The Burger Court Opinion Writing Database

National Boiler Marketing Association v. United States

436 U.S. 816 (1978)

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

May 9, 1978

Dear Harry:

Re: 77-117 National Broiler Marketing Assn. v. United States

I join.

Regards,

WEB

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 9, 1978

RE: No. 77-117 National Broiler Marketing Assn. v. United States

Dear Harry:

I am in full accord with your opinion except for the last paragraph of footnote 20. I had in mind a concurrence which would suggest that NBMA might not qualify for the exemption even if all of the members maintained breeder flocks and grow-out facilities. I have this in mind because I am not sure that I agree with the Government's contrary position expressed in its brief and at oral argument. The last paragraph of footnote 20 would seem to be inconsistent with that suggestion. Could you see your way clear to deleting it?

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 10, 1978

RE: No. 77-117 National Broiler Marketing Assn.
v. United States

Dear Harry:

I agree.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

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

From: Mr. Justice Brennan

Circulated: 6/5/78

Recirculated: _____

No. 77-117 NATIONAL BROILER MARKETING ASSOCIATION
v.
UNTIED STATES

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion that several of NBMA's members were not engaged in the production of agriculture as farmers, and that Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967), compels the holding that NBMA's activities challenged by the United States cannot be afforded the Sherman Act exemption NBMA asserts. Since that disposition settles this aspect of the suit between the parties, it is unnecessary for the Court to consider, and the Court reserves, the question of "the status under the Act of the fully integrated producer that not only maintains its breeder flock, hatchery, and grow-out facility, but also runs its own processing plant." Ante p. 11 n. 21. I write separately only to suggest some considerations which bear on this broader question. I do so because the rationale of the dissent necessarily carries over to that question.

I

The Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. § 291, like the Sherman Act which it modifies, was populist legislation which reacted to the increasing concentrations

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 6/9/78

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-117

National Broiler Marketing Association, Petitioner, *v.* United States. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1978]

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion that several of NBMA's members were not engaged in the production of agriculture as farmers, and that *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U. S. 384 (1967), compels the holding that NBMA's activities challenged by the United States cannot be afforded the Sherman Act exemption NBMA asserts. Since that disposition settles this aspect of the suit between the parties, it is unnecessary for the Court to consider, and the Court reserves, the question of "the status under the Act of the fully integrated producer that not only maintains its breeder flock, hatchery, and grow-out facility, but also runs its own processing plant." *Ante*, p. 11 n. 21. I write separately only to suggest some considerations which bear on this broader question. I do so because the rationale of the dissent necessarily carries over to that question.

I

The Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. § 291, like the Sherman Act which it modifies, was populist legislation which reacted to the increasing concentrations of economic power which followed on the heels of the industrial revolution. The Sherman Act was the first legislation to deal with the problems of participation of small economic units in an economy increasingly dominated by economic titans. Next enacted

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 9, 1978

Re: No. 77-117, National Broiler Marketing Assn. v. U. S.

Dear Harry,

I shall await the dissenting opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 25, 1978

No. 77-117, Nat'l Broiler Marketing Assn.
v. United States

Dear Byron,

Please add my name to your dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

J

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 10, 1978

Re: 77-117 - National Broiler Marketing Assn. v. United States

Dear Harry,

In due course, I shall circulate a dissent in this case.

Sincerely yours,

Byron

Mr. Justice Blackmun

Copies to the Conference

D R A F T

No. 77-117 — National Broiler Marketing Association v. United States

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 5-10-78

Recirculated: _____

MR. JUSTICE WHITE, dissenting.

The majority opinion fails to provide a functional definition of what it means to be a farmer within the sense of the Capper-Volstead Act. We are alternatively told that antitrust protection was not intended for "the full spectrum of the agricultural sector, but, instead . . . only those whose economic position rendered them comparatively helpless" (ante, at 10), and then that certain members of the National Broiler Marketing Association are not entitled to protection because they are not big enough to own their own breeder flock, hatchery, or grow-out facility (ante, at 11). The rule of the case evidently is that ownership of one of those facilities is somehow requisite in order to be a farmer. But no attempt is made to link that conclusion to the motivating factors behind an antitrust exemption for agriculture.

4, 5

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–117

National Broiler Marketing Association, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1978]

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, dissenting.

The majority opinion fails to provide a functional definition of what it means to be a farmer within the sense of the Capper-Volstead Act. We are alternatively told that antitrust protection was not intended for "the full spectrum of the agricultural sector, but, instead . . . only those whose economic position rendered them comparatively helpless" (*ante,* at 10), and then that certain members of the National Broiler Marketing Association are not entitled to protection because they are not big enough to own their own breeder flock, hatchery, or grow-out facility (*ante,* at 11). The rule of the case evidently is that ownership of one of those facilities is somehow requisite in order to be a farmer. But no attempt is made to link that conclusion to the motivating factors behind an antitrust exemption for agriculture.

Historically, perishability of produce forced the farmer to take whatever price he could obtain at the time of the harvest. This one factor, more than any other, underlay the legislative recognition that allowing farmers to combine in marketing cooperatives was necessary for the economic survival of agriculture. "[I]t is folly to suggest to the farmer with a carload of cattle on the market to 'take them home' or to 'haul

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 7, 1978

MEMORANDUM TO THE CONFERENCE

Re: 77-117 - National Broiler Marketing Assn. v. United States

I am adding the following additional footnote to my dissent in this case:

14/ The concurring opinion insists that the interpretation presented here "would permit the behemoths of agribusiness to form an exempt association . . . so long as these concerns are engaged in the production of agriculture." (Ante at 9.) If this is a fatal flaw, it is shared equally by the majority opinion, which conditions exempt status on ownership of a breeder flock, hatchery, or grow-out facility. (Ante at 11.) For all the majority opinion holds, antitrust exemption would apply to the NBMA if only it purged its membership of those integrators too small to own their own flock, hatchery, or grow-out facility.

In concluding that the possible extension of any antitrust exemption to large concerns was contrary to Congressional intent, the concurring opinion has overlooked several explicit references in the legislative history. These passages demonstrate the point impliedly recognized by the majority opinion and this dissent: that one necessary evil of the bill, accepted by its sponsors, was that just as producers could combine and become processors as well as producers, and yet retain their exemption, large food processors could, by becoming producers, fall within the protection of the Act for whatever they produced (and up to 50% of the product of others not even eligible for exemption. 7 U.S.C. § 291 [third proviso]). In light of

these explicit passages, the thrust of the concurring opinion's search of the legislative history is largely blunted.

> The Senator From Ohio [Mr. POMERENE] at the last session of the Senate inquired very pertinently whether that provision would not, for instance, permit Mr. Swift or Mr. Armour or Mr. Wilson, each of whom, I undertake to say, owns a farm and raises hogs, for instance, to organize under this proposed act and deal in the products of their own farms, and also to buy extensively from other producers. I think that that could be accomplished under the House bill. Recognizing that there is an evil there, and that the act might easily be abused, the Senate bill provides that such organizations cannot deal in products other than those produced by their members to an amount greater than the amount of the products which they get from their members. So that if the three gentlemen to whom I refer should organize an association under this proposed law, they could throw the product of their own farms into the association and could put just so much more into the business, but no more.

62 Cong. Rec. 2157 (1922)(Sen. Walsh).

> [W]e have not given the farmers the power to organize a complete monopoly. This amendment applies to every association, whether it is a monopoly or an attempt to create a monopoly or not, for it provides that any association must admit anyone who is qualified. If Mr. Armour should be a farmer he would have to be admitted; if a sugar manufacturer should happen to raise a little sugar he would have to be admitted.

62 Cong. Rec. 2268 (1922) (Sen. Kellogg).

B. R. W.

op 6. 9. 10

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

2nd DRAFT

Recirculated: 6-9-78

SUPREME COURT OF THE UNITED STATES

No. 77-117

National Broiler Marketing Association, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1978]

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, dissenting.

The majority opinion fails to provide a functional definition of what it means to be a farmer within the sense of the Capper-Volstead Act. We are alternatively told that antitrust protection was not intended for "the full spectrum of the agricultural sector, but, instead . . . only those whose economic position rendered them comparatively helpless" (*ante*, at 10), and then that certain members of the National Broiler Marketing Association are not entitled to protection because they are not big enough to own their own breeder flock, hatchery, or grow-out facility (*ante*, at 11). The rule of the case evidently is that ownership of one of those facilities is somehow requisite in order to be a farmer. But no attempt is made to link that conclusion to the motivating factors behind an antitrust exemption for agriculture.

Historically, perishability of produce forced the farmer to take whatever price he could obtain at the time of the harvest. This one factor, more than any other, underlay the legislative recognition that allowing farmers to combine in marketing cooperatives was necessary for the economic survival of agriculture. "[I]t is folly to suggest to the farmer with a carload of cattle on the market to 'take them home' or to 'haul

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 9, 1978

Re: No. 77-117 - National Broiler Marketing Asso. v. United States

Dear Harry:

Please join me.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 9, 1978

Re: No. 77-117 - National Broiler Marketing Asso.
v. United States

Dear Harry:

I am still with you.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

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

From: Mr. Justice Blackmun

Circulated: MAY 8 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–117

National Broiler Marketing Association, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Once again,[1] this time in an antitrust context, the Court is confronted with an issue concerning integrated poultry operations. Petitioner phrases the issue substantially as follows:

> "Is a producer of broiler chickens precluded from qualifying as a 'farmer,' within the meaning of the Capper-Volstead Act, when it employs an independent contractor to tend the chickens during the 'grow-out' phase from chick to mature chicken?" [2]

The issue apparently is of importance to the broiler industry and in the administration of the antitrust laws.[3]

---

[1] See *Bayside Enterprises, Inc.* v. *NLRB*, 429 U. S. 298 (1977).

[2] The Court of Appeals described the issue in this manner:

"We must decide whether broiler industry companies that neither own nor operate farms can be 'farmers' within the meaning of a 1922 federal statute called the Capper-Volstead Act, which gives farmers' cooperatives some measure of protection from the antitrust laws" (footnote omitted). 550 F. 2d 1380, 1381 (CA5 1977).

[3] Nineteen States have filed a brief *amicus curiae* and assert interests as antitrust litigants. See *In re Chicken Antitrust Litigation*, M. D. L. No. 237, ND Ga. No. C74–2454A. See also Brown, *United States* v. *National Broiler Marketing Association:* Will the Chicken Lickin' Stand?, 56 N. C. L. Rev. 29 (1978); Department of Agriculture, Farmer Cooperative Service, Legal Phases of Farmer Cooperatives (1976); Note, Trust Busting

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 9, 1978

Re: No. 77-117 - National Broiler Marketing Association
v. United States

Dear Bill:

Thank you for your letter of May 9. Although it may well be that we are not in entire agreement on a hypothetical case you suggest, that case is not before us. I am willing, nevertheless, to delete the last paragraph of footnote 20.

I am making some other changes in the opinion, so it may be well, before you vote, to await the second draft. The changes, I think, are minor and merely supportive ones.

Sincerely,

Harry

Mr. Justice Brennan

Brennan 077

pp. 4, 7, 10, 11

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: MAY 10 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–117

National Broiler Marketing Association, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Once again,[1] this time in an antitrust context, the Court is confronted with an issue concerning integrated poultry operations. Petitioner phrases the issue substantially as follows:

> "Is a producer of broiler chickens precluded from qualifying as a 'farmer,' within the meaning of the Capper-Volstead Act, when it employs an independent contractor to tend the chickens during the 'grow-out' phase from chick to mature chicken?"[2]

The issue apparently is of importance to the broiler industry and in the administration of the antitrust laws.[3]

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✓

p. 11

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: MAY 31 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–117

National Broiler Marketing Association, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Once again,[1] this time in an antitrust context, the Court is confronted with an issue concerning integrated poultry operations. Petitioner phrases the issue substantially as follows:

> "Is a producer of broiler chickens precluded from qualifying as a 'farmer,' within the meaning of the Capper-Volstead Act, when it employs an independent contractor to tend the chickens during the 'grow-out' phase from chick to mature chicken?" [2]

The issue apparently is of importance to the broiler industry and in the administration of the antitrust laws.[3]

[1] See *Bayside Enterprises, Inc.* v. *NLRB*, 429 U. S. 298 (1977).

[2] The Court of Appeals described the issue in this manner:

"We must decide whether broiler industry companies that neither own nor operate farms can be 'farmers' within the meaning of a 1922 federal statute called the Capper-Volstead Act, which gives farmers' cooperatives some measure of protection from the antitrust laws" (footnote omitted). 550 F. 2d 1380, 1381 (CA5 1977).

[3] Nineteen States have filed a brief *amicus curiae* and assert interests as antitrust litigants. See *In re Chicken Antitrust Litigation*, M. D. L. No. 237, ND Ga. No. C74–2454A. See also Brown, *United States* v. *National Broiler Marketing Association:* Will the Chicken Lickin' Stand?, 56 N. C. L. Rev. 29 (1978); Department of Agriculture, Farmer Cooperative Service, Legal Phases of Farmer Cooperatives (1976); Note, Trust Busting

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 9, 1978

I am still with you HAB

MEMORANDUM TO THE CONFERENCE:

Re: No. 77-117 - National Broiler Marketing Association v. United States

In response to Byron's additional footnote set forth in his memorandum of June 7, I am making two additions to the opinion. On page 11, following the second sentence in part IV, I am adding: "Their participation involves only the kind of investment that Congress clearly did not intend to protect.[21]" The second change is a revision of the old footnote 21 to make it read as set forth in the enclosure.

HAB.

21/ Because we conclude that these members have not made the kind of investment that would entitle them to the protection of the Act, we need not consider whether, even if they had, they would be ineligible for the protection of the Act because their economic position is such that they are not helplessly exposed to the risks about which Congress was concerned. Thus we need not consider here the status under the Act of the fully integrated producer that not only maintains its (own) breeder flock, hatchery, and grow-out facility, but also runs its own processing plant. Neither do we consider the status of the less fully integrated producer that, although maintaining a grow-out facility, also contracts with independent growers for a large portion of the broilers processed at its facility.

There is nothing in the record that would allow us to consider whether these integrators are "too small" to own their own breeder flocks, hatcheries, or grow-out facilities, or whether, because of the history of their economic development, they have concentrated only on the feed production and processing aspects of broiler production.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 10, 1978

No. 77-117 National Broiler v. United States

Dear Harry:

Please join me.

I would have no objection to Bill Brennan's suggestion.

Sincerely,

L. Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 30, 1978

Re: No. 77-117 - National Broiler Marketing Assoc. v. United States

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 2, 1978

Re: 77-117 - National Broiler Marketing Assn. v. United States

Dear Chief:

Although I still have some doubts about this case, I think I will come out in the affirm column instead of the reverse column.

Respectfully,

John

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 11, 1978

Re: 77-117 - National Broiler Marketing Assn. v. United States

Dear Harry:

Although I think I shall wait for the dissent before finally coming to rest, I presently expect to join your opinion.

Respectfully,

John

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 31, 1978

Re: 77-117 - National Broiler Marketing Assn. v. United States

Dear Harry:

Please join me.

Respectfully,

Mr. Justice Blackmun

Copies to the Conference