

# The Burger Court Opinion Writing Database

*Gulf Oil Corp. v. Copp Paving Co.*  
419 U.S. 186 (1974)

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



✓  
Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
THE CHIEF JUSTICE

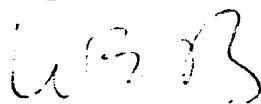
December 3, 1974

Re: 73-1012 - Gulf Oil Corporation v. Copp Paving Co.

Dear Lewis:

Please join me.

Regards,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

November 25, 1974

MEMORANDUM TO THE CONFERENCE:

In 73-1012, Gulf Oil Corporation v. Copp Company I will shortly circulate a dissent.

William O. Douglas

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

**SUPREME COURT OF THE UNITED STATES** *Franklin Douglas*

From: Douglas, J.

Circulated: 11-27

No. 73-1012

Recirculated:

Gulf Oil Corporation et al.,  
Petitioners,  
v.  
Copp Paving Company,  
Inc., et al.

On Petition for Writ of  
Certiorari to the United  
States Court of Appeals  
for the Ninth Circuit.

[December —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

I suppose it would be conceded that if one person or company acquired all the asphaltic concrete plants in the United States, there might well be a violation of § 2 of the Sherman Act which makes unlawful a monopoly of "any part of the trade or commerce among the several States." 15 U. S. C. § 2. Moreover, even though their sales were all intrastate, they would come within the ban of § 1 of the Sherman Act, if they substantially affected interstate commerce. For in the Sherman Act, we held, "Congress wanted to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements." *United States v. South-eastern Underwriters Assn.*, 322 U. S. 533, 558.

While the Clayton Act cut down on the Sherman Act when it came to the construction given it by courts dealing with labor problems,<sup>1</sup> and while it added to the scope of the Sherman Act by covering the aggregation of economic power through stock acquisitions,<sup>2</sup> there is not a word to suggest that when it defined the term "commerce" it desired to contract its scope.<sup>3</sup> The legislative

<sup>1</sup> See H. R. Rep. No. 627, 63d Cong., 2d Sess., pp. 14-16.

<sup>2</sup> *Id.*, at 17.

<sup>3</sup> The definition of "anti-trust laws" as used in the Clayton Act included the Sherman Act. H. R. Rep. No. 627, 63d Cong., 2d

1, 2, 3, 4 & 6

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.

No. 73-1012

Circulate:

Gulf Oil Corporation et al.,  
Petitioners,  
v.  
Copp Paving Company,  
Inc., et al.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Recirculate: 11-29

[December —, 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN joins, dissenting.

I suppose it would be conceded that if one person or company acquired all the asphaltic concrete plants in the United States, there might well be a violation of § 2 of the Sherman Act which makes unlawful a monopoly of "any part of the trade or commerce among the several States." 15 U. S. C. § 2. Moreover, even though their sales were all intrastate, they would come within the ban of § 1 of the Sherman Act, if they substantially affected interstate commerce. For in the Sherman Act, we held, "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . ." *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, 558 (1944).

While the Clayton Act modified the Sherman Act by restricting possible application of the antitrust laws to labor unions,<sup>1</sup> and by expanding the scope of those laws to cover the aggregation of economic power through stock acquisitions,<sup>2</sup> there is not a word to suggest that

<sup>1</sup> 15 U. S. C. § 17; see H. R. Rep. No. 627, 63d Cong., 2d Sess., pp. 14-16.

<sup>2</sup> 15 U. S. C. § 18; H. R. Rep. No. 627, *supra*, at 17. See also *United States v. Penn-Olin Chemical Co.*, 378 U. S. 158, 170-171 (1964); *United States v. E. I. du Pont de Nemours & Co.*, 353 U. S. 588, 597 (1957).

1 June 8

### 3rd DRAFT

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

**SUPREME COURT OF THE UNITED STATES**

From: D:\10\13\4.

No. 73-1012

Circulate: 12-10

Gulf Oil Corporation et al., Petitioners,  
v.  
Copp Paving Company, Inc., et al. } On Petition for Writ of  
Petitioners,  
v.  
Copp Paving Company, Inc., et al. } Certiorari to the United  
States Court of Appeals  
for the Ninth Circuit.

[December 1, 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN joins, dissenting.

I suppose it would be conceded that if one person or company acquired all the asphaltic concrete plants in the United States, there might well be a violation of § 2 of the Sherman Act which makes unlawful a monopoly of "any part of the trade or commerce among the several States." 15 U. S. C. § 2. Moreover, even though their sales were all intrastate, they would come within the ban of § 1 of the Sherman Act, if they substantially affected interstate commerce. For in the Sherman Act, we held, "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . ." *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, 558 (1944).

While the Clayton Act modified the Sherman Act by restricting possible application of the antitrust laws to labor unions,<sup>1</sup> and by expanding the scope of those laws to cover the aggregation of economic power through stock acquisitions,<sup>2</sup> there is not a word to suggest that

<sup>1</sup> 15 U. S. C. § 17. See H. R. Rep. No. 627, 63d Cong., 2d Sess., pp. 14-16; *United States v. Hutcheson*, 312 U. S. 219 (1941).

<sup>2</sup> 15 U. S. C. § 18; H. R. Rep. No. 627, *supra*, at 17. See also *United States v. Penn-Olin Chemical Co.*, 378 U. S. 158, 170-171 (1964); *United States v. E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 597 (1957).

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

November 27, 1974

RE: No. 73-1012 Gulf Oil Corporation v. Copp  
Paving Co.

Dear Bill:

Please join me in your dissenting opinion  
in the above.

Sincerely,



Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

December 6, 1974

73-1012, Gulf Oil v. Copp Paving

Dear Lewis,

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

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

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IN THE LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 5, 1974

Re: No. 73-1012 - Gulf Oil Corp. v. Copp Paving  
Co., Inc.

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to Conference

DEC 5 1974

## 1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 73-1012

Gulf Oil Corporation et al.,  
Petitioners,  
v.  
Copp Paving Company,  
Inc., et al. } On Petition for Writ of  
Certiorari to the United  
States Court of Appeals  
for the Ninth Circuit.

[December —, 1974]

MR. JUSTICE MARSHALL, concurring.

I join in the judgment and opinion of the Court, with one qualification. Part III B of the opinion correctly notes that we have no occasion today to pass upon the applicability of the Clayton Act to activities having a substantial effect on commerce although not "in commerce," since no such effects are present in this case. For the same reason, we ought not to characterize the construction offered by the United States as a "radical expansion of the Clayton Act's scope." As the Court itself says, "the situation is not so clear." Until the issue is properly presented by a case requiring its resolution, I would express no opinion on it.

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

## 1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

From: Mackman, J.

No. 73-1012

Circulated: 11/27/74

Recirculated: \_\_\_\_\_

Gulf Oil Corporation et al., Petitioners,  
v.  
Copp Paving Company, Inc., et al. } On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit.

[December —, 1974]

MR JUSTICE BLACKMUN.

I join the Court's judgment and opinion. I emphasize, however, that in this case the Court is not deciding whether the "effects on commerce" theory is or is not applicable in defining the scope of the Clayton Act. See *ante*, p. 17. As the Court points out, it would be inappropriate to reach that issue here, for there has been no showing of the necessary factual predicate of a substantial effect on interstate commerce. Consideration of the extent of Congress' exercise of its commerce power under these sections of the Clayton Act must await another case where the issue is properly presented.

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 5, 1974

Re: No. 73-1012 - Gulf Oil Corp. v. Copp Paving Co.

Dear Lewis:

I am still with you on your circulation of December 4. In fact, I shall now withdraw my concurring statement circulated November 27.

Sincerely,



Mr. Justice Powell

cc: The Conference

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

1st DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

Circulated: NOV 22 1974

No. 73-1012

Recirculated: \_\_\_\_\_

Gulf Oil Corporation et al., Petitioners v. Copp Paving Company, Inc., et al.	On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
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[November —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case concerns the jurisdictional requirements of § 2 (a) of the Robinson-Patman Act, 15 U. S. C. § 13, subd. (a), and of §§ 3 and 7 of the Clayton Act, 15 U. S. C. §§ 14 and 18. It presents the questions whether a firm engaged in entirely intrastate sales of asphaltic concrete, a product that can be marketed only locally, is a corporation "in commerce" within the meaning of each of these sections, and whether such sales are "in commerce" and "in the course of such commerce" within the meaning of §§ 2 (a) and 3 respectively. The Court of Appeals for the Ninth Circuit held these jurisdictional requirements satisfied, without more, by the fact that sales of asphaltic concrete are made for use in construction of interstate highways. 487 F. 2d 202. We reverse.

I

Asphaltic concrete is a product used to surface roads and highways. It is manufactured at "hot plants" by combining, at temperatures of approximately 375° F., about 5% liquid petroleum asphalt with about 95%

December 4, 1974

No. 73-1012 Gulf Oil v. Copp

Gentlemen:

I am circulating this afternoon a second draft of my opinion for the Court.

As the three of you have been good enough to join me, I send this word of explanation. Both Justices Stewart and White expressed reservations as to the extent of my reliance, in the first draft, on United States v. Yellow Cab Co. Although that case involved the Sherman Act, I had thought its exposition of the distinction between restraints "in commerce" and those that "affect commerce" was helpful.

However, there is merit to the view that we do not need to rely on a Sherman Act case where only the Clayton and Robinson-Patman Acts are involved. Accordingly, I have rewritten that portion (pp. 8-11) of the first draft.

The revisions do not change the basic analysis or the results. Unless I hear to the contrary, I will assume that your previous "joins" remain operative.

Sincerely,

The Chief Justice  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

lfp/ss

pp 3, 7-9, 10, 12, 13, 15, 16

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackman  
Mr. Justice Rehnquist

## 2nd DRAFT

From: Powell, J.

ITEM. 100

**SUPREME COURT OF THE UNITED STATES**

~~10000~~ Circulated:

No. 73-1012

Recirculated DEC 4 1974

Gulf Oil Corporation et al., Petitioners,  
v.  
Copp Paving Company, Inc., et al. } On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case concerns the jurisdictional requirements of § 2 (a) of the Robinson-Patman Act, 15 U. S. C. § 13, subd. (a), and of §§ 3 and 7 of the Clayton Act, 15 U. S. C. §§ 14 and 18. It presents the questions whether a firm engaged in entirely intrastate sales of asphaltic concrete, a product that can be marketed only locally, is a corporation "in commerce" within the meaning of each of these sections, and whether such sales are "in commerce" and "in the course of such commerce" within the meaning of §§ 2 (a) and 3 respectively. The Court of Appeals for the Ninth Circuit held these jurisdictional requirements satisfied, without more, by the fact that sales of asphaltic concrete are made for use in construction of interstate highways. 487 F. 2d 202. We reverse.

I

Asphaltic concrete is a product used to surface roads and highways. It is manufactured at "hot plants" by combining, at temperatures of approximately 375° F., about 5% liquid petroleum asphalt with about 95%

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 2, 1975

MEMORANDUM TO THE CONFERENCE:

Cases Held for  
No. 73-1012 Gulf Oil Corp. v. Copp Paving Co., Inc.

Two cases, one on direct appeal and one on cert, were held for the Copp Paving Co. case. My recommended dispositions are as follows:

No. 73-1689 United States v. American Building Maintenance Industries (App. from C.D. Cal.)

This is direct appeal from an order of the District Court for the Central District of California (Curtis) granting defendant's motion for summary judgment of dismissal for want of jurisdiction. The United States' complaint alleged that ABMI had violated Section 7 of the Clayton Act by acquiring the stock of J.E. Benton Management Corp. and by merging Benton Maintenance Co. into American Building Maintenance Co. of California. The district court held that, at the time the acquisition and merger were consummated, neither of the Benton companies was "engaged in commerce" within the meaning of Section 7.

ABMI, a California corporation, has 56 janitorial service branches serving 500 communities in the United

Oct 74. Wm. Doyle

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 27, 1974

Re: No. 73-1012 - Gulf Oil v. Copp Paving Co.

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 5, 1974

73-1012

Re: Gulf Oil Corp. v. Copp Paving Co.

Dear Lewis:

I guess I hadn't realized from our conversation the other day how substantial were the revisions which you contemplated in your opinion for the Court in this case. I was a little disappointed to see the downgrading of Yellow Cab and upgrading of Mandeville Island in your rewrite of pages 7-9, and also with the breadth of change in the treatment of the Clayton Act question on page 15.

I greatly doubt that I would want to write separately in this case, and will probably end up adhering to my join; I would, however, ask for a few days to think the matter over.

I sat with Whit Seymour and Bob Clare in judging the City Bar Ass'ns moot court last night in New York, and both asked specially to be remembered to you.

Sincerely,



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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 10, 1974

Re: No. 73-1012 - Gulf Oil v. Copp Paving

Dear Lewis:

I have overcome my momentary disenchantment with the concessions which I can see that you had to make in order to get a Court opinion, and will adhere to my previous "join".

Sincerely,

Wm

Mr. Justice Powell