OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Petitioner V. ARABIAN AMERICAN OIL COMPANY AND ARAMCO SERVICES COMPANY; and ALI BOURESLAN, Petitioner V. ARABIAN AMERICAN OIL COMPANY AND ARAMCO SERVICES COMPANY

CASE NO: 89-1838; 89-1845

PLACE: Washington, D.C.

DATE: January 16, 1991

PAGES: 1 - 46

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IN THE SUPREME COURT OF THE UNITED STATES

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EQUAL EMPLOYMENT OPPORTUNITY :
COMMISSION, :
Petitioner :
v. : No. 89-1838
ARABIAN AMERICAN OIL COMPANY :
AND ARAMCO SERVICES COMPANY; :
and :
ALI BOURESLAN, :
Petitioner :
v. : No. 89-1845
ARABIAN AMERICAN OIL COMPANY :
AND ARAMCO SERVICES COMPANY :

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Washington, D.C.

Wednesday, January 16, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

KENNETH W. STARR, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

PAUL L. FRIEDMAN, ESQ., Washington, D.C.; on behalf of the

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Respondents.

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PROCEEDINGS

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 89-1838, Equal Employment Opportunity Commission v. Arabian American Oil Company, and 89-1845, Boureslan v. Arabian American Oil Company.

General Starr.

ORAL ARGUMENT OF KENNETH W. STARR

ON BEHALF OF THE PETITIONERS

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

This case brings before the Court a single question of statutory interpretation: whether Title VII of the 1964 Civil Rights Act applies to acts of discrimination by U.S. employers with respect to U.S. citizens outside the territorial limits of the United States. In this case the Fifth Circuit, sitting en banc, held that Title VII does not apply abroad, relying on the well-established presumption that acts of Congress ordinarily do not apply outside the territorial limits of the United States, absent an expression of intent to the contrary.

The court concluded that there was inadequate evidence of Congress' intent so as to overcome the presumption. As a result the Fifth Circuit affirmed the

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district court's dismissal of the lawsuit filed in this case by the private petitioner, Ali Boureslan.

Mr. Boureslan is a naturalized U.S. citizen who alleges in his complaint that during the course of his employment in Saudi Arabia by ARAMCO, a U.S. corporation, that he was the victim of discrimination based on race, religion, and national origin.

In our view, Title VII's protections do not stop at the border. To the contrary, Congress intended for Title VII's protections to run to the benefit of U.S. citizens wherever they may be when they are in the employ of U.S. employers. Its intent, we believe, is reflected in both the text and the structure of the statute itself.

In light of its broad grant of coverage set forth in the opening section of Title VII, 2000e, Congress then in the next provision, section 702.2000e-1 carved out two exceptions to Title VII's sweep, specifically, an addition to the exception with respect to religious institutions. Congress created the alien exemption which expressly exempts from Title VII the employment of, the words of the statute, aliens outside any State.

The most natural reading of this provision, we believe, is that the statutory protections of Title VII do apply outside the United States, but that the statute's coverage is limited by category. That is, by excluding

one category, aliens, from coverage, the most natural and reasonable inference to draw is that U.S. citizens are protected. And that reading is fully supported --

QUESTION: General Starr, that's the most -- you assert that's the most reasonable reading. Do you think it's the only reading? Is it textually not possible to understand it to apply just in the situation of United States territories, so you'd be outside the States, but still not in a foreign country?

MR. STARR: I think that is an exceptionally strained reading of it. There is no basis whatever in the text of this statute to believe that that is what Congress was getting at, and indeed, the legislative history -- and the only legislative history with respect to this specific exemption at the time of the drafting in 1963 and 1964 -- is in support of our reading of it. The House committee report says that the purpose of this was not with respect to territories to solve the Vermilya-Brown problem that the respondents have suggested, but rather it was -- the purpose was to remove, these are the words of the report, conflicts of law, conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise. And the Senate reports contains a very similar explanation.

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QUESTION: General Starr, let's grant that that is a strained reading. I suppose it's also a strained reading of a statute that confers jurisdiction over all companies involved in interstate or foreign commerce of the United States. It is probably a strained reading to read that as applying only to United States companies or companies involved in interstate or foreign commerce on the shores of this country, as opposed to in France or Germany. That's a strained reading, too, but we do it all the time, don't we?

MR. STARR: I don't think it's strained at all, because for one thing, we have guidance from what Congress was getting at, especially in the history of this provision, that it was getting at discrimination by U.S. employers. That has been the interpretation of the EEOC --

QUESTION: I'm not saying this provision is strained. You're mistaking my question. I'm granting it's strained. But I'm saying, does not our doctrine that when Congress -- when Congress means to apply the laws of the United States abroad, it must be clear about it, does not that doctrine mean that we will accept strained readings and will indeed impose strained readings in order to defeat extraterritorial jurisdiction, unless Congress has been clear about it? Because when we say interstate

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and foreign commerce, or when Congress says that, we do not interpret that to mean anybody engaged in foreign commerce abroad. And I think that's a pretty strained reading, don't you?

MR. STARR: I don't think, in response to your question, that the Court should engage in a clear statement form of analysis that it has done in the Eleventh Amendment setting, in tribal sovereign immunity settings, in -- in the law of preemption to require a clear and unambiguous statement. And that is this. In this context we're talking about Congress applying this statute to -- and intending to cover -- American enterprises. The Court frequently reads broadly drafted laws against the backdrop of the law of conflicts of law. And it is clear that its application to foreign nationals, foreign entities, would raise very serious questions.

That's what this Court had before it in cases such as Benz and McCulloch. That's what the Court had before it in the critical case, the pivotal case in terms of the presumption of Foley Brothers. So when we look at the Court's analysis there, what did it find? It found that there was absolute silence. We don't think there is silence here.

We think the alien exemption provision is a powerful provision. It is a powerful message in terms of

Congress' intent.

What the Court said in Foley Brothers is here's a statute that is very broadly worded, the Eight Hour Law. There is no geographic limitation at all, and we have found no indication whatsoever of what Congress had in mind in terms of its applicability extraterritorially. For us to apply it extraterritorially would require us to require it, by its language, to foreign nationals. And that, we think Congress would have been clear if it had intended it not to apply extraterritorially but to foreign nationals. The oddity of applying a U.S. Fair Labor Standards Act to foreign work places and to foreign nationals in those foreign work places has been evident.

Congress has been -- I think this is one thing about the drafting of the 1964 statute that is important. Congress, in drafting the statute, had before it a different model. It had the Fair Labor Standards Act model. The Fair Labor Standards Act, by its terms, 213(f), does not apply to foreign work places. Congress has used that model in other statutes, including in the original version of the Age Discrimination Act. It has also limited expressly -- expressly -- the applicability of the Railway Labor Act to domestic work places. It did not do so --

QUESTION: General Starr, we, we could have held

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in that case simply it doesn't apply to foreign nationals. We could have simply said it doesn't apply. Which is what you're saying in this case. On its face you acknowledge this does not apply to employees who are foreign nationals, but on its face it would apply to companies abroad who are not United States companies, just as it applies domestically to companies that are not United States companies.

MR. STARR: But when we look --

QUESTION: You want us to read it not that way. You want us to create an exception that is not in the text.

MR. STARR: The exception, however, is one with respect to foreign employers that is powerfully suggested by the history of this provision and the way this Court has historically gone about the analysis of broadly worded statutes against the backdrop of conflicts of law. That's what the Court did in Lauritzen against Larsen. Justice Jackson's opinion in that court -- in that case was dealing with a Jones Act action. The Jones Act was very broadly interpreted. Any seaman. But the Court, in going through a careful conflict of laws analysis, concluded that it did -- would not apply in the setting of a foreign national.

That's what the EEOC, the agency that is -- of

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course is charged with the interpretation of the statute, has concluded that Congress had in mind, to cover U.S. employers and not foreign corporations, and indeed that is the only authority of which we are aware, judicially, in the Lavrov case, where the district court said this does not apply to a foreign corporation outside the territorial limits of the United States. And we don't quarrel with that. That is a very understandable, natural reading of the statute against the backdrop of conflict of laws, as well as Congress' specific intent to get at what the reports called American enterprises.

QUESTION: General Starr, the more of these unexpressed exceptions you have to read into the statute to make it work, the less it strikes me as clear, which our opinions say it has to be, that the statute is meant to have extraterritorial application. You read in another exception, too. You say that, for example, if Saudi law requires the segregation of men and women in the work place, that that would be covered by the bona fide occupational qualification exception. Would we allow a State law of one of the United -- one of the sovereign States to qualify as a bona fide occupational qualification exception if a State required some provision that is contrary to Title VII?

MR. STARR: No, because of the supremacy clause.

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The standard for liability has been established by Title VII, and that's -- the BFOQ exception is obviously available to the State, but not based upon stereotypes and the like. It would have to satisfy the stringent provisions of BFOQ.

But when we are dealing with the law of a foreign nation, we're then in an area where there are these understandable areas of concern and sensitivity, and that's why the question that has been presented to this Court is very narrow and very specific. And ARAMCO doesn't contest that the question before this Court is the applicability of Title VII to U.S. employers.

My ultimate response, Justice Scalia, to this line of questioning is let that wait for another day. But in discussing that, in looking to that other day and being mindful that that case will eventually arise, the comfort that I want to give you is that the EEOC, the agency charged with interpreting this statute, has very reasonably interpreted it as not applying to foreign corporations. And this Court has done precisely the same kind of conflict of laws analysis time and time again.

QUESTION: General Starr, Foley Brothers involved an American employer and an American citizen, didn't it?

MR. STARR: It did. It did.

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QUESTION: And you say that's different because the statute was written differently?

MR. STARR: It is different because when we look at what Foley Brothers -- the analysis of the Court in Foley Brothers, the statement of the canon of construction is is there -- the presumption is it applies only domestically unless a contrary intent appears. When the Court then engages in the analysis of the statute, it notes one very pivotal thing in addition to Congress' silence, that Congress -- at page 286 of the opinion -- that Congress in the act drew no distinction between alien labor and citizen labor. And that fact, that Congress failed to draw that distinction, resonated powerfully with the Court that Congress would not have intended therefore for the law to have applied overseas by virtue of the oddity, as the Court saw it, of it applying, it being the Eight-Hour Statute, to Iranian nationals working in Iran on a U.S. project.

QUESTION: Is there any statutory definition of the word "state" in the act?

MR. STARR: There is, Mr. Chief Justice. It is found in the definitional provisions in 2000e(i). The term "state" is defined to include the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, and a number of other territories of the

United States.

QUESTION: So they -- the way they define "state," the alien exemption, saying employment of aliens outside any "state," would mean outside of any State or territory, basically.

MR. STARR: That is correct.

QUESTION: Well, what about, say, the American Embassy in Paris? I take it the act, even if you look at the exclusion for the term "state," is applicable to the American Embassy in Paris?

MR. STARR: I think that's right. That does not fall within the definition --

QUESTION: And that would -- that would make the exemption have some sense, because it would mean that, I take it an American citizen would be protected by the act in the American Embassy, but that an alien would not be?

MR. STARR: That is correct. An alien would not be able to avail himself or herself of the protections of Title VII. It is not at all odd or anomalous that Congress would have drafted the statute and created this sort of scheme of coverage. And I think that the ADEA experience is instructive, because when Congress learned that the obvious result of its incorporating the Fair Labor Standards Act geographic limitation in the ADEA, when it learned the consequences of that, that Americans

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abroad were not protected, Congress moved with alacrity to say we have an anomaly in the coverage of the anti-discrimination laws of the United States. We want to move to end that anomaly. And it was in that connection that Congress was reminded of what it was already charged with knowledge of, namely --

QUESTION: But incidentally, Mr. Starr, my example of the coverage of the American Embassy would pertain under both your and the respondents' analysis of the statute, would it not? In other words, coverage of the American Embassy could --

MR. STARR: Because of the United States being --

QUESTION: -- would be given under ARAMCO's interpretation of the statute?

MR. STARR: It may, except ARAMCO's reading, and it will speak for itself, as I understand it, is no extraterritorial reach. So even though the foreign government -- excuse me, the United States Government is now, as it was not in 1964, covered by the act, I think that ARAMCO's position would be that unless there are other coverages, executive orders, other bodies of law to which a person would look who is employed by an embassy, then, indeed, Title VII does not apply overseas.

I think they have acknowledged a base of work

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place exception. If someone leaves on a trip, is away for a short period of time, I think they do contemplate a sensible reading of the statute to that limited extent. But if someone is actually employed in Paris or in Tokyo by a U.S. employer, and that person is there for part of his or her career, their vision of Title VII is not applicable to a U.S. employer.

QUESTION: General Starr, we said in Benz that for us, that is this Court, to run interference in such a delicate field of international relations, that is to interpret the statute to apply abroad, there must be present the affirmative intention of the Congress clearly expressed. Now, what clear expression do you find in this statute, other than the negative implication from this exception? The definition of commerce does not even mention foreign commerce, as some statutes do. What is there beyond the negative implication of this exclusion of foreign workers, that constitutes a clear expression of Congress?

MR. STARR: I have to, with all respect, quarrel with your reading out of the commerce definition, foreign commerce, by virtue of the magic words not being there. The words -- the definition of commerce includes commerce outside any State. There are several definitions of commerce which make it very, very global in its reach.

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And I don't think there should be a serious question. I realize the other side is going to suggest to you that there is, but there should not be a serious question that the natural reading of the commerce provision covers foreign commerce, the foreign commerce of the United States with respect --

QUESTION: Well, the definition includes trade among the several States or between the State and any place outside?

MR. STARR: Exactly. Anyplace outside there, Justice White, is exactly that. It is quite broad. Anyplace means, to me, especially given the other definitions -- the opening definition is the Constitution, the commerce clause definition of interstate commerce, commerce affecting among the several States. But it goes on, it does not stop, and defines commerce very broadly, very globally.

The point I want to make about Benz is this, Justice Scalia. Benz involved the extraordinary circumstances of applying U.S. law aboard a foreign vessel. Note that that foreign vessel was within the territorial limits of the United States. But the difficulty in terms of considerations of international law and comity was that it was a foreign flag vessel with a foreign crew. The Court declined to grant territorial

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application of United States law, even though that was in a harbor of the United States and clearly engaged in the foreign commerce of the United States. And why did it do it? It said because what would be the result would be extraordinary in terms of maritime law and the law of international relations.

What we're again dealing with here is a U.S. corporation and a U.S. national, and this Court has said time and time again that no considerations of great concern in international law are raised by the application of U.S. law to a U.S. citizen, even though that citizen may be abroad at the time.

QUESTION: General Starr, can I just ask this question on the definition with respect to Justice White's question, commerce between a foreign nation and any State. What about an American employer running a business in Saudi Arabia that just does business in the Near East and has no transactions with the United States? Is that covered?

MR. STARR: That employer may well -- Wickard v. Filburn, broad definitions of commerce, but I think that would raise a serious question as to whether that entity is involved in U.S. commerce, including the foreign commerce of the United States.

QUESTION: Okay.

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MR. STARR: There certainly would be an argument. It may very well be that our position would be, under Wickard v. Filburn and the kind of components and so forth that the entity is using, that there would be coverage. As long as -- that's the point that I have inadequately made. This is law applicable to United States citizens. This Court in unanimous opinions authored by Chief Justices Taft, Hughes, in numerous cases has said the application of U.S. law to U.S. citizens on the high seas and even in foreign lands is all right as long as you're not, quote, "interfering with the rights of foreign nationals." There's no --

QUESTION: General Starr, this is a law applicable only to United States citizens only because you say it is a law applicable only to United States citizens. If you read the statute on its face, it's applicable to everybody, every employer. And certainly within the United States you interpret it that way, as being applicable to every employer. It seems to me to justify the expansion of the statute by saying it's only applicable to United States citizens is to beg the question. Only after you decide that it applies abroad do you invent the limitation that it applies only to the United States citizen, because to apply it to other people abroad would be unthinkable.

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MR. STARR: Let me not beg the question by saying this law applies abroad in our reading of the statute for these reasons. The alien exemption points powerfully in that direction. That's what the exemption is all about. It contemplates foreign application. That is what, in our judgment, a broad and sweeping definition of commerce powerfully suggests. If there is any doubt, all, all of it, the legislative history directly in point supports our interpretation and --

QUESTION: But of course that sweeps in the foreign employer as well. And that's -- that's where it gets very sticky, I think.

MR. STARR: My basic message is leave that sticky question to another day. That's not the question presented. But --

QUESTION: Well, but I think it has to be in our minds as we resolve this one.

MR. STARR: I'm not suggesting that it should not be in the Court's mind. And our response to the Court is this. In our reading of this voluminous legislative history, our study of the text, the structure of the statute itself, there is not a single indication that Congress was seeking to get at non-American enterprises. That is what the Senate report says, that's what the House report says, that's what an interpretive memorandum, the

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case -- the Clark case interpretive memorandum says. What --

QUESTION: That's true, but the problem is that the language of the statute itself doesn't produce that result, does it?

MR. STARR: It does not, and when this Court has historically faced that question it has looked to the backdrop of conflicts of law. That's what the Court did in Foley Brothers. The difference between this case and Foley Brothers is here there is that contraindication of Congress' intent that the -- that the Foley Court found completely silent. In terms of the clarity of the intent, we would urge that the Court very carefully consider the use of terms such as "clear and unambiguous" and the like for this reason.

That is not the formulation of Foley Brothers. It's not the formulation that this Court used in quoting from Foley Brothers in the Argentine Republic case two terms ago. What Foley Brothers speaks to is is there a contrary intent. It is not an Eleventh Amendment Federalism kind of value that is at stake when we are talking about the application of U.S. law to U.S. citizens.

I would like, if I may, to reserve the balance of my time.

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QUESTION: Very well, General Starr.

Mr. Friedman, we'll hear from you.

ORAL ARGUMENT OF PAUL L. FRIEDMAN

ON BEHALF OF THE RESPONDENTS

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

We agree with the Solicitor General that this is a question of statutory interpretation. We also agree with him that what is involved here is what he today has referred to as the well-established presumption against extraterritorial application of U.S. laws. But we think there are several problems, at least five, before one even gets to the presumption, with his position.

One is the language of the statute. It says nothing about an extraterritorial reach. Second is the legislative history, which says nothing about foreign work places, nothing about extraterritoriality. And there is no indication in that legislative history, despite the fact that there were 441 witnesses who testified, that anybody thought this was going to apply overseas.

Third, the structure and the legislative history of the act talk only in terms of a domestic focus of the act. Fourth, as Justice Scalia's questions suggest, there really is no principled basis to limit this statute to U.S. employers overseas once you start down that road.

Fifth, to apply it overseas runs afoul of prerogatives and sovereignty of other nations and with international conventions. And then you get to the presumption which says that Congress must speak clearly, expressly, and affirmatively if it intends a statute to apply overseas.

Now I, I think I understand the Solicitor General to be saying either that the alien exemption provision itself grants coverage to U.S. citizens overseas by a negative inference, or he may be saying that it is the commerce language which grants coverage to everybody, and then the alien exemption provision withdraws it from aliens. If it is the latter, which is strongly suggested -- stated -- in his reply brief, we run into the very problems that the Court was discussing with the Solicitor General a few moments ago.

The commerce language "between a State and any place outside thereof" is found in numerous other statutes, and this Court and no other court has ever said that those statutes apply overseas. It is found, for example, in the Labor Management Reporting and Disclosure Act. It is found in the recently passed Americans with Disabilities Act. It is found in at least a dozen other statutes, including all of those that we list in footnote 17 on page 23 of our brief.

The language, commerce between a State and any other -- and any foreign nation, which arguably is broader or suggests a stronger indication that Congress may have intended what the Solicitor General argues, is not found in this statute, but it is found in the National Labor Relations Act, on which this statute was patterned, in the Labor Management Relations Act, on which this statute was patterned, and this Court has said that neither of those apply extraterritorially. It is also found in the Federal Employers' Liability Act, the Railway Labor Act, and even Title II, the Public Accommodation section of the Civil Rights Act. Those statutes, and Chisholm and Air Line Stewards and some other cases, have been held not to apply extraterritorially. Of course, no one has ever suggested, to my knowledge, that the Public Accommodation section does.

So we suggest that his position is a troublesome one if he is relying on the notion that this commerce language alone provides jurisdiction. Now, if he's saying something beyond that, which he also seems to be saying in his brief, that this statute is an example of Congress legislating on the nationality principle. It wasn't entirely clear in the various earlier portions of this case and maybe even in some of the Solicitor General's earlier submissions to this Court, but it is now clear

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that he's relying on the nationality principle.

The nationality principle is a disfavored basis to exercise jurisdiction. It applies usually in matters of allegiance, like military service and taxation, when we reach overseas to reach our nationals. And every time Congress has chosen to legislate on that principle, it has used the words expressly: U.S. citizen or U.S. person or U.S. national. I believe it did so, except in the Department of Defense statute in -- cited by the Solicitor General, and of course the Department of Defense is a U.S. person, in every single statute cited by the Solicitor General in his reply brief at footnote 13 on page 16.

With respect to anti-discrimination statutes, the only cases that I am aware of in which Congress has chosen to reach into foreign work places are the Export Administration Act, the comprehensive Anti-Apartheid Act, and the Age Discrimination in Employment Act, where Congress, in each case, spoke about U.S. persons, U.S. nationals, or, in the case of the amended Anti -- Age Discrimination Act, American employers.

And so, regardless of whether you approach it on the commerce language approach or on the notion that Congress acted affirmatively somehow, it hasn't done it in a way that this Court has accepted that Congress must do it in order to reach into foreign territory.

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QUESTION: Well, I -- you argue that the -- there has to be a congressional intent to apply it extraterritorially that is clear and affirmatively expressed. I'm not sure that's what the Foley case stands for. In fact I don't read it that way. And I think in Steele against Bulova Watch Company, where the Lanham Act was held applicable extraterritorially, there wasn't anything clear and express. So I'm wondering whether your understanding of the presumption is the one the Court has applied. There may be a presumption all right, but I would think it would just go to congressional intent, express or otherwise.

MR. FRIEDMAN: Well, Justice O'Connor, if I may, I'd like to deal with the presumption and Steele somewhat separately. It seems to me that when one goes back to the early cases in which what we call the presumption and what today the Solicitor General called the presumption, you get to Sandberg, you get to Bowman, and those cases -- Blackmer. And the Court said legislation is presumptively territorial. It said that failure to say something expressly negatives the purpose of Congress. It said in Sandberg that we don't presume Congress to legislate by implication when a few affirmative words would stand for --- would state Congress' intention, and so on and so forth.

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When you get to Foley, and Benz and McCulloch, and Foley cited Blackmer and Foley cited Sandberg, it seems to me that Foley does say -- and as was pointed out earlier, it was a U.S. citizen that brought that suit -- Foley does say that, that it, that Congress must express its intention to extend coverage beyond places where the United States has sovereignty or some measure of legislative control, and there was no indication that it had done so there. The fact that it would apply equally to aliens and U.S. citizens, the Court I believe said only, quote, "buttresses the conclusion of the Court." It had already reached its conclusion. And we say that it did so on the basis of that presumption, or the canon, it used the, it talked about it as canon of construction in that case.

In Benz and McCulloch, the Court did say that the basic question was whether Congress had written the act and intended it to apply overseas and required an affirmative intention of Congress clearly expressed, at least in the McCulloch case. So one pieces those together to take what in some cases was called a canon of construction, in other cases a presumption and an assumption that Congress seeks to legislate domestically, and comes up with what we call a strong presumption and I think the Solicitor General calls a well-established

presumption.

The Steele and Lanham Act question, it seems to me, is somewhat separate. And it's somewhat separate because there we're dealing not with the nationality principle, but with the effects part of the territoriality principle. And the Congress, to the extent it has said it is doing so, and this Court and the Second Circuit in Alcoa, for example, and in Schoenbaum, to the extent it has recognized the effects principles, it made it very clear that those are very narrow exceptions, the Lanham Act, certain of the securities laws, and the antitrust laws. They are a reach into foreign territories which have never been applied in other cases, never been applied in employment and labor law statutes. None of those cases is cited in the legislative history of this statute, Rather the National Labor Relations Act and the Labor Management Relations Act are.

QUESTION: Are you suggesting, Mr. Friedman, that there is some reason why securities acts as a class, or the Lanham Act should apply, and the statute like Title VII shouldn't?

MR. FRIEDMAN: There are a number of reasons. One is when one really examines the language of the Lanham Act, the Securities Act and the Antitrust Act, they don't just use the foreign commerce or foreign nation language

in the definition of commerce itself, which would -- is what of course gives jurisdiction to Congress to legislate nationally rather than leaving things to the State, but rather in each of those cases, I believe, in the proscribed conduct provisions of the statutes they talk about conduct in interstate or foreign commerce, restraint of trade and commerce, monopolization of trade or commerce between the States or with foreign nations, the use of deceptive or misleading trademarks in interstate and foreign commerce itself.

In this statute, we have a definition of commerce and of interstate commerce which is, as the dissent below said, nothing more than a jurisdictional nexus. The predicate for Congress to legislate national -- nationally in an area that might otherwise have been thought to be left to the States: labor and employment, and discrimination for that matter in the early years.

And -- but in the section that proscribes certain unlawful employment practices, there is no reference to conduct in commerce, employment practices in commerce, and that makes -- that's a distinction between all of those cases.

Another distinction, of course, is --

QUESTION: Yes, but that is because the statute is not narrowly limited to engaged in commerce. They have

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-- it's the broadest possible language in the prohibition.

MR. FRIEDMAN: In this statute? In Title VII?

QUESTION: Yes. It's just every person, and basically everyone is covered by the act, isn't it?

MR. FRIEDMAN: Well, everyone would be covered by the act, unless, of course, one assumes and presumes that Congress doesn't legislate beyond its borders unless it says it's doing so.

QUESTION: No, but what I meant to say is that the reference to commerce in statutes like the Sherman Act and all, limits -- is a limiting provision if the -- if you added words here it shall be unlawful employment practice for an employer when in commerce, or something, that would tend to limit the scope of it rather than broaden it. And as the absence of any reference to commerce, I don't think adds any force to your argument.

MR. FRIEDMAN: Well, I --

QUESTION: I may not have quite understood the thrust of your argument.

MR. FRIEDMAN: I think you did understand the thrust of my argument.

(Laughter.)

MR. FRIEDMAN: Except to say that -- except to say that if the commerce language, the definition of commerce in any statute is sufficient to conclude that

that statute reaches overseas, then we have an awful lot of statutes on the books that reach overseas that nobody ever thought would.

QUESTION: Of course, I suppose their response is you really have to read that definitional provision together with the exemption, the alien exemption.

MR. FRIEDMAN: Well, I think --

QUESTION: And I'm not sure they're entirely independent of one another, which is sort of what you're arguing.

MR. FRIEDMAN: I'm not going to make the Solicitor General's argument for him, but I did suggest, and I think I'm right, that it has changed and shifted from time to time, both in this Court and in the lower courts as to whether the exemption provides coverage by a negative inference, by exempting aliens therefore it applies to U.S. citizens, or whether the commerce language provides coverage and then the exemption withdraws it. Either of them, it seems to us, is no the way that statutes are normally construed. Just to -- just to --

QUESTION: No, normally we read the entire statute and try and figure out what Congress meant.

MR. FRIEDMAN: That's right.

QUESTION: We read it all together.

MR. FRIEDMAN: And I think if you, if you read

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the entire statute and try to figure out what commerce meant here, it's a difficult task. But what is -- what is clear from reading the statute and the legislative history is that this was an unusual statute and had an unusual history as to how it got passed. There were 172 civil rights bills considered in '63 and '64.

There were 441 witnesses, that, as I may have mentioned, and days and days of debates, there were no hearings in the Senate. There were hearings on this provision in the labor committee, but then the statute went over to the judiciary committee. There were all sorts of amendments, there were substitute bills written in the dead of night and delivered to congressmen's doors at midnight. There was the Dirksen-Mansfield amendment which is what really was finally voted on in the Senate, which nobody had a chance to debate really at great length in that form, and the House approved the same thing after an hour's worth of debate. So when you look at all of that and you see this one provision that came from statutes in the forties and fifties as to which I think we have offered a more plausible explanation, historically, as to how it got there and what it means than has the Solicitor General --

QUESTION: What is that explanation, Mr. Friedman?

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MR. FRIEDMAN: It is an explanation which really turns on an effort by Congress to overrule this Court's decision in Vermilya-Brown. And both in the Fair Labor Standards Act and in the fair employment bills that they began to consider immediately after the Vermilya-Brown decision, they began for the first time -- an alien exemption provision appeared for the first time, and a redefinition of State, territory, and possession so as to exclude leased bases appeared for the first time. By the time we got to '64 they have this definition of "state" which clearly goes beyond States and includes territories and certain, but not all, possessions. It is -- it is set forth at -- briefly in our brief as to what we think Congress was trying to do --

QUESTION: What was the problem of Vermilya-Brown that Congress was trying to avoid with this exception?

MR. FRIEDMAN: Congress -- the Court said that leased bases and military bases are possessions, and that therefore --

QUESTION: Even though they were located in foreign countries.

MR. FRIEDMAN: Even though they were located in foreign countries they were possessions. And therefore employees employed by Government contractors, most of whom

were aliens, were entitled to the same benefits I'd say most of them were not U.S. citizens -- were entitled to the same benefits, the same wages and hours and other provisions of the Fair Labor Standards Act in those, quote, "possessions" that everybody else was.

Now, what Justice Jackson in his dissent with four other justices -- three other justices. If there had been four he would have prevailed.

(Laughter.)

MR. FRIEDMAN: But what Justice Jackson said in his dissent is that that's a very strained reasoning -- reading of possessions, and that's not what Congress meant by the term "possession," and it's not what Congress meant in the Fair Labor Standards Act. And so there was a tremendous effort in -- immediately after Vermilya-Brown, in the Fair Employment Practices Act and ultimately in the amendment to the Fair Labor Standards Act in 1957 -- and it was finally amended in 1957 because some people brought some lawsuits saying they were entitled to the benefits that Vermilya-Brown seemed to suggest they had. Either the Government had been ignoring Vermilya-Brown for 6 -- for 8 years, or no one thought to ask for those same benefits.

But the history of the amendments to the Fair Labor Standards Act, which culminated in '57, and the

history of the Fair Employment Practices statutes, which culminated in '64, explain how the alien exemption provision got into the statute and may explain how -- what the alien exemption provision still meant when the '64 act was adopted.

QUESTION: Is there legislative history in connection with the '64 act? --

MR. FRIEDMAN: None.

QUESTION: -- that shows.

So there is no legislative history in connection with that act that would show how the alien exemption came to be there?

MR. FRIEDMAN: All we know is that in '49 Congressman Powell introduced it and there were various statutes. When it got to '63, '64, Congressman Roosevelt in the labor committee took language that had come up through the years from the Fair Employment Practices Act and wrote a bill. And that included an alien exemption and included that one sentence in the legislative history. That -- that bill didn't get out of the labor committee. Congressman Roosevelt came over to the judiciary committee one day and said this is much stronger than what President Kennedy has proposed. Put it in the -- 7152, because this is a better statute. And that's how it got there. And nobody, in debating Title VII or any of the other

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provisions of the Civil -- became the Civil Rights Act of 1964, ever discussed it from that moment forward.

QUESTION: May I ask this, Mr. Friedman? The Vermilya-Brown problem, as I recall, it was a question of defining the territory or the geographic area covered, and the decision applied equally to American citizens and aliens, and the correction applied equally to American citizens and aliens.

MR. FRIEDMAN: That's correct. It applied equally to the American citizens and aliens, and the correction, we say, was -- attempted to be accomplished in two ways. One was to redefine possessions to say that leased bases are not possessions.

QUESTION: Right.

MR. FRIEDMAN: And the other was to deal expressly with the problem of aliens and the problem of -- that foreign governments suggested --

QUESTION: But that's dealing with the problem of aliens in territories or geographic locations where there was unquestioned Federal jurisdiction.

MR. FRIEDMAN: I think it's -- I think it's both.

QUESTION: I see.

MR. FRIEDMAN: I think it's both, because, again if you look at the, for example, the dissenting opinion in

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-- I forget, the concurring opinion in Foley Brothers by Justice Frankfurter and Justice Reed, who were trying to relitigate Vermilya-Brown, if I might say so, at that point, they were, they were discussing the reactions that we got from foreign governments and from the Defense Department and others that --

QUESTION: And they also relied heavily on letters from different parts of the executive branch of our Government, too.

MR. FRIEDMAN: They did.

QUESTION: But you don't have any such support in this case.

MR. FRIEDMAN: Well, the Solicitor General is here.

(Laughter.)

MR. FRIEDMAN: I guess that the next thing I -- I don't know if I need to make this point because it came clear from the discussion between Justice Scalia and Mr. Starr, that this statute would apply to foreign employers as well as to U.S. employers if it were extended extraterritorially. And it's just a host of problems if one starts down that road because there is really no principled basis on which to make those distinctions.

And one wonders why the Solicitor General does not require Congress or -- to have a statutory exemption

for alien or foreign employers, and asks the Court to do that for them, when it's the alien exemption for foreign employees that he is relying on here.

And one wonders whether he would also limit the term employer to U.S. employers in this country, even though the suggestion of Sumitomo and the suggestion of the lower courts that have followed Sumitomo is that when in the United States, absent a treaty to the contrary, a foreign employer is bound by Title VII. Query: shouldn't we be bound by their employment laws and their discrimination laws when we do business as their guests in their country?

There are 55 nations at least that have adopted employment discrimination laws of their own, and most of them, including Saudi Arabia's, provide for exclusive jurisdiction and say expressly that they regulate all employment within the country's borders, including those involving foreign citizens. We don't think Congress could have intended -- and that's what this case is about, congressional intent -- to impose our law unilaterally in light of that. We don't think Congress could have done that in light of ILO Convention 111 and some other international documents. But ILO 111 says that, that every country should act nationally within its own sovereignty to deal with employment discrimination.

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We also think that to apply this would create specific conflicts, not just conflicts with dual sovereigns trying to regulate the same conduct, but specific, specific conflicts that are suggested in the brief of amicus Rule of Law Committee. The laws of Argentina, Saudi Arabia, Japan, and others, have different rules, with respect to women for example. More protections in some cases, and more protectionism, some might say, in other cases. But they're different. There are other kinds of conflicts, obviously, which might arise as well between the law -- between Title VII and the laws of other countries.

QUESTION: Mr. Friedman, what about the deference we normally accord to the agency that is charged with implementing the act? Here it's the EEOC. There is no doubt that that's the agency committed with the responsibility for this act, and they simply disagree with you on a matter that is arguably ambiguous. Why, why isn't their call what governs?

MR. FRIEDMAN: Well, their call -- and maybe we should use the word plural, calls -- their call has changed dramatically over the years. One can look at their early guideline, and it seems clear that they're saying what the Court said in Espinoza, that the alien exemption provision means that aliens are protected in

this country, too, and nothing more. Their current policy guideline really suggests exactly what the problems are. They don't just say it applies to U.S. employers. They say it applies to some foreign employers. And then they have a whole list of factors that they're going to apply.

It seems to us that you don't give deference to an agency (1) when they're wholly -- when they're completely trying to rewrite a statute; (2) when their guidance -- guidelines -- 1988 was the first time they really said this -- was not contemporaneous; (3) when it's inconsistent from over the course of the years; (4) when it's inconsistent with the language, the legislative history of the statute itself, and (5) when it's only a guideline and not a regulation because they don't have authorities to -- authority to issue regulations in this area; and (6) when it deals with their own jurisdiction. They're not experts either on their own jurisdiction or in foreign relations law.

There are a whole host -- and fundamentally they're wrong. But there are a whole host of reasons why the Court ought not to give deference to the EEOC in this case. It didn't give deference to the EEOC in Espinoza, for example. It doesn't always -- no, it doesn't always do that, obviously. And I think this is a case where it ought not to.

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QUESTION: You don't think we should give them deference here?

MR. FRIEDMAN: No, actually I don't, Your Honor.

(Laughter.)

QUESTION: No, you say we give them the same deference we gave them in the General Electric case?

MR. FRIEDMAN: Exactly.

QUESTION: Yeah.

(Laughter.)

MR. FRIEDMAN: In the end, in the end the question of whether this was good policy -- what what the Solicitor General argues was good policy in 1964 was a question for Congress, and we say they didn't do it. If it's good policy in 1991, Congress can do it. It amended the Age Discrimination Act; it passed a civil rights bill this year, which was vetoed; it deals with discrimination questions time and again; and it doesn't hesitate to go back and take a fresh look at either Title VII or some of the other titles and some of the other statutes. And it is free to do that.

QUESTION: Of course fresh looks at this statute are very time consuming over there.

MR. FRIEDMAN: They're very time consuming over there, that's true. But they are the -- they are the branch of government that has that responsibility.

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QUESTION: I guess there isn't much question that the present Congress has been under the impression that it applies to U.S. employers of U.S. citizens overseas.

MR. FRIEDMAN: I -- whether -- there's not much question that Senator Grassley thought it applied. He said so at the time of the age discrimination hearings, that he thought it applied overseas. He also said that he thought the age discrimination statute applied, and the only reason to amend it was to clarify it. The Chairman of the EEOC disagreed with him on that point.

Senator Grassley was referring to two district court decisions in support of his view, and one of them was dicta and one of them was overruled. So I don't think it's quite fair to say that the Congress agreed. I think it's fair to say that one Senator agreed. And I think there have been some statements in the public press by other Congressmen that they would seek to amend the statute if this Court rules in our favor.

Unless there are any questions about Justice Scalia's testimony in 1975 --

(Laughter.)

MR. FRIEDMAN: -- I respectfully request that the Court affirm the judgment of the court below. Thank you.

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QUESTION: Thank you, Mr. Friedman.

Mr. Starr, do you have rebuttal?

REBUTTAL ARGUMENT OF KENNETH W. STARR

ON BEHALF OF THE PETITIONER

MR. STARR: Yes, I do, Mr. Chief Justice. I think we should understand what is at stake and what ARAMCO is saying, that ARAMCO and other U.S. employers are free to discriminate overseas on grounds of race, religion, national origin, and gender, and the like.

Very briefly, Mr. Friedman has quite properly used the term "canon of construction." I think that is exactly what we are dealing with in terms of the judicial tools to employ in getting at the ultimate question of what Congress intended. The presumption is, as this Court said in Foley Brothers, a canon of construction. It is an axiom of experience, it is to assist the Court. It should not be employed to require of Congress a particular form to express itself.

And when we look at what Congress did, I think the fair inference to be drawn from a reading of the entire text of this statute is that, and I will state clearly, that it is in fact the combination of the broad jurisdictional reach within the structural creation of an exemption from that broad reach which gives us comfort that Congress intended for there to be extraterritorial

applicability.

With respect to the specifics and the legislative history on Vermilya-Brown, one critical point is Vermilya-Brown was effectively revisited legislatively in 1957. The problem that Congress had with Vermilya-Brown was therefore taken care of several years before the focus on the 172 bills that Mr. Friedman suggests so dominated the legislative history of the '64 statute, which is what we're about here. That Congress was nonetheless trying to fix up a problem that had been fixed in 1957. What that --

QUESTION: But General Starr, I'm not sure I have the various language in mind, but I think the argument ran that during that fixing up of Vermilya-Brown they adopted language which was much like this, and the pattern, you just assume that when they copied language which was used previously it may have had the same purpose. Isn't that what their argument is?

MR. STARR: I think that is -- that there may have been some lingering problem, but to the extent there was a congressional problem, Vermilya-Brown handled it. And here is the key point which they don't dispute. All, all of it, the legislative history -- it is not extensive -- but all of it is in our favor with respect to what this alien exemption meant in this statute. And the

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authoritative memorandum, this Court in Stotts and other cases --

QUESTION: What do you mean it supports?

MR. STARR: Our reading of the statute with respect --

QUESTION: Well, it's just -- the legislative history just doesn't challenge your view, that's all. It's just silent. Is there any -- any mention in the legislative history of foreign application, expressly?

MR. STARR: Yes, at page -- it is. At page 16 of our opening brief, I refer the Court to the two reports from which we draw. And then in the authoritative memorandum of Senators Clark and Case, the bipartisan memorandum, that memorandum states that the meaning of this exemption is that it provides an exemption with respect to what the employment of aliens abroad --

QUESTION: What is an authoritative memorandum? I mean, what made it authoritative? Was it -- was it adopted in the statute or something?

MR. STARR: This Court in Stotts said specifically that this Court has on two prior occasions recognized the authoritative nature of this memorandum with respect to the meaning of Title VII.

QUESTION: Oh. It's authoritative because we said so, then?

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(Laughter.)

MR. STARR: On three occasions.

I thank the Court.

CHIEF JUSTICE REHNQUIST: Thank you, General Starr.

The case is submitted.

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)

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#89-1845 - ALI BOURESLAN, Petitioner V. ARABIAN AMERICAN OIL COMPANY AND ARAMCO SERVICES COMPANY

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BY Roy Ernest Hunter

(REPORTER)