

The Burger Court Opinion Writing Database

Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission

461 U.S. 190 (1983)

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

January 27, 1983

Re: 81-1945 - Pacific Gas & Electric Company v. State Energy
Resources Conservation & Development Commission

MEMORANDUM TO THE CONFERENCE:

Byron reports he is now leaning the "other way" in this case. You recall some votes at Conference were tentative, and that is why I suggested a further Conference. There were no "takers" and my position remains tentative.

In light of this development, I request Byron to proceed with this as a "memo assignment" and, of course, each of us is free to do a memo of views. For my part, I will await Byron's views.

Regards,

WJB

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

CHAMBERS OF
THE CHIEF JUSTICE

April 5, 1983

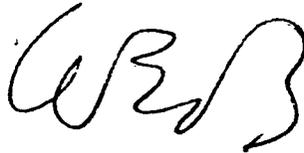
Re: 81-1945 - Pacific Gas & Electric Co. v. State
Energy Resources Conserv. & Dev. Comm'n.

Dear Byron:

I join.

I agree with all the comments on the effective way you have sorted out the issues here in a case with "sticky" problems, as manifested in the tentative nature of conference votes.

Regards,



Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 16, 1983

Re: Pacific Gas & Elec. v. State Energy Comm'n, No. 81-1945

Dear Byron:

May I offer my congratulations on the excellent job you have done in your memorandum in this case. After studying it carefully, I am persuaded that my original vote to reverse in this case was erroneous. I expect to join an opinion based on your memorandum.

Sincerely,


WJB, Jr.

Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 31, 1983

Re: No. 81-1945 -- Pacific
Gas & Electric Company, et al.
v. State Energy Resources
Conservation & Development
Commission, et al.

Dear Byron,

I agree.

Sincerely,

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

Justice White

Copies to the Conferfence

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 26, 1983

Re: 81-1945 -

Pacific Gas & Electric Co. v. State Energy
Resources Conservation & Development Comm'n

Dear Chief,

Booked

I was rather hoping that I would not draw the opinion in the above case. The vote at Conference, it seems to me, was a rather shaky 6 to 3 to reverse. My own vote was not all that firm, and I have been in the process of changing my mind since that time. I think I have arrived at that point and would be glad to circulate a memorandum on that side of the case -- that is, to affirm. This result would return the case to Congress, which itself created the problem by its two savings clauses. Using its authority under these clauses, any state including California if its present effort does not fly, could find a way of slowing or entirely preventing the further development of atomic power in that state. Should you prefer to reassign, however, please do so.

Sincerely yours,

BRW_{epm}

The Chief Justice

Copies to the Conference

cpm

Justice Brennan
 Justice Marshall ✓
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice White**

Circulated: FEB 23 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1945

PACIFIC GAS AND ELECTRIC COMPANY, ET AL., PETITIONERS *v.* STATE ENERGY RESOURCES CONSERVATION & DEVELOPMENT COMMISSION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February —, 1983]

Memorandum of JUSTICE WHITE.

The turning of swords into plowshares has symbolized the transformation of atomic power into a source of energy in American society. To facilitate this development the federal government relaxed its monopoly over fissionable materials and nuclear technology, and in its place, erected a complex scheme to promote the civilian development of nuclear energy, while seeking to safeguard the public and the environment from the unpredictable risks of a new technology. Early on, it was decided that the states would continue their traditional role in the regulation of electricity production. The interrelationship of federal and state authority in the nuclear energy field has not been simple; the federal regulatory structure has been frequently amended to optimize the partnership.

This case emerges from the intersection of the federal government's efforts to ensure that nuclear power is safe with the exercise of the historic state authority over the generation and sale of electricity. At issue is whether provisions in the 1976 amendments to California's Warren-Alquist Act, Cal. Pub. Res. Code §§ 25524.1(b) and 25524.2 (West 1977), which condition the construction of nuclear plants on findings by the State Energy Resources Conservation and Develop-

Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

pp. 3, 6, 20, 24, 30; footnotes
 renumbered; stylistic changes -

From: **Justice White**

Circulated: _____

Recirculated: MAR 14 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1945

PACIFIC GAS AND ELECTRIC COMPANY, ET AL.,
 PETITIONERS *v.* STATE ENERGY RESOURCES
 CONSERVATION & DEVELOPMENT
 COMMISSION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE NINTH CIRCUIT

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Changes from Memorandum at 2-4,
13-14, 16-19, 21, 23, 28-30;
footnotes renumbered;
stylistic changes throughout

Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: MAR 31 1983

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1945

PACIFIC GAS AND ELECTRIC COMPANY, ET AL.,
PETITIONERS *v.* STATE ENERGY RESOURCES
CONSERVATION & DEVELOPMENT
COMMISSION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[March —, 1983]

JUSTICE WHITE delivered the opinion of the court.

The turning of swords into plowshares has symbolized the transformation of atomic power into a source of energy in American society. To facilitate this development the federal government relaxed its monopoly over fissionable materials and nuclear technology, and in its place, erected a complex scheme to promote the civilian development of nuclear energy, while seeking to safeguard the public and the environment from the unpredictable risks of a new technology. Early on, it was decided that the states would continue their traditional role in the regulation of electricity production. The interrelationship of federal and state authority in the nuclear energy field has not been simple; the federal regulatory structure has been frequently amended to optimize the partnership.

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Justice Brennan
 ✓ Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: APR 8 1983

pp. 11-12, 19 and
 stylistic changes throughout

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1945

PACIFIC GAS AND ELECTRIC COMPANY, ET AL.,
 PETITIONERS *v.* STATE ENERGY RESOURCES
 CONSERVATION & DEVELOPMENT
 COMMISSION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE NINTH CIRCUIT

[April —, 1983]

JUSTICE WHITE delivered the opinion of the Court.

The turning of swords into plowshares has symbolized the transformation of atomic power into a source of energy in American society. To facilitate this development the federal government relaxed its monopoly over fissionable materials and nuclear technology, and in its place, erected a complex scheme to promote the civilian development of nuclear energy, while seeking to safeguard the public and the environment from the unpredictable risks of a new technology. Early on, it was decided that the states would continue their traditional role in the regulation of electricity production. The interrelationship of federal and state authority in the nuclear energy field has not been simple; the federal regulatory structure has been frequently amended to optimize the partnership.

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Justice Brennan
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice Brennan
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice Brennan

pp. 21,23,28-30 & stylistic
 changes throughout
 3RD DRAFT

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

From: Justice White

Circulated: _____

APR 10 1983

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 81-1945

PACIFIC GAS AND ELECTRIC COMPANY, ET AL.,
 PETITIONERS *v.* STATE ENERGY RESOURCES
 CONSERVATION & DEVELOPMENT
 COMMISSION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE NINTH CIRCUIT

[April 20, 1983]

JUSTICE WHITE delivered the opinion of the Court.

The turning of swords into plowshares has symbolized the transformation of atomic power into a source of energy in American society. To facilitate this development the federal government relaxed its monopoly over fissionable materials and nuclear technology, and in its place, erected a complex scheme to promote the civilian development of nuclear energy, while seeking to safeguard the public and the environment from the unpredictable risks of a new technology. Early on, it was decided that the states would continue their traditional role in the regulation of electricity production. The interrelationship of federal and state authority in the nuclear energy field has not been simple; the federal regulatory structure has been frequently amended to optimize the partnership.

This case emerges from the intersection of the federal government's efforts to ensure that nuclear power is safe with the exercise of the historic state authority over the generation and sale of electricity. At issue is whether provisions in the 1976 amendments to California's Warren-Alquist Act, Cal. Pub. Res. Code §§ 25524.1(b) and 25524.2 (West 1977), which condition the construction of nuclear plants on findings

HAB

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 27, 1983

Cases held for No. 81-1945,
Pacific Gas & Electric v. State Energy Res. Commn.

81-2065, Van Dissel v. Jersey Central Power & Light Co.

Petitioners are a class of riparian property owners who claim that warm water emitted by the coolant system of respondent's nuclear power plant has caused an infestation of shipworms which has in turn destroyed wooden docks and other structures in the waterways. Petitioners brought suit in New Jersey state court on a number of tort theories--negligence, nuisance, trespass, strict liability. Violation of the state water pollution statute and inverse condemnation were also alleged. The trial court found that the Atomic Energy Act preempted all the state law claims, except for inverse condemnation. The case went to trial on the inverse condemnation issue, and the trial court found that petitioners had not shown that the nuclear power plant was the proximate cause of the damage.

The New Jersey Superior Court affirmed. The court agreed with the trial judge that the tort and statutory claims for damages constitute at least an indirect interference with respondent's radioactive waste discharge system. This system cannot be regulated by the state because it is part of the system installed with federal approval to protect against radiation hazards. The factual findings which defeated petitioner's inverse condemnation claim were also affirmed. The New Jersey Supreme Court declined to review the case, and petitioners came here arguing that the Atomic Energy Act does not preempt state tort law and that a monetary recovery would have no effect on the radioactive waste disposal system.

Because the New Jersey courts found that state tort law would interfere with radioactive waste disposal from the plant, the decision below is consistent with our decision in Pacific Gas & Electric. Of course, direct state regulation of the nuclear

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 31, 1983

Re: No. 81-1945 - Pacific Gas and Electric Co. v.
State Energy Resources Conservation and
Development Commission

Dear Byron:

Please join me.

Sincerely,



T.M.

Justice White

cc: The Conference

HAB

January 25, 1983

Re: No. 81-1945 - Pacific Gas and Electric Co. v. State
Energy Resources Conservation & Development Comm.

Dear Bill and John:

I shall try my hand at a dissent in this case.

Sincerely,

HAB

Justice Rehnquist

Justice Stevens

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Blackmun**

Circulated: APR 13 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1945

PACIFIC GAS AND ELECTRIC COMPANY, ET AL.,
 PETITIONERS *v.* STATE ENERGY RESOURCES
 CONSERVATION & DEVELOPMENT
 COMMISSION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE NINTH CIRCUIT

[April —, 1983]

JUSTICE BLACKMUN, concurring in part and concurring in
 the judgment.

I join the Court's opinion, except to the extent it suggests
 that a State may not prohibit the construction of nuclear
 power plants if the State is motivated by concerns about the
 safety of such plants. Since the Court finds that California
 was not so motivated, this suggestion is unnecessary to the
 Court's holding. More important, I believe the Court's dic-
 tum is wrong in several respects.

The Court takes the position that a State's safety-moti-
 vated decision to prohibit construction of nuclear power
 plants would be pre-empted for three distinct reasons.
 First, the Court states that "the Federal Government has oc-
 cupied the entire field of nuclear safety concerns, except the
 limited powers expressly ceded to the States." *Ante*, at 20.
 Second, the Court indicates that "a state judgment that nu-
 clear power is not safe enough to be further developed would
 conflict squarely with the countervailing judgment of the
 NRC . . . that nuclear construction may proceed notwith-
 standing extant uncertainties as to waste disposal." *Ibid.*
 Third, the Court believes that a prohibition on construction
 of new nuclear plants would "be in the teeth of the Atomic

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: APR 14 1983

pp. 1, 5, 7

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1945

**PACIFIC GAS AND ELECTRIC COMPANY, ET AL.,
PETITIONERS v. STATE ENERGY RESOURCES
CONSERVATION & DEVELOPMENT
COMMISSION ET AL.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[April —, 1983]

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins,
concurring in part and concurring in the judgment.

I join the Court's opinion, except to the extent it suggests that a State may not prohibit the construction of nuclear power plants if the State is motivated by concerns about the safety of such plants. Since the Court finds that California was not so motivated, this suggestion is unnecessary to the Court's holding. More important, I believe the Court's dictum is wrong in several respects.

The Court takes the position that a State's safety-motivated decision to prohibit construction of nuclear power plants would be pre-empted for three distinct reasons. First, the Court states that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Ante*, at 20. Second, the Court indicates that "a state judgment that nuclear power is not safe enough to be further developed would conflict squarely with the countervailing judgment of the NRC . . . that nuclear construction may proceed notwithstanding extant uncertainties as to waste disposal." *Ibid*. Third, the Court believes that a prohibition on construction of new nuclear plants would "be in the teeth of the Atomic

January 21, 1983

Dear Chief:

I would appreciate not being assigned 81-1945
Pacific Gas & Electric Co. v. State Energy Resources
Commission.

You may recall that my law firm has represented Virginia Electric and Power Company since 1906. I did no work for Vepco, as a special group in my firm had this responsibility. Jo and I also sold our Vepco stock when I came on the Court.

I nevertheless have remained out when Vepco has been a party. It is not a party in this case, and I do not know which side of the issue Vepco favors. My understanding is that it no longer proposes to construct any additional nuclear plants.

In any event, in view of my firm's long standing connection with a major power company, it seems unwise for me to be the author of an opinion.

There is one other modest request that I hope you will consider: I gave up an assigned case when you asked me to tackle the abortion cases. Apart from those cases, I have circulated everything assigned to me and am in good shape.

Therefore, I hope very much that I will be assigned three cases at this time.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 1, 1983

81-1945 Pacific Gas v. State Energy Resources

Dear Byron:

John's letter of the 28th to you prompts me to reply.

I agree with John that your memorandum is a first class job. Although I was very close to being on the fence at Conference, I voted tentatively to reverse because it is perfectly clear that California's action - whatever its motivation - is contrary to the national policy of encouraging nuclear energy in view of the certainty that in time the fossil fuels will be exhausted.

I am persuaded by your opinion, however, that Congress did not prevent a state from adopting, for economic reasons, a moratorium on any type of power plant. For example, if the price of oil had continued to escalate, a state rationally could conclude that hydroelectric power and coal were more economical sources of energy.

I therefore am prompted to join you when your memorandum is converted to an opinion, but only if you adhere to your present distinction between economic and safety reasons. As to the latter, it seems clear from your opinion that there is federal preemption.

Sincerely,



Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 31, 1983

81-1945 Pacific Gas & Electric Company v.
State Energy Resources

Dear Byron:

Please join me.

Sincerely,

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

Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 17, 1983

Re: 81-1945 Pacific Gas and Electric Co. v. State Energy
Resources Conservation & Development Comm.

Dear Byron:

I agree with your circulation of March 14th.

Sincerely,



Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 12, 1983

Re: No. 81-1945 Pacific Gas & Electric Co. v.
State Energy Resources Commission

Dear Byron:

Please join me in your opinion for the Court.

Sincerely,



Justice White

cc: The Conference

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

CHAMBERS OF
 JUSTICE JOHN PAUL STEVENS

February 28, 1983

Re: 81-1945 - Pacific Gas v. State Energy Resources

Dear Byron:

Your memorandum is really a first class job. I definitely agree with your final conclusion, and I think I am prepared to subscribe to all of your reasoning except for your conclusion on page 20 that the State could not completely prohibit the new construction of atomic energy plants for safety reasons. I agree, of course, that the State may not superimpose its own safety regulations on either the construction or operation of atomic energy plants, but as presently advised, it is my view that a State does retain the power to reject entirely any power plants of this kind regardless of its actual motivation. This one difference of opinion with your analysis would not prevent me from joining substantially all of what you have written if it is converted into an opinion, and I would definitely join the judgment you propose.

Respectfully,



Justice White
 cc: The Conference

*Hold
 [unclear]*

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 13, 1983

Re: 81-1945 - Pacific Gas v. State Energy
Resources

Dear Harry:

Please join me.

Respectfully,



Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 13, 1983

Re: 81-1945 - Pacific Gas v. State Energy
Resources

Dear Byron:

By joining Harry, I have joined you to the same extent that he has.

Respectfully,



Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 18, 1983

No. 81-1945 Pacific Gas and Electric Co.
v. State Energy Resources
Conservation & Development Comm'n.

Dear Byron,

I was initially inclined to reach a different result in this case, but I have now resolved to join your opinion along the lines of the memorandum you circulated.

Sincerely,



Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 8, 1983

No. 81-1945 Pacific Gas & Electric Co. v.
v. State Energy Resources Comm'n.

Dear Byron,

Please join me.

Sincerely,

Sandra

Justice White

Copies to the Conference