

The Burger Court Opinion Writing Database

Kirby Forest Industries, Inc. v. United States

467 U.S. 1 (1984)

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

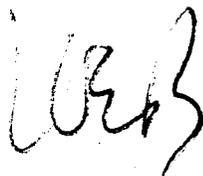
September 28, 1983

Re: No. 82-1993¹⁹⁹⁴ - Kirby Forest Indus., Inc. v. United States

MEMORANDUM TO THE CONFERENCE

I join Sandra's motion to CFV/SG.

Regards,



①

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

CHAMBERS OF
THE CHIEF JUSTICE

May 9, 1984

Re: 82-1994 - Kirby Forest Industries, Inc. v. U.S.

Dear Thurgood:

I join your second draft.

Regards,

Wm B

Justice Marshall

Copies to the Conference



CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

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

April 27, 1984

No. 82-1994

Kirby Forest Industries, Inc.
v. United States

Dear Thurgood,

I agree.

Sincerely,

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 23, 1984

No. 82-1994: Kirby Forest Industries
v. United States

Dear Thurgood,

I hope that you will look with favor on the suggestions made by Bill Rehnquist and John Stevens. I am uneasy, like they are, with some parts of the circulation draft.

Sincerely,

Byron

Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 25, 1984

No. 82-1994: Kirby Forest v. U.S.

Dear Thurgood,

Please join me.

Sincerely,



Justice Marshall

cc: The Conference

STYLISTIC CHANGES THROUGHOUT.

pp. 12-17

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

From: Justice Marshall

Circulated: _____

Recirculated: **APR 24 1984**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1994

KIRBY FOREST INDUSTRIES, INC., PETITIONER *v.*
UNITED STATES

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

[April —, 1984]

JUSTICE MARSHALL delivered the opinion of the Court.

Title 40 U. S. C. § 257, in conjunction with Rule 71A of the Federal Rules of Civil Procedure, prescribes a procedure pursuant to which the United States may appropriate privately owned land by eminent domain. The central issue in this case is whether the manner in which the value of the land is determined and paid to its owner under that procedure comports with the requirement, embodied in the Fifth Amendment, that private property not be taken for public use without just compensation.

I

A

The United States customarily employs one of three methods when it appropriates private land for a public purpose. The most frequently used is the so-called "straight-condemnation" procedure prescribed in 40 U. S. C. § 257. Under that statute, an "officer of the Government" who is "authorized to procure real estate for the erection of a public building or for other public uses"¹ makes an application to the Attorney General who, within 30 days, must initiate con-

¹Such authorization generally is derived from some independent statute that vests the officer with the power of eminent domain but does not prescribe the manner in which that power should be exercised. See, *e. g.*, 16 U. S. C. § 404c-11.

STYLISTIC CHANGES THROUGHOUT.

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

From: Justice Marshall

Circulated: _____

Recirculated: **MAY 9 - 1984**

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1994

**KIRBY FOREST INDUSTRIES, INC., PETITIONER v.
UNITED STATES**

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

[May —, 1984]

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

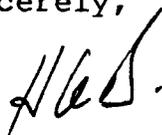
May 10, 1984

Re: No. 82-1994, Kirby Forest Industries, Inc.
v. United States

Dear Thurgood:

Please join me.

Sincerely,



Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 25, 1984

82-1994 Kirby Forest Industries v. U.S.

Dear Thurgood:

Please join me.

Sincerely,

Lewis

Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 19, 1984

Re: No. 82-1994 Kirby Forest Industries, Inc. v.
United States

Dear Thurgood:

I like most of your opinion in this case, but parts of it give me enough problems so that I don't want to join it as presently written. I have two minor and concrete suggestions, and one major suggestion that is harder to spell out.

On page 13, in the paragraph beginning on that page and carrying over to page 14, you say "It is certainly possible, as petitioner contends, that the filing of a notice of lis pendens by the Government reduced the price that the land would have fetched, but impairment of the market value of real property incident to otherwise legitimate governmental action ordinarily does not result in a taking." I don't think this statement accurately relates the filing of a lis pendens to a determination of fair market value. A lis pendens simply puts on the record of real property transactions the announcement that the government has filed a condemnation action; the theory of fair market value is what would be paid by a willing buyer to a willing seller, both fully informed as to the factors determining the value of the property. A fully informed buyer would presumably know that the government had brought a condemnation action without having to find it out from the lis pendens; it seems to me it is not the filing of a notice of lis pendens by the government which might reduce the price that land would have fetched, but the filing of the condemnation action by the government. A lis pendens tells a fully informed buyer nothing that he does not already know.

On page 14, you parenthetically describe what you conceive to be the holding of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) in this language: "(zoning ordinance that caused a 75% reduction in the value of

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

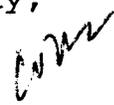
April 25, 1984

Re: No. 82-1994 Kirby Forest Industries v. United States

Dear Thurgood:

Please join me.

Sincerely,



Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 19, 1984

Re: 82-1994 - Kirby Forest Industries, Inc.
v. United States

Dear Thurgood:

Although I'm with you on most of what you have written, I am concerned that portions of your opinion resolve issues that are not really before us at the present time. Specifically, I am reluctant to join the following portions of the opinion, not necessarily because I would not agree with what you have to say, but rather because I am somewhat uncertain about the possible application of what you say to other cases.

The full paragraph in the text on p. 12 and at the top of p. 13, together with footnotes 22 and 26, seem to me to go a little bit farther than anything the Court has yet specifically held. I wonder if it would be possible to substitute a statement somewhat along the following lines:

"Even though we have recognized that such a theory would justify the conclusion that a taking has occurred in certain circumstances, see, e.g., San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), in this case we do not find that prior to the payment of the condemnation award, an interference with petitioner's property interest was severe enough to give rise to a taking under such a theory. See also B. Ackerman, Private Property and the Constitution 44-49, 73-74 (1977); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just

Compensation' Law, 80 Harv. L. Rev. 1165,
1214-1224 (1967)."

Second, it seems to me that the last two sentences on p. 14, as well as the sentence on p. 15 and footnotes 29 and 30 are directed at a case not before us and should either be omitted entirely, or merely described as possible problems that might arise in other litigation.

Third, toward the top of p. 18 you state that a reassessment is "both necessary and sufficient." I agree that the reassessment would be sufficient, but I hesitate to say that it is necessary for fear that it will become a standard part of every condemnation hearing in the future. I also have some question whether the Rule 60(b) procedure you describe is the only, or even the correct, way to raise the question.

Finally, I would much prefer to omit footnotes 33 and 34 because I think both of those footnotes are unnecessary to the decision.

If you can see your way clear to either omitting or substantially modifying the above portions of your opinion, I will be happy to join. Otherwise, as presently advised, I will probably write separately indicating that I agree with most of your analysis but do not join the portions that I identify.

Respectfully,



Justice Marshall

Copies to the Conference



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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 25, 1984

Re: 82-1994 - Kirby Forest Industries, Inc.
v. United States

Dear Thurgood:

Please join me. I appreciate your consideration
of the points that had concerned me.

Respectfully,

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

September 27, 1983

No. 82-1994 Kirby Forest Indus., Inc.
v. United States

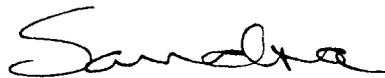
MEMORANDUM TO THE CONFERENCE

At Conference I voted to join three to grant this case. It was relisted under our informal practice to take a second look where there are only four votes to take the case.

In taking my second look, it occurs to me that we should ask the Solicitor General to respond to the merits before voting to grant. As of now, the SG has merely responded that the case is still interlocutory.

Accordingly, I will change my vote to a request for a response on the merits.

Sincerely,



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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

October 10, 1983

No. 82-1994 Kirby Forest Indus., Inc. v.
United States

MEMORANDUM TO THE CONFERENCE

Apologies to all for my "waffling" on this case. I have looked at it again and am now prepared to simply give it a straight vote to grant. It is a recurring issue involving substantial public funds, and there is a circuit conflict.

Sincerely,

Sandra



CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

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

April 19, 1984

No. 82-1994 Kirby Forest Industries, Inc.
v. United States

Dear Thurgood,

Please join me.

Sincerely,

Justice Marshall

Copies to the Conference