In the

Supreme Court of the United States

CECILIA ESPINOZA AND RUDOLFO ESPINOZA,)
)
Petitioners,)
)
v.) No. 72-671
)
FARAH MANUFACTURING COMPANY, INC.,)

Washington, D.C.
October 10 & 11, 1973

Pages 1 thru 40

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

CECILIA ESPINOZA AND RUDOLFO ESPINOZA, Petitioners	:	
v.	:	No. 72-671
FARAH MANUFACTURING COMPANY, INC.	:	

Washington, D.C.

Wednesday, October 10, 1973
Thursday, October 11, 1973

The above-entitled matter came on for argument at 2:25 o'clock p.m. on Wednesday, October 10, 1973. The Court was adjourned at 3:00 o'clock p.m. The above entitled matter continued on for hearing on Thursday, October 11, from 10:02 o'clock a.m. to 10:17 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

GEORGE COOPER, ESQ., 435 W. 116th Street, NYC,NY
For the Petitioner
KENNETH R. CARR, ESQ., P.O. Box 9519, El Paso, Texas For the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in docket No. 72-671, Cecilia Espinoza and Rodolfo Espinoza versus Farah Manufacturing Company, Inc.

Mr. Cooper, you may proceed.

ORAL ARGUMENT OF GEORGE COOPER, ESQ.

ON BEHALF OF THE PETITIONER

MR. COOPER: Thank you, your Honor.

Mr. Chief Justice, and may it please the Court:

With me today is my co-counsel in this case, Mr. Ruben Montemayor, of San Antonio, Texas.

The Petitioner in this case, Mrs. Espinoza, is a lawfully admitted, permanent resident alien of the United States. She is married to an American citizen and has two children who are American citizens . She applied for a job and was denied the job solely because she, herself, is not a citizen of the United States and at issue in this case is whether this form of exclusion, of discrimination against Mrs. Espinoza, is prohibited by federal civil rights acts.

The primary construction to be made in this case is whether the national origin discrimination prohibition in Title 7 applies to bar this form of exclusion.

In beginning the argument, your Honors, I would like to clarify exactly what our position is and remove some distractions from the case.

First of all, it should be clear that there is no question whatever that aliens, as persons or individuals, are, in fact, protected by Title 7. The scope of Title 7 is not limited to citizens. It includes aliens, noncitizens as well. The only question is, what they are protected against.

Second, your Honors, and this is most important because it is an element of confusion in the case for many persons, myself for a long time included.

It is not necessary for the Court, in ruling in our favor on the Title 7 argument -- it is not necessary for this Court to find that discrimination on grounds of citizenship or nationality is, in its own terms, prohibited by Title 7. Our basic position is that citizenship discrimination is prohibited.

Our basic position is that Title 7 bars national origin discrimination and that phrase should be interpreted to cover any nonmerit-related discrimination on any ground which relates to national origin and nationality so relates. Nationality is nonrelated to merit in performing a job. It is related to national origin and therefore, discrimination on grounds of nationality should be interpreted as covered by Title 7. But we do not press your Honors to go that far in this case. It is not necessary because whether or not Title 7, the national origin phrase in Title 7 -- whether or not that is interpreted to include nationality, it should be clear

that the citizenship requirement for Farah is a requirement which has a discriminatory impact in terms of national origin. The citizenship requirement is, like the test or high school/diploma requirement that was before this Court in Griggs against Duke Power Company is a standard which, although it may be neutral on its face, is a standard which has a definite and decided adverse impact in national origin terms and that impact alone is ample to cause the citizenship standard to be declared unlawful.

There are two ways in which the citizenship requirement has this adverse effect in national origin terms.

First, it has an adverse impact directly related to a person's place of birth. One aspect of national origin, taking the term "national origin"simply and literally, one aspect of someone's national origin is where they, themselves, are born.

The Respondents apparently deny or ignore that fact and say that national origin means ethnic origin but the statute doesn't say that. The statute doesn't say "ethnic origins." There is nothing in the legislative history of the statute that says "ethnic origins." The statute says "national origins" and there are various aspects of national origins. One aspect of a person's national origin is where his ancestors, his forebears, come from, his ethnic origin. Buat another aspect of an individual's national

origin is where he, himself, comes from and if an employer discriminates against an individual because of his birthplace, he is discriminating in national origin terms and his acts should be prohibited by the statute.

Now, Farah Manufacturing Company has not gone so far as to openly and clearly discriminate in terms of place of birth. We admit that. They don't say, "We hire only people born in the United States and no one born abroad." If they had said that, I think the case would be easy and --

Q They do have quite a few who weren't born in this country. Isn't that true?

MR. COOPER: Yes, your Honor, most of the Farah employees are born in this country. They do have some --

Q But they have a sizeable number.

MR. COOPER: Yes, your Honor, most of the Farah employees are born in this country but they don't restrict their employment to only persons born in this country. They restrict the employment to citizens and, of course, some citizens are persons who were born abroad but that doesn't alter the fact that the citizenship requirement is a requirement which has a definite, clear, marked, decided, adverse impact in terms of a person's place of birth.

If you were born in one place, the United States, the citizenship requirement is, essentially, meaningless to you. Your citizenship has been handed to you by virtue of

your birth. But if you were born any other place but in the United States, you must undergo a serious and restrictive and difficult process to gain citizenship, the process of naturalization and any standard which imposes a harsher, more difficult burden on persons because of their place of birth is a standard which has a discriminatory impact in terms of the individual's national origin.

Q Mr. Cooper?

MR. COOPER: Yes?

Q If Farah took the position that it would confine its employment to persons born in Texas, would you be here?

MR. COOPER: To persons born in Texas, your Honor?

Q Born in Texas.

MR. COOPER: Well, that would not relate to national origin in terms of the way it excluded other people from other parts of the United States, but it would relate to national origin in terms of discriminating against persons of foreign birth and you would have to assess the national origin impact of that.

Is the impact of a Texas restriction a restriction which has a harsher effect on the foreign-born than the American born? That would be a question which we would have to pursue. I am not sure what the facts would

show. But it is quite clear that the citizenship requirement is a requirement which imposes a very differential burden on the American-born as compared to the foreign-born. It is just like the test in the Griggs caseThe test was one which was given to whites and blacks. It didn't exclude all blacks, just like the citizenship requirement doesn't exclude all foreign-born persons. But the test was one which the blacks had a more difficult time passing. The test was something which operated as a built-in headwind against the blacks and it is that built-in headwind, making it more difficult in practice for blacks than whites to get jobs which caused the test to be declared unlawful in Griggs and so, too, the citizenship requirement which makes it more difficult for the foreign-born to get a job than for the native-born to get a job, is the discrimination -- is a standard which has a discriminatory impact in national origin terms, to the extent that national origin relates to an individual birthplace.

We think that point is simple and clear and that, alone, is sufficient grounds to sustain us, your Honors.

But if there are no questions on that point, let me go into our second point. That is that even if the Court wishes to ignore this discrimination in terms of place of birth, which is the effect of the citizenship rule, if the Court wants, instead, merely to look at ethnic discrimination, which is what the Respondents urge, nontheless, the

citizenship requirement has a discriminatory impact, a discriminatory effect in terms of an individual's ethnic background.

The citizenship requirement does not, in practice and effect, apply to all ethnic groups equally. Rather, it imposes a harsher burden on some ethnic groups than on other ethnic groups, which groups --

Q What group are you talking about? The ethnic group, is not a citizen?

MR. COOPER: Your Honor, the ethnic group changes from time to time. The ethnic group which is most harshly affected by a citizenship requirement is the ethnic group at a particular time and place which is most heavily made up of recent immigrants. In Boston, in 1850, the ethnic group --

Q We are not talking about 1850, we are talking about now.

MR. COOPER: Now, --

Q What is your ethnic group that you are talking about now?

MR. COOPER: Yes, your Honor.

Q You are talking about foreign people who haven't been naturalized.

MR. COOPER: Your Honor, in terms of --

Q As contrasted to foreign people who have been naturalized and you are going to break those up into

two separate ethnic groups?

MR. COOPER: No, your Honor. No, your Honor.

Q I hope you don't try.

MR. COOPER: No, your Honor. The two separate ethnic groups, if we are talking in ethnic terms, without regard to birthplace, the different ethnic groups are Mexican on the one hand, Polish on the other hand, Italian on the other hand, those ethnic -- when I'm talking ethnic groups, I am talking in those terms now. If one wants to look at that aspect of national origin and, again, remember that that is only one aspect of national origin; it is our basic position that there is more than one aspect and birthplace is a separate, independent aspect, but if you want to look at ethnic background, that aspect of national origin, the citizenship requirement in Texas right now, primarily hurts Mexicans. In San Francisco, it primarily hurts orientals and Mexicans. In Boston in 1850, it would have primarily hurt the Irish. In each case, the citizenship --

Q And the basis for the fact that it affects Mexicans right now is what?

MR. COOPER: Because the ethnic group which is most heavily represented in the noncitizen category, the ethnic group which is most heavily made up of recent immigrants in Texas right now is Mexicans. Eighty percent of the alien residents in San Antonio, 70 to 80 percent, are

Mexicans.

Q Well, why --

MR. COOPER: So if you impose an anti-alien rule, the primary people you hurt are the Mexicans and that will always be the case.

Q You only hurt the Mexicans who aren't naturalized.

MR. COOPER: Yes, your Honor, you only hurt the Mexicans who aren't naturalized. That's right. In each case, you only hurt the people who aren't naturalized, but what's the effect of the rule?

In the Griggs case, the only people you hurt were the blacks who couldn't pass the test but that wasn't the way that the Court looked at it. The Court said -- to the extent that --

Q Well, you don't restrict this to those who didn't pass for naturalization, you restricted it to those who didn't bother to take it.

MR. COOPER: Well, your Honor, there are two reasons that people aren't naturalized. One is because they don't bother to do it. The other is because they can't do it, and there are many reasons why they can't do it, starting from the fact that you may not have been in the country long enough --

Q Do you have any of that in this case? Is

there any reason why this particular person couldn't be naturalized?

MR. COOPER: Yes, your Honor, she doesn't speak English and one of the requirements for naturalization is that --

Q You don't have to tell me that, that you have to speak English.

MR. COOPER: Yes.

Q But she can learn English.

MR. COOPER: Yes, and she has not yet learned English. The record indicates she is in the process of trying to learn English. She is in the process of pursuing citizenship but she has not acquired the ability to pursue citizenship. But she is not the only person who can't speak English. There are many people who are U.S. citizens who can't speak English. The U.S. citizens from Puerto Rico, most of them, many of them, can't speak English. The mere fact that you can't speak English doesn't necessarily preclude you from being a citizen, unless you were born abroad, and it certainly doesn't have anything to do with this job, here.

The important fact is that --

Q Doesn't have anything to do with this job?

MR. COOPER: Yes. Yes, your Honor.

Q I thought you said "any job."

MR. COOPER: No, it doesn't have anything to do

with this job and that is, of course, crucial.

To the extent that the citizenship requirement is unlawful because of its discriminatory impact, discriminatory effects, we don't say that it is per se unlawful. We say, rather, that it is unlawful unless the particular employer can show some job-relatedness to it and in this case there is not the slightest suggestion that being a citizen or speaking English or being anything else with regard to citizenship has anything to do with the job which is running a sewing machine in a pants factory.

In terms of ethnic discrimination, again, the point is, your Honors, that in each case the effect of a citizenship requirement will be to discriminate against the particular group which predominates in the alien population at the time and that is the group which, at the time, is most vulnerable to national origin discrimination.

The use of a citizenship requirement mirrors the national origin discrimination in the country at the particular time and because of that, because the effect of the citizenship requirement is to single out and have primary impact on the particular group which is primarily recent immigrants at the particular time, the effect of it is to impose a disproportionate burden on certain ethnic groups, the most vulnerable ethnic groups of the time and place and that impact also makes -- also causes national origin discrimination.

Now, your Honors, in response to these two arguments on our part, the arguments that the citizenship requirement is a test, a standard, which has discriminatory effects in terms of place of birth, singles out American-born people and favors them as compared to foreign-born people or the fact that it singles out long-time established ethnic groups and prefers them to recent immigrant and ethnic groups, the only --

Q Does this particular person have a special preference under present statutes because she is married to an American national?

MR. COOPER: Yes, your Honor, in terms of being able to become a permanent resident alien, there are various ways in which you can do that. The way in which --

Q Well, is there a truncated procedure to become a naturalized citizen also?

MR. COOPER: No, your Honor. No, your Honor. She has to meet the same requirements for citizenship --

Q The same requirements, but aren't there some time differences?

It's a shorter process, isn't it?

MR.COOPER: There may be some modifications in the process because of the fact that she acquired her permanent residence status through her marriage to an American citizen.

Q Her marriage, yes.

But she is not exempted from the learning of history requirements, from the English language requirements and those requirements of citizenship.

The only response which the Respondent has to our claims that the citizenship requirement is a standard which has adverse special extra effects on people born abroad, special burdens on the foreign born, or on certain ethnic groups, the recent immigrant ethnic groups, the only response they have to that is to say, well, that may be true that that form of discrimination is unlawful in some cases, that discriminatory effect, but it is not unlawful in our case because we hire a lot of Mexicans. We hire a lot of Mexicans who are citizens.

There are several reasons why that answer is inadequate. First of all, to the extent that the unlawful aspect of the discrimination is its special burden on the foreign-born, its differential treatment of the foreign-born as compared to the American-born, the hiring of Mexicans who are American-born is no defense at all. That is essentially an irrelevant answer.

Now, if we turn to the second way of looking at the case, analyzing it in terms of the ethnic effect rather than the birthplace effect, it is also not a sufficient answer to say, "We hire a lot of Mexicans," because the Respondent has not established, first of all, that his hiring of a lot of

Mexicans means that he hires other ethnic groups which may be adversely affected by the citizenship requirement.

Second, it says nothing about whether or not at least one more person of Mexican background might not have been hired, had he not imposed this citizenship requirement and that is all it takes, your Honors. All it takes is the possibility that one more Mexican might have been hired. That is all it takes to justify holding the standard unlawful because we are not here talking about any kind of standard which has anything whatsoever to do with job-relatedness, merit or ability. We are talking about a wholly arbitrary standard which the employer has not attempted to justify at all and even a de minimus discriminatory effect should be enough to declare that kind of requirement unlawful.

So, for those two reasons, the discriminatory effect, the special burden which is imposed on the foreign-born and also, because of the discriminatory effect and special burden that this imposes on recent immigrant groups, the citizenship requirement should be declared unlawful under the general standard of the Griggs against Duke Power Company case that any special requirement or hurdle which is non-job related, should be declared --

Q The second "inevitable effect," as you call it, is demonstrably not present in this case, is it? The

first one may be, I grant you.

MR. COOPER: The first one clearly is, yes, sir. Now, the second one is not present to an obvious extent. It may be present. We don't know how many Mexicans. We do know that the company employs more than 90 percent Mexicans.

Q Nintey-seven, 96 percent.

MR. COOPER: It varies from plant to plant. We do know that, but we don't know whether there might have been one more Mexican without this discriminatory effect.

The same kind of argument --

Q And the person, as I understand it, I remember this from the briefs, which I read, perhaps, a month ago, that the person actually hired in lieu of this person was someone of Mexican descent?

MR. COOPER: No, your HOnor, the Respondent has claimed that, but there is, in fact, no credible evidence in the record to support that. The only thing in the record --

Q But the probability would be that it would be true, based on that 96 or 97 percent.

MR. COOPER: Oh, yes, your Honor, the probability -- the probabilities are clearly true. But the same kind of issue was presented to this Court in the Phillips versus Martin-Marietta case, the case involving sex discrimination against women with small children. The employer in that case said, well, he admitted that his requirement had a

discriminatory effect on women, but he then went on to point out that he hired 70 to 80 percent women and therefore, he more than made up for whatever discriminatory effect he might have caused and the Court essentially ignored that argument and properly so because it is not -- it is what I call the "quota defense" argument. I can discriminate so long as I make up for it with some other positive discrimination. That is an argument which seems to us to be inconsistent with the basic purposes of Title 7 to bring about the hiring of individuals on the basis of their own merit and not on the basis of quotas.

But, as Mr. Justice Stewart correctly points out, to the extent we are talking about the first effect, the effect in terms of birthplace, it is quite clear that the hiring of Mexican citizens has nothing to do with that.

And, indeed, most of the Mexicans hired are native-born Mexicans, if we look in terms of birthplace. There are very few naturalized Mexicans in San Antonio.

Q A minute ago you said -- is that statement in the record?

MR. COOPER: Pardon me?

Q Is the last statement you made in the record?

MR. COOPER: The percentage of naturalized Mexicans as compared to native-born Mexicans in San Antonio?

Q Umn hmn.

There is no data in the record on that, your Honor. The census figures are --

Q Just a minute ago, you said, when the question was asked you whether this applicant was replaced by another Mexican, you answered that it wasn't in the record. I just wanted to know why you didn't say one way or the other either in the record or out of the record?

MR. COOPER: The data on the percentage of naturalized citizens, the data on the percentage of Mexicans and so on is not in the record. It is derived from the Census Department figures.

Q I don't understand what you are thinking. A naturalized Mexican-American would have to be somebody born in Mexico.

MR. COOPER: That's right.

Q Or else he wouldn't have needed to be naturalized.

MR. COOPER: That's right, your Honor, that's right.

Q Well, then, you say that you are distinguishing between naturalized Mexicans and native-born Mexicans. What do you mean by that?

MR. COOPER: No, no, I'm not --

Q They are all native-born Mexicans in order to be naturalized. Otherwise, they'd be native Americans.

MR. COOPER: No, no, the only point I was making

was that, to the extent that Farah employs Mexicans --

Q Yes.

MR. COOPER: Most of the people who it employs are probably native-born Mexicans rather than naturalized Mexicans.

Q You mean, born in the United States?

MR. COOPER: Mexicans who -- he hires only citizen Mexicans, I mean, citizens.

Q A native-born Mexican means somebody who is born in Mexico.

MR. COOPER: Oh, excuse me-- native -- excuse me, I'm sorry. I should have stated it differently. He hires primarily Mexicans who are native-born in the United States, persons of Mexican background, who were born in the United States.

Q Oh, I see.

MR. COOPER: There is nothing in the record on that, your Honor, Mr. Justice Marshall.

Q But yet, the probabilities from the population make-up of the area, according to the Census Bureau --

MR. COOPER: The Census figures indicate that only something like 30,000 out of almost 400,000 Mexicans in San Antonio are foreign-born and that is our basic Title 7 case, your Honor. We also make an argument under Section 1981 of 42USC and there, of course, the argument is much more straightforward. Section 1981 clearly prohibits

discrimination against aliens as compared to citizens. The language of the statute is very clear and as to that argument, we are prepared to rest in our brief.

I would just make one point to the Court --

Q Was the 1981 argument argued anywhere before you came here?

MR. COOPER: No, your Honor, and that is the point I was about to make. It was not discussed or argued in the lower courts as such. There was reference to Jones against Mayer, references to things mentioned in the statute, but the argument was not presented as such and it is relevant to this case only in -- it is relevant to this case in three different ways.

One, it certainly bears upon the general statutory provisions with regard to protection of aliens and to that extent relevant to the construction of Title 7. That is the primary purpose here.

Secondly, it does provide an alternative basis for this Court's decision if this Court should wish to go ahead and decide the case on section 1981 and, thirdly, and I express this only as a caution on our part, if, in fact, the Court decides against us on the Title 7 grounds and does not want to reach the 1981 issue, we just ask that the Court not take any action which will preclude us from raising the issue in the case on remand because the case is here now only on a

denial of motion only for summary judgment and on remand, the case will still be alive for further action.

Q Your whole case turns, does it not, on equating the national origin with making out that your client is being discriminated against because of national origin and not simply because of the failure to become a naturalized citizen.

MR. COOPER: No, your Honor. No, your Honor. We admit that she was discriminated against because of her non-citizen status. That is a pro-citizen discrimination.

Our basic point is that nonetheless, since the effect of discriminating against people because of lack of citizenship is to impose a special burden and to make it -- to lay down a built-in headwind for foreign-born people, the citizenship requirement is unlawful. The statute, in Griggs, the statute did not prohibit test requirements. The individual in Griggs was denied a job because he failed a test but the Court went on to say that you can't deny a person a job because they failed the test if the test is one which has a discriminatory impact on protected groups and so, too, here. Mrs. Espinoza has been denied a job because of her lack of citizenship. Her lack of citizenship is a neutral requirement but it is a requirement which has a discriminatory effect on a protected group, the foreign-born, because the foreign-born are a protected group in terms of

national origin discrimination.

Q Mr. Cooper, you said your case is here on denial of summary judgment. Was it certified by the district courts?

MR. COOPER: No, your Honor, the district court granted summary judgment.

Q It granted summary judgment.

MR. COOPER: The Fifth Circuit reversed and now this is an appeal from that reversal so if this Court affirms the Fifth Circuit, the case goes back down to the district court with the summary judgment denied, in effect.

Q So you had won a summary judgment?

MR. COOPER: We had won a summary judgment in the district court, yes, your Honor.

I think I have --

Q Would there be anything left to the case?

MR. COOPER: If the Court rules for us on the Title 7 grounds or on the 1981 grounds.

Q Well, how about if it rules against it, and affirms the court of appeals?

MR. COOPER: If it rules against us, there is still an argument to be made on the merits in the district court, an argument that in this particular case -- that Farah's citizenship requirement is applied in a discriminatory fashion and there is also the possibility of its raising the

1981 argument, if the Court chooses not to reach it.

Q That 1981 argument is not here before us, is it?

MR. COOPER: Well, your Honor, it is a variation. It is a variation on the same theme and I think the Court could reach it if it wanted but, certainly, the Court would have good grounds not to reach it if it doesn't want at this time.

Q Was this question presented in your petition to this Court?

MR. COOPER: No, your Honor. No, your Honor, as I said, here's ample reason not to reach it if the Court chooses not to reach it.

Q Well, I am just wondering if we can.

It is not a jurisdictional point, is it?

MR. COOPER: Oh, no, I don't see it as precluded in jurisdictional terms, no, your Honor.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Carr.

ORAL ARGUMENT OF KENNETH R. CARR., ESQ.

ON BEHALF OF THE RESPONDENT

MR. CARR: Thank you, Mr. Chief Justice, and may it please the Court:

In reading Counsel's description and particularly in his brief, of the plight of the American immigrant in the

1880's and up to as recently as 45 or 50 years ago, I was reminded of the remarks of Mr. Justice Frankfurter in the Sand - Door case in the Carpenter's Local 1976.

Speaking of the secondary boycott problems in that case, he said that these afford a striking illustration of the importance that it is the business of Congress to declare policy and not this Court's.

The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted. We are presented here with a simple and narrow question of statutory construction. That is, in 1964 did -- not should, but did Congress intend to halt an employer's policy of hiring only United States citizens where all parties acknowledge that that policy has been applied in a nondiscriminatory manner?

We think that the history of the Act clearly demonstrates that Congress had no such intention.

Before discussing the factors before the United States Congress, we should note that there has been only one case other than the district court in this case which has applied national origin in the way that Petitioner's brief suggests that it should be applied and that case decided in Petitioner's brief is London Borough of Eeling versus Race Relations Board and there the Queen's Bench Division applied precisely the statutory construction to a national origin

statute in Great Britain that Petitioner seeks here.

That decision was reversed by the House of Lords in 1972 and aside from that one decision, nobody has yet agreed with Counsel, aside from that one in the District Court here.

Now, what was before the Congress in 1964? I'd suggest that the first and most obvious factor before the Court was the employment practices of the Federal Government itself. From 1914 for 50 years, eight or nine consecutive Presidents, beginning with President Wilson, had required by Executive Order that in order to sit for a Civil Service examination, an individual must be a citizen of the United States.

Now, at various times there were certain very limited exceptions which I regard at totally irrelevant to the basic issue here. For the last 21 of those years, beginning in 1943 and under Presidents Roosevelt, Truman, Eisenhower and Kennedy, these same Presidents who reaffirmed the necessity that a Civil Service applicant must be a citizen by Executive Order also forbade discrimination based upon, among other things, national origin.

Now, obviously, for 21 years, no one had raised the contention and no one had suggested to the Congress that these two policies could not coexist side by side. This has been raised in one case that I am aware of since 1964 in Mo San Wong versus Hampton in the northern district of

California in 1971 where a group of Chinese aliens, again under a statutory construction case sued the chairman of the Civil Service Commission when they were denied the right to sit for Civil Service examination and they alleged that the Civil Service rule was in violation of what by then was statutory Federal Government policy of not discriminating on the basis of national origin and the judges there said that there was no problem, that the two statutes, the two policies could easily coexist.

Q Is the case now before us the only case that you know of in the courts involving this question under Title 7 of the Civil Rights Act of '64?

MR. CARR: It's the only case I'm aware of, yes, your Honor.

The next area that was before the Congress when it was enacting the Civil Rights Act of 1964 was the fact that according to the Equal Employment Opportunity Commission, some 28 states had enacted Fair Employment Practices legislation at the time that the Civil Rights Act of 1964 was passed. The various Fair Employment Practices Commissions of those states in 19 -- pardon me, one other factor, virtually all of these 28 forbade discrimination based interally on national origin and/or national ancestry.

Of 19 of these State Fair Employment Practices Commissions had discussed and considered the question of

whether, under their policy, an employer could still require citizenship.

MR. CHIEF JUSTICE BURGER: We will resume there at 10:00 in the morning, Mr. Carr.

MR. CARR: All right, thank you, your Honor.

[Whereupon, at 3:00 o'clock p.m., the Court was adjourned until 10:00 a.m. the following morning.]