

The Burger Court Opinion Writing Database

United States v. ITT Continental Baking Co.

420 U.S. 223 (1975)

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. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 12, 1975

Re: 73-1290 - U. S. v. ITT Continental Baking Co.

Dear Potter:

I agree with your view that the proposed majority holding will return to haunt the administration of consent decrees. Please show me as joining your dissent.

Regards,

LESB

Mr. Justice Stewart

Copies to the Conference

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U.S. SUPREME COURT

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 5, 1975

Dear Bill:

Please join me in your
opinion in 73-1290, UNITED STATES
v. ITT CONTINENTAL BAKING CO.

WILLIAM O. DOUGLAS

Mr. Justice Brennan

cc: The Conference

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REPRODUCED FROM THE COLLECTION

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U.S. DEPARTMENT OF JUSTICE

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1290

Reconsideration: 1/16/75

United States, Petitioner,
v.
ITT Continental Baking Company.

On Writ of certiorari to the
United States Court of Appeals
for the Tenth Circuit.

[January —, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this case is whether violations of the prohibition of a Federal Trade Commission (FTC) consent order against "acquiring" other companies were complete when the initial acts of acquisition were accomplished, and thus constituted single violations within the meaning of the applicable civil penalty statutes, 15 U. S. C. § 21 (1), 15 U. S. C. § 45 (1), or whether such violations constituted a "continuing failure or neglect to obey" within the meaning of those statutes, authorizing imposition of daily penalties. The United States District Court for the District of Colorado interpreted the consent order to proscribe only the initial act of acquisition and therefore held that only a single penalty might be imposed. 1972 CCH Trade Cases ¶ 73,993. The Court of Appeals for the Tenth Circuit affirmed the District Court to that extent, 485 F. 2d 16 (1973). A subsequent decision of the Court of Appeals for Eighth Circuit in in conflict, *United States v. Beatrice Foods Co.*, 493 F. 2d 1257 (1974), cert. pending No. 73-1798. In interpreting a consent order worded in its pertinent terms similarly to that in this case, the Court of Appeals for the Eighth Circuit held that acquisition is a continu-

Substantial organizational changes
Stylistic changes throughout
2 substantive additions, see
pgs. 7-8, 17.

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

3rd DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 73-1290

Recirculated: 2/6/75

United States, Petitioner,	}	On Writ of certiorari to the United States Court of Ap- peals for the Tenth Circuit.
v.		
ITT Continental Baking Company.		

[January —, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this case is whether violations of the prohibition of a Federal Trade Commission (FTC) consent order against "acquiring" other companies constituted single violations within the meaning of the applicable civil penalty statutes, 15 U. S. C. § 21 (l), 15 U. S. C. § 45 (l), or whether such violations constituted a "continuing failure or neglect to obey" within the meaning of those statutes, authorizing imposition of daily penalties. The United States District Court for the District of Colorado interpreted the consent order to proscribe only the initial act of acquisition and held that therefore only a single penalty might be imposed. 1972 CCH Trade Cases ¶ 73,993 (Aug. 2, 1971). The Court of Appeals for the Tenth Circuit affirmed the District Court to that extent, 485 F. 2d 16 (1973). A subsequent decision of the Court of Appeals for the Eighth Circuit is in conflict, *United States v. Beatrice Foods Co.*, 493 F. 2d 1257 (1974), cert. pending No. 73-1798. In interpreting a consent order worded in its pertinent terms similarly to that in this case, the Court of Appeals for the Eighth Circuit held that acquisition is a continuing offense until it is undone, noting that the construction of "acquiring"

See pgs. 2, 7, 8, 13

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

From: _____

Circulation: _____

Recirculated: 2/10/75

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1290

United States, Petitioner, }
v. } On Writ of certiorari to the
ITT Continental Baking } United States Court of Ap-
Company. } peals for the Tenth Circuit.

[January —, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this case is whether violations of the prohibition of a Federal Trade Commission (FTC) consent order against "acquiring" other companies constituted single violations within the meaning of the applicable civil penalty statutes, 15 U. S. C. § 21 (1), 15 U. S. C. § 45 (1), or whether such violations constituted a "continuing failure or neglect to obey" within the meaning of those statutes, authorizing imposition of daily penalties. The United States District Court for the District of Colorado interpreted the consent order to proscribe only the initial act of acquisition and held that therefore only a single penalty might be imposed. 1972 CCH Trade Cases ¶ 73,993 (Aug. 2, 1971). The Court of Appeals for the Tenth Circuit affirmed the District Court to that extent, 485 F. 2d 16 (1973). A subsequent decision of the Court of Appeals for the Eighth Circuit is in conflict, *United States v. Beatrice Foods Co.*, 493 F. 2d 1257 (1974), cert. pending No. 73-1798. In interpreting a consent order worded in its pertinent terms similarly to that in this case, the Court of Appeals for the Eighth Circuit held that acquisition is a continuing offense until it is undone, noting that the construction of "acquiring"

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 26, 1975

MEMORANDUM TO THE CONFERENCE

RE: No. 73-1798 Beatrice Foods Co. v. United States

This case was held for No. 73-1290 United States v. ITT Continental Baking, in which we reversed the holding of the Tenth Circuit that violation of the prohibition of an FTC consent order prohibiting the "acquiring" of competing bakeries was subject only to single and not to daily penalties. The Eighth Circuit in Beatrice construed the consent order, as we did, that is, that the violation of "acquiring" constituted a continuing violation subject to daily penalties. I shall therefore vote to deny.

W.J.B.Jr.

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 17, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 73-1290, U.S. v. ITT Continental Baking Co.

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

P.S.
P.S.

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SECTION OF ADVISORY

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

SUPREME COURT OF THE UNITED STATES

No. 73-1290

From: Stewart, J.

JAN 31 1975

Circulated: _____

United States, Petitioner,
v.
ITT Continental Baking
Company.

On Writ of certiorari to the
United States Court of Ap-
peals for the Tenth Circuit.

[February —, 1975]

MR. JUSTICE STEWART, dissenting.

The respondent Continental made corporate acquisitions in violation of a 1962 consent decree that, in pertinent part, prohibited Continental from "acquiring" described baking companies. The Government sought to impose daily penalties upon Continental for the continued holding of those assets. The Government's theory was that daily penalties were appropriate because Continental's retention of the assets was a "continuing failure or neglect to obey a final order," within the meaning of the relevant civil penalties statutes, 15 U. S. C. §§ 21 (1), 45 (1).¹ The issue in this case is whether the consent decree can be so construed.² The District Court and the Court of Appeals ruled that the consent decree prohibited only the distinct acts of "acquiring" the bakeries, not the "retaining" or the "holding" of the assets after acquisition. The Court of Appeals indicated that an order to divest would have been an appropriate remedy for the unlawful acquisitions, but held that the retention of the assets was not in itself a continuing refusal to obey the

¹ These provisions are set out in full in the Court's opinion, *ante*, at 4-5, nn. 5, 6.

² For the reasons stated by the Court, I agree that the other issues that the respondent seeks to raise in this case need not and should not be addressed.

✓
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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

Stewart, J.

3rd DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Recirculated: FEB 11 1975

No. 73-1290

United States, Petitioner, }
v. } On Writ of certiorari to the
ITT Continental Baking } United States Court of Ap-
Company. } peals for the Tenth Circuit.

[February —, 1975]

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL
and MR. JUSTICE REHNQUIST join, dissenting.

The respondent Continental made corporate acquisitions in violation of a 1962 consent decree that, in pertinent part, prohibited Continental from "acquiring" described baking companies. The Government sought to impose daily penalties upon Continental for the continued holding of those assets. The Government's theory was that daily penalties were appropriate because Continental's retention of the assets was a "continuing failure or neglect to obey a final order," within the meaning of the relevant civil penalties statutes, 15 U. S. C. §§ 21 (1), 45 (1).¹ The issue in this case is whether the consent decree can be so construed.² The District Court and the Court of Appeals ruled that the consent decree prohibited only the distinct acts of "acquiring" the bakeries, not the "retaining" or the "holding" of the assets after acquisition. The Court of Appeals indicated that an order to divest would have been an appropriate remedy for the unlawful acquisitions, but held that the retention of the assets was not in itself a continuing refusal to obey the

¹ These provisions are set out in full in the Court's opinion, *ante*, at 5 nn. 5, 6.

² For the reasons stated by the Court, I agree that the other issues that the respondent seeks to raise in this case need not and should not be addressed.

✓

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 20, 1975

Re: No. 73-1290 - U.S. v. ITT Continental Baking
Company

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Brennan

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U.S. DEPARTMENT OF JUSTICE

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 18, 1974

Re: No. 73-1290 -- United States v. ITT Continental
Baking Co.

Dear Chief:

Please change my vote on this one from Affirm to Reverse.

I have carefully reviewed this over the week-end and find that Lewis' convincing argument at the Conference was "too convincing". On reflection, I have returned to my original intention.

I am sorry to backslide but so be it.

Sincerely,

T.M.

T.M.

The Chief Justice

cc: The Conference

Wm Brennan
Oct 74

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 27, 1975

Re: No. 73-1290 -- United States v. ITT Continental
Baking Company

Dear Bill:

Please join me.

Sincerely,



T. M.

Mr. Justice Brennan

cc: The Conference

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U.S. SUPREME COURT ADVANCE COPY

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 12, 1975

Re: No. 73-1290 - United States v. ITT Continental Baking Co.

Dear Bill:

Please join me in your circulation of February 10.

Sincerely,

H. A. B.

Mr. Justice Brennan

cc: The Conference

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U.S. DEPT. OF JUSTICE

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 16, 1975

No. 73-1290 U.S. v. ITT Continental
Baking Company

Dear Bill:

As I was on the "short end" of the vote in the above case, I will await a dissent.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

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SSRBUNUC 30 000001 1 N

February 4, 1975

No. 73-1290 U.S. v. ITT Continental
Baking Co.

Dear Potter:

I will gladly join your dissent, and write this note only to make a suggestion. Your opinion focuses on the provisions of the consent decree, and properly relies upon United States v. Armour & Co. I am in accord with this.

In addition, and perhaps more fundamentally, I am not persuaded that the statutory language supports the Court's conclusion. Bill Brennan's opinion reads the statute as imposing a penalty for "a continuing offense". This is not the statutory language, which authorizes a penalty "in the case of a violation through continuing failure or neglect to obey a final order of the Commission".

I view the statutory language ("continuing failure or neglect to obey") as being narrower than the phrase "continuing offense". In view of the rule requiring a narrow construction with respect to penalties, I see no justification for departing from the literal language and adopting an expansive construction. I would read the statute as authorizing daily penalties only when the violator has refused to obey a specific order, e.g., a failure or refusal to obey a specific divestiture order.

If you prefer not to add something along the foregoing lines, I will probably write a brief concurrence in addition to joining your dissent.

Sincerely,

Mr. Justice Stewart

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 5, 1975

No. 73-1290 U.S. v. ITT Continental
Baking Co.

Dear Potter:

Please join me in your dissenting opinion.

Sincerely,

L. F. P.

Mr. Justice Stewart

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

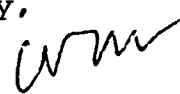
January 31, 1975

Re: No. 73-1290 - United States v. ITT Continental Baking

Dear Potter:

Please join me in your dissenting opinion.

Sincerely,



Mr. Justice Stewart

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U.S. SUPREME COURT