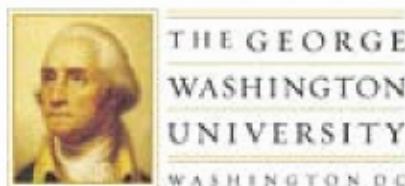


The Burger Court Opinion Writing Database

United States v. Topco Associates, Inc.
405 U.S. 596 (1972)

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



To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackman
Mr. Justice Powell
Mr. Justice Rehnquist

From: The ~~U.S. Supreme Court~~

Circulated: FEB 23 1972

Recirculated: _____

No. 70 - 82 -- United States v. Topco Associates, Inc.

MR. CHIEF JUSTICE BURGER, dissenting.

This case does not involve restraints on interbrand competition or an allocation of markets by an association with monopoly or near-monopoly control of the sources of supply of one or more varieties of staple goods. Rather, we have here an agreement among several small grocery chains to join in a cooperative endeavor which, in my view, has an unquestionably lawful principal purpose; in pursuit of that purpose they have mutually agreed to certain minimal ancillary restraints which are fully reasonable in view of the principal purpose and which have never before today been held by this Court to be per se violations of the Sherman Act.

In joining in this cooperative endeavor, these small chains did not agree to the restraints here at issue in order to make it possible for them to exploit an already established line of products through non-competitive pricing. There was no such thing as a Topco line of products until this

November 19, 1971

Dear Chief:

You asked me to assign No. 70-82 -
United States v. Topeo.

I am inclined to assign it to Thurgood but he's away this weekend. I'll talk with him when he returns and see what his wishes are and let you know.

William O. Douglas

The Chief Justice

CC: Justice Marshall

Wm Douglas
Oct 11

November 20, 1971

MEMORANDUM TO MR. JUSTICE MARSHALL:

70-82

I wrote the Chief Justice on
yesterday, and sent you a copy of
the note, that I was going to ask
you on Monday to see if you want
to take TOPCO.

Another alternative would be
No. 70-13 - Dunn v. Blumstein,
which involves the Tennessee
durational residency requirement.

Monday will be time enough to
talk about this, and then perhaps
I can pass the word on to the Chief
Justice.

W. O. D.

Mr. Justice Marshall

Douglas Adams, Feb
20. 1971

November 22, 1971

Dear Chief:

I have talked with Thurgood Marshall and decided that No. 70-82 - United States v. Topco, and the Tennessee durational residency case - No. 70-13 - Dunn v. Blumstein should go to him.

I just have your note on the Ford Motor Co. case - No. 70-113, and if you like I can keep that for myself.

W. O. D.

The Chief Justice

70-113
Wm Dunn
Oct 7 1

5
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 3, 1971

Dear Thurgood:

In No. 70-82 - U. S. v. Topco -
please join me in your opinion.

W. O. D.

Carlo

Mr. Justice Marshall

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 9, 1971

Dear Thurgood:

I am glad you added footnote 9 in

Topco.

I am still with you.

W. O. D.

Mr. Justice Marshall

50 41
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 3, 1971

RE: No. 70-82 - United States v. Topco
Associates

Dear Thurgood:

I agree.

Sincerely,



Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 7, 1971

No. 70-82 - U.S. v. Topco Associates

Dear Thurgood,

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

Sincerely yours,

C. S.
✓

Mr. Justice Marshall

Copies to the Conference

P.S. -- I have a couple of ideas about
this opinion that I have taken the liberty
of asking my law clerk, Bill Jeffress,
to communicate to your law clerk.

3
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 3, 1971

Re: No. 70-82 - United States v.
Topco Associates Inc.

Dear Thurgood:

Please join me in your very
well done opinion in this case.

Sincerely,

Byron

Mr. Justice Marshall

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-82

United States, Appellant, } On Appeal from the United
v. } States District Court for
Topco Associates, Inc. } the Northern District of
Illinois.

[December —, 1971]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The United States brought this action for injunctive relief against Topco Associates, Inc.'s ("Topco") alleged violation of § 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1. Jurisdiction was grounded in § 4 of the Act, 15 U. S. C. § 4. Following a trial on the merits, the United States District Court for the Northern District of Illinois entered judgment for Topco, and the United States appealed directly to this Court pursuant to § 2 of the Expediting Act, 32 Stat. 823, as amended. 15 U. S. C. § 29. We noted probable jurisdiction, 402 U. S. 905 (1971), and we now reverse the judgment of the District Court.

I

Topco is a cooperative association of approximately 25 small and medium sized regional supermarket chains which operate stores in some 33 States.¹ Each of the member-chains operates independently; there is no pooling of earnings, profits, capital, management, or adver-

¹ Topco, which is referred to at times in this opinion as the "association," is actually composed of 23 chains of supermarket retailers and two retailer-owned cooperative wholesalers.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-82

United States, Appellant, } On Appeal from the United
v. } States District Court for
Topeco Associates, Inc. } the Northern District of
Illinois.

[December —, 1971]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The United States brought this action for injunctive relief against Topeco Associates, Inc.'s ("Topco") alleged violation of § 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1. Jurisdiction was grounded in § 4 of the Act, 15 U. S. C. § 4. Following a trial on the merits, the United States District Court for the Northern District of Illinois entered judgment for Topco, and the United States appealed directly to this Court pursuant to § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. We noted probable jurisdiction, 402 U. S. 905 (1971), and we now reverse the judgment of the District Court.

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¹ Topco, which is referred to at times in this opinion as the "association," is actually composed of 23 chains of supermarket retailers and two retailer-owned cooperative wholesalers.

PP. 13
AA

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-82

United States, Appellant, v. Topco Associates, Inc. } On Appeal from the United States District Court for the Northern District of Illinois.

[January —, 1972]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The United States brought this action for injunctive relief against Topco Associates, Inc.'s ("Topco") alleged violation of § 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1. Jurisdiction was grounded in § 4 of the Act, 15 U. S. C. § 4. Following a trial on the merits, the United States District Court for the Northern District of Illinois entered judgment for Topco, 319 F. Supp. 1031, and the United States appealed directly to this Court pursuant to § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. We noted probable jurisdiction, 402 U. S. 905 (1971), and we now reverse the judgment of the District Court.

I

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¹ Topco, which is referred to at times in this opinion as the "association," is actually composed of 23 chains of supermarket retailers and two retailer-owned cooperative wholesalers.

To: The
Mr. Justice Blackmun
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Harlan
Mr. Justice Marshall ✓
Mr. Justice Douglas
Mr. Justice Stewart

1st DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES. 12/20/71

No. 70-82

Recirculated:

United States. Appellant, } On Appeal from the United
v. } States District Court for
Topco Associates, Inc. } the Northern District of
Illinois.

[January —, 1972]

MR. JUSTICE BLACKMUN, concurring in the result.

The conclusion the Court reaches has its anomalous aspects for surely, as the District Court's findings make clear, today's decision in the Government's favor will tend to stultify Topco members' competition with the great and larger chains. The bigs, therefore, should find it easier to get bigger and, as a consequence, reality seems at odds with the public interest. The *per se* rule, however, is so firmly established by the Court's decided cases that, at this late date, I could not oppose it. Relief, if any is to be forthcoming, apparently must be by way of legislation.

For: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

No. 70-82

Recirculated: 2/25/72

United States, Appellant, } On Appeal from the United
v. } States District Court for
Topco Associates, Inc. } the Northern District of
Illinois.

[February —, 1972]

MR. JUSTICE BLACKMUN, concurring in the result.

The conclusion the Court reaches has its anomalous aspects for surely, as the District Court's findings make clear, today's decision in the Government's favor will tend to stultify Topco members' competition with the great and larger chains. The bigs, therefore, should find it easier to get bigger and, as a consequence, reality seems at odds with the public interest. The *per se* rule, however, now appears to be so firmly established by the Court that, at this late date, I could not oppose it. Relief, if any is to be forthcoming, apparently must be by way of legislation.