

The Burger Court Opinion Writing Database

Tidewater Oil Co. v. United States
409 U.S. 151 (1972)

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

November 8, 1972

Re: 71-366 - Tidewater Oil Co. v. U. S. & Phillips
Petroleum Co.

Dear Thurgood:

Please join me.

Regards,

WEB

Mr. Justice Marshall

Copies to the Conference

P. S. (TM only) That is a good "plug" on the direct appeal problem. --WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

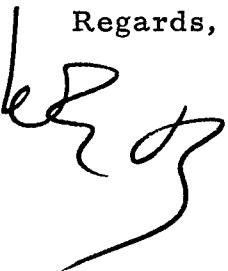
November 17, 1972

Re: No. 71-366 - Tidewater Oil Co. v. U. S.

Dear Thurgood:

Please note on your opinion that I join
Byron in his reservation.

Regards,



Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

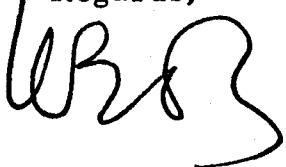
November 20, 1972

Re: No. 71-366 - Tidewater Oil Co. v. U. S.

MEMORANDUM TO THE CONFERENCE:

My note joining Byron White's reservation was a
"transposition" of the kind the Executive Branch calls
"administrative error."

It is withdrawn and I fully join in Thurgood's
opinion.

Regards,


4th DRAFT

SUPREME COURT OF THE UNITED STATES

Circulated: 11/14/72

No. 71-366

Recirculated:

Tidewater Oil Co., Petitioner, } On Writ of Certiorari
v. } to the United States
United States and Phillips } Court of Appeals for
Petroleum Company. } the Ninth Circuit.

[November —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

I agree with JUSTICE STEWART that under § 2 of the Expediting Act the appeal of the interlocutory order in this case was properly taken to the Court of Appeals. But I disagree with the intimations in both the majority and minority opinions that because of our over-work the antitrust cases should first be routed to the courts of appeals and only then brought here.¹

The case for our "overwork" is a myth. The total number of cases filed has increased from 1063 cases in the 1939 Term to 3643 in the 1971 Term. That increase has largely been in the *in forma pauperis* cases, 117 being filed in the 1939 Term and 1903 in the 1971 Term. But we grant or note very few cases. The signed opinions of the Court (which are only in argued cases) totaled 137 in the 1939 Term with six per curiams² or a total of 143 Court opinions, while in the 1971 Term we had 129 signed opinions of the Court and 20 per curiams³

¹ It is true that several Justices over the years have expressed the desire that the antitrust cases come to us only by certiorari to the court of appeals. So far as I am aware the only opinion speaking for the Court containing that suggestion is *United States v. Singer Mfg. Co.*, 374 U. S. 174. But there the idea was contained only in a footnote (*Id.*, at 175 n. 1); and as Chief Justice Hughes was wont to say, "Footnotes do not really count."

² Not including orders of dismissal or affirmance.

³ Including orders of dismissal or affirmance.

1, 3, 4

5th DRAFT

SUPREME COURT OF THE UNITED STATES

To: *cc*
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Douglas, J.

No. 71-366

Circulated:

Tidewater Oil Co., Petitioner. } On Writ of Certiorari
v. } to the United States
United States and Phillips } Court of Appeals for
Petroleum Company. } the Ninth Circuit.

Recirculated: NOV 17 1972

[November 20, 1972]

MR. JUSTICE DOUGLAS, dissenting.

I agree with JUSTICE STEWART that the appeal of the interlocutory order in this case to the Court of Appeals under § 1292 (b) of the Interlocutory Appeals Act was not barred by the Expediting Act. But I disagree with the intimations in both the majority and minority opinions that because of our overwork the antitrust cases should first be routed to the courts of appeals and only then brought here.¹

The case for our "overwork" is a myth. The total number of cases filed has increased from 1063 cases in the 1939 Term to 3643 in the 1971 Term. That increase has largely been in the *in forma pauperis* cases, 117 being filed in the 1939 Term and 1903 in the 1971 Term. But we grant or note very few cases. The signed opinions of the Court (which are only in argued cases) totaled 137 in the 1939 Term with six per curiams² or a total of 143 Court opinions, while in the 1971 Term we had 129 signed opinions of the Court and 20 per curiams³

¹ It is true that several Justices over the years have expressed the desire that the antitrust cases come to us only by certiorari to the court of appeals. So far as I am aware the only opinion speaking for the Court containing that suggestion is *United States v. Singer Mfg. Co.*, 374 U. S. 174. But there the idea was contained only in a footnote (*Id.*, at 175 n. 1); and as Chief Justice Hughes was wont to say, "Footnotes do not really count."

² Not including orders of dismissal or affirmance.

³ Including orders of dismissal or affirmance.

80
14
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

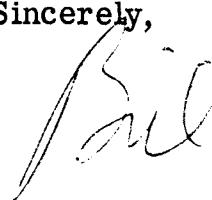
November 6, 1972

RE: No. 71-366 - Tidewater Oil v. United
States

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

November 3, 1972

MEMORANDUM TO THE CONFERENCE

Re: 71-366, Tidewater Oil v. United States

I shall in due course circulate a dissenting opinion
in this case.

P.S.
P.S.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Recirculated: NOV 3 1972

No. 71-366

Recirculated:

Tidewater Oil Co., Petitioner, } On Writ of Certiorari
v. } to the United States
United States and Phillips } Court of Appeals for
Petroleum Company. } the Ninth Circuit.

[November —, 1972]

MR. JUSTICE STEWART, dissenting.

The Expediting Act, enacted in 1903, provides that in civil antitrust actions brought by the United States "an appeal from the *final judgment* in the District Court will lie only to the Supreme Court." (Emphasis added.) Section 1292 (b), enacted in 1958, provides that when a district court, "in making in a civil action an order not otherwise appealable under this section," shall appropriately certify the question involved, the Court of Appeals has discretionary jurisdiction to hear an *interlocutory* appeal from that order. Thus, the Expediting Act, by its terms, relates only to appeals from *final* judgments in a limited category of cases, while § 1292 (b) applies to appeals from certain *interlocutory* orders in *all* civil actions. The Expediting Act does not prohibit Court of Appeals jurisdiction under § 1292 (b), for the former applies only to final judgments, while the latter applies only to interlocutory orders. To find any inconsistency whatever between the two statutes thus requires rejection of the plain meaning of each of them—rejection, in short, of a most basic principle of statutory construction. As the Court of Appeals for the Seventh Circuit recognized in *Fisons Limited v. United States*, 458 F. 2d 1241, 1245 (1972), "the language of each [can] be given full effect without limiting the scope of the other."

5,6,7,9
B
To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 71-366

Recirculated: NOV 8 1972

Tidewater Oil Co., Petitioner, } On Writ of Certiorari
v. } to the United States
United States and Phillips } Court of Appeals for
Petroleum Company. } the Ninth Circuit.

[November —, 1972]

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The Expediting Act, enacted in 1903, provides that in civil antitrust actions brought by the United States "an appeal from the *final judgment* in the District Court will lie only to the Supreme Court." (Emphasis added.) Section 1292 (b), enacted in 1958, provides that when a district court, "in making in a civil action an order not otherwise appealable under this section," shall appropriately certify the question involved, the court of appeals has discretionary jurisdiction to hear an *interlocutory* appeal from that order. Thus, the Expediting Act, by its terms, relates only to appeals from *final* judgments in a limited category of cases, while § 1292 (b) applies to appeals from certain *interlocutory* orders in *all* civil actions. The Expediting Act does not prohibit court of appeals jurisdiction under § 1292 (b), for the former applies only to final judgments, while the latter applies only to interlocutory orders. To find any inconsistency whatever between the two statutes thus requires rejection of the plain meaning of each of them—rejection, in short, of a most basic principle of statutory construction. As the Court of Appeals for the Seventh Circuit recognized in *Fisons Limited v. United States*, 458 F. 2d 1241, 1245 (1972), "the language of each [can] be given full effect without limiting the scope of the other."

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 13, 1972

Re: No. 71-366 - Tidewater Oil Co. v. United States
and Phillips Petroleum Co.

Dear Thurgood:

Please place at the foot of your opinion in
this case the following:

Mr. Justice White joins the Court's
opinion except for the advisory to Congress
reflecting one view of the relative merits
of the Expediting Act.

Sincerely,

Byron

Mr. Justice Marshall

Copies to Conference

B

To: The Chief Justice
> Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: NOV 3 1972

No. 71-366

Recirculated: _____

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Tidewater Oil Co., Petitioner, | On Writ of Certiorari
v. | to the United States
United States and Phillips | Court of Appeals for
Petroleum Company. | the Ninth Circuit.

[November —, 1972]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

On July 13, 1966, the United States filed a civil antitrust suit against Phillips Petroleum Company ("Phillips") and petitioner Tidewater Oil Company ("Tidewater"). The complaint alleged that Phillips' acquisition of certain assets and operations of Tidewater violated § 7 of the Clayton Act, 15 U. S. C. § 18 (1970). The District Court denied the United States' motion for a temporary restraining order to prevent consummation of the acquisition,¹ and its subsequent motion for a preliminary injunction to require either rescission of the acquisition or maintenance by Phillips of the going concern value of the transferred assets and operations.

Petitioner continued as a party to the suit during some five years of pretrial discovery and preparation.² Then in April 1971, following the Government's announcement that it was ready for trial, petitioner moved to be dismissed as a party.³ The District Court denied the mo-

¹ Tidewater then transferred title to its Western Marketing and Manufacturing Division to Phillips.

² Tidewater merged with Getty Oil Company on September 30, 1967. It has never been contended that that merger altered Tidewater's legal status in this case.

³ In its motion to be dismissed, Tidewater contended "that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets by defendant Tidewater Oil Company to Phillips Petroleum Com-

WQ

Changes Turned Over

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-366

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Black
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Black
Mr. Justice Powell
Mr. Justice Rehnquist

From: Marshall, J

Circulated: _____

Recirculated: _____

Tidewater Oil Co., Petitioner, } On Writ of Certiorari
v. } to the United States
United States and Phillips } Court of Appeals for
Petroleum Company. } the Ninth Circuit.

[November —, 1972]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

On July 13, 1966, the United States filed a civil antitrust suit against Phillips Petroleum Company ("Phillips") and petitioner Tidewater Oil Company ("Tidewater"). The complaint alleged that Phillips' acquisition of certain assets and operations of Tidewater violated § 7 of the Clayton Act, 15 U. S. C. § 18 (1970). The District Court denied the United States' motion for a temporary restraining order to prevent consummation of the acquisition,¹ and its subsequent motion for a preliminary injunction to require either rescission of the acquisition or maintenance by Phillips of the going concern value of the transferred assets and operations.

Petitioner continued as a party to the suit during some five years of pretrial discovery and preparation.² Then in April 1971, following the Government's announcement that it was ready for trial, petitioner moved to be dismissed as a party.³ The District Court denied the mo-

¹ Tidewater then transferred title to its Western Marketing and Manufacturing Division to Phillips.

² Tidewater merged with Getty Oil Company on September 30, 1967. It has never been contended that that merger altered Tidewater's legal status in this case.

³ In its motion to be dismissed, Tidewater contended "that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets

PP. 13, 14, 21, 22, 23

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

From: Marshall, J. 1972

SUPREME COURT OF THE UNITED STATES

No. 71-366

Circulated:

Recirculated: NOV 10 1972

Tidewater Oil Co., Petitioner, } On Writ of Certiorari
v. } to the United States
United States and Phillips } Court of Appeals for
Petroleum Company. } the Ninth Circuit.

[November —, 1972]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

On July 13, 1966, the United States filed a civil antitrust suit against Phillips Petroleum Company (Phillips) and petitioner Tidewater Oil Company (Tidewater). The complaint alleged that Phillips' acquisition of certain assets and operations of Tidewater violated § 7 of the Clayton Act, 15 U. S. C. § 18 (1970). The District Court denied the United States' motion for a temporary restraining order to prevent consummation of the acquisition,¹ and its subsequent motion for a preliminary injunction to require either rescission of the acquisition or maintenance by Phillips of the going concern value of the transferred assets and operations.

Petitioner continued as a party to the suit during some five years of pretrial discovery and preparation.² Then in April 1971, following the Government's announcement that it was ready for trial, petitioner moved to be dismissed as a party.³ The District Court denied the mo-

¹ Tidewater then transferred title to its Western Marketing and Manufacturing Division to Phillips.

² Tidewater merged with Getty Oil Company on September 30, 1967. It has never been contended that that merger altered Tidewater's legal status in this case.

³ In its motion to be dismissed, Tidewater contended "that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets

HAB

10, 23

78^{1,2} The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

6th DRAFT

From: Marshall, J.

Circulated:

No. 71-366

Recirculated: NOV 16 1972

SUPREME COURT OF THE UNITED STATES

Tidewater Oil Co., Petitioner, } On Writ of Certiorari
v. } to the United States
United States and Phillips } Court of Appeals for
Petroleum Company. } the Ninth Circuit.

[November —, 1972]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

On July 13, 1966, the United States filed a civil antitrust suit against Phillips Petroleum Company (Phillips) and petitioner Tidewater Oil Company (Tidewater). The complaint alleged that Phillips' acquisition of certain assets and operations of Tidewater violated § 7 of the Clayton Act, 15 U. S. C. § 18 (1970). The District Court denied the United States' motion for a temporary restraining order to prevent consummation of the acquisition,¹ and its subsequent motion for a preliminary injunction to require either rescission of the acquisition or maintenance by Phillips of the going concern value of the transferred assets and operations.

Petitioner continued as a party to the suit during some five years of pretrial discovery and preparation.² Then in April 1971, following the Government's announcement that it was ready for trial, petitioner moved to be dismissed as a party.³ The District Court denied the mo-

¹ Tidewater then transferred title to its Western Marketing and Manufacturing Division to Phillips.

² Tidewater merged with Getty Oil Company on September 30, 1967. It has never been contended that that merger altered Tidewater's legal status in this case.

³ In its motion to be dismissed, Tidewater contended "that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 6, 1972

Re: No. 71-366 - Tidewater Oil Co. v. U.S., et al.

Dear Thurgood:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 7, 1972

Re: No. 71-366 Tidewater Oil Co.,
v. United States and Phillips
Petroleum Company

Dear Thurgood:

Please join me.

Sincerely,

Lewis

Mr. Justice Marshall

cc: The Conference

LFP, Jr.:pls

14
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 6, 1972

Re: No. 71-366 - Tidewater Oil Co. v. U.S. and Phillips

Dear Potter:

Please join me in your dissent.

Sincerely,

W
N

Mr. Justice Stewart

Copies to Conference