The Burger Court Opinion Writing Database

Chrysler Corp. v. Brown

441 U.S. 281 (1979)

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

November 14, 1978

Re: 77-922 - Chrysler Corp. v. Brown

Dear Bill:

Apropos your question (I believe at lunch Monday) whether Bill Rehnquist was an appropriate assignee of the above case, I had discussed this with Bill. He prefers his first choice disposition, i.e., no judicial review, but he was willing to write the holding to reflect the majority view otherwise. There were 8 to affirm and he fits the old English rule-of-thumb as the "least persuaded", hence likely to write narrowly. I intended to mention this as we left the Dining Room but forgot.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

February 1, 1979

Dear Bill:

Re: 77-922 Chrysler Corp. v. Brown

I am not fully at rest on your very helpful memo and "roadmap." Like Lewis, I may be able to join, but I want to reexamine your proposed disposition in light of views expressed by other memos.

Regards,

Warren

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

February 14, 1979

Re: 77-922 - Chrysler Corp. v. Brown

Dear Bill:

Supplementing my memo to you on February 1, I think I can join an opinion generally along the lines of your memo. That is consistent with my Conference vote to remand the case.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

March 29, 1979

Dear Bill:

Re: 77-922 Chrysler Corporation v. Brown

I join.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 18, 1979

RE: No. 77-922 Chrysler Corporation v. Brown

Dear Bill:

I am in agreement with John Stevens' note to you of January 18. My notes are not that revealing but my recollection is that this was substantially the view which attracted six votes to Affirm. In any event, like John, I would simply Affirm the Court of Appeals.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 10, 1979

RE: No. 77-922 Chrysler Corporation v. Brown

Dear Bill:

I agree.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 15, 1979

Re: No. 77-922, Chrysler v. Brown

Dear Bill,

Your Memorandum closely parallels my views in this case, so closely that I would gladly join it as an opinion. I would be quite content to rely on both grounds for finding that the regulations in question do not meet the "authorized by law" proviso of § 1905, as your Part IIIA now does, or to rely exclusively on either ground. I would prefer the present version, however. (This is in response to the paragraph beginning at the bottom of page 3 and continuing on page 4 of your road-map memorandum.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 15, 1979

Re: No. 77-922, Chrysler Corp. v. Brown

Dear Bill,

I am glad to join you opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 6, 1979

Re: No. 77-922 - Chrysler Corporation
v. Harold Brown, Secretary of
Defense, et al.

Dear Bill,

As presently advised, I could join an opinion along the lines contained in your memorandum of January 12, 1979.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 13, 1979

Re: No. 77-922 - Chrysler Corporation
v. Brown

Dear Bill,

This is for real. I join.

Sincerely yours,

Byron

Mr. Justice Rehnquist

Copies to the Conference

cmc

12 APR 1979

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-922

Chrysler Corporation, Petitioner, *v.* Harold Brown, Secretary of Defense, et al.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[April —, 1979]

MR. JUSTICE MARSHALL, concurring.

I agree that respondents' proposed disclosure of information is not "authorized by law" within the meaning of 18 U. S. C. § 1905, and I therefore join the opinion of the Court. Because the number and complexity of the issues presented by this case will inevitably tend to obscure the dispositive conclusions, I wish to emphasize the essential basis for the decision today.

This case does not require us to determine whether, absent a congressional directive, federal agencies may reveal information obtained during the exercise of their functions. For whatever inherent power an agency has in this regard, § 1905 forbids agencies from divulging certain types of information unless disclosure is independently "authorized by law." Thus, the controlling issue in this case is whether the OFCCP disclosure regulations, 41 CFR §§ 60.40-1 to 60.40-4 (1978), provide the requisite degree of authorization for the agency's proposed release. The Court holds that they do not, because the regulations are not sanctioned directly or indirectly by federal legislation.[1] In imposing the authorization requirement of § 1905, Congress obviously meant to allow only those disclosures contemplated by congressional action. *Ante*, at 17–28. Otherwise the agencies Congress intended to control

[1] That the OFCCP regulations were not promulgated in strict compliance with the Administrative Procedure Act, *ante*, at 28–32, is an independent reason why those regulations do not satisfy the requirements of § 1905, although the agency could rectify this shortcoming.

November 28, 1978

Re: No. 77-922 - Chrysler Corp. v. Brown

Dear Bill:

This is in response to your note handed to me at the bench today.

I would still favor an opinion which assumed the rules were valid legislative rules, and which leaves any challenge to them open on remand. All the Court need decide now is that APA review is available. One of the components of that review is the opportunity to assert that the procedures the act required were not followed.

I have asked my clerk Luther Munford to discuss this with your clerk to see if something can be worked out.

Sincerely,

HAB

Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 26, 1979

Re: No. 77-922 - Chrysler Corporation v. Brown, Secretary

Dear Bill:

My long delay in responding to your circulation of 12 January and your explanatory letter of that date indicates, I suspect, my difficulty with this case. You and your chamber obviously have devoted much effort and thought to the issues, and for that I am grateful. This is not very easy going.

To use Byron's expression, "as presently advised," I am inclined to join an opinion along the lines contained in your memorandum. In specific response to your inquiry as to part IIIA, I prefer the double reliance of the present version of your memorandum.

All this indicates, I suspect, that if one is patient long enough, everything works out all right.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 21, 1979

Re: No. 77-922 - Chrysler Corporation v. Brown

Dear Bill:

In order to eliminate any question, this note is to advise you that I do join your recirculation of March 15 as a proposed opinion for the Court.

Sincerely,

HAB

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 16, 1979

No. 77-922 Chrysler v. Brown

Dear Bill:

I write at this time, after having read your memorandum only once, to say that I probably will join it as a Court opinion.

In view of its length and complexity, I will review it again more carefully. I may possibly have a suggestion or two.

I found your "road-map" particularly helpful.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 22, 1979

No. 77-922 Chrysler v. Brown

Dear Bill:

Over the weekend, I reread your memorandum circulated on January 12, your "roadmap", and also have reviewed the correspondence among the Brothers.

I also have reviewed my own pre-Conference notes that were the basis of views I expressed at the Conference, although I probably did not cover them fully. My vote, as recorded at the time, was to "affirm with modifications that would assure a full adjudicatory hearing". My primary concern had been with what seemed to me to be quite arbitrary action by the government agency, ignoring the requirements of the APA. I had thought that the term "authorized by law" required at least a formal adjudication "on the record", with a full opportunity to be heard.

With this view of the situation, I thought I could affirm CA3's decision to remand, but in an opinion requiring an adjudicatory hearing under the APA.

Although this remains my tentative view, I find the issues in the case troublesome and I will await the circulation of other opinions before coming finally to rest. Your memorandum, and the exchange of views in the correspondence, have been constructive and enlightening.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

February 12, 1979

77-922 Chrysler Corp. v. Brown

Dear Bill:

Although I have written you the substance of a join note, I write privately to make a suggestion.

I have had some question as to whether §1905 applied to agency action or only to disclosure by an "officer or employee". The language of the statute, without more, would suggest that it was intended to proscribe individual rather than institutional action. But your letter to John of January 19 advances what seems to me to be sufficiently persuasive reasons for concluding, as you do, that the statute does apply to the heads of agencies who purport to act institutionally rather than personally.

It would be helpful, I think, if you met this point in your opinion - perhaps along the lines set forth in your letter to John.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 12, 1979

77-922 Chrysler Corp. v. Brown

Dear Bill:

Having now devoted further study to your memorandum of January 12, I now believe I can join an opinion along the lines of your memorandum.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 12, 1979

77-922 Chrysler Corp. v. Brown

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

77-922

Supreme Court of the United States

Memorandum

28 Nov, 19 78

Harry —

I have been trying to write a memorandum in Chrysler v. Brown, which I'm (I'm afraid of absent mindedness assigned to me for an opinion. I had thought that regs. authorizing disclosure satisfied criminal provision of 18 USC §1905. We (my law clerk & I) now find that these regs were not adopted w/ notice & comment under APA - therefore un—

Supreme Court of the United States

Memorandum

----------, 19----

Re your Morton v. Ruiz.
The regs do not have the force of law. At conf on Chrysler, I said you agreed w/ WJB, who in turn said (according to my notes) "regulations were authorized by law" - if my analysis of Morton is right, is there any possibility of your being willing to allow a finding that agency action was "arbitrary" ~~under~~ under APA until it had gone thru APA notice & comment for regulations?

(over)

Mr. Justice Rehnq

I As you might imagine, I am struggling mightily to write an opinion that could command a court. I have of course heavily compromised the views I expressed at conf, but ~~that APA can~~ and am writing it to say that APA is applicable

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 12, 1979

MEMORANDUM TO THE CONFERENCE

Re: No. 77-922 Chrysler v. Brown

The enclosed tome is circulated in the form of a memorandum even though it was assigned to me for a Court opinion. I do so partly because of the necessity of changing some of my own views to reflect what I thought were those of the Conference, and partly because I encountered difficulties in dealing with 18 U.S.C. § 1905 that led me to reach a conclusion with respect to a proviso in that statute that probably differs from the resolution implied by the votes of six members of the Conference who indicated that they would affirm the judgment of the Court of Appeals for the Third Circuit. The tome is perhaps best accompanied by the following road-map.

Part I of the memorandum is a statement of facts and is, I hope, not controversial.

Part II holds that there is no "reverse FOIA" claim on the part of a supplier of information to the government. The Conference was unanimous upon this point, and my recollection is that when we granted certiorari this seemed to be the most important issue in the case. At any rate, as John said at Conference, it was certainly the basket in which Chrysler had placed most of its eggs.

Part III deals with the effect of 18 U.S.C. § 1905, a provision of the Criminal Code forbidding disclosure of confidential material furnished to the government by a third party. The Court of Appeals for the Third Circuit did not pass upon the substantive scope of the prohibitions of this section, but did decide that there was no implied private right of action created by them. Part IIIB of the present draft reaches the same conclusion as did the Court of Appeals with respect to the non-existence of a private right of action.

At Conference, John and I expressed the view that the substantive prohibitions of § 1905 were basically an "anti-leak" statute, whereas Potter expressed the view that its reach was broader than that, and that the application of § 1905 in this case resulted in the agency action being "not in accordance with law" for purposes of the Administrative Procedure Act. I have deliberately refrained from adopting any particular definition of the scope of § 1905; the Court of Appeals did not pass upon it, and I feel that we are therefore justified in doing the same thing.

Part IIIA deals with the "authorized by law" exception to § 1905, and in the course of drafting it I have come to think that the treatment of this question by the Court of Appeals was extremely superficial and ultimately quite wrong. My Conference notes, which I am sure are imperfect, indicate no detailed discussion of this exception at Conference: To the extent, however, that my analysis in Part IIIA leads me to a result different from that reached by the Court of Appeals I may well be going contrary to the wishes of six members of the Conference who voted to affirm the judgment of the Court of Appeals and thus by implication indicated agreement with that court's treatment of § 1905 and the "authorized by law" exception. Part IIIA of the memorandum concludes that the present regulations upon which the government relies to make

the disclosures "authorized by law" within the meaning of § 1905 fail to meet the requirement of the proviso for two reasons: (a) although some legislatively authorized agency regulation may have the force of law so as even to preempt state law, Paul v. United States, 371 U.S. 245 (1963), such regulations must be substantive in nature and authorized by Congress. Batterton v. Francis, 432 U.S. 416, 425 n. 9 (1977); Morton v. Ruiz, 415 U.S. 199 (1974). Part IIIA of the draft concludes that even though Executive Order 11246 may stand "on its own bottom" so to speak, neither it nor any other Executive Order can be a substitute for congressional authorization in this sense, and the only other congressional authorization for the regulations upon which the Government relies, 5 U.S.C. § 301 (the "housekeeping statute") simply will not wash.

Part IIIA goes on to conclude that in addition to lacking the legislative authorization necessary for substantive regulations which would comply with the "authorized by law" exception to § 1905, the regulations in this case were not promulgated in compliance with the Administrative Procedure Act (a point which the Government concedes), and are therefore inapplicable for that reason.

If the treatment of the phrase "authorized by law" as the fulcrum of this part of the analysis is acceptable to a majority, there are three alternative ways of reaching the conclusion that the regulations in question do not meet the "authorized by law" proviso of § 1905. The first would be to say that there is no legislative authorization for them, and go no further; the second would be to assume arguendo that there is legislative authorization, but decide that failure to promulgate them in compliance with the Administrative Procedure Act renders them unavailable to the Government until they are promulgated in compliance with that Act; the third would be to say both. Part IIIA, as presently written, says

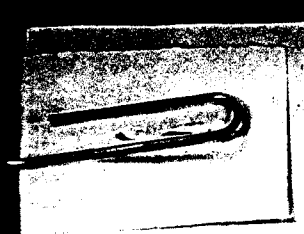
both; I would be willing to adopt either of the other two alternatives if a majority of the Conference were so inclined. To me the least preferable would be reliance on the failure to comply with the Administrative Procedure Act, because the agency can easily comply with those procedures and we would very soon have back here the question of substantive authorization. And while we can in good conscience decline to pass on the substantive scope of § 1905, since the Court of Appeals did likewise, the Court of Appeals did pass on the question of the existence vel non of the authority to issue substantive regulations which meet the "authorized by law" exception to § 1905.

Since we conclude, in harmony with the Court of Appeals, that there is no private right of action under § 1905, it may be asked why spend all this time deciding whether the regulations in question come within the "authorized by law" exception to that section. The answer, I hope, is apparent from Part IV, which goes on to hold that although Chrysler may not bring an independent action for injunctive relief on the basis of § 1905, an agency violation of § 1905 in releasing material which that section prohibited it from releasing would be "not in accordance with law" as that term is used in § 10(e) of the Administrative Procedure Act. Since both Chrysler and the Government concede that Chrysler is entitled to have review of the disclosure under the provisions of the Administrative Procedure Act (a concession by the Government of which I doubted the wisdom at Conference, but now think probably inescapable), Chrysler would be entitled to have the agency determination to release the material "held unlawful and set aside" pursuant to § 10(b) of the APA if the material in question is included within the substantive reach of § 1905. The Court of Appeals did not pass upon the substantive reach of the statute, because of its conclusion that regardless of that reach, the regulations were within the proviso exempting from its provisions information the release

of which had been "authorized by law". Since the memorandum takes the position in Part III that the regulations do not meet the "authorized by law" test, it then becomes necessary to decide the substantive reach of § 1905.

The District Court did decide this. The Court of Appeals did not, and my memorandum does not, as I have previously stated: instead, it remands to the Court of Appeals for decision of this question. I am now persuaded that we would benefit by additional legal and factual inquiry by the Court of Appeals into this question, including the meaning of the statute and the materials sought to be released. The result is a vacate and remand to the Court of Appeals for determination of this question.

Sincerely,



Pg 11, 20 & 21

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

From: Mr. Justice Rehnquist

Circulated: 12 JAN 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-922

Chrysler Corporation, Petitioner, v. Harold Brown, Secretary of Defense, et al.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[January —, 1979]

Memorandum of MR. JUSTICE REHNQUIST.

The expanding range of federal regulatory activity and growth in the Government sector of the economy have increased federal agencies' demand for information about the activities of private individuals and corporations. These developments have paralleled a related concern about secrecy in Government and abuse of power. The Freedom of Information Act (hereinafter "FOIA") was a response to this concern, but it has also had a largely unforeseen tendency to exacerbate the uneasiness of those who comply with governmental demands for information. For under the FOIA third parties have been able to obtain Government files containing information submitted by corporations and individuals who thought the information would be held in confidence.

This case belongs to a class that has been popularly denominated "reverse-FOIA" suits. The Chrysler Corporation (hereinafter "Chrysler") seeks to enjoin agency disclosure on the grounds that it is inconsistent with the FOIA and 18 U. S. C. § 1905, a criminal statute with origins in the 19th century that proscribes disclosure of certain classes of business and personal information. We agree with the Court of Appeals for the Third Circuit that the FOIA is purely a disclosure statute and affords Chrysler no private right of action to enjoin agency disclosure. But we cannot agree with that

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

OF
JUSTICE WILLIAM H. REHNQUIST

January 19, 1979

Re: No. 77-922 Chrysler Corp. v. Brown

Dear John:

I wanted to clarify my understanding of your memo of January 18, 1979. I think implicit in your comments in paragraph 2 is the assumption that § 1905 -- though you do not mention it -- is not a statute "either commanding or forbidding disclosure of certain information." In other words, if I understand you, § 1905 is nothing more than an anti-leak statute. As you doubtless recall, you and I took that position at Conference, but our view did not prevail. I still, however, think it is a plausible approach in this case, although, after my research, I no longer think the correct one.

Part of my change of heart is the treatment of the statute by other courts, none of which have followed the approach which we took at Conference. Certainly the Third Circuit has not. In this case, and in Westinghouse Electric Corp. v. NRC, 555 F.2d 82 (CA 3 1977), the Third Circuit assumed that § 1905 did bind agency and department heads, but in each case concluded that disclosure was pursuant to regulations having the "force of law. That § 1905 binds the heads of agencies is also consistent with the assumptions underlying the debates on the 1958 amendment to § 301, which are set out in my memorandum. I also note that not long after enactment of § 1905, the Attorney General advised the Secretary of the Treasury and the Chairman of the Federal Communications Commission that they should regard themselves as bound by § 1905. 41 Op. Att'y Gen. 166, 221.

This is not the place, however, to argue the merits. I simply note that I think the logical consequence of your position is that there is no APA review in this case, because there is "no law to apply" -- disclosure of confidential information is

within the discretion of the agency or department heads. My memorandum at 29-30. That, I take it, is why you could not join Part IV. That also, however, does not comport with the Third Circuit's position. Therefore, if my understanding of your memorandum is correct, your bottom line should be to vacate the CA 3's judgment (which remanded) and remand to that court with instructions to direct the DC to dismiss the complaint.

Sincerely,

Mr. Justice Stevens

Copies to the Conference

REVISIONS THROUGHOUT

PP 1, 9, 10, 12-17, 19, 22, 23, 25, 32, 33, 35

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

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 15 MAR

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-922

Chrysler Corporation, Petitioner, v. Harold Brown, Secretary of Defense, et al. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[January —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The expanding range of federal regulatory activity and growth in the Government sector of the economy have increased federal agencies' demand for information about the activities of private individuals and corporations. These developments have paralleled a related concern about secrecy in Government and abuse of power. The Freedom of Information Act (hereinafter "FOIA") was a response to this concern, but it has also had a largely unforeseen tendency to exacerbate the uneasiness of those who comply with governmental demands for information. For under the FOIA third parties have been able to obtain Government files containing information submitted by corporations and individuals who thought the information would be held in confidence.

This case belongs to a class that has been popularly denominated "reverse-FOIA" suits. The Chrysler Corporation (hereinafter "Chrysler") seeks to enjoin agency disclosure on the grounds that it is inconsistent with the FOIA and 18 U. S. C. § 1905, a criminal statute with origins in the 19th century that proscribes disclosure of certain classes of business and personal information. We agree with the Court of Appeals for the Third Circuit that the FOIA is purely a disclosure statute and affords Chrysler no private right of action to enjoin agency disclosure. But we cannot agree with that

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 13, 1979

MEMORANDUM TO THE CONFERENCE

Re: No. 77-922 - Chrysler Corp. v. Brown

Attached is the footnote which I propose to insert following the sentence ending on the first line of page 35, to which footnote I referred at Conference this morning.

Sincerely,

Att.

Footnote 49/ [to be added to op. in Chrysler Corp. v. Brown.]

Since the Court of Appeals assumed for purposes of argument that the material in question was within an exemption to the FOIA, that court found it unnecessary to expressly decide that issue and it is open on remand. We, of course, do not here attempt to determine the relative ambits of Exemption 4 and § 1905, or to determine whether § 1905 is an exempting statute within the terms of the amended Exemption 3, 5 U.S.C. § 552(b)(3) (1976). Although there is a theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of § 1905, and that therefore the FOIA might provide the necessary "authoriz[ation] by law" for purposes of § 1905, that possibility is at most of limited practical significance in view of the similarity of language between Exemption 4 and the substantive provisions of § 1905.

HAL

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 19, 1979

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 77-922 - Chrysler Corp. v. Brown

There are two cases being held for Chrysler Corp. v. Brown. They are General Dynamics Corp. v. Marshall, No. 78-79, and Sears, Roebuck & Co. v. Dahm, No. 78-97. These cases present precisely the same issues as Chrysler and should be GVRed in light of that opinion.

General Dynamics Corp. v. Marshall: General Dynamics submits EEO-1 reports and makes AAPs available to the Defense Logistics Agency, regarding its Convair Division, and to the Maritime Administration of the Commerce Department, regarding its Electric Boat Division. FOIA requests were made to both agencies for certain of General Dynamic's AAPs. General Dynamics objected to disclosure of specified statistical data in the AAPs. The Maritime Administration responded that it had "decided not to invoke Exemption 4" and DLA responded that it did not think that any of the material was within an exemptio to the FOIA. General Dynamics successfully obtained an injunction in District Court. The District Court held, inter alia, that the materials at issue were within Exemption 4 and that disclosure was barred by 18 U.S.C. § 1905. The Eighth Circuit reversed and remanded, relying on the reasoning in the Third Circuit's opinion in Chrysler. It directed the District Court to remand to the relevant compliance agencies for supplementation of the administrative record.

77-922

Supreme Court of the United States

Memorandum

-------------------------------, 19-------

Harry —

I tried to write Chrysler v. Brown — the reverse FOIA case — to reserve the Morton v. Ruiz question as to "authorized by law" in §1905 - I found when I did so I got into what southwesterners call "el cajon" — a box canyon — & couldn't write my way out — I did try, however

[illegible]

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 18, 1979

Re: 77-922 - Chrysler Corp. v. Brown

Dear Bill:

Based on my present (and no doubt incomplete) understanding of this case, I can join Parts I, II, and IIIB of your memorandum but not Parts IIIA and IV. For I am presently of the opinion that the regulations discussed in Part IIIA are of a kind which the President, or the head of an Executive Department, could adopt without any special statutory authority and without complying with APA rulemaking procedures.

If there were no statutes pertaining to the acquisition or disclosure of information, I believe the executive would be free to speak freely about the discharge of his public responsibilities. He would need no statutory authority to disseminate information acquired by his subordinates. Either by virtue of the inherent power of his executive office, or by virtue of the housekeeping authority conferred by the antecedents of 5 U.S.C. § 301, the head of any Executive Department surely has ample authority to prescribe rules relating to the dissemination of information to the public. That normal incident of managerial authority may, of course, be curtailed by rules which place limits on either what may be disclosed or what must be disclosed. But if there is no statute either commanding or forbidding disclosure of certain information, I would regard regulations relating to the dissemination of such information as rules "of agency organization, procedures or practice" that are exempted from APA's procedural requirements by 5 U.S.C. § 553.

I am still not sure that the Government was correct in its concession that administrative review is available to Chrysler, but if it is, I would accept the Government's position on the proper scope of review. In sum, I believe this means that I would simply affirm the Court of Appeals.

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 19, 1979

Re: 77-922 - Chrysler Corp. v. Brown

Dear Bill:

Thank you for your response to my memorandum of January 18. You may well be correct about the proper disposition that my position would require. Frankly, I have not thought that part of the problem all the way through. I merely wanted to let you know promptly that my present reaction differs from yours with respect to Parts IIIA and IV of your memorandum.

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 3, 1979

Re: 77-922 - Chrysler v. Brown

Dear Bill:

It is embarrassing to have taken so long to digest this case, and also to conclude that my original view of the case has been shown to be quite wrong. I now find your demonstration that § 1905 is not merely an "anti-leak" statute unanswerable, and having been convinced on that point, I join your persuasive opinion.

Respectfully,

John

Mr. Justice Rehnquist

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