The Burger Court Opinion Writing Database

Andrus v. Allard

444 U.S. 51 (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 19, 1979

Re: 78-740 - Andrus v. Allard

Dear Bill:

I am now persuaded that the "wildlife" aspect places this case in a somewhat different category from Penn Central. However, I conclude that the best I can do is join the judgment. In that "dubitante" status!, I am more comfortable joining only the judgment.

Regards,

WEB

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 4, 1979

RE: No. 78-740 Andrus v. Allard

Dear Chief:

I'll try my hand at an opinion for the Court in the above.

Sincerely,

Bill

The Chief Justice

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnqu
Mr. Justice Steven

From: Mr. Justice Bren

Circulated: 29 OCT 79

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-740

Cecil D. Andrus, Secretary of the Interior, et al., Appellants, *v.* L. Douglas Allard et al. | On Appeal from the United States District Court for the District of Colorado.

[October —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Eagle Protection Act and the Migratory Bird Treaty Act are conservation statutes designed to prevent the destruction of certain species of birds.[1] Challenged in this case

[1] The Eagle Protection Act, 54 Stat. 250, 16 U. S. C. § 668 (a) provides in pertinent part that

"Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export, or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both: . . . *Provided further*, That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to the preservation of the golden eagle."

The Migratory Bird Treaty Act, 40 Stat. 755, 16 U. S. C. § 703, similarly provides that:

"Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 1, 1979

RE: No. 78-740 Andrus v. Allard

Dear Lewis:

Thank you very much for your comments on the opinion in the above. Would it meet your concerns if at page 14 I rephrased "does not in itself amount to a taking" to read "does not in itself necessarily amount to a taking."

And at page 15 rephrase "loss of future profits . . . provides a slender reed, etc." to read "loss of future profits . . . often provides only a slender reed, etc."

On the matter of standing would it meet your concerns if I were to add to note 21 at page 13 the following brief paragraph:

> "Moreover appellees face possible criminal prosecutions for violations of the statutes which of itself suffices to give them standing to litigate their interest in the construction of the statutes."

Sincerely,

Bill

Mr. Justice Powell

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 6, 1979

RE: No. 78-740 Andrus v. Allard

Dear Lewis:

Thank you for your thoughtful suggestions for revision. I will be pleased to adopt changes 1 and 2 (page 14) and change 4 (addition to footnote 21). I am afraid, however, that I cannot incorporate your requested change of page 15. I'm afraid that the language you propose would materially alter the sense of that passage beyond what I can accept. I appreciate that this may mean that you will write separately but at least we did try.

Sincerely,

Bill

Mr. Justice Powell

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

13-16

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 16 NOV 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-740

Cecil D. Andrus, Secretary of the Interior, et al., Appellants, *v.* L. Douglas Allard et al. } On Appeal from the United States District Court for the District of Colorado.

[November —, 1979]

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"Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means

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

CHAMBERS OF
JUSTICE POTTER STEWART

October 30, 1979

Re: No. 78-740, Andrus v. Allard

Dear Bill,

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

October 31, 1979

Re: No. 78-740 - Andrus v. Allard

Dear Bill,

Please join me.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 30, 1979

Re: No. 78-740 - Andrus v. Allard

Dear Bill:

Please join me.

Sincerely,

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 30, 1979

Re: No. 78-740 - Andrus v. Allard

Dear Bill:

Please join me.

Sincerely,

HAB.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 31, 1979

No. 78-740: Andrus v. Allard

Dear Bill:

I agree with your excellent treatment of the statutory issues in this case, but I have some difficulty with your "taking clause" discussion. I am troubled by the broad statements that denial of the right to sell property "does not in itself amount to a taking" (p. 14) and that "loss of future profits . . . provides a slender reed upon which to rest a takings claim" (p. 15).

As I read the cases you have cited for the first proposition, they simply establish that the government can prohibit the sale of property that poses some threat to the public interest. They are rooted in the "nuisance theory" of the taking clause. Thus, while it is true that not every denial of the fundamental right to sell is a taking in a constitutional sense, that extraordinary intrusion on property rights is permisslble only when lesser measures cannot accomplish an important government purpose.

Since the taking clause analysis is a balancing of the need to govern against the interests of private property owners, Pennsylvania Coal v. Mahon, 290 U.S. 393 (1922), what the government is trying to achieve has an effect on whether compensation is due. See United States v. Caltex, 344 U.S. 149 (1952) (total destruction of an oil refinery not a taking because of wartime necessity); Miller v. Schoene, 276 U.S. 272 (1928) (destruction of infected cedars not a taking because necessary for the protection of orchards more valuable to the community). The unusual fact that justifies an extraordinary interference with private property in this case is the inability to distinguish new feathers from old ones.

quite agree that it is necessary to consider the which a regulation interferes with an owner's his property. But the very need to engage in that shows, I think, that interference with future profits less offensive to the takings clause than physical erference with the property itself. In economic terms, h interferences have the same effect: they reduce the resent value of property. I therefore could not say that oss of future profits is a "slender reed upon which to rest a takings claim."

Although I too think that appellees have standing to raise the taking clause issue, I have some doubt about the suggestion that they have standing to challenge a restriction on the disposition of property even if they never lawfully acquired a right of disposition. I should have thought that appellees had standing because they have an interest in a construction of the statutes that would save them from criminal prosecution. Indeed, criminal prosecution is what they complained about when they brought this suit to overturn the Secretary's regulations.

If you find it possible to accommodate these thoughts, I will be happy to join you. Otherwise, I will write.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

November 2, 1979

No. 78-740: Andrus v. Allard

Dear Bill:

I appreciate your willingness to consider some relatively small changes to accommodate my concerns. Rather than the language you suggest, would you be willing to incorporate the substance of the following alternative suggestions.

Change the third sentence in the second paragraph on page 14 to read "But the denial of one traditional property right does not always amount to a taking".

In the third sentence of the last paragraph on that same page, substitute the word "necessarily" for the word "simply" in the phrase "a reduction in the value of property is not simply equated with a taking".

In the second sentence on page 15 say "At any rate, any reduction in appellees' potential economic benefit is attributable to a loss of future profits rather than to a physical interference with the use of the property". And, in the final sentence of the paragraph, could you say "the interest in anticipated gains traditionally has been viewed as more amenable to regulation than other property interests".

Your proposal for an addition to footnote 21 is generally acceptable to me, but I would add it to the existing paragraph and begin it with "All appellees, however, face . . . ."

I don't think any of these suggestions change the analysis of your fine opinion, with which I agree. My

concern is related solely to avoiding language that might be read more broadly in a different context.

Sincerely,

Mr. Justice Brennan

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 14, 1979

78-740 Andrus v. Allard

Dear Bill:

I have decided not to write separately, and accordingly will join your opinion.

Sincerely,

L. Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 5, 1979

Re: No. 78-740 - Andrus v. Allard

Dear Bill:

I share doubts similar, though probably not identical, to those expressed by Lewis in his letter to you of October 31st. I shall therefore await further developments.

Sincerely,

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 20, 1979

Re: No. 78-740 - Andrus v. Allard

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 31, 1979

Re: 78-740 - Andrus v. Allard

Dear Bill:

Further study of this case persuades me that you are correct in stating that a flat proscription on the sale of wildlife, without regard to the legality of its taking, is and for a long time has been a traditional legislative tool for enforcing conservation policy. On that understanding, even though I was originally of the other view, it does seem realistic to assume that Congress meant exactly what its language seems to say.

The Court's opinion in New York ex rel, Silz v. Hesterberg, 211 U.S. 31 (1908), makes it clear that state game laws could (and apparently did) make it illegal during a closed season to possess game lawfully taken in another state. When the Eagle Protection Act was passed in 1940, it did not apply to Alaska (or, of course, Canada) but its prohibitions against commerce in eagles within the forty-eight states quite clearly applied to eagles taken in Alaska or Canada. It follows, I believe, that the prohibition applied to eagles that were "lawfully taken." I think it would be hard to maintain that Congress intended to draw a distinction between (a) eagles that were lawfully taken because of the place of taking--i.e., Alaska or Canada; and (b) eagles that were lawfully taken because of the time of taking--i.e., before the Act was passed.

What all this means is that my planned dissent will not materialize, and I will join your opinion.

Respectfully,

Mr. Justice Brennan

Copies to the Conference