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## Employment in the Federal Civil Service-- Aliens Need Not Apply: *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978)

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## NOTE

Employment in the Federal Civil Service—  
Aliens Need Not Apply

*Vergara v. Hampton*  
581 F.2d 1281 (7th Cir. 1978)

On August 24, 1978, in *Vergara v. Hampton*,<sup>1</sup> the United States Court of Appeals for the Seventh Circuit, in holding that an Executive Order barring lawfully admitted aliens from the competitive service did not exceed the President's authority, sustained a broad prohibition against alien employment in the federal government.<sup>2</sup> Under this Executive Order, the Civil Service Commission was given authority to restrict admission to the competitive service examination or appointment in the civil service to citizens or nationals of the United States.<sup>3</sup> Only when it was necessary for the efficiency of the Service

1. *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 1993 (1979). Mr. Justice Powell took no part in the consideration of or the decision on this petition.

2. Exec. Order No. 11,935, 3 C.F.R. 146 (1977), which amended Civil Service Commission Rule VII, 5 C.F.R. § 7.1 *et seq.*, by adding § 7.4, which states in part: "No person shall be admitted to competitive examination unless such person is a citizen or national of the United States."

The term "alien," as defined by the statute, means a person who is not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3) (1976). The broad prohibition against alien employment applies to all positions filled through civil service competitive examination procedures. Accordingly, admission to the examination is limited to those persons who are citizens of, or who owe permanent allegiance to the United States. 5 C.F.R. § 7.4 (1978). See Comment, *Alien's Right to Work: State and Federal Discrimination*, 45 *FORDHAM L. REV.* 835, 855 (1977).

3. Executive Order No. 11,935 delegated power to the Commission to set standards for admission to the civil service. The Commission decided that one such standard would be the prohibition of aliens in federal employment. The text of the President's statement, in full, reads as follows:

(a) No person shall be admitted to competitive examination unless such person is a citizen or national of the United States.

(b) No person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States.

(c) The 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. 5 C.F.R. § 7.4 (1978).

The term "national" means a person owing permanent allegiance to a state, or a citizen of the United States, or those born in a territorial possession of the United States. 8 U.S.C. §§ 1101 (a) (21)-(22), 1408 (1976). In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 90, n.2 (1976) [hereinafter cited as *Mow Sun Wong*], Justice Stevens narrowed the definition to include all Americans and natives of American Samoa.

could the Commission make an exception to this restriction, and then only in specific cases and only for temporary appointments.<sup>4</sup> The order amended a previous Civil Service Regulation which excluded aliens from government employment. It was neither clear which government entity had actually prescribed the regulation excluding aliens, nor what government interests it was intended to further.<sup>5</sup>

A citizenship requirement for government employment has been a part of the Commission's policy since its inception, although many exceptions have been made in its application.<sup>6</sup> The specific regulation involved in the *Vergara* case and amended by the Executive Order in question was the result of an order issued by President Eisenhower in 1954.<sup>7</sup> The language of that order did not demand the

4. As the Supreme Court stated in *Mow Sun Wong*, the main concern of the Civil Service Commission is efficiency. Any regulations that the Commission would promulgate would have to evidence an efficiency concern as its underlying basis. Any regulation made outside the scope of this concern would need the express approval, and more likely, the initial promulgation, of that level of government responsible for its effect. *Mow Sun Wong*, 426 U.S. at 88.

5. In 1954, President Eisenhower issued an Executive Order pursuant to a statute authorizing him to do so. Exec. Order No. 10,577, § 2.1(a), 3 C.F.R. 218, 219 (1954-1958 Comp.). The statute provided, in part, that the President may:

- (1) prescribe such regulations for 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. 5 U.S.C. § 3301 (1976).

The Executive Order issued by the President read, in part, as follows:

The Civil Service 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 or rated in examinations.

The Commission, pursuant to this authorization, issued one regulation that provided in part:

- (a) A person may be admitted to competitive examination only if he is a citizen 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. 5 C.F.R. § 338.101 (1971).

The primary issue concerning the above regulation was whether it exceeded the authority of the Commission, as stated in President Eisenhower's order of 1954. The decision reached in *Mow Sun Wong* was that the regulation was not made by a level of government with the proper authority and was invalid.

6. *Mow Sun Wong*, 426 U.S. at 104-11. The Court traced a brief history of the Civil Service Commission as well as the various exceptions made in the citizenship requirements.

7. See note 5, *supra*.

complete denial of employment to aliens, nor did it specify any particular interests attributable to the federal government that would rationally be served if such a denial were adopted by the Commission in the form of a regulation.<sup>8</sup> Nevertheless, such a regulation was promulgated by the Commission.

In 1976, the Supreme Court held that a regulation barring aliens from employment in the federal civil service was invalid as a denial of due process.<sup>9</sup> The Court found that exclusion from federal employment amounted to deprivation of a "liberty interest"<sup>10</sup> under the Constitution, and that due process required that a regulation legitimately serve the interests that were intended to support its adoption, which the regulation at issue did not.<sup>11</sup> Shortly after this decision was handed down by the Court, the Executive Order in the instant case was published.<sup>12</sup> In reviewing the relief requested by the

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8. The language used in the Executive Order issued by President Eisenhower does not expressly prohibit aliens from federal employment. The order merely grants the Commission power to establish certain standards with respect to citizenship, as well as ascertaining the applicant's fitness. It includes nothing pertaining to the exclusion to employment to certain persons. Conversely, the order issued by President Ford in 1976 specifically excludes aliens from the competitive examination process or appointment in the Civil Service. Neither order specifies any governmental interests or policies which would be furthered by it, or by such a regulation. However, President Ford's order was accompanied by identical letters addressed to the Speaker of the House and the President of the Senate, articulating the national interests furthered by his order. Pres. Ford, Letter of Sept. 2, 1976, Citizenship Requirements for Federal Employment, 41 Fed. Reg. 37303 (1976).

9. See *Mow Sun Wong*, *supra* note 3.

10. *Id.* at 102.

11. Interests that could support such a broad prohibition of employment are national security, preservation of the long-standing policy of prohibiting aliens from employment in the Civil Service, foreign affairs and policy formulation, the quality of the service, and maintenance of the *status quo* to avoid inefficiency.

In his letter, addressed to the President of the Senate and to the Speaker of the House, President Ford stated:

[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, except where the efficiency of the service or the national interest dictate otherwise in specific cases or circumstances. It is also my judgment that it 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. Therefore, I am issuing an Executive Order which generally prohibits the employment of aliens in the competitive service. Letter of Sept. 2, 1976, *supra* note 8, at 37303.

12. See note 3, *supra*. The order was made in direct response to the invalidation of the Commission's regulation in the *Mow Sun Wong* decision.

appellants,<sup>13</sup> which was denied by the United States District Court for the Northern District of Illinois, Eastern Division, the circuit court *held*, affirmed and modified: The Executive Order was within the President's authority, it did not violate due process, those aliens to whom it applied did not fall within the protection of 42 U.S.C. § 1981, and appellants were entitled to class status.<sup>14</sup>

#### I. BACKGROUND INFORMATION SIGNIFICANT TO THE DECISION

The decision of the district court to dismiss the original action was issued in a Memorandum Opinion and Order denying the plaintiff's motions: (1) to be certified as a class action; and (2) for summary judgment.<sup>15</sup> In the same order, the court granted the appellants' motion for summary judgment on the remaining issues.<sup>16</sup> The circuit court in the *Vergara* case treated the district court's denial of class representation summarily. The circuit court determined that threshold requirements of numerosity, need, and common question were all satisfactorily met, and thus established the predicate necessary to bring a class action.<sup>17</sup>

The circuit court then turned to the remaining substantive issues, which were found to be inextricably related to the Supreme Court decision of *Hampton v. Mow Sun Wong*.<sup>18</sup> In *Mow Sun*

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13. The appellants . . . "[sought] to enjoin the [Civil Service Commissioner] from continued enforcement of the Executive Order and from refusing to examine, appoint and certify them for employment in the United States Civil Service." See Appellants' Opening Brief at 2.

14. The district court's holding as to the issues of the Presidential authority, due process, and equal protection was affirmed. The decision was modified as to the issue of class status, which status the appellants were granted. *Vergara v. Hampton*, 581 F.2d 1281 (1978) (hereinafter *Vergara*).

15. The district court found that class status under Federal Rule 23 could not be sustained because the class would be too broad, the plaintiff's claims too divergent, and the plaintiffs, therefore, would not be representative of persons within the represented class. *Vergara v. Hampton* (No. 73 C 2537, N.D. Ill. July 21, 1977) (unreported memorandum decision).

16. The district court determined that the interests of the government justified its action, noting that courts have historically deferred to the federal government in matters regarding immigration and naturalization. *Id.*

17. The Supreme Court invalidated a civil service regulation promulgated by the Commission pursuant to what it deemed as proper authority granted in President Eisenhower's Executive Order. In ruling the regulation invalid, the Court did not hypothecate whether a similar or identical regulation would be invalid if it were properly authorized. In direct response to this decision, President Ford issued a new Executive Order amending the previous civil service rule. *Supra* note 2.

18. 426 U.S. 88 (1976).

Wong, the Court held that a Civil Service Commission regulation barring legally admitted resident aliens from civil service employment deprived them of due process and was, therefore, unconstitutional.<sup>19</sup> The Court determined that constitutional safeguards, applied by the Court to discrimination against aliens by state regulations, could be overridden by certain "national interests," but only when those interests were asserted by the federal government.<sup>20</sup> Therefore, the federal government could bar all aliens from employment if it could justify blanket discrimination by asserting purely national interests. A bar of this type would make citizenship a prerequisite to seeking federal employment. Specifically reserved by the Court was the question of whether such federal citizenship requirements would be susceptible to or immune from constitutional challenge.<sup>21</sup> In the instant case, this challenge occurred as a result of President Ford's reaffirmation, in Executive Order No. 11,935, of the government's policy prohibiting alien employment in the civil service.

Although the *Vergara* court reached a conclusion with respect to the Executive Order only, it seems appropriate to review the

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19. For a detailed discussion of due process and its related considerations, not within the scope of this note, see generally Comment, *Procedural Due Process and the Exercise of Delegated Power: The Federal Civil Service Employment Restriction on Aliens*, 66 GEO. L.J. 83 (1977); Rosberg, *Aliens and the National Government*, 1977 SUP. CT. REV. 275 (hereinafter cited as Rosberg); Note, *Wandering Between Two Worlds: Employment Discrimination Against Aliens*, 16 VA. J. INT'L L. 355, 367 (1976).

20. The Supreme Court has implied in a line of cases that although the constitutional requirements of due process and equal protection are applicable to both the states and the federal government, they may be overridden by national interests peculiar only to the federal government. *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971) (aliens are a suspect classification, warranting strict judicial scrutiny of any infringement of their constitutional rights); *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948); *Truax v. Raich*, 239 U.S. 33 (1915); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). See generally Miller, *Immigration and Nationality Law*, 1977 ANNUAL SURVEY OF NATIONALITY LAW 205; Das, *Discrimination in Employment Against Aliens—The Impact of the Constitution and Federal Civil Rights Laws*, 38 U. PITT. L. REV. 499 (1974).

21. *Mow Sun Wong*, 426 U.S. at 116. Mr. Justice Brennan, with whom Mr. Justice Marshall joins, concurring, stated:

I join the Court's opinion 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. 426 U.S. at 117.

For an interesting discussion of this action by the Court, see generally Rosberg, *supra* note 19.

Supreme Court's decision in *Mow Sun Wong*, focusing on the regulation found to be invalid there and the subsequent order which gave that regulation new vitality. In *Mow Sun Wong*, one of the Court's basic objections to the regulation promulgated by the Commission was the lack of any express requirement, either by Congress or by the President, that the Commission adopt such a regulation.<sup>22</sup> Such an objection is justified when a regulation is so expansive as to deprive an entire group of people the right to employment by the very government that initially welcomed them as inhabitants.<sup>23</sup>

The Court stated that "if the [regulation was] expressly mandated by the Congress or the President we [the Court] might presume that any interest which might rationally be served by the [regulation] did in fact give rise to its adoption."<sup>24</sup> However, the Executive Order giving rise to the adoption of the regulation only authorized the Commission "to establish standards with respect to citizenship . . . ."<sup>25</sup> It was not a command by the President to require citizenship as a "general condition" of employment by the Commission, but was more reasonably interpreted as a command to "classify" positions for which citizenship would be a prerequisite.<sup>26</sup>

It is apparent that aliens are protected by the Constitution and may exercise many of the rights and privileges granted to citizens.<sup>27</sup>

22. This objection was the cornerstone of the Court's decision to invalidate the regulation. The Constitution grants Congress the power to regulate immigration and naturalization. Congress delegated that power to the President in the area of alien employment in the civil service. President Eisenhower's Executive Order merely authorized the Commission to set standards for admission to the service; it did not "require" it to exclude aliens. A decision to exclude aliens, the Court found, could not be made by the Commission on its own initiative since such a decision would not further the efficiency of that agency. *Mow Sun Wong*, 426 U.S. at 116.

23. The United States welcomes hundreds of thousands of immigrant aliens each year to reside within its borders. See Rosberg, *supra* note 19, at 277.

24. 426 U.S. at 103. Although Justice Stevens states that: "It follows that some judicial scrutiny is mandated by the Constitution," the Court would, if the regulation were promulgated by the President or by the Congress and supported by any reasonable national interest, lower even this scrutiny standard to one of mere rationality.

25. See note 5, *supra*.

26. 426 U.S. at 112. The Court uses this distinction as a basis for its decision in *Mow Sun Wong*, enabling it to avoid other constitutional questions, which it specifically reserves for the future. *Id.* at 103.

27. Constitutional protections accorded aliens lie within the equal protection clause of the Fourteenth Amendment, as well as the due process clause of the Fifth Amendment. Both amendments specify a "person" as the entity accorded these rights and do not specify "citizen." U.S. CONST. amends. 5 and 6. See generally 3 EMPL. REL. L.J. 23 (1977).

The Court in *Mow Sun Wong* found that, in addition to those disadvantages imposed by the regulation, aliens are subject to disadvantages not shared by the rest of the nation.<sup>28</sup> The Court thus held that ineligibility for employment in a large sector of the economy "was of sufficient significance to be characterized as a deprivation of an interest in liberty."<sup>29</sup> However, as the Court found, this type of deprivation, brought to bear by the federal government, could be justified by national interests furthered by it.

After a brief historical analysis explaining how the present situation arose, the Supreme Court concluded that those "interests" that could adequately support an unequivocal determination, by either Congress or the President, to bar all aliens from employment in the federal civil service were not interests that could legitimately justify a like determination by the Commission.<sup>30</sup> According to the Court, the basic concern of the Commission was providing for its own efficiency, a concern to which it should confine itself.<sup>31</sup> Since resident alien status is only granted pursuant to decisions made by Congress through the exercise of its constitutional power over immigration and naturalization, or by the President, through the exercise of his delegated power:

[D]ue process requires that the decision to impose that deprivation of an important liberty be made either at a comparable level of government 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.<sup>32</sup>

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28. *Mow Sun Wong*, 426 U.S. at 102.

29. *Id.* and accompanying note. See 25 U. OF KAN. L. REV. 593 (1977).

30. *Mow Sun Wong*, 426 U.S. at 116.

31. *Mow Sun Wong*, 426 U.S. at 114. The Court determined that this concern for efficiency was confined to very specific areas:

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 for entry, or for naturalization policies. Indeed, it is not even within the responsibility of the Commission to be concerned with the economic consequences of permitting or prohibiting the participation by aliens in employment opportunities in different parts of the national market. On the contrary, the Commission performs a limited and specific function. 426 U.S. at 114.

32. 426 U.S. at 116.



The decision to exclude aliens from federal employment was made by the Civil Service Commission, a level of government not comparable to the Congress or the President.<sup>33</sup> The regulation held invalid in *Mow Sun Wong* was not justified by considerations or interests properly within the Commission's scope—that scope necessarily encompasses only efficiency concerns.<sup>34</sup> The Supreme Court, therefore, declared the regulation invalid.

The *Vergara* court faced the question of whether the President's Executive Order, reaffirming this invalid regulation and justifying it with proper national interests, was constitutional.<sup>35</sup> The decision reached in *Mow Sun Wong* gave the circuit court some guidance. The circuit court addressed the issues raised by the appellants in light of the Supreme Court's decision.

## II. THE VERGARA OPINION

The three major issues presented to the court in the instant case were as follows: (1) whether the President's order exceeded his constitutional and statutory authority; (2) whether the order violated the civil rights provisions of 42 U.S.C. § 1981 as it applies to aliens; and (3) whether the order violated the due process clause of the Fifth Amendment.<sup>36</sup> An affirmative finding on any one of the issues would render the order invalid, while there had to be a negative determination on all three issues if the order was to be upheld.

The circuit court stated that the main issue before the Supreme Court in *Mow Sun Wong* was whether the interests of the federal government were identical to the interests which the Civil Service Commission could rely upon as a justification for adopting a regulation whose sole purpose was to exclude aliens from employment. The Supreme Court found these interests to be quite different.<sup>37</sup> Since

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33. See notes 22 and 31, *supra*.

34. *Id.*

35. This is the primary question facing the circuit court. The Supreme Court assumed, without deciding, that the President had the power to exclude aliens, as long as the exercise of that power was buttressed by appropriate national interests.

36. *Vergara*, 581 F.2d at 1281.

37. If the interests of the federal government were coextensive with those of the agency in relation to the regulation's promulgation, then the agency could use those interests as a basis for adopting it. The Court, in *Mow Sun Wong*, determined that the agency should confine itself to efficiency considerations when adopting regulations. Such considerations would not concern the same policy determinations that would result if they were subject to forces within the political arena. *Id.* at 1284; *Mow Sun Wong*, 426 U.S. at 103-04; *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

the interests of the Commission were primarily those of efficiency, it would be improper, and a violation of due process, for the agency to promulgate a regulation concerning anything other than those efficiency concerns.<sup>38</sup> In reaching this conclusion, the Court had to first determine whether Congress authorized the President, who in turn delegated his authority to the Commission, to initially adopt the regulation.<sup>39</sup> The Supreme Court found that such authorization was codified in 5 U.S.C. § 3301,<sup>40</sup> and that the President had delegated that authority to the Commission. The Court then had to determine if the President's delegation of authority was a requirement to exclude, or merely an authorization to set standards. It found that no such requirement to exclude existed, and therefore, the regulation was improperly adopted.<sup>41</sup>

As the court in the instant case noted, if the Supreme Court in *Mow Sun Wong* had believed that the President's statutory authority was insufficient, it would not have reached the constitutional question of due process, but would have decided the case squarely on the lack of statutory authority.<sup>42</sup> The Supreme Court did assure that 5 U.S.C. § 3301 gave the Civil Service Commission the power to retain or modify regulations without further authorization from Congress or the President.<sup>43</sup> Nevertheless, that assurance was narrowly confined to regulations "as would best promote the efficiency of the service."<sup>44</sup> Matters outside this narrow scope would need the specific reaffirmation of either Congress or the President.<sup>45</sup>

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38. *Mow Sun Wong*, 426 U.S. at 112-13. See Comment, *Procedural Due Process and the Exercise of Delegated Power: The Federal Civil Service Employment Restriction on Aliens*, 66 GEO. L. REV. 83 (1977), in which the author gives an analysis of procedural due process and its effect on restrictions on alien employment, with particular attention given to the *Mow Sun Wong* decision. See also note 31, *supra*.

39. This area of delegated authority had, until recently, gone unquestioned because Congressional power to regulate aliens is firmly established in the Constitution. "The Congress shall have Power To . . . establish a uniform Rule of Naturalization . . . throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

40. 5 U.S.C. § 3301 (1976).

41. See note 2, *supra*.

42. *Mow Sun Wong*, 426 U.S. at 112. As Justice Stevens explained:

The President's direction to "establish standards with respect to citizenship" is not necessarily a command to require citizenship as a general condition of eligibility for federal employment. Rather it is equally, if not more reasonably, susceptible of an interpretation as a command to classify positions for which citizenship should be required. *Id.*

43. 5 U.S.C. at § 3301.

44. 426 U.S. at 113.

45. *Id.* at 116. It can be inferred from the Supreme Court's conclusion that, in relation to the regulation held invalid, an entity of government, particularly the Congress

The circuit court viewed the application of 42 U.S.C. § 1981 in an historical perspective, noting primarily Congress' lack of consideration that this section was ever applicable to the citizenship qualifications established by the civil service.<sup>46</sup> Interestingly, this argument was not presented in *Mow Sun Wong* or in the two subsequent district court cases,<sup>47</sup> and it was deleted from the appellants' case in their petition for certiorari.<sup>48</sup>

The appellants argued in *Vergara* that aliens were among those persons that § 1981 protects from discrimination. According to the appellants, this protection extends to discrimination in employment generally and applies to discrimination by the federal government, by its officers, and by the President in the promulgation of orders and regulations.<sup>49</sup> The circuit court rejected this argument<sup>50</sup> in favor of the Supreme Court's conclusion in *Mow Sun Wong* that 5 U.S.C. § 3301 conferred adequate power to the President.<sup>51</sup>

The *Vergara* court found it unlikely, from an historical viewpoint, that after so many years and after the passage of so much legislation excluding (for various reasons and in various degrees) aliens from the federal civil service, Congress would consider this section applicable to citizenship qualifications.<sup>52</sup> As the Supreme Court indicated in its decision, Congress has acquiesced in citizenship restrictions imposed by the Commission for over a century. Although this should not be interpreted as express legislative approval, it may be an

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or the President, would have to reaffirm its original unarticulated interests in the language of the regulation's amendment in order for it to pass judicial inspection.

46. *Vergara*, 581 F.2d at 1285. *Contra* 3 EMPL. REL. L.J. 12 (1977).

47. *Mow Sun Wong v. Hampton*, 435 F. Supp. 37 (N.D. Cal. 1977); *Santin Ramos v. United States Civil Service Comm'n.*, 430 F. Supp. 422 (D. P.R. 1977).

48. Counsel for appellants stated that this argument was inherently weak and would not be pursued at the Supreme Court level. It was deleted from the appellants' petition for certiorari.

49. *Vergara*, 581 F.2d at 1285. The pertinent parts of 42 U.S.C. § 1981 (1976) read as follows: "All persons . . . shall have the same rights . . . to make and enforce contracts . . . as is enjoyed by white citizens . . ." The appellants would have the court read this section as a protection accorded all persons. The section may be far-reaching, but neither the court here, nor the appellants in the application for certiorari, believed that it reached so far as to protect aliens from the plenary power of Congress acting within its constitutional powers regarding immigration and naturalization.

50. *Vergara*, 581 F.2d at 1285.

51. *Mow Sun Wong*, 426 U.S. at 113.

52. *Vergara*, 581 F.2d at 1285. The circuit court found that in the past forty years Congress has adopted legislation excluding aliens from employment in the civil service. *Id.* at 1285 n.7.

indication that Congress has never placed emphasis on the contravention of any federal statute because of the regulation.<sup>53</sup> Emphasizing the historical aspect, the circuit court held § 1981 inapplicable, and then addressed the third issue, due process.<sup>54</sup>

In taking up the due process question, the circuit court again analyzed the *Mow Sun Wong* decision, wherein the Supreme Court "assumed" that the President could lawfully exclude aliens, although it did not actually decide that question.<sup>55</sup> The *Vergara* court, meanwhile, addressed exactly that question, using the foundation provided both explicitly and implicitly in *Mow Sun Wong*.<sup>56</sup>

The Supreme Court assumed that if national interest considerations could justify such a restriction on alien employment, then those considerations must be expressly stated by the Congress or the President. What the Court was looking for was proper justification for the restriction.<sup>57</sup> This "national interest" justification could take the form of an added incentive for aliens to become naturalized or, to a lesser degree, an expendable token to be used in treaty negotiations.<sup>58</sup> The

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53. *Id.* at 1285. In *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973), the Court, for example, interpreted the phrase "national origin" found in Title VII of the Civil Rights Act of 1964. The Court concluded that: "To interpret the term 'national origin' to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy. The Court cannot lightly find such a breach of faith." *Id.* at 90-91. The Court suggested that Congress intended the term to be narrow in scope and did not intend it to embrace non-citizens. The *Vergara* court applied this same type of analysis to § 1981.

54. *Vergara*, 581 F.2d at 1285.

55. *Mow Sun Wong*, 426 U.S. at 114. See also concurring opinion of Justice Brennan, *supra* note 20, at 116.

56. Explicitly, the Court grounded its decision to invalidate the regulation on an analysis of who is to exercise proper authority to deprive aliens of a right to federal employment—an agency or the President. This allowed the Court to skirt the constitutional issues manifested in a delegation of power analysis. Implicitly, the Court's ultimate decision was dependent on determining the balance between the constitutional rights of a minority group on the one hand, and the constitutional and almost plenary power that the government possesses in regard to aliens on the other hand. Although the Supreme Court avoided the issue of Presidential power in its *Mow Sun Wong* decision, the court in *Vergara* not only faced it, but had to tailor its decision to that of the Supreme Court.

57. *Mow Sun Wong*, 426 U.S. at 115.

58. Justifications such as the ones listed are those properly within the scope of interests attributable to the President or to the Congress, but they "are not matters which are properly the business of the Commission." *Id.* at 115. While administrative convenience could justify certain regulations, the Court found it unable to sustain the regulation in this case. See Rosberg, *supra* note 19, at 314.

Court said that any rational interest would suffice as long as it had express authorization from Congress or the President.<sup>59</sup>

The Supreme Court demanded, as a requisite to compliance with due process, that a decision of such gravity be made, not by an agency with general authority over aliens, but by a level of government comparable in stature to the Congress.<sup>60</sup> Congress is the branch of government possessing constitutional power over the entrance and naturalization of aliens. Congress delegated part of this power to the President; therefore, only the President would have the same stature as Congress in this area. The Court would find no problem with due process if the regulation was originally promulgated at this higher level. The only alternative, and one not utilized by the government, would be to allow the Commission to make the decision to exclude aliens, but require that it justify such a decision by citing interests that were within the agency's normal range of concern.<sup>61</sup> The circuit court opinion concluded by expressing the belief that the national interests contained in the Executive Order were sufficient for the Supreme Court to find the order valid.<sup>62</sup> The question of whether due process imposes other limitations was reserved.<sup>63</sup>

The Supreme Court decision was sharply divided, an indication that the Court could interpret the validity of the Executive Order quite differently today.<sup>64</sup> The *Vergara* court reasoned that the four

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59. *Mow Sun Wong*, 426 U.S. at 103. In this case, the Court used "rational" in describing "interests." This is one indication that the Court will not allow the government to use any interest as a justification. The interest must have a rational relationship to the deprivation set forth in the rule. The traditional test for rational relationship was set forth by the Warren Court in *McGowan v. Maryland*, 366 U.S. 420 (1960), where the Court stated: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 366 U.S. at 426.

60. *Mow Sun Wong*, 426 U.S. at 103.

61. *Id.* at 114. This could prove untenable for the Commission since the normal scope of concern is an efficient federal service. Efficiency may not require that all aliens be deprived of a job in the government, but only of those positions which are, in some way, sensitive.

62. *Vergara*, 581 F.2d at 1287. President Ford stated in letters to the Speaker of the House and to the President of the Senate that he found such a prohibition to be in the national interest. Letter of Sept. 2, 1976, *supra* note 8, at 37303.

63. *Vergara*, 581 F.2d at 1287. Circuit Judge Tone stated:

Because the constitutionality of the citizenship requirement has so recently received intensive consideration from the Supreme Court, and no doubt, will soon be before the Court again, a further discussion of that subject in this opinion would be of little value to the Court or to others. *Id.* at 1287.

64. Two justices joined in Justice Stevens' opinion, but filed a concurring opinion, and four justices dissented. Justices Brennan and Marshall joined in the opinion

dissenting justices would find the order valid, since they had previously found the regulation valid. Considering the tenor of the majority opinion in *Mow Sun Wong*, it was also very likely that one or more of these justices would now reach a different conclusion in regard to the validity of the order and would uphold it.<sup>65</sup>

### III. IMPLICATIONS OF THE CIRCUIT COURT'S DECISION

Three months after the Supreme Court's decision in *Mow Sun Wong*, President Ford issued an Executive Order reaffirming the Commission's ban on alien employment in the federal civil service.<sup>66</sup> Since the promulgation of that order, two United States district courts have held it to be valid in similar litigation.<sup>67</sup> Both decisions, as well as the decision in the instant case, were predicated upon the Supreme Court's decision.<sup>68</sup> In *Mow Sun Wong*, the Court emphasized that it would "presume" that any interest espoused by the President or by the Congress which could rationally be served by the regulation would be viewed by the Court as a valid reason underlying its adoption.<sup>69</sup>

In view of the *Mow Sun Wong* opinion, it is doubtful that the *Vergara* court could have reached a contrary conclusion.<sup>70</sup> Clearly, the Supreme Court believed that the statutory delegation to the President by Congress was sufficient. Second, as the circuit court correctly concluded, § 1981 was inapplicable simply from an historical viewpoint. The court in the instant case found it unlikely that the Supreme Court would hold § 1981 applicable to other acts of Congress when Congress most likely did not intend such an application to be made, and additionally, when Congress has made an historical habit of ignoring § 1981 when legislating with respect to aliens.<sup>71</sup>

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with the express understanding that the equal protection question, that would undoubtedly be raised by enactment of a bar on alien employment by either Congress or the President, would be reserved. *Mow Sun Wong*, 426 U.S. at 117.

65. *Vergara*, 581 F.2d at 1286.

66. Executive Order, *supra* notes 2 and 3.

67. 42 U.S.C. at § 1981.

68. All three cases were decided in light of the *Mow Sun Wong* decision, incorporating the Court's rationale almost verbatim.

69. *Mow Sun Wong*, 426 U.S. at 103.

70. Since the Court in *Mow Sun Wong* had assumed that the President had the power to exclude aliens from the civil service, and reserved any constitutional question regarding that power, the circuit court could do little beyond invalidating the order. See Comment, *Aliens' Right to Work: State and Federal Discrimination*, 45 FORDHAM L. REV. 835 (1977).

71. *Vergara*, 581 F.2d at 1285. In essence, the Court would have to anticipate the intent of Congress with respect to the application of § 1981. Contrary views have

Third, the circuit court viewed the due process question, in relation to the Executive Order, as firmly grounded in the assumption made by the majority in *Mow Sun Wong*, namely, that the President has the delegated power to impose the citizenship requirement that the Commission had adopted.<sup>72</sup> The Supreme Court's mandate that any decision to impose such a requirement be made at "a comparable level of government" was satisfied by the Executive Order.<sup>73</sup> The court in the instant case, realizing that the Supreme Court decision was divided, that the Order would probably be held valid if reviewed by the Court, and that the question would surely be before the Court in the near future, did not strike out on its own to render an imaginative opinion, but instead strictly followed the rationale of the Supreme Court.<sup>74</sup>

One criticism of the Supreme Court's opinion centers on the majority's decision to assume that the President was capable of ordering the exclusion of aliens, while finding that the Commission was not.<sup>75</sup> This seems to suggest unlimited Presidential power in authorizing total exclusion of aliens from the civil service.<sup>76</sup> Certainly, the Court could have based its decision on a more stable foundation by finding the President's authority limited to the same efficiency concerns as that of the agency, and then voiding the regulation on the basis of an improper delegation of authority.<sup>77</sup> This theory would have left no question as to the validity of the Executive Order.<sup>78</sup> The Court's decision in *Mow Sun Wong* would indeed be hollow if it were in fact attempting to open the Commission's door to aliens. The order found to be valid in the instant case merely reversed the effect of the regulation's invalidation, while infusing it with new vitality. In view

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attempted to demonstrate an intention on the part of Congress to broaden the language of the section to include aliens. *Guerra v. Manchester Terminal Corp.*, 350 F. Supp. 529, 533-36 (S.D. Tex. 1972) (general discussion of § 1981 as applicable to aliens).

72. This power is codified in 5 U.S.C. § 3301 (1976).

73. *Mow Sun Wong*, 426 U.S. at 116.

74. *Supra* note 69, at 1287.

75. See *The Supreme Court: 1975 Term*, 90 HARV. L. REV. 56, 108 (1976).

76. *Id.*

77. *Id.* at 109.

78. Although the Court could have chosen to find the President's power limited, Justice Stevens was not willing to limit this power in the area of international affairs. One author has noted that this may have been the result of a hesitation to invalidate a regulation based on a clear and unambiguous delegation of authority. *Id.* at 109 n.41.

of the Court's reluctance to take a more positive stand, it seems apparent that the Court will continue to retain an aversion to placing limits upon the President's power over matters fundamentally international.

The Court seemed to be less solicitous, however, of the President's executive authority in a case decided the same day as *Mow Sun Wong*. In *Mathews v. Diaz*,<sup>79</sup> the Supreme Court held that Congress may condition an alien's eligibility for participation in a federal medical insurance program on continuous residence in the United States for a five year period and admittance for permanent residence.<sup>80</sup> In *Diaz*, the Court "emphatically rebuffed this challenge to the constitutionality of the provision limiting alien participation in the program."<sup>81</sup> Justice Stevens wrote the opinion for the majority and had little trouble in upholding the provision: "[T]he Court did not show any eagerness to look behind the asserted interest in encouraging the naturalization of aliens or enhancing the President's ability to bargain for treaties."<sup>82</sup>

In declaring the Executive Order to be valid, the court in the instant case reflected the Supreme Court's hesitation to limit the President's power in this area.<sup>83</sup> With considerations of due process in decisionmaking, rulemaking accountability, and liberty interests in employment competing with the broad federal power over aliens, the paramount federal control over immigration and naturalization, as well as other overriding national interests, the Supreme Court has had difficulty in developing a standard of review in this area.<sup>84</sup> The circuit court in the instant case exhibited little originality in deviating from the Supreme Court's decision, applying those guidelines that the Supreme Court enunciated in *Mow Sun Wong*. Unfortunately, whatever guidelines were set forth by the Court were not articulated in any meaningful formula which could serve as a guide to future rulemaking.<sup>85</sup>

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

80. *Id.* at 69.

81. Rosberg, *supra* note 19, at 283.

82. *Id.* at 282.

83. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1140-46 (1978). The author discusses the *Mow Sun Wong* decision as viewed within a structural model of constitutional analysis, including due process in lawmaking and due process in law-applying. See also Rosberg, *supra* note 19, at 338.

84. *The Supreme Court: 1975 Term*, *supra* note 75, at 110.

85. *Id.* at 110-11.



IV. INTERNATIONAL IMPLICATIONS IMPLICIT  
IN THE FEDERAL GOVERNMENT'S REFUSAL TO EMPLOY ALIENS

It is axiomatic in the realm of international law that a sovereign nation has absolute control over persons who enter or leave its boundaries, as well as over what rights or privileges such persons will be accorded. This power is plenary.<sup>86</sup> The Supreme Court has consistently upheld the power of Congress to regulate aliens, and in this respect, Congress has had nearly limitless power.<sup>87</sup> Historically, the Court has been reluctant to scrutinize federal legislation on the premise that aliens do not have a constitutional right to enter the United States.<sup>88</sup>

In 1976, aliens were given some hope of expanded employment opportunities as a result of the decision in *Mow Sun Wong*. That hope was mitigated by the subsequent decision in that case on remand, as well as by the decision made by the *Vergara* court, and the fact that the Supreme Court denied certiorari to the *Vergara* appellants. This denial of certiorari indicates that the Supreme Court will continue to be hesitant in invalidating rules and regulations in the area of naturalization and immigration when they are justified by proper national interests.<sup>89</sup> The formulation of policy in this area necessarily entails arbitrary and fluctuating formulations as to the numbers of immigrants entering the country, which classes will have priority to enter, and the conditions under which they may remain in the United States.<sup>90</sup> Invalidation of one rule could have a domino

86. Mr. Justice Rehnquist emphasized this in his dissent in *Mow Sun Wong*: The power of Congress to exclude aliens altogether from the United States, 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. [citing *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895).]

See generally Rosberg, *supra* note 19, at 316; W.M. GIBSON, *ALIENS AND THE LAW* 119 (1940).

87. Rosberg, *supra* note 19, at 324-25.

88. *Id.* at 318.

89. Rules governing immigration are detailed, and in many cases, confused. A country cannot allow all who apply for permission to enter its borders to have free access. It must discriminate between competing interests. These interests necessarily include the benefit derived from the applicant by the country, what the applicant can contribute economically and socially, and whether the applicant has relatives residing in the country. Once in the country, an alien must periodically register as an alien and be subject to other restrictions. See note 87, *supra*.

90. See Rosberg, *supra* note 19, at 328.

effect throughout the entire system.<sup>91</sup> Traditionally, these decisions are politically motivated, and, although the Supreme Court possesses a legitimate interest in this area, it has not shown a strong desire to shape that interest into judicial limitations on the exercise of Executive or Congressional control over aliens.<sup>92</sup>

Furthermore, governments must be aware of the diplomatic considerations in formulating immigration policy and rules governing aliens.<sup>93</sup> The world community is especially sensitive to American policy in this area. This community necessarily consists of many highly trained and very skilled persons who could be a valuable resource to the United States government.<sup>94</sup> Continued exclusion of aliens from government employment for a minimum of five years, therefore, acts to deter the immigration of these persons to the United States.<sup>95</sup>

Additionally, it can be argued that the United States, noted for its "open" democratic society, should not steadfastly refuse to allow freely-admitted aliens to be employed by the nation's largest employer.<sup>96</sup> These persons pay taxes, serve in the armed forces, and bear all of the burdens of citizenship; yet, in many ways, they are treated as a second class—bearing the burdens, but not sharing the rewards.<sup>97</sup>

However, it is equally important to allow the federal government to protect the security of the nation in the most efficient way it sees fit, and in this instance, it has chosen to exclude aliens from the civil service.<sup>98</sup> In time, the barriers to such employment may be removed as increased global pluralism and altered domestic attitudes change the perceptions of the government. Until that time, or until the judiciary feels itself competent to meaningfully question government policy in this area, aliens will find the door at the Civil Service Commission not just closed, but bolted.

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91. *Id.* at 325.

92. *Mow Sun Wong*, 426 U.S. at 101 n.21; *Mathews v. Diaz*, 426 U.S. at 81; Rosberg, *supra* note 19, at 323.

93. Rosberg, *supra* note 19, at 325.

94. *Id.*

95. 8 U.S.C. § 1427(a)(1) (1978).

96. U.S. Civil Service Commission, Federal Civilian Manpower Statistics, Monthly Release No. SM-13-7812 (Dec. 1978). As of September, 1978, there were 2,872,851 government jobs available.

97. Rosberg, *supra* note 19, at 328.

98. Executive Order, *supra* note 3.

## V. CONCLUSION

The Supreme Court's decision to deny certiorari is one indication that the Court, given its analysis in *Mow Sun Wong*, is seeking to hold the government accountable for its decisions.<sup>99</sup> It would seem that with regard to any decision made by the federal government to exclude aliens from the civil service, the Court is well aware that political and traditional constitutional prerogatives place it outside of the permissible range of rigorous judicial review.<sup>100</sup> However, when such decisions by the federal government deprive aliens of certain fundamental rights, in this case, of a liberty interest in employment, the Court will not look merely to the rational basis of the decision, nor will it strictly scrutinize its purpose.<sup>101</sup> The Court indicates that it will analyze how the rule was made, by whom, and to what end, in order to determine whether the adoption of the rule was truly legitimate, whether it has retained that legitimacy, or whether it has lost its legitimacy as a result of an improper justification for its promulgation.<sup>102</sup>

Considering the mitigation of historical provincialism and the increase in global pluralism, discrimination against lawfully-admitted resident aliens on the basis of citizenship seems incongruous. The open door policy of the United States with regard to the admission of aliens is decisively a closed door policy when such persons seek employment in the federal civil service. Perhaps, it could be argued, aliens should confine their employment preferences to the private sector and not seek to be employed by the federal government. The fact remains, however, that the federal government is the largest single employer in the United States. Thus, when it shuts its door to qualified aliens, it is closing it on a valuable labor resource.

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99. *The Supreme Court: 1975 Term*, *supra* note 80, at 114.

100. Executive Order, *supra* note 3.

101. See Note, *Erosion of the Strict Scrutiny Standard as Applied to Resident Aliens*, 10 LAW. AM. 1049 (1978).

102. This is what one author terms the "proper decisionmaker" doctrine which he finds is suggested by a broad reading of the *Mow Sun Wong* decision. *The Supreme Court: 1975 Term*, *supra* note 80, at 112. See Comment, *Procedural Due Process and the Exercise of Delegated Power: The Federal Civil Service Employment Restriction on Aliens*, 66 GEO. L. REV. 83, 113 (1977); see also *Mow Sun Wong*, 426 U.S. at 113.

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