



unlike every United States citizen, who has an entirely different set of procedures and rights.

Instead of arguing that they comply with 42 U.S.C. 1981(a), the Prosecution makes two excuses. First, they rely heavily on a 1991 Amendment to 42 U.S.C. 1981. As noted in the Defense Motion to Dismiss for Violation of Section 1981, at page 2, the Prosecution is foreclosed from relying on that 1991 Amendment because that Amendment simply *expanded* the scope of Civil Rights Protections. Before the Amendment, courts throughout the land, including *Bowers v. Campbell*, 505 F.2d 1155 (9<sup>th</sup> Cir. 1974) but also many others, had held that the statute applied to the federal government. *See, e.g., NAACP v. Levi*, 418 F. Supp. 1109, 1117 (D.D.C. 1976) (applying Sec. 1981 to federal government); *Kurylas v. U. S. Dep't of Agric.*, 373 F. Supp. 1072 (D.D.C. 1974) (same), *aff'd*, 514 F.2d 894 (D.C. Cir. 1975).

In 1989, the United States Supreme Court limited the ability of individuals to sue State Governments under Section 1981 in the Rehnquist Court decision *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989). Two years later, Congress enacted legislation to overrule that interpretation of the statute in the *Jett* case. That is what subsection (c), on which the prosecution relies, is about. But that section nowhere says what the prosecution wants it to say. Nowhere does it *exclude* protection from federal misconduct, and it is worth recalling that 1981 has always protected against it (and *Jett* said nothing to the contrary). The 1991 Act said not one word about *restricting* its reach to the federal government, it merely added state actors to the already existing protection against federal wrongdoing.

The sole intent of the 1991 Amendment was to expand the reach of Section 1981, not contract it. The Act of Congress in 1991 had four stated “purposes,” all to increase civil rights. *See* P.L. 102-166 (1991), Sec. 3(4) (purpose is to “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.”) Had restricting the reach of Section 1981 been on the agenda, one would have expected commentary somewhere about it. Senators Kennedy, Wellstone, and every other Democratic Senator save one (who abstained) voted for the 1991 Amendments. It strains credulity to argue that they were voting to restrict the application of Section 1981. [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=102&session=1&vote=00238](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=102&session=1&vote=00238). (The only five Senators to vote against the Amendments were Senators Helms, Coats, Smith, Symms, and Wallop.) The House of Representatives is no different. Representatives Rangel, Frank and 250 other Democrats voted for the Amendments. *See* <http://clerk.house.gov/evs/1991/roll386.xml>. For these reasons, [\*La Compania Ocho, Inc. v. U.S. Forest Service\*, 874 F. Supp. 1242, 1251 \(D.N.M. 1995\)](#), is the correct view of the law. While some courts have reached a different conclusion, those courts have known that *some other* federal civil rights statute would give the same protections against the federal government, unlike the case at hand.<sup>1</sup>

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<sup>1</sup> For example, *Williams v. Glickman*, 936 F. Supp. 1 (D.D.C. 1996) grounded its holding not only in the text of the statute, but also the fact that the plaintiffs there could use a different statute, Section 1982. *Williams*, 936 F. Supp. 5 & n.6 (“Especially in view of the fact that the plaintiffs may seek equitable relief here under [§ 1982](#), the Court does not conclude that the result reached by applying the statute's plain meaning is absurd.”). 42 U.S.C. 1982 gives property rights to “citizens” and is plainly not applicable here. The prosecution’s interpretation of Section 1981

*Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), merely confirm that Section 1981 requires purposeful discrimination. Neither of them concern with a situation whereby the very rights enumerated in Section 1981 are specifically and purposefully not provided to aliens. The meaning of the equal protection clause has absolutely no bearing on whether the statute has been infringed in this way. Section 1981 does not permit the government to make excuses: it does not say that the federal government can treat people unequally with respect to “like punishment, pains, penalties . . . and exactions of every kind” when they have a reason for doing so. Rather, its text and command are clear: discriminations in matters of fundamental justice are not the kind of thing that can be made by our Government. America learned this lesson after our horrific experience in the Civil War. This commission should not betray it.

If anything, the Prosecution has it backward: the clear conflict between the original words of Section 1981 and the Military Order highlight the Order’s equal protection problems.

5. Files attached. None.

6. Oral Argument. We strongly believe oral argument is necessary. Again see D18.

7. Legal Authority Cited.

a. 42 U.S.C § 1981(a)

b. *Bowers v. Campbell*, 505 F.2d 1155 (9<sup>th</sup> Cir. 1974)

c. *NAACP. v. Levi*, 418 F. Supp. 1109 (D.D.C. 1976)

d. *Kurylas v. U. S. Dep't of Agric.*, 373 F. Supp. 1072 (D.D.C. 1974) (same), *aff'd*, 514 F.2d 894 (D.C. Cir. 1975)

e. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989)

f. 1991 Amendment to 42 U.S.C. § 1981, P.L. 102-166 (1991)

g. [\*La Compania Ocho, Inc. v. U.S. Forest Service\*, 874 F. Supp. 1242 \(D.N.M. 1995\)](#)

h. *Grutter v. Bollinger*, 539 U.S. 306 (2003)

i. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982)

8. Witnesses. See D18.

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would thus force the 1991 Amendments to be read in a way entirely inconsistent with equity and with Congress’ stated intent.

9. Additional Information None.

NEAL KATYAL  
Civilian Defense Counsel