P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in No. 72-671, Espinoza against Farah Manufacturing Company.

Mr. Carr, I think you have about 25 minutes remaining.

ORAL ARGUMENT OF KENNETH R. CARR, ESQ.

ON BEHALF OF RESPONDENT

(Continued)

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

Yesterday at recess we were examining some of the factors that Congress had before it at the time it passed the Civil Rights Act of 1964. It looked at the fact that the Federal Government, operating under the same prohibitory language as is contained in Title 7 of the Civil Rights Act, saw no inconsistency for 21 years in applying the same policy that Farah applies.

Then we were in process of looking at the fact that some 19 state Fair Employment Practice Commissions, as of 1964, had addressed themselves to the question of, whether under their own FEP legislation, barring discrimination on the basis of national origin or national ancestry, an employer could, nevertheless, require that his employees be citizens and of those 19 states, 18 had found no inconsistency

in the policies.

Then we turn, if we may, to the debate surrounding the '64 Act itself and, of course, the very first thing we are faced with is the remark of Congressman Roosevelt, who was chairman of the House Subcommittee which reported out what became the Civil Rights Act and in the course of being questioned on the floor of the House with regard to what "national origin" meant, he said, "May I just make very clear that national origin means national. It means the country from which you or your forebears come from. You may come from Poland, Czechoslovakia, England, France or any other country," and with that, the subject was dropped.

Now, in his brief, Mr. Cooper points out that this is isolated, that there is only one such illustration in the debate, and I might suggest there that the reason is because the issue is so obvious that, once answered in the normal understanding of the word, there was no further necessity for expanding on it.

Q Well, how does that affect -- how did Congressman Roosevelt's words bear on this issue or help your case?

MR. CARR: Because, your Honor, they hold that the national origin prohibition in the Act means that it is unlawful for Farah, in the facts of this case, to discriminate against people on the basis of the fact that they or their

ancestors came from Mexico. The facts in this case clearly show that there has been no such discrimination, that, rather the discrimination, if it exists -- and there is discrimination, no question -- is based on the fact that the person was not a citizen of the United States.

Now, under Congressman Roosevelt's language, if Farah had a policy of hiring nationals from Poland, from Czechoslovakia, from England and France, but not nationals of Mexico, then there would be discrimination on the national origin of the individual and it would clearly be prohibited. But everybody acknowledges, and all the facts stand clear, that that is not Farah's policy.

The only other reference similar to this that we were able to find was in the debates or the hearings before Congressman Roosevelt's committee where then-Secretary of Labor, Willard Wirtz, was describing the federal policy of complaint processing on the grounds of employment discrimination within the Government and Secretary Wirtz's attention, obviously, was primarily with regard to racial discrimination, but then he turned to national origin and religious discrimination and he said, "For example, if a person feels that he has been disadvantaged because he is of Mexican, Italian or Polish origin, then he files a complaint with the Commission and proceeds."

Now, obviously, it was implicit in what Secretary

Wirtz was saying, that every single one of those people were United States citizens. They wouldn't even have been employees of the Federal Government if they weren't.

Section 701(b) which is now -- of Title 7 -- which is now recodified into 5USC7151 -- declares that it is the policy of the Federal Government not to discriminate on the grounds of national origin and yet no one understood that this was changing the federal policy. It was only making statutory what had theretofore been the rule by Executive Order and everyone understood that the Federal Government was still going to limit its employment practices -- employment hiring to United States citizens and, indeed, I direct your attention, if I might, to the brief filed herein on the motion for certiorari filed by the Solicitor General where he says that the U.S. agrees with the Fifth Circuit's interpretation that Congress construed the phrase to mean ancestry rather than citizenship and then he makes the obvious point in a footnote that, surely, Congress intended that the same meaning be applied to Section 701(b) of Title 7 as it applied in 703(a).

Q But technically, I suppose, you could say there was discrimination against people who were born abroad in the sense that -- or people who weren't born in this country, who didn't originate in this country.

MR. CARR: I agree, your Honor.

Q Technically there is because those people who were born abroad have to satisfy an employment qualification that people born here don't.

MR. CARR: That is right, but --

Q And, technically, that is it, and so your argument has to be, that isn't what Congress intended.

MR. CARR: Well, right, and the reason --

Q That's a substantial discrimination, isn't it? I mean, it is a substantial qualification.

MR. CARR: It is. No question about that.

Q You say it takes -- how long does it take to be naturalized?

MR. CARR: Depending on the circumstances, I think it is three to five years to get it.

Q So you just don't get a job in this country with the Federal Government or with your client for quite a while?

MR. CARR: That is correct and I'd say, frankly, your Honor, that if more companies had the policy that Farah has, Congress would probably see fit to change the law.

What we are suggesting is that so far, they haven't.

Q So your argument is strictly of Congressional intention?

MR. CARR: Precisely and I think that is the only

issue before this Court.

Q So it isn't a -- well, you don't think the 1981 argument is here?

MR. CARR: No, sir, I don't, for a number of reasons.

Q Did you have some problems with that?

MR. CARR: A few, but not major ones, your Honor. 1981, of course, is -- I think for the reasons that both Justice Blackmun and Justice Marshall pointed out yesterday, is not before us.

Q All right.

MR. CARR: But even if it were, the courts that have faced the question, with one single exception, have held that Section 1981 does not apply to national origin discrimination. They do so primarily on the basis of Mr. Justice Stewart's decision in Jones versus Mayer --

Q You mean a power question, they couldn't have used the 13th Amendment, they had to use the 14th?

MR. CARR: That's right.

Q Which means state action.

MR. CARR: Correct. Either way, if they use the 13th, then by the terms, it applies only to racial discrimination and if they use the 14th, then it applies to state action.

Q Well, what about the immigration power?

MR. CARR: We are not suggesting here, your Honor, that the Congress could not outlaw -- prohibit Farah's policy under the immigration policy. It could. We only suggest that, so far, it hadn't.

Q Well, I know, but do you think it is the practice of the courts to invalidate an Act of Congress that would be valid under power X just because Congress purported to use only power Y?

MR. CARR: Where, your Honor, it is clear that Congress understood that it was acting pursuant to one, I think that sheds real light on the Congressional understanding of what they were purporting to do.

Q I see.

MR. CARR: I don't mean to bother the Court, really, with --

Q All right, I'm sorry to have brought it up.

MR. CARR: The cases that have held that 1981 does not apply to a racial discrimination, it is interesting that the only case, and it is cited in Mr. Cooper's brief, that holds to the contrary is Guerra versus Manchester Terminal, which is now on appeal to the Fifth Circuit and I think it will there be reversed, but even Guerra recognizes that the Act was founded, Section 1981 was founded on the 13th Amendment and I think for that reason Guerra is clearly wrong and I think the Fifth Circuit will reverse it.

To expand a little further on the suggestion of what the view of the United States is, it has been the policy for a number of years of the United States to put in various appropriations acts that no money expended under this or any other appropriation act in this fiscal year will be used, with certain, again, limited exceptions to pay aliens.

Now, to give the reading to Title 7 that Mr. Cooper and Petitioner ask, you would have to assume that in '64, Congress on the one hand said, "From now on, the Federal Government is going to hire aliens but we are just not going to pay them." And, obviously, that was not the Congressional intent.

Now, I'd like to direct the Court's attention for a second to the question of the EEOC regulation.

Q Mr. Carr?

MR. CARR: Yes, sir?

Q Before you get into that --

MR. CARR: Certainly, your Honor.

Q There is nothing in the record to show that there is any variation on the no-citizen rule --

MR. CARR: Your Honor --

Q -- it applies to anybody equally?

MR. CARR: Your Honor, there is in the record the recognition that one time Farah deviated from that policy. Now, it is not in the record, and I apologize both to Counsel

and the Court. I represented the facts in my brief and they are correct, but they are not contained in the record. Now, that is because we weren't asked in the interrogatory. It would have come out but there has been one single exception in the history of the Company, your Honor.

While Mr. Chief Justice Burger in Griggs pointed out that EEOC guidelines are entitled to great deference and we don't quarrel with that for a moment, he then said that the reason they do is that since the Act and its legislative history supports the Commission's conclusion, this affords good reason to treat the guidelines as expressed in the will of Congress and it seems to me that this is analagous to a Fair Labor Standards Act situation where this Court in Skidmore versus Swift, and consistently since, has said that interpretative bulletins of the Secretary of Labor in wage-hour cases are entitled to great weight, but in Skidmore versus Swift itself, the Court held that the reason they are is because of the weight of such judgment in a particular case, it said, will depend upon of the thoroughness evident in its consideration, upon the validity of its reasoning and all those other factors which give these interpretative bulletins the power to persuade, if not the power to control and the courts, while giving tremendous deference -- and I have been on the losing side of one or two -- to interpretative bulletins of the Secretary of

Labor, they don't hesitate to overrule them where they are wrong.

Now, we think that that is precisely what the Court should do in Griggs -- I'm sorry, in Farah.

In support of that, we show you what we regard as the fatal flaw in the EEOC's reasoning and again direct your attention to the memorandum on the question of whether certiorari should be granted.

The Solicitor General pointed to the record of Farah in employing people of Mexican origin and the fact that over 90 percent of our employees have such origin and he referred to this as the atypical situation presented here which makes this a poor case to determine the validity of the EEOC guideline and the interpretation of the Act it embodies and in a footnote in the same brief, speaking, I am certain for the EEOC, the Solicitor said that in light of these same factors, the EEOC agrees that this is not an appropriate case in which to test the validity of its guidelines and, therefore, asks the Court not to grant certiorari and it seems to me that this just proves the invalidity of the EEOC's reasoning because the guideline, as set out, says that it does not matter what the facts are. If you employ a citizenship criterion for employment, then you have got a violation. But we don't you to look at the facts here because they are not good for us.

And if that is the case, this would be the perfect case to look at and we suggest that the reason they didn't want the Court to grant cert was because they knew this Court would affirm the Fifth Circuit decision and throw out their guideline.

Counsel did raise yesterday in his brief one case which appears to have some similarity between our case and that is the Phillips versus Martin Marietta. Superficially, the argument is the same. In Phillips versus Martin Marietta, Martin Marietta was charged with sex discrimination against women and they defended on the grounds, well, we couldn't possibly be discriminating. Seventy-five percent of our employees are women. But the difference was that, as to all potential male applicants, Martin Marietta said you are welcome. We're going to look at you.

As to women applicants, they said, you're welcome, unless you have a child under six.

Now, to analogize Martin Marietta to Farah would be the same distinction I drew earlier. If we hired Polish aliens and English aliens and French aliens, but not Mexican aliens, then we'd be treating a person differently. But we are not and, therefore, Martin Marietta also has no application.

Mr. Justice Stewart, I believe, yesterday asked Mr. Cooper whether there was any evidence in the record

with regard to who was hired in the Petitioner's place and Mr. Cooper said that there was none. Now, in the Appendix at page 89, the deposition of the Petitioner is reprinted. She was asked there, "Do you know who was hired for the job for which you were applying?" and she said, "No, sir." But the next question was, "Do you understand that those persons were Mexican-Americans with Mexican ancestors but who are United States citizens?" Answer, "Yes, sir."

Now, in Greene versus MacDonald Douglas, this Court said that one of the factors needed to prove up a prima facie case of racial discrimination was for the petitioner to show, or the plaintiff to show that a person of a different race had been hired in his stead and here it is clear from the plaintiff's deposition that the person hired in her stead was of the same national origin as she.

Your Honor, if there are no further questions, we would then just urge that the Court affirm the decision below as eminently correct.

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Carr.

Mr. Cooper, do you have any time remaining here?

No? You've used all your time, I think.

Thank you, gentlemen, the case is submitted.

[Whereupon, at 10:17 o'clock a.m., the case was submitted.]