IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1336

In re Application of FRE LE POOLE GRIFFITHS,
FOR ADMISSION TO THE BAR,
Appellant.

ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

APPELLEE'S BRIEF

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INDEX

TABLE OF AUTHORITIES

Regulation: PAGE

Rules:

Federal Statutes:

State Statutes:

PAGE

Other Authorities:

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Opinion Below

The opinion of the Supreme Court of Connecticut is reported in 162 Conn. 249, ——A.2d——(1972). It is also included in the Appendix to the Jurisdictional Statement at 22-39.

Jurisdiction

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. §1257 (2).

Questions Presented

1. Does Connecticut Superior Court Rule 8(1), which requires that an applicant for admission to the bar be a citizen of the United States, discriminate unreasonably and unconstitutionally against aliens situated as is the Appellant, depriving her of equal protection of the laws?

2. Does Rule 8(1) contravene exclusive Federal power over immigration?

3. Does Rule 8(1) unconstitutionally burden the Appellant's right to determine her nationality thereby violating her rights under the First Amendment of the United States Constitution?

Statutes Involved

CONNECTICUT PRACTICE BOOK, "SECTION 8, QUALIFICATIONS FOR ADMISSION: To entitle an applicant to admission to the Bar, except under Sec. 12 of these rules, he must satisfy the committee:

FIRST, That he is a citizen of the United States."

(Sec. 12 applies to admission of attorneys of other jurisdictions who must be citizens.)

Statement of the Case

The Appellant is an applicant for admission to the bar of Connecticut. She is a resident and taxpayer of New Haven, Connecticut and has complied with all the conditions and requirements for admission to take the bar examinations except that she is not a citizen of the United States. Although

she could easily become a citizen of the United States by reason of her marriage to a United States citizen, she has elected to remain a citizen of the Netherlands and has not filed and does not intend to file a declaration of intent to become a citizen of this country. 8 U.S.C. §§1427(f), 1430(a). She filed with the clerk of the Superior Court an application for admission to the bar and the standing committee on recommendations for admission to the bar of New Haven County recommended to the bar of that county that her application be denied as she was not a citizen and thus failed to meet the requirements of the rules of the Superior Court for admission as an attorney. At a meeting of the bar of New Haven County, the report of the standing committee on recommendations for admission to the bar was presented and the members of the bar voted to accept the report of the committee denying her application. She thereupon petitioned the Superior Court for New Haven County for a decree that she be permitted to take the examination as a candidate for the bar and that she be declared eligible for such admission. Her petition was denied on the ground that she did not meet the necessary qualifications of being a citizen of the United States, which is the first requirement provided by §8 of the rules of the Superior Court governing admission to the Connecticut bar. Practice Book §8(1).

From this judgment the Appellant appealed to the Supreme Court of Connecticut. Her assignment of errors claimed that the court erred in not declaring §8(1) of the Practice Book to be unconstitional; in not exercising its inherent power to waive the provisions of §8(1), in order to avoid injustice to the petitioner and in overruling the several claims of law which she made as follows: "a. Rule 8(1) of the Superior Court Rules discriminates unreasonably against aliens situated as is the

petitioner, depriving them thereby of their Constitutional Right to equal protection of the law; b. All forms of discrimination against aliens are presumed invalid unless the State shows an overwhelming or compelling interest in maintaining discrimination. c. Superior Court Rule 8(1) interferes with the Federal power over immigration. d. Superior Court Rule 8(1) as applied to the petitioner violates international public policy and the First Amendment of the United States Constitution by burdening petitioner's right freely to determine her nationality. e. Superior Court Rule 8(1) creates an unreasonable and arbitrary classification without rational relation to the petitioner's fitness or capacity to practice law. f. Superior Court Rule 8(1) violates equal protection in that it treads upon fundamental personal rights without satisfying the more stringent tests established for such regulations. g. Superior Court Rule 8(1) does not promote a compelling governmental interest. h. Superior Court Rule 8(1) imposes an impermissible burden upon interstate travel." (App. J. S. 22-24).[*]

The Supreme Court of Connecticut unanimously overruled the Appellant's assignment of errors and upheld the constitutionality of Rule 8(1). (App. J.S. 39)

SUMMARY OF ARGUMENT

I.

Connecticut Rule 8(1) is a reasonable requirement to protect the state's vital interest in the integrity of its judicial and governmental structure. As a bar admission rule it is intended to keep the machinery of the state under control of the citi-

[*] "App. J. S." — refers to the Appendix to the Jurisdictional Statement.

zens of the state and thus passes the test of reasonableness; in addition the interest protected is vital, and thus it passes the more stringent test as an alienage classification. No inquiry beyond reasonableness is really needed. The reason that an alienage classification thus receives special scrutiny, namely, the alien's non-participation in government, fails here because that non-participation is the purpose served by the classification. [To admit the test is to allow the classification.] A Connecticut attorney is an officer of the Court who acts by and with the authority of the State as a commissioner of the Superior Court; because of this power which he has been given, the State is legitimately concerned not only with the professional integrity and competence of the bar, an interest which has been held to be sufficiently strong to outweigh certain First Amendment claims; but also, with the integrity of participation in and exercise of actual government power. It is the almost universal practice in the United States to limit such participation in government to citizens, and this policy is sanctioned by State and Federal laws, and International Agreements both generally and with specific reference to the legal professsion.

II.

Rule 8(1) does not conflict with any discernible Federal policy. When it acts in the area of aliens and naturalization, Congressional power is admittedly exclusive; but Congress has not entered the field of professional licensing and citizenship qualifications, and has in fact sanctioned such qualifications. The latest revision of the immigration laws is not inconsistent with these qualifications. The alleged effect upon aliens' distribution and travel is imaginary and, even if real, allowable in light of the interest served by the rule.

III.

The principle asserted of a right to choose nationality has doubtful legal significance in this country as international or constitutional law, since it is not part of any treaty, and in fact has been contradicted substantially by this Court. The 'right' cannot be found in the First Amendment unless a flag salute is the equivalent of the process of acquiring citizenship, and the powers of the United States as a sovereign nation are limited below those of other nations by some stricture not to be found in the Constitution.

ARGUMENT

I.

The Equal Protection Clause of the Fourteenth Amendment does not prevent Connecticut from conditioning admission to practice law upon the applicant's possession of United States citizenship.

Under the emerging equal protection principles the state retains the right to classify and Connecticut Superior Court Rule §8(1), which restricts the practice of law to citizens, is a reasonable regulation to protect the state's vital interest in the integrity of its judicial and governmental structure.

It is well established that a lawfully admitted alien as well as a citizen is a "person" for equal protection purposes. *Truax* v. *Raich*, 239 U.S. 33, 39 (1915); *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410, 420 (1948); *Graham* v. *Richardson*, 403 U.S. 365, 371 (1971). The Equal Protection Clause does not guarantee, however, that all persons be treated in the same manner; it only proscribes discrimination which lacks a

rational basis for difference in classification. *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Graham* v. *Richardson*, *supra*, at 371. This Court has never held that discrimination based on alienage, like discrimination based on race, is *per se* irrational. It is true that this Court has rejected foreign citizenship as a basis for state restrictions on ownership of property and employment in particular occupations characterized by this Court as "the common occupations of the community." *Truax* v. *Raich*, *supra*, at 41; *Oyama* v. *California*, 332 U.S. 633, (1948); *Sei Fujii* v. *California*, 38 Cal. 2d 718, 242 P.2d 617 (1952). However, a notable exception to the rule prohibiting the exclusion of aliens in particular occupations is the professions. See Article "Constitutionality of Restrictions on Aliens' Rights to Work," 57 Colum. L.R. 1012, 1026 (1957).

In Connecticut, as well as most of the states, lawyers must be citizens. This is accomplished by including it in the requirements for admission to practice by statute or court rule. In Connecticut the Superior Court, being the rule-making authority for bar admission, adopted the citizenship requirement as the first qualification for all applicants. Conn. Practice Book §8(1). This rule has been in effect since its adoption in 1879. See Conn. Practice Book 1879 §4(3) and 8. The requirement of citizenship is intended to ensure that one whose professional life is intimately involved in the structure and authority of the state will have a more formal and long term connection to it than is provided by geographical coincidence.

A. The proper constitutional test of Rule §8(1), as a classification, is its reasonable relation to an allowed purpose.

Confusion arises in this case because it involves two strands of thought, bar admission and alienage. It can be viewed as a bar admission case involving the problems of alienage or as Appellant insists, an alien discrimination case involving the legal profession. The Court below saw this as a bar admission case and phrased its opinion largely in the terms of "reasonable relationship" which had been held appropriate to such rules . In the process the Connecticut Supreme Court held that §8(1) also passed the more stringent standards of "strict judicial scrutiny" as an alienage classification. If it has passed "strict judicial scrutiny" *a fortiori* it is a reasonable rule.

1. The equal protection guarantee does not prohibit a state from classifying its residents if the distinction is based on a rational purpose.

The "reasonable relation" test was first applied in the Takahashi case. This test permits a classification only if the classes delimited by the legislature reflect actual difference which are related to the varying treatment given them and such treatment is in furtherance of a legislative purpose. It struck down a state statute which prohibited the issuance of commercial fishing licenses to persons "ineligible to citizenship." *Takahashi* v. *Fish and Game Commission, supra.*

This Court has always applied the "reasonableness" test to classifications challenged under the Equal Protection Clause of the Fourteenth Amendment and just last term unanimously reasserted its correctness. *Reed* v. *Reed,* 404 U.S. 71, 75-76 (1971). Moreover, it has never been denied that "reasonable-

ness" is the proper test of permissibility of a bar admission rule. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239 (1957); *Cummings* v. *Missouri*, 4 Wall. 277, 319-320 (1866).

A State may require high standards of qualification but any qualification must have a rational connection with the applicants' fitness or capacity to practice law. *Schware* v. *Board of Bar Examiners, supra*, at 239.

In circumstances where it appears generally unlikely that a classification can be reasonable, this Court has said that the standard of "strict judicial scrutiny" will apply; but this does not mean the abandonment of the "reasonableness" test for something stronger.

2. The factors which warrant "strict judicial scrutiny" are not present in this case.

Alienage *per se* has never been termed an invidious or "particularly dubious classification." Brief for Appellant at 9-10. An examination of the cases cited therein will show that alienage will not be allowed as a permissible classification when it conceals an invidious discrimination, or when the purposes served are not sufficient to satisfy the requirements of equal protection. Alien land ownership laws were struck down on equal protection grounds because there is no presumption of validity to racially discriminatory alien classifications. *Sei Fujii* v. *California, supra*, at 730. It has not even been suggested that Rule 8(1), in intention or application, discriminates on the forbidden standard of race or nationality. Moreover, the Court below found no intent to put aliens at an economic disadvantage (App. J. S. 37). Appellant has not advanced any reason to controvert that finding except an obtuse suggestion that the Connecticut legislature might have enacted protec-

tionist laws for some other business activities. Brief for Appellant at 32. It is not clear what bearing this has upon the motivation of the judges who drafted Rule 8(1) a century ago.

The now famous footnote 4 to *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153 (1938), apparently has been accepted as the explanation for the different standard of review. *Graham* v. *Richardson*, *supra* at 372. Justice Stone suggested that the presumption of constitutionality is weakened, and judicial scrutiny more acute, when a challenged law facially reveals an infringement of a constitutional provision, or when it restricts the operation of the political processes which would tend to bring about its own repeal, if thought undesirable by participants in that process. "Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities, and which may call for a correspondingly more searching judicial inquiry." 304 U.S. 144, 153, n. 4 (1938). The problem is not discreteness or insularity in the case of a positively phrased rule as applied to the well-educated wife of an American citizen. It can be seen that the justification for special scrutiny, namely, potential defects in the democratic structure, is precisely contradicted by the very reason for Rule 8(1), namely, to restrict participation in the machinery of government to citizens under that government. To admit that the purpose is valid, is to deny the need for the test of special scrutiny.

It appears that this purpose is valid although an elaborate demonstration would seem unnecessary for the principle is really self-evident. To deny its validity, is to require, constitutionally, that aliens have access to the franchise and to elective office; yet aliens are almost universally and by con-

stitutional provision, barred from participation in the government structure as voters and office holders.

Moreover, the purpose constitutes a sufficient "special public interest" to justify an otherwise suspect classification. On occasion this Court has upheld a "special public interest" doctrine to justify classifications based on alienage. See e.g. *Crane* v. *New York*, 239 U.S. 195 (1915). (the prohibition of employment of aliens on public works projects). This doctrine was primarily based on the idea that "whatever is a privilege rather than a right may be made dependent on citizenship." *People* v. *Crane*, 214 N.Y. 154, 164, 108 N.E. 427, 430 (1915). Although this Court unanimously rejected this concept in the distribution of welfare benefits it did not rule out its continuing vitality in other contexts. *Graham* v. *Richardson*, *supra* at 374.

The "special public interest" theory has fallen into disrepute because the reasons which have been advanced in support of it in the previous alienage classification cases have been artificial or archaic. These have been variants of "property interest" theories, relics of the era when property was seen as the ultimate political reality; or the feudal restrictions on alien land ownership, which, in their time served a vital interest in the preservation of the state. The nation no longer depends on knight-service, or scutage for its defense. These representations and structures no longer serve their purpose, namely, the preservation of the state as an entity, and an identity. This purpose, this "special public interest" is now served by laws which concern citizenship, and participation in the political process, and which are constitutional as applied to aliens if they are reasonably related to this purpose.

B. The state has a legitimate, and even "vital" interest in protecting the integrity of its governmental and judicial processes.

The Court below did not dwell on this proposition at great length, because it is self-evident in almost any theory of the structure of a democratic society. If the institution of government, and particularly the judiciary, do not function as they should, or if public confidence in their performance is imperfect, then the state in every literal sense is less viable than it could and should be. Government in this country has attempted to protect this interest, with reference to the two subjects here under consideration, attorneys and aliens. It will be seen that regulations in these areas have been sustained which would have been clearly unconstitutional but for this overriding interest.

1. To protect the integrity of the judicial process, states have closely regulated the practice of law.

While the state may not be "arbitrary" in denying admission to the bar, nonetheless it is clear that it may require high standards of an individual to practice law. The validity of close supervision of the legal profession has been repeatedly reaffirmed by this Court. *Ex parte Burr*, 9 Wheat. 529 (1824); *Cummings* v. *Missouri*, *supra*; *Ex parte Garland*, 4 Wall. 333 (1866); *Theard* v. *United States*, 354 U.S. 278, 281 (1957); *Schware* v. *Board of Bar Examiners*, *supra*. (Opinion of Frankfurter, J., concurring). This was not simply to protect the public from private loss due to unscrupulous or incompetent private counsellors. The more important objective has always been recognized as public faith

and confidence in the system of justice, because the legal profession is largely responsible for "the safekeeping of this country's legal and political institutions." *Konigsberg* v. *State Bar of California,* 366 U.S. 36, 52 (1961). Morever, a state may choose to police its bar by admission procedures as well as by deterrence and punitive post-admission sanctions, *Law Students Civil Rights Research Council* v. *Wadmond,* 401 U.S. 154, 167 (1971).

The interest in the integrity and quality of the legal profession has survived strong constitutional challenges based on the fundamental personal rights of free speech and association. Lawyers may be required to support a professional organization, despite disagreement with its public position or policies, because of the greater benefit to the profession, and hence to society, which would accrue from a unified bar. *Lathrop* v. *Donohue,* 367 U.S. 820 (1961). A bar admission applicant's political views may be subject to a certain amount of scrutiny, despite a deterrent effect upon First Amendment rights, because a state may legitmately be concerned about the loyalty of "a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety." *Konigsberg* v. *State Bar, supra* at 54. "Lawyers who are of the courts have been included in [that] rubric." *Law Students Civil Rights Council, Inc.* v. *Wadmond,* 299 F. Supp. 117, 125 (S.D.N.Y. 1969) aff'd. 401 U.S. 154 (1971). When the inquiry centers on freedom of association the indeterminativeness of any generalization has led the court to require the same standards of proof as to knowledge of and interest to further illegal purposes which are required for criminal convictions. *Baird* v. *State Bar of Arizona,* 401 U.S. 1 (1971); *Re Stolar,* 401 U.S.

23 (1971). On the same day, however, the Court re
the legitimacy of a properly circumscribed examination of a bar applicant's political beliefs which was intended to insure that he could take the oath of admission in good faith. *Law Students Research Council, Inc.* v. *Wadmond, supra* at 163-164. No citation is required to show that any of these incursions into protected First Amendment freedoms would be disallowed in any other circumstances which did not so closely concern the integrity of the government itself.

Justice Miller's view of the attorney's place in our government was not challenged in 1866, and is unassailable now.

> "That fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualifications which should be required in a lawyer, seems to me too clear for argument . . . [F]or ages past, the members of the legal profession have been powerful for good or evil to the government. They are, by the nature of their duties, the moulders of public sentiment in questions of government, and are every day engaged in aiding in the construction and enforcement of the laws." *Ex parte Garland, supra,* at 385-386 (dissenting opinion).

At issue in that case was the determination of the proper governmental authority to regulate admission to the bar of this Court and constitutional restraints on legislative action; not the need for admission standards, or the vital role of the bar in our government.

2. To protect its citizenry and the integrity of its governmental processes, states and the Federal Government have restricted the political activities of aliens and barred them from positions which would present a possible conflict of loyalties.

"Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of society." *Luria* v. *United States*, 231 U.S. 9, 22 (1913). This theory of government as a reciprocal trust between the state and the citizens who comprise it is at least as old as Plato's Crito and age has not diminished its vitality. Some of the reciprocal obligations apply to, and are demanded of, all residents. See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 655 (1898). There are, however, important and instructive differences between the obligations and rights of the citizens and of the resident aliens, in relation to the state. All these differences stem from the inescapable political truth that "Citizenship in this nation is a part of a co-operative affair, the citizenry is the country and the country is its citizenry." *Afroyim* v. *Rusk*, 387 U.S. 253, 268 (1967).

Aliens are barred from participation in the actual operation of government and especially from making policy choices in government, because they do not have sufficient identification with the state. This is not a question of competence nor of "loyalty" as measured by oaths, but one of common sense. One who wishes to participate in decision-making ought to have a formal commitment to the results of the decision making process, and the fundamental decision making process to which aliens are denied access is voting. Generally, aliens cannot stand for election, and cannot vote anywhere in the United

States, and this has been true since 1926. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586, n. 10 (1952). Before that time, some jurisdictions allowed aliens to vote, if they had declared their intention to become citizens. Konvitz, *The Alien and Asiatic in American Law*, 180 (1946). Voting and office-holding are almost definitional indications of citizenship, in the co-operative structure of government. See e.g. Constitution of Connecticut, Article 6 §§1 and 10; and Article 11, §1, which requires that all [illegible], including the clerks of the courts, be citizens, (despite Appellant's assertion to the contrary. Brief for Appellant at 20).

Aliens can be required to serve the government, but they cannot hold positions of command and responsibility within it. There are exceptions to this rule, as the Appellant has vigorously pointed out, but examination of them only proves the purpose of the rule. Aliens can be called to serve in the armed forces but they cannot hold positions of responsibility and command as commissioned officers in the regular forces. 10 U.S.C. §3285; 10 U.S.C. §5571. Aliens are barred from federal employment generally, 5 C.F.R. 338.101, (1972), except (1) where their foreign background might be a decided advantage, in positions such as translators, overseas positions with the State Department or Agriculture Department, (2) where technical skills might be needed, such as in the Smithsonian Institution, Atomic Energy Commission, or Department of Defense. Appellant cites two Civil Service Commission brochures for the proposition that aliens are not prohibited from the "highest levels" of governments, and this is in a sense true, as noted above. However, the majority of positions filled under the "excepted service" are not at high levels at all, but are seasonal or part-time jobs, or positions inherently unsuited

to competitive examination. Lack of United States citizenship is a proper disqualification for the "excepted service", 5 C.F.R. §302.203 (g) (1972). Part 305 of 5 C.F.R. covers the policy-sensitive "super-grade" civil service positions, in GS-16, 17 and 18, and §305.101 says explicitly that all normal requirements of that sub-chapter, which include citizenship, are in force except as noted therein; the requirement may be waived for a "limited executive assignment," conceived as a temporary or urgent type of position, by §305.509. An alien with a special, rare talent might qualify for a non-competitive appointment, §316.601. The narrow range of the exceptions demonstrate the generality of the rule: aliens are barred from government positions of command or policy-making authority. Moreover, the courts have respected this rule. The recent Federal court decisions cited in the Appellant's brief concerned clerk-typists, administrative assistants, hospital aides and other non-sensitive positions. One opinion takes pains to make clear that other positions in civil service and government might still rationally require citizenship. *Dougall* v. *Sugarman*, 339 F. Supp. 906, 911 (S.D.N.Y. 1971) (opinion of Lumbard, J. concurring). prob. juris. noted ——U.S. —— 40 U.S. Law Week 3588 (June 12, 1972). One is compelled to ask, is an attorney, practicing before the courts of the state, and possibly, as in Connecticut, possessed of powers to issue orders with the authority of the state government, more like a clerk-typist, or a government official?

This Court has never struck down restrictions upon the employment of aliens in positions which might be compromised by a conflict of loyalties. See *Pearl Assurance Co. Ltd.* v. *Harrington*, 38 F. Supp. 411 (D. Mass. 1941) (opinion of Frankfurter, J.), *aff'd per curiam* 313 U.S. 549 (1941), which

upheld the right of the state to bar aliens from certain positions in the insurance business as local managing representatives of foreign insurance companies. It would seem that the connection between the legal counsellor and the laws of his jurisdiction ought to be at least as close as that between the insurance representative and his customer's interest.

C. *The role of an attorney at law in Connecticut justifies the citizenship requirement for admission because of the connection between the legal profession and the government.*

The Court below, in its opinion, outlines the historical and legal development of the rules for admission of attorneys to practice law in Connecticut. (App. J. S. 24-25). The Superior Court, a constitutional court, promulgated the rules for admission, Conn. Constit. Art. 5, §1. Although the requirement at issue in this case is a rule of Court and not a statute it has the force of a statute. *Application of Dodd,* 132 Conn. 237, 241, 43 A.2d 224 (1945). There is no longer any doubt as to the power of this constitutionally established tribunal to fix, by rule, the qualifications necessary for the practice and the procedure to be followed for admission to practice law in Connecticut. *Application of Dinan,* 157 Conn. 67, 71, 244 A.2d 603 (1968); *Heiberger* v. *Clark,* 148 Conn. 177, 185, 169 A.2d 652 (1961).

1. An attorney is an "officer of the court" in a sense that is meaningful in this context and in Connecticut he is formally designated as such by his office of commissioner of the Superior Court.

A careful analysis of the concept of "officer of the court" and of the court's treatment of it, only reinforces its significance in support of Rule 8(1). This Court has long termed the attorney an "officer of the court." *Ex parte Garland, supra,* at 378; *Powell* v. *Alabama,* 287 U.S. 45, 73 (1932); *Theard* v. *United States, supra,* at 281 quoting Justice Cardozo to the effect that an attorney is "an instrument or agency to advance the ends of justice." In every circumstance when the concept has been distinguished, it has been in the interest of freeing the legal profession from political, personal or peremptory interference. *Ex parte Robinson,* 19 Wall. 505; *Ex parte Bradley,* 7 Wall. 364. The case of *Cammer* v. *United States,* 350 U.S. 399, 405, (1956), the occasion for Justice Black's note that confusion surrounds the phrase "officer of the court", is a perfect example of this motive for distinguishing it. This Court there disallowed a contempt sanction against an attorney for "misbehavior of a court officer in an official transaction." The "misbehavior" involved mailing questionnaires to grand jury members who were federal employees in an attempt to determine if they were influenced by bias or fear of reprisals when they indicted the attorney's client for filing a false non-communist affidavit. Thus, a lawyer is not an "officer of the court" on the organization chart of the state judiciary system, but his influence as "an instrument or agency to advance the ends of justice," whether or not he possesses the actual authority of a literal "officer of the court" as to issue process (as he does in Connecticut) is very substantial. Attorneys "are, by the

nature of their duties, the moulders of the public sentiment on questions of government, and are every day engaged in aiding in the construction and enforcement of the laws." *Ex Parte Garland, supra,* at 386. (Miller, J., dissenting opinion). It bears repeating that participation in the fundamental decision making structures of the polity is almost universally limited, in this country, to citizens.

In Connecticut, the term of the court" has a very concrete meaning, for by statute every attorney admitted to practice is also a commissioner of the Superior Court, and may "sign writs, issue subpoenas, take recognizances, and administer oaths." Conn. Gen. Stat. §51-85. The Court below elaborated on this office and its powers at length in its opinion, but it should be re-emphasized that these powers are not merely ministerial functions, and the earliest case which discussed them at length said categorically that they were to be exercised only by "an officer of the state," *Doolittle* v. *Clark,* 47 Conn. 316 (1879).

Because of the functions and powers as members of the bar and commissioners of the Superior Court as a final step before actual admission an applicant must take the traditional oath of an attorney (App. J.S. 44). He must also take an oath to support the Constitutions of the United States and of the State of Connecticut "as long as you continue a citizen thereof," which oath is required of "[m]embers of the general assembly, and all officers, executive and judicial, before they enter on the duties of their respective offices." Conn. Const. Art. 11 §1, See, Conn. Gen. Stat. §1-25. Contrary to the contention of the Appellant, these powers are not automatic formalities, and abuses, some with serious effects, have occurred. Several times attorneys, or Justices of the Peace, with analogous

powers, have been forbidden to use them in cases in which they were an interested party. *Doolittle* v. *Clark, supra; Yudkin* v. *Yates,* 60 Conn. 426 (1891). In *Sharkiewicz* v. *Smith,* 142 Conn. 410, 114 A.2d 691 (1955) the Court held that an attorney had properly and professionally, refused to sign writs for a layman attempting to institute a frivolous lawsuit. Mandamus would not lie to order him to sign a writ. *Application of Sharkiewicz,* 143 Conn. 724, 126 A.2d 822 (1956). To be sure, the particular cases of abuse which have arisen have involved conflicts of professional, not national allegiance. This can hardly be taken to show that none could possibly arise, because, after all, during this same period there have been no alien attorneys in the state, or, for that matter, in most of the nation.

2. The reasonableness of Rule 8(1) is evidenced by its acceptance in international agreements, treaties, Congressional action and in the court rules or statutes of nearly every state in the country.

The principle embodied in Rule 8(1) is embraced and endorsed almost universally in this country. Though this widespread concurrence is not conclusive proof of its correctness, it is certainly persuasive evidence of its reasonableness.

Up to 1972 the relevant court decisions upheld the validity of citizenship as a bar admission qualification. In 1972 the Supreme Court of California struck down a statutory requirement of citizenship as violative of the Equal Protection Clause reversing a previous decision of that court. *Raffaelli* v. *Committee of Bar Examiners*—Cal. 3rd ——496 P.2d 1264 (1972). The Court admitted that its decision was distinguishable from

the decision of the Connecticut Supreme Court. (App. S. B. 22)* *Application of Park*, 484 P.2d. 690, 696 (Alaska 1971) also relied on by the Appellant is distinguishable. In that case the Court struck down a statutory requirement of citizenship as an encroachment on the inherent judicial power to determine standards of admission to the bar. The court rejected any inference that "there may not be imposed prerequisites for admission to the bar which bear on the qualifications of an applicant as they relate to citizenship." It also said that demonstrated intent to become a citizen, was a necessary prerequisite before an alien could, in good faith, take an oath of allegiance to the Constitution. Appellant contends that, because there are a few jurisdictions which allow aliens to practice, therefore to do so is rational, therefore to prevent them from practicing can advance no "compelling state interest." The rest of the nation is not bound by the findings of rationality of the Courts of California, and two or three other states. Twenty-seven states, by statute, limit the practice of law to citizens or aliens who have filed their intention to become citizens; in the latter cases, membership in the bar is usually revoked if citizenship is not acquired. Nineteen other states have court rules to the same effect. See Aliens in Professions and Occupations, 16 Immigration and Naturalization Reporter 37 (1968); Alien Lawyers in the United States and Japan — A Comparative Study, 39 Wash. L. Rev. 412, 415 (1964) (The authors of this latter article demonstrate that Japan also effectively bars aliens from the practice of law).

Bi-lateral treaties now in force reveal the policy of the Federal Government not to nullify existing state requirements for admission to the professions. This country signed a

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*"App. S. B." — refers to Appellant's Supplemental Brief.

treaty of Friendship, Commerce and Navigation with the Netherlands on March 27, 1956. Article VII ¶1, of said treaty accords national treatment to nationals and companies of either party "with respect to engaging in all types of commercial, industrial, financial and other activity for gain (business activities) within the territories of the other party . . ." Not only does Article VII of said treaty omit professional activities, but Paragraph 8 of the protocol to the treaty states: "The activities referred to in Article VII, Paragraph 1, do not include the practice of the professions." (March 27, 1956), 8 U.S.T. 2043, T.I.A.S. 3942.

In addition to the evidence of national policy expressed in the foregoing treaty the hearings before the subcommittee of the Committee on Foreign Relations of the United States Senate on July 13, 1953 and excerpts from the report of July 17, 1953 from the Committee on Foreign Relations disclose a definite policy not to nullify any state requirement of citizenship to practice a profession. The report reads, in part: "It [the Committee on Foreign Relations] felt that if a State by its own constitutional processes requires that an individual seeking to practice a particular profession should be a citizen of the United States, such laws should not be nullified by the national-treatment provisions of the pending conventions." The reservation proposed and adopted by the Senate with respect to the then pending treaties was that the provisions on the practice of the professions "shall not extend to professions which, because they involved the performance of functions in a public capacity or in the interest of public health and safety, are state-licensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored nation clause in the said treaty shall apply to

such professions." As noted on the top of Page 10 of the report, the practice of law was "a profession which a court might find is of a public character." S. Rep. Exec. Rep. No. 5, 83d Cong. 1st Sess. p. 10 (1953)

A treaty to the extent that it is self-executing — that is requires no legislation to make it operative — has the force and effect of a legislative enactment and is equivalent to an act of Congress, as the supreme law of the land. 52 Am. Jur. §17, U.S. Const. Art. VI §2. Congress may enact an inconsistent rule which will control the action of the courts. *Fong Yue Ting* v. *United States,* 149 U.S. 698 (1893).

The Immigration and Naturalization Act of 1965 did not, directly or by implication, supersede the existing treaty between this country and the Netherlands, or any other existing treaty which included a reservation excluding professions from the equal treatment provisions in said treaty. The cases cited by Appellant in support of her position on the appeal, namely *Purdy & Fitzpatrick* v. *California,* 71 Cal.2d 556, 456 P.2d 645 (1969), (public works employment) and *Raffaelli* v. *Committee of Bar Examiners, supra* (admission to the bar) agree on reasons to void citizenship as a permissible requirement qualification except one, namely, infringement on federal power over immigration. The Court in *Raffaelli* did not discuss this point. Paolo Raffaelli was a citizen of Italy (App. S. B. 4). The treaty with Italy then in effect specifically excepted the practice of law from the provisions of national treatment. See, Treaty of Friendship, Commerce and Navigation with Italy, (February 2, 1948) 63 Stat. 2255, T.I.A.S. 1965 (Art VII, §1). This may explain the omission.

At one time in this country, some aliens were admitted to the bar, and some women were refused. *Bradwell* v. *State*, 16 Wall. 130 (1872); *Re Lockwood*, 154 U.S. 116 (1894). At that time, the United States was very much a non-native country, and the notion of national citizenship had just been defined in the Fourteenth Amendment. Up to that time the Constitution contained no definition of citizenship. In 1870, more than ⅛ of the population of this country was foreign-born; by 1890, about ¼ of the adult males were foreign born, and of these, only ½ were naturalized, even under the standards which prevailed then.* Of course it could be reasonable to admit aliens to the bar when alienage did not mean very much legally, and when a great and growing part of the population were not citizens. It was just as reasonable to exclude women, apparently. At the time this Court was saying yes to aliens, no to women, the Connecticut court adopted opposite rules. Conn. Practice Book, 1879, §4(3), (8); See, *In re Hall*, 50 Conn. 131, 47 Am. Rep. 625 (1882). The Connecticut Supreme Court, after careful re-examination of the problem, still finds that "the requirement of citizenship is not simply reasonable, but is basic to the maintenance of a viable system of dispensing justice under our form of government" (App. J. S. 34).

3. A state may require of an alien a more convincing demonstration of allegiance than a simple oath.

To require citizenship of a lawyer is not to presume that all aliens are positively disloyal and the court below did not suggest this. Appellant insists she is ready and willing to take the appropriate oaths, while at the same time she points out that, if an oath might not be appropriate as a demonstration of

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*U. S. Bureau of Census, Historical Statistics of the United States, Colonial Times to 1957 (1960).

fealty, an alternative may be used. She of course would like to show that a judge could by himself waive the citizenship requirement, but the statute which she has misread gives no room for such an interpretation, as it only permits an affirmation "on pain of perjury" to be substituted for an oath "so help me God." Brief for Appellant p. 22 n. 11; Conn. Gen. Stat. §1-23.

Oath requirements have been greatly restricted in recent years out of deference to an individual's political rights and beliefs. *Law Students Research Council, Inc.* v. *Wadmond, supra.* It is now admitted that an oath can be "no more than an amenity." *Cole* v. *Richardson*, 405 U.S. 676, 685 (1972). Perhaps in line with this trend, further investigation of a bar applicant's statements has been allowed in order to test whether such applicant can take an oath in good faith, *Konigsberg* v. *State Bar of California, supra*, at 42; *Law Students Research Council, Inc.* v. *Wadmond, supra* at 163-164; *cf. Orloff* v. *Willoughby*, 345 U.S. 83, 91 (1953). The state may reasonably require the further identification with the governmental system which is evidenced by citizenship when granting one the license to participate in the functioning of that system as an attorney. This is not to imply that aliens are "presumptively disloyal," but to require a more secure demonstration of such loyalty than is contained in a form of words, which is required of every bar applicant. The naturalization requirements include proof, not merely asseveration, of attachment to the principles of the Constitution; and this seems an eminently reasonable criterion for qualification as an attorney as well, *cf. Law Students Research Council, Inc.* v. *Wadmond, supra,* at 166. This generalized, but fundamental "political" test is particularly relevant in the present context, wherein Appellant

insists, for reasons unknown, that she has no intention of becoming an American citizen.

The Court concluded that after applying the various tests directed in decisions, §8(1) was not constitutionally invalid as to the Appellant as a denial to her of the equal protection of the laws. "Attorneys are the means through which the majority of the people seek redress for their grievances, enforcement and defense of their rights and compensation for their injuries and losses. The Courts not only demand their loyalty, confidence and respect, but also require them to function in a manner which will foster public confidence in the profession and, consequently, the judicial system. In this light the requirement of citizenship is not simply reasonable but is basic to the maintenance of a viable system of dispensing justice under our form of government." (App. J. S. 34).

II

Rule 8(1) does not conflict with federal policy and authority concerning aliens.

The Appellant has presented a rather ingenious argument to show a conflict between professional licensing laws and federal immigration policy.

A. Citizenship qualifications for professional certification are not part of any federal regulatory scheme, on the contrary, the Federal Government has included them within the reserved powers of the State.

There are areas subject to exclusive federal control, but there are not many, and the reasons are clear in the federal

structure of the country. Federal legislation is usually "interstitial" and rarely occupies a field entirely. When it does so, it is for some reason peculiarly appropriate to national attention, such as foreign affairs, "uniformity" and freedom of interstate commerce.

When the Federal Government acts in the field of alienage and citizenship, there is a strong presumption that it has decreed an exclusive system of regulations; but over the particular topic — not necessarily the entire subject of aliens. *Hines* v. *Davidowitz,* 312 U.S. 52 (1941) (pre-empting the practice and requirement of alien registration by states). The Congressional power to prescribe a uniform rule of naturalization was not exercised vigorously for more than a century. When this Court reaffirmed the United States' sovereign right to preemptorily refuse an alien entry to this country, it did not suggest that such national power was so pervasive that no state law could overlap the subject of alienage. *Kleindienst* v. *Mandel,* —— U.S. —— 40 U.S. Law Week 5103 (U.S. June 29, 1972). The reasons for Federal supervision of policies regarding aliens are uniformity, *Graham* v. *Richardson, supra,* and foreign policy, *Zschernig* v. *Miller,* 389 U.S. 429 (1968). Uniformity is nearly complete, in that all but a few states require attorneys to be citizens, and it has not been suggested that any international embarrassment results from the requirement. This Court has recognized the allowability of professional licensing restrictions, if not in conflict with a treaty. *Hines* v. *Davidowitz, supra,* at 69, n. 22. We have already referred to the national policy in connection with various treaties which specifically recognize this restriction, and similar restrictions are common in other countries.

These restrictions do not contradict Congress' intent in the Immigration and Nationality Act of 1965, which can be made entirely consistent with these treaties. The major purpose of the 1965 Act reflected in the bill itself, and in the reports and debate was to eliminate the national origin quota as a basis for admitting immigrants. It is a scheme of regulation of alien employment only insofar as it attempts to control admission roughly by need for persons with particular skills, and the emphasis in the debate and the administration of the law has been over 8 U.S.C. §1153(a)(4), the 'fourth preference.' The debate which was exhaustive, was dominated by the quota issue, the protection of jobs in the fourth preference, and the welcome prospect of an influx of scientists, engineers, physicians, and teachers under the third preference. See e.g. 111 Cong. Rec. Part 18, at 24457 (September 20, 1965). There is no reference to non-technical professionals such as lawyers under the third preference, and no inference that alien lawyers would be admitted to practice except by normal procedure. At the present time, lawyers and all non-medical professionals, no matter what their educational background, must justify their admission under the third preference on a case-by-case basis, 29 C.F.R. §§60.3, 60.7 (Schedule A) (1972). The obvious understanding and intent of Congress was that the country would inevitably benefit from the presence of a larger number of cultured and educated persons possessed of talent and initiative, even if not immediately employable in their particular occupational specialty. Especially for professionals, there was no "right" or even expectation of employment in a particular area, even in the profession by which the alien obtained permanent residence. See *Butterfield v. Attorney General*, 442 F.2d 874, 878 (1971), citing testimony by Secretary of Labor

Wirtz, Hearings on H.R. 2580 before Subcommittee No. 1 of the House Judiciary Committee, 89th Cong. 1st Sess. (1965) at p. 126 referring constantly to scientists and teachers. Of the handful of lawyers who immigrated to the United States in fiscal 1971, only one-fifth were admitted under the third preference. The rest were in other categories. The third preference was not even a new policy, but simply a clarification and recodification after the quotas were abolished. The old immigration law similarly attempted to encourage professional immigration, yet it existed side-by-side with the bilateral treaties which recognized the special status of the professions and excluded them from national treatment provisions. This is indicative of a national policy not to interfere with state citizenship requirements for professional certification. Any burden which Rule 8(1) places upon general congressional power to admit aliens, is a burden long acknowledged and allowed by Congress itself; and the rule is not an obstacle to the accomplishment of the full purposes of Congress, for those purposes nowhere envisioned abolition of state laws requiring citizenship for professional certification. Except for the one reference in the table of definitions (8 U.S.C. §1101 (32)) Congress does not seem to have been concerned about the problem of alien lawyers at all.

B. The effect of Rule 8(1) upon broad Federal policies is minimal.

Congress might understandably have been unaware of this problem of alien lawyers. In this age of class litigation, it is doubtful that a class would be found of persons in Appellant's position. In view of the existing laws, no doubt aliens who have chosen to become lawyers have chosen to become citi-

zens. In addition, there are relatively few lawyers immigrating to the United States. Figures from the Annual Report of Immigration and Naturalization Service 1971, show that only 384 lawyers or judges became permanent resident aliens that year in all preference categories, 76 of these being beneficiaries of the "third preference." This represented less than 1% of the professional and technical workers admitted. An additional 141 lawyers and judges were admitted for temporary stays under 8 U.S.C. §1101 (a)(15)(H) and (J); 108 of these were exchange visitors or trainees. By contrast, there were 4.2 million aliens in the country in January, 1971, 3.7 million of these permanent residents, and 370,000 immigrants admitted during that year.

It is federal policy to encourage the interstate travel of aliens, but there is no federal program regulating such travel. It is very difficult to see how the requirement of Rule 8(1) can operate as a restriction on interstate travel, since nearly every state has the same requirement. There is no evidence that alien lawyers are flocking to the states which remain the exception, and given the size of the alien lawyer population, they could hardly have a meaningful influence upon the distribution of the alien population through the country even if they did. A policy to encourage free interstate commerce does not mandate absolute uniformity of state commercial laws according to a federal standard; similarly, a policy to encourage free interstate travel of persons does not mean that all professional and occupational qualifications must be dictated to the states by the Federal government. This is especially true for the more sensitive professions, including law. A rule requiring citizenship of a lawyer is simply not comparable, legally or practically, to a law which attempts to ex-

clude unwanted aliens by denying them welfare benefits, or by subjecting them to a restrictive quota in all employment, or by preventing them from working in one of the common occupations of the community.

The Connecticut Supreme Court understood the scope of federal regulation perfectly well. In *Graham* v. *Richardson*, *supra*, after all, it was stipulated that the offensive statute was designed to hamper the travel of aliens — it was not at all a case of incidental effect. Not only is Rule 8(1) not so intended, it would not even have that effect, on a meaningful scale. In addition, the court found that Rule 8(1) served a legitimate and independent need. In short, Rule 8(1) has no discernible impact on the goals behind our federal immigration laws. It is only "statutes, rules, or regulations which unreasonably burden or restrict this [interstate] movement" which must fail. *Shapiro* v. *Thompson*, 394 U.S. 618, 629 (1969).

III

The asserted principles of international political philosophy have no legal status in the United States Constitution.

Appellant is searching for constitutional text with which her political philosophy can be interwoven, and has sought support in the First Amendment. The only case cited to support her position is *West Virginia Board of Education* v. *Barnett*, 319, U.S. 624 (1943).

Attitudes toward nationality may indeed be changing, and some day perhaps citizenship will be simply an administrative

convenience like a driver's license. This result may even be laudable. But, the nationality laws of the United States have not changed, and when they do change, Congress will be the means of achieving it. Decisions based on policy alone are not for this Court to make. This Court has shown no inclination to question the basis and thrust of our laws concerning citizenship and aliens. *Kleindienst* v. *Mandel, supra; Rogers* v. *Bellei,* 39 U.S. Law Week 4354 (April 5, 1971). None of the international agreements cited in appellant's argument has the force of a treaty; they are effectively precatory. Even the United Nations Charter, which is a treaty, is not the supreme law of this country when it is not self-executing. *Hitai* v. *Immigration and Naturalization Service,* 343 F.2d 466 (2d Cir. 1965). The law of this country does indeed recognize an individual's right to expatriate himself, 8 U.S.C. §1481; but there is no right to change nationality if by this is meant a right to become a United States citizen except by naturalization, or even to reside in this country as a non-citizen under one's own terms. The government's authority here is still absolute, see, *Kleindienst* v. *Mandel, supra.* Even the principles of free choice of nationality for women are not United States law, except as Congress has made them so. 8 U.S.C. §1489; *Savorgnan* v. *United States,* 171 F.2d 155 (7th Cir. 1948) *aff'd.* 338 U.S. 491 (1950).

There is no absolute right in the First Amendment to choose one's form of loyalty oath. More accurately, a person cannot be forced to make a ritual show of allegiance where to do so would be contrary to his deeply held, and constitutionally protected, religious beliefs. *West Virginia Board of Education* v. *Barnett,* 319, U.S. 624 (1943). The analogy in Appellant's argument between a school child's morning stiff-arm salute to

the flag, and standards of admission to the legal profession, is questionable. Appellant is trying to fit her theory of a desirable political society into some "penumbra" of the First Amendment.

Appellant lists some cases to show that states may not interfere with what she calls 'basic rights and freedoms' without some counterbalancing compelling state interest. The right interfered with in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) was the free exercise of religion, recognized explicitly in the First Amendment; the Court could not even find a Constitutionally protected right in *Fleming* v. *Nestor*, 363 U.S. 603 (1960); *Speiser* v. *Randall*, 357 U.S. 513 (1958) involved an unfair burden-of-proof arrangement which interferred with the explicitly protected freedom of speech; and *Shapiro* v. *Thompson*, *supra*, protected the long-recognized right of free interstate travel against interference motivated by local xenophobia and rationalized by administrative afterthoughts. The 'basic rights' she asserts, which amount to insistence that she be admitted to a profession in part on her own terms, have long been subject to a considerable amount of legitimate interference under United States constitutional law. *Speiser* v. *Randall*, *supra* at 527 notes explicitly that the legal profession may be subject to some interferences which would be unconstitutional if aimed at someone claiming a tax-exemption.

Any interference with what may be 'wise principles of international law' is insubstantial when compared with the long-recognized interest of the state in protecting the integrity of its institutions. In answer to the claim of the Appellant the Court below concluded:

> "The rule is a classic example of a state regulation designed not to restrict a right but to protect rights. It is

not designed to lead the petitioner into a circumstance where she will be forced to choose between conflicting allegiances but rather to assure that the force of her continued allegiance to a foreign power will not be brought to bear in areas affected with significant public interest in a state where she chooses to remain an alien. By withholding her allegiance from the United States she 'leaves outstanding a foreign call on . . . [her] loyalties which international law not only permits our government to recognize but commands it to respect.' *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 585, 72 S. Ct. 512, 96 L. Ed. 586.

We do not find §8(1) of the Practice Book to be unconstitutional. Nor do we find it unreasonable that as a condition to the petitioner's admission to the bar of this state and the exercise of the rights and authority of an attorney admitted to practice in its courts that the petitioner take the necessary steps leading to citizenship, including the oath of citizenship prescribed by 8 U.S.C. §1448 to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen and to bear true faith and allegiance to the United States . . ." (App. J. S. 38-39).

CONCLUSION

For the reasons set forth the judgment appealed from should be affirmed.

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