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Balancing Federal Power over Aliens and Fifth Amendment Protections—*Mow Sun Wong v. Campbell*

Mow Sun Wong v. Campbell[1] represents the culmination of ten years of litigation[2] on the constitutionality of the federal regulation[3] excluding aliens from appointment to the federal civil service. The United States Court of Appeals for the Ninth Circuit, applying an intermediate standard of review[4] designed to balance the federal interests in immigration and naturalization against the rights of aliens, held the regulation constitutional.[5] But federal interest in immigration and naturalization does not support exclusion from the federal civil service of resident aliens ineligible for citizenship. In upholding the exclusion, the Ninth Circuit ignored the problem of the regulation's overbreadth.

In 1970, five aliens, lawful residents of the United States, were excluded from the federal civil service on the basis of section 338.101 of the Civil Service Commission regulations.[6] The regulation, with few exceptions, permits only American citizens and natives of American Samoa to hold civil service positions. The five aliens brought suit in federal district court, asserting that the regulation denied them liberty in violation of the due process clause of the fifth amendment.[7] Citing Congress's near-plenary power over aliens, the district court ap-

1 626 F.2d 739 (9th Cir. 1980).

2 Mow Sun Wong v. Hampton, 333 F. Supp. 527 (N.D. Cal. 1971), *rev'd*, 500 F.2d 1031 (9th Cir. 1974), *aff'd on other grounds*, 426 U.S. 88 (1976); 435 F. Supp. 37 (N.D. Cal. 1977). Robert Hampton was Chairman of the United States Civil Service Commission. The functions of the Commission were transferred to the Office of Personnel Management (OPM) in 1978. 44 Fed. Reg. 1055 (1978). Alan Campbell was confirmed as Director of the OPM on July 27, 1979. 125 CONG. REC. S10790 (1979).

3 5 C.F.R. § 338.101 (1980) provides:

> (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 regulation was promulgated pursuant to 5 U.S.C. §§ 3301-3302 (1976), which provide:

> 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; and
>
> (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.
>
> 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. Each officer and individual employed in an agency to which the rules apply shall aid in carrying out the rules.

4 Under this standard of review, the regulation must substantially further important federal interests in the regulation of immigration and naturalization. Compare the traditional standards of review discussed at notes 8 and 10 *infra*.

5 626 F.2d at 745.

6 *See* note 3 *supra*.

7 U.S. CONST. amend. V provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

plied only a "rational basis" standard and upheld the regulation.[8]

The Ninth Circuit reversed. Stating that classifications of aliens are suspect[9] and subject to strict scrutiny,[10] the court held that the regulation unreasonably discriminated against resident aliens solely because of their status as aliens.[11] The court identified several federal interests served by the regulation, but concluded that its blanket exclusion was overbroad.[12]

The Supreme Court of the United States affirmed on different grounds.[13] The Court did not articulate a clear standard of review but focused instead on the regulation's source. The Court conceded that federal interests may justify a citizenship requirement but also stated that due process dictates that the decision to impose such a requirement be made by the proper authority. "Since these residents were admitted as a result of decisions made by the Congress and the President, . . . the decision to impose . . . [a] deprivation of an important liberty [must] be made either at a comparable level of government"[14] or by the Commission, for reasons properly their concern. The Court concluded that the Commission's "only concern," "an efficient federal service," was insufficient to uphold the citizenship requirement.[15]

President Ford responded to the Supreme Court's opinion by issuing Executive Order No. 11,935, which specifically excluded aliens from virtually all federal civil service positions.[16] The plaintiffs returned to district court seeking to invalidate the order, alleging that the President lacked authority to issue the order and that the order violated the fifth amendment's due process clause. The district court rejected both arguments.[17] The court found authority for the presi-

8 333 F. Supp. at 532.

Under the rational basis test, the regulation in question is given a strong presumption of constitutionality. It will be upheld by the reviewing court unless no rational basis can be found for its existence. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955).

9 Although the Court has never clearly defined "suspect classifications," three factors have been identified in determining whether a classification is "suspect": (1) a characteristic determined by birth; (2) a history of discrimination against members of the class; (3) underrepresentation of the class in decisionmaking positions in government. The Court identified suspect classifications in Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); McLaughlin v. Florida, 379 U.S. 184 (1964) (religion and national origin).

10 Suspect classifications undergo strict scrutiny. Any such classification is presumed unconstitutional until the government shows that it is drawn as narrowly as possible to further a compelling government interest. *See, e.g.*, cases cited at note 9 *supra*.

11 500 F.2d at 1040.

12 *Id.* at 1041.

13 Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

14 *Id.* at 116.

15 *Id.* at 114-15.

16 626 F.2d at 741.

Exec. Order No. 11935, 5 C.F.R. § 7.4 at 13 (1980), *reprinted in* 5 U.S.C. § 3301 (1976), 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 C.F.R. Part 7) is hereby amended by adding thereto the following new section:
>
> "Section 7.4 Citizenship
>
> "(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 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."

17 Mow Sun Wong v. Hampton, 435 F. Supp. 37 (1977).

dential order in 5 U.S.C. § 3301(1), which directed the President to issue regulations promoting an efficient civil service,[18] and in the President's constitutional powers over foreign affairs.[19]

On the due process issue, the court noted that, while the President and Congress possess near-plenary power over aliens, aliens possess all the characteristics of groups the classification of which undergoes strict judicial scrutiny.[20] The court compromised in the face of this tension, applying an intermediate standard of review: "[W]hen the federal government seeks to sustain a rule discriminating against noncitizens in a manner which would violate equal protection if adopted by a state, it must demonstrate that the rule substantially furthers important federal interests in the regulation of immigration and naturalization."[21] The court found that the federal interest in encouraging naturalization was sufficient to justify the order.[22]

The Ninth Circuit affirmed,[23] adopting the district court's reasoning on both the authority[24] and due process[25] issues. It also found the interest in encouraging naturalization was properly the concern of the President,[26] satisfying the due process requirement articulated by the Supreme Court.[27]

Although no precedent squarely supports the Ninth Circuit's intermediate standard, a review of the Supreme Court's treatment of aliens and of the federal interests involved indicates that it is a proper compromise between those interests and fifth amendment considerations. A strong argument can be made for applying strict scrutiny to the civil service citizenship requirement. It has long been established that aliens are protected by the equal protection and due process clauses of the fourteenth amendment.[28] In *Graham v. Richardson*,[29] the Supreme Court stated that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom . . . such heightened judicial solicitude is appropriate."[30] In the recent case of *Sugarman v. Dougall*,[31] the Court held New York's citizenship requirement for civil service positions invalid under the fourteenth amendment. The Court rejected arguments that a state can limit the benefits of employment to its own citizens[32] and that aliens are undesirable career employees because of the risk of deportation or conscription by their government.[33] The Court conceded that the formu-

18 435 F. Supp. at 40-42. The statute is reprinted at note 3 *supra*.
19 *Id.* at 41.
20 435 F. Supp. at 43. See discussion in notes 9-10 *supra*.
21 *Id.* at 44.
22 *Id.* at 45.
23 626 F.2d 739 (9th Cir. 1980).
24 *Id.* at 741-43.
Although discussed at length in the opinions, the question of the adequacy of the President's authority is of secondary importance. Congress could eliminate the issue by simply enacting a law specifically excluding aliens from the civil service.
25 *Id.* at 745.
26 *Id.*
27 *See* text accompanying notes 14-15 *supra*.
28 Yick Wo v. Hopkins, 118 U.S. 356 (1886).
29 403 U.S. 365 (1970).
30 *Id.* at 372.
31 413 U.S. 634 (1973).
32 *Id.* at 645.
33 *Id.* at 645-46.

lation and execution of sensitive policy should be restricted to citizens, but noted that New York's statute excluded aliens from positions unconnected with such sensitive decisionmaking.[34] The statutory requirement swept too broadly to withstand the strict scrutiny applied by the Court.

Arguably, *Graham* and *Sugarman* required the federal civil service regulation at issue in *Mow Sun Wong* to be invalidated under the strict scrutiny test. But two arguments militate against extending the reasoning of those cases to federal civil service regulations. First, alienage differs from other suspect classifications in that Congress and the President have been given specific authority over matters of immigration and naturalization.[35] Finding this authority constitutionally committed to the political branches of the federal government,[36] the Supreme Court has not applied strict scrutiny to federal regulations concerning aliens. Rather, it has tended to defer to the judgment of the political branches: "The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."[37]

The second argument against extending *Graham* and *Sugarman* to federal regulation of immigration and naturalization is that the fifth amendment, unlike the fourteenth amendment applicable in *Sugarman*, does not contain specific equal protection language.[38] The fifth amendment can provide such protection, since "discrimination may be so unjustifiable as to be violative of due process."[39] However, the Supreme Court in *Mow Sun Wong* stated that this protection is not coextensive with the equal protection clause of the fourteenth amendment: "[I]t is quite clear that the primary office of the [fourteenth amendment] differs from, and is additive to, the protection guaranteed by the [fifth amendment]."[40]

Although aliens have been held a class in need of "heightened judicial solicitude,"[41] the Ninth Circuit decided that these two arguments call for a standard of review less rigorous than strict scrutiny.[42] However, the argument that fifth and fourteenth amendment protections are not coextensive provides weak support for applying different standards of review for federal and state discrimination. Although the Supreme Court has stated that the protections are not coextensive and the fourteenth adds to the fifth,[43] it has not ruled on the substantive differences of the protection afforded by the amendments. The Court is not likely to hold that the federal government is free to discriminate in ways unavailable to the states; indeed, the Court has stated that its "approach to Fifth

34 *Id.* at 641-42.

35 U.S. CONST. art. I, § 8, cl. 4 provides: "The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization. . . ."

36 435 F. Supp. at 43.

37 Matthews v. Diaz, 426 U.S. 67, 81-82 (1975).

38 U.S. CONST. amend XIV. § 2 provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Compare the language of the fifth amendment, note 6 *supra*.

39 Bolling v. Sharpe, 347 U.S. 497, 499 (1956).

40 426 U.S. at 100 n.17.

41 403 U.S. at 372. The Supreme Court in *Hampton v. Mow Sun Wong* described aliens as "an identifiable class of persons who, entirely apart from the rule itself, are already subject to disadvantages not shared by the remainder of the community. Aliens are not entitled to vote and . . . are often handicapped by a lack of familiarity with our language and customs." 426 U.S. at 102.

42 626 F.2d at 745.

43 *See* text accompanying note 40 *supra*.

Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."[44] Thus, substantive differences between the amendments appear insufficient to support different standards of review for state and federal regulations.

The Supreme Court stated in *Mow Sun Wong*, however, that the significance of the two amendments can vary when overriding national interests are present which cannot be asserted by a state.[45] The question thus becomes whether the federal interests asserted by the Commission make strict scrutiny of the federal regulation inappropriate.[46]

In light of federal power over immigration and naturalization, several interests indicate that strict scrutiny should not be applied to federal regulation of aliens. As the Supreme Court stated in *Harisiades v. Shaughnessy*:[47]

> Any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign regulations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.[48]

The Court further pointed out in *Matthews v. Diaz*[49] that "[s]ince a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary."[50] In prior cases, the government has advanced interests in the areas of immigration, naturalization, foreign policy, or national sovereignty to support relaxed scrutiny of federal regulation of aliens.[51] In *Mow Sun Wong*, the Civil Service Commission advanced three interests: civil service efficiency,[52] facilitation of treaty negotiation,[53] and encouragement of naturalization.[54] Although these are legitimate interests, they have not been previously cited to support judicial deference to federal power over

44 Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1974).

45 "[T]here may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual state." 426 U.S. at 100.

46 This inquiry is not to find a compelling federal interest for purposes of satisfying the strict scrutiny test. Rather, interests are sought which would justify not applying strict scrutiny to a classification of persons to whom such protection would otherwise be provided. If no such interests exist, the civil service regulation should have to pass strict scrutiny.

47 342 U.S. 580 (1951).

48 *Id.* at 588-89.

49 426 U.S. 67 (1976).

50 *Id.* at 81.

51 Kliendienst v. Mandel, 408 U.S. 753 (1972) (Communist party member excluded); Boutilier v. Immigration and Naturalization Serv., 387 U.S. 118 (1967) (homosexual deported); Galvan v. Press, 347 U.S. 522 (1954) (Communist deported); Shaughnessy v. Mezei, 345 U.S. 206 (1953) (alien can be excluded without a hearing); Harisiades v. Shaughnessy, 342 U.S. 580 (1951) (Congress has power to expel aliens who were former members of the Communist party); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1949) (exclusion of alien wife of World War II veteran upheld); Maher v. Eby, 264 U.S. 32 (1924) (constitutional ex post facto prohibition not applicable to deportation laws); Oceanic Navigation Co. v. Stranahan, 214 U.S. 320 (1909) (upheld law prohibiting entry of aliens with certain communicable diseases); United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904) (deportation is not a deprivation of liberty without due process); Lem Moon Sing v. United States, 158 U.S. 538 (1895) (exclusion of Chinese alien attempting to re-enter United States); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (residency certificate required for aliens of Chinese descent); Ekin v. United States, 142 U.S. 651 (1892) (Congress has power to exclude named classes of aliens).

52 435 F. Supp. at 45.

53 *Id.*

54 *Id.*

aliens,[55] and it is questionable whether they are sufficient for that purpose.

The basis for judicial deference is the constitutional grant of authority to Congress and the President over immigration, naturalization, and foreign affairs.[56] Any interest not related to these areas cannot support relaxed scrutiny. Efficiency in the civil service is not an interest requiring judicial deference. Although facilitating treaties does involve matters of foreign relations, exclusion of all aliens is so tenuously connected to treaty negotiations that it can hardly support judicial deference.[57]

The final federal interest, encouraging naturalization, appears capable of supporting relaxed judicial scrutiny. It is an interest "unique to the federal government, and capable of supporting a degree of federal legislation beyond that permissible to the states."[58]

In light of the federal interest in naturalization, the Ninth Circuit adopted an intermediate standard of review requiring that the classification "substantially further important federal interests in the regulation of immigration and naturalization."[59] To insure the legitimacy of the interests asserted and comply with due process requirements, the regulation must be made by a party properly concerned with the interest.[60] The requirements of this intermediate standard properly balance federal interests and the rights of aliens.

The Ninth Circuit properly applied the standard to aliens eligible for naturalization. Encouraging naturalization is an important interest underlying federal regulation of aliens and would be substantially furthered by requiring citizenship for civil service positions.[61] The President, possessing statutory authority to regulate the civil service[62] and constitutional authority over foreign affairs,[63] is legitimately concerned with the qualifications of civil servants. Thus, encouraging naturalization properly supports the exclusion of aliens eligible for naturalization.

The district court noted, however, that a substantial number of resident aliens are not eligible for naturalization until they satisfy residency and other requirements.[64] The citizenship limitation on civil service positions cannot hasten the naturalization of these aliens.[65] The district court correctly stated that "Executive Order 11,935 is thus overbroad if the governmental interest in encouraging naturalization is the only such interest capable of supporting it."[66]

The Ninth Circuit's failure to consider overbreadth is the major weakness in

55 Different interests are implicated because *Mow Sun Wong* involved a federal regulation imposed on aliens already lawfully admitted into the United States. Prior cases involved questions of exclusion or deportation. *See, e.g.*, cases cited in note 51 *supra*.

56 *See* notes 35 and 63 *infra*.

57 *See* Note, *Aliens in the Federal Civil Service*, 10 CORNELL J. INT'L L. 255, 263-64 (1977). This interest was not considered by either the district or appellate courts.

58 435 F. Supp. at 45.

59 *Id.* at 44.

60 626 F.2d at 745.

61 *Id.*

62 *See* note 3 *supra*.

63 U.S. CONST. art. II, § 2, cl. 2 provides: "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors. . . ."

64 435 F. Supp. at 45-46.

65 *Id.*

66 *Id.*

the opinion. The court states only that encouraging naturalization is a sufficient reason to uphold Executive Order 11,935 "for reasons stated by the district court in its opinion."[67] The district court justified the broad scope of the executive order by finding that the federal interest in an efficient civil service supported the exclusion of aliens ineligible for citizenship, since continuity in the service would be disrupted if aliens were hired and later forced to leave because of failure to qualify for citizenship.[68] But the continuity argument was rejected by the Supreme Court in *Sugarman* as a reason for excluding aliens from New York's civil service.[69]

By adopting the reasoning of the district court, the Ninth Circuit evidently intends that judicial inquiry under the intermediate standard of review continue once a court has determined that the classification "substantially furthers important federal interests in the regulation of immigration and naturalization." A statute must be further examined to see that its breadth is justified by a proper federal interest. Apparently, the interest need not be related to immigration and naturalization, since civil service efficiency can suffice.

Because classifications of aliens are suspect, adequate protection of aliens' rights requires that federal regulations apply to a group no broader than necessary to further proper federal interests. Consistent application of the intermediate standard of review also requires a relationship between these interests and the regulation of immigration and naturalization. The interest endorsed by the Ninth Circuit as justification for the regulation's broad scope—civil service efficiency—is not related. It is particularly weak in light of its rejection by the Supreme Court in *Sugarman*. Absent contrary considerations, aliens ineligible for citizenship should at least be allowed to compete for civil service positions in which continuity is not a major factor.

The nature of the relationship between aliens and the federal government indicates that a standard of review less than strict scrutiny is appropriate for a regulation excluding aliens from the federal civil service. The intermediate standard employed by the Ninth Circuit fairly balances the rights of aliens and the interests of the federal government. However, because the court failed to address the overbreadth of the regulation, the extent to which the rights of aliens will actually be protected remains uncertain. The court should have unequivocally stated that aliens may only be excluded from the civil service pursuant to a regulation substantially furthering important federal interests in the regulation of immigration and naturalization.

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67 626 F.2d at 745.
68 435 F. Supp. at 45-46.
69 Sugarman v. Dougall, 413 U.S. 634, 645-46 (1973).