The Burger Court Opinion Writing Database

Renegotiation Board v. Bannercraft Clothing Co.

415 U.S. 1 (1974)

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

October 18, 1973

Re: No. 72-822 - Renegotation Board v. Bannercraft

Dear Lewis:

I see no reason for you to be out of the above case on the facts in your memorandum of October 17.

Cordially,

WEB

Mr. Justice Powell

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

CHAMBERS OF
THE CHIEF JUSTICE

January 22, 1974

Personal

Re: No. 72-822 - Renegotiation Board v. Bannercraft Clothing Company, Inc.

Dear Harry:

I am in general agreement with your opinion. The only reservation is whether it is necessary to say that the District Court has no equitable jurisdiction to intervene here; it might do so where equitable remedy might be proper. Congress has provided pretty open access.

I am not sending this to the Conference because I do not want to "stir the horses." I'll reexamine the situation when I get back and it may be clarified by then.

Regards,

WEB

Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

February 13, 1974

Personal

Re: No. 72-822 - Renegotiation Board v. Bannercraft Clothing Co., et al

Dear Harry:

I am fully in accord with your excellent opinion in the above and I am baffled by Lewis' position.

Page 23 draws this suggestion for your consideration: The first full paragraph beginning with line three would be clearer to me if it read (my suggested inserts are underlined):

> 'vastness of defense expenditure overcharging and misappropriation of public funds by unscrupulous contractors and those fortuitously placed to perform needed work, was almost inevitable."

Maybe this is not crucial but the word 'misappropriation" standing alone does not seem quite to fit the gouging tactics of our business friends who like to get a free ride on the government.

Regards,

Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

February 13, 1974

Re: No. 72-822 - Renegotiation Board v. Bannercraft Clothing Co., et al

Dear Harry:

Please join me.

Regards,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 10, 1974

MEMO TO THE CONFERENCE:

I will shortly circulate (I hope) a dissent in 72-822, The Renegotiation Board v. Bannercraft Co.

WILLIAM O. DOUGLAS

THE CONFERENCE

1st DRAFT

SUPREME COURT OF THE UNITED STATES

1-14

No. 72–822

The Renegotiation Board, Petitioner, *v.* Bannercraft Clothing Company, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

The Court reverses the Court of Appeals' saying that respondent-contractors had not exhausted their administrative remedies. At issue is whether data in possession of the Renegotiation Board and relevant to the controversy between respondents and that Board should be disclosed to respondents. That raises a question under the Fredom of Information Act. It is, I submit, clear that respondents had exhausted every known way to obtain that data through administrative channels. Nothing remained to be done at that level. The District Court is the inforcement arm of the Freedom of Information Act. Today's decision, however, says that court cannot act. Hence respondents are without remedy. The end result is to make FOIA a dead letter in this area. Hence my dissent.

The nature of the so-called administrative law aspects of the problems under the Renegotiation Act are quite unique. The aim, of course, is the elimination of excessive profits of contractors and subcontractors in the national defense program, 50 U. S. C. § 1211. Detailed financial information must be filed with the Renegotiation Board., *id.*, § 1215 (e)(1). In on the basis of that data the Board decides to proceed, it refers the case to

To : The Chief Justice

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72–822

The Renegotiation Board, Petitioner, *v.* Bannercraft Clothing Company, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

1-15

[January —, 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE POWELL concurs, dissenting.

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1, 9

To : The Chief Justice

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72–822

The Renegotiation Board, Petitioner, *v.* Bannercraft Clothing Company, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

1-22

[January —, 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART and MR. JUSTICE POWELL concur, dissenting.

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-822

The Renegotiation Board, Petitioner, *v.* Bannercraft Clothing Company, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL concur, dissenting.

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5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72–822

The Renegotiation Board, Petitioner, v. Bannercraft Clothing Company, Inc., et al. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

[January —, 1974]

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 11, 1974

RE: No. 72-822 Renegotiation Bd. v. Banner-Craft Clothing Co., Inc.

Dear Harry:

You have certainly cleared up all my doubts and I am happy to agree.

Sincerely,

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 18, 1974

Re: No. 72-822, Renegotiation Board v.
Bannercraft Clothing Company

Dear Bill,

Please add my name to your dissenting opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Douglas

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 10, 1974

Re: No. 72-822 - The Renegotiation Board v. Bannercraft Clothing Co., Inc.

Dear Harry:

I think you handled this case very well and I join your opinion.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 22, 1974

Re: No. 72-822 -- The Renegotiation Board v. Bannercraft Clothing Company, Inc., et al.

Dear Bill:

Please join me in your dissent in this case.

Sincerely,

T.M.

Mr. Justice Douglas

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquis

1st DRAFT

Mr. Justice Blackmun, J.

Circulated: 1/11/74

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72-822

The Renegotiation Board, Petitioner, v. Bannercraft Clothing Company, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1974]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

These consolidated cases raise the issue of the effect of the Freedom of Information Act (FOIA), 5 U. S. C. § 552, upon proceedings pending under the Renegotiation Act of 1951, 65 Stat. 7, as amended, 50 U. S. C. App. § 1211, *et seq.* In particular, they concern the jurisdiction of a federal district court to enjoin the renegotiation process until an FOIA claim is resolved.

I

The three respondents, Bannercraft Clothing Company, Inc., Astro Communication Laboratory, a division of Aiken Industries, Inc., and David P. Lilly Co., Inc., successor to Delaware Fastener Corporation, all possessed national defense contracts with a "Department" of the United States, as defined in § 103 (a) of the Renegotiation Act, 50 U. S. C. App. § 1213 (a). These agreements, therefore, under § 102 of that Act, 50 U. S. C. App. § 1212, were subject to renegotiation.

A. *Bannercraft.* In 1966 and 1967 this respondent manufactured uniforms at a plant in Philadelphia. Its

pp. 16, 18, 22, 23, 24

To: 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.

Circulated: _____

Recirculated: 1/17/74

SUPREME COURT OF THE UNITED STATES

No. 72-822

The Renegotiation Board, Petitioner, *v.* Bannercraft Clothing Company, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1974]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

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January 23, 1974

PERSONAL

Re: No. 72-822 - Renegotiation Board v.
Bannercraft Clothing Co., et al.

Dear Chief:

This is in response to your note of January 22 written as you were about to depart from Washington.

I had thought that the proposed opinion does not say that the District Court has no equitable jurisdiction. Pages 16-18, particularly, page 18. I try then to go on to state that in a renegotiation case the contractor must pursue its administrative remedy and, when it fails so to do, may not achieve what it wants by way of injunctive relief.

Your vote is now the decisive one. Thus far all votes have followed the tentative conclusions expressed at the conference.

Sincerely,

HAB

The Chief Justice

f.24

To: The Chief Justic
Mr. Justice Dougl.
Mr. Justice Brenna
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

From: Blackmun, J.

Circulated: _____

Recirculated: 1/31/74

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-822

The Renegotiation Board, Petitioner, v. Bannercraft Clothing Company, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January —, 1974]

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A. *Bannercraft.* In 1966 and 1967 this respondent manufactured uniforms at a plant in Philadelphia. Its

February 13, 1974

Re: No. 72-822 - Renegotiation Board v.
Bannercraft Clothing Co., et al.

Dear Chief:

Thank you for your letter of February 13. The changes you suggest for page 23 buttress what I was trying to say there. I shall be glad to make them. I am having the page rerun and shall recirculate it.

Sincerely,

HAB

The Chief Justice

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 13, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 72-822 - Renegotiation Board v. Bannercraft Clothing Co., Inc., et al.

With the Chief's joinder, there is now a Court to reverse. I have once again reviewed the opinion and propose a change in the first full paragraph on page 23.

This is the only change proposed. Rather than have the Print Shop rerun all 24 pages, it has rerun only pages 23 and 24. Only these are circulated. The others remain as in the copy circulated to you on January 31.

Harry

renegotiation process is afforded through the injunctive power specifically bestowed by 5 U. S. C. § 552 (a)(3).

The Renegotiation Act and its predecessors obviously emerged from congressional awareness that, with the vastness of defense expenditures, overcharging and misappropriation of public funds by unscrupulous contractors and those fortuitously placed to perform needed work was almost inevitable. The target of the legislation was excessive profit, not the fair and reasonable one. The latter was anticipated and accepted. The line between a reasonable profit and excessive profit is not always easily ascertained or brightly lit. But the ascertainment of excessive profits was a duty vested by the Congress in the Renegotiation Board in the first instance. The Board thus is the fulcrum of a process that enables the Government initially to consult a contractor, to make a contract with it, and then to have the contract subject to modification for excessive profits, whenever they materialize, without violation of the Due Process Clause of the Fifth Amendment. The disgorging of excessive profits is not by way of a tax, but the process is not unlike the imposition of a tax equivalent to the excessive profits. Congress' initial placing of the contractor-initiated final proceeding in the Tax Court is indicative of the relationship.

Of course there is uncertainty in the renegotiation process. And, of course, that uncertainty is lessened or eliminated if the contractor, like the poker player, is able to ascertain all the cards in the Board's hand. There is risk, also, when the contractor accepts the determination of excessive profits made at any level of the renegotiation process. These risks, however, are the same risks that are inherent in the negotiation and voluntary settlement of any dispute. The one who pays possibly might pay less if he resorts to the fact finder instead of making the settlement. But he might pay

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 19, 1974

Bannercraft
72-822

MEMORANDUM TO THE CONFERENCE

Re: No. 72-1503 - Sears, Roebuck & Co. v. NLRB

This is a hold for Bannercraft and should appear on a Supplemental List for February 22. Sears charged its union with unfair labor practices in violation of the NLRA. The General Counsel issued a complaint against the union. Sears requested of the Labor Board and of the General Counsel certain documents that are issued in Washington in significant cases to guide the Board's regional directors.

Sears rested its claim to the documents on its right, as a charging party, to participate in the Board's proceeding. When the request was refused, Sears filed an FOIA action in the District Court for the District of Columbia. It alleged that it could not meaningfully participate in the ULP charge without the requested information. The GC continued to refuse.

The District Court found that Sears would be irreparably injured by participating in the hearing without the memoranda. It enjoined the Board and the General Counsel from going forward until Sears had a reasonable time to inspect and analyze the information. The Board appealed from the injunction and moved for summary reversal.

A panel (Judges Leventhal and Wilkey) of the CA DC granted the Board's motion and remanded the case. 473 F.2d 91. It held that the District Court had jurisdiction to enjoin an agency proceeding pending resolution of an FOIA claim, citing Bannercraft. The presence of this jurisdiction, however, did not mean that the Board and the GC were entitled to the relief they were granted by the District Court. It is only in extraordinary circumstances that a court, in its discretion, may intervene to interrupt agency proceedings to dispose of a single, intermediate or collateral issue. Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41. A cogent showing of irreparable harm is an indispensable condition of such intervention.

The court went on to hold that in this case there was no cogent showing of how Sears would be irreparably harmed in its participation in the ULP charge without the memoranda. It was successful in getting the Board to issue a complaint. It does not contend the Board will not prosecute in good faith. Any benefits from the memoranda can be developed in the Board's proceedings. It may be that Sears will be held entitled to the documents under the FOIA, but that is a different problem from the kind of irreparable injury required to interrupt an administrative proceeding. If it later appears that there was significant adverse impact on Sears in the ULP charge proceedings, because it was denied timely disclosure, an appropriate remedy can be fashioned by the Board.

There is a footnote appended to the effect that a short time earlier the District Court had issued its final order in the underlying FOIA case, that it held for Sears on all points, and that an appeal from that decision was pending in the CA DC. 473 F. 2d, at 93 n. 4. (On appeal, the CA affirmed without opinion. 480 F. 2d 1195.)

It seems to me that in view of the result in Bannercraft, cert should be denied here. A possible alternative, of course, is to vacate and remand for reconsideration in the light of Bannercraft.

H.A.B.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 17, 1973

No. 72-822 Renegotiation Board v.
Bannercraft

MEMORANDUM TO THE CONFERENCE:

I did not discover until during the course of the argument that Sears Roebuck & Co. filed an amicus brief in this case on September 26. I had reviewed the principal briefs early in September.

Sears is listed in Martindale as a client of my former law firm. I personally did no work for it, but others in the firm occasionally tried damage suits or did other casual work.

Sears has a petition for cert pending in Sears v. NLRB, No. 72-15 which is one of the cases cited in the briefs of the parties in the above case. It involved the NLRB and not the Renegotiation Board.

I will welcome advice on Friday as to whether I should remain in this case.

L. F. P., Jr.

Lewis

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 15, 1974

No. 72-822 Renegotiation Board v. Bannercraft

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,

Lewis

Mr. Justice Douglas

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 14, 1974

Re: No. 72-822-Renegotiation Board v. Bannercraft

Dear Harry,

I was surprised and pleased to see how closely parallel my treatment of the injunctive issue in Sampson was to your treatment of it in this case. It may prove that all great minds run in the same track -- but in this case, yours is undoubtedly the greater, since you had sense enough to realize that the two would be dealing with the same subject matter, whereas I had completely overlooked it. I think your opinion is an excellent one. And, while I am at it, heartfelt thanks for the second anniversary note!

Sincerely,

Bill

Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 14, 1974

Re: No. 72-822 - Renegotiation Board v. Bannercraft

Dear Harry:

Please join me.

Sincerely,

WHR