The Burger Court Opinion Writing Database

Fri v. Sierra Club

412 U.S. 541 (1973)

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

June 5, 1973

Re: No. 72-804 - Ruckelshaus, et al v. Seirra Club, et al

Dear Potter:

Please join me.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

April 12, 1973

Dear Chief:

In 72-804, RUCKELSHAUS v. SIERRA CLUB I join Byron in a desire to grant the amicus brief of Michigan.

William O. Douglas

The Chief Justice

cc: The Conference

B

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 4, 1973

404

Memo to Conference:

I will shortly circulate a dissent in 72-904, Ruckelshaus v. Sierra Club.

WOD

William O. Douglas

The Conference

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

1st DRAFT

From: Douglas, J.

Circulated: 6-5-73

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72-804

William D. Ruckelshaus, Administrator of the Environmental Protection Agency, Petitioner, *v.* Sierra Club et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

It is inconceivable to me that Congress in passing the Clean Air Act contemplated an administrative regime that would make possible the pollution of existing clean air basins. California,[1] for example, has 11 air basins drawn in compliance with the Act.[2] Two of them have substantially clean air quality, measured by five major pollutants[3] for which primary and secondary ambient air quality standards have been promulgated. Two of these air basins have substantially clean air quality, *i. e.*, are well below the national secondary ambient air quality standard. Eight have one or more, but not all, major pollutants exceeding the national secondary ambient air quality standards. One—the area embracing Los Angeles—is fully polluted up to or exceeding the national secondary standards for all major air pollutants. Under the Court's decisions, the clean air basins may not be polluted with impunity up to the level of the secondary standards, that is to say, what the Court approves today

[1] The Attorney General of California has filed an *amicus* brief in support of the respondents.

[2] See 40 CFR § 81.159, § 81.167.

[3] Carbon monoxide, particulate matter, nitrogen oxide, sulfur dioxide, and hydrocarbon.

/ M

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Circulated: _____

No. 72-804

Recirculated: 6-6-73

William D. Ruckelshaus, Administrator of the Environmental Protection Agency, Petitioner, v. Sierra Club et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

It is inconceivable to me that Congress in passing the Clean Air Act contemplated an administrative regime that would make possible the pollution of existing clean air basins. California,[1] for example, has 11 air basins drawn in compliance with the Act.[2] Two of them have substantially clean air quality, measured by five major pollutants[3] for which primary and secondary ambient air quality standards have been promulgated. Two of these air basins have substantially clean air quality, *i. e.*, are well below the national secondary ambient air quality standard. Eight have one or more, but not all, major pollutants exceeding the national secondary ambient air quality standards. One—the area embracing Los Angeles—is fully polluted up to or exceeding the national secondary standards for all major air pollutants. Under the Court's decisions, the clean air basins may not be polluted with impunity up to the level of the secondary standards, that is to say, what the Court approves today

[1] The Attorney General of California has filed an *amicus* brief in support of the respondents.

[2] See 40 CFR § 81.159, § 81.167.

[3] Carbon monoxide, particulate matter, nitrogen oxide, sulfur dioxide, and hydrocarbon.

WJ

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

From: Douglas, J.

Circulated: _____

Recirculated: 6-7

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-804

William D. Ruckelshaus, Administrator of the Environmental Protection Agency, Petitioner, *v.* Sierra Club et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN concur, dissenting.

It is inconceivable to me that Congress in passing the Clean Air Act contemplated an administrative regime that would make possible the pollution of existing clean air basins. California,[1] for example, has 11 air basins drawn in compliance with the Act.[2] Two of them have substantially clean air quality, measured by five major pollutants[3] for which primary and secondary ambient air quality standards have been promulgated. Two of these air basins have substantially clean air quality, *i. e.*, are well below the national secondary ambient air quality standard. Eight have one or more, but not all, major pollutants exceeding the national secondary ambient air quality standards. One—the area embracing Los Angeles—is fully polluted up to or exceeding the national secondary standards for all major air pollutants. Under the Court's decision, the clean air basins may be polluted with impunity up to the level of the secondary

[1] The Attorney General of California has filed an *amicus* brief in support of the respondents.

[2] See 40 CFR § 81.159, § 81.167.

[3] Carbon monoxide, particulate matter, nitrogen oxide, sulfur dioxide, and hydrocarbon.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 6, 1973

RE: No. 72-804 Ruckelshaus v. Sierra Club

Dear Bill:

Please join me in your dissenting opinion in the above.

Sincerely,

Bill

Mr. Justice Douglas

cc: The Conference

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

1st DRAFT

From: Stewart, J.

Circulated: MAY 29 1973

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 72-804

William D. Ruckelshaus, Administrator of the Environmental Protection Agency, Petitioner, v. Sierra Club et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

In response to the problem of increased pollution of our atmosphere, Congress enacted the Clean Air Act of 1970, 42 U. S. C. § 1857 *et seq.* That Act directs the Administrator of the Environmental Protection Agency (EPA) to develop air quality criteria, and, on the basis of those criteria, to establish national primary and secondary ambient air quality standards. § 109 (a).[1] National primary standards are "ambient air quality standards [*i. e.*, levels of pollution in the air of a community] the attainment and maintenance of which in the judgment of the Administrator . . . are requisite to protect the public health." § 109 (b)(1).[2] A national secondary standard is "a level of air quality the attainment and maintenance of which in the judgment of the Administrator . . . is requisite to protect the public welfare from any known or anticipated ad-

[1] 42 U. S. C. § 1857c-4 (a).
[2] *Id.*, § 1857c-4 (b)(1).

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

CHAMBERS OF
JUSTICE POTTER STEWART

113-4

June 7, 1973

MEMORANDUM TO THE CONFERENCE

Re: No. 72-804 - Ruckelshaus v. Sierra Club

Since this second draft is so short, I thought I'd better make it a Per Curiam.

P.S.

P. S.

Attached to PS 6-7-1973

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

From: Stewart, J.

2nd DRAFT

Circulated:

Recirculated: JUN 7 197

SUPREME COURT OF THE UNITED STATES

No. 72–804

William D. Ruckelshaus, Administrator of the Environmental Protection Agency, Petitioner, v. Sierra Club et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June — 1973]

PER CURIAM

The judgment is affirmed by an equally divided Court.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

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. 72-804

Recirculated: JUN 7 1973

William D. Ruckelshaus, Administrator of the Environmental Protection Agency, Petitioner, *v.* Sierra Club et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1973]

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE POWELL took no part in the decision of this case.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 12, 1973

Re: No. 72-804 - Ruckelshaus v. Sierra Club

Dear Chief:

Would you please note for the public record that I would have granted the motion of the State of Michigan for special leave to present argument as amicus curiae in this case.

Sincerely,

Byron

The Chief Justice

Copies to Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 30, 1973

Re: No. 72-804 - Ruckelshaus v. Sierra Club

Dear Potter:

I am with you in your proposed opinion in this case.

Sincerely,

Byron

Mr. Justice Stewart

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 5, 1973

Re: No. 72-804 - Ruckelshaus v. Sierra Club

Dear Potter:

At conference, I voted to reverse the Court of Appeals in this case. Shortly thereafter, however, I indicated informally that I found the case a troubling one and had not yet come firmly to rest. I now find that I cannot join your opinion. In my judgment, the statement in section 101(b)(1) of the Act of a purpose "to protect and enhance the quality of the Nation'a air resources" is at least sufficient to create an ambiguity as to whether the Act was intended to authorize the degradation of those resources. When one looks at the legislative history to resolve this ambiguity, it becomes clear that Congress did not intend to permit states with "clean" air to submit plans providing for the deterioration of air quality up to the secondary standards. Although your opinion is a persuasive one, and the issue is certainly not free from doubt, I conclude that I would affirm the Court of Appeals.

Sincerely,

T.M.

Mr. Justice Stewart

cc: Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 6, 1973

Re: No. 72-804 - Ruckelshaus, Administrator
v. Sierra Club

Dear Bill:

If you could see your way clear to omit footnote 5 on page 2 of your dissent circulated June 5, I join you. I make this request because I did not join Hugo's dissent in San Antonio Conservation Society v. Texas Highway Department, 400 U.S. 968 (1970).

Sincerely,

H.A.B.

Mr. Justice Douglas

cc: The Conference

April 18, 1973

No. 72-804 Ruckelshaus v. Sierra Club

Dear Chief:

Not until last night did I go through the mass of briefs amici filed in the above case.

One is on behalf of the Edison Electric Institute which, according to its brief, is the national association of electric utilities. One of these is Virginia Electric and Power Company - a client of my former law firm. We may have had occasional employments from Edison Institute itself.

No - not a client

My firm is not on the brief, nor is Vepco, one of the numerous utilities which have joined in other amicus briefs. I am trying, however, to reach the responsible partner in my old firm to ascertain more clearly whether present clients are implicated.

I will sit for the argument and - with advice of the Conference and yourself - will decide whether I am free to participate in the decision.

Sincerely,

The Chief Justice

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 30, 1973

No. 72-804 Ruckelshaus v. Sierra Club

Dear Potter:

Please note on the next draft of your opinion that I took no part in the decision of this case.

Sincerely,

Lewis

Mr. Justice Stewart

cc: The Conference

lfp/ss

Dictated after talks with BCJ & Potter. But I decided not to send him. I may have acted unnecessarily to disqualify myself, but I doubt wisdom of reversing myself at this late date.

June 7, 1973

No. 72-804 Ruckelshaus v. Sierra Club

MEMORANDUM TO THE CONFERENCE:

The four to four vote in the above case is unsatisfactory to all concerned. It has prompted me - after discussions with several of you - to reexamine the reasons which impelled me to take no part in the decision. IFB

I restate the facts, in summary form, which I outlined to the Conference at the time I recused myself. My old firm has represented Virginia Electric and Power Company (Vepco) for many years (although I personally did no work for it). Prior to the argument in this case, I talked to George Gibson - the partner in charge of Vepco's work - and he then thought that Vepco had no interest in the case. It is a member of Edison Electric Institute, a trade organization which filed a brief amicus, and which includes among its membership most of the major electric utilities in the country. I did not think membership in a trade association was a disqualifying factor. Accordingly, on the basis of the situation as I then knew it, I sat for the oral arguments and had previously read the briefs.

The day before our Conference, George Gibson called me to say that he had looked into the matter further with the following results: Vepco has a fosil fuel plant under construction in West Virginia, to be completed this summer. It has major additions to coal burning plants at Yorktown and Possum Point, Virginia. Vepco's engineers have designed the new plant, and the additions, with anti-pollution devices which they believe will avoid a pollution problem. As George Gibson put it to me, they do not expect any increase in the pollution level in the areas in which the plants are being built or enlarged. But these are expressions of opinion rather than established fact. All planned additional generating facilities of Vepco, extending through 1880, will be atomic, involving no air pollution problem.

In any event Vepco did not file a brief amicus in this case, and of course is not a party.

On the above facts, and on balance, I nevertheless thought that the safest course would be for me to recuse myself. On further reflection, I am troubled by the implications of the basis of my decision. It is probable that we will have other environmental cases here, perhaps a number of them. I suppose that many businesses, represented by my former firm and perhaps by the firms with which other members of the Court were associated, could be affected in varying degrees by any decision of this Court relating to environmental standards, the interpretation of environmental legislation and the like. My impression is that members of the Court considered this type of possible adverse effect on a former client too remote and speculative to justify recusal.

I hesitate to reexamine my own position with respect to a case after the vote is in, especially where my participation would be decisive. In view, however, of the undesirability of affirmance by an evenly divided Court, I thought it best to reopen this issue with the Conference and obtain the benefit of your advice. Before you give it, a fair disclosure would require me to say that I would join Potter if I do participate.

L. F. P., Jr.

ss