

The Burger Court Opinion Writing Database

FTC v. Standard Oil Co. of California

449 U.S. 232 (1980)

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

December 12, 1980

Re: 79-900 - Federal Trade Commission v. Standard Oil
Company of California

Dear Lewis:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'W. Powell', written in a cursive style.

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 1, 1980

Re: No. 79-900 - FTC v. Standard Oil of Ca.

Dear Lewis,

I suggest one problem with your opinion. Footnote 11 adopts for this case the Bannercraft bad faith/ultra vires reservation and therefore conjectures that "[o]ur determination of finality might be different if Socal had alleged evidence which, if true, could make out a case of fraud or conflict of interest." But isn't consideration of the Bannercraft exception really irrelevant for purposes of determining final agency action under the APA?

You properly point out at page 11 that exhaustion and finality are different concepts. For purposes of determining finality, I do not see why characterization of the FTC complaint depends on the motivation behind its issuance. The standards you spell out in counseling that this is not final agency action are logically no less compelling or applicable whether the FTC acts in good faith or in bad faith. The complaint does not become more or less definitive, the practical effect on Socal remains the same, and the disruption to the agency process still occurs. It seems that an exception for bad faith therefore undercuts the very reasons in support of the finding that this is not final agency action.

I do share your concern, however, that the FTC should not have broad license to issue complaints in bad faith or ultra vires. I suppose that a respondent to an FTC complaint issued in bad faith or ultra vires might be able to bring a mandamus action against a Commissioner, or refuse to comply with a subpoena on the basis of FTC abuse of discretion. I would suppose it would be wholly proper to indicate such possibilities in footnote 11.

If these comments have been persuasive, they could be accommodated, I suggest, by the elimination of the first and last sentences of the second paragraph in footnote 11.

Sincerely,

Justice Powell

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 3, 1980

RE: No. 79-900 FTC v. Standard Oil of California

Dear Lewis:

I agree.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 26, 1980

Re: No. 79-900, FTC v. Standard Oil Co. of California

Dear Lewis,

Please add the following at the foot of your
opinion for the Court in this case:

Justice Stewart took no part in the
consideration or decision of this case.

Sincerely yours,

P.S.
/

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 1, 1980

Re: 79-900 - FTC v. Standard Oil of CA

Dear Lewis,

Although I would have preferred to reverse because the issuance of a complaint is a matter committed to agency discretion, your draft more nearly reflects the Conference vote and I shall neither dissent nor concur only in the judgment if there is a court for your opinion.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

P.S. Having just now seen John's note to you, I should say that I hope you do not drop your treatment of "agency action".

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 2, 1980

Re: No. 79-900 - Federal Trade Commission v.
Standard Oil Company

Dear Lewis:

Please join me.

Sincerely,

J.M.
T.M.

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 1, 1980

Re: No. 79-900 - FTC v. Standard Oil Co. of California

Dear Lewis:

Like John, I am close to joining your good opinion for this case, but I have some minor difficulties with footnote 11 beginning on page 11. The statement that the complaint's allegations, if true, "fall short of showing that the Commission could not have had reason to believe that Social had violated the Act" gives an appearance, at least, of resolving the merits. Is this appropriate in an opinion addressed only to the issuance of reviewability of the merits at this time?

I am also concerned about the final sentence of that footnote, suggesting that the issuance of a complaint might be regarded as "final" if there were allegations which, if true, could make out a case of fraud or conflict of interest. It seems to me that issuance of a complaint either is final agency action or it is not. I may be wrong as to this, but at least I raise the point for your consideration.

Sincerely,



Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 3, 1980

Re: No. 79-900 - FTC v. Standard Oil of California

Dear Lewis:

With the omission of footnote 11, I am glad to join your opinion.

Sincerely,



Mr. Justice Powell

cc: The Conference

Supreme Court Justice
John Paul Stevens
William Brennan
Byron White
Lewis Powell
Thurgood Marshall
Harry Blackmun
William Rehnquist
Chief Justice Warren

11-26-80

Justice Mr. Justice Powell

circulated: NOV 26 1980

1st DRAFT

circulated:

SUPREME COURT OF THE UNITED STATES

No. 79-900

Federal Trade Commission et al.,
Petitioners,
v.
Standard Oil Company of
California. } On Writ of Certiorari to
the United States Court
of Appeals for the Ninth
Circuit.

[December —, 1980]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the issuance of a complaint by the Federal Trade Commission is "final agency action" subject to judicial review before administrative adjudication concludes.

I

On July 18, 1973, the Federal Trade Commission issued and served upon eight major oil companies, including Standard Oil Company of California (Socal),¹ a complaint averring that the Commission had "reason to believe" that the companies were violating § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45,² and stating the Commission's charges in that respect.³ The Commission issued the complaint under au-

¹The other seven respondents to the complaint were Exxon Corporation, Texaco, Inc., Gulf Oil Corporation, Mobil Oil Corporation, Standard Oil Company (Indiana), Shell Oil Corporation, and Atlantic Richfield Company. *In the Matter of Exxon Corporation, et al.*, Docket No. S934

²Section 5 of the Act provides in pertinent part:
"(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

³The Commission charged that the eight companies had "maintained and reinforced a noncompetitive market structure in the refining of crude oil into petroleum products," had "exercised monopoly power in

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 2, 1980

79-900 FTC v. Standard Oil

Dear John:

Thank you for your letter of November 26, and your suggestion with respect to footnote 7 of my opinion in which I said there had been "agency action".

I would prefer not to omit footnote 7 or to reserve decision as to "agency action". It seems to me that the complaint falls within the APA language describing "agency action", and the legislative history indicates that Congress intended the term to cover a broad range of activities.

It also seems to me that a recognition that the issuance of the complaint was "agency action" is a logical preliminary to our decision that there was no "final agency action".

While I would prefer to retain footnote 7 in substantially its present form, I will defer to a majority of the Court if your suggestion is supported to this extent.

Sincerely,



Mr. Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 2, 1980

No. 79-900 FTC v. Standard Oil

Dear Bill and Harry:

In response to your respective concerns over footnote 11, I am simply omitting the entire footnote. It added very little to the opinion.

I appreciate your suggestions.

Sincerely,



Mr. Justice Brennan
Mr. Justice Blackmun

Copies to the Conference

LFP/lab

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See The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Rehnquist
Mr. Justice Burger
Mr. Justice Stevens

From Mr. Justice Powell

12-3-80 circulated _____

pg 11 = n. 11 deleted

Recirculated: **DEC 3 1980**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-900

Federal Trade Commission et al.,
Petitioners,
v.
Standard Oil Company of
California.

On Writ of Certiorari to
the United States Court
of Appeals for the Ninth
Circuit.

[December —, 1980]

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¹ The other seven respondents to the complaint were Exxon Corporation, Texaco, Inc., Gulf Oil Corporation, Mobil Oil Corporation, Standard Oil Company (Indiana), Shell Oil Corporation, and Atlantic Richfield Company. *In the Matter of Exxon Corporation, et al.*, Docket No. 8934.

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page 12: new note 13

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

From: Mr. Justice Powell

12-8-80

Circulated: _____

Re-circulated: DEC 9 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-900

Federal Trade Commission et al., Petitioners, v. Standard Oil Company of California.	}	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
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[December —, 1980]

JUSTICE POWELL delivered the opinion of the Court.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 12, 1980

No. 79-900 FTC v. Standard Oil

MEMORANDUM TO THE CONFERENCE

The Chief has joined me, and suggests that I bring the case down on Monday.

I have cleared this with John Stevens, the only Justice who has written separately, and he agrees.

Accordingly, and absent dissent, I will announce our decision on Monday.

L. F. P.

L. F. P., Jr.

lab

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 28, 1980

Re: No. 79-900 FTC v. Standard Oil Co.

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 2, 1980

Re: No. 79-900 FTC v. Standard Oil Co.

Dear Lewis,

You already have my join in this case. I think there is considerable merit, however, in the points raised in Harry's and Bill's circulation of December 1. I am inclined to agree that the determination at issue in this case is non-final whether made in good faith or bad. I would not, however, take the approach suggested by Bill and discuss hypothetical mandamus actions or the like. Rather I think the best course would be simply to eliminate footnote 11 altogether. *you*

Regarding John's circulation of November 26, I agree with Byron: do not drop your discussion of "agency action" in footnote 7.

Sincerely,



Mr. Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 26, 1980

Re: 79-900 - FTC v. Standard Oil

Dear Lewis:

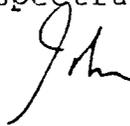
With one minor problem, I am prepared to join your opinion.

At the Conference I expressed the opinion that the issuance of a Commission complaint was not "agency action" within the meaning of § 4(b) of the Administrative Procedure Act. I remain of that view and therefore will find it necessary to write in response to footnote 7 unless you can see your way clear to disposing of the "agency action" issue in the same way that you dispose of the "committed to agency discretion by law" issue. In other words, I wonder if you could not simply omit the long paragraph in the middle of footnote 7 and revise the last sentence to read something like this:

"In view of our conclusion that the issuance of the complaint was not 'final agency action,' we do not address either of these questions."

I might add that it seems particularly appropriate to avoid discussion of the "agency action" question because that issue was not raised in either of the questions presented by the Commission's petition for certiorari.

Respectfully,



Mr. Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 3, 1980

Re: 79-900 - FTC v. Standard Oil

Dear Lewis:

In a few days I will try to have a separate opinion on the "agency action" question.

Respectfully,



Mr. Justice Powell

Copies to the Conference

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Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

79-900 - FTC v. Standard Oil

From: Mr. Justice Stevens

Circulated: DEC 4 '80

Recirculated: _____

JUSTICE STEVENS, concurring in the judgment.

"Agency action" is a statutory term that identifies the conduct of executive and administrative agencies that Congress intended to be reviewable in federal court.¹ In general, the term encompasses formal orders, rules, and interpretive decisions that crystallize or modify private legal rights.² Agency action that is merely "preliminary, procedural, or intermediate" is subject to judicial review at the termination of the proceeding in which the interlocutory ruling is made.³ Today the Court

¹ 5 U.S.C. § 702 provides in part:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

² Section 701(b)(2) provides:

"For the purposes of this chapter--

* * *

"(2) 'person', 'rule', 'order', 'license', 'sanction', 'relief', and 'agency action' have the meanings given them by section 551 of this title."

Section 551 (13) provides:

"'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act;"

Footnote(s) 3 appear on following page(s).

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10. 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

Circulated: _____

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1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-900

Federal Trade Commission et al.,
Petitioners,
v.
Standard Oil Company of
California. } On Writ of Certiorari to
the United States Court
of Appeals for the Ninth
Circuit.

[December —, 1980]

JUSTICE STEVENS, concurring in the judgment.

“Agency action” is a statutory term that identifies the conduct of executive and administrative agencies that Congress intended to be reviewable in federal court.¹ In general, the term encompasses formal orders, rules, and interpretive decisions that crystallize or modify private legal rights.² Agency action that is merely “preliminary, procedural, or intermediate” is subject to judicial review at the termination of the proceeding in which the interlocutory ruling is made.³ Today

¹ Title 5 U. S. C. § 702 provides in part:

“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”

² Section 701 (b) (2) provides:

“For the purposes of this chapter—

“(2) ‘person,’ ‘rule,’ ‘order,’ ‘license,’ ‘sanction,’ ‘relief,’ and ‘agency action’ have the meanings given them by section 551 of this title.”

Section 551 (13) provides:

“‘agency action’ includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act;”

³ Section 704 provides:

“A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.”

Brennan 80

7-3

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

Circulated: _____

Recirculated: DEC 11 '80

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-900

Federal Trade Commission et al., Petitioners, v. Standard Oil Company of California.	}	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
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[December —, 1980]

JUSTICE STEVENS, concurring in the judgment.

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