FEDERAL CIVIL SERVICE EMPLOYMENT: RESIDENT ALIENS NEED NOT APPLY

This Comment discusses the legal impediments on the congressional and presidential power to deprive resident aliens of federal civil service employment. The constitutional protections afforded resident aliens are examined, along with the constitutional sources of congressional and executive power over aliens. The Comment also analyzes the President's statutory authority over federal civil service. The author concludes that either an executive or a congressional prohibition on alien federal civil service employment would violate the alien's due process guarantee under the fifth amendment. In addition, an Executive Order excluding aliens from federal civil service employment is found to exceed the President's statutory authority.

INTRODUCTION

In 1976, the Supreme Court in *Hampton v. Mow Sun Wong*[1] struck down a federal Civil Service Commision regulation which limited the vast majority of civil service positions to American citizens and nationals.[2] The Court held that the Civil Service Commission had exceeded its statutory authority in promulgating the regulation.[3] In

1. 426 U.S. 88 (1976).
2. 5 C.F.R. § 338.101 (1977). This regulation provides in pertinent part:
   (a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.
   (b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. However, a noncitizen may be given (1) a limited executive assignment under section 305.509 of this chapter in the absence of qualified citizens or (2) an appointment in rare cases under section 316.601 of this chapter, unless the appointment is prohibited by statute . . . .

The term "owes permanent allegiance" is a term of art, generally referring to those who are nationals of the United States. This was the interpretation of the Supreme Court in Hampton v. Mow Sun Wong, 426 U.S. 88, 90 n.1 (1976): "Apparently the only persons other than citizens who owe *permanent* allegiance to the United States are noncitizen 'nationals.' See 8 U.S.C. §§ 1101(a)(21),(22), 1408." (emphasis in original). Generally, nationals are people who are citizens of territorial possessions of the United States. *See* 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.3c (rev. ed. 1977).

3. 426 U.S. at 114, 115.

so ruling, the Court expressly declined to resolve the issue of whether a similar restriction would be constitutional if imposed by Congress or the President.[4] This Comment will analyze the question left unresolved in *Hampton v. Mow Sun Wong*.[5]

The resolution of that question has both immediate and long-term significance. Taking a cue from the Court's opinion, President Ford issued Executive Order No. 11935,[6] limiting employment in the competitive service, with few exceptions, to citizens and nationals of the United States.[7] Litigation challenging the constitutionality of the Executive Order has already been commenced.[8] Further, in the letter accompanying the Executive Order,[9] President Ford called for congressional action on this issue.[10] Such legislation has since been introduced.[11]

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4. *Id.* at 114, 116.

5. The issue with which the Court dealt in *Hampton v. Mow Sun Wong*—whether the Civil Service Commission exceeded its statutory authority—will not be discussed in this Comment. The Comment will deal instead with the constitutional and statutory limits on Congress and on the President in imposing a bar on aliens in the federal civil service.

6. 5 C.F.R. § 7.4 (1977).

7. *Id.* The text of the Executive Order provides as follows:

> (a) No person shall be admitted to competitive examination unless such person is a citizen or national of the United States.
>
> (b) No person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States.
>
> (c) The [Civil Service] Commission may, as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments.

8. A motion was filed in the United States District Court for the Northern District of California on October 12, 1976, under the name of Mow Sun Wong v Hampton, for an order implementing the Supreme Court decision in Hampton v. Mow Sun Wong.

9. 41 Fed. Reg. 37,301, 37,303 (1976).

10. *Id.* at 37,304. "While I am exercising the constitutional and statutory authority vested in me as President, a recognition of the specific constitutional authority vested in the Congress prompts me to urge that the Congress promptly address these issues."

11. At least two bills have been introduced in Congress. S. 3572, introduced in the 94th Congress, did not pass. That bill would have amended 5 U.S.C. § 330 (1970) to limit federal civil service positions to United States citizens.

H.R. 1809 was introduced in the 95th Congress. It would amend subchapter of chapter 33 of title 5 by adding the following new section:

> § 3328. Competitive Service; citizenship requirements.
>
> An individual may not be admitted to a competitive examination held by the Civil Service Commission or appointed in the competitive service unless such individual—
>
> (1) is a citizen of the United States; or
>
> (2) owes permanent allegiance to the United States.

See note 2 *supra* for definition of those individuals who owe "permanent allegiance to the United States."

The federal civil service consists of "all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services . . . ."[12] The competitive service generally includes all civil service positions in the executive branch.[13] It accounts for nearly three million positions in the federal government.[14]

This Comment examines the legal impediments on the congressional and presidential power to impose a blanket deprivation of federal civil service employment on aliens. The first section deals with the constitutional limitations on Congress. The second section examines the President's statutory and constitutional authority to issue Executive Order No. 11935. The conclusion reached is that both congressional and executive directives imposing a blanket prohibition on alien federal civil service employment violate the constitutional mandate of due process of law. In addition to the constitutional impediments, Executive Order No. 11935 is found to exceed the statutory authority on which the President relied.

CONGRESSIONAL POWER OVER ALIENS: ITS EXISTENCE AND SCOPE

A "permanent resident" is an alien who has entered the United States under an immigrant visa.[15] To obtain such a visa, the alien must satisfy certain prescribed qualitative[16] and quantitative[17] re-

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In allowing no exceptions for the "efficiency of the service" or the "national interest," the scope of exclusion under H.R. 1809 would be even broader than that under Exec. Order No. 11935.

12. 5 U.S.C. § 2101(1) (1970).

13. *Id.* § 2102(a) defines the "competitive service" as:

> (1) all civil service positions in the executive branch, except—
> (A) positions which are specifically excepted from the competitive service by or under statute; and
> (B) positions to which appointments are made by nomination for confirmation by the Senate, unless the Senate otherwise directs . . . .

14. THE WORLD ALMANAC AND BOOK OF FACTS 129 (G. Delury ed. 1977).

15. Immigration and Nationality Act of 1952 § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1970); *id.* § 101(a)(20), 8 U.S.C. § 1101(a)(20); *id.* § 204, 8 U.S.C. § 1154 [The Immigration and Nationality Act is hereinafter cited as I. & N. Act].

16. There are 32 bases upon which an alien may be denied an immigrant visa. These are listed in *id.* § 212(a), 8 U.S.C.A. § 1182(a) (West Supp. 1977).

17. Exclusive of certain exceptions, the quota system allots a total of 170,000 immigrant visas annually to countries in the Eastern Hemisphere and 120,000 annually to Western Hemisphere countries. *Id.* § 201(a), 8 U.S.C.A. § 1151(a). In addition, an annual limit of 20,000 is placed on the number of immigrant visas available to any one country. *Id.* § 202(a), 8 U.S.C.A. § 1152(a).

quirements and must follow the requisite procedures.[18] Once admitted, the alien classified as a permanent resident is entitled to remain indefinitely,[19] unless deported for engaging in specific, proscribed activities.[20] A non-immigrant, by contrast, is admitted for a fixed period of time.[21] A condition of his stay is that he depart within that specific time limit.[22]

While a restriction on federal civil service employment to United States citizens and nationals effectively bans *all* aliens and refugees, the scope of this Comment is limited to those aliens who are classified as "permanent residents."[23] It is therefore necessary to examine the sources of federal power over aliens and the constitutional protections afforded the permanent resident alien.

There is no direct constitutional authority granting Congress power over immigration, deportation, or regulation of aliens within the United States.[24] Since the first general immigration statute was enacted in 1881,[25] the courts have formulated various theories to support congressional control over these matters.

In one of the earlier cases,[26] the Supreme Court upheld the congressional right to control immigration as an exercise of the power to regulate foreign commerce.[27] Shortly thereafter, congressional authority over immigration was held to be an "incident of sovereignty."[28] According to the Court, the government has the power to exclude foreigners from this country whenever, in its judgment, the

18. *See generally* 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE §§ 3.1-3.28b (rev. ed. 1977).

19. *Id.* § 2.5c.

20. I. & N. Act § 241, 8 U.S.C. § 1251 (1970).

21. 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.6b(1) (rev. ed. 1977).

22. *Id.* § 2.6b(2).

23. Throughout this Comment, the term *alien*, unless otherwise specified, refers to an alien lawfully admitted for permanent residence. An argument can be made that the same rights should be extended to other aliens, particularly refugees paroled into the United States pursuant to I. & N. Act § 212, 8 U.S.C. § 1182(d)(5) (1970). *See* Comment, *Extending the Constitution to Refugee-Parolees*, 15 SAN DIEGO L. REV. 139 (1977); Comment, *Refugee-Parolee: The Dilemma of the Indochina Refugees*, 13 SAN DIEGO L. REV. 175 (1975).

24. The only constitutional powers which appear *directly* related to aliens are the power to establish a uniform rule of naturalization, U.S. CONST. art. I, § 8, cl. 4, and perhaps the power to regulate commerce with foreign nations, *id.*, cl. 3.

25. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.

26. The Head Money Cases, 112 U.S. 580 (1884).

27. These cases upheld that part of the Act of Aug. 3, 1882, which provided that a shipowner must pay a duty of 50¢ for each passenger not a citizen of the United States who arrived by vessel from a foreign port to a port within the United States. Support for the regulation was found in the commerce clause, as opposed to the taxing power of Congress.

28. The Chinese Exclusion Case, 130 U.S. 581 (1889).

public interests require such exclusion.[29] Four years later, the Supreme Court justified the power to expel aliens as an exercise of control over foreign relations, commerce, naturalization and war.[30]

Any power which Congress may have over aliens, whether constitutional or as an "incident of sovereignty," is tempered by the constitutional rights granted aliens. While aliens do not enjoy status entirely equal to that of United States citizens, aliens who have entered this country are entitled to many of the same rights.[31] The fifth and fourteenth amendments prohibit the federal government and the states, respectively, from depriving any "person" of life, liberty or property without due process of law. The fourteenth amendment requires equal protection of the law for any "person." Settled case law has construed these provisions as applicable to aliens.[32]

A series of recent Supreme Court cases has recognized that the alien's right to equal protection precludes state discrimination against aliens in civil service employment,[33] denial of state welfare benefits to aliens,[34] the refusal to admit aliens to the state bar examination,[35] and barring certain resident aliens from state financial assistance for higher education.[36]

The fifth amendment, applicable to acts of the federal government, contains no equal protection clause. It does, however, forbid discrimination which is so unjustifiable as to violate due process.[37] In *Bolling v. Sharpe,*[38] the Supreme Court expressly held that a failure by the federal government to accord equal protection may conflict with the due process guarantee of the fifth amendment. A federal district court in *In re Smith*[39] stated:

> By characterizing the problem presented in this case as one of equal protection, we do not mean to suggest that fifth amendment due pro-

29. *Id.* at 606.
30. Fong Yue Ting v. United States, 149 U.S. 698, 711-12 (1893).
31. *See* Carlson v. Landon, 342 U.S. 524 (1952); Johnson v. Eisentrager, 339 U.S. 763 (1950).
32. Brownell v. Tom We Shung, 352 U.S. 180 (1956); Galvan v. Press, 347 U.S. 522 (1954); United States v. Pink, 315 U.S. 203 (1942); Yick Wo v. Hopkins, 118 U.S. 356 (1886).
33. Sugarman v. Dougall, 413 U.S. 634 (1973).
34. Graham v. Richardson, 403 U.S. 365 (1971).
35. *In re* Griffiths, 413 U.S. 717 (1973).
36. Nyquist v. Mauclet, 97 S. Ct. 2120 (1977).
37. Bolling v. Sharpe, 347 U.S. 497 (1954).
38. *Id.*
39. 323 F. Supp. 1082 (D. Colo. 1971).

> cess takes in all of fourteenth amendment equal protection. It is enough to note that fifth amendment due process does include an equal protection principle . . . and that the two provisions are coextensive insofar as they prohibit discrimination based upon race . . . and *other discriminations which are invidious* or deprive persons of constitutional rights . . . .[40]

Thus, the federal government, in imposing an "invidious" discrimination, ought to be bound, under the fifth amendment, by the same standards which apply to state discrimination under the fourteenth amendment. It has been argued by the federal government that its "plenary power" over aliens may justify civil service employment discrimination which would violate equal protection if indulged in by the states.[41] As will be shown, the bases of federal authority over aliens, and the limits on other "plenary" powers, do not support this theory.

Congressional power over the deportation and exclusion of aliens appears so well settled as to foreclose further argument.[42] The right of Congress to restrict the lawful conduct of aliens *once admitted* to the United States is considerably less clear. Except for situations dealing with alien registration,[43] only in the recent case of *Mathews v. Diaz*[44] has the Supreme Court extended the power to regulate "conditions of entrance and residence of aliens" to justify a discrimination against aliens lawfully admitted and residing in this country.

In *Mathews v. Diaz,* the Court upheld a Medicare requirement conditioning an alien's eligibility on five years continued residency plus "permanent resident" status. Ironically, the Court relied on *Graham v. Richardson,*[45] which had invalidated citizenship and residency requirements for state welfare benefits, to justify its position. According to the Court, one of the grounds for the *Graham* decision was state encroachment upon the exclusive federal power over the entrance and residence of aliens.[46] Therefore, concluded the Court in *Mathews v. Diaz,* the federal government, through this "exclusive" power, has greater latitude than do the states in imposing unequal burdens upon aliens.[47]

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40. *Id.* at 1088 (emphasis added).
41. Brief for Appellee at 19-21, Mow Sun Wong v. Hampton, 500 F.2d 1031 (9th Cir. 1974).
42. *See* text accompanying notes 24-30 *supra.*
43. Hines v. Davidowitz, 312 U.S. 52 (1941). It should be noted that the power to require registration was justified by the Court in Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893), as necessary to carry out the power to *admit* or *expel* aliens.
44. 426 U.S. 67 (1976).
45. 403 U.S. 365 (1971).
46. 426 U.S. 67, 84 (1976).
47. *Id.* at 81, 82.

The decision in *Graham,* however, was actually based on the premise that a state's refusal to grant welfare benefits to aliens conflicts with federal regulations regarding the *exclusion* and *deportation* of public charges.[48] In support of its conclusion, the Court cited *Truax v. Raich*[49] to the effect that " '[t]he authority to control immigration—to *admit* or *exclude* aliens—is vested solely in the Federal Government . . . .' "[50] Upon close examination, there is nothing in this language that suggests an expansion of the federal plenary power over aliens beyond that previously exercised—that is, exclusion, deportation and registration.

In addition, it should be noted that the *Graham* Court held only that the *federal* government—as opposed to the *states*—had exclusive control over the regulation of aliens. The allocation of that power between Congress and the courts is an entirely different question. The vesting of the exclusive power over aliens in the federal government does not necessarily lead to the implication that the interpretation of *Congress* must take precedence over that of the *Supreme Court.* Yet, by giving Congress virtually limitless power over aliens, this is what the Court appears to have assumed in *Mathews v. Diaz.*[51]

48. 403 U.S. at 377.
49. 239 U.S. 33, 42 (1915).
50. Graham v. Richardson, 403 U.S. 365, 379 (1971) (emphasis added).
51. Whatever the validity of the reasoning in Mathews v. Diaz, 426 U.S. 67 (1976), a reviewing court need not feel compelled to apply its conclusion to the alien seeking federal employment. The situations can be distinguished on at least two grounds:

First, *Mathews v. Diaz* dealt with a Medicare medical insurance program of the Social Security Administration. *Id.* at 70. One half of the program's financing is provided by the federal government. *Id.* n.1. It could be argued that aliens ought not to be entitled to rely on the generosity of the federal government immediately upon arrival in this country. A questionable theory even in the Medicare context, it has *no* force when applied to federal civil service employment. Through federal employment the alien seeks the opportunity to *earn* his livelihood, to be self-sufficient, thereby avoiding reliance on welfare. Rather than asking support from public funds the alien is seeking to *contribute* to his new country.

A second distinction can be found in the Court's statement in *Mathews v. Diaz* that the party challenging the constitutionality of a statute has the burden of advancing principled reasoning that will invalidate the line drawn by Congress while tolerating a different line distinguishing some aliens from others. *Id.* at 82. The Court in *Diaz* felt that appellees were unable to identify a principled basis for prescribing such a different standard. *Id.* at 84. In the federal employment situation, rather than totally excluding aliens, a "different line" could easily be drawn at positions sensitive to the national security (*see* text accompanying notes 106-12 & 116 *infra*) or at positions requiring a language skill or

The Supreme Court's words in *Fong Yue Ting v. United States*[52] and *Lem Moon Sing v. United States*[53] should be remembered. While upholding congressional power over the deportation of aliens, the Court in *Fong Yue Ting* also affirmed that aliens residing in the United States, as long as they are permitted by the government to remain, are entitled to the protections of the Constitution and the laws.[54]

In *Lem Moon Sing,* the congressional power to exclude aliens was upheld, but the Court went on to emphasize that, while the alien lawfully remains, he is entitled to the guarantees of life, liberty and property which are secured by the Constitution to all those within the jurisdiction of the United States. His personal rights while he is in this country "are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States."[55]

The implication is clear that the Court interpreted the plenary power over aliens as limited to deportation, and as long as that power was *not* exercised, Congress had no authority to violate the constitutional safeguards guaranteed the alien.

Granting the possibility of the extension of federal "plenary" power over aliens beyond exclusion and deportation, the statement of the Court of Appeals for the Ninth Circuit in *Mow Sun Wong v. Hampton*[56] is pertinent: "To state that Congress' plenary power over aliens enables the federal government to unreasonably discriminate against aliens, neglects to consider the fact that even Congressional plenary power is subject to Constitutional limits."[57]

The Supreme Court in *Hampton v. Mow Sun Wong* noted that power over the exclusion and deportation of aliens is vested in the political departments of the government. Therefore, according to the Court, these matters are to be regulated by treaty or by act of Congress *except* when the judicial department is required by the paramount law of the Constitution to intervene.[58]

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educational level which some aliens may not possess (*see* text accompanying notes 113-15 *infra*). Thus, it need *not* be argued, as did appellees in *Diaz*, that all aliens must be treated equally with all citizens. The standards suggested would suffice to "invalidate the line drawn" and provide some guidance in drawing a different and more reasonable line.

52. 149 U.S. 698 (1893).
53. 158 U.S. 538 (1895).
54. 149 U.S. at 724.
55. 158 U.S. at 547.
56. 500 F.2d 1031 (9th Cir. 1974).
57. *Id.* at 1036.
58. 426 U.S. 88, 101 n.21 (1976), *citing* Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893).

The importance of balancing the personal constitutional rights of the alien against the "plenary" power of the federal government was emphasized by Justice Douglas in his dissent in *Harisiades v. Shaughnessy*:[59]

> The power of Congress to exclude, admit or deport aliens flows from sovereignty itself and from the power "To establish an uniform Rule of Naturalization . . . ." The power of deportation is therefore an *implied* one. The right to life and liberty is an *express* one. Why this *implied* power should be given priority over the *express* guarantee of the Fifth Amendment has never been satisfactorily answered.[60]

This same argument applies with even greater force to congressional control over the employment of aliens who have been legally admitted to the United States. Analogy can be made to another case in which the political nature of the issue was in question. Referring to the war power, the Court in *United States v. Robel*[61] said, "[w]hen Congress' exercise of . . . powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restrictions on freedom can be tolerated."[62]

The conclusion is inevitable that even the broadest interpretation of federal plenary power over aliens will not suffice to remove the denial of federal civil service employment from the judicial arena.

The Argument for Strict Scrutiny

The preceding section demonstrates that congressional action imposing a disability on aliens should be held subject to constitutional restraints. The question then arises: What standard should a court apply in reviewing a statute for compliance with those restraints?

In light of *Graham v. Richardson,*[63] a viable argument can be made that a "strict scrutiny" standard of review ought to be applied to any regulation limiting federal civil service employment to citizens. Strict scrutiny is the standard applied to an enactment which burdens a "suspect class" or which infringes on a "fundamental interest."[64] A unanimous Court in *Graham* described aliens as a class as

59. 342 U.S. 580 (1952).
60. *Id.* at 599 (dissenting opinion) (emphasis in original).
61. 389 U.S. 258 (1967).
62. *Id.* at 264.
63. 403 U.S. 365 (1971).
64. *Id.* at 375; Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
While a suspect classification alone is sufficient to trigger strict scrutiny, an argument can also be made that the right to work is a "fundamental interest." In

"a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."[65]

Other cases which have applied the "suspect classification" standard to aliens have shed light on the reasoning behind it. In a case decided before *Graham*, the California Supreme Court found a statute prohibiting employment of aliens on public works unconstitutional.[66] The court judicially noted that aliens in general suffer from prejudice. The court further stated that aliens, because they are denied the right to vote, lack the most basic means of defending themselves in the political processes. In view of these circumstances, it was concluded, courts should view legislation discriminating against aliens with "special solicitude."[67]

The lack of the franchise distinguishes aliens from other "suspect" classes. Without the vote, the alien cannot effect political change, he cannot bring his case before legislative assemblies, and he is deprived of the "remedial channels of the democratic process."[68] Because he lacks any voice in the political arena, it is especially important that the alien be heard in the courtroom.

To compound the disability of the lack of franchise, aliens are in many respects a politically unpopular group. One federal court, in *Faruki v. Rogers,*[69] described the application of the compelling interest test to statutes drawn on lines of race or nationality as "the means

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an early case, a federal court stated that "[n]o enumeration . . . of the privileges [and] immunities . . . of man in civilized society . . . would exclude the right to labor for a living." *In re* Parrott, 1 F. 481, 498 (C.C.D. Cal. 1880). The court held that such a right is "as sacred as the right to life, for life is taken if the means whereby we live be taken." *Id.*

According to the California Supreme Court in Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 579, 456 P.2d 645, 654, 79 Cal. Rptr. 77, 86 (1969), "[*a*]*ny* limitation on the opportunity for employment impedes the achievement of economic security, which is *essential* for the pursuit of life, liberty and happiness; courts sustain such limitations only after careful scrutiny." (emphasis added).

In Truax v. Raich, 239 U.S. 33, 41 (1915), the right to work was described by the Supreme Court as being "of the very essence of personal freedom . . . ."

Finally, it should be noted that the number of federal government employees in 1975 exceeded the number employed in any of the following major industries: lumber, electrical equipment and supplies, transportation equipment, apparel and textile products and printing and publishing. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 92-93 (Bulletin 1905, 1976).

To arbitrarily exclude aliens from what the Court in Hampton v. Mow Sun Wong, 426 U.S. 88, 102 (1976), referred to as "a major sector of the economy" is certainly a significant deprivation.

65. 403 U.S. at 372.

66. Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

67. *Id.* at 580, 456 P.2d at 654, 79 Cal. Rptr. at 86.

68. M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 180 (1946).

69. 349 F. Supp. 723 (D.D.C. 1972).

by which the judiciary ensures that such laws represent more than an official expression of naked prejudice."[70] The court in *Faruki* struck down a federal statute which required ten years residency before a naturalized citizen could be appointed as a Foreign Service officer. According to the court, such classifications, like those based on race, appear to be a product of prejudice against, and oppression of, poorly represented minority groups.[71]

Extending the Strict Scrutiny Standard to Federal Action

The alien's status as a member of a "suspect class" seems secure as applied to *state* discrimination.[72]

The Supreme Court has, in the past, applied to congressional legislation the same rules as to classifications which are applied in examining state legislation.[73] The implication is that the validity of federal legislation is tested, under the fifth amendment, by the same rules of equality as is state legislation under the fourteenth.

In addition, some support for extending the alien's "suspect" classification, and therefore applying strict scrutiny to a federal statute, can be found in *Nielson v. Secretary of Treasury*.[74] According to this case, the burden is on the *government* to put forth the reasonableness of, and justification for, a measure discriminating against aliens.[75]

A federal district court applied *Graham,* holding unconstitutional federal action which resulted in discrimination against Filipinos who had served in the American armed forces during World War II.[76] Because of the federal government's failure to appoint a naturalization officer for a period of nine months, Filipinos otherwise eligible for naturalization[77] were unable to avail themselves of the opportu-

70. *Id.* at 728.
71. *Id.* at 729.
72. Sugarman v. Dougall, 413 U.S. 634 (1973), applied the strict scrutiny standard to discrimination against aliens in state civil service employment. *See also In re* Griffiths, 413 U.S. 717 (1973); Graham v. Richardson, 403 U.S. 365 (1971).
73. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); District of Columbia v. Brooke, 214 U.S. 138 (1909).
74. 424 F.2d 833 (D.C. Cir. 1970).
75. *Id.* at 846.
76. *In re* Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975).
77. Eligibility would have been under the Nationality Act of Oct. 14, 1940, Pub. L. No. 853, ch. 876, 54 Stat. 1137, as amended at ch. 199, §§ 701-705, 56 Stat. 182 (current version at 8 U.S.C.A. § 1440 (West 1970)).

nity. The court conceded the "reasonable concern" of the Immigration and Naturalization Service for the maintenance of amicable relations between the United States and the Philippine Islands.[78] But the court concluded that concern alone, when considered in the light of "the suspect nature of the classification" and "the strictness of the applicable constitutional standards," was insufficient justification for violating the petitioners' rights.[79]

In reviewing the same civil service regulation found unconstitutional in *Hampton v. Mow Sun Wong,*[80] the appellate court in *Jalil v. Hampton*[81] conceded that "[t]he federal government has interests different from those applicable to the states, but nonetheless it must demonstrate that its interests justify the discrimination against aliens."[82] The *Jalil* court remanded the case for determination of the limits of statutory and delegated authority. Judge Bazelon, in dissent, cited *Nielson v. Secretary of Treasury.*[83] He concluded that the principles of *Graham* apply fully to the federal government.[84]

The Result of Applying the Strict Scrutiny Standard

Once it is decided that the standard of strict scrutiny applies, the ordinary presumption of validity of a government action is reversed. The burden shifts to the government to justify the discrimination.[85] Under this standard, not only must the classification reasonably relate to the purposes of the law, but the state, in addition, must bear the burden of establishing that the classification is "*necessary* to promote a *compelling* governmental interest."[86]

Were such a strict standard applied to legislation prohibiting aliens from federal civil service, it would be the government's difficult task to propose a compelling interest which would be furthered by such discrimination. In addition, because the discrimination must be "necessary" to that interest, the government would be required to show that the statute was drawn with "precision"—that is, "tai-

78. The Philippine government was apparently fearful that, on the eve of Philippine independence (which was to occur on July 4, 1946), large numbers of Filipinos would be naturalized and emigrate to the United States. An unidentified official of the Philippine government conveyed this concern to the United States Department of State. The Commissioner of the Immigration and Naturalization Service requested that the Attorney General revoke the naturalization power of the Vice Consul assigned to the Philippines and that no new naturalization officer be named. 406 F. Supp. at 935-36.
79. *Id.* at 951.
80. 426 U.S. 88 (1976).
81. 460 F.2d 923 (D.C. Cir. 1972).
82. *Id.* at 929.
83. 424 F.2d 833 (D.C. Cir. 1970).
84. *Id.* at 930 (dissenting opinion).
85. Dunn v. Blumstein, 405 U.S. 330, 342 (1972).
86. Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (first emphasis added).

lored" to serve the legitimate objectives.[87] If any less burdensome alternative were available, the government would be required to choose it.

The application of these requirements in the federal employment situation would result in a burden nearly impossible for the government to meet. According to Justice Marshall, race, nationality and alienage are "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose.[88] The federal district court in *In re Naturalization of 68 Filipino War Veterans*[89] pointed out that seldom has a state *or the federal government* been able to meet the burden placed on it to justify discrimination based on alienage. When it has met that burden, it has been under circumstances which were truly exceptional.[90] The court then referred to *Korematsu v. United States*[91] which upheld restrictions on persons of Japanese ancestry during World War II because of "circumstances of direst emergency and peril."[92]

Although there may be several legitimate interests of the federal government which would be furthered by the blanket exclusion of aliens from the federal civil service,[93] it is likely that the "broad sweep" would invalidate any such restriction under strict scrutiny. Dissenting in *Jalil v. Hampton,* Judge Bazelon concluded that it was *inconceivable* that the Government could establish a compelling state interest which would justify the exclusion of *all* aliens from *all* positions in the competitive civil service.[94]

The Rational Relationship Test

As has been shown,[95] alienage is a suspect classification triggering strict scrutiny as against the states; it should therefore be equally suspect in federal legislation. A reviewing court, however, may not feel compelled to reach such a conclusion. As previously discussed, the federal government, as an incident of sovereignty, has a degree of

87. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).
88. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 105 (1973) (dissenting opinion).
89. 406 F. Supp. 931 (N.D. Cal. 1975).
90. *Id.* at 950.
91. 323 U.S. 214 (1944).
92. *Id.* at 220.
93. *See* notes 105-54 and accompanying text *infra.*
94. 460 F.2d 923, 930 (D.C. Cir. 1972) (dissenting opinion).
95. *See* notes 72-84 and accompanying text *supra.*

control over the alien which a state cannot assert. It is arguable, therefore, that in reviewing federal legislation which discriminates against aliens, the court may require only a rational relationship between the law and a constitutionally permissible objective.

A regulation is said to be rationally related to an objective if the regulation produces effects that advance, rather than retard, or have no bearing on the attainment of the objective.[96] Even under this less stringent standard, however, a distinction between different classes of persons must be *reasonable* rather than arbitrary and must be based upon some ground of difference which has a *fair* and *substantial relation* to the object of the legislation, so that all persons similarly circumstanced are treated alike.[97]

The measure of scrutiny a court will afford legislation under the rational relationship standard is not entirely clear and may vary according to the type of classification involved. In recent cases,[98] while declining to apply strict scrutiny, the Supreme Court has indicated that it *will* examine the purpose proposed in support of a statute based on a sexual classification.[99] In *Weinberger v. Wiesenfeld*[100] the Court expressly stated that the recitation of a benign purpose is not an "automatic shield" protecting against inquiry into the actual purpose of a statute.[101] A federal statute denying equal protection on the basis of an alienage classification would seem to deserve at least that level of inquiry.

The Second Circuit appeared to be using a standard very similar to that of *Wiesenfeld* in a recent deportation case.[102] The court held unconstitutional a statutory interpretation subjecting aliens within a particular group to "disparate treatment on criteria wholly unrelated to any legitimate governmental interest."[103]

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96. P. BREST, PROCESS OF CONSTITUTIONAL DECISIONMAKING 1004 (1975).

97. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

98. Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Stanley v. Illinois, 405 U.S. 645 (1974).

99. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), dealt with a gender-based distinction mandated by a federal statute, the Social Security Act (42 U.S.C. § 402(g) (1970)). It is interesting to note that Buckley v. Valeo, 424 U.S. 1, 93 (1976), cited *Wiesenfeld* for the proposition that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."

100. 420 U.S. 636, 648 (1975).

101. In addition, the Court said that it "need not in equal protection cases accept at face value assertions of legislative purpose, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Id.* n.16.

102. Francis v. INS, 532 F.2d 268 (2d Cir. 1976).

103. *Id.* at 273. The *Francis* case challenged the application of a statute (I. & N. Act § 212(c), 8 U.S.C. § 1182(c) (1970)) which had been construed to allow a lawfully admitted alien, convicted of a narcotics offense, who departed from and returned to the United States to an unrelinquished domicile, to be permitted

Even under the traditional rational relationship test, however, the standards of "reasonable" classification and "substantial" relation between the classification and the object of the legislation must be met. Following is an analysis of potential federal interests which the government might seek to serve through the exclusion of aliens from the federal civil service. Although, with the exception of the protection of resources, they appear to be legitimate goals which the government may promote, the *means* used—the exclusion of aliens from federal employment—will not, in fact, promote the *ends* which the government is pursuing.

It should be noted that the Supreme Court in *Hampton v. Mow Sun Wong,* while conceding the legitimate interest of the Civil Service Commision in administrative efficiency, also stated: "Any fair balancing of the public interest in avoiding the wholesale deprivation of employment opportunities caused by the Commission's indiscriminate policy, as opposed to *what may be nothing more than hypothetical justification,* requires rejection of the argument of administrative convenience in this case."[104]

The implication is clear that, even under the rational relationship test, because of the "quality of the interest at stake," the Court will require at least *some* evidence on the part of the government in support of any hypothetical interest it claims to be pursuing through the denial of federal civil service employment to aliens.

Administrative Efficiency

The Civil Service Commission argued in *Hampton v. Mow Sun Wong* that the need for undivided loyalty in certain sensitive positions justified a citizenship requirement in at least some areas of the federal service and that the broad exclusion of aliens served the adminstrative purpose of avoiding the trouble and expense of classifying those positions.[105] This same justification had been raised in *Sugarman v. Dougall.*[106] The Court in *Sugarman* held that the state's interest in an employee of undivided loyalty is substantial, but it

to remain in the United States at the Attorney General's discretion. Petitioner had never made such a temporary departure. Therefore, the Attorney General was statutorily without discretion to allow petitioner, a lawfully admitted alien convicted of a narcotics offense, to remain in the United States despite an unrelinquished domicile of more than seven years.

104. 426 U.S. at 115-16 (emphasis added).

105. *Id.* at 104.

106. 413 U.S. 634 (1973).

went on to say that the justification "proves both too much and too little."[107] The state's broad prohibition of the employment of aliens was found to apply to many positions to which the state's claimed justification had little relationship.[108] The *Mow Sun Wong* Court, although recognizing the need for loyalty in some positions, rejected administrative efficiency as a justification for the nearly total ban on aliens imposed by the Civil Service Commission regulation.[109] The Court concluded that the quality of the interest at stake was so substantial that what may have been only a hypothetical justification of administrative convenience on the part of the Commission was insufficient to support the blanket deprivation of employment to aliens.[110]

The second possible prong of the administrative convenience argument might be the contention that aliens, in general, would be less efficent or qualified employees because of the lack of language or other skills. A reviewing court ought certainly to require some evidentiary basis to support such a theory. However, even if such a generalization were shown to be true, the examination process established by the federal civil service has been designed as a screening device to assure fairness and accuracy in the selection process.[111] Because United States citizens are chosen through this individualized process, it would create no additional administrative burden to evaluate the qualifications of aliens through this same method. Using this reasoning, the court in *Faruki v. Rogers*[112] dismissed this aspect of administrative efficiency as an insufficient rational basis to justify the durational residency requirement imposed on naturalized citizens as a prerequisite to appointment as a Foreign Service Officer.[113]

An invocation of the governmental interest of administrative efficiency, therefore, seems likely to fail as a rational basis for the blanket exclusion of aliens in the federal civil service. No court has denied the government's right to exclude aliens from direct participation in the formulation, execution or review of public policy, or positions affecting the national security.[114] When an employment ban

107. *Id.* at 642.
108. *Id.*
109. 426 U.S. at 115. In reaching this conclusion, the Court said: "Nor can we reasonably infer that the administrative burden of establishing the job classifications for which citizenship is an appropriate requirement would be a particularly onerous task for an expert in personnel matters . . . ." *Id.*
110. *Id.* at 115, 116.
111. 5 U.S.C. §§ 3301, 3304, 3308 (1970).
112. 349 F. Supp. 723 (D.D.C. 1972).
113. *Id.* at 734.
114. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 104 (1976); Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

extends, however, to the "sanitation man, class B"[115] and the clerical worker, as well as to those who participate in the formulation and execution of important policy decisions, the citizenship requirement is vastly overbroad. This sweeping exclusion bears no rational relationship to the asserted governmental interest of promoting administrative efficiency.

Bargaining Power for Treaty Negotiation Purposes

It was suggested by the Civil Service Commission in the *Mow Sun Wong* case that the broad exclusion of aliens in the federal service may facilitate the President's negotiation of treaties with foreign nations by allowing him to offer employment opportunities to citizens of a given foreign country in exchange for reciprocal concessions.[116]

As previously discussed, the federal government has virtual plenary power over the admission, exclusion, and deportation of aliens.[117] Sufficient bargaining power in the negotiation of treaties can be found in these rights of sovereignty without trading away the constitutional protections of those aliens who have been legally admitted to the United States.

Further, one must ask whether the exclusion of aliens bears a *reasonable* relationship to the federal interest asserted. Is it reasonable to condition the employment of an alien in the United States on, for example, the willingness of his native country to ship us oil? Is it reasonable to refuse employment to the alien whose native country has nothing for which we wish to bargain? Is it reasonable to assume that the behavior of other countries will actually be affected by such a threat? Once an alien has immigrated to the United States and indicated an intention to take up permanent residence here, it seems unlikely that his native country would have such a continuing interest in his employment opportunities that it would be willing to make significant foreign policy concessions to promote them.

In *Reed v. Reed*[118] the Supreme Court recognized the unfairness of grounding an automatic preference for state-related kinds of employment on a factor over which a person has no control.[119] *Frontiero*

115. Sugarman v. Dougall, 413 U.S. 634, 643 (1973).
116. 426 U.S. at 104.
117. *See* text accompanying notes 24-30 *supra*.
118. 404 U.S. 71 (1971).
119. *Id.* at 76-77.

v. Richardson[120] described the sex classification as an immutable characteristic determined solely by the accident of birth.[121] This same characterization might be applied to the classification of an alien based upon the assets and cooperation of his native country. If the bargaining power rationale were truly viable, the federal government could grant employment to one alien because his native government is cooperative and obliging, while denying it to another whose government is not as receptive to our diplomatic overtures. That would hardly accord with fairness. In neither of these situations would the alien residing in this country have an iota of control.

Finally, the bargaining power rationale is invalid because it proves too much. Under such a theory, the federal government could conceivably impose almost *any* disability it wished upon the alien and dismiss his protest with the magic words "bargaining power." If the alien's native country has as strong an interest in his welfare as would be necessary to support discrimination in employment, there is no reason to assume the contrary when even greater deprivations are at issue.

Schneider v. Rusk[122] recognized the constitutional limits on the extent to which the furthering of foreign relations can justify deprivation of individual rights. The government in *Schneider* argued that by returning to her native country and residing there for over three years, Mrs. Schneider, a naturalized American citizen, had relinquished her American citizenship.[123] Possible conflicts with foreign countries, contended the government, justified this use of the foreign relations power. The Court disagreed and, in effect, found no rational relationship between deprivation of citizenship and the conduct of foreign affairs.[124] The same reasoning applies to invalidate the "bargaining power" theory, even under the rational relationship standard of scrutiny.

Providing an Incentive for Naturalization

The final justification proferred by the Civil Service Commission in *Mow Sun Wong* was that reserving the federal service for citizens would provide an incentive to aliens to qualify for naturalization, thereby participating more effectively in our society.[125]

120. 411 U.S. 677 (1973).
121. *Id.* at 686.
122. 377 U.S. 163 (1964).
123. *Id.* at 164.
124. *Id.* at 166, 167. It should also be noted that *Schneider* dealt with naturalization, a matter over which Congress has explicit constitutional authority. U.S. CONST. art. I, § 8, cl. 4. As discussed earlier (*see* text accompanying notes 40-55 *supra*), Congress has *no* such explicit authority over the regulation of alien conduct within the United States.
125. 426 U.S. at 104.

Accepting the contention that encouraging naturalization is a legitimate goal of the federal government, denial of federal civil service employment is not an appropriate means to that end.

First, an alien is not ordinarily entitled to apply for naturalization until he has resided continuously in the United States for five years after admission for permanent residency.[126] Until expiration of the five-year period, the alien, of whom there are hundreds of thousands at any one time,[127] has no more control over his status than did the petitioner in *Frontiero* over her sex. It makes little sense to "encourage" an alien to become naturalized when the law explicitly *prevents* him from doing so.

Second, in *Katzenbach v. Morgan,*[128] New York had attempted to justify an English literacy requirement as part of its voting qualifications.[129] The Supreme Court expressed doubt as to whether denial of a right deemed "so precious and fundamental" in our society was a necessary or appropriate means to encourage people to learn English.[130] Although voting is considered a fundamental right, an analogy to the federal civil service area might also cast doubt on the reasonableness of depriving the alien of the important right to work as a necessary or appropriate means of encouraging naturalization.

Finally, upholding the encouragement of naturalization as a justification for denying federal employment leads to the same inevitable conclusion as did the bargaining power rationale. The deprivation of *any* privilege could arguably "encourage" the alien who is qualified to become a naturalized citizen.[131] In effect, this would appear to

126. I. & N. Act § 316(a), 8 U.S.C. § 1427(a) (1970). *Id.* § 319(a), 8 U.S.C. § 1430(a) shortens this period to three years for an alien who is married to a United States citizen.

127. Each year, exclusive of what are referred to as "immediate relatives" (*see id.* § 201(b), 8 U.S.C. § 1151(b)), a total of 170,000 people are admitted to the United States for permanent residence from the Eastern Hemisphere. *Id.* § 201(a), 8 U.S.C.A. § 1151(a) (West Supp. 1977). The yearly quota for the Western Hemisphere is 120,000. *Id.*

128. 384 U.S. 641 (1966).

129. The Court first questioned whether this was the interest actually being served, or whether prejudice may have played a role in the enactment. *Id.* at 654. That same inquiry would be appropriate in examining any legislation denying employment to aliens.

130. *Id.*

131. The logic of this argument was recently conceded by the Supreme Court in Nyquist v. Mauclet, 97 S. Ct. 2120 (1977). In this case, resident aliens who did not intend to become citizens were barred from state financial assistance for higher education. It was argued that the statute served to encourage aliens to

constitute force tantamount to blackmail to compel the alien to take advantage of what has been characterized as a "right" and a "privilege."[132]

The Protection of Resources

Although not proposed by the government in *Hampton v. Mow Sun Wong*,[133] the theory that a citizen has a special public interest in the distribution of resources has, in the past, carried some weight in upholding discriminatory treatment of aliens. This rationale was held to support a citizenship qualification in public works employment in *Crane v. New York.*[134] The district court in *Mow Sun Wong v. Hampton*[135] found, as an alternative basis for upholding the civil service regulation, that the regulation may have been intended to serve the economic security of citizens through reserving civil service positions to them rather than to aliens.[136]

The Supreme Court, in *Graham v. Richardson,*[137] held that in light of *Takahashi v. Fish & Game Commission*,[138] the validity of the special public interest doctrine was in doubt. *Takahashi* rejected citizen ownership of state resources as a rationale for restricting state fishing licenses to citizens. The *Graham* court concluded that the "special public interest" doctrine was an insufficient basis on which to preserve limited state welfare benefits to citizens.[139] *Sugarman v. Dougall*[140] extended *Graham's* holding to a state public employment situation.

The "special public interest" theory is especially questionable as applied to aliens, for resident aliens contribute on an equal basis to federal tax funds.[141] Many states also impose tax liability on alien residents.[142] Because of this contribution to the public treasury, the alien has the same interest as the citizen in determining how that money ought to be expended.

become naturalized citizens. *Id.* at 2126. The Court rejected this as a valid concern of the state, but went on to say that even if it *were* valid, it would be inadequate to support such a ban: "If the encouragement of naturalization through these programs were seen as adequate, then every discrimination against aliens could be similarly justified. The exception would swallow the rule." *Id.* at 2127.

132. United States v. Macintosh, 283 U.S. 605 (1931); Maney v. United States, 278 U.S. 17 (1928); Tutun v. United States, 270 U.S. 568 (1926).

133. 426 U.S. 88 (1976).

134. 239 U.S. 195 (1915).

135. 333 F. Supp. 527 (N.D. Cal. 1971).

136. *Id.* at 532.

137. 403 U.S. 365, 374 (1971).

138. 334 U.S. 410 (1948).

139. 403 U.S. at 372-74.

140. 413 U.S. 634 (1973).

141. 26 C.F.R. § 1.871-1(a) (1976).

142. *See, e.g.,* CAL. REV. & TAX CODE § 17041(a) (West Supp. 1977).

A final argument can be levelled against the distribution of resources theory. The exclusion of aliens limits the group of job applicants, some of whom would otherwise have qualified for federal employment. The limitation therefore reduces the overall quality of the public work force and decreases the efficiency of job performance. The result is either a net *increase* in cost to the public or a *decrease* in the quality of work produced.[143]

Related to this "special public interest" theory is the contention, occasionally voiced, that public employment is a "privilege" rather than a "right." Therefore, according to this view, the government need not make this "privilege" available to all on an equal basis. This idea was expressed in *Rok v. Legg,*[144] which upheld federal restrictions on alien employment in public works projects. Relying on *People v. Crane*,[145] the federal district court concluded that whatever is a governmental privilege, as opposed to a right, *may* be made dependent upon citizenship.[146]

Graham and *Sugarman,* however, appear to have laid this distinction to rest. *Sugarman* expressly rejected the concept that constitutional rights may depend upon whether a governmental benefit is characterized as a "right" or as a "privilege."[147] Recognizing that a state has a valid interest in preserving fiscal integrity, the *Graham* Court added that such a goal could not be accomplished through invidious distinctions.[148]

The "special public interest" in a limited resource and the right/privilege dichotomy appear, therefore, to have no viability in the defense of discriminatory treatment of aliens in federal employment.

Allegiance to and Identity with the Government

A final rationale which the government might propound as providing a rational basis for excluding aliens is the necessity for allegiance to, and identification with, the government in general. While similar to the administrative efficiency argument, this theory would extend

143. *See* Inge v. Board of Pub. Works, 135 Ala. 187, 33 So. 678 (1902); City St. Improvement Co. v. Kroh, 158 Cal. 308, 110 P. 933 (1910). *See also* text accompanying notes 178-84 *infra*.
144. 27 F. Supp. 243 (S.D. Cal. 1939).
145. 214 N.Y. 154, 108 N.E. 427, 150 N.Y.S. 933 (1915).
146. 27 F. Supp. at 245.
147. 413 U.S. at 644.
148. 403 U.S. at 374.

beyond positions which are "sensitive" or involve "national security."

Under the Military Selective Service Act,[149] resident aliens must register for the draft[150] and are liable for induction on the same basis as citizens.[151] Upon induction, the alien must swear to uphold the Constitution of the United States.[152] By federal statute,[153] all those elected or appointed to an office of honor or profit in the civil service must take an oath of allegiance.[154] An alien, as well as a citizen who wished to qualify for the federal civil service, could be required to take this oath. If the sufficiency of an alien's allegiance to the United States is not questioned for the purpose of serving in the military, it would seem a blatant double standard to imply that the alien's oath is insufficient evidence of allegiance to qualify for federal civil service employment.

Executive Power over Federal Employment of Aliens

Despite the foregoing arguments, a reviewing court may be persuaded that the federal government has the power to impose a discrimination against aliens in civil service employment which would be unconstitutional if imposed by a state. If so, the question arises: Is Executive Order No. 11935 a valid exercise of this federal power?

Sources of Executive Power over Aliens

The President's authority "to issue . . . [an Executive] order must stem either from an act of Congress or from the Constitution itself."[155] President Ford professed to be relying on both constitutional and statutory authority in the promulgation of Executive Order No. 11935.[156]

However, the President's constitutional power to regulate the conduct of aliens already admitted into the United States rests on even

149. 50 U.S.C. App. §§ 451-473 (1970).
150. *Id.* § 453.
151. *Id.* § 454(a).
152. 10 U.S.C. § 502 (1970).
153. 5 U.S.C. § 3331 (1970).
154. The oath taken by all but the President is as follows:
> I, ———, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States againt all enemies, foreign and domestic; that I will bear true faith and allegiance to the same . . . .

155. Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 585 (1952).
156. The introduction to the Executive Order states:
> By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including Sections 3301 and 3302 of Title 5 of the United States Code, and as President of the United States of America, Civil Service Rule VII (5 CFR Part 7) is hereby amended by adding thereto the following new section . . . .

41 Fed. Reg. 37,301 (1976).

more tenuous grounds than does the power of Congress. Like Congress, the President has no explicit constitutional authority in this area. What power he may have over aliens must apparently be derived from the power over the conduct of foreign affairs.[157]

What is generally referred to as the President's "foreign affairs power" appears to derive not only from his constitutional powers to make treaties with the advice and consent of the Senate,[158] and to act as Commander-in-Chief of the armed service,[159] but also from the powers of external sovereignty vested in the federal government as necessary accompaniments to its political existence.[160] These sovereign powers have been described as the power to acquire territory by discovery and occupation, the power to expel undesirable aliens, and the power to make international agreements which are not treaties in the constitutional sense.[161]

Granting the broad executive power in the field of international relations, the control of the employment opportunities of aliens, once lawfully admitted into this country, is only through the most tenuous and strained interpretation a control over foreign relations.[162] The mere assertion, without support, that an Executive Order regulating domestic employment is an exercise of the foreign affairs power ought to be seriously questioned by a reviewing court.

In the absence of authority under the foreign affairs power for the Executive Order, the President must rely on the statutory authority granted him through the civil service laws enacted by Congress.[163] When the President's action is restricted to the limits of statutory

157. U.S. CONST. art. II, § 2, cl. 2, says the President:
> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

This section gives the President no direct constitutional authority over employment within the civil service. The civil service positions denied to aliens by Exec. Order No. 11935 are *not* appointive but competitive positions. Those holding such positions are *not* "officers" but are agents or employees of the federal government. McGrath v. United States, 275 F. 294, 300 (2d Cir. 1921).

158. U.S. CONST. art. II, § 2, cl. 2.

159. *Id.*, cl. 1.

160. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

161. *Id.* at 318.

162. *See* text accompanying notes 116-17 *supra*.

163. 5 U.S.C. §§ 3301, 3302 (1970).

authority, the validity of his action must be measured by those congressional limits which the President must follow.[164] The authority of an executive officer to make regulations to enforce a statute is limited to the making of regulations which are *within* the power granted and which are reasonable.[165]

Analysis of the Applicable Statute

The Five Specific Criteria Mentioned

The statutory power on which President Ford relied in his Executive Order is set forth at 5 U.S.C. section 3301.[166] Although the statute appears to provide general power, five specific criteria (age, health, character, knowledge and ability) which the President may consider in ascertaining fitness for employment are listed in 5 U.S.C. section 3301(2). The legislative history of the Pendleton Act,[167] which created the federal civil service, indicates that no mention was made of a citizenship requirement, although other specific qualifications were proposed.[168]

The fact that the criteria of "age, health, character, knowledge and ability" were enumerated would imply the exclusion of others. This was the conclusion of the Supreme Court in *Addison v. Holly Hill Fruit Products*.[169] In that case, Congress had enumerated eleven classes which were exempted from the wage and hour provisions of the Fair Labor Standards Act. The Court felt that exemptions made in such detail precluded their enlargement by implication.[170]

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164. Cole v. Young, 351 U.S. 536, 557 n.20 (1956).
165. Loglisci v. Liquor Control Comm'n, 123 Conn. 31, 192 A. 260 (1937).
166. The statute, in pertinent part, provides as follows:
§3301. The President may—
(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought . . . .
5 U.S.C. § 3301 (1970).
§ 3302, on which the President also purported to rely, provides:
The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for—
(1) necessary exceptions of positions from the competitive service; and
(2) necessary exceptions from the provisions of sections 2951, 3304(a), 3306(a)(1), 3321, 7152, 7153, 7321, and 7322 of this title.
Id. § 3302.
Neither this section itself, nor the power to provide for exceptions to the sections listed in § 3302(2), grants the President any direct authority to exclude aliens from the competitive service.
167. 14 CONG. REC. S133, 860 (1883).
168. *Id.* §§ 1, 3, 7.
169. 322 U.S. 607 (1944).
170. *Id.* at 617.

In *Cole v. Young,*[171] the Court invalidated an Executive Order[172] implementing an act of Congress. In that instance, Congress had given the President discretion to apply the Summary Suspension Act[173] to agencies of the government if he felt the national security was threatened.[174] The Court held that "national security" must be narrowly defined.[175] It reasoned that Congress did not intend the term to be broad enough to include *all* activities of the government; otherwise, it would not have specified certain agencies—for example, State, Justice, and Defense Departments—within the Act.

The same reasoning applies to Executive Order No. 11935. Had Congress intended the President to be free to use his absolute discretion to decide what would "best promote the efficiency of the service" there would have been no need to specify the five criteria listed in 5 U.S.C. section 3301(2).

Is Exclusion Regulation?

If the power to *regulate* with respect to citizenship can be found in 5 U.S.C. section 3301, it is arguable that in effectively *excluding* all aliens from the federal service, the President exceeded and misconstrued the term "regulation."

The language of 5 U.S.C. section 3301(1) makes it apparent that Congress intended the President to prescribe regulations for admission into the civil service. The blanket exclusion of Executive Order No. 11935 is, in effect, a refusal to define and prescribe specific standards which allow for *admission* to federal employment. The decision in *Hampton v. Mow Sun Wong* lends some support to this contention. The Court interpreted Executive Order No. 10577, which instructed the Civil Service Commission "to establish standards with respect to citizenship," as "not necessarily a command to require citizenship as a general condition of eligibility for federal employment. Rather it is equally, if not more reasonably, susceptible of interpretation as a command to classify positions for which citizenship should be required."[176]

171. 351 U.S. 536 (1956).
172. Exec. Order No. 10450, 18 Fed. Reg. 2,489 (1953).
173. Act of Aug. 26, 1950, Pub. L. No. 733, ch. 803, 64 Stat. 476. The Act authorized heads of specified federal agencies to summarily dismiss employees upon determining that dismissal was necessary or advisable in the interest of national security.
174. 351 U.S. 536 (1956).
175. *Id.* at 551.
176. 426 U.S. at 112.

Judge Bazelon, in his dissenting opinion in *Jalil,* appeared to agree that exclusion is *not* regulation: "A regulation which simply excludes *all* aliens from *all* competitive positions on its face sets no standards . . . and is therefore invalid. We should not hesitate to say so."[177]

Does the Exclusion of Aliens Promote Efficiency?

The language of 5 U.S.C. section 3301(1) directs the President to regulate in such a way as will "best promote the efficiency of that service." It is certainly arguable that automatic exclusion of essentially the entire alien population of the United States from the ranks of those eligible for the competitive service is *not* conducive to efficient operation.[178] The Supreme Court recognized this in *Hampton v. Mow Sun Wong.* Referring to the concern of the Civil Service Commission in providing for an efficient federal service, the Court said that in general it would be fair to assume that the goal of efficiency would be best served by *removing* unnecessary restrictions on the eligibility of qualified job applicants.[179]

Many aliens are highly educated and technically skilled individuals.[180] Other than those aliens who are admitted to the United States on the basis of qualifications as relatives or refugees,[181] the prospective immigrant must be granted labor certification from the Secretary of Labor.[182] To receive such certification, aliens must, in effect, prove their potential usefulness in the United States labor market. The Labor Department must be satisfied that the immigrant has skills which are needed in this country.[183]

Labor Department statistics indicate that immigrants have a higher percentage of professionally trained people than the United States population at large.[184] If eligibility for federal civil service were

177. 460 F.2d at 931 (emphasis in original).

178. *See* text preceding note 143 *supra.*

179. 426 U.S. at 115.

180. *See, e.g.,* I. & N. Act § 203(a)(3), 8 U.S.C. § 1153(a)(3) (1970), which gives preference in immigration to those with special abilities in the arts and sciences. *Id.* § 203(a)(6), 8 U.S.C. § 1153(a)(6), gives preference to immigrants who can perform specified skilled or unskilled labor.

181. *Id.* §§ 203, 204, 8 U.S.C. §§ 1153, 1154.

182. *Id.* § 203(a)(3), (a)(6), (a)(8), 8 U.S.C. § 1153(a)(3), (a)(6), (a)(8).

183. U.S. DEP'T OF LABOR, IMMIGRANTS AND THE AMERICAN LABOR MARKET 10 (Research Monograph No. 31, 1974). Congress has codified, in great detail, the requirements for the admission of permanent residents to the United States. *See* I. & N. Act §§ 201-204, 211-212, 8 U.S.C. §§ 1151-1154, 1181-1182 (1970). As part of this scheme, the labor certification program has been developed to assure that the employment of aliens will not adversely affect the wages and working conditions in the United States.

184. U.S. DEP'T OF LABOR, IMMIGRANTS AND THE AMERICAN LABOR MARKET 23 (Research Monograph No. 31, 1974).

based on ability and education rather than citizenship, which is rarely directly related to job performance, it is obvious that the efficiency of the service would be enhanced. Under Executive Order No. 11935, the federal civil service is deprived of the opportunity to tap the resource of many thousands of skilled and qualified people. In excluding this large segment of qualified workers, Executive Order No. 11935 not only fails to "best promote the efficiency" of the federal service, but actually contradicts the explicit statutory directive which the President purports to be following.

Potential Conflict with Congressional Power over Immigration

As has been shown, the President has no firm basis, either constitutional or by statute, for Executive Order No. 11935. In addition, whatever power the President *may* have over the employment opportunities of aliens may be limited by the recognized congressional control over the admission, exclusion and deportation of aliens.

State laws regulating alien employment have often been struck down, both on equal protection grounds and on the basis of conflict with congressional control over immigration.[185] In *Purdy & Fitzpatrick v. State*,[186] the supreme court of California struck down a state statute refusing aliens the right to employment on public works projects. The court found that the statute encroached upon Congress' power over immigration and naturalization by depriving aliens of the right to work and, therefore, deterring immigration and subsequent entry of lawfully admitted aliens into California.[187] The Court in *Truax* expressed the basis for this conflict when it said that to deny to aliens the opportunity to earn a livelihood once lawfully admitted to the state is tantamount to denial of entrance and abode.[188]

Arguably, any attempt by the President, whether by statute or under the foreign affairs power, to regulate employment of an alien once lawfully admitted, would be in derogation of the congressional statutory scheme regulating immigration. It might, therefore, be found invalid under the separation of powers doctrine, as were the state regulations mentioned under the supremacy doctrine.

185. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915).
186. 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).
187. *Id.* at 573, 456 P.2d at 650, 79 Cal. Rptr. at 82.
188. 239 U.S. at 42.

While the President *may*, in certain circumstances, exercise some control over the admission and exclusion of aliens,[189] in general that power rests with Congress.[190] The Immigration and Nationality Act[191] is Congress' expression of that power, and it is a complete and comprehensive scheme. The Act sets out in detail the categories of admissible aliens, taking into consideration the employment potential and professional qualifications of the applicant for admission.[192]

Executive Order No. 11935 is not intended as a direct exercise of executive power over the admission of aliens. It may, however, operate as did state employment laws—as an exclusion of aliens. If so, it impinges on an area already thoroughly regulated by Congress. A reviewing court ought to follow, in that case, the last expression of the legislative branch and invalidate the Executive Order.

Infringement on the Alien's Constitutional Rights

Aside from the issue of conflict with congressional control over immigration, an exercise of the President's foreign affairs power must still be balanced against the individual constitutional rights of the alien.[193]

The Supreme Court in *United States v. Curtiss-Wright Export Corp.*,[194] while setting forth the broad parameters of the foreign affairs power, made the point that it, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[195] In *New York Times Co. v. United States*,[196] Justice Black's concurring opinion made it clear that the executive power over the conduct of foreign affairs was not, in itself, sufficient to justify enjoining publication of classified materials and abridging freedom of the press in the name of "national security."[197] The Court, in *Zemel v. Rusk*,[198] affirmed these limits, pointing out

189. The power of exclusion may be exercised through treaties by the President and Senate. Lem Moon Sing v. United States, 158 U.S. 538, 543 (1895). In addition, under I. & N. Act § 212(f), 8 U.S.C. § 1182(f) (1970), the President can suspend the entry of any alien or class of aliens if entry would be detrimental to the interests of the United States.

190. Galvan v. Press, 347 U.S. 522 (1954); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Lem Moon Sing v. United States, 158 U.S. 538 (1895); Brownlow v. Miers, 28 F.2d 653 (5th Cir. 1928); Savelis v. Vlachos, 137 F. Supp. 389 (E.D. Va. 1955), *aff'd.*, 248 F.2d 729 (4th Cir. 1957).

191. 8 U.S.C. §§ 1101-1503 (1970).

192. *See, e.g.*, I. & N. Act § 203(a)(3), (a)(6), 8 U.S.C. § 1153(a)(3), (a)(6) (1970);. *See also* note 180 *supra*.

193. For further discussion, *see* text accompanying notes 31-62 *supra*.

194. 299 U.S. 304 (1936).

195. *Id.* at 320.

196. 403 U.S. 713 (1971).

197. *Id.* at 718-20.

198. 381 U.S. 1 (1965).

that, simply because he is dealing with foreign relations, the Executive is not vested with totally unrestricted freedom of choice.[199]

The district court in *Faruki v. Rogers*[200] refused to grant special deference to a federal statute limiting foreign service employment simply because the statute may have been related to the conduct of foreign affairs. Where constitutionally protected rights are at stake, the court felt that automatic notions of deference have no place.[201]

In conclusion, the broadest interpretation of the President's statutory or foreign affairs power might yield some executive control over the employment rights of permanent resident aliens. However, because of the serious impairment on the alien's right to be free from invidious discrimination and the intrusion on the domain of Congress, the balance should be struck in favor of federal employment of aliens. Executive Order No. 11935 should be found invalid.

CONCLUSION

A United States Department of Labor study analyzed the impact of resident aliens on the United States labor market.[202] As part of the study, interviews were conducted with aliens and their employers.[203] The interviewers found that aliens have a sincere belief in the work ethic and a great deal of ambition.[204] The study arrived at the following conclusion: "That immigrants have been hard working, upwardly mobile, and successful has been known to Americans for a long, long time. The interviews of immigrants and their employers simply showed it is still the case (and that employers still appreciate it)."[205]

Disregarding the constitutional and statutory impediments in the federal employment situation, one fact remains: There exists a pool of ambitious, eager and capable individuals available for employment with the federal government. It is not only unfair to the alien who is being denied employment, but also short-sighted and foolish to allow prejudice and historical narrow-minded attitudes to prevent

199. *Id.* at 17.
200. 349 F. Supp. 723 (D.D.C. 1972). *See* text accompanying notes 69-71 *supra* for further discussion of the case.
201. 349 F. Supp. at 732.
202. U.S. DEP'T OF LABOR, IMMIGRANTS AND THE AMERICAN LABOR MARKET (Research Monograph No. 31, 1974).
203. The sample consisted of 115 immigrants who entered the United States in 1970 and 201 employers of such immigrants. *Id.* at 35.
204. *Id.* at 45.
205. *Id.*

what could be an efficient and highly satisfactory employment relationship. The blanket prohibition on federal civil service employment of aliens is not only unconstitutional, but practically undesirable as well.

A reviewing court ought to recognize the equity and the logic in the alien's case and refuse to deny him that right deemed "as sacred as the right to life."[206]

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206. *In re* Parrott, 1 F. 481, 498 (C.C.D. Cal. 1880).