

# The Burger Court Opinion Writing Database

*Trans Alaska Pipeline Rate Cases*  
436 U.S. 631 (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

September 28, 1977

Re: A-280 - Exxon Pipeline Co. v. U.S.  
(77-457)  
A-278 - Mobil Alaska Pipeline Co. v. U.S.  
(77-452)

MEMORANDUM TO THE CONFERENCE:

Several Justices have indicated their desire for an expedited response in this case, and I join in the view that this is needed.

Therefore, I have directed the Clerk to request a response be provided by the close of business next Monday, October 3. In view of the circumstances, this will be done by telephone and confirmed by letter.

Regards,

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

CHAMBERS OF  
THE CHIEF JUSTICE

October 18, 1977

RE: 77-452 - Mobil Alaska Pipeline v. U.S. (A-278)  
77-457 - Exxon Pipeline v. U.S. (A-280)  
A-319 - BP Pipelines v. U.S.

Dear Bill:

The joint efforts of Byron, John and you are entirely  
satisfactory to me.

Regards,

WSB

Mr. Justice Rehnquist

Copies to the Conference

① Brannon 77

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

CHAMBERS OF  
THE CHIEF JUSTICE

October 19, 1977

MEMORANDUM TO THE CONFERENCE:

Re: (77-452) Mobile Alaska Pipeline Co. v. United States  
(77-457) Exxon Pipeline Co. v. United States  
(77-551) BP Pipelines, Inc. v. United States et al

I find we need to "gather" to issue the stays in the above case. Attached is proposed order for Conference action.

Please meet in the Conference Room at 11:00 a.m. tomorrow, Thursday, October 20, 1977. Lewis and Potter are out of the case, and Bill Rehnquist is out of Washington.

Regards,

WRB

Brennan 77

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

CHAMBERS OF  
THE CHIEF JUSTICE

October 26, 1977

Re: 77-452; 77-457; 77-551; A-278; A-280; A-319 -  
Mobil Alaska Pipeline Co., et al. v. United States

Dear Bill:

The failure of the parties to agree on a stay order does not disturb me as it apparently does you. We can draft our own order and the essence is relatively simple: to impound any income which may later be subject to valid claims.

I will try to collaborate on a proposed stay order and have it around by tomorrow.

Regards,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

November 11, 1977

Dear John:

Re: 77-452;457;551;602, etc. Mobil Alaska v. U.S.

I join your proposed order of November 9, 1977.

Regards,

WB

Mr. Justice Stevens

cc: The Conference

Brennan '77

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

CHAMBERS OF  
THE CHIEF JUSTICE

May 31, 1978

Re: 77-452; 457; 551; 602 - Mobil Alaska Pipeline v. U.S.

Dear Bill:

I join.

Regards,

WEB/m

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM.J. BRENNAN, JR.

October 18, 1977

RE: Nos. 77-452, 77-457 and A-319 (Mobil, etc.)

Dear Bill:

I agree with your proposed order in the above.

Sincerely,

*Bill*

Mr. Justice Rehnquist

cc: The Conference

• Brennan '77

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM.J. BRENNAN, JR.

October 26, 1977

MEMORANDUM TO THE CONFERENCE

RE: Nos. 77-452, 457, 551, A-278, A-280, A-319  
Mobil Alaska Pipeline Co., et al. v. United  
States

The inability of the parties to agree on the terms of a stay puts this case in the category of a complete mess. I went along with the stay now outstanding but I am now of the firm view that we should vacate it (perhaps with some provisions for refund at the end of the case of the excess already collected by the pipelines) and, if cert. is granted, direct an expedited briefing and argument session. Some of the considerations that lead me to this are outlined in Whit Peters' attached memorandum to me. The Comsat order referred to in Note 1 is also attached.

Incidentally I still think cert. should be denied and the chaos only confirms me in that view.

W.J.B. Jr.

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: ~~1/1/77~~

Recirculated: ~~1/1/77~~

SUPREME COURT OF THE UNITED STATES

MOBIL ALASKA PIPELINE CO., et. al. v. UNITED STATES

Nos. 77-452, 77-457, 77-551, A-278, A-280, A-319

MR. JUSTICE BRENNAN, dissenting.

*joined by Marshall, T*

I initially joined in granting a stay in these cases. Upon further consideration, however, I am convinced that our stay was improvidently and precipitately issued and that it should now be dissolved.

Petitioners will be able to collect approximately \$1.5 million per day by virtue of our stay that would not be collected were the suspension order of the Interstate Commerce Commission -- which is the subject of petitions for certiorari in this case<sup>1/</sup> -- to remain in effect. Because of the enormous sums of money that will be collected under our stay, over \$100 million by January 28, 1977 when the suspension order of the ICC ends by its terms, the Court should be very clear before continuing

---

<sup>1/</sup> For a discussion of the background of this litigation, see Mobil Alaska Pipeline Co. v. United States, --- F.2d --- (CA 5 No's. 77-2392, 77-2412, 77-2437. July 29, 1977).

•Brennan 77

1st DRAFT

Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Black  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Burger  
Mr. Justice Marshall

**SUPREME COURT OF THE UNITED STATES**

MOBIL ALASKA PIPELINE COMPANY *v.*  
UNITED STATES ET AL.;  
EXXON PIPELINE COMPANY *v.* UNITED STATES  
ET AL.; and  
BP PIPELINES, INC. *v.* UNITED STATES ET AL.

Brennan  
1/2  
1/4

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 77-452, 77-457, 77-551, A-278, A-280, and A-319.  
Decided November —, 1977

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

I initially joined in granting a stay in these cases. Upon further consideration, however, I am convinced that our stay was improvidently and precipitately issued and that it should now be dissolved.

Petitioners will be able to collect approximately \$1.5 million per day by virtue of our stay that would not be collected were the suspension order of the Interstate Commerce Commission—which is the subject of petitions for certiorari in this case<sup>1</sup>—to remain in effect. Because of the enormous sums of money that will be collected under our stay, over \$100 million by January 28, 1978, when the suspension order of the ICC ends by its terms, the Court should be very clear before continuing this stay that it is really needed to protect petitioners and, more importantly, that the provisions of the stay adequately protect the interests of anyone who may be affected by this litigation. On the pleadings so far before us, I am not convinced that the Court is in a position to act with any such conviction.

First, with respect to the need for the stay, it is important to

<sup>1</sup> For a discussion of the background of this litigation, see *Mobil Alaska Pipeline Co. v. United States*, — F. 2d — (CA5 Nos. 77-2392, 77-2412, 77-2437. July 29, 1977).

Brennan 77

Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshal  
Mr. Justice Blackmu  
Mr. Justice Powell  
Mr. Justice Rehnqui  
Mr. Justice Stevens

From: Mr. Justice Brenn

Circulated: 11/2

2nd DRAFT

Recirculated: 11/5

## SUPREME COURT OF THE UNITED STATES

MOBIL ALASKA PIPELINE COMPANY *v.*  
UNITED STATES *ET AL.*;  
EXXON PIPELINE COMPANY *v.* UNITED STATES  
*ET AL.*;  
BP PIPELINE, INC. *v.* UNITED STATES *ET AL.*; and  
ARCO PIPELINE COMPANY *v.* UNITED STATES *ET AL.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 77-452, 77-457, 77-551, 77-602, A-278, A-280, A-319, and A-376.  
Decided November —, 1977

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

I initially joined in granting a stay in these cases. Upon  
further consideration, however, I am convinced that our stay  
was improvidently and precipitately issued and that it should  
now be dissolved.

Petitioners will be able to collect approximately \$1.5 million  
per day by virtue of our stay that would not be collected were  
the suspension order of the Interstate Commerce Commission—  
which is the subject of petitions for certiorari in this case<sup>1</sup>—to  
remain in effect. Because of the enormous sums of money  
that will be collected under our stay, over \$100 million by  
January 28, 1978, when the suspension order of the ICC ends  
by its terms, the Court should be very clear before continuing  
this stay that it is really needed to protect petitioners and,  
more importantly, that the provisions of the stay adequately  
protect the interests of anyone who may be affected by this  
litigation. On the pleadings so far before us, I am not con-  
vinced that the Court is in a position to act with any such  
conviction.

<sup>1</sup> For a discussion of the background of this litigation, see *Mobil Alaska Pipeline Co. v. United States*, — F. 2d — (CA5 Nos. 77-2392, 77-2412, 77-2437, July 29, 1977).

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3-31-78

1st PRINTED DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 77-452, 77-457, 77-551, AND 77-602

Mobile Alaska Pipeline Company,  
Petitioner,

77-452 *v.*

United States et al.

Exxon Pipeline Company,  
Petitioner,

77-457

United States et al

BP Pipelines Inc., Petitioner,  
77-551

17-001

United States et al.

ARCO Pipe Line Company,  
Petitioner,

77-602

United States et al.

On Writs of Certiorari to  
the United States Court  
of Appeals for the Fifth  
Circuit.

[June —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The primary question presented in this case is whether the Interstate Commerce Commission is authorized by § 15 (7) of the Interstate Commerce Act, as added, 36 Stat. 552, as amended, 49 U. S. C. § 15 (7),<sup>1</sup> to suspend *initial* tariff sched-

<sup>1</sup> "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, . . . the Commission shall have . . . authority . . . to enter upon a hearing concerning the lawfulness of such rate, fare, [or] charge . . . ; and pending such hearing and the decision thereon the Commission, upon filing with such schedule

• Bremer 77

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

CHAMBERS OF  
JUSTICE W. J. BRENNAN, JR.

June 1, 1978

Memorandum re: Nos. 77-452, 77-457, 77-551 & 77-602,  
Trans Alaska Pipeline Rate Cases

Dear Bill,

Thank you for your letter on this case. Let me respond in reverse order of the points you raise.

1. It is not my intention to bless any exercise of ancillary power beyond that exercised in this case. I frankly do not see how Part V can be read to go beyond this since I have limited what we are approving to "the Commission's conditions," op. at 23 -- referring to refund conditions -- and to "what the Commission has done here," id., at 25. However, if it would help, I can add the word "refund" to the first line of the last paragraph on page 23 so that it reads "the Commission's refund conditions . . . ."

2. The use of the word "public" is correct and is used in the sense used by President Taft in proposing the Mann-Elkins Act. See Op. at 9 n. 18. Moreover, the State is certainly acting for its public in defending its oil revenues, as is the Justice Department whose complaint was that high TAPS rates were inconsistent with national energy policy. I do not understand why "public" must be equated with "consumer representatives" as you apparently feel it must. In short, I am disposed to leave this as it is.

3. Footnote 6, in its present form, is in response to informal suggestions from other chambers. Since I am already on public record as being skeptical of the claim that the market price of crude oil is fixed -- which is the claim made, not as you say that "the price of oil is

not affected by the TAPS rate" -- I am disposed to leave this as it is.

4. Finally, I simply do not understand your objection to my "extended treatment" of the jurisdictional point. I do not see how it is anything but completely faithful to Arrow -- which you will remember I wrote -- and SCRAP. I understand from discussions between our respective clerks that you are troubled that that Pub. L. No. 93-584 might undercut the reasoning of Arrow with respect to conflicting injunctions. This is not the case. The lower court decisions which granted injunctions against rate increases were not actions for review of orders of the ICC. Instead, the jurisdictional basis was one or more of (1) diversity coupled with a common law action against common carriers, (2) the Sherman Act, or (3) an implied right of action under the Interstate Commerce Act. See, e.g., Northern Pac. Ry. Co. v. Pac. Coast Lumber Mfgr's, 165 F. 1 (CA9 1908); Jewett Bros. & Jewett v. Chicago, M. & St. P. Ry. Co., 156 F. 160 (CCDSD 1907). Obviously none of these actions would be brought in a Court of Appeals in the first instance as an action on review of an order of the ICC, yet such petitions for review are the only actions covered by the Hobbs Act as expanded by Pub. L. No. 93-584. To avoid any confusion on this score, I would be willing to add a footnote at the end of the first full paragraph on p. 13 (the paragraph beginning "Second, . . .") which would read as follows:

n/ In the past, actions for injunction were brought in diversity under the common law of carriers or under federal question jurisdiction on the theory that the Sherman Act was being violated by a rate increase or alternatively that there was an implied right of action under § 1 of the Interstate Commerce Act, 49 U.S.C. § 1. See, e.g., Northern Pac. Ry. Co. v. Pac. Coast Lumber Mfgr's, 165 F. 1 (CA9 1908); Jewett Bros. & Jewett v. Chicago, M. & St. P. Ry. Co., 156 F. 160 (CCDSD 1907). The provisions consolidating judicial review of ICC orders in a single court of appeals, see supra, n. 17, are therefore not apposite to actions for injunctive relief and it would still be possible for district courts to reach conflicting views about the propriety of injunctive relief, a conflict that would create the rate discriminations sought to be ended by the Mann-Elkins Act.

If these changes would allow you to join the opinion, I would be happy to make them. Otherwise, given the time of the year, I will simply adopt your suggested alternative of marking you as concurring in the judgment.

Sincerely,



P.S. Not to press you, but if this is to come down Tuesday, I think I had better be able to give it to the printer tomorrow.

Mr. Justice Rehnquist

Copies to 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 22 AY 1978

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

TRANS ALASKA PIPELINE RATE CASES ) On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

[May --, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The primary question presented in this case is whether the Interstate Commerce Commission is authorized by § 15(7) of the Interstate Commerce Act, 24 Stat. 384, added, 36 Stat. 552, as amended, 49 Stat. § 15(7),<sup>1/</sup> to suspend

<sup>1/</sup>"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, . . . the commission shall have . . . authority . . . to enter upon a hearing concerning the lawfulness of such rate, fare, [or] charge . . . ; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when such rate, fare, [or] charge . . . would otherwise go into effect . . . ."

PP 7, 13, 15-17, 20, 23, 25

3 n. 6, nn. 27-32 are renumbered

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: 31 MAY 1978

1st PRINTED DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 77-452, 77-457, 77-551, AND 77-602

Mobile Alaska Pipeline Company,  
Petitioner,

77-452 *v.*

United States et al.

Exxon Pipeline Company,  
Petitioner,

77-457 *v.*

United States et al.

BP Pipelines Inc., Petitioner,

77-551 *v.*

United States et al.

ARCO Pipe Line Company,  
Petitioner,

77-602 *v.*

United States et al.

On Writs of Certiorari to  
the United States Court  
of Appeals for the Fifth  
Circuit.

[June —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The primary question presented in this case is whether the Interstate Commerce Commission is authorized by § 15 (7) of the Interstate Commerce Act, as added, 36 Stat. 552, as amended, 49 U. S. C. § 15 (7),<sup>1</sup> to suspend *initial* tariff sched-

<sup>1</sup> "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, . . . the Commission shall have . . . authority . . . to enter upon a hearing concerning the lawfulness of such rate, fare, [or] charge . . . ; and pending such hearing and the decision thereon the Commission, upon filing with such schedule

6-2-78

Concurred

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 77-452, 77-457, 77-551, AND 77-602

Trans Alaska Pipeline Rate Cases. } On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 6, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The primary question presented in these cases is whether the Interstate Commerce Commission is authorized by § 15 (7) of the Interstate Commerce Act, as added, 36 Stat. 552, as amended, 49 U. S. C. § 15 (7),<sup>1</sup> to suspend *initial* tariff schedules of an interstate carrier subject to Part I of the Act, 24 Stat. 379, as amended, 49 U. S. C. §§ 1-27 (1970 ed., and Supp. V). In addition, we are asked to decide whether, if the Commission is so authorized, it has additional authority summarily to fix maximum interim tariff rates which will be allowed to go into effect during the suspension period and to require carriers filing tariffs containing such rates, as a further condition of nonsuspension, to refund any amounts collected which are ultimately found to be unlawful. We hold that the Commission has statutory authority to suspend initial

<sup>1</sup> "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, . . . the Commission shall have . . . authority . . . to enter upon a hearing concerning the lawfulness of such rate, fare, [or] charge . . . ; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, [or] charge . . . , but not for a longer period than seven months beyond the time when it would otherwise go into effect . . . ."

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Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

September 28, 1977

MEMORANDUM TO THE CONFERENCE

Re: A-280 - Exxon Pipeline Co. v. U. S. (77-457)  
A-278 - Mobil Alaska Pipeline Co. v. U. S.  
(77-452)

I shall take no part in the consideration or decision  
of this application.

PS

P. S.

Brennan 77

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

CHAMBERS OF  
JUSTICE POTTER STEWART

October 18, 1977

Re: Nos. 77-452, 77-457, and A-319  
(Mobil, etc.)

Dear Bill,

As you know, I shall take no part in  
the consideration or decision of these cases.

Sincerely yours,



Mr. Justice Rehnquist

Copies to the Conference



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

CHAMBERS OF  
JUSTICE POTTER STEWART

May 25, 1978

Re: No. 77-452, etc., Trans Alaska Pipeline  
Rate Cases

Dear Bill,

This case is a more difficult one for me than your persuasive opinion makes it seem. In light of the Chessie case, however, which I thought was wrong but which is now the law, I am persuaded that your conclusion is correct. In short, I am glad to join your opinion for the Court.

Sincerely yours,

P. S.

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 23, 1978

Re: 77-452, 77-457, 77-551 & 77-602 -  
Trans Alaska Pipeline Rate Cases

Dear Bill,

I agree.

Sincerely yours,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

October 19, 1977

Re: Nos. 77-452, 77-457, and A-319 (Mobil, etc.)

Dear Bill:

I have no objection to your proposed order.

I still am against the stay.

Sincerely,

*JM*

T. M.

Mr. Justice Rehnquist

cc: The Conference

*Brennan 77*

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 3, 1977

Re: Nos. 77-452, 77-457, 77-551, A-278, A-280, A-319,  
Mobil Alaska Pipeline Co., et. al. v. United States

Dear Bill:

Please join me in your dissent.

Sincerely,

*JM*

T. M.

Mr. Justice Brennan

cc: The Conference

6 Brennan 77

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 22, 1978

Re: Nos. 77-452, 77-457, 77-551, 77-602, Trans Alaska  
Pipeline Rate Cases

Dear Bill:

Please join me.

Sincerely,

*J.M.*  
T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

October 17, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 77-452 - Mobil Alaska Pipeline Co.

v. U.S.

No. 77-457 - Exxon Pipeline Co. v. U.S.

No. A-319 - BP Pipelines, Inc. v. U.S.

I voted to deny the stay application and to deny certiorari. I remain firm as to that. With one vote on the stay application now shifting, I have no particular objection to the proposal set forth in Bill Rehnquist's memorandum of today.

*Ha. S.*

—

• *Blackmun 77*

November 9, 1977

Re: No. 77-452, etc. - Mobile Alaska Pipeline Co.  
v. United States

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Dear John:

Because I am dissenting, I have no standing to comment about the content of the proposed order. I am bothered a little, however, by the third line of paragraph 4. Should not the words "any portion" read "a portion?" This is a "picky" comment, but it seems to me that as presently read it is on an all or nothing basis.

Sincerely,

HAB

Mr. Justice Stevens

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 31, 1978

Re: No. 77-452, etc. - Trans-Alaskan Pipeline rate cases

Dear Bill:

Please join me in your opinion.

I have the same reaction John did as to the reference on page 29 to "The Price is Right" and would prefer to have that reference omitted. My joinder, however, is not conditioned on this.

Sincerely,



Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

October 18, 1977

MEMORANDUM TO THE CONFERENCE

Re: Nos. 77-452, 77-457, and A-319 (Mobil, etc.)

Following receipt of John's memorandum of October 17th, he, Byron, and I undertook to draft a proposed stay order for submission to the Conference. Our joint suggestion is as follows:

"The petition for certiorari is granted. The order of the Interstate Commerce Commission served June 28, 1977 in its Investigation and Suspension Docket No. 9164, Trans-Alaska Pipeline System (Rate Filings) is hereby stayed pending final disposition of the writ of certiorari by this Court. The stay is conditional upon applicants-petitioners' agreement to keep account of the amounts collected under the proposed rates, as that term is used in the order in this matter issued by the Interstate Commerce Commission on June 28, 1977, and their agreement to refund any portion of the amounts collected under such rates by virtue of this stay order which it is ultimately determined that they were not lawfully entitled to

• *Brennan 17*

collect. The parties shall submit a proposed order embodying this undertaking to the Clerk of this Court within five days."

In view of the Chief's suggestion that the order come down as soon as possible, the views of the remaining four of you would be appreciated.

Sincerely,



Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

October 27, 1977

MEMORANDUM TO THE CONFERENCE

Re: Nos. 77-452, 457, 551, A-278, A-280, A-319  
Mobil Alaska Pipeline Co., et al. v. United  
States

It is my impression that the major area of disagreement between the parties in regard to the stay is the rate of interest. The Arctic Slope Regional Corporation proposes a simple annual interest rate of 10%, this apparently being the interest rate they are now paying to borrow money. The S.G. suggests interest computed at the rate set forth at 18 C.F.R. § 154.67 (c) (2), which is nine percent per annum. Petrs suggest interest computed in accordance with Section 15(8)(e) of the Interstate Commerce Act (49 U.S.C. § 15(8)(e)), which is interest at a rate equal to the average yield of marketable securities of the United States which have a duration of 90 days. I think this latter rate is preferable in large part because it is the rate selected by Congress to apply to certain common carriers under ICC jurisdiction in a situation somewhat analogous to the one presently before us. Moreover, this is the rate selected by the ICC in its order of June 28, 1977 when it conditioned acceptance of the interim rates upon the execution of a refund provision. I do not think this rate is made inappropriate by the fact that the order may be in effect for more than 90 days and yet the interest rate is set at that of 90 day securities. Indeed, Section 15(8)(e) itself appears to contemplate this rate staying in effect as long as seven months on occasion.

In regard to Bill Brennan's suggestion that perhaps we have not heard sufficiently from the consuming public, I would only note that it is my impression from the moving papers that the

price charged for transporting the oil has no direct impact on the price paid for the oil by the consumers. As I understand it, the ultimate price of the oil is determined largely by market conditions (in particular, the price set by the OPEC nations) and that price is divided up between those providing transportation and those producing the oil at the wellhead, with, of course, a royalty and severance tax on that wellhead value going to the State of Alaska and a further royalty on that wellhead value going to the ASRC. Thus, it is a question of dividing up the pie and not a question of increasing or decreasing the total amount of money available or increasing or decreasing the ultimate cost of the oil to the consumers. In fact, the claim of the ~~State~~ of Alaska and ASRC seems to be predicated largely on the notion that the amount of money they receive will decrease in direct proportion to the increase in the amount of money received by petrs in their capacity as owners of the TAPS.

In regard to the form of the order, I propose something along the following lines:

On October 20, 1977, this Court stayed the order of the Interstate Commerce Commission served June 28, 1977, in its Investigation and Suspension Docket No. 9164, Trans-Alaska Pipeline System (Rate Filings) pending final disposition of the petitions for a writ of certiorari by this Court. To further effectuate that order, it is hereby ordered:

1. During the period the stay is in effect, commencing at \_\_\_\_ a.m. (p.m.) E.D.T., October \_\_\_, 1977, the following pipeline companies may collect their respective rates set forth in the tariffs that were suspended by the Interstate Commerce Commission in its order of June 28, 1977:

Amerada Hess Pipeline Corporation  
Arco Pipeline Company  
BP Pipeline Company  
Mobil Alaska Pipeline Company  
Sohio Pipe Line Company

Exxon Pipeline Company  
Union Alaska Pipeline Company

2. The Federal Energy Regulatory Commission may proceed with its investigation of the rates set forth in said tariffs (FERC Docket No. (R78-1) and in connection with that investigation may enter any appropriate orders not inconsistent with either this order or this Court's order of October 20, 1977.

3. During the period the stay is in effect, the pipeline companies shall keep account of all sums collected under the terms of said tariffs by virtue of the stay entered by this Court.

4. In the event certiorari is denied or it is otherwise ultimately determined that said pipeline companies were not lawfully entitled to collect any portion of the rates so collected, the pipeline companies shall refund such portion of said rates, with interest computed in accordance with Section 15 (8) (e) of the Interstate Commerce Act (49 U.S.C. § 15(8)(e)), to the persons entitled thereto without further order of this Court.

Sincerely,

*WM*

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

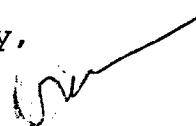
November 8, 1977

Re: Nos. 77-452, 77-457, etc. - Mobile Alaska Pipeline  
Co. v. United States

Dear John:

I agree with your proposed order.

Sincerely,



Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 1, 1978

Re: No. 77-452, 77-457, 77-551 & 77-602 Trans-Alaska  
Pipeline Cases

Dear Bill:

While I am in general agreement with your opinion, I have several minor problems with it that would, however, prevent my joining the current draft outright. My major reservation is with footnote 17 on page 7. I agree with you that jurisdiction was not barred in this case by Arrow Transportation Co. or SCRAP, but I have reservations about the extended treatment to the jurisdiction issue which you give. In both Arrow Transportation Co. and SCRAP, the lower courts had enjoined rate changes that the Commission had chosen not to suspend. As you note, federal courts do not have the power to enjoin rate changes before the Commission has determined that they are unlawful or to make "an independent appraisal of the reasonableness of rates." In this case, however, the question is whether the Commission has the power to suspend initial rates. I see no reason to say anything more. In particular, although you "reaffirm our previous holdings," some of the discussion might be read as suggesting that the prior decisions are more limited than previously thought.

I agreed generally with John's criticisms and am happy to see that you generally accommodated them. Your redraft of

footnote 6, however, still gives me some concern. I see no reason to dispute the parties' statement that the price of oil is not affected by the TAPS rate or engage in a debate on the price of oil in the western United States. I am similarly bothered by your statement on page 13 that "only the public perceives that it will be injured by the proposed TAPS rates and has objected to them." As far as I can tell from the record, the only parties to object to the TAPS rates were the State of Alaska, the Arctic Slope Regional Corporation, and the Antitrust Division of the Justice Department. The former two objected because of their economic ties to the producers of oil, not as consumer representatives. And I would be hesitant to equate the Antitrust Division with the "public" in general. Would there be any way of rewording this sentence to remove this equation?

Finally, Part V could be read as permitting the FERC to impose any provisions on the granting of a rate increase that is "necessary and 'directly related'" to protection of the public. I would be hesitant to lay down a general rule that would automatically determine all future controversies that might arise. Would it be possible to drop a footnote stating that we only decide whether the FERC can impose refund provisions and do not intimate any opinion as to other conditions that FERC might choose to impose?

If you can accommodate these several concerns, I will be glad to join your opinion for the Court. Because you already have a Court, however, you may not wish to make any changes at this late date. If so, please simply show me as concurring in the judgment.

Sincerely,

*Wm*

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 2, 1978

Re: Nos. 77-452, 77-457, 77-551 & 77-602 - Trans Alaska  
Pipeline Rate Cases

Dear Bill:

As you suggest in your P.S., it is late in the Term, and I will be happy to join the opinion you have prepared for the Court if it contains the proposed insert described in your letter of June 1st.

Sincerely,

*WBW*

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

October 17, 1977

Re: 77-452 - Mobil Alaska Pipeline v. U.S. (A-278)  
77-457 - Exxon Pipeline v. U.S. (A-280)  
A-319 - BP Pipelines v. U.S.

Dear Chief:

Having talked further with Byron and Bill Rehnquist, I am now persuaded that I should change my vote on the stay application and vote to grant. This vote is, however, conditioned on (a) including a suitable refund provision in the stay order, and (b) the understanding that the three votes to grant certiorari are firm. If there is any chance that certiorari is not going to be granted, I would, of course, vote to deny the stay.

Respectfully,



The Chief Justice

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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

From: Mr. Justice Stevens

MON 8/11

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

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

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

MOBIL ALASKA PIPELINE COMPANY *v.*

UNITED STATES ET AL.;

EXXON PIPELINE COMPANY *v.* UNITED STATES

ET AL.;

BP PIPELINE, INC. *v.* UNITED STATES ET AL.; and  
ARCO PIPELINE COMPANY *v.* UNITED STATES ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 77-452, 77-457, 77-551, 77-602, A-278, A-280, A-319, and A-376.  
Decided November —, 1977

On October 20, 1977, this Court stayed the order of the Interstate Commerce Commission served June 28, 1977, in its Investigation and Suspension Docket No. 9164, Trans-Alaska Pipeline System (Rate Filings) pending final disposition of the petitions for a writ of certiorari by this Court. To further effectuate that order, it is hereby ordered:

1. During the period the stay is in effect, commencing at 3 (p. m.) E. D. T., October 20, 1977, the following pipeline companies may collect their respective rates set forth in the tariffs that were suspended by the Interstate Commerce Commission in its order of June 28, 1977:

Amerada Hess Pipeline Corporation  
Arco Pipeline Company  
BP Pipeline Company  
Mobil Alaska Pipeline Company  
Sohio Pipe Line Company  
Exxon Pipeline Company  
Union Alaska Pipeline Company

2. The Federal Energy Regulatory Commission may proceed with its investigation of the rates set forth in said tariffs (FERC Docket No. (R78-1)) and in connection with that investigation may enter any appropriate orders not incon-

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P-21

4th DRAFT

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshal  
Mr. Justice Blackmu  
Mr. Justice Powell  
Mr. Justice Rehnqui

**SUPREME COURT OF THE UNITED STATES**

From: Mr. Justice Steve

Circulated:

MOBIL ALASKA PIPELINE COMPANY v.  
UNITED STATES ET AL.; Recirculated: NOV 9 19  
EXXON PIPELINE COMPANY v. UNITED STATES  
ET AL.;

BP PIPELINE, INC. v. UNITED STATES ET AL.; and  
ARCO PIPELINE COMPANY v. UNITED STATES ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 77-452, 77-457, 77-551, 77-602, A-278, A-280, A-319, and A-376.  
Decided November —, 1977

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2. The Federal Energy Regulatory Commission may proceed with its investigation of the rates set forth in said tariffs (FERC Docket No. (R78-1)) and in connection with that investigation may enter any appropriate orders not inconsistent with either this order or this Court's order of October 20, 1977.

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 23, 1978

Re: 77-452, etc. - Trans Alaska Pipeline  
Rate Cases

Dear Bill:

Please join me in your fine opinion.

Frankly, I do not understand the reference to "The Price is Right" on page 29, and would hope that you could make some language change in footnote 6 to remove the sinister implication.

Respectfully,



Mr. Justice Brennan

Copies to the Conference