

# The Burger Court Opinion Writing Database

## *United States v. Lovasco*

431 U.S. 783 (1977)

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

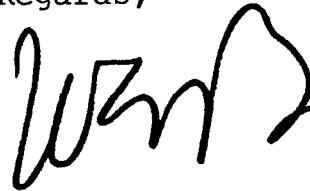
August 10, 1977

Re: No. 75-1844 United States v. Lovasco

Dear Thurgood:

Your proposed modification of the second paragraph of footnote 7 in the above case is fully acceptable to me.

Regards,



Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM.J. BRENNAN, JR.

Re: No. 75-1844, United States v. Lovasco

Mr. Justice Marshall:

Mr. Justice Brennan asked me to inform you that he is happy to go along with the revision of footnote 7 of the Lovasco opinion that you suggest. He agrees that your proposed rewritten footnote is preferable to simply deleting the second paragraph of the footnote as it is presently written.

*Steve Reiss*

W.J.B. by Steve Reiss

cc: Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

August 11, 1977

Re: No. 75-1844, United States v. Lovasco

Dear Thurgood,

My preference is to delete the second paragraph of footnote 7. I am content, however, to leave the ultimate decision to you.

Sincerely yours,

*P. S.*

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

August 8, 1977

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

Re: No. 75-1844, United States v. Lovasco

Dear Justice Marshall:

I favor rewriting the second paragraph of  
the disputed footnote in the manner you suggest.

Regards,



Byron R. White

BRW:mc

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

August 4, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-1844, United States v. Lovasco

I have received a letter from the Solicitor General questioning footnote 7 of my opinion for the Court in this case. The footnote reads as follows:

In addition to challenging the Court of Appeals' holding on the constitutional issue, the United States argues that the District Court should have deferred action on the motion to dismiss until after trial, at which time it could have assessed any prejudice to the respondent in light of the events at trial. This argument, however, was not raised in the District Court or in the Court of Appeals. Absent exceptional circumstances, we will not review it here. See, e.g., Durgan v. United States, 274 U.S. 195, 200 (1927); Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 330 (1967).

At oral argument, the Government suggested that its failure to raise the procedural question in its brief in the Court of Appeals should be excused because the proceedings in that court were "skewed" by the fact that the District Court had based its dismissal solely on Fed. Rule Crim. Proc. 48 (b), and because the issue was raised by the Government in its petition for rehearing. Tr., at 7-8, 51. Neither of these factual assertions is accurate. The opening paragraph of the argument in the Government's brief below recognized that the only issue before the court was a due process question, and the remainder of the brief treated that question on the merits. And even after the Court of Appeals issued its decision based squarely on the Due Process Clause, the Government did not even hint at the procedural issue in its petition for rehearing.

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The Solicitor General makes two points. First, he says that the Government had meant to say that the district court's reliance on Rule 48(b) had "skewed" the briefing of the substantive issue (i.e., when preindictment delay violates due process) but had not meant to suggest that the briefing of the procedural issue (i.e., the timing of action on the motion to dismiss) had been similarly affected. In the cited portions of the argument, however, the Assistant Solicitor General repeatedly referred in the plural to the "issues" that had not been briefed because of the district court's reliance on Rule 48(b). Moreover, the crucial point -- which the Solicitor General misses -- is that the district court's citation of Rule 48(b) did not "skew" proceedings on any issue. The Government's brief in the Court of Appeals did not, as the Government implies, focus on the applicability of Rule 48(b) to preindictment delay. The brief recognized in the very first paragraph that the Rule was inapplicable and that the only question before the court was the due process question; the remainder of the brief discussed only that question. Had I not requested the Clerk's office to obtain a copy of that brief from the Eighth Circuit, I could have been seriously misled by the Government's assertions.

The Solicitor General's second point is more meritorious. He points to a paragraph in the petition for rehearing in the Court of Appeals which does at least "hint" at the procedural issue. In context, it seems to me that the petition was arguing that Lovasco had failed to establish prejudice -- an argument relevant to the substantive issue whether the district court erred in dismissing the indictment. But the petition did suggest that prejudice can be established only after trial, and I overlooked that suggestion in preparing my opinion. To that extent, footnote 7 as presently written is inaccurate.

I see two options. First, we could eliminate entirely the second paragraph of the footnote to avoid further embarrassment to the lawyer in question. I do not think it is necessary to do so -- and certainly do not want to vindicate the lawyer -- but I would not oppose doing so as an act of beneficence. The alternative -- which I favor -- is to rewrite the paragraph to eliminate the inaccuracy and alter the tone. I propose the following:

At oral argument, the Government seemed to suggest that its failure to raise the procedural question in its brief in the Court of Appeals should be excused because the proceedings in that Court were "skewed" by the fact that the District Court had based its dismissal solely on Fed. Rule Crim. Proc. 48(b), and because the issue was raised by the Government in its petition for rehearing.

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the basis for the district court's dismissal could have "skewed" appellate proceedings regarding the procedural question, the fact is that the opening paragraph of the argument in the Government's brief below recognized that the only issue before the court was a due process question, and the remainder of the brief treated that question on the merits. And even after the Court of Appeals issued its decision based solely on the Due Process Clause, the Government's petition for rehearing did not squarely raise the procedural issue as an alternative ground for rehearing the case en banc.

I am attaching the Solicitor General's letter, the relevant portions of the transcript of oral argument, and the Government's petition for rehearing in the Court of Appeals for your consideration. Please let me know whether you favor deleting the paragraph or modifying it as proposed.

T. M.



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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

September 13, 1977

Re: No. 75-1844, United States v. Lovasco

Dear Mr. Putzel:

After consultation with my colleagues, I have decided to make a change in footnote 7 of the majority opinion in the above case. Please delete the current second paragraph of the footnote and insert in lieu thereof the following:

At oral argument, the Government seemed to suggest that its failure to raise the procedural question in its brief in the Court of Appeals should be excused because the proceedings in that Court were "skewed" by the fact that the District Court had based its dismissal solely on Fed. Rule Crim. Proc. 48(b), and because the issue was raised by the Government in its petition for rehearing. Tr., at 7-8, 51. But even assuming that the basis for the district court's dismissal could have "skewed" appellate proceedings regarding the procedural question, the fact is that the opening paragraph of the argument in the Government's brief below recognized that the only issue before the court was a due process question, and the remainder of the brief treated that question on the merits. And even after the Court of Appeals issued its decision based solely on the Due Process Clause, the Government's petition for rehearing did not squarely raise the procedural issue as an alternative ground for rehearing the case en banc.

Thank you.

Sincerely,

  
T.M.

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

August 22, 1977

Re: No. 75-1844 - United States v. Lovasco

Dear Thurgood:

My preference would be to delete the second paragraph of footnote 7. You, however, are closer to the case than I am, and I shall abide by your judgment in the matter.

Sincerely,



Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

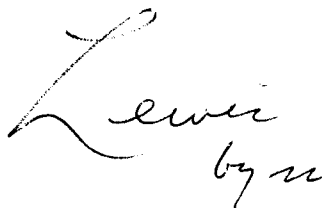
August 12, 1977

No. 75-1844 United States v. Lovasco

Dear Thurgood:

Either "option", as set forth in your letter of  
August 4, will be fine with me.

Sincerely,

A handwritten signature in cursive script, reading "Lewis F. Powell, Jr." with the initials "by m" written below the name.

Mr. Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

August 15, 1977

Re: No. 75-1844, U.S. v. Lovasco

Dear Thurgood:

I am happy to abide your preference as to which of the proposed changes outlined in your letter of August 4 should be adopted.

Sincerely,

WHR/cms

Mr. Justice Marshall

Copies to the Conference