

Aliens in the Federal Civil Service

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ALIENS IN THE FEDERAL CIVIL SERVICE

From its inception, our Nation welcomed and drew strength from the immigration of aliens. Their contributions to the social and economic life of the country were self-evident¹

The preceding statement of Mr. Justice Powell reflects the Supreme Court's increasingly vigorous action to assure equality of opportunity for alien residents of the United States.² Following this trend, in *Hampton v. Mow Sun Wong*³ the Court recently held invalid the Civil Service Commission's regulation excluding aliens from employment in the federal civil service.⁴ Speaking for the Court, Mr. Justice Stevens declared that the interests of foreign policy and national security, which had been invoked to justify the exclusionary policy, were not proper concerns of the Civil Service Commission and thus could not provide a basis for the agency's maintenance of the restriction.⁵ However, the Court assumed, without deciding, that the power of Congress or the President to control alien affairs, national security, and foreign policy would support an express determination by either branch to exclude aliens from federal employment.⁶

1. In re Griffiths, 413 U.S. 717, 719 (1973). In this case, the Supreme Court invalidated as a denial of equal protection the Connecticut court rule restricting admission to the bar to United States citizens.

2. See note 25 *infra*.

3. 426 U.S. 88 (1976).

4. The pertinent Civil Service Commission regulation, 5 C.F.R. § 338.101(a), (b) (1976), provides in 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.

Mow Sun Wong could not qualify for civil service employment on the basis of his "permanent allegiance to the United States," since a "person who owes permanent allegiance to the United States" includes only natives of American Samoa. Brief for Petitioners at 81 n.67, *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

5. 426 U.S. at 116-17. This case represented Mr. Justice Stevens' maiden efforts on the Supreme Court, and apparently his was the decisive vote in the 5-4 decision. 53 INTERPRETER RELEASES 162 (June 7, 1976).

6. In *Mow Sun Wong*, the government advanced the arguments that the exclusion of aliens was justified by an interest in providing an incentive for aliens to become naturalized, by allowing the President to use the possibility of employment in the civil service as a bargaining token, and by the need to have loyal employees in sensitive positions. 426 U.S. at 104-05. The Court stated:

[T]he need for undivided loyalty in certain sensitive positions clearly justifies a

In response to this decision, President Ford issued an executive order prohibiting the employment of aliens in the federal civil service, except as authorized when necessary to promote the efficiency of the service.⁷ In his letter to the Speaker of the House and the President of the Senate accompanying the order, the President did not identify the specific national interest on which he based his decision. He simply concluded:

[I]t is in the national interest to preserve the long-standing policy of generally prohibiting the employment of aliens from positions in the competitive service [I]t would be detrimental to the efficiency of the civil service, as well as contrary to the national interest, precipitously to employ aliens in the competitive service without an appropriate determination that it is in the national interest to do so.⁸

In the President's view, whether any federal employment of aliens would further the national interest was an issue to be determined by Congress, the branch primarily responsible for alien affairs.⁹

citizenship requirement in at least some parts of the federal service

. . . We may assume . . . that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing . . . the President with an expendable token for treaty negotiating purposes

Id. (emphasis added).

The Court summarized:

[A]ssuming without deciding that the national interests identified by the petitioners would adequately support an explicit determination by Congress or the President to exclude all noncitizens from the federal service, we conclude that those interests cannot provide an acceptable rationalization for such a determination by the Civil Service Commission.

Id. at 116 (emphasis added).

7. Exec. Order No. 11,935, 41 Fed. Reg. 37301 (1976). The text of the Order states, in pertinent part:

- (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.

The President's Order did not modify the regulation at issue in *Mow Sun Wong*, but instead added a new section to the statute: 5 C.F.R. § 7.4 (1976).

8. Letter from the President to the Speaker of the House and to the President of the Senate, Sept. 2, 1976, reprinted in 12 WEEKLY COMP. OF PRES. DOC. 1302 (1976).

9. *Id.* at 1303:

In this regard, I am mindful that the Congress has the primary responsibility with respect to the admission of aliens into, and the regulation of the conduct of aliens within, the United States.

While I am exercising the constitutional and statutory authority vested in me

As the President recognized, his Executive order does not conclusively resolve the issue of whether aliens should be excluded from the federal civil service.¹⁰ Furthermore, the Court specifically abstained from deciding the constitutionality of such a Presidential or congressional mandate.¹¹ Indeed, Justice Stevens' opinion was fully supported by only two other Justices, and a majority was obtained by the concurrence of Justices Brennan and Marshall,¹² who joined the opinion only with "the understanding that there are reserved the equal protection questions that would be raised by congressional or Presidential enactment of a bar on employment of aliens by the Federal Government."¹³ Thus, neither the Court nor the President undertook to identify the overriding national interests which could justify the exclusion of aliens from the federal civil service.¹⁴ This Note will analyze the various national interests which have been advanced in support of the exclusion, and will discuss the possible alternative responses of Congress¹⁵ and the courts to the President's Order¹⁶ which will best protect both the national interests and the rights of aliens.

as President, a recognition of the specific constitutional authority vested in the Congress prompts me to urge that the Congress promptly address these issues.

The Supreme Court has affirmed congressional supremacy over alien affairs:

The power of Congress to exclude aliens altogether . . . or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.

Kleindienst v. Mandel, 408 U.S. 753, 766 (1972), *citing* *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895). In addition, the exclusive power of Congress to prescribe the terms and conditions of entry includes the power to regulate aliens in various ways once they are here. *See Hines v. Davidowitz*, 312 U.S. 52, 69-70 (1941).

10. Letter from the President, *supra* note 8, at 1303. "By his Executive Order, the President has now exercised the authority, heretofore found permissible but lacking by the Court, and has invited Congress to exercise its authority to determine what exceptions should be made to the general rule barring aliens from federal employment." 53 INTERPRETER RELEASES 297 (Sept. 10, 1976).

11. "We proceed to a consideration of that question, *assuming, without deciding*, that the Congress and the President have the constitutional power to impose the requirement that the Commission has adopted." 426 U.S. at 114 (emphasis added). *See* note 6 *supra*.

12. Justices Stevens, Stewart, Powell, Marshall, and Brennan formed the majority. Justice Rehnquist's dissenting opinion was joined by Chief Justice Burger and Justices White and Blackmun.

13. 426 U.S. at 117.

14. *See* notes 7 & 8 *supra* and accompanying text.

15. *See* note 10 *supra*.

16. *See* note 7 *supra*.

I

BACKGROUND

Before determining the national interests which would permit the exclusion of aliens from the civil service, it is necessary to examine the extent to which each branch of government exercises authority over alien affairs, national security, and federal personnel.

The roles of Congress and the President in these areas are not clearly delineated. While Congress exercises primary authority over alien affairs and national security,¹⁷ it has delegated much of its power to the Executive,¹⁸ who already holds broad constitutional powers in these areas.¹⁹ Similarly, congressional control of the civil service²⁰ has been largely delegated to the President²¹ and the Civil Service Commission.²²

17. Congressional authority over alien affairs rests on its control over immigration and naturalization. U.S. CONST. art. I, § 8, cl. 4. Its authority over national security is derived from its war powers, U.S. CONST. art. I, § 8, cl. 11; its power to govern and regulate the armed forces. U.S. CONST. art. I, § 8, cl. 14; and its power to suppress insurrections and repel invasions, U.S. CONST. art. I, § 8, cl. 15.

18. See Immigration and Nationality Act of 1952, 66 Stat. 185, 8 U.S.C. § 1182 (1975); National Security Act of 1947, 61 Stat. 496, 50 U.S.C. § 402 (1970).

19. U.S. CONST. art. II, § 2, cl. 1, states: "The President shall be Commander in Chief of the Army and Navy of the United States . . ." Section 2, cl. 2 states: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . ." Section 3 provides: "[H]e shall receive Ambassadors and other public Ministers . . ."

20. 5 U.S.C. § 3101 (1970) provides: "Each Executive agency . . . may employ such number of employees . . . as Congress may appropriate for from year to year."

21. 5 U.S.C. § 3301 (1970) provides:

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.

It should be noted that Congress did not authorize the President to *require* citizenship as a basis for employment.

22. 5 U.S.C. § 1301 (1970) stipulates: "The Civil Service Commission shall aid the President, as he may request, in preparing the rules he prescribes under this title for the administration of the competitive service." The President's power over government employees has been further delegated to the Civil Service Commission through Executive Orders. The basis of 5 C.F.R. § 338.101 (1976), the regulation held invalid in *Mow Sun Wong*, is found in Exec. Order No. 10,577, § 2.1(a), 3 C.F.R. § 218 (1954), 5 U.S.C. § 3301 (1970), which states:

The Commission is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations.

The judiciary has been reluctant to limit executive power over *external* affairs of national security, *i.e.* those involving foreign relations.²³ Furthermore, in matters concerning alien affairs and *internal* national security, courts have hesitated to disturb some administrative decisions, stating that they are “political questions,” thereby exempt from judicial intervention.²⁴ The Supreme Court, however, has not refrained from scrutinizing and invalidating direct legislative expressions of *state* discrimination against aliens in employment.²⁵ For example, in *Graham v. Richardson*,²⁶ in holding that the denial of welfare benefits to noncitizens violated the equal protection clause of the fourteenth amendment, the Court established that any classification based on alienage is “suspect” and subject to close judicial scrutiny under equal

23. In *Oetjen v. Central Leather*, 246 U.S. 297, 302 (1918), the Court affirmed: “The conduct of the foreign relations . . . is committed by the Constitution to the Executive [T]he exercise of this political power is not subject to judicial inquiry or decision.” More recently, in a decision involving the CIA’s classification of documents in the interest of national security, the Court of Appeals stated: “Gathering intelligence information and the other activities of the Agency, including clandestine affairs against other nations, are all within the President’s constitutional responsibility [Intelligence operations] are an executive function beyond the control of the judicial power.” *United States v. Marchetti*, 466 F.2d 1309, 1315, 1317 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). The Supreme Court has, however, restrained the President’s power over national security when *internal* action is involved. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

24. In *Kleindienst v. Mandel*, 408 U.S. 753 (1972), a waiver of the statutory exclusion of an alien was sought by those who wished to invite him to speak in the United States. The Court held that where a legitimate and bona fide reason exists for the executive branch’s refusal to waive the exclusion, the courts would not look behind the decision, even to weigh it against the first amendment interests of those citizens who wished to hear the alien speak. But see the analysis of the political question doctrine in *Baker v. Carr*, 369 U.S. 186, 211 (1962): “[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” See also *Jalil v. Hampton*, 460 F.2d 923, 925 n.1 (D.C. Cir.), *cert. denied*, 409 U.S. 887 (1972) (where the district court noted that the question of an alien’s exclusion from the civil service is not so purely political as to preclude a judicial determination of the rights of the parties).

25. Nearly one hundred years ago, the Court realized that equal protection of the fourteenth amendment was not confined to citizens. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The right to work for a living in the common occupations of the community was recognized as the very essence of personal freedom which could not be denied to aliens. *Truax v. Raich*, 239 U.S. 33 (1915). Doubt was cast on the “proprietary interest rationale” as a basis for the exclusion of aliens from particular occupations. *Takahashi v. Fish & Game Comm.*, 334 U.S. 410 (1948). State classifications based on alienage are inherently suspect and subject to close judicial scrutiny. *Graham v. Richardson*, 403 U.S. 365 (1971). A state could not exclude aliens from the practice of law. In re *Griffiths*, 413 U.S. 717 (1973). Denial to aliens of certain classes of *state* civil service employment was not justified by the “special public interest,” see note 29 *infra*, the mobility of aliens, or a state’s interest in defining its political community. *Sugarman v. Dougall*, 413 U.S. 634 (1973).

26. 403 U.S. 365 (1971).

protection analysis.²⁷ The Court applied the *Graham* rationale to the exclusion of aliens from the competitive class of *state* civil service employment in *Sugarman v. Dougall*,²⁸ where it held that neither the "special public interest" doctrine²⁹ nor the allegation that aliens are more likely to remain only temporarily in their positions justified a classification excluding noncitizens from employment.³⁰

While in accord with the judicial trend of expanding the equal employment opportunities of aliens, opening government service to aliens was unprecedented.³¹ *Sugarman* recognized, however, that "citizenship [may bear] some rational relationship to the special demands of [a] particular position,"³² and that compelling state interests could justify a *narrowly drawn* restriction on the employment of aliens.³³ The same reservation - that aliens may be denied employment if the exclusion is founded on compelling state interests - qualifies the *Mow Sun Wong* decision.

Mow Sun Wong was one of five Chinese residents of San Francisco, who in 1970 commenced a class action against the Civil Service Commission and the heads of the three federal agencies which had denied them employment because of their alienage.³⁴ Claiming that the denial of federal employment violated their rights under the due process clause

27. *Id.* at 371-72.

28. 413 U.S. 634 (1973).

29. *Id.* at 645. In *People v. Crane*, 214 N.Y. 154, 108 N.E. 427, *aff'd sub nom.* *New York v. Crane*, 239 U.S. 195 (1915), Mr. Justice Cardozo upheld the New York restriction of employment on public works to citizens on the grounds that the "special public interest" doctrine allowed restriction of the state's resources to its own members. Under this doctrine, government employment is considered a privilege rather than a right and as such may be dependent upon citizenship because public resources may be confined to citizens.

30. 413 U.S. at 645.

31. In practically every nation, aliens may not obtain employment in the career civil service. A. ROTH, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* 151-54 (1949). International standards only impose a test of reasonableness upon alien restrictions, and restrictions upon economic opportunities to promote a legitimate national interest are not unusual. 11 *HARV. INT'L L.J.* 228, 233, 235 n.32 (1970). See generally G. BURGESS, *HANDBOOK OF CIVIL SERVICE LAWS AND PRACTICES* (1966).

32. 413 U.S. at 647.

33. *Id.* at 648-49.

34. The federal agencies involved were the Post Office, the General Services Administration, and the Department of Health, Education and Welfare, none of which is primarily responsible for alien affairs, national security, or foreign policy. See note 46 *infra*. In 1971, the Postal Service was removed from the jurisdiction of the Civil Service Commission, and in 1974, without any additional statutory authority or direction, it amended its regulation to make all aliens who had been admitted for permanent residence eligible for all Postal Service positions except those at a high executive level or those designated as sensitive. Therefore, the Postal Service did not join in defending the Civil Service Commission regulation. 426 U.S. at 97-98.

of the fifth amendment, the aliens sought declaratory and injunctive relief.³⁵ The district court held that the exclusion was constitutional and that the federal government need only demonstrate a rational basis for denying employment to aliens:

It is quite rational and reasonable for the Executive, via a grant of power from the Legislature, to determine that the formation of policy and its execution, at whatever level, should be entrusted only to United States citizens. Moreover, as an alternative rational basis . . . the Executive may intend that the economic security of its citizens be served by the reservation of competitive civil service positions to them, rather than to aliens.³⁶

While the appeal was pending, the Supreme Court invalidated *state* restrictions on the employment of noncitizens in the *Sugarman* case.³⁷ Recognizing that *Sugarman* was not controlling because the fourteenth amendment's restrictions on state powers were not directly applicable to the federal government,³⁸ the Court of Appeals for the Ninth Circuit concluded nonetheless that the federal regulation in issue in *Mow Sun Wong* was invalid because it "sweeps indiscriminately excluding *all* aliens from *all* positions requiring the competitive Civil Service examination."³⁹ The court accepted the argument that citizenship might be a proper requirement for positions involving policy making or national security interests, but refused to support a universal citizenship requirement on those grounds.⁴⁰

Before the Supreme Court, the Civil Service Commission argued that no justification for the restriction was necessary because the exercise of federal power over aliens was not subject to the demands of equal protection. Alternatively, the Commission claimed that the fifth amendment imposed only a slight burden of justification, which it had met.⁴¹

35. The plaintiffs also claimed that the restriction of federal employment to citizens violated Exec. Order No. 11,478, 3 C.F.R. § 133 (1965), which forbids discrimination in federal employment on the basis of "national origin." The district court held that this order referred only to discrimination among citizens. 333 F. Supp. 527, 530 (N.D. Cal. 1971); 426 U.S. at 93.

36. 333 F. Supp. at 532. The argument of protection of economic security was invalidated by the rejection of the "special public interest doctrine." See note 29 *supra*.

37. *Sugarman v. Dougall*, 413 U.S. 634 (1973). In *re Griffiths*, 413 U.S. 717 (1973), holding that a state may not refuse aliens the right to practice law, was decided on the same day.

38. "[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." U.S. CONST. amend. XIV, § 1 (emphasis added).

39. 500 F.2d 1031, 1037 (9th Cir. 1974).

40. *Id.* at 1040; 426 U.S. at 96.

41. 426 U.S. at 99. See note 6 *supra* for the interests which the government deemed sufficient to justify the exclusion of aliens from the federal civil service.

The Court answered that ineligibility for employment in a major sector of the economy was a deprivation of an interest in liberty which violated the equal protection concepts of the fifth amendment and agreed with the respondents that some judicial scrutiny of that deprivation was constitutionally mandated.⁴²

Nevertheless, affirming the Court of Appeals' ruling that *Sugarman* was not controlling, the Supreme Court stated:

[O]verriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State.⁴³

However, after examining congressional and Presidential treatment of the issue, the Court found that neither branch had ever explicitly excluded aliens from the civil service nor identified an interest which would justify the exclusion.⁴⁴ Moreover, in promulgating the regulation in issue, the Civil Service Commission had concerned itself exclusively with the promotion of an efficient federal service and not with any interests which might support such a restriction on alien employment.⁴⁵ Consequently, the regulation was deemed invalid on the theory that any rule which deprived a class of the important liberty of eligibility for federal employment must be made directly by Congress or the President, or by an agency specifically authorized to protect a predominant national interest.⁴⁶

42. 426 U.S. at 102-03. The Supreme Court phrased its decision in terms of procedural due process rather than equal protection, which prompted Justice Rehnquist to argue in his dissenting opinion that the majority "inexplicably melds together the concepts of equal protection and procedural and substantive due process." *Id.* at 119.

43. *Id.* at 101.

44. *Id.* at 105.

45. The Court held that "administrative convenience" was not a valid basis for the exclusion, although it fell properly within the scope of the Civil Service Commission's authority. The administrative desirability of a simple exclusionary rule, where citizenship is a valid requirement for some positions, did not provide a rational basis for the general exclusion because the Civil Service Commission did not show that it had ever evaluated the relative desirability of an exclusionary rule *vis-à-vis* the value of increasing the pool of eligible employees. *Id.* at 114-16.

46. 426 U.S. at 116-17. In the opinion, the Court implies that agencies responsible for foreign affairs, treaty negotiations, immigration or naturalization could conclude that the furtherance of those interests required the restriction of federal employment to citizens: "It is the business of the Civil Service Commission to adopt and enforce regulations which will best promote the efficiency of the federal civil service. That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies." *Id.* at 114. In addition, the Court stated: "[D]ue process requires that the decision to impose that deprivation of an important liberty be made either at a comparable level of government . . . [i.e., the President or Congress] or, if it is to be permitted to be made by the Civil Service Commission, that it be justified by reasons which are properly the concern of that agency." *Id.* at 116.

In holding the exclusionary rule invalid, the Court carefully avoided the implication that *any* congressional or Presidential decision to restrict civil service employment to citizens would be constitutionally permissible.⁴⁷ Indeed, the Court indicated that such a decision at least required an identification of the national interests supporting it in order to provide a reference for judicial examination.⁴⁸ Instead of responding to *Mow Sun Wong's* open question of defining the overriding national interests which justify the exclusion of aliens from federal employment, President Ford's Order and explanatory letter merely present Congress with the problem of ascertaining and protecting these interests.⁴⁹

II

OPEN QUESTIONS OF *MOW SUN WONG*

In *Mow Sun Wong*, the Supreme Court suggested three justifications for the exclusion of aliens from the federal civil service: the President's interest in preserving a "bargaining token" of offering employment opportunities to citizens of a given foreign country in exchange for reciprocal concessions, the interest in offering aliens an incentive to qualify for naturalization and thereby participate more effectively in our society, and the need for undivided loyalty in certain sensitive positions.⁵⁰ Since the Court only *assumed* that these interests would support a citizenship requirement, the adoption of any one of these concerns by Congress or the President as a basis for exclusion would undoubtedly be subject to further judicial scrutiny to determine whether that interest outweighed the alien's right of equal access to federal employment.⁵¹

While some statutes do condition equal treatment of an alien upon reciprocal treatment of American citizens by the alien's own country,⁵²

47. See note 11 *supra*.

48. As the Court stressed: "[I]neligibility for employment in a major sector of the economy - is of sufficient significance to be characterized as a deprivation of an interest in liberty . . . [S]ome judicial scrutiny of the deprivation is mandated by the Constitution." 426 U.S. at 102-03. Despite the Court's statement that "[i]f the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption," *id.* at 103, the necessity for judicial scrutiny of the exclusion of aliens from the civil service would seem to require that the national interest supporting the rule at least be identifiable.

49. See notes 7, 8, & 9 *supra* and accompanying text.

50. See note 6 *supra* and accompanying text.

51. See text accompanying note 13 *supra*.

52. See, e.g., 10 U.S.C. § 7435(a) (1970):

If the laws, customs, or regulations of any foreign country deny the privilege of leasing public lands to citizens or corporations of the United States, citizens of that foreign country, or corporations controlled by citizens of that foreign country, may not . . . acquire or own any interest in, or right to any benefit from, any lease of land in the . . . naval fuel reserves . . .

most nations do not employ aliens in their civil service agencies.⁵³ Generally, an alien who leaves his homeland to seek employment in the United States often severs his ties to his own country. That nation, therefore, may see little need to grant reciprocal advantages to American citizens to protect the benefits of its citizens who are unlikely to return home.⁵⁴ Furthermore, in view of the applicable policies of international law, it is unlikely that foreign nations will allow Americans to work for their government services, regardless of a restriction or lack of restriction on the employment of their nationals in the American civil service.⁵⁵

If the President were to exclude aliens from the civil service because of the need for such a bargaining token, the Supreme Court would be faced with the choice of deferring to the President's acknowledged supremacy in this area,⁵⁶ or scrutinizing the exclusion under the equal protection doctrine.⁵⁷ Moreover, such a Presidential decision may

See also 28 U.S.C. § 2502(a) (1970):

Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the Court of Claims if the subject matter of the suit is otherwise within the court's jurisdiction.

53. "Restrictions upon the economic opportunities of aliens, if imposed prospectively and pursuant to a legitimate interest of a country, are generally regarded as unexceptional in international law." 11 HARV. INT'L L.J. 228, 233 (1970).

54. Most immigrants are admitted to the United States because they have relatives already here; this provides them with an additional impetus to remain permanently in this country. See generally Abrams & Abrams, *Immigration Policy - Who Gets In and Why?*, 38 THE PUBLIC INTEREST 3 (1975).

55. Under international law, the obligations due by the alien to his national state operate as a limit on the grant of political rights by the resident state. An alien generally cannot practice professions or occupations which require an oath of allegiance (*i.e.*, civil service jobs). E. BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* § 24a (1915). In addition, the Universal Declaration of Human Rights, which embodies principles of customary international law, merely emphasizes that everyone has the right to participate in and benefit from government and public service *in his own country*:

(1) Everyone has the right to take part in the government of his own country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his own country.

UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. Res. 217, U.N. Doc. A/810 at 71 (1948).

56. See note 23 *supra*.

57. See text accompanying note 13 *supra*. The Supreme Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), provides guidelines for determining whether a question is excluded from judicial review as a political question:

In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations. *Coleman v. Miller*, 307 U.S. 433, 454-55. The nonjusticiability of a political question is primarily a function

conflict with congressional authority to regulate alien affairs.⁵⁸ Since the President's interest in preserving a "bargaining token" is at best a weak one in terms of its impact on foreign policy, it would probably fail to support the exclusion of aliens if weighed against the strong congressional interest in controlling alien affairs and the stronger constitutional interest of protecting the individual rights of aliens.

It can be argued that the reservation of federal employment for citizens will encourage aliens to become naturalized citizens, and that as such they will be better equipped to contribute to American society.⁵⁹ Because of his unfamiliarity with the social and political mores and institutions of the country, an alien may not function as effectively in government as a citizen.⁶⁰ On the other hand, he may provide advantageous outside input into federal decision making, particularly where specialized scientific and cultural knowledge is desired.⁶¹ Since transfu-

of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is in itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

369 U.S. at 210-11. In *Jalil v. Hampton*, 460 F.2d 923 (D.C. Cir.), *cert. denied*, 409 U.S. 887 (1972), the Court of Appeals for the District of Columbia relied on the analysis of the political question doctrine in *Baker* and determined that the question of an alien's exclusion from the civil service is not so purely political as to preclude a judicial determination of the rights of the parties.

58. See note 9 *supra*.

59. "Congress provided that aliens seeking citizenship status prove what citizens of birth are, as a class, presumed to understand: a basic familiarity with our social and political mores and institutions. The naturalized citizen has demonstrated both the willingness and ability to integrate into our social system as a whole . . ." Dissenting opinion of Justice Rehnquist in *Sugarman*, 413 U.S. at 661-62.

60. *Cf.* dissenting opinion of Justice Rehnquist in *Sugarman*, 413 U.S. at 660. In their brief, the Appellants presented an additional argument for the exclusion: "In contrast to citizens, the alien owes primary allegiance to the country of his nationality, and must honor the obligations that country places on its nationals abroad." Brief for Appellants at 10, *Sugarman v. Dougall*, 413 U.S. 634 (1973).

61. Leading American scientists concluded that the restrictive American visa policy of the 1950's, limiting the right of foreign scientists freely to engage in teaching and research, actually hurt the continuing advance of American science. 11 BULL. ATOMIC SCIENTIST 367-73 (Dec. 1955). The effect of the priority given to immigrants who are professionals has helped alleviate some shortages of skilled professionals, notably physicians, in this country. However, this development also has detriments:

A readily available source of trained professionals from other countries may slow the development of domestic talents and the expansion of training facilities. While this importation of talent may be economical for the United States, it is not fair either to the foreign countries that educate the professionals or to our own

sion of new talent from the private sector into the public service is generally encouraged, any restriction on access to the civil service will only promote stagnation within its ranks.⁶² In addition, offering federal employment as an incentive to naturalization may compel an alien to seek citizenship, not from a desire to participate fully in American society, but for purely economic reasons.⁶³

The third interest suggested in *Mow Sun Wong* as a possible justification for the exclusion of aliens from the federal civil service is that of national security. This national interest has been labeled as the need for undivided loyalty in certain sensitive positions where the "occupant . . . could bring about, by virtue of the nature of the position, a material adverse effect on the national security."⁶⁴

The meaning of the term "national security" is not clear, and most of the confusion stems from various legislative, administrative, and judicial attempts to define the term.⁶⁵ It may be broadly defined as the government's capacity to defend itself from violent overthrow as well as the ability of the government to function effectively.⁶⁶ The Department

citizens — particularly those minority groups and women whose access to professional training and economic advancement has been limited.

Abrams & Abrams, *supra* note 54, at 11.

62. Restrictions on access to the civil service . . . affect an important question of policy, the degree to which lateral movement of staff between the civil service, the state economic enterprises and the private sector of the economy should be tolerated or encouraged In the United States injections of talent from the private sector into the civil service have been encouraged as a counter to overprotection of mediocrity.

G. BURGESS, HANDBOOK OF CIVIL SERVICE LAWS AND PRACTICES 429 (1966).

63. Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012, 1028 (1957). It is now estimated that only half of all immigrants join the labor force. Abrams & Abrams, *supra* note 54, at 19-20. However, access to the large federal job market may encourage more resident aliens to look for work and induce visitors to begin work and await adjustment of status from visitor to permanent resident. During the period of adjustment, such a worker would be an "illegal alien." *Id.* at 22.

64. 32 C.F.R. § 156.5(c) (1976). This is the definition of a sensitive position applied by the Defense Department in its hiring decisions.

65. For example, the term is not explicitly defined in the principal legislation concerning the matter, the National Security Act of 1947, 50 U.S.C. § 401-06 (1970).

66. 'National security' is not a term of art with a precise, analytic meaning. At its core the phrase refers to the government's capacity to defend itself from violent overthrow by domestic subversion or external aggression. But it also encompasses simply the ability of the government to function effectively . . . at home and abroad. Virtually any government program, from military procurement to highway construction and education, can be justified in part as protecting the national security.

85 HARV. L. REV. 1130, 1133 (1972). Case law definitions of national security are often very broad. In *Ramos v. United States Civil Service Commission*, 376 F. Supp. 361, 367 n.9 (D.C.P.R. 1974), *modified*, 426 U.S. 916 (1976), a sensitive position is defined as one where

of Defense narrowly defines national security as referring "to those activities which are directly related to the protection of the military, economic, and productive strength of the United States, including the protection of the Government in domestic and foreign affairs, against espionage, sabotage, subversion, and any other illegal acts which adversely affect the national defense."⁶⁷

While not purporting to define national security, the Supreme Court in *Sugarman v. Dougall*⁶⁸ discussed the type of interest which would support a restriction of noncitizen employment. According to the Court, citizenship would bear a rational relationship to a position whose occupants participated directly in the formulation, execution or review of broad public policy and who perform functions that go to the heart of representative government.⁶⁹ Despite the breadth of this description, the Court emphasized that the means of imposing any such restriction must be narrowly drawn.⁷⁰

Under the *Sugarman* and *Mow Sun Wong* analyses, "national security" emerges as the only interest of those advanced which may adequately support a restriction on alien employment in the federal civil service.⁷¹ However, President Ford's Order is neither premised on the national security interest nor narrowly drawn.⁷² It is both a device to maintain the status quo and a request for Congress to consider the policies and issues raised by *Mow Sun Wong* in order to determine conclusively what interests, if any, support the restriction of civil service jobs to citizens.

"citizenship may be a valid job qualification because participation in the decision-making process of the polity is the very definition of citizenship."

67. 32 C.F.R. § 156.5(a) (1976).

68. 413 U.S. 634 (1973).

69. *Id.* at 647.

70. *Id.* at 643. The citizenship requirement for New York State police officers was recently upheld in *Foley v. Connelie*, 419 F. Supp. 889 (S.D.N.Y. 1976). See notes 89-94 *infra* and accompanying text.

71. *Sugarman* is limited to prohibition of state discrimination against aliens in civil service employment. The paramount federal power over immigration and naturalization precluded the extension of *Sugarman* to the federal civil service. Exercise of that power could give rise to national interests, not present at the state level, which justify a citizenship requirement in the federal civil service. Nevertheless, *Mow Sun Wong* emphasized that any such interest must be "overriding." 426 U.S. at 100-01.

72. The President's Order is not, on its face, expressly supported by any of the interests advanced in *Mow Sun Wong*. See notes 6 & 7 *supra*. Although the President concludes that "it is in the national interest to preserve the long-standing policy of generally prohibiting the employment of aliens from positions in the competitive service," nowhere in the Executive Order or the accompanying letter does he elaborate specifically why such a policy furthers the national interests nor what particular aspect of the national interest it benefits. See note 8 *supra* and accompanying text.

III

ALTERNATIVE CONGRESSIONAL APPROACHES

Several means are available to Congress to resolve the issues of alien employment raised by the Supreme Court and the President. First, by appropriate legislation Congress may simply ratify the President's total exclusion of aliens from the federal civil service. Judicial response to such a statute may vary, depending on whether or not Congress sufficiently identified a particular national interest which required the exclusion.

Mow Sun Wong emphasizes that the restriction of civil service employment to citizens must serve an overriding national interest. Although the Court appears to require an identification of any supporting interest,⁷³ a congressional ratification of President Ford's Order might be upheld judicially without any further elaboration of the reasons for excluding aliens from the federal civil service. Applying the "political question" doctrine,⁷⁴ courts have repeatedly sustained congressional power to control the entry and residence of aliens.⁷⁵

However, the restriction of federal civil service employment to citizens may present an appropriate case for limiting the application of the political question doctrine,⁷⁶ particularly where the exclusion is unjustified by an identifiable national interest. A deprivation of the rights of aliens after they have been admitted for permanent residence does not involve immigration and naturalization to such a degree to place it beyond judicial cognizance.⁷⁷ Additionally, aliens admitted to the United States are protected by the Bill of Rights,⁷⁸ including the equal protection clause of the fourteenth amendment. Any classification of *all* aliens as ineligible for federal employment requires judicial examination under the tests of *Graham* and *Sugarman*.⁷⁹

73. See note 48 *supra* and accompanying text.

74. See *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

75. "Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government . . . [T]he formulation of these policies is entrusted exclusively to Congress . . ." *Kleindienst v. Mandel*, 408 U.S. 753, 766-67 (1972), citing *Galvan v. Press*, 347 U.S. 522, 531-32 (1954).

76. See note 57 *supra*.

77. See *Baker v. Carr*, 369 U.S. 186 (1962).

78. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

79. See notes 26-33, 68-70 *supra* and accompanying text. In *Mathews v. Diaz*, 426 U.S. 67 (1976), Mr. Justice Stevens asserted that a classification among aliens, as opposed to a classification *between* aliens and citizens, was permissible. *Id.* at 78-79. The Court held that a classification requiring permanent admission and continuous residence in the United States for five years was valid as a condition to alien participation in the federal

If a particular interest supporting the exclusion is identified, the recent case of *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*,⁸⁰ involving local government restrictions on the employment of aliens, suggests a test which may be used by the courts in determining the propriety of the *federal* exclusion of aliens from the civil service. In this case, decided after *Mow Sun Wong*, the Supreme Court invalidated Puerto Rico's statute which denied to aliens the right to engage in the private practice of engineering. In finding that the claimed governmental interests of preventing an influx of Spanish-speaking alien engineers into Puerto Rico, raising the low standard of living, and providing an assurance of financial accountability to clients of engineers were not sufficiently compelling to justify such discrimination,⁸¹ the Court nevertheless concluded:

[A] State, Territory, or local government, *or certainly the Federal Government*, may . . . be permitted some discretion in determining the circumstances under which it will employ aliens or whether aliens may receive public benefits or partake of public resources on the same basis as citizens.⁸²

The Court subsequently offered the following guidelines for determining whether the exercise of governmental discretion denies aliens equal protection:

In each case, the governmental interest claimed to justify the discrimination is to be *carefully examined* in order to determine whether that interest is *legitimate* and *substantial*, and inquiry must be made whether the *means* adopted to achieve the goal are *necessary* and *precisely drawn*.⁸³

Although *Flores de Otero* concerns discrimination in the private sector⁸⁴ authorized by a commonwealth,⁸⁵ such a test also provides a worka-

supplemental medical insurance program. *Mathews* was decided on the same day as *Mow Sun Wong*.

80. 426 U.S. 572 (1976).

81. *Id.* at 605-06.

82. *Id.* at 604-05 (emphasis added).

83. *Id.* at 605 (emphasis added).

84. [A]liens have been restricted from engaging in private enterprises and occupations that are otherwise lawful

. . . It is with respect to this kind of discrimination that the States have had the greatest difficulty in persuading this Court that their interests are substantial and constitutionally permissible, and that the discrimination is necessary for the safeguarding of those interests.

Id. at 603.

85. Because of the unique status of the Commonwealth of Puerto Rico, it is unclear whether the equal protection clause of the fourteenth amendment or the due process

ble basis for evaluating federal restrictions on the public employment of aliens. President Ford's Order, prohibiting the employment of aliens in the name of protecting a generalized "national interest,"⁸⁶ lacks even a rational relationship between the rule and the interest served. Additionally, it fails to meet the *Flores de Otero* requirements of demonstrating that the claimed interest is legitimate and substantial, and that the total exclusion of aliens from federal civil service is both a necessary and precisely drawn means of protecting that interest. However, the courts will generally defer to the political branches in matters of national security.⁸⁷ If either the President or Congress were to identify the *national security* as a reason for excluding aliens from the civil service, that interest would probably be sufficient to support the restriction under either the rational relationship test or a legitimate and substantial interest test.⁸⁸

That federal courts do not hesitate to scrutinize strictly the statutory exclusion of aliens from government employment is reflected in a recent decision of the District Court for the Southern District of New York. In *Foley v. Connelie*⁸⁹ the court addressed the issue of the constitutionality of New York's citizenship requirement for its state police officers. Since state troopers are "officers who participate directly in the . . . execution of broad public policy and who perform functions that go to the heart of representative government,"⁹⁰ the court found a vital and essential relationship between citizenship and the proper performance of a state trooper's duties and determined that it need not subject the statute to

clause of the fifth amendment protects the rights of residents of Puerto Rico. The Court concluded that either provision applied to this case:

[I]rrespective of which Amendment applies, the statutory restriction on the ability of aliens to engage in the otherwise lawful private practice of civil engineering is plainly unconstitutional. If the Fourteenth Amendment is applicable, the Equal Protection Clause nullifies the statutory exclusion. If, on the other hand, it is the Fifth Amendment and its Due Process Clause that apply, the statute's discrimination is so egregious that it falls within the rule of *Bolling v. Sharpe*

. . . .
426 U.S. at 601.

86. See note 8 *supra* and accompanying text.

87. See note 23 *supra* and accompanying text.

88. In *Mow Sun Wong*, the Court concluded that if the exclusion of aliens from the federal civil service were mandated by the Congress or the President, there need be only a rational relationship between the rule and the interest. 426 U.S. at 103. In *Flores de Otero*, however, the Court apparently suggests that even a federal restriction on employment of aliens in the civil service should be strictly scrutinized. See notes 82-83 *supra* and accompanying text. Interestingly, *Mow Sun Wong* was decided on June 1, 1976; *Flores de Otero* on June 17, 1976.

89. 419 F. Supp. 889 (S.D.N.Y. 1976). The court relied on *Sugarman, In re Griffiths*, *Mow Sun Wong*, and *Flores de Otero* in reaching its decision.

90. *Id.* at 895, citing *Sugarman v. Dougall*, 413 U.S. at 647.

close judicial scrutiny.⁹¹ Yet, even under the stricter test of *Sugarman*,⁹² the citizenship requirement was defended as serving a substantial and compelling state interest in the maintenance of public order to effect the preservation of the political structure.⁹³ In upholding the statute, the court concluded that the restriction was sufficiently precise, and no less drastic alternative could adequately protect the state interest.⁹⁴

An alternative approach to resolving the unanswered issues of *Mow Sun Wong* is to define those positions which involve functions that go to the heart of representative government⁹⁵ and which, therefore, should be restricted to citizens. In order to determine which federal positions affect the national security interest to such a degree that they should be barred to aliens,⁹⁶ Congress could create a system of job classification and implement it using existing procedures for security clearance of federal personnel.

Currently, the responsibility for imposing narrow and precise restrictions on federal employment rests with each agency head, who has the power to designate positions as sensitive.⁹⁷ The administrative agencies

91. 419 F. Supp. at 895.

92. *Id.*

93. *Id.* at 898.

94. *Id.* at 899. The standard of review enunciated in *Foley* seems even stricter than that of *Flores*. See note 83 *supra* and accompanying text. In *Foley*, the court applied the following standard:

Where a state asserts a compelling state interest to justify statutory discrimination based on a suspect classification, it must establish a very substantial state interest; it cannot choose a means to pursue that interest which unnecessarily burdens or restricts constitutionally protected activity; the statute must be drawn with precision and be tailored to meet legitimate objectives; finally, if there is a less restrictive alternative available that will adequately accomplish its purposes, the state must employ it.

419 F. Supp. at 895.

95. *Id.*

96. *Mow Sun Wong* suggests that jobs in agencies concerned with foreign affairs, treaty negotiations, or immigration and naturalization may sufficiently affect the national interest to be barred to aliens. 426 U.S. at 114; see note 48 *supra*.

97. For example, consider the Department of Defense Civilian Applicant and Employment Security Program, 32 C.F.R. § 156.5(c) (1976). The regulations define a sensitive position:

(c) *Sensitive position*. A "sensitive position" is any position within the Department of Defense the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security. Sensitive positions are of the following two categories:

(1) *Noncritical sensitive position*. Positions so designated by the authority of the Head of a DoD Component, involving the following:

(i) Any position, the duties or responsibilities of which require access to SECRET or CONFIDENTIAL defense information or material.

(ii) Any position involving education and orientation of DoD personnel.

thus have broad discretion to establish qualifications for their employees,⁹⁸ but federal employees are afforded statutory safeguards against unjust removal and discrimination in hiring.⁹⁹

To protect both the national interest and the rights of individual employees and applicants, many federal agencies have created elaborate standards and security clearance procedures to distinguish sensitive positions and determine the suitability of individuals for those jobs.¹⁰⁰

(iii) Any other position so designated by authority of the Head of a DoD Component.

(2) *Critical sensitive position.* Positions so designated by authority of the Head of a DoD Component, involving the following:

(i) Access to TOP SECRET defense information or material.

(ii) Development or approval of war plans, plans, or particulars of future major or special operations of war, or critical and extremely important items of war.

(iii) Development or approval of plans, policies, or programs which affect the overall operations of the Department of Defense or of a DoD Component, *i.e.*, policy-making or policy determining positions.

(iv) Investigative duties, the issuance of personnel security clearances, or duty on personnel security boards.

(v) Fiduciary, public contact, or other duties demanding the highest degree of public trust.

(vi) Any other position so designated by authority of the Head of a DoD Component.

See also 5 U.S.C. § 7532 (1970) (which gives heads of agencies the power to remove or suspend employees in the interests of national security).

98. *United Public Workers v. Mitchell*, 330 U.S. 75, 103 (1946). This decision upheld the Hatch Act, *i.e.*, the right of Congress to regulate political activity of public employees and to delegate authority to the Executive branch to establish abstention from political activity as a condition of public employment.

99. In *Cole v. Young*, 351 U.S. 536 (1956), the Court held that 5 U.S.C. § 7532 allows summary removal of an employee "in the interest of national security" only where it is clearly shown that his position is one where he could adversely affect the national security. *See also* *United States v. Robel*, 389 U.S. 258 (1967) (holding that the statute making it unlawful for a member of a Communist action organization to work in any defense facility was unconstitutionally overbroad). *See also* N.Y. Times, Sept. 9, 1976, at 1, col. 5 (reporting that the Civil Service Commission has ordered elimination of all political loyalty questions on the standard application for federal jobs). Federal rulings had held that the questions were so overbroad that they encroached on the first amendment rights. *See generally* Das, *Discrimination in Employment Against Aliens: The Impact of the Constitution and Federal Civil Rights Laws*, 35 U. PITT. L. REV. 499, 534-36 (1974).

100. The elaborate standards and procedures of the Department of Defense are a good example of such a set of guidelines. *See* note 97 *supra*. The Defense Department's basic standard for employment and retention of civilian employees is "that, based on all the available information, the employment or retention in employment of an individual is clearly consistent with the interests of national security." 32 C.F.R. § 156.7(a) (1976). In applying that standard, consideration is given, but not limited, to an individual's past and current participation in a list of twenty activities and associations, including membership in, affiliation or sympathetic association with, any foreign or domestic organization which

Such a system, if applied impartially to aliens and citizens, provides a reliable method for deciding from which sensitive positions aliens should be excluded.¹⁰¹ However, because certain ties with foreign countries raise presumptive doubts as to an individual's loyalty, some existing criteria may be unfair if indiscriminately applied to aliens.¹⁰² In addition, substantive criteria for establishing loyalty and methods of investigation, if applied more stringently to aliens, may result in a deprivation of liberty without due process in contravention of the holding of *Mow Sun Wong*.¹⁰³

If an alien is denied federal employment after a security investigation, he should be afforded a hearing¹⁰⁴ and, if unsatisfied, an opportunity to appear in court and question whether the criteria applied were promulgated within the scope of the agency's authority and whether the criteria were fairly applied to him.¹⁰⁵ Any information sought in connection with a security investigation must be "specifically, directly and narrowly"

is totalitarian, Fascist or Communist, or close association with one engaging in such activity. 32 C.F.R. § 156.7(b) (1976). Subsection (b) further provides: "As the following activities and associations are of varying degrees of seriousness, the ultimate determination must be made on the basis of an overall commonsense evaluation of all the information in a particular case." In addition, Defense Department regulations provide for a security investigation, the scope of which is to be determined by the "degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security . . ." 32 C.F.R. § 156.8(a) (1976).

101. Where a position affects national interests, but provides a lesser risk of harm, the standard for employment and retention may be less stringent than "clearly consistent with the interests of national security." See note 100 *supra*. For example, the standard to be used in making an advisory opinion relating to the loyalty of a United States citizen who is an employee of, or being considered for employment in, a public international organization of which the United States is a member is "whether or not on all the evidence there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States." 5 C.F.R. § 1501.8(a) (1976). The Postal Service regulations allow noncitizens who have been accorded permanent resident status to hold all Postal Service positions except those of a high executive level or those expressly designated as sensitive. 426 U.S. at 98 n.13; see note 34 *supra*.

102. Some of the criteria listed in 32 C.F.R. § 156.7(b) (1976), note 100 *supra*, could be unfair if applied to an alien without full consideration of his individual situation. For example, item 15, the presence of a close friend or relative in a nation whose interests may be inimical to those of the United States, should not be a sufficient basis for excluding an alien from a civil service position without a showing of the relationship of this circumstance to a specific risk to American interests.

103. 426 U.S. at 116-17. See 85 HARV. L. REV. 1130, 1169-77 (1976).

104. See, for example, the hearing procedures outlined in the Department of Defense Civilian Applicant and Security Clearance Program. 32 C.F.R. § 156.9(e) (1976).

105. Usually administrative remedies must be exhausted before judicial relief will be granted. See *Leiner v. Rossell*, 121 F. Supp. 27 (S.D.N.Y. 1954). However, suspension on security grounds may constitute action which is "clearly illegal" and may entitle the employee to judicial relief without exhausting his administrative remedies.

related to performance of the employee's official duties.¹⁰⁶ While reluctant to disturb federal administrative decisions concerning aliens where national security interests are involved,¹⁰⁷ or where the discrimination alleged is among aliens and not between aliens and citizens,¹⁰⁸ the courts will examine the exercise of power imposing employment qualifications if that exercise arguably violates due process.¹⁰⁹

The future action of Congress, whether acquiescence to the Presidential decision to exclude aliens completely from the civil service, or implementation of a classification system which will permit exceptions to President Ford's Order, will have an important effect on the allocation of federal responsibility for alien affairs. If Congress ratifies President Ford's Order, it will relinquish further its control over immigration and naturalization and federal personnel to the Executive. In addition, such a decision would reaffirm the power of the political branches of government to regulate alien affairs and national security even when the exercise of that power conflicts with judicial protection of individual rights. Externally, the congressional decision may have a major impact on the decision of aliens, both visitors and residents, to seek permanent residence and citizenship in the United States.¹¹⁰

IV

RECOMMENDATIONS

The need for loyal employees in sensitive positions appears sufficiently compelling to justify a decision to exclude aliens from those jobs which do affect the national security interest. Furthermore, although the lack of a uniform definition of national security poses a considerable problem for purposes of deciding which positions should be restricted to citizens, the problem is not insurmountable. Yet, while providing the benefit of certainty, an express definition of national security by Congress, the President, or the Supreme Court would not resolve the issue of job classification, protect alien rights, or guarantee American security. When the national security interest has clashed with individual

106. See *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280, 284 (1968).

107. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).

108. *Mathews v. Diaz*, 426 U.S. 67, 78-79 (1976).

109. *Cole v. Young*, 351 U.S. 536 (1956); *Cafeteria Workers Union v. McElroy*, 367 U.S. 886 (1961).

110. Cf. notes 54 & 62 *supra*. If Congress adopts the Presidential exclusion without identifying the supporting national interest, there is a danger that a broad power, exercised in the "national interest," may operate as a disguised exclusion of aliens from federal jobs for a variety of economic, political, and nationalistic reasons.

liberties, the courts have tried to give maximum protection to each with a minimum sacrifice of the opposing interest.¹¹¹ A rigidly defined concept of national security would not accurately reflect changing security needs and would only operate to the detriment of individual liberties.¹¹² Moreover, because of the dynamic nature of foreign affairs, a fixed definition of national security may overly restrict the Executive and render him less capable of responding adequately to international crises.¹¹³ Finally, any definition should be sufficiently flexible to enable each administrative agency to apply it to positions within its ranks and determine which jobs affect the security interest which that agency is charged with protecting.

While lacking the precision provided by an express definition, a broad statement of national security may be useful in determining whether, as President Ford believed,¹¹⁴ the national interest justifies the policy of denying aliens equal access to federal employment. The major factor in determining whether a particular position, or all federal positions, should be reserved to citizens should be the policy-making impact of the job as measured by the potential influence of its occupant on the productive strength of the United States, particularly in the areas of defense, foreign policy, and internal security. If an alien employee's ties to his native country may influence his policy decisions to the detriment of American strength, then such a job should be barred to him or restricted to citizens.¹¹⁵

If the test of policy-making impact is applied to civil service jobs, not every position will be deemed sensitive for national security purposes, even if occupied by one whose interests may be inimical to the United States, since the vast majority of civil service jobs involve policy execution rather than decision making.¹¹⁶ Although such execution, if incon-

111. K. DAVIS, *ADMINISTRATIVE LAW TEXT* 189 (3d ed. 1972).

112. See 85 HARV. L. REV. 1130, 1134 (1972).

113. The judiciary has not yet decided whether special circumstances, such as armed hostilities between the United States and the country of which the alien is a citizen, would justify the use of a classification based on alienage. In *re Griffiths*, 413 U.S. 717, 722 n. 11 (1973). However, in *Mathews v. Diaz*, 426 U.S. 67 (1976), the Court asserted:

Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution.

426 U.S. at 81.

114. Letter from the President, note 8 *supra* and accompanying text.

115. The decision whether to employ an *individual* alien should be founded upon an overall factual determination, based on the sensitivity of the particular position. Decisions to bar aliens *completely* from a federal position should be supported by a very strong showing of the adverse effect to be exerted on the national security by an alien occupant of that position. See notes 100 & 101 *supra*.

116. In his dissenting opinion in *Foley v. Connelie*, 419 F. Supp. 889 (S.D.N.Y. 1976),

sistent with policy goals and directives, may have a harmful effect on national security, the performance of most federal employees in implementing policy decisions is subject to review and disciplinary action which will reduce the damage caused by one person's improper acts.¹¹⁷

Since the administrative agencies specifically responsible for the interests of national security can best apply the policy-making impact test to the positions within their departments, a further delegation of congressional authority over alien affairs to those agencies seems an appropriate method of deciding which federal jobs should be barred to aliens.¹¹⁸ These decisions should be made by the agency head, who should strive to protect both the national interest and the equal employment opportunities of aliens, within the restrictions imposed by national security.

A job within an agency which is not primarily concerned with national security interests may nevertheless be sensitive and thus reserved to citizens if that particular position affects national security. Such a de-

Judge Mansfield declared that the class of positions where citizenship bears a rational relationship to its special demands is clearly a narrow one. 419 F. Supp. at 901. He did not believe that the position of state trooper, which involved application of settled law rather than the formulation of new law or policy, was such a position. 419 F. Supp. at 902.

117. See, e.g., regulations of the Department of State, Ethical and Other Conduct and Responsibilities of Employees, 22 C.F.R. § 10.735-305(d) (1976):

A special Government employee shall avoid any action . . . which might result in, or create the appearance of:

- (1) Using public office for private gain;
- (2) Giving preferential treatment to any person;
- (3) Impeding Government efficiency or economy;
- (4) Losing independence or impartiality;
- (5) Making a Government decision outside official channels; or
- (6) Affecting adversely the confidence of the public in the integrity of the Government.

22 C.F.R. § 10.735-105 (1976) provides:

A violation of the regulations in this part by an employee or special Government employee may be cause for appropriate disciplinary action which may be in addition to any penalty prescribed by law.

22 C.F.R. § 9.62 (1976) contains procedures for enforcing security violations and 22 C.F.R. § 9.63 (1976) provides for disciplinary action for security violations.

118. The delegation of discretionary congressional authority over alien affairs to administrative agencies is not unprecedented. The Immigration and Nationality Act, 8 U.S.C. § 1201 (1976) provides that a consular officer may issue a visa in his discretion. 8 U.S.C. § 1203 (1976) specifies that aliens who have been lawfully admitted for permanent residence and want to leave the country are entitled to a re-entry permit at the discretion of the Attorney General. In general, an alien who seeks permanent residence must satisfy both the statutory requirements for admission as an immigrant and obtain a favorable exercise of discretion from the Attorney General or his delegate. K. DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 236-37 (2d ed. 1975).

termination should be made by the head of the agency, and reviewed by the chief officer of the agency which has specific authority to deal with that interest.

In addition, under this proposal some sensitive positions could be held by aliens if they met certain security clearance requirements.¹¹⁹ The substantive and procedural standards to determine eligibility for employment should vary with the sensitivity of the job, and applicants should be given maximum procedural safeguards without jeopardizing the security program.¹²⁰ Alien as well as citizen applicants who are denied employment after an impartial investigation should be provided with reasons for their rejection and full opportunity for appeal, unless such disclosure would endanger national security.¹²¹

Regardless of the apparent care and impartiality involved in decisions to exclude aliens from employment, judicial review of such decisions is necessary to balance the right of an alien to seek employment against the compelling national interests which would deny him that employment. Rather than attempt a further definition of those national interests,¹²² the court review should include:

119. The Department of Defense subdivides sensitive jobs into "noncritical sensitive positions" and "critical sensitive positions," with more severe investigative procedures required for appointment to the latter. See notes 97 & 100 *supra*. In addition, the incumbent of every sensitive position is subject to reinvestigation every five years. 32 C.F.R. § 156.8(a)(4) (1976). Such an approach would function well in determining alien eligibility for various strata of sensitive positions.

120. *Parker v. Lester*, 112 F. Supp. 433, 443 (N.D. Cal.), *rev'd on other grounds*, 227 F.2d 708 (9th Cir. 1955). The district court concluded that seamen were entitled to a hearing before being rejected for employment for security reasons.

121. See the dissent in *Cafeteria Workers Union v. McElroy*, 367 U.S. 886, 901-02 (1961), which voiced disagreement with the majority view that a discharge of a cook for security reasons would not, in law or in fact, prevent her from obtaining other federal employment:

[Rejection from a job for security reasons] is far more likely to be taken as an accusation of communism or disloyalty than imputation of some small personal fault [T]he Government . . . ought not to affix a "badge of infamy" . . . to a person without some statement of charges, and some opportunity to speak in reply.

Current policy is to give employees who have been suspended for security reasons a summary of the reasons for the action, to the extent national security will permit. See, e.g., 32 C.F.R. § 156.9(e)(5) (1976).

122. In addition to those discussed in *Foley v. Connelie*, notes 89-94 *supra* and accompanying text, the courts have identified other compelling interests to justify discrimination between aliens and citizens. In *United States v. Gordon-Nikkar*, 518 F.2d 972, 976 (5th Cir. 1975), the court held that the federal government had a compelling interest in insuring that jurors were personally committed to the proper application and enforcement of United States laws, and therefore was justified in excluding aliens from jury service. Similarly, in *Perkins v. Smith*, 370 F. Supp. 134, 137 (D. Md.), *aff'd*, 426 U.S. 913 (1976),

- (1) whether an agency actually has responsibility for the interest it purports to protect by the exclusion of aliens;
- (2) whether an agency has adequately examined the policy-making importance of the job and its potential effect on the protected national interest before deciding that an alien should be denied access to that position;
- (3) whether, in the case of a job which is sensitive but may be open to some aliens, the agency has formulated criteria rationally designed to serve the protected interest, and whether the criteria were properly applied to the individual alien; and
- (4) whether the agency provides strict procedural safeguards for notice, fair hearing and appeal for both aliens and citizens.¹²³

The foregoing procedures are more consistent with the policies set forth in *Mow Sun Wong* than President Ford's complete exclusion of aliens from employment in the federal civil service. The retention of a broad definition of national security insures that decisions involving the national security interest will remain in the hands of the political branches of government. Furthermore, the requirement that an administrative decision to exclude an alien from employment be adequately documented, and the additional requirement that an agency which does not deal with matters of national security have such decision reviewed by an agency which does, insures that the decision to deprive an alien of an important liberty will be justified by reasons that are properly the concern of that agency.¹²⁴ Finally, judicial review will insure that individual rights as well as the national security are thoroughly considered in any decision which restricts the equal employment opportunities of aliens.

CONCLUSION

The decision of *Mow Sun Wong*, removing restrictions on alien employment in the civil service unless justified by a supreme national interest,¹²⁵ mandates a determination of the compelling interests which allow a citizenship restriction, and the establishment of fair administrative procedures to implement any restriction. President Ford's subse-

the court, citing *Sugarman*, concluded that the jury is at the heart of our system of government and the exclusion of aliens from jury service did not constitute a denial of equal protection.

123. Judicial review of administrative decisions does not include a review of the merits of the decision, but may include a review of the substantiality of the evidence. See W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 387-88, 405-06 (6th ed. 1974).

124. 426 U.S. at 114-15.

125. *Id.* at 116.

quent decision to continue the restriction on alien employment satisfies none of these requirements. Rather, it maintains the current exclusion pending an appropriate congressional determination of its efficacy.

Of the interests suggested as overriding in *Mow Sun Wong*, the need for loyalty appears sufficiently compelling to exclude aliens from sensitive positions. The analysis of *Mow Sun Wong* and related law supports the conclusion that only those agencies concerned with interests affecting the national security, *i.e.* national defense, alien affairs, and foreign policy, can exclude aliens from the positions which clearly affect those interests, and the exclusion must be administered under proper procedural protection.

The failure to establish a method for determining alien eligibility for federal jobs or to elaborate upon the Presidential decision will prevent the implementation of the policies of *Mow Sun Wong*. While there is substantial danger to the national security if all barriers to employment, even for sensitive positions, are removed, President Ford's broad exclusion unduly infringes the rights of aliens. If adopted by Congress, the suggested procedures will maintain the separate interests of each branch in the national security while protecting the freedom of aliens to pursue employment with the federal government. In addition to accommodating the competing policy interests, the proposed guidelines provide a basis for evaluating the potential impact of the *Mow Sun Wong* issue on national policies of immigration, naturalization, and foreign affairs.

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