The Burger Court Opinion Writing Database

Lowe v. SEC

472 U.S. 181 (1985)

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

May 20, 1985

Re: No. 83-1911 - Christopher L. Lowe v. Securities and Exchange Commission

Dear John:

I am inclined to join Byron's concurrence, but I will wait on your next draft.

Regards,

WEB

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

May 28, 1985

Re: No. 83-1911 - Christopher L. Lowe v. Securities and Exchange Commission

Dear Byron:

I found this case more difficult as the writing unfolded. I have concluded your analysis is close enough to my own that I can join your concurring opinion.

Regards,

WEB

Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 10, 1985

No. 83-1911

Lowe, et al. v. SEC

Dear John,

Please join me in your opinion in the above.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 4, 1985

Re: 83-1911 - Lowe v. SEC

Dear John,

I do not find the legislative history compelling enough to overturn the long-standing administrative interpretation of the Act, which the Commission was implementing in Capital Gains, 375 U.S. 180. Your disposal would effectively foreclose the disclosure remedies we approved against a publisher of a capital gains "report", whom the SEC had treated as an investment advisor. I would not take that course and would not interfere with other available remedies short of enjoining publication. Also, although you purport not to decide the constitutional issue, you seem to do so, see pp. 23, 24, and far too cryptically for me. I thus will concur along the lines of the Conference vote as I understand it.

Sincerely,

Byron

Justice Stevens

Copies to the Conference

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

From: **Justice White**

MAY 1 1985

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1911

CHRISTOPHER L. LOWE ET AL., PETITIONERS *v.*
SECURITIES AND EXCHANGE COMMISSION

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

[May ——, 1985]

JUSTICE WHITE, concurring in the result.

The issue in this case is whether the Securities and Exchange Commission may invoke the injunctive remedies of the Investment Advisers Act, 15 U. S. C. §§ 80b–1 to 80b–21, to prevent an unregistered adviser from publishing newsletters containing investment advice that is not specifically tailored to the needs of individual clients. The Court holds that it may not because petitioner's activities do not make him an investment adviser covered by the Act. For the reasons that follow, I disagree with this improvident construction of the statute. In my view, petitioner is an investment adviser subject to regulation and sanction under the Act. I concur in the judgment, however, because to prevent petitioner from publishing at all is inconsistent with the First Amendment.

I

A

I have no quarrel with the principle that constitutional adjudication is to be avoided where it is fairly possible to do so without negating the intent of Congress. Due respect for the Legislative branch requires that we exercise our power to strike down its enactments sparingly. For this reason, "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is

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

Stylistic changes throughout;
see also pp. 5-8, 10, 15, & 16

From: **Justice White**

Circulated: _____

Recirculated: 5/10/85

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1911

CHRISTOPHER L. LOWE, ET AL., PETITIONERS *v.*
SECURITIES AND EXCHANGE COMMISSION

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

[May ——, 1985]

JUSTICE WHITE, concurring in the result.

The issue in this case is whether the Securities and Exchange Commission may invoke the injunctive remedies of the Investment Advisers Act, 15 U. S. C. §§ 80b–1 to 80b–21, to prevent an unregistered adviser from publishing newsletters containing investment advice that is not specifically tailored to the needs of individual clients. The Court holds that it may not because petitioner's activities do not make him an investment adviser covered by the Act. For the reasons that follow, I disagree with this improvident construction of the statute. In my view, petitioner is an investment adviser subject to regulation and sanction under the Act. I concur in the judgment, however, because to prevent petitioner from publishing at all is inconsistent with the First Amendment.

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

From: **Justice White**

Circulated: _____

Recirculated: JUN 7 1985

– pp. 1, 18, 24, 25, and stylistic –

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1911

CHRISTOPHER L. LOWE, ET AL., PETITIONERS *v.* SECURITIES AND EXCHANGE COMMISSION

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

[June ——, 1985]

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in the result.

The issue in this case is whether the Securities and Exchange Commission may invoke the injunctive remedies of the Investment Advisers Act, 15 U. S. C. §§80b–1 to 80b–21, to prevent an unregistered adviser from publishing newsletters containing investment advice that is not specifically tailored to the needs of individual clients. The Court holds that it may not because petitioner's activities do not make him an investment adviser covered by the Act. For the reasons that follow, I disagree with this improvident construction of the statute. In my view, petitioner is an investment adviser subject to regulation and sanction under the Act. I concur in the judgment, however, because to prevent petitioner from publishing at all is inconsistent with the First Amendment.

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I have no quarrel with the principle that constitutional adjudication is to be avoided where it is fairly possible to do so without negating the intent of Congress. Due respect for the Legislative branch requires that we exercise our power to strike down its enactments sparingly. For this reason, "[w]hen the validity of an act of the Congress is drawn in

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 22, 1985

Re: No. 83-1911-Lowe v. Securities & Exchange

Dear John:

Please join me.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

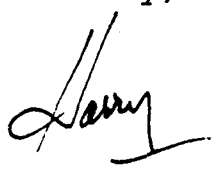
April 9, 1985

Re: No. 83-1911, Lowe v. SEC

Dear John:

I, too, thought the Commission's construction of the statute was a permissible one and was entitled to some deference. I also am inclined to agree with Byron that the legislative history does not support the weight your opinion would give it. I, therefore, shall await Byron's concurrence which will follow the conference vote as I understood it.

Sincerely,



Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 30, 1985

Re: No. 83-1911, Lowe v. SEC

Dear John:

Please join me.

Sincerely,

Harry

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 3, 1985

83-1911 Lowe v. SEC

Dear John:

Please add at the end of the next draft of your opinion that I took no part in the consideration or decision of the above case.

Sincerely,

Lewis

Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 9, 1985

Re: No. 83-1911 Lowe v. SEC

Dear John,

For now I will await Byron's separate writing.

Sincerely,

WHR

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 13, 1985

No. 83-1911 Lowe v. SEC

Dear Bryon,

Please join me.

Sincerely,

Justice White

cc: The Conference

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

From: **Justice Stevens**

Circulated: APR 3 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1911

CHRISTOPHER L. LOWE, ET AL., PETITIONER *v.* SECURITIES AND EXCHANGE COMMISSION

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

[April ——, 1985]

JUSTICE STEVENS delivered the opinion of the Court.

The question is whether petitioners may be permanently enjoined from publishing nonpersonalized investment advice and commentary in securities newsletters because they are not registered as investment advisers under § 203(c) of the Investment Advisers Act of 1940 (the Act), 15 U. S. C. § 80b–3(c).

Christopher Lowe is the president and principal shareholder of Lowe Management Corporation. From 1974 until 1981, the corporation was registered as an investment adviser under the Act.[1] During that period Lowe was convicted of misappropriating funds of an investment client, of engaging in business as an investment adviser without filing a registration application with New York's Department of Law, of tampering with evidence to cover up fraud of an investment client, and of stealing from a bank.[2] Consequently, on May 11, 1981, the Securities and Exchange Commission (Commission), after a full hearing before an administrative law judge, entered an order revoking the registration of the Lowe Management Corporation, and or-

[1] *In the Matter of Lowe Management Corp.*, [1981 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 82,873, 84,321 (May 11, 1981).

[2] *Id.*, at 84,321–84,323.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 5, 1985

Re: 83-1911 - Lowe v. SEC

Dear Byron:

Thank you for your note. I think you are correct that my proposed draft would foreclose disclosure remedies against an unregistered publisher who had no person-to-person relationship with his subscribers--at least until Congress amended the statute to address that specific problem. In Capital Gains, as I read it, no question was raised about the defendant's status as an investment adviser. The injunctive relief requested by the Commission would have applied only "while the said Capital Gains Research Bureau, Inc. is an investment adviser." See 375 U.S., at 184 and n. 5.

Although it may be unusual to treat the relationship between such a publisher and five thousand subscribers to a report as "fiduciary," the opinion seems to rest on the premise that the statute was designed to protect "the adviser's fiduciary relationship to his clients." Id., at 201. The opinion draws a distinction between "arm's-length transactions" and practices that operate as a fraud or deceit "upon a client," id., at 195, and repeatedly describes the recipients of the report as "clients" rather than mere subscribers. See id., at 182, 187, 188, 189, 190, 191, 192, and 194. The opinion also stresses "the delicate fiduciary nature of an investment advisory relationship." See id., at 190 and 191. I also note that the Act repeatedly refers to "clients." See, e.g., §80b-1(1); §80b-3(b)(1); §80b-3(b)(2); §80b-3(b)(3); §80b-3(c)(1)(E); §80b-6(1); §80b-6(2); §80b-6(3).

As a practical matter, I am not sure there really is as much difference between our two positions as might appear at first blush. For a holding that an unregistered publisher like Lowe has a constitutional

right to publish would mean, I suppose, that he could continue to publish without disclosing his purchases and sales of securities that are the subject of his reports. Similarly, the publisher in Capital Gains could simply withdraw his registration and go about his business. If you respond by suggesting that the registration itself provides a badge of reliability, the Commission could continue to accept the registered status conditioned on compliance with the relief requested in Capital Gains. The most significant difference, as I see it, is that my proposed construction of the statute would leave Congress free to draft legislation that would require appropriate disclosures even by publishers who might not be registered.

With respect to the constitutional issue, I think you are right in suggesting that the draft indicates that the speech is entitled to some First Amendment protection, but the statutory disposition makes it unnecessary to indicate whether the justifications for the federal legislation are strong enough to enable us to sustain either registration or some other appropriate regulation of this kind of presumptively protected speech.

Respectfully,

Justice White

Copies to the Conference

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

From: **Justice Stevens**

Circulated: _____

Recirculated: APR 9 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1911

CHRISTOPHER L. LOWE, ET AL., PETITIONER *v.* SECURITIES AND EXCHANGE COMMISSION

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

[April ——, 1985]

JUSTICE STEVENS delivered the opinion of the Court.

The question is whether petitioners may be permanently enjoined from publishing nonpersonalized investment advice and commentary in securities newsletters because they are not registered as investment advisers under § 203(c) of the Investment Advisers Act of 1940 (the Act), 15 U. S. C. § 80b–3(c).

Christopher Lowe is the president and principal shareholder of Lowe Management Corporation. From 1974 until 1981, the corporation was registered as an investment adviser under the Act.[1] During that period Lowe was convicted of misappropriating funds of an investment client, of engaging in business as an investment adviser without filing a registration application with New York's Department of Law, of tampering with evidence to cover up fraud of an investment client, and of stealing from a bank.[2] Consequently, on May 11, 1981, the Securities and Exchange Commission (Commission), after a full hearing before an administrative law judge, entered an order revoking the registration of the Lowe Management Corporation, and or-

[1] *In the Matter of Lowe Management Corp.*, [1981 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 82,873, 84,321 (May 11, 1981).

[2] *Id.*, at 84,321–84,323.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 2, 1985

Re: 83-1911 - Lowe v. SEC

Dear Byron:

Your circulation is characteristically well written but I do not believe you have adequately dealt with the statutory exception. I am drafting some footnotes by way of response but may not get them circulated before I depart for Durham to attend an important commencement this weekend.

Respectfully,

John

Justice White

Copies to the Conference

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

From: **Justice Stevens**

Circulated: _____

Recirculated: MAY 7

My 7 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1911

CHRISTOPHER L. LOWE, ET AL., PETITIONER *v.* SECURITIES AND EXCHANGE COMMISSION

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

[May ——, 1985]

JUSTICE STEVENS delivered the opinion of the Court.

The question is whether petitioners may be permanently enjoined from publishing nonpersonalized investment advice and commentary in securities newsletters because they are not registered as investment advisers under § 203(c) of the Investment Advisers Act of 1940 (the Act), 15 U. S. C. § 80b–3(c).

Christopher Lowe is the president and principal shareholder of Lowe Management Corporation. From 1974 until 1981, the corporation was registered as an investment adviser under the Act.[1] During that period Lowe was convicted of misappropriating funds of an investment client, of engaging in business as an investment adviser without filing a registration application with New York's Department of Law, of tampering with evidence to cover up fraud of an investment client, and of stealing from a bank.[2] Consequently, on May 11, 1981, the Securities and Exchange Commission (Commission), after a full hearing before an administrative law judge, entered an order revoking the registration of the Lowe Management Corporation, and ordering Lowe not to associate thereafter with any investment adviser.

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[1] *In the Matter of Lowe Management Corp.*, [1981 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 82,873, 84,321 (May 11, 1981).

[2] *Id.*, at 84,321–84,323.

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

From: **Justice Stevens**

Circulated: _____

Recirculated: JUN 6 1985

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 15, 21, 26

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1911

CHRISTOPHER L. LOWE, ET AL., PETITIONERS *v.* SECURITIES AND EXCHANGE COMMISSION

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

[June ——, 1985]

JUSTICE STEVENS delivered the opinion of the Court.

The question is whether petitioners may be permanently enjoined from publishing nonpersonalized investment advice and commentary in securities newsletters because they are not registered as investment advisers under §203(c) of the Investment Advisers Act of 1940 (Act), 54 Stat. 850, 15 U. S. C. §80b-3(c).

Christopher Lowe is the president and principal shareholder of Lowe Management Corporation. From 1974 until 1981, the corporation was registered as an investment adviser under the Act.[1] During that period Lowe was convicted of misappropriating funds of an investment client, of engaging in business as an investment adviser without filing a registration application with New York's Department of Law, of tampering with evidence to cover up fraud of an investment client, and of stealing from a bank.[2] Consequently, on May 11, 1981, the Securities and Exchange Commission (Commission), after a full hearing before an Administrative Law Judge, entered an order revoking the registration of the Lowe Management Corporation, and or-

[1] *In re Lowe Management Corp.*, [1981 Transfer Binder], Fed. Sec. L. Rep. CCH ¶82,873 p. 84,321.

[2] *Id.*, at 84,321-84,323.

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 3, 1985

No. 83-1911 Lowe v. Securities and Exchange Commission

Dear John,

Please join me.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference