Supreme Court to Decide Case On Bias Against Legal Aliens

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Body

The ***Supreme*** ***Court*** agreed today to ***decide*** whether a Reconstruction-era civil rights law, originally intended to protect the ***legal*** rights of former slaves, also bars discrimination ***against*** ***aliens***.

While the issue reaches the ***Court*** in the context of the refusal by an insurance company to write homeowner's insurance for people who are not American citizens, the ***case*** could have considerably broader implications.

The United States Chamber of Commerce and a coalition of large employers told the ***Court*** that an interpretation of the 1866 law as barring employment discrimination ***against*** ***aliens*** would force employers to violate that law every time they complied with a 1986 law that makes it a crime to hire ***aliens*** who lack documents authorizing them to work in the United States.

The question the ***Court*** agreed to ***decide*** covers only private and not governmental discrimination ***against*** ***aliens***, so the ***case*** is not likely to affect such governmental measures as California's Proposition 187, which bars illegal ***aliens*** from public school, welfare benefits and non-emergency health care. The California measure is being challenged principally on constitutional grounds; ***Supreme*** ***Court*** precedents have given ***aliens*** a protected status within the 14th Amendment's guarantee of equal protection.

But the Constitution does not govern purely private behavior like employment or ordinary commercial transactions, which are covered by a number of modern and century-old civil rights laws.

In the ***case*** the ***Court*** accepted today, the law at issue is the Civil Rights Act of 1866, which is usually referred to as Section 1981, after its numerical listing in the United States Code. The law gives "all persons" the same right to "make and enforce contracts as is enjoyed by white citizens."

The United States ***Court*** of Appeals for the Fourth Circuit, in Richmond, ruled last year that this law could be invoked by an Australian citizen, a ***legal*** resident of the United States, who was refused a homeowner's policy on his Baltimore house by the Government Employees Insurance Company, a subsidiary of the Geico Corporation. The company told the man, Vincent P. Duane, that it did not write homeowner's insurance for noncitizens.

Mr. Duane sued in Federal District ***Court*** for an injunction and damages. Geico asked that the suit be dismissed on the ground that Section 1981 applied only to discrimination on the basis of race. Both the District ***Court*** and the

appellate ***court*** ruled that the law also bars discrimination ***against*** ***aliens***. Those ***courts***' rulings made no distinction between ***aliens*** in the United States legally or illegally.

The ***case*** has not yet gone to trial, reaching the ***Supreme*** ***Court*** on the purely ***legal*** issue of the law's scope.

In its appeal, Geico v. Duane, No. 94-1139, the company argues that Congress has never indicated a belief that private discrimination ***against*** ***aliens*** was illegal. The debate over the Immigration Reform and Control Act of 1986, which made it illegal for employers to hire undocumented ***aliens*** while at the same time protecting some ***legal*** ***aliens*** ***against*** job-related discrimination, proceeded on the assumption that no laws existed on the subject, the company's brief said.

The notion that Section 1981 already prohibited discrimination ***against*** ***aliens*** "is an astonishing proposition," the brief said, "because Congress has legislated for more than a century without identifying or implementing any such national policy."

Mr. Duane argued in his brief that to interpret Section 1981 as not applying to discrimination ***against*** noncitizens, the ***Court*** would have to ignore the law's literal language, which guarantees to all the rights enjoyed by "white citizens."

In 1987, the United States ***Court*** of Appeals for the Fifth Circuit, in New Orleans, ruled that Section 1981 did not apply to ***aliens***; the ***Supreme*** ***Court*** considered that decision but ultimately did not review it.

Also today, the ***Court*** heard arguments in a Federal criminal ***case*** that raises the question of whether the Government has jurisdiction under the racketeering law to prosecute a crime involving a single small company with operations essentially confined to one state.

Last year the United States ***Court*** of Appeals for the Ninth Circuit, in San Francisco, overturned the racketeering conviction of a former Federal prosecutor who used the proceeds of narcotics dealing to finance the operation of a gold mine in Alaska.

The Racketeer Influence and Corrupt Organizations Act, the Federal law usually known as RICO, makes it a crime to invest income from racketeering activity in "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." The Ninth Circuit ruled in this ***case*** that the Government had failed to prove that the gold mine had more than an "incidental" effect on interstate commerce.

The ruling was startling because since the New Deal, the Federal ***courts*** have placed few if any constraints on the authority of Congress to regulate and define interstate commerce. In its appeal of that 1994 ruling, U.S. v. Robertson, No. 94-251, the Government is urging the ***Court*** to rule that any "perceptible and identifiable" impact on interstate commerce is sufficient to provide jurisdiction.

In this ***case***, the gold mine used supplies from outside Alaska and its owner, the defendant, traveled in and out of the state, Miguel A. Estrada, an Assistant Solicitor General, told the ***Court***.

Justice Sandra Day O'Connor asked, "Is there any business enterprise in America that wouldn't be covered" by the commerce power?

"As a practical matter, I cannot think of any business in America that wouldn't be covered," Mr. Estrada replied. He added that "in our economy in this day and age, I can't think of anything that is likely to happen in the real world" that would not have implications for interstate commerce.

The Justices appeared essentially to agree with the Government's lawyer, although one member of the ***Court***, Justice Antonin Scalia, said in frustration at one point, "If that's what we've said, maybe we should unsay it."

Later, addressing Glenn S. Warren, the defendant's lawyer, Justice Scalia did not appear to hold out much hope that the mountain of precedent arrayed ***against*** him was about to tumble down. "You don't have a single ***case*** in

which 'affecting commerce' has been interpreted by this ***Court*** as you wish us to interpret it here," Justice Scalia told Mr. Warren in a disappointed tone.

But a second interstate commerce ***case*** the ***Court*** is considering during this term may present more problems for the Government. In early November, the ***Court*** heard arguments in U.S. v. Lopez, No. 93-1260, which challenges the constitutionality of a 1990 law that made it a crime to possess a gun within 1,000 feet of a school. A Federal appeals ***court*** declared the law unconstitutional as going beyond the Government's authority to regulate interstate commerce. Today, nearly four months after the argument, that ***case*** is apparently still under active consideration, as several questions about it from the bench indicated.

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