

The Burger Court Opinion Writing Database

North Dakota v. United States

460 U.S. 300 (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

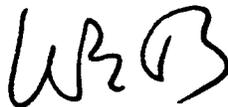
February 4, 1983

Re: 81-773 - North Dakota v. United States

Dear Harry:

I join.

Regards,



Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 15, 1983

RE: No. 81-773 North Dakota v. United States

Dear Harry:

Please join me.

Sincerely,



Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 9, 1983

Re: 81-773 - North Dakota v. United States

Dear Harry,

I shall have a few words to say in this case, probably concurring in part and dissenting in part.

Sincerely,



Justice Blackmun

Copies to the Conference

cpm

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

From: **Justice White**

Circulated: FEB 15 1983

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-773

NORTH DAKOTA, APPELLANT *v.* UNITED STATES

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[February —, 1983]

JUSTICE WHITE, concurring in part and dissenting in part.

I agree that gubernatorial consent is required before wetland easements may be acquired under the Migratory Bird Hunting Stamp Act, 48 Stat. 451, 16 U. S. C. § 718 *et seq.*, that, once given, such consent may not be revoked by the State at will, and that we need not decide whether a governor's consent might become revocable if the federal government were to delay unreasonably the acquisition of easements pursuant to the consent. Accordingly, I join Parts I and II-A of the Court's opinion.

Whether North Dakota's 1977 legislation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941), presents a somewhat more complex problem. In particular, I am concerned with the Court's blanket invalidation of the part of N. D. Cent. Code § 20.1-02-18.1 which authorizes landowners to drain after-expanded wetlands, notwithstanding easement agreements to the contrary, and, N. D. Cent. Code § 47-05-02.1, which limits easements to a maximum term of 99 years. The District Court's judgment held that these laws are void "insofar as they purport to regulate the terms, conditions, or use of acquisitions of land, or interests therein by the United States . . . under the Duck Stamp Act." — F. Supp. —. The Eighth Circuit affirmed this judgment and today the Court does like-

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 3, 1983

Re: 81-773 - North Dakota
v. United States

Dear Harry,

I am content to withdraw my separate
opinion and will no doubt join your next
circulation.

Sincerely,



Justice Blackmun

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 17, 1983

Re: No. 81-773-North Dakota v. United States

Dear Harry:

Please join me.

Sincerely,

J.M.

T.M.

Justice Blackmun

cc: The Conference

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

From: **Justice Blackmun**

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~~HAB
Done for me
TM~~

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-773

NORTH DAKOTA, APPELLANT v. UNITED STATES

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

[February —, 1983]

JUSTICE BLACKMUN delivered the opinion of the Court.

Under the federal Migratory Bird Hunting Stamp Act, the Secretary of the Interior is authorized to acquire easements over small wetland areas suitable for migratory waterfowl breeding and nesting grounds. Although the State of North Dakota initially consented to the Secretary's acquisition of easements over certain wetlands, the State now seeks to withdraw its consent and to impose conditions on any future acquisitions. This has led to the present litigation, for the State's present posture raises the question whether the Secretary may proceed to acquire easements pursuant to North Dakota's prior consent.

Could you
want to
D.W.

I

A

In 1929, the Migratory Bird Conservation Act (Conservation Act), 45 Stat. 1222, ch. 257, 16 U. S. C. § 715 *et seq.*, became law. By § 5 of that Act, 45 Stat. 1223, the Secretary of the Interior was authorized to acquire land "for use as inviolate sanctuaries for migratory birds."¹ Land acquisitions

¹ Section 5 was amended by § 5(a) of the Fish and Wildlife Improvements Act of 1978, Pub. L. 95-616, 92 Stat. 3113, with minor changes from the language quoted in the text. The sense of that language, however, was not altered. See 16 U. S. C. § 715d (1976 ed., Supp. V).

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499. 11, 15-16, 19, 20

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

From: Justice Blackmun

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-773

NORTH DAKOTA, APPELLANT v. UNITED STATES

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

[February —, 1983]

JUSTICE BLACKMUN delivered the opinion of the Court.

Under the federal Migratory Bird Hunting Stamp Act, the Secretary of the Interior is authorized to acquire easements over small wetland areas suitable for migratory waterfowl breeding and nesting grounds. Although the State of North Dakota initially consented to the Secretary's acquisition of easements over certain wetlands, the State now seeks to withdraw its consent and to impose conditions on any future acquisitions. This has led to the present litigation, for the State's present posture raises the question whether the Secretary may proceed to acquire easements pursuant to North Dakota's prior consent.

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¹Section 5 was amended by § 5(a) of the Fish and Wildlife Improvements Act of 1978, Pub. L. 95-616, 92 Stat. 3113, with minor changes from the language quoted in the text. The sense of that language, however, was not altered. See 16 U. S. C. § 715d (1976 ed., Supp. V).

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 3, 1983

Re: No. 81-773 - North Dakota v. United States

Dear Byron:

As a result of our telephone conversation, and in an effort to accommodate your concern, I shall rewrite paragraph III of the opinion to read as follows:

The District Court and the Court of Appeals held that gubernatorial consent was not required prior to federal acquisition of wetlands easements, and that North Dakota's 1977 legislation could not be applied to any easements acquired under the Stamp Act. We conclude that although gubernatorial consent is required, it has been given here and cannot be revoked. We also conclude that North Dakota's 1977 legislation cannot restrict the United States' ability to acquire easements pursuant to consent previously given. To this extent, we affirm the judgment below.

It is so ordered.

Sincerely,



Justice White

cc: The Conference

pp. 20-21

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

From: **Justice Blackmun**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-773

NORTH DAKOTA, APPELLANT v. UNITED STATES

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

[March —, 1983]

JUSTICE BLACKMUN delivered the opinion of the Court.

Under the federal Migratory Bird Hunting Stamp Act, the Secretary of the Interior is authorized to acquire easements over small wetland areas suitable for migratory waterfowl breeding and nesting grounds. Although the State of North Dakota initially consented to the Secretary's acquisition of easements over certain wetlands, the State now seeks to withdraw its consent and to impose conditions on any future acquisitions. This has led to the present litigation, for the State's present posture raises the question whether the Secretary may proceed to acquire easements pursuant to North Dakota's prior consent.

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¹Section 5 was amended by § 5(a) of the Fish and Wildlife Improvements Act of 1978, Pub. L. 95-616, 92 Stat. 3113, with minor changes from the language quoted in the text. The sense of that language, however, was not altered. See 16 U. S. C. § 715d (1976 ed., Supp. V).

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 9, 1983

81-773 North Dakota v. United States

Dear Harry:

Please join me.

Sincerely,



Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 18, 1983

Re: No. 81-773 North Dakota v. United States

Dear Sandra,

Please join me.

Sincerely,



Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 4, 1983

Re: 81-773 - North Dakota v. United States

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 SANDRA DAY O'CONNOR

February 16, 1983

No. 81-773 North Dakota v. United States

Dear Harry,

My views are somewhat different than those expressed in your opinion and from those written by Byron. I will circulate a partial dissent.

Sincerely,



Justice Blackmun

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: FEB 17 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-773

NORTH DAKOTA, APPELLANT *v.* UNITED STATES
ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[February —, 1983]

JUSTICE O'CONNOR, concurring in part, and dissenting in part.

I agree with the Court that gubernatorial consent is required for the acquisition of wetlands easements, that the required consent was given in this case, and that North Dakota may not simply revoke its consent at will. I disagree with the Court, however, in its holding that the United States acquired its easements pursuant to the consents within a reasonable time as a matter of law. I would remand this case in order to allow the lower courts an opportunity to determine whether the federal Government delayed unreasonably in making its acquisitions. Because I would remand, and because I believe that the Court decides two other issues that are not properly before the Court, I dissent in part.

First, in its brief, the Government concedes that "Congress must have assumed that the Secretary would be able to rely on the continued effectiveness—at least for a reasonable amount of time—of gubernatorial consents." Brief for Appellee 26 (emphasis added).¹ The Government's concession on this point reflects the position, correct in my view, that Congress did not intend that gubernatorial consents, once given, could never be withdrawn even if the United States failed to acquire its easements within a reasonable time. Al-

¹ See also Brief for Appellee 14, 27; Transcript of Oral Arg. 35, 41.

PP. 1, 3

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-773

NORTH DAKOTA, APPELLANT *v.* UNITED STATES

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[March —, 1983]

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, concurring in part, and dissenting in part.

I agree with the Court that gubernatorial consent is required for the acquisition of wetlands easements, that the required consent was given in this case, and that North Dakota may not simply revoke its consent at will. I disagree with the Court, however, in its holding that the United States acquired its easements pursuant to the consents within a reasonable time as a matter of law. I would remand this case in order to allow the lower courts an opportunity to determine whether the federal Government delayed unreasonably in making its acquisitions. Because I would remand, and because I believe that the Court decides ~~an~~ ^{another} issue that is not properly before the Court, I dissent in part.

First, in its brief, the Government concedes that "Congress must have assumed that the Secretary would be able to rely on the continued effectiveness—at least for a reasonable amount of time—of gubernatorial consents." Brief for Appellee 26 (emphasis added).¹ The Government's concession on this point reflects the position, correct in my view, that Congress did not intend that gubernatorial consents, once given, could never be withdrawn even if the United States failed to acquire its easements within a reasonable time. Al-

¹ See also Brief for Appellee 14, 27; Transcript of Oral Arg. 35, 41.

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