The Burger Court Opinion Writing Database

Douglas v. Seacoast Products, Inc.

431 U.S. 265 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 11, 1977

Re: 75-1255 - Douglas v. Seacoast Products

Dear Thurgood:

I join.

Regards,

WBB

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 14, 1977

RE: No. 75-1255 Douglas v. Seacoast Products, Inc.

Dear Thurgood:

I agree.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 10, 1977

No. 75-1255 - Massachusetts v. Westcott

Dear Thurgood,

For the reasons expressed at our Conference discussion, I should much prefer the first alternative route described in your memorandum of today.

Sincerely yours,

P. S.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 14, 1977

75-1255 - Douglas v. Seacoast Products

Dear Thurgood,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 21, 1977

Re: No. 75-1255 - Douglas v. Seacoast Products

Dear Thurgood,

I have joined your opinion for the Court and shall adhere to that position. I do, however, share the concerns expressed in Lewis' letter to you of April 18 and would feel much more comfortable if you were disposed "to make the relatively few changes" that those concerns would require.

Sincerely yours,

P.S.
1.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

(3) ✓

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 15, 1977

Re: No. 75-1255 - Douglas v. Seacoast Products

Dear Thurgood:

Please join me.

Sincerely,

Byron

Mr. Justice Marshall

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 10, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-1255, Massachusetts v. Westcott

In the course of drafting an opinion in Massachusetts v. Westcott, I asked the library to see if there were a quick way to ascertain through public records whether Westcott had a federal license for his vessel, The Suzanne. With apparent ease, it was discovered that the Merchant Vessel Documentation Division of the Coast Guard had such information readily available and that the vessel is, in fact, licensed for the mackerel fisheries. A license for the mackerel fisheries is the catch-all category that covers essentially all but cod and whale, 46 CFR §67.07-13, and thus presumably covers Mr. Westcott's fish, scup and fluke. It is the same license that appellees in the Virginia case hold (Douglas v. Seacoast Products, Inc.) and that will control that case. While I am aware of the fact that Potter suggested that we remand for a determination as to whether Westcott has a federal license and that the conference decided instead to go ahead and decide on the basis of the privileges and immunity clause, I, nevertheless, thought the conference should be aware of the fact that the information was more easily ascertained than was perhaps expected and that we now know that he does have the identical license.

As I see it, we have essentially two choices. We can take judicial notice of the fact that respondent is federally enrolled and licensed and then decide the case on the basis of the Virginia case which will hold that vessels with a federal license for fisheries cannot be precluded from fishing in State waters on the same basis as state residents. The new federal rules of evidence allow us to take judicial notice sua sponte of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201 (b) and (c). Since the fact of being enrolled and licensed is a matter of public record available for the asking, we should be able to take notice.

In view of the rule's provision that "a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed," Rule 201(e), I think that if we decide to take this route, we should allow the parties to file supplemental briefs addressed to the questi of the propriety of taking notice and perhaps to the import of the license. This latter issue, however, may not be necessary in view of the full briefing in the Virginia case.

The second route is to go ahead and decide the case on the basis of the privileges and immunities clause. I believe this to be a defensible route in view of the fact that that was the only defense raised by petitioner in the courts below and was the sole ground of decision in the Supreme Judicial Court, that the issue was fully briefed and argued, and that it was that issue on which we granted cert. I will be happy to write the case in this manner if a majority still believes this the better route.* Of course, the opinion will still have to reflect the fact that respondent has a licer

T.M.

* I am willing to write the opinion in either of these two ways.

P. 7, 9, 16, 19, 20

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1255

James E. Douglas, Jr., Commissioner, Virginia Marine Resources Commission, Appellant, *v.* Seacoast Products, Inc., et al.	On Appeal from the United States District Court for the Eastern District of Virginia.

[April —, 1977]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is the validity of two Virginia statutes which limit the right of nonresidents and aliens to catch fish in the territorial waters of the Commonwealth.

I

Persons or corporations wishing to fish commercially in Virginia must obtain licenses. Section 28.1–81.1 of the Virginia Code (§ 81.1),[1] enacted in 1975, limits the issuance of com-

[1] Section 28.1–81.1 provides:

"Licenses for taking of fish restricted to United States citizens.—(a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a ciitzen of the ship, or association unless each participant therein shall be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.

"(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of

STYLISTIC CHANGES THROUGHOUT.
2, 3, 4, 13, 14, 19

APR 19 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1255

James E. Douglas, Jr., Commissioner, Virginia Marine Resources Commission, Appellant, *v.* Seacoast Products, Inc., et al.	On Appeal from the United States District Court for the Eastern District of Virginia.

[April —, 1977]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 22, 1977

Re: No. 75-1255, Douglas v. Seacoast Products

Dear Lewis:

I appreciate the concerns expressed in your letter of the 18th, but I wonder if perhaps you are not overstating the problems.

The language on p. 17 is not intended to be "equal protection language" at all. The Commerce Clause also prohibits discrimination against, or complete exclusion of, interstate or federally licensed commerce, at least absent weighty justifications not shown here. In any event, it was, I believe, Byron's view at conference, and I think he was correct, that the federal license establishes a statutory equal treatment requirement. That is all that is intended by the references to discrimination and equality.

With respect to the description of the State's interest in its wildlife, again I thought I was accurately reflecting the view of the Conference that the issue is not one of "ownership" in the common law sense, but rather that we must view the problem in terms of the more modern concept of reasonable police power regulation. The only thing that is foreclosed by the opinion is the simplistic view that because a state "owns" its wildlife, it can do anything it wants with it, including regulating its commercial use in an unjustifiably unfair manner. We remain free, I think, in the Montana case --which involves recreational rather than commercial activity -- to consider all possible justifications for the license fee disparity.

With this explanation, I hope you can join the opinion.

Sincerely,

TM.

T. M.

Mr. Justice Powell

cc: The Conference

11, 17, 21

MAY 16 1977

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1255

James E. Douglas, Jr., Commissioner, Virginia Marine Resources Commission, Appellant, *v.* Seacoast Products, Inc., et al.	On Appeal from the United States District Court for the Eastern District of Virginia.

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"(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of

J.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

(2)

April 14, 1977

Re: No. 75-1255 - Douglas v. Seacoast Products, Inc.

Dear Thurgood:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 11, 1977

No. 75-1255 Massachusetts v. Westcott

Dear Thurgood:

My preference is for the first alternative outlined in your memo of February 10. I am not entirely sure I could accept the other alternative.

I commend your resourcefulness in obtaining the licensing information.

Sincerely,

Lewis

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 18, 1977

No. 75-1255 Douglas v. Seacoast Products

Dear Thurgood:

I would appreciate your adding at the end of your opinion for the Court that:

"Mr. Justice Powell concurs in the judgment of the Court."

Although I agree with substantially all of your opinion, there are some statements in it that seem to me to go beyond the Commerce Clause/preemption issue that is the basis for my vote to affirm.

We have granted certiorari in the Montana case challenging the right of a state to impose on nonresidents for the privilege of hunting and fishing a higher license fee than that imposed on residents. (No. 76-5528, Baldwin v. Fish & Game Commission of Montana).

Although I do not think your opinion in this case forecloses our freedom to view the Montana case on its own merits, some of the language as to the nature of a state's interest in its wild animals and fish causes me concern (e.g., text p. 19 and note 21). Also, some of the equal protection language (e.g., "blatantly discriminatory" - p. 17) seems unnecessary in a Commerce Clause case.

I believe you have or will have a Court. If, however, you run into difficulty in obtaining the requisite votes, I would join your otherwise fine opinion if a relatively few changes were made.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 22, 1977

No. 75-1255 Douglas v. Seacoast Products

Dear Thurgood:

Thank you for your letter.

While I certainly agree that recreational hunting and fishing is different from commercial, I still have a sense of uneasiness about the language in your opinion that I mentioned in my earlier letter.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 18, 1977

Re: No. 75-1255 Douglas v. Seacoast Products.

Dear Thurgood:

As you have a solid court, I have decided to join Bill Rehnquist's little opinion, in addition to concurring in the judgment. I find myself particularly in agreement with what Bill has written about the proprietary interest of a state in fish and game within its boundaries. Although your opinion does not negate such interest, some of the language goes well beyond what I would think necessary in this case.

As to the Submerged Lands Act, I do not have a strong view and would--if necessary--have joined your arguably correct position. On balance, however, I am inclined to agree with Bill that we need not construe the Act so broadly at this time.

Sincerely,

Lewis

Mr. Justice Marshall

LFP/tap

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 14, 1977

Re: No. 75-1255 - Douglas v. Seacoast Products

Dear Thurgood:

I anticipate writing at least a partial dissent in this case, and will try not to delay you too long with it. The dissent on the merits would extend to No. 75-1775, Massachusetts v. Wescott, also, but I had earlier advised you that in the event the Court divided evenly as to treating the latter case on the federal licensing issue alone, I would join your opinion on the authority of Douglas. I will still do that if it becomes necessary.

Sincerely,

Mr. Justice Marshall

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart

MAY 13 1977

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1255

James E. Douglas, Jr., Commissioner, Virginia Marine Resources Commission, Appellant, *v.* Seacoast Products, Inc., et al.	On Appeal from the United States District Court for the Eastern District of Virginia.

[May —, 1977]

MR. JUSTICE REHNQUIST, concurring in part and dissenting in part.

I concur in the judgment of the Court and join in all but Parts II, D, and III of its opinion. As the Court states, it appears that licenses issued to respondent's ships under the federal licensing statute, 46 U. S. C. § 263, confer upon their grantees an affirmative right to engage in fishing activities in the coastal waters of the United States on the same terms as any other fishermen. I also agree that the federal statute pre-empts similar state licensing legislation which would allow some to engage in the fishery while absolutely excluding any federal licensees. This, I believe, is as much as need be said to decide the case before us. Rather than stopping there, however, the Court embroiders upon this holding a patchwork of broader language whose purpose is almost as uncertain as its long-run effect.

This case has nothing to do with the Equal Protection Clause and the Court's statement that "[t]he challenged statutes . . . draw blatantly discriminatory lines among federal licensees" does not add anything to its pre-emption holding. *Ante*, at 17. I take it that the result in this case would be unchanged whether the state licensing legislation excluded one, some, or all of the ships federally licensed to fish, and regardless of the reason given by the State for going beyond regulation of the manner of fishing, to flatly deny licenses to some applicants.

— 1

Pp 1, 4

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

MAY 12 1977

No. 75–1255

James E. Douglas, Jr., Commissioner, Virginia Marine Resources Commission, Appellant, *v.* Seacoast Products, Inc., et al.	On Appeal from the United States District Court for the Eastern District of Virginia.

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I am inclined

The Court's treatment of the States' interests in their coastal fisheries appears to me to cut a somewhat broader swath than is justifiable in this context. True enough, the States do not "own" free-swimming creatures within their territorial limits in any conventional sense of that term, *Missouri* v. *Holland*, 252 U. S. 416, 434 (1920); *Pierson* v. *Post*, 3 Caines 175 (NY 1805). It is therefore no answer to an assertion of federal pre-emptive power that such action amounts to an unconstitutional appropriation of state prop-

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

3rd DRAFT

MAY 19 1977

SUPREME COURT OF THE UNITED STATES

No. 75-1255

James E. Douglas, Jr., Commissioner, Virginia Marine Resources Commission, Appellant, *v.* Seacoast Products, Inc., et al.	On Appeal from the United States District Court for the Eastern District of Virginia.

[May —, 1977]

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, concurring in part and dissenting in part.

I concur in the judgment of the Court and join in all but Parts II, D, and III of its opinion. As the Court states, it appears that licenses issued to respondent's ships under the federal licensing statute, 46 U. S. C. § 263, confer upon their grantees an affirmative right to engage in fishing activities in the coastal waters of the United States on the same terms as any other fishermen. I also agree that the federal statute pre-empts similar state licensing legislation which would allow some to engage in the fishery while absolutely excluding any federal licensees. This, I believe, is as much as need be said to decide the case before us. Rather than stopping there, however, the Court embroiders upon this holding a patchwork of broader language whose purpose is almost as uncertain as its long-run effect.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Also Rehnquist

May 13, 1977

Re: 75-1255 - Douglas v. Seacoast

Dear Thurgood:

Is there any possibility that you could use Bill Rehnquist's analysis as the basis for rejecting appellant's Submerged Lands Act argument? If you could do so, and perhaps make some minor changes in language (such as deleting the "blatantly discriminatory" sentence) on page 17, I should think the differences between the two opinions might well evaporate.

Perhaps it is presumptuous of me to make this suggestion at this late date, but if the two of you can agree I would be delighted to join a unanimous opinion. If that is not possible, I probably will join you anyway, perhaps with a sentence or two explaining the extent of my agreement with Bill.

Respectfully,

JPS

Mr. Justice Marshall

cc: Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 13, 1977

RE: 75-1255 Douglas v. Seacoast Products, Inc.

Dear Thurgood:

Please join me.

Respectfully,

John

Mr. Justice Marshall

Copies to the Conference