is he more narrow in his contacts than,  
19 say, teachers?

20          MR. STEWART: Yes, in the sense that the teacher  
21 would address a class or be associated with a class on a day  
22 to day basis, whereas a probation officer is directed  
23 primarily toward juveniles as a group or adult offenders.

24          QUESTION: But teachers are addressed primarily to  
25 juveniles as groups, too, are they not?

1           MR. STEWART: That's correct. They do not relate  
2 in a broad sense to adults. They focus primarily on the  
3 juveniles and those that are in their class. But in both  
4 instances the probation officer performs a function  
5 representing the state on behalf of society as a whole, in  
6 attempting to establish rehabilitation, establish guidance  
7 for juveniles as well as adults, and I think that this  
8 particular function or facet of this position relates very  
9 closely to the significant governmental powers that this  
10 Court felt were important in determining whether or not  
11 citizenship could validly be required.

12           QUESTION: Mr. Stewart, is there anything in the  
13 record to indicate how many probationers in Los Angeles each  
14 probation officer is responsible for?

15           MR. STEWART: I believe it varies, Your Honor.  
16 There is nothing in the record, but there were some remarks  
17 made by one of the amicus as to the work load, but I  
18 believe their case load now is somewhere around 100  
19 offenders.

20           QUESTION: Why did the amicus think that was  
21 relevant to any of the issues in this case?

22           MR. STEWART: They apparently felt because their  
23 work load was such that they were mere functionaries, and  
24 used that statistic to try to buttress their argument. That  
25 is the only relevance that at least was expressed in their

1 brief.

2 QUESTION: Do you think that is relevant?

3 MR. STEWART: No, I don't, Your Honor.

4 QUESTION: Mr. Stewart, would you outline the  
5 duties of a probation officer with respect to juveniles?

6 MR. STEWART: Yes. The duties of a probation  
7 officer with respect to juveniles can be divided into  
8 perhaps two categories, those which could be considered  
9 delinquents and those that could be considered to be  
10 abandoned, neglected, or abused children in California.

11 As far as delinquents are concerned, they have  
12 jurisdiction to determine whether or not to take a juvenile  
13 into custody because of some offense, whether or not to  
14 divert him into the criminal justice system or to release  
15 him back to his parents or to some informal method of  
16 treating the individual. They can determine whether or not  
17 charges should be filed against a juvenile.

18 The juvenile can be remanded to the custody of the  
19 deputy probation officer at the determination of the  
20 juvenile judge and put under a program of corrective  
21 behavior and restrictions somewhat similar to conditions of  
22 parole.

23 The probation officers in Los Angeles County run  
24 juvenile camps, have sole jurisdiction over approximately  
25 nine or ten juvenile camps in Los Angeles County.



1           With regard to the non-delinquent children, their  
2 powers are very extensive. They act as sort of a *parens*  
3 *patriae* concept. They can come in and seek to remove the  
4 child from the custody of its parents because of abuse or  
5 neglect. Once again, the court can remand the juvenile back  
6 into the custody of the probation officer to be put under a  
7 program or put into his protective custody and moved into a  
8 foster home, or under one of the juvenile halls, not the  
9 juvenile hall in the delinquent sense, but we have a  
10 juvenile hall that has children that have been abandoned or  
11 neglected, and they were under the jurisdiction of the  
12 probation department up until just a couple of years ago,  
13 but in other counties they are still under the control of  
14 the probation department.

15           QUESTION: Isn't that all under the supervision of  
16 the social worker?

17           MR. STEWART: The only -- only the abandoned,  
18 neglected, and abused child does the social worker have a  
19 role, Your Honor.

20           QUESTION: You mean the probation officer can move  
21 the child from one status to another on his own?

22           MR. STEWART: I was referring to a delinquent  
23 child. Where the child is adjudged to be a delinquent,  
24 under a separate section of our code, the social worker does  
25 not have any role in that. It is only in the abandoned,

1 abused, and neglected category that the social worker has a  
2 role, and generally it depends on the county that you are  
3 in.

4           In Los Angeles County, the probation -- the  
5 welfare department is quite extensive, and they do play a  
6 substantial role in the placing of the child into foster  
7 homes and the like.

8           QUESTION: Mr. Stewart, does the record tell us  
9 anything about the offender population in the county? I  
10 assume there must be some significant number of  
11 non-citizens, Spanish-speaking non-citizens who may be  
12 offenders in Los Angeles County.

13          MR. STEWART: There is nothing in the record  
14 indicating the offender record or what their alien backgroun  
15 is.

16          QUESTION: Does the argument about the citizenship  
17 requirement as to most people necessarily apply with the  
18 same force if the probation officer's people with whom he  
19 deals, 100 or so offenders, if they are all non-citizens,  
20 Spanish-speaking, and so forth? What is the relevance there  
21 for insisting that you not have, say, a non-citizen who  
22 might be more like the people he is responsible for?

23          MR. STEWART: Well, the individual, whether he is  
24 an alien or not, is still under the jurisdiction of our  
25 system of criminal laws and our constitutional protection,

1 so it is not similar to a situation where a probation  
2 officer may be acting outside of the country. The probation  
3 officer is representing the court and our criminal justice  
4 system.

5           And secondly, as far as relating, I don't think  
6 that there is a substantial difference between whether he is  
7 alien or non-alien in terms of relating to a particular  
8 offender. If it is a question of language, then we have the  
9 special category of Spanish-speaking probation officers in  
10 Los Angeles County that have preference in hiring, as a  
11 matter of fact. They are citizens, but it was -- they were  
12 designed to address the problem and perhaps some problems in  
13 language communication, but I do not feel that a non-alien  
14 probation officer would relate any better to a non-alien  
15 offender.

16           QUESTION: Well, I just was wondering what in that  
17 particular category, what is it -- does the citizenship  
18 requirement in that category perform a useful function? I  
19 suppose it narrows the class of Spanish-speaking persons  
20 that are eligible for employment, and is that -- One reason  
21 I ask the question is that a year or two ago we had a case  
22 involving correction officers called Minick, in which the  
23 state had an affirmative policy of trying to get different  
24 minority groups because they might be able to relate better  
25 with the offenders for whom they were responsible.

1           Here you have kind of a different approach to the  
2 problem.

3           MR. STEWART: Well, we believe we can do it, but  
4 it doesn't require that he be a -- or that citizens of the  
5 United States --

6           QUESTION: Well, which you can't do. You can't  
7 take aliens, as I understand your -- or is there room for  
8 exceptions? Can there be exceptions?

9           MR. STEWART: No.

10          QUESTION: You have just tied your own hands in  
11 this area.

12          MR. STEWART: Well, what I am saying is that  
13 having an alien probation officer does not in my view  
14 enhance the relationship between himself and a non-alien  
15 offender, that in Los Angeles County in particular there is  
16 a large number of citizen Spanish-speaking individuals of  
17 Spanish or Hispanic background that can relate very well  
18 with the criminal offenders, whether of the Spanish or other  
19 race, or whether he is an alien or he is not an alien.

20          QUESTION: I suppose in Ambach versus Norwick the  
21 same argument could have been made that an alien  
22 Spanish-speaking Puerto Rican might have related better to  
23 students in New York schools than a citizen and nonetheless  
24 we upheld the New York requirement that teachers be citizens.

25          MR. STEWART: And I believe it would apply equally



1 well to the Foley case, because there have been efforts, of  
2 course, for the police department to more adequately or more  
3 broadly represent the structure of society, yet you upheld a  
4 citizenship requirement for police officers, and they relate  
5 as well to non-alien offenders. I find no distinction  
6 between Foley and Ambach in that regard.

7           QUESTION: Mr. Stewart, does the record show how  
8 many probation officers there are in the County of Los  
9 Angeles?

10           MR. STEWART: The record does not show that. I  
11 can represent to the Court what --

12           QUESTION: It is a matter of public record, isn't  
13 it?

14           MR. STEWART: Yes, it is, and it is approximately  
15 2,500.

16           QUESTION: Twenty-five hundred? Do you have any  
17 idea what percentage of those are Spanish-speaking citizens?

18           MR. STEWART: I believe that the percentage of  
19 them are approximately, and this is a guess, in the vicinity  
20 of 20 percent, 15 to 20 percent.

21           QUESTION: I suppose a guess would not be very  
22 helpful for us unless counsel on the other side would agree.

23           MR. STEWART: Yes, I understand, Your Honor, but  
24 there is nothing in the record indicating that. I can  
25 represent that the county does have the Spanish-speaking

1 qualification, which allows a preference in hiring for  
2 probation officers.

3           QUESTION: May I ask this, since I have  
4 interrupted you? One of the Appellees had become a  
5 citizen. May the other two apply for citizenship? Have  
6 they been here long enough or whatever the requirements are  
7 that would entitle them to apply for citizenship? Do you  
8 know?

9           MR. STEWART: I am sure that they would, and I say  
10 that only because this case began in 1975, and it is now  
11 1981, and I believe there is a five-year --

12           QUESTION: The record doesn't show whether they  
13 could have applied in 1975.

14           MR. STEWART: I don't believe it does.

15           QUESTION: Mr. Stewart, some of the writers in  
16 this field have suggested that the regulation of aliens has  
17 really been pre-empted by the federal government. I would  
18 like to ask you whether the federal government requires  
19 probation officers to be citizens.

20           MR. STEWART: As I understand it, the federal  
21 government requires all their civil servants to be  
22 citizens. The Court considered the federal government's  
23 restriction to citizenship in the Hampton case, and I  
24 understand that the President then issued a directive  
25 requiring citizenship of most classifications of civil

1 servants. I may be wrong, but I believe that they did.

2 QUESTION: Well, administrative exceptions can be  
3 made, can they not, in the federal government to employ  
4 aliens?

5 MR. STEWART: I am sure that there can, Your  
6 Honor, yes.

7 QUESTION: If the convicted criminal has any  
8 rights in the area, is there anything to the notion that an  
9 American citizen might think he had some right to have a  
10 probation officer supervising him or advising the court  
11 about him who was not an alien citizen of another country?  
12 Do you think the criminal defendants have any rights in the  
13 matter?

14 MR. STEWART: I don't think the criminal  
15 defendants have a right to a particular type of probation  
16 officer. I think that is up to the court and the probation  
17 authorities to determine the best qualified probation  
18 officer without regard to whether he is an alien or not an  
19 alien.

20 I have emphasized the power of the probation  
21 officer with regard to the criminal justice system, but it  
22 is clear that in that exercise of power they exert or  
23 execute vast discretionary powers, not only with the  
24 pre-sentencing report and recommendations to the court.  
25 They act in a quasi-judicial capacity and have been held to

1 act in that capacity and are entitled to immunity as a judge  
2 would be for acting in a quasi-judicial capacity.

3           They also possess peace officer status, and while  
4 it is not exercised to the same extent as a policeman, they  
5 can exercise a peace officer status and take a probationer  
6 who has violated probation into custody. They exercise vast  
7 discretion in determining whether or not a condition of  
8 parole has been violated, and if it has, what should be the  
9 disposition. It does not necessarily follow that he will  
10 automatically request a revocation of parole.

11           I think just by virtue of the extensive, expansive  
12 authority of a probation officer over juveniles, that itself  
13 would be sufficient to justify the imposition of a  
14 citizenship requirement. They are clearly when you review  
15 their entire functions not mere functionaries, but they form  
16 the core of the state's philosophy regarding rehabilitation  
17 of criminals.

18           As the crime rate increases, the function of a  
19 probation officer becomes more and more important. As the  
20 ABA announced or stated in their report on probation, that  
21 it is one of the central features of our criminal justice  
22 system, and more and more the courts have come to rely on  
23 probationers, probation officers. As such, they certainly  
24 execute a significant and important governmental function,  
25 in my view far expanding in many respects that of a police

1 officer in Foley and a teacher in Ambach.

2 I would like to reserve my remaining time.

3 CHIEF JUSTICE BURGER: Very well.

4 Ms. Burdick.

5 ORAL ARGUMENT OF MARY S. BURDICK, ESQ.,

6 ON BEHALF OF THE APPELLEES

7 MS. BURDICK: Mr. Chief Justice, and may it please  
8 the Court, the state of California by enactment of one  
9 simple single section of California law, Government Code  
10 Section 1031(A), in one fell swoop has banned over one and  
11 one-third million legally admitted resident aliens of  
12 California from employment in more than 70 different job  
13 categories, regardless of whether those aliens are seeking  
14 to become citizens.

15 The jobs from which aliens are excluded include  
16 deputy probation officers, the positions which the  
17 plaintiffs in this case sought, as well as such jobs as  
18 inspectors for specialized boards, such as the boards of  
19 dental examiners --

20 QUESTION: Are we really concerned with anything  
21 except probation officers here?

22 MS. BURDICK: Yes, I believe we are. The  
23 probation officers were prevented from obtaining employment  
24 by a statute which sweeps too broadly and which does not  
25 comply with the mandate of Sugarman that a statute which



1 limits constitutional rights if challenged under the  
2 Fourteenth Amendment must be narrowly drawn and precisely  
3 crafted in light of the state's interest.

4           QUESTION: I thought overbreadth was limited to  
5 freedom of speech.

6           MS. BURDICK: Well, not necessarily. Of course,  
7 in Sugarman, the Court struck down the statute and said it  
8 was not precisely crafted and narrowly drawn.

9           QUESTION: Well, I am probably a poor person to  
10 interpret Sugarman since I dissented in that case, but as I  
11 read it, it simply said that the state could have excluded  
12 certain jobs from aliens but that it simply swept with too  
13 broad a brush substantively rather than having conduct which  
14 might have been proscribed get off free because you couldn't  
15 tell what it meant.

16           MS. BURDICK: Well, I don't think that Sugarman  
17 indicated that the Court was unable to decide which job  
18 classifications were limited to citizens. The Court said  
19 that, and gave examples of jobs that the jobs were too many  
20 and that the statutes swept too broadly, and therefore was  
21 not precisely crafted, and that is exactly what we have  
22 here, a statute --

23           QUESTION: But, Ms. Burdick, if we agreed that as  
24 applied to deputy probation officers the statute was  
25 unconstitutional, do we have to go on and deal with the

1 overbreadth issue at all?

2 MS. BURDICK: You would not have to in order to  
3 resolve the case of the three plaintiffs. However, this  
4 Court would be using a prudential limit on standing, not a  
5 strict standing requirement to do so, and that would lead to  
6 the very unprudential result which the county has urged that  
7 we have 69 more cases to decide about the rest of the  
8 statute.

9 Now, if we were suggesting that none of the  
10 positions in this statute could ever be limited to citizens,  
11 then I would agree that this is an incorrect vehicle.

12 QUESTION: This isn't a class action, is it?

13 MS. BURDICK: No, it is not.

14 QUESTION: Well, are you suggesting that it is  
15 time this Court fishes or cuts bait on the question of  
16 whether or not alienage may be required, or may be  
17 prohibited by a state in state employment, that it come to  
18 rest somewhere or other rather than deciding each case on an  
19 ad hoc basis?

20 MS. BURDICK: Well, the Court has clearly  
21 indicated that in some job positions aliens may be excluded,  
22 but I think, yes, this is a case where there is an  
23 opportunity to draw the line, and to establish some criteria  
24 so that the cases do not have to be resolved one at a time  
25 without any standards.

1 QUESTION: Do you think Judge Hill tried very hard  
2 to follow the Ambach and the Foley cases?

3 MS. BURDICK: Well, as the court noted below,  
4 Judge Hill and the other two judges on the panel had been  
5 California state trial judges. They were familiar with what  
6 a probation officer does. They said in their opinion that  
7 they considered Foley, they considered Ambach. I have to  
8 believe that they did so.

9 QUESTION: And they divided two to one.

10 MS. BURDICK: They divided two to one. That is  
11 correct.

12 QUESTION: Ms. Burdick, going back to Justice  
13 White's inquiry, was there a reason why this wasn't brought  
14 as a class action?

15 MS. BURDICK: What is reflected in the record is  
16 that a first amended complaint was proposed to make this a  
17 class action. What is not reflected in the record is that  
18 the Court urged the parties to stipulate that it did not  
19 have to be a class action because the Court believed it  
20 could reach the overbreadth issue.

21 There is then a stipulation in the record that the  
22 parties would drop the class allegations from the complaint  
23 and would proceed with the action. However, the county did  
24 agree to apply the decision to all probation officers,  
25 deputy probation officers in the stipulation, whether they

1 were named plaintiffs or not.

2 QUESTION: We couldn't decide this as a class  
3 action, could we?

4 MS. BURDICK: Pardon?

5 QUESTION: We could not decide this case as a  
6 class action, could we? Of course not, because it is not  
7 here.

8 MS. BURDICK: No, this is not a class action, and  
9 I am not purporting to --

10 QUESTION: Well, if we can't decide this single  
11 class, how can we decide the whole class you want us to  
12 decide?

13 MS. BURDICK: Well, I am not asking the Court to  
14 decide that no one, no member of what could have been a  
15 class could ever be required to become a citizen to get any  
16 of the jobs here. All we are asking the Court to say is  
17 that this statute is not precisely crafted as applied to  
18 anyone. That still leaves the legislature in the position  
19 of being able to go back and do what it could have done  
20 before, and that is examine each peace officer position and  
21 require citizenship for those where it feels it is  
22 appropriate.

23 QUESTION: Maybe this is what Justice White  
24 already asked, but whatever reason the legislature had for  
25 requiring citizenship for probation officers must also apply

1 to everybody else thrown into this statute, such as cemetery  
2 sextons and the like. They didn't say, well, there is a  
3 special -- they didn't separate this, probation officers,  
4 out from the others, and whatever the reason was must be  
5 common to the entire group covered by the statute. Is that  
6 your argument?

7 MS. BURDICK: That is correct. When the  
8 California attorney general a decade ago examined this  
9 statute, he opined that it was unconstitutional, examined  
10 the legislative history, and said he could find no reason  
11 for a broad sweeping citizenship requirement. The  
12 citizenship requirement is not contained in a statute which  
13 says, probation officers must be citizens, and a separate  
14 one that says investigators for the board of dental quality  
15 assurance must be citizens.

16 What we had was one statute enacted that said  
17 peace officers must be citizens. The definition of peace  
18 officer is contained scattered throughout other parts of  
19 California law, has evolved over the years, and there has  
20 never been any attempt to attach a citizenship requirement  
21 individually to the job categories. The legislature acted  
22 with a broad brush.

23 QUESTION: And yet you concede, do you not, that  
24 you represent only three people here and each of them are  
25 applicants for the position of probation officer.



1 MS. BURDICK: Yes, that's correct.

2 QUESTION: The Attorney General's opinion was way  
3 back in 1970, wasn't it?

4 MS. BURDICK: Yes, it was.

5 QUESTION: That would be before Foley and Norwick,  
6 Ambach.

7 MS. BURDICK: That's correct. The Attorney  
8 General of California anticipated Sugarman, Foley, and  
9 Ambach, in his opinion, indicated that under current law  
10 even before those decisions the statute violated the  
11 Fourteenth Amendment, but even after the Attorney General's  
12 opinion and this Court's decisions, at least the county of  
13 Los Angeles in California has continued to enforce the  
14 statute.

15 QUESTION: Has the Attorney General appeared in  
16 this litigation at all?

17 MS. BURDICK: No.

18 QUESTION: And yet it is his duty to defend the  
19 statute under California law, or not? Is that to be imposed  
20 on the county officials?

21 MS. BURDICK: The only obligation that I know of  
22 to involve the Attorney General is under this Court's rules  
23 to send him the required notice of the case. He does not  
24 have any obligation that I know of under California law to  
25 appear.

1           This case offers an excellent opportunity for the  
2 Court to set some criteria and develop a way to draw lines  
3 in future cases where public employees are excluded if they  
4 are not citizens. I offer and suggest three criteria which  
5 may help give some meaning to the language of Sugarman,  
6 Foley, and Connelie.

7           This language -- these criteria can be used to  
8 evaluate jobs that are policy implementation jobs,  
9 non-elective, non-appointive, and I believe that these will  
10 give some substance to the language of this Court's opinions  
11 that require that the public be substantially affected by  
12 jobs which are limited to citizens, and that those jobs lie  
13 at the heart of representative government.

14           My first suggestion is that we inquire whether  
15 public employees have an important public power which puts  
16 them in a position of authority and control over a  
17 substantial portion of the citizen population.

18           My second suggested criteria is that we ask if  
19 there is any way in which the citizen government buffers the  
20 contact between the population in general and the public  
21 employee, either by screening the clientele of the public  
22 employee or by interposing some direct supervisor.

23           QUESTION: On your first criteria, Ms. Burdick, do  
24 you mean all the people of California, all the people of Los  
25 Angeles County, or all the persons criminally convicted in

1 Los Angeles County? What is your constituency that you have  
2 in mind for that first criteria?

3 MS. BURDICK: The constituency of the probation  
4 officer in California is that portion of the population  
5 which has been arrested by the police --

6 QUESTION: I want to know what constituency you  
7 were talking about when you mentioned your first criteria.

8 MS. BURDICK: Well, I would say that a job which  
9 met the first criteria would require that all of --  
10 substantially all or a significant portion of the population  
11 within the jurisdiction of the public employee, the  
12 geographical jurisdiction, be subject to authority and  
13 control. For example --

14 QUESTION: Probation officers don't deal with the  
15 populace generally, do they?

16 MS. BURDICK: No, exactly. That is my point. I  
17 don't believe probation officers meet this first criteria.

18 QUESTION: Their constituency is primarily the  
19 convicted defendant, is it not?

20 MS. BURDICK: That's correct.

21 QUESTION: Now, their contacts with other people  
22 are to acquire information about those convicted  
23 defendants. Is that so?

24 MS. BURDICK: That's correct.

25 QUESTION: Did I correctly understand Mr. Stewart

1 to say they have 2,500 probation officers?

2 MS. BURDICK: I have no information and there is  
3 no information in the record as to the total number of  
4 probation officers.

5 On that first criteria, as you pointed out, the  
6 probation officer deals with a very small population. The  
7 amicus Service Employees Union has offered data which can be  
8 found at their Footnote 4 and 11 and the accompanying text  
9 that indicates that one-tenth of 1 percent of the California  
10 population comes under the jurisdiction of a probation  
11 officer.

12 My second suggested criteria was whether there was  
13 a buffer between the public and the public employee.

14 My third suggestion is that we ask if the public  
15 employee holds a position which has some symbolic importance  
16 in the public mind in terms of what the public would  
17 perceive as the meaning of the power and authority of the  
18 government to control and to assimilate the general  
19 population.

20 If we apply these criteria to the probation  
21 officer functions, I think we will see that there is a  
22 distinct difference between a probation officer on the one  
23 hand and public employees such as police officers and  
24 teachers on the other.

25 QUESTION: But when you speak of the public,

1 certainly the public speaks through the legislature, does it  
2 not?

3 MS. BURDICK: Yes, and it is the legislature which  
4 I would suggest is the entity which is properly limited to  
5 citizens. It is the legislature which would control the  
6 authority of the court, the court which in turn would  
7 control the authority of the probation officer. The  
8 probation officer is very much screened out from the  
9 political process by the time a small portion of the  
10 population comes under his control.

11 QUESTION: But when the legislature says that a  
12 probation officer must be a citizen, doesn't that mean that  
13 the public perceives that the probation officer ought to be  
14 a citizen?

15 MS. BURDICK: I don't know if that is true. In  
16 this case, the legislature said all peace officers shall be  
17 citizens. What they had in mind at the time they enacted  
18 that statute as to what a peace officer might be, I don't  
19 know, but if it is true that there has been a reasoned  
20 legislative decision here, then there has been a reasoned  
21 legislative decision that messengers have to be citizens,  
22 too, and I think at some point the Court has to go behind  
23 that decision to see whether it violates the Fourteenth  
24 Amendment.

25 QUESTION: Well, we don't ordinarily require that



1 all state legislative or for that matter Congressional  
2 decisions be "reasoned", do we?

3 MS. BURDICK: No, but when there is a challenge  
4 under the Fourteenth Amendment, particularly when a discrete  
5 and insular minority such as aliens is involved, this Court  
6 has required that there be a compelling justification for  
7 the classification.

8 If I may apply my criteria to the jobs performed  
9 by a probation officer, I think we will see the distinction  
10 between a probation officer on one hand and a teacher or a  
11 policeman on the other.

12 Probation officers, the court found, act as  
13 advisors to the court by preparing pre-sentence and  
14 probation reports for juveniles and adults. The content of  
15 that report is factual, and the statute states exactly what  
16 is to be included. Therefore, there is very little  
17 discretion in assembling the factual material in the  
18 probation report.

19 The probation officer, of course, does make a  
20 recommendation as to probation, but in California only the  
21 judge can set probation, set the terms and conditions,  
22 revoke probation, or modify it.

23 In court, the probation officer does act as an  
24 advisor to juveniles who do not have legal counsel.  
25 However, in this capacity, they become less and less like

1 decision-makers and more like legal counsel, which this  
2 Court, of course, has held in In re Griffiths may not be  
3 limited to citizens.

4           In their supervisory capacity, probation officers  
5 meet and counsel the population under their control, which I  
6 have indicated is very small. The documents relied on by  
7 the Appellants to support their argument that probation  
8 officers perform an important function indicate that on the  
9 average a probation officer can meet with a probationer less  
10 than once a month. Therefore --

11           QUESTION: Would you concede that citizenship  
12 might be made a requirement by the legislature for judges?

13           MS. BURDICK: In California there is such a  
14 requirement, and the criteria that I have offered are for  
15 non-appointive, non-elective positions. I am not sure they  
16 would be generally applicable. But it would be a very  
17 difficult case to argue that judges could not be required to  
18 be citizens.

19           QUESTION: Ms. Burdick, just out of curiosity, is  
20 the prosecutor in Los Angeles County required to be a  
21 citizen?

22           MS. BURDICK: I don't know. Mr. Stewart tells me  
23 he is.

24           QUESTION: He does have to be.

25           QUESTION: Ms. Burdick, could I -- suppose this

1 statute that is here in Section 1 said all school teachers  
2 must be citizens, and Section 2, all policemen must be  
3 citizens, Section 3, all other peace officers must be  
4 citizens, and then the definition of police officer is just  
5 as it is in this case, and suppose your clients were either  
6 applicants for police positions or as teachers.

7 MS. BURDICK: If you --

8 QUESTION: Do you think you would be here making  
9 the same argument, that because the statute is so broad, it  
10 may not be applied to teachers or police officers?

11 MS. BURDICK: I think if there were a statute that  
12 said police --

13 QUESTION: Well, this is the very statute here.  
14 The only difference is that the first two sections apply to  
15 teachers and police officers, and your clients are some of  
16 those people.

17 MS. BURDICK: I believe that I would have standing  
18 to raise that issue. However, for prudential reasons, the  
19 Court might find that I would not have enough of a stake in  
20 the case and would not be raising it in the proper context,  
21 that it would be an inappropriate case to decide the full  
22 breadth.

23 QUESTION: Well, what if we decide that probation  
24 officers are more like police officers? And that if the  
25 only section there was in the statute dealt with probation

1 officers, you would lose. Do you think you should win  
2 because the statute applies to some other positions?

3 MS. BURDICK: I think in this case, yes, we should  
4 be able to prevail as the three-judge court below found on  
5 the issue that this statute was not carefully crafted by the  
6 legislature in light of the legislature's legitimate  
7 interest in protecting the political community. That would  
8 still leave the California legislature free to go back and  
9 enact a narrow statute which applied only to the categories  
10 this Court found appropriately limited to citizens.

11 QUESTION: Supposing the legislature did go back  
12 and craft, as you say, a narrowly drawn statute that said  
13 all probation officers must be citizens. Would you feel  
14 that was constitutional or unconstitutional?

15 MS. BURDICK: That would be unconstitutional,  
16 because I do not believe that probation officers properly  
17 fall within the political community and are similar to  
18 police officers and teachers. I believe the probation  
19 officer performs more one of the common occupations.

20 QUESTION: Well, so then you really don't need the  
21 overbreadth argument at all, do you?

22 MS. BURDICK: No. As I indicated, we could win if  
23 this Court only ruled that probation officers cannot be  
24 required to be citizens. However, it would then be in the  
25 posture that perhaps 69 more cases would be necessary to

1 reach the point that the District Court, the three-judge  
2 court had already met, and that was that the statute is  
3 overbroad, and a citizenship requirement, if enacted, will  
4 have to be done so narrowly.

5 QUESTION: And therefore probation officers would  
6 be different from police officers and teachers.

7 MS. BURDICK: Yes.

8 QUESTION: Ms. Burdick, do you think the Court  
9 should consider a federal pre-emption standard in looking at  
10 these cases?

11 MS. BURDICK: I know that it has been argued in  
12 earlier cases that federal immigration law and federal power  
13 pre-empts the state imposition of any citizenship  
14 requirements. Although that issue is not directly addressed  
15 in Foley and Ambach, because of the existence in Foley and  
16 Ambach, we have chosen not to pursue that claim here.

17 QUESTION: Ms. Burdick, let me ask you one thing.

18 MS. BURDICK: Yes.

19 QUESTION: Is there a distinction in the facts,  
20 however relevant it may or may not be, between this case and  
21 Ambach in that your people were willing to take a loyalty  
22 oath and those in Ambach did not go that far?

23 MS. BURDICK: I had thought that the plaintiffs in  
24 both Foley and Ambach had indicated their willingness to  
25 sign the pre-employment loyalty oath.



1 QUESTION: But in any event, yours are willing?

2 MS. BURDICK: Ours are all willing, and Mr.

3 Chavez-Salido, in fact, had his petition for naturalization  
4 pending when he applied for employment and was still denied  
5 employment.

6 If I apply the criteria that I have suggested to  
7 the job of probation officer, I would note that a probation  
8 officer does not perform important functions which put him  
9 in a position of power and authority over a substantial  
10 portion of the population. As I noted, they deal with  
11 approximately one-tenth of 1 percent of the population.  
12 They have control of that percentage of the population only  
13 during the period of probation, and their contact during  
14 that period is intermittent.

15 QUESTION: How did you arrive at that one-tenth of  
16 1 percent? I missed your calculation.

17 MS. BURDICK: The figures came from the--

18 QUESTION: Population of Los Angeles County? Are  
19 you starting with that?

20 MS. BURDICK: I took -- the figures are from  
21 Footnotes 4 and 11 of the amicus brief of the Service  
22 Employees Union, and the figure was 23 million Californians  
23 and 23,000 probationers.

24 QUESTION: Does the record show the total number  
25 of persons in confinement in California then?

1 MS. BURDICK: No, it does not.

2 If we compare then the police officer and the  
3 teacher, we see that a police officer has authority and  
4 power to intervene in the life of any citizen during the  
5 entire life of that citizen. A teacher has power and  
6 authority over substantially all citizens for at least ten  
7 to twelve years of their lives, and for substantial periods  
8 of time during those ten to twelve years.

9 QUESTION: Well, that is not true of a student at  
10 a private school, nor is it true of a police officer if he  
11 makes a warrant, unjustified, warrantless arrest, is it?

12 MS. BURDICK: I can see that public school  
13 teachers deal with probably 85 to 90 percent of the  
14 population. I consider that a substantial enough proportion  
15 to meet my first criteria. It is also true, of course, that  
16 a policeman can only intervene with one person at a time,  
17 and that his decision to do so may eventually be found to  
18 have been in error. However, the policeman has the  
19 authority to make the decision on the spot in his own  
20 discretion whether to intervene with any citizen at any  
21 time. The supervision and the oversight of that decision  
22 comes afterwards, and then it is by the court.

23 QUESTION: Well, don't you think that supervision  
24 and oversight also comes from his lieutenant and his  
25 captain?

1 MS. BURDICK: Yes, it does, but at the moment of  
2 intervention, the police have the exercise of their own  
3 personal understanding of their job and their obligation as  
4 their only guidance. There is no direct supervisor walking  
5 with the policeman on a beat.

6 QUESTION: Well, how about the probation officer  
7 who decides to suspend probation or to hold the first of the  
8 Morrissey versus Brewer hearings? Doesn't he have the  
9 initial right to make a determination that there is grounds  
10 for holding the second type of hearing on his own?

11 MS. BURDICK: In California, a probation officer  
12 cannot alter or revoke, make any changes in probation at  
13 all. He can merely bring the issue before the judge, where  
14 the judge makes that decision.

15 QUESTION: But he has the right to institute the  
16 proceeding, doesn't he?

17 MS. BURDICK: Yes, he can suggest to the court  
18 that a change should be made, but only the court can make  
19 that change. Therefore, again, he acts as an advisor,  
20 bringing issues to the court, but not as the ultimate  
21 decision maker.

22 My second criteria was that we look to see if  
23 there is some buffer between the general population and the  
24 public official, either by the intervention of a supervisor  
25 or by screening of the clientele of the public officer. It

1 is the police, the judges, and the juries who winnow out the  
2 general population and find that narrow group which should  
3 be under the control of a probation officer.

4 I would suggest that it is then the police, the  
5 judges, and the juries who exercise the role of government  
6 in the criminal justice system, and that they simply pass on  
7 to the probation officer a very small class of people in  
8 need of limited supervision under set terms and conditions  
9 for a short period of time.

10 On the other hand, as I have already suggested,  
11 the police come in direct contact with the general public,  
12 and teachers come in direct contact with all of the general  
13 public. There is no intervention, and there is no  
14 supervisor.

15 My third criteria was that there be some symbolic  
16 importance in the job in order to give meaning to the  
17 context of what we believe lies at the heart of our  
18 representative government. Police and school teachers are  
19 constant, pervasive symbols of what it means to be under the  
20 control and authority and the assimilative forces of our  
21 society. A probation officer is an important employee, but  
22 he is not a symbolic functionary of government.

23 QUESTION: Isn't a probation officer an arm of the  
24 sentencing judge in California?

25 MS. BURDICK: Well, he is an advisor to and is

1 present in court, but I don't think that he rises to the  
2 same importance in terms of symbolism as the judge or the  
3 jury.

4           QUESTION: What do you think the probationer or  
5 parolee thinks when the probation officer comes around to  
6 have a chat with him? Does he think that had something to  
7 do with the Judge?

8           MS. BURDICK: He certainly understands that the  
9 probation officer is following the instructions of the  
10 judge, but I don't think that he has the same reaction to  
11 the probation officer who is an employee in an office that  
12 he would have to the armed police officer or to the judge  
13 behind the bench.

14           QUESTION: Are the probation officers in  
15 California permitted to carry arms under some circumstances  
16 by administrative leave?

17           MS. BURDICK: Only if their employing authority  
18 authorizes it, and to the best of my knowledge, and as far  
19 as the record reflects, no such authorization has been given  
20 in Los Angeles.

21           QUESTION: Ms. Burdick, do they wear uniforms?

22           MS. BURDICK: I believe they do not.

23           In short, a probation officer, like a teacher or a  
24 policeman, is an advisor, not a decision-maker. He deals  
25 with a very small, carefully screened portion of the



1 population for a short period of time. The three-judge  
2 court below comprised of former California state trial  
3 judges with firsthand knowledge of the operation of the  
4 probation system twice concluded based on the evidence  
5 presented to them that probation officers do not perform  
6 functions that fall within the heart of a representative  
7 government.

8 QUESTION: Ms. Burdick, let me ask you one other  
9 question. Does the record tell us how these people are  
10 appointed? I know there is an examination of some kind.  
11 Who is the appointing authority?

12 MS. BURDICK: I don't know what the appointing  
13 authority is, or whether they are simply employees of the  
14 probation department.

15 QUESTION: And who runs the probation department?  
16 Is that an elected office? I am just wondering if they are  
17 possibly patronage people.

18 MS. BURDICK: I have no information that they are  
19 patronage people, no. They have a competitive examination.

20 If there are no further questions.

21 CHIEF JUSTICE BURGER: Mr. Stewart?

22 ORAL ARGUMENT OF WILLIAM F. STEWART, ESQ.,

23 ON BEHALF OF THE APPELLANT - REBUTTAL

24 MR. STEWART: Mr. Chief Justice --

25 QUESTION: Could you answer my last question? You

1 probably know. How are they appointed?

2 MR. STEWART: Yes. They are appointed by  
3 competitive examination. They are not patronage.

4 QUESTION: A competitive examination, and strictly  
5 on merit? It is part of the civil service --

6 MR. STEWART: That is correct.

7 QUESTION: Yes, but who appoints them? The  
8 judge? The state's attorney? Doesn't somebody appoint them?

9 MR. STEWART: Appoint the individual probation  
10 officers?

11 QUESTION: Yes, sir.

12 MR. STEWART: Yes, they are appointed by the chief  
13 probation officer, and based upon a competitive civil  
14 service list.

15 I agree with the Appellees that some lines should  
16 be drawn, but I believe that the lines drawn by the  
17 Appellees are too narrow and inappropriate for this  
18 particular job function. Probation officers advise their  
19 juveniles of constitutional rights. Moreover, if they act  
20 as legal advisors to juveniles, they act as a public legal  
21 advisor, in a sense, and this Court, while it held that  
22 citizenship could not be required of private attorneys, the  
23 Court has not had the opportunity to consider whether or not  
24 citizenship could be required of public counsel.

25 Now, judges and prosecutors also have somewhat

1 limited contact, yet as an integral part of the criminal  
2 justice system, of which the probation officer is a part,  
3 they can legitimately be required to be citizens. I believe  
4 that the Appellees have failed to articulate any viable  
5 reason as to why probation officers should be excluded from  
6 that team of judge, prosecutor, and police officer, and  
7 could not be limited to citizens.

8           QUESTION: Incidentally, Mr. Stewart, I know it is  
9 not germane, but do you know whether there is any  
10 constitutional or statutory provision that requires a member  
11 of this Court to be an American citizen?

12           MR. STEWART: I don't know, Your Honor.

13           QUESTION: Or even a lawyer?

14           QUESTION: I don't think you will find it.

15           QUESTION: Well, perhaps the question is, could  
16 Congress pass a statute requiring members of the federal  
17 judiciary to be citizens of the United States?

18           MR. STEWART: I believe they could, Your Honor. I  
19 believe they could, and I believe California could pass a  
20 statute that requires their police officers and their  
21 probation officers and their judges and their prosecutors to  
22 be citizens as well, because I think the standard here is  
23 too narrow that they have articulated, but it is whether or  
24 not the individual has been given or cloaked with some  
25 aspect of the sovereign power of the state. This Court has

1 said that the states should be given broad power to  
2 structure their political community, and I think probation  
3 officers clearly fall within that political community. They  
4 exercise a sovereign --

5 QUESTION: But isn't it true that everybody who  
6 works for the government exercises some of the government's  
7 sovereign power?

8 MR. STEWART: I don't believe so, Your Honor.  
9 There are jobs that are government employment, but there are  
10 other jobs, and we make this distinction in municipal law  
11 between a governmental officer who exercises a sovereign  
12 power --

13 QUESTION: You would differentiate between the  
14 governmental functions and the proprietary functions, is  
15 your basic distinction.

16 MR. STEWART: Yes, between the type of employment  
17 such as a clerk typist or an engineer or an accountant who  
18 may work with the government or he may work outside the  
19 government. When you are dealing with --

20 QUESTION: How about an accountant for the  
21 probation department?

22 MR. STEWART: Pardon me?

23 QUESTION: How about an accountant for the  
24 probation department?

25 MR. STEWART: I don't believe that he could be

1 restricted to be a citizen.

2 QUESTION: Is there a requirement that members of  
3 your staff have to be citizens?

4 MR. STEWART: Yes, there is, Your Honor. There is  
5 a requirement that --

6 QUESTION: Statutory, county?

7 MR. STEWART: A statutory requirement that  
8 county --

9 QUESTION: I have yet to run across a bureaucrat  
10 of the federal or state government who wasn't the very  
11 epitome of all authority in government. Have you?

12 MR. STEWART: Well, I would like to be a little  
13 more modest than that, Your Honor. We do draw a  
14 distinction, though, in civil law between a governmental  
15 employee and one who is a governmental officer in the sense  
16 of possessing and exercising sovereign powers, and here, the  
17 state of California has conditioned a grant of some of their  
18 sovereign powers upon citizenship, in a bond that is simply  
19 an oath will not suffice. If an oath would suffice, then  
20 why even require citizenship? You have done away with the  
21 requirement of citizenship if someone merely can give an  
22 oath to uphold the Constitution or to obey the law in lieu  
23 of citizenship.

24 QUESTION: Mr. Stewart, some time ago Justice  
25 O'Connor asked you kind of a double question, and I think



1 you didn't get back to the first one. Are you persuaded at  
2 all by this theory of pre-emption that some of the academics  
3 have advanced in this area?

4 MR. STEWART: No, I do not, because that same  
5 point could have been made in Foley and Ambach, and the  
6 Court was not concerned about pre-emption in those two  
7 cases, and I think by virtue of the Court's --

8 QUESTION: Did you say the point was made or could  
9 have been made?

10 MR. STEWART: Well, I don't believe that the  
11 decision in Ambach or Foley or Sugarman turned on federal  
12 pre-emption. The Court, when it articulated the standards  
13 that the states had broad power to define their political  
14 community and applied that then to the context of Foley and  
15 Ambach, did not say that they were pre-empted from that in  
16 terms of citizenship because of the federal jurisdiction.

17 QUESTION: No, but I think the point of the  
18 professorial comments is that this is the way out of this  
19 wilderness, and line drawing, and the like, to adopt a  
20 theory of pre-emption. You wouldn't like that, of course.

21 MR. STEWART: No, Your Honor. I would recommend  
22 that we look more at the exercise of the sovereign powers as  
23 a way to draw the line rather than just simply take away  
24 completely the state's power to require citizenship.

25 QUESTION: Thank you, counsel.

CERTIFICATION

1 The case is submitted.

2 (Whereupon, at 11:00 o'clock a.m., the case in the  
3 above-entitled matter was submitted.)

4

5 and these pages constitute the original and  
6 proceedings for the records of the Court.

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8 *Suzanne Young*  
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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:

CLARENCE E. CABEL, ETC., ET AL. vs. JOSE CHAVEZ-SALIDO ET AL 80-990

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

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