

# The Burger Court Opinion Writing Database

## *United States v. Bornstein*

423 U.S. 303 (1976)

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

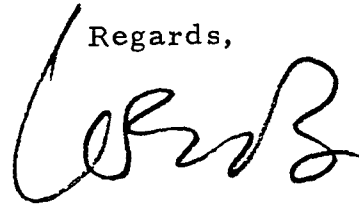
December 3, 1975

Re: 74-712 - U. S. v. Bornstein

Dear Potter:

I have some problems with this case as I  
did at Conference. I will await Bill Rehnquist's view  
since he may share my reservations as to Part II.

Regards,



Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

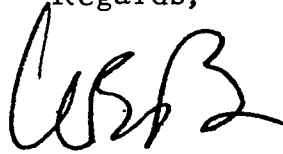
January 9, 1976

Re: 74-712 - United States v. Bornstein

Dear Bill:

I join your opinion dissenting in part.

Regards,



Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

December 1, 1975

RE: No. 74-712 United States v. Bornstein

Dear Potter:

I agree.

Sincerely,

Mr. Justice Stewart

cc: The Conference

NOV 25 1975

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-712

United States,	}	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.
Petitioner,		
v.		
Philip L. Bornstein et al.		

[December —, 1975]

MR. JUSTICE STEWART delivered the opinion of the Court.

The False Claims Act provides that the United States may recover from a person who presents a false claim or causes a false claim to be presented to it a forfeiture of \$2,000 plus an amount equal to double the amount of damage that it sustains by reason of the false claim.<sup>1</sup>

<sup>1</sup> The False Claims Act was adopted in 1863. Act of Mar. 2, 1863, c. 67, 12 Stat. 696. It was re-enacted as §§ 3490-3494, 5438 of the Revised Statutes. The Act is now codified in 31 U. S. C. §§ 231-234. The language used in Title 31 differs in some important respects from that contained in the Revised Statutes. Since Title 31 has not been enacted into positive law, the official text of the statute is that which appears in the Revised Statutes. See *United States v. Niefert-White Co.*, 390 U. S. 228, 228-229, n. 1; *United States ex rel. Marcus v. Hess*, 317 U. S. 537, 539-540 and n. 2.

The relevant statutory provisions are as follows:

Sec. 3490. "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together

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

Date: \_\_\_\_\_

Circulated: \_\_\_\_\_

Received: \_\_\_\_\_

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-712

United States, Petitioner, v, Philip L. Bornstein et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.
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[December —, 1975]

MR. JUSTICE STEWART delivered the opinion of the Court.

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 7, 1976

Re: No. 74-712 - United States v. Bornstein

Dear Bill:

Please add my name to your dissent in this  
case.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 28, 1975

Re: No. 74-712 -- United States v. Philip L. Bornstein

Dear Potter:

Please join me.

Sincerely,

*TM*

T. M.

Mr. Justice Stewart

cc: The Conference



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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 28, 1975

Re: No. 74-712 - U. S. v. Bornstein

Dear Potter:

I was hesitant before about the one issue, but I feel your opinion is a persuasive one and reaches a result that comports with the statutory aims. I therefore am glad to join.

Sincerely,

*Harry*

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 26, 1975

No. 74-712 United States v. Bornstein

Dear Potter:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Stewart

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 1, 1975

Re: No. 74-712 - United States v. Bornstein

Dear Potter:

I appreciate your efforts to accommodate my reservations about a part of your circulating opinion in this case; since we do not seem to be any closer together, I will shortly circulate an opinion concurring in part and dissenting in part.

Sincerely,

*W. H. R.*

Mr. Justice Stewart

Copies to 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 Stevens

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Mr. Justice Rehnquist

No. 74-712

Circulated: 12/24/75

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

United States,	}	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.
Petitioner,		
v.		
Philip L. Bornstein et al.		

[January —, 1976]

MR. JUSTICE REHNQUIST, dissenting in part.

The narrow construction of the False Claims Act adopted by the Court in Part II of the opinion, while not repugnant to the face of the statute itself, is by no means the only permissible construction of that language. Because that construction, as applied to the facts of this case, leads to an arbitrary result providing a windfall for those who would seek to defraud the Government, I would construe the statute somewhat differently than does the Court. Instead of concentrating in isolation on the "conduct of the person from whom the government seeks to collect the statutory forfeitures," as the Court does, I believe that the statute requires inquiry as to the relationship, in terms of proximate cause and foreseeability, between the conduct of such person and the number of false claims actually presented to the Government.

Section 3490 provides that any nonmilitary person "who shall do or commit any of the acts prohibited by any" of the provisions of § 5438 "shall forfeit and pay" \$2,000 to the United States. The "act" which is prohibited by the first clause of § 5438, at issue here, is the "mak[ing] or caus[ing] to be made, or present[ing] or caus[ing] to be presented, for payment . . . any claim . . .