

# The Burger Court Opinion Writing Database

## *Herb's Welding, Inc. v. Gray*

470 U.S. 414 (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

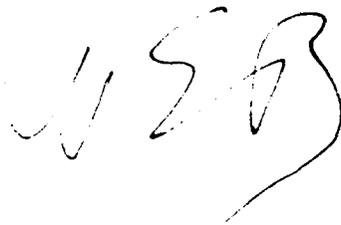
November 20, 1984

Re: 83-728 - Herb's Welding, Inc. v. Robert H. Gray, Jr.

Dear Byron:

I join.

Regards,

A handwritten signature in dark ink, appearing to be 'JWB', written in a cursive style.

Justice White

Copies to the Conference

NOV 21 1984

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

October 9, 1984

No. 83-728

Herb's Welding v. Gray

Dear Thurgood, Harry and Sandra,

We four are in dissent in the  
above. Would you be willing, Thurgood,  
to take on the dissent?

Sincerely,

Justice Marshall

Justice Blackmun

Justice O'Connor

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 7, 1984

No. 83-728

Herb's Welding, Inc., et al.  
v. Robert H. Gray, Jr., et al.

---

Dear Byron,

I shall await the dissent in the  
above.

Sincerely,

*Bill*

Justice White

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

February 26, 1985

No. 83-728

Herb's Welding, Inc., et al.  
v. Robert H. Gray, Jr., et al.

Dear Thurgood,

Please join me.

Sincerely,



Justice Marshall

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**

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-728

**HERB' WELDING, INC., ET AL., PETITIONERS v.  
ROBERT H. GRAY, JR., ET AL.**

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

[November —, 1984]

JUSTICE WHITE delivered the opinion of the Court.

The Longshoremen's and Harbor Workers' Compensation Act, (LHWCA or Act), 33 U. S.C § 901 *et seq.*, provides compensation for the death or disability of any person engaged in "maritime employment," § 902(3), if the disability or death results from an injury incurred upon the navigable waters of the United States, piers, or any adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel, § 903(a).<sup>1</sup> Thus, a worker claiming under the Act must satisfy both a "status" and a "situs" test. The court below held that respondent Robert Gray, a welder working on a fixed offshore oil-drilling platform in state terri-

<sup>1</sup>Section 2(3) of the Act, 86 Stat. 1251, 33 U. S. C. § 902(3), provides:

"The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

Section 3(a) of the Act, 33 U. S. C. § 903(a) provides in part:

"Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

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

From: **Justice White**

Circulated: \_\_\_\_\_

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-728

HERB'S WELDING, INC., ET AL., PETITIONERS *v.*  
ROBERT H. GRAY, JR., ET AL.

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

[November —, 1984]

JUSTICE WHITE delivered the opinion of the Court.

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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**

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES:

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3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-728

HERB'S WELDING, INC., ET AL., PETITIONERS *v.*  
ROBERT H. GRAY, JR., ET AL.

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

[December —, 1984]

JUSTICE WHITE delivered the opinion of the Court.

The Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, provides compensation for the death or disability of any person engaged in "maritime employment," § 902(3), if the disability or death results from an injury incurred upon the navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing, or building a vessel, § 903(a).<sup>1</sup> Thus, a worker claiming under the Act must satisfy both a "status" and a "situs" test. The court below held that respondent Robert Gray, a welder working on a fixed

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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**

Pp. 6-11; footnotes 6-13 renumbered

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4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-728

HERB'S WELDING, INC., ET AL., PETITIONERS *v.*  
ROBERT H. GRAY, JR., ET AL.

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

[March —, 1985]

JUSTICE WHITE delivered the opinion of the Court.

The Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, provides compensation for the death or disability of any person engaged in "maritime employment," § 902(3), if the disability or death results from an injury incurred upon the navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing, or building a vessel, § 903(a).<sup>1</sup> Thus, a worker claiming under the Act must satisfy both a "status" and a "situs" test. The court below held that respondent Robert Gray, a welder working on a fixed

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

October 10, 1984

Re: No. 83-728-Herb's Welding v. Gray

Dear Bill:

I will do the dissent in this one.

Sincerely,



T.M.

Justice Brennan  
Justice Blackmun  
Justice O'Connor

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 5, 1984

Re: No. 83-728-Herb's Welding v. Gray

Dear Byron:

"In due course" I will circulate a dissent.

Sincerely,

*J.M.*  
T.M.

Justice White

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

From: **Justice Marshall**

Circulated: FEB 25 1985

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-728

**HERB'S WELDING, INC., ET AL., PETITIONERS v.  
ROBERT H. GRAY, JR., ET AL.**

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

[February —, 1985]

JUSTICE MARSHALL, dissenting.

Today the Court holds that a marine petroleum worker is not covered by the Longshoremen's and Harborworkers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, when pursuing his occupation on a fixed offshore rig within the three-mile limit of a state's territorial waters. Although such an individual routinely travels over water as an essential part of his job and performs the rest of his job adjacent to and surrounded by water, he is not covered because, in the Court's view, his occupation is not "maritime employment." See § 2(3), 33 U. S. C. § 902(3). The Court reaches this conclusion even though a worker of the same occupation, working in the same industry, and performing the same tasks on a rig located in the same place, would be covered if that rig were one that was capable of floating.<sup>1</sup> Neither the Court, nor any of the

<sup>1</sup>"Floating" petroleum rigs are classified as vessels in admiralty jurisprudence, see *Producers Drilling Co. v. Gray*, 361 F. 2d 432, 437 (CA5 1966), and as such have long been within the Act's coverage. *Ante*, at 2 n. 2. It must be emphasized, however, that in admiralty law, the classification of a structure as "floating" turns only on its capacity to float, and not on the relevance of bouyancy to its typical use or its state at the time of an injury. Many "floating" offshore petroleum rigs are so classified because they are floated to their drilling sites; but once there, they are elevated above the water and supported by legs that rest on the ocean bottom. See *Producers Drilling Co.*, *supra*, at 437 (classification in-

STYLISTIC CHANGES THROUGHOUT

P. 1, 6, 13, 19, 22

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

From: Justice Marshall

Circulated: \_\_\_\_\_

Recirculated: MAR 1 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-728

HERB'S WELDING, INC., ET AL., PETITIONERS *v.*  
ROBERT H. GRAY, JR., ET AL.

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

[March —, 1985]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE O'CONNOR join, dissenting.

Today the Court holds that a marine petroleum worker is not covered by the Longshoremen's and Harborworkers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, when pursuing his occupation on a fixed offshore rig within the three-mile limit of a state's territorial waters. Although such an individual routinely travels over water as an essential part of his job and performs the rest of his job adjacent to and surrounded by water, he is not covered because, in the Court's view, his occupation is not "maritime employment." See § 2(3), 33 U. S. C. § 902(3). The Court reaches this conclusion even though a worker of the same occupation, working in the same industry, and performing the same tasks on a rig located in the same place, would be covered if that rig were one that was capable of floating.<sup>1</sup> Neither the Court, nor any of the

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STYLISTIC CHANGES THROUGHOUT *and*  
PP. 8, 11-12, 14-16

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

From: Justice Marshall

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3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-728

HERB'S WELDING, INC., ET AL., PETITIONERS *v.*  
ROBERT H. GRAY, JR., ET AL.

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

[March —, 1985]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE O'CONNOR join, dissenting.

Today the Court holds that a marine petroleum worker is not covered by the Longshoremen's and Harborworkers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, when pursuing his occupation on a fixed offshore rig within the three-mile limit of a state's territorial waters. Although such an individual routinely travels over water as an essential part of his job and performs the rest of his job adjacent to and surrounded by water, he is not covered because, in the Court's view, his occupation is not "maritime employment." See § 2(3), 33 U. S. C. § 902(3). The Court reaches this conclusion even though a worker of the same occupation, working in the same industry, and performing the same tasks on a rig located in the same place, would be covered if that rig were one that was capable of floating.<sup>1</sup> Neither the Court, nor any of the

<sup>1</sup>"Floating" petroleum rigs are classified as vessels in admiralty jurisprudence, see *Producers Drilling Co. v. Gray*, 361 F. 2d 432, 437 (CA5 1966), and as such have long been within the Act's coverage. *Ante*, at 2, n. 2. It must be emphasized, however, that in admiralty law, the classification of a structure as "floating" turns only on its capacity to float, and not on the relevance of buoyancy to its typical use or its state at the time of an injury. Many "floating" offshore petroleum rigs are so classified because they are floated to their drilling sites; but once there, they are elevated

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 8, 1984

Re: No. 83-728, Herb's Welding, Inc. v. Gray

Dear Byron:

I, too, shall await the dissent in this case.

Sincerely,



Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 28, 1985

Re: No. 83-728, Herb's Welding, Inc. v. Gray

Dear Thurgood:

Please join me in your dissenting opinion.

Sincerely,

*H.A.B.*

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.

November 6, 1984

83-728 Herb's Welding v. Gray

Dear Byron:

Please join me.

Sincerely,

*Lewis*

Justice White

lfp/ss

cc: The Conference



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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 6, 1984

Re: No. 83-728 Herb's Welding v. Gray

Dear Byron,

Please join me.

Sincerely,

Justice White

cc: The Conference

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13

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 6, 1984

Re: 83-728 - Herb's Welding v. Gray

Dear Byron:

Please join me.

Respectfully,



Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

November 5, 1984

No. 83-728 Herb's Welding, Inc. v. Gray

Dear Byron,

For now I will wait for the dissent before  
deciding whether to join your opinion.

Sincerely,



Justice White

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

February 25, 1985

No. 83-728 Herb's Welding, Inc. v. Gray

Dear Thurgood,

Please join me in your dissenting opinion.

Sincerely,

Justice Marshall

Copies to the Conference

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