The Burger Court Opinion Writing Database

United States v. Weller

401 U.S. 254 (1971)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

February 8, 1971

Re: No. 77 - U. S. v. Weller

Dear Potter:

Please join me in your requiem opinion on the Criminal Appeals Act.

A decent respect for the departed alone warrants a signed opinion!

Regards,

WEB

WEB

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE HUGO L. BLACK

February 2, 1971

Dear Potter:

Re: No. 77 - United States v. Weller

I agree but am strongly of the opinion that the importance of this case would be better recognized if you could make your Per Curiam opinion a regular Court opinion.

Sincerely,

H. L. B.

Mr. Justice Stewart

cc: Members of the Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Justice Blackmun

1st DRAFT

2/1/71

SUPREME COURT OF THE UNITED STATES

No. 77.—October Term, 1970

United States, Appellant, *v.* Thomas William Weller.	On Appeal From the United States District Court for the Northern District of California.

[February —, 1971]

Mr. Justice Douglas, dissenting.

I believe that the appeal is properly here and I believe that *United States* v. *Mersky,* 361 U. S. 431, is a precedent that sustains my view and may not properly be distinguished as the Court undertakes to do.

In *Mersky* a statute governing the labeling of imported articles was involved. The Act made it mandatory to label articles of foreign origin with "the English name of the country of origin." It also said that the Secretary of the Treasury "may" determine the "words and phrases or abbreviations" which were acceptable "as indicating the country of origin." 19 U. S. C. § 1304 (a).

We held that the Act and the regulation were "so inextricably intertwined" that dismissal of the information "must be held to involve the construction of the statute." 361 U. S., at 438.

In the present case the Court concludes that the provision of the Selective Service Act in issue and the regulations are "far short" of being "inextricably intertwined." But with all respect the only section of the Act quoted is the penal provision defining the crime of refusing to be inducted. The relevant section is § 10 (b)(3), 50 U. S. C. § 460 (b)(3), which reads in relevant part:

> "Such local boards, or separate panels thereof each consisting of three or more members, shall,

p 3

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

Recirculated: 2-3

No. 77.—October Term, 1970

United States, Appellant, v. Thomas William Weller. } On Appeal From the United States District Court for the Northern District of California.

[February —, 1971]

Mr. Justice Douglas, dissenting.

I believe that the appeal is properly here and I believe that *United States* v. *Mersky*, 361 U. S. 431, is a precedent that sustains my view and may not properly be distinguished as the Court undertakes to do.

In *Mersky* a statute governing the labeling of imported articles was involved. The Act made it mandatory to label articles of foreign origin with "the English name of the country of origin." It also said that the Secretary of the Treasury "may" determine the "words and phrases or abbreviations" which were acceptable "as indicating the country of origin." 19 U. S. C. § 1304 (a).

We held that the Act and the regulation were "so inextricably intertwined" that dismissal of the information "must be held to involve the construction of the statute." 361 U. S., at 438.

In the present case the Court concludes that the provision of the Selective Service Act in issue and the regulations are "far short" of being "inextricably intertwined." But with all respect the only section of the Act quoted is the penal provision defining the crime of refusing to be inducted. The relevant section is § 10 (b)(3), 50 U. S. C. § 460 (b)(3), which reads in relevant part:

> "Such local boards, or separate panels thereof each consisting of three or more members, shall,

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

2/3/71

No. 77.—October Term, 1970

United States, Appellant, v. Thomas William Weller.	On Appeal From the United States District Court for the Northern District of California.

[February —, 1971]

Mr. Justice Douglas, dissenting.

I believe that the appeal is properly here and I believe that *United States* v. *Mersky*, 361 U. S. 431, is a precedent that sustains my view and may not properly be distinguished as the Court undertakes to do.

In *Mersky* a statute governing the labeling of imported articles was involved. The Act made it mandatory to label articles of foreign origin with "the English name of the country of origin." It also said that the Secretary of the Treasury "may" determine the "words and phrases or abbreviations" which were acceptable "as indicating the country of origin." 19 U. S. C. § 1304 (a).

We held that the Act and the regulation were "so inextricably intertwined" that dismissal of the information "must be held to involve the construction of the statute." 361 U. S., at 438.

In the present case the Court concludes that the provision of the Selective Service Act in issue and the regulations are "far short" of being "inextricably intertwined." But with all respect the only section of the Act quoted is the penal provision defining the crime of refusing to be inducted.[1] The more relevant section is

[1] As we noted only last Term in dealing with this same statute, "[a]s a matter of sound construction, however, 'statute upon which the indictment . . . is founded' should be read to include the entire statue, and not simply the penalty provisions." *United States* v. *Sisson*, 399 U. S. 267, 280 n. 9.

January 29, 1971

Re: No. 77 - United States v. Weller

Dear Potter:

I am glad to join your opinion but, like Bill Brennan, I feel that it should be an authored opinion, not a per curiam.

Sincerely,

J.M.H.

Mr. Justice Stewart

CC: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 29, 1971

RE: No. 77 - United States v. Weller

Dear Potter:

I am happy to join the above. But why should it be a Per Curiam? Even though it may be our last wrestle with the Criminal Appeals Act, its quality justifies recognition of its author.

Sincerely,

W. J. B. Jr.

Mr. Justice Stewart

cc: The Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: JAN 29 1971

No. 77.—OCTOBER TERM, 1970

Recirculated: _____

United States, Appellant, v. Thomas William Weller. } On Appeal From the United States District Court for the Northern District of California.

[February —, 1971]

PER CURIAM.

In this case we are called upon, perhaps for the last time, to construe the elusive provisions of the Criminal Appeals Act, 18 U. S. C. § 3731.[1] Somewhat ironically, the argument that we have no jurisdiction over this appeal is made by the appellant, the United States. The appellee, on the other hand, insists the case is properly here.

A grand jury in the United States District Court for the Northern District of California indicted the appellee

[1] The Omnibus Crime Control Act of 1970, § 14 (a), 84 Stat. 1890 (1971), amended the Criminal Appeals Act to read in pertinent part as follows:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

This Court's appellate jurisdiction of government appeals in federal criminal cases has thus been eliminated. Pending cases, however, are not affected, since subsection (b) of the amending section provides:

"The amendments made by this section shall not apply with respect to any criminal case begun in any district court before the effective date of this section."

The Omnibus Crime Control Act of 1970 took effect on January 2, 1971. The appellee in this case was indicted on January 15, 1969.

1,6

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. [illegible]

2nd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 77.—October Term, 1970

Recirculated FEB 1 1971

United States, Appellant, v. Thomas William Weller.	On Appeal From the United States District Court for the Northern District of California.

[February —, 1971]

Mr. Justice Stewart delivered the opinion of the Court.

In this case we are called upon once again to construe the elusive provisions of the Criminal Apppeals Act, 18 U. S. C. § 3731.[1] Somewhat ironically, the argument that we have no jurisdiction over this appeal is made by

[1] The end of our problems with this Act is finally in sight. The Omnibus Crime Control Act of 1970, § 14 (a), 84 Stat. 1890 (1971), amended the Criminal Appeals Act to read in pertinent part as follows:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

This Court's appellate jurisdiction of government appeals in federal criminal cases has thus been eliminated. Pending cases, however, are not affected, since subsection (b) of the amending section provides:

"The amendments made by this section shall not apply with respect to any criminal case begun in any district court before the effective date of this section."

The Omnibus Crime Control Act of 1970 took effect on January 2, 1971. The appellee in this case was indicted on January 15, 1969.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. [illegible]

4th DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 77.—October Term, 1970

Recirculated: FEB 2 1971

United States, Appellant, v. Thomas William Weller.	On Appeal From the United States District Court for the Northern District of California.

[February —, 1971]

Mr. Justice Stewart delivered the opinion of the Court.

In this case we are called upon once again to construe the elusive provisions of the Criminal Apppeals Act, 18 U. S. C. § 3731.[1] Somewhat ironically, the argument that we have no jurisdiction over this appeal is made by

[1] The end of our problems with this Act is finally in sight. The Omnibus Crime Control Act of 1970, § 14 (a), 84 Stat. 1890 (1971), amended the Criminal Appeals Act to read in pertinent part as follows:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

This Court's appellate jurisdiction of government appeals in federal criminal cases has thus been eliminated. Pending cases, however, are not affected, since subsection (b) of the amending section provides:

"The amendments made by this section shall not apply with respect to any criminal case begun in any district court before the effective date of this section."

The Omnibus Crime Control Act of 1970 took effect on January 2, 1971. The appellee in this case was indicted on January 15, 1969.

January 28, 1971

Re: No. 77 - United States v. Weller

Dear Potter:

Please join me in your per curiam opinion in this case.

Sincerely,

B.R.W.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 18, 1971

Re: No. 77 - United States v. Weller

Dear Potter:

Please join me.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

February 3, 1971

Re: No. 77 - United States v. Weller

Dear Potter:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Stewart

cc: The Conference