

ORIGINAL

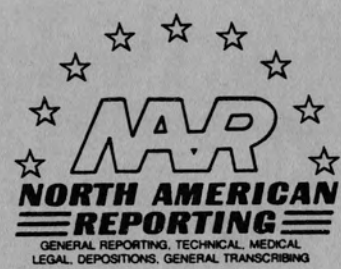
In the

Supreme Court of the United States

FEDERAL TRADE COMMISSION,	)	
ET AL.,	)	
	)	
PETITIONERS,	)	
	)	
V.	)	No. 79-900
	)	
STANDARD OIL COMPANY OF CALIFORNIA,	)	
	)	
RESPONDENT.	)	
	)	

Washington, D.C.  
October 15, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

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 FEDERAL TRADE COMMISSION, ET AL., :  
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 Petitioners, :  
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 v. : No. 79-900  
 :  
 STANDARD OIL COMPANY OF CALIFORNIA, :  
 :  
 Respondent. :  
 :  
 ----- :

Washington, D.C.

Wednesday, October 15, 1980

The above-entitled matter came on for oral argument  
at 11:31 o'clock a.m.

BEFORE:

HON. WARREN E. BURGER, Chief Justice of the United States  
 HON. WILLIAM J. BRENNAN, JR., Associate Justice  
 HON. POTTER STEWART, Associate Justice  
 HON. BYRON R. WHITE, Associate Justice  
 HON. THURGOOD MARSHALL, Associate Justice  
 HON. HARRY A. BLACKMUN, Associate Justice  
 HON. LEWIS F. POWELL, JR., Associate Justice  
 HON. WILLIAM H. REHNQUIST, Associate Justice  
 HON. JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WADE H. McCREE, JR., ESQ., Solicitor General of the United States, U. S. Department of Justice, Washington, D.C. 20530; on behalf of the Petitioners.

GEORGE A. SEARS., ESQ., Pillsbury, Madison & Sutro, 225 Bush Street, P. O. Box 7880, San Francisco, California 94120; on behalf of the Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

WADE H. McCREE, JR., ESQ.,  
om behalf of the Petitioners.

3

GEORGE A. SEARS, ESQ.,  
om behalf of the Respondent.

18

MILLERS FALLS  
ERASE  
COTTON CONTENT

P R O C E E D I N G S

1  
2 MR. CHIEF JUSTICE BURGER: We will hear arguments  
3 next in Federal Trade Commission v. Standard Oil Company of  
4 California.

5 Mr. Solicitor General, I think you may proceed when  
6 you are ready.

7 ORAL ARGUMENT OF SOLICITOR GENERAL WADE H. McCREE, JR.,  
8 ON BEHALF OF THE PETITIONER

9 MR. McCREE: Mr. Chief Justice, and may it please  
10 the Court:

11 The Federal Trade Commission Act of 1914 provides  
12 in part that unfair methods of competition in or affecting  
13 commerce are declared unlawful. And it further provides that  
14 whenever the Commission shall have reason to believe that any  
15 corporation is using any unfair method of competition and if  
16 it shall appear to the Commission that a proceeding in respect  
17 thereof to be in the interest of the public, it shall issue  
18 and serve on the respondent a complaint, which requires an  
19 answer, administer the proceedings to establish the proof of  
20 the allegations set out therein, and then the issuance, in case  
21 the allegations are established, of a cease and desist order  
22 which, unless overturned by a court on review or unless the  
23 period for review, which is 60 days, has expired, then becomes  
24 enforceable.

25 This case presents important questions of

1 administrative law and it requires the Court to answer a ques-  
2 tion that might be stated as follows: This case requires the  
3 Court to decide whether during the pendency of an administra-  
4 tive proceeding a district court that concededly cannot review  
5 the sufficiency of what is alleged in the agency complaint to  
6 constitute its reason to believe that certain firms have vio-  
7 lated the law, can nevertheless determine whether the agency  
8 in fact made the reason to believe determination that caused  
9 it to file the complaint.

10 The case arises out of the following factual situa-  
11 tion. The Federal Trade Commission in 1971 authorized an  
12 investigation to determine whether the structure of the petro-  
13 leum industry caused it, or contributed to its engaging in  
14 unfair trade practices. The investigation was concerned with  
15 competition, principally at the refining end of the petroleum  
16 industry, and had very little to do with the crude oil or  
17 importation end of it.

18 The method in which the staff conducted the investi-  
19 gation consisted essentially of seeking information from  
20 independent operators and not directly from the principal  
21 vertically integrated corporations by calling in their officers  
22 or by subpoenaing their records. It also consisted of seeking  
23 information from several governmental agencies that had the  
24 responsibility of collecting data about the petroleum industry.  
25 This began in 1971.

1           In 1973 when the nation first experienced an acute  
2 fuel shortage, Senator Henry Jackson sent a letter to the  
3 Federal Trade Commission Chairman requesting that within 30  
4 days the Commission write a report on the relationship between  
5 the structure of the petroleum industry and the shortage of  
6 petroleum products that was afflicting the country. That  
7 was May, 1973.

8           On July 6, 1973, the Federal Trade Commission sub-  
9 mitted to Senator Jackson a commission report entitled,  
10 "Preliminary Federal Trade Commission Staff Report on its  
11 Investigation of the Petroleum Industry." And it indicated  
12 that this report had not yet been evaluated by the Commission,  
13 nor did the findings and conclusions necessarily reflect those  
14 of the Commission. It also asked that the report not be given  
15 undue publicity because it might jeopardize subsequent prose-  
16 cution.

17           On July 13, seven days later, Senator Jackson  
18 released the preliminary report for publication as a committee  
19 report. On July 18, then, the Commission, having on the pre-  
20 vious July 17 issued a report stating that it intended to file  
21 a complaint, caused its complaint to be filed naming the  
22 eight petroleum companies that were respondents before the  
23 Commission and are respondents here, charging that they were  
24 violating Section 5 of the Federal Trade Commission Act, that  
25 it had reason to believe that that fact existed, and that it

1 was in the public interest to proceed to a hearing on the alle-  
2 gations that the complaint set forth, describing the acts and  
3 practices claimed to be in violation of the Act.

4 Standard Oil of California, one of the eight named  
5 petroleum companies, moved the Commission to dismiss its com-  
6 plaint on the grounds that the Commission did not have reason  
7 to believe that this respondent had violated the law at the  
8 time it issued the complaint, and that the proceeding was not  
9 in the public interest. The Commission denied these motions  
10 by order of February 12, 1974.

11 Respondent then sought reconsideration of this order  
12 and on June 4, 1974, the Commission denied the motion for  
13 rehearing and reiterated its previous determination that the  
14 adequacy of the Commission's "reason to believe" that a viola-  
15 tion of the law had occurred, and its belief that a proceeding  
16 would be in the public interest, was not litigable.

17 The Commission staff then proceeded with discovery  
18 to prepare to prove the allegations set forth in the adminis-  
19 trative complaint and Standard Oil of California and the other  
20 seven respondent petroleum companies vigorously resisted its  
21 efforts for discovery. Eleven months later, on May 1, 1975,  
22 Standard Oil of California filed a complaint in the United  
23 States District Court for the Northern District of California  
24 for declaratory relief, contending that the Federal Trade  
25 Commission did not have reason to believe that a violation of

1 law had occurred at the time it filed its complaint.

2 QUESTION: Are you going at some point to mention  
3 the proceeding in Indiana? At your own time.

4 MR. McCREE: The proceeding in Indiana, Mr. Chief  
5 Justice, was a similar proceeding brought by Standard Oil of  
6 Indiana, another one of the eight respondents, also asserting  
7 that the Commission did not have reason to believe that Sec-  
8 tion 5 of the Act had been violated at the time it filed its  
9 petition, its administrative complaint.

10 That matter was decided as far as its result is  
11 concerned favorably to the Commission, because the District  
12 Court, although looking into the matter, concluded that the  
13 Commission had reason to believe and therefore the Commission  
14 was successful at the district court level. An appeal was  
15 noticed in that and dismissed, I believe, but there is no  
16 Court of Appeals decision pending with reference to that, and  
17 as far as I am aware that matter rests.

18 QUESTION: What would you say is the impact of that  
19 holding on this case, if any?

20 MR. McCREE: Well, I think -- I think it has no  
21 precedential value for this purpose, it just shows that another  
22 district court thought that it could at that stage of the  
23 administrative proceeding look into the adequacy of the reason  
24 to believe standard, or look into whether the Commission did  
25 in fact make the reason to believe determination.



1           But it's not a precedent for us here. As a matter  
2 of fact, even more recently, in a case called Boise-Cascade,  
3 that was decided last May, the -- I believe -- the District  
4 Court for the District of Delaware decided that a district  
5 court could not look into the sufficiency of a reason to be-  
6 lieve determination. And if the Indiana case is a precedent  
7 against the Commission, certainly the Boise-Cascade case is a  
8 precedent for the Commission. But we think that neither is  
9 even instructive to this Court, except for the favorable lan-  
10 guage that we find in the Boise-Cascade case, which effectively  
11 follows the language of the dissenting opinion in the matter  
12 in the Northern District of California, where Standard Oil of  
13 California filed the complaint to which I just made reference.

14           QUESTION: Mr. Solicitor General, Standard Oil of  
15 California is the only one of the eight respondents before  
16 us in this case.

17           MR. McCREE: It is the only one before us in this  
18 case; yes, Mr. Justice Brennan.

19           QUESTION: General McCree, in an administrative pro-  
20 ceeding such as this, does the main information-seeking process  
21 occur in the pleading stage or in the discovery stage? That  
22 is, could the Commission simply issue a complaint in the  
23 language of the statute and serve it on the respondent and the  
24 respondent simply file a general denial and then go to dis-  
25 covery?

1 MR. McCREE: I think not. I think the Commission  
2 must have reason to believe. I don't think it could do it  
3 capriciously, and if the Justice's inquiry looks to that point,  
4 I would say, it cannot do it capriciously. It must have rea-  
5 son to believe, but it's our contention that what constitutes  
6 reason to believe as the argument will develop is a matter  
7 that is not reviewable by the Court, that if it's agency action  
8 it is action committed to the discretion of the agency and  
9 therefore is not reviewable.

10 We would liken it to prosecutorial discretion to  
11 initiate a prosecution. Responsibly, a prosecutor would not  
12 initiate a prosecution unless he had reason to believe that  
13 there was some basis for it. But we submit that ordinarily  
14 a court will not inquire into the reason why a prosecutor  
15 decided to initiate a fraud proceeding.

16 QUESTION: Wouldn't one go further than that in the  
17 court system and say that if a prosecutor initiates a prose-  
18 cution a defendant can't come in and have it dismissed on the  
19 grounds that the prosecutor had no reason to believe that the  
20 evidence would prove the case?

21 MR. McCREE: That's right. He cannot do that. We  
22 quite agree. And we contend that he cannot do it here either.

23 The District Court for the Northern District of  
24 California upon entertaining this complaint that asked for a  
25 declaratory judgment and other relief proceeded essentially

1 to determine, first, that the sufficiency of the reason to  
2 believe, the sufficiency of the facts that gave the Commission  
3 reason to believe as it recited was committed to agency dis-  
4 cretion and was not reviewable for the district court. And  
5 neither side disagrees with that determination. He then  
6 dismissed the action brought before him.

7           The Court of Appeals, however, for the 9th Circuit,  
8 two members of a three-judge panel agreed first with the  
9 determination of the district court, agreeing that the -- well,  
10 I'm ahead of myself. I'll take it step by step if I may.

11           First, it determined that it was agency action to  
12 file the complaint, which is something with which we disagree  
13 and I'll talk about it in a few moments.

14           Second, it determined that whether there was reason  
15 to believe that the Act had been violated was agency action  
16 committed to the discretion of the agency, and therefore under  
17 the Administrative Procedures Act could not be reviewed by the  
18 Court. However -- and we think it's a little extraordinary --  
19 the Court of Appeals went on to decide that judicial review is  
20 available with respect to whether the Commission did in fact  
21 make a reason to believe determination, and that there was law  
22 to apply, as this court used this phrase, in *Citizens to*  
23 *Preserve Overton Park v. Volpe*, and it vacated the judgment of  
24 dismissal and remanded the matter to the district judge with  
25 instructions to find out, did the Commission in fact make a

1 reason to believe determination, which determination is unre-  
2 viewable, as it decided. That's the status in which this  
3 matter confronts the Court this morning.

4 One judge dissented on the ground that the Commis-  
5 sion's action initiating the administrative proceeding is in  
6 essence an exercise of prosecutorial discretion and as such is  
7 exempted from judicial review. He also said that to permit an  
8 inquiry into whether the determination was in fact made would  
9 require an impermissible probing into the mental processes of  
10 the Commission and that it was something in which the Court  
11 should not engage.

12 QUESTION: Well, would it really require any probing  
13 at all if five commissioners all signed a piece of paper and  
14 verified it saying, we have reason to believe that the unfair  
15 practices took place?

16 MR. McCREE: Well, we contend that that's really what  
17 we have here. This complaint is regular on its face. The com-  
18 plaint purports to be issued pursuant to the authorization of  
19 the Commission, the complaint recites that a reason to believe  
20 determination was made, the complaint is attested to by the  
21 Secretary of the Commission and is in every respect in proper  
22 form. Yet, the Court of Appeals did what we regard as an  
23 extraordinary thing and suggests that the complaint that was  
24 filed before the district court is sufficient to raise that  
25 question.

1           And I think it's very much like questioning an in-  
2     dictment handed down by a grand jury. It's in proper form,  
3     it's signed by the foreman of the grand jury, recites that a  
4     majority of the grand jurors agree to the allegations set  
5     forth in the indictment, and then the defendant is permitted,  
6     before any proof is introduced, to say, I don't think they  
7     really agreed to that. And the court would investigate to see  
8     whether or not that happened.

9           QUESTION: Could there be a preliminary proceeding  
10    to inquire into the truth of whether a grand jury had ever  
11    indeed handed down, or whether, on the contrary, a fraud was  
12    being perpetrated on the court?

13          MR. McCREE: I think perhaps in an extraordinary  
14    circumstance, but when the indictment is fair on its face,  
15    there's no suggestion that it's a forgery, there's no sugges-  
16    tion that it was altered, it just relates to the mental pro-  
17    cesses of the grand juror, which is exactly what we have here.

18          What respondent, Standard Oil of California, asserts,  
19    essentially, is that the decision to file the administrative  
20    complaint was motivated politically because of the intervention  
21    of Senator Jackson who made this inquiry. And that is really  
22    the essence of it.

23          QUESTION: May I ask you of your interpretation of  
24    the 9th Circuit opinion, assuming the following. Assume that  
25    somehow or other the facts came to light and there was in fact

1 political motivation at the time the complaint was filed.

2 But by the time the Commission responded to the motion to dis-  
3 miss the complaint, which I understand they did some months  
4 later, they had reviewed the matter and then decided in an  
5 orderly way at a meeting of the full Commission that there was  
6 then reason to believe the case should go forward. But they  
7 didn't have the reason to believe it at the time they filed  
8 the complaint. What do you think the Court of Appeals for the  
9 9th Circuit would say should be done about that? Would they  
10 make you dismiss the complaint and start all over and file a  
11 new complaint?

12 MR. McCREE: Well, it certainly would be a waste of  
13 judicial time and a waste of administrative time to do that,  
14 because they could do exactly what you suggest. They could  
15 dismiss it and have a resolution. As a matter of fact --

16 QUESTION: They may in effect be contending that  
17 -- this is some years ago, but in all these years the Commis-  
18 sion still hasn't made its determination that there's reason  
19 to believe there's a violation. They're still keeping the case  
20 alive. Is that what they would --

21 MR. McCREE: It's certainly passing strange that the  
22 Commission would keep it alive under all those circumstances  
23 if it had not at least ratified its act of filing it.

24 QUESTION: Doesn't the very fact you're here defend-  
25 ing what the Commission did implicitly indicate that somebody

1 has reason to believe the case ought to go forward.

2 MR. McCREE: Mr. Justice Stevens, I certainly agree  
3 with that. We wouldn't be here if the Commission had any doubt  
4 about it, and we think this is one of the reasons why the  
5 decision to file the complaint should be insulated from judi-  
6 cial review, because if the Commission recognized that it made  
7 a mistake, we would expect it to behave responsibly and to  
8 strike its complaint. The fact that it proceeds with it -- as  
9 a matter of fact it's proceeded here through some very arduous  
10 and not too productive discovery. I'm advised that there have  
11 been almost 400 proceedings relating to the Commission's effort to  
12 get discovery in this matter, and that there have been 14 or 15  
13 lawsuits filed, matters of various sorts, to quash subpoenas,  
14 the matter to which the Chief Justice referred in the Northern  
15 District of Indiana, and this matter, and others. While the  
16 Commission tried to establish something, that curiously enough  
17 someone said, they didn't really intend to file.

18 QUESTION: Could you, Mr. Solicitor General, concede  
19 arguendo -- and assume, arguendo -- that the Commission may  
20 have acted with unseemly haste in responding to the congres-  
21 sional inquiry and yet take the position that that has nothing  
22 to do with the central issue?

23 MR. McCREE: Arguendo, Mr. Chief Justice, I can make  
24 that concession, and I think this happens sometimes in the  
25 criminal area where a prosecution takes place because the

1 public is insistent upon the solving of some crime that vexes  
2 it, and sometimes perhaps in those instances a grand jury may  
3 return an indictment with unseemly haste. The question, of  
4 course, becomes whether they actually did it, and the proof  
5 of the sufficiency of it comes in its capacity to sustain it  
6 later on.

7           And if the Commission in this case cannot sustain  
8 these allegations, of course there will be no cease and desist  
9 order, which is the sanction that the Commission would impose  
10 if its staff in presenting evidence could establish these  
11 facts. And that's a higher standard than reason to believe,  
12 which is a very vague standard.

13           Also, I would like to comment too, further stimulated  
14 by the Chief Justice's question, that the fact that there was  
15 a political inquiry doesn't of itself vitiate the proceeding or  
16 suggest that there's not reason to believe. The Congress has  
17 responsibility for the same matters that the Federal Trade  
18 Commission has, to see that there are not anticompetitive  
19 activities in the petroleum market. And for it to make an  
20 inquiry of an agency that was created with the primary func-  
21 tion to oversee these matters seems to me the most responsible  
22 kind of legislative action that could take place. And nowhere  
23 does Standard Oil of California assert that Senator Jackson  
24 required them to file an action, or even suggested that they  
25 file an action. His was an inquiry about their investigation,



1 which commenced in 1971 and it proceeded for 17 months before  
2 the fuel crisis stimulated him in his capacity as Chairman of  
3 the Permanent Investigations Subcommittee of the Senate, to  
4 make this inquiry.

5 Our argument, essentially, is as follows. First, we  
6 suggest that the issuance of an administrative complaint is not  
7 agency action within the meaning of the Administrative Proce-  
8 dure Act.

9 QUESTION: Is that point, Mr. Solicitor General,  
10 preserved in the petition for certiorari, do you think?

11 MR. McCREE: We think it is. I believe, Mr. Justice  
12 Blackmun, your question probably results from the fact that  
13 we did not use that very language when we filed our petition,  
14 but we did use this language, that the matter is not final  
15 agency action. Now, if it's to be final agency action, it has  
16 to be agency action in the first place, and so the first--

17 QUESTION: That really is directed at a different  
18 point, isn't it, not final agency action?

19 MR. McCREE: It is ultimately, except it can't -- if  
20 it's not agency action at all, it can't be final agency action,  
21 and we suggest that --

22 QUESTION: Well, would you be as satisfied with  
23 winning on the argument you've made up to now as you would on  
24 this one?

25 MR. McCREE: I would prefer to win on the argument

1 I've made up to now.

2 QUESTION: Namely, that it's committed to agency  
3 discretion?

4 MR. McCREE: That it's committed to agency discretion  
5 and that it is not reviewable.

6 QUESTION: Even though it's agency action?

7 MR. McCREE: If the Court should decide this is agen-  
8 cy action and wishes to agree with our contention that it's  
9 committed to agency discretion, we'd be very pleased to win on  
10 that basis.

11 QUESTION: Why do we need to deal with that at all,  
12 or do we?

13 MR. McCREE: I'm pleased to have the Court make that  
14 inquiry but I'm just suggesting that on proper analysis it  
15 isn't agency action, because the Administrative Procedures Act  
16 defines agency action as a number of things, none of which  
17 remotely resembles the filing of a complaint.

18 QUESTION: Well, if it isn't subject to judicial  
19 review, then no matter how we describe it it isn't final agency  
20 action. Is that not so?

21 MR. McCREE: That's entirely correct. Mr. Chief  
22 Justice, I see I have about five minutes remaining. With the  
23 permission of the Court I would like to reserve that time for  
24 rebuttal. Thank you, sir.

25 MR. CHIEF JUSTICE BURGER: Very well. There are only

1 three minutes remaining, counsel, before lunch. I think we'll  
2 not ask you to divide your argument, so we'll resume at this  
3 point, Mr. Sears, at 1 o'clock.

4 (Recess)

5 MR. CHIEF JUSTICE BURGER: Mr. Sears, you may proceed  
6 whenever you are ready.

7 ORAL ARGUMENT OF GEORGE A. SEARS

8 ON BEHALF OF THE RESPONDENT

9 MR. SEARS: Mr. Chief Justice, may it please the  
10 Court:

11 QUESTION: Would you care to comment on the possible  
12 implications of the Indiana holding where we have the same  
13 parties? There's certainly an interconnection there.

14 MR. SEARS: I'd be glad to do that, Your Honor.  
15 The cases present entirely disparate issues. The only party  
16 to this case is the Standard Oil Company of California. In  
17 the Indiana case seven of the eight respondents in Docket 8934  
18 are the plaintiffs in that suit. The issue in the Indiana case  
19 goes to a denial of due process to respondents because of a  
20 denial of discovery in Docket 8934 by the administrative law  
21 judge. The orders of the judge which prompted the Indiana  
22 case were orders which denied respondents any discovery until  
23 after complaint counsel had completed their discovery and had  
24 perhaps further defined the issues in the case.

25 The suit before Judge McNagny contended that such a

1 denial of discovery per se was a denial of due process in  
2 the circumstances of the litigation. Judge McNagny agreed  
3 with that and he voided it, the two orders in question, of the  
4 administrative law judge, and directed that the administrative  
5 law judge should reconsider discovery applications by the  
6 respondents.

7 I think from that, Mr. Chief Justice, that you'll  
8 understand that the issue there is entirely disparate from the  
9 issue presented here today. It was made explicitly clear in  
10 the pleadings in the Indiana case that no challenge was being  
11 made to the reason to believe of the Commission at the time it  
12 issued the complaint in the case. That was explicitly clear  
13 in that case. That issue, the absence of reason to believe  
14 that Standard of California had violated Section 5 before the  
15 complaint issued is the issue that is presented in this case  
16 exclusively.

17 The issue before the Court is whether the allegations  
18 in Standard's complaint state a claim for relief. There is no  
19 evidentiary record. The 9th Circuit held that the allegations  
20 of Standard's complaint and the reasonable inferences there-  
21 from state a claim for relief on account of conduct of the  
22 Commission which is in violation of constitutional and statu-  
23 tory requirements.

24 Standard's claim is that the Commission charged  
25 Standard with a federal offense without reason to believe that

1 Standard had violated the law. That is without any basis to  
2 relate conduct of Standard in the relevant geographic area to  
3 a violation of Section 5 of the FTC Act.

4 The Commission's position in the case is that whe-  
5 ther it had reason to believe that Standard had violated  
6 Section 5 is not subject to review in any court at any time,  
7 and that the basis for its action, however invidious and unre-  
8 lated to statutory requirement, may never be examined by a  
9 court. That Commission assertion of unreviewable prerogative  
10 cannot be squared with due process safeguards or the rule of  
11 law.

12 QUESTION: I take it you would necessarily reject  
13 any analogy between the indictments by a grand jury and the  
14 action taken here?

15 MR. SEARS: I'd like to comment on that, Mr. Chief  
16 Justice. The cases which I cite in our brief show that upon a  
17 proper showing, an examination may be made into the question  
18 of whether an indictment has been handed down without any evi-  
19 dence in the absence of any evidence to show probable cause  
20 that the defendant committed the crime. That kind of examina-  
21 tion may be made on a proper showing.

22 I am asserting the same line of reasoning here,  
23 adding only this comment, that this is a stronger case for  
24 examining the basis for Commission action. The reason is that  
25 conceptually the grand jury stands between the prosecutor and

1 the citizen charged with crime.--

2 QUESTION: Mr. Sears, how do you distinguish the  
3 Costello case in that case?

4 MR. SEARS: May I just finish my sentence, Your  
5 Honor?

6 QUESTION: Certainly.

7 MR. SEARS: -- whereas in this case obviously the  
8 Commission itself is prosecutor here as well as judge under  
9 the FTC Act and the Commission acts directly upon the citizens,  
10 the person. That's why I'm suggesting this is a stronger  
11 reason for this Court to look at the absence of basis for  
12 Commission action.

13 Now, sir, Costello. As I have stated and quoted in  
14 my brief, Justice Burton's concurring opinion in that case  
15 makes explicit that there is a distinction between an examina-  
16 tion into the adequacy or the sufficiency of evidence on the  
17 one hand and the absence of evidence, a no-evidence situation,  
18 no evidence to relate conduct of defendant to commission of  
19 offense, on the other hand.

20 QUESTION: Do you suggest then that in a federal  
21 court a defendant could come in and move to dismiss an indict-  
22 ment on the ground that the Government simply had no evidence  
23 to prove its case?

24 MR. SEARS: Again, sir, as the cases which I have  
25 cited in my brief demonstrate, that is done.

1 QUESTION: Are there any cases from this Court sup-  
2 port that?

3 MR. SEARS: I submit, sir, that Costello from this  
4 Court supports that, that it directly supports that.

5 QUESTION: Well, this is an approach something like  
6 Thompson v. Louisville, isn't it?

7 MR. SEARS: It may be, Your Honor, though I couldn't  
8 testify to that. I'm not familiar standing here with Thompson  
9 v. Louisville, Your Honor.

10 QUESTION: That was a case of no relevant evidence  
11 whatsoever.

12 MR. SEARS: In that case, Your Honor, it supports  
13 this case, because my contention here is that the Commission  
14 issued the complaint in Docket 8934, having before it no evi-  
15 dence which could support any inference --

16 QUESTION: And why do you say it issued the com-  
17 plaint, Mr. Sears?

18 MR. SEARS: Because, again, of reasons which I have  
19 laid out in my brief, Your Honor, that the Commission felt  
20 intense pressure in the extraordinary circumstances of that  
21 time.

22 QUESTION: You mean, they got together and said, we  
23 can't resist this pressure of Senator Jackson and let's just  
24 go ahead and do it even though we have no evidence whatever -- ?

25 MR. SEARS: Well, Your Honor --

1 QUESTION: Would they go that far?

2 MR. SEARS: Let me put it a little differently, if I  
3 might. Let me suggest that what the Commission more likely  
4 thought to itself if, here we've had a winter of people  
5 shivering in their homes with fuel oil shortages, and we've  
6 had a spring when people are cursing in lines in gas stations  
7 and we think that it might be a good idea to jump on the band-  
8 wagon, to get out front, and let people know that we are trying  
9 to do something to confront a situation of obvious public  
10 concern.

11 QUESTION: So that Senator Jackson's interest was no  
12 part of this?

13 MR. SEARS: No, I don't say that either, sir. Again,  
14 as I've laid out in my complaint in the case, I think that  
15 Senator Jackson's actions were highly significant. They  
16 brought to bear in a specific time period a focus of pressure  
17 on the Commission which led it to act and which, I suggest,  
18 led it to act rashly and unlawfully, and that's why this case  
19 is here.

20 QUESTION: I gather your argument does --  
21 but your argument does suggest that they knew that they had  
22 absolutely no evidence to support the issuance of the complaint,  
23 no reason to believe.

24 MR. SEARS: Well, let me -- let me talk around the  
25 corners of that a little bit. I am not here to charge



1 Commissioners with bad faith, with -- for example, responding to  
2 Your Honor's suggestion that they somehow acted fraudulently in  
3 the circumstances, knowing that they had no basis on which to  
4 act. I'm not here suggesting or arguing that. I don't need to  
5 do that, that's not the drive of the case. The drive of the  
6 case is that, in fact, the Commissioners had no basis on which  
7 to relate conduct of the Standard Oil Company of California in  
8 the relevant geographic area of the East and Gulf Coast states  
9 of the United States, to a violation of Section 5 of the FTC  
10 Act. That is my contention.

11 QUESTION: Mr. Sears, supposing that we affirm the  
12 9th Circuit? The case is sent back to District Court and the  
13 Commissioners file an affidavit in that court which says in  
14 substance, well, they're right, we jumped the gun, we had  
15 suspicion but we didn't have any facts, but we've been studying  
16 the matter during the last couple of years and we are now  
17 satisfied there is reason to believe Standard has violated  
18 the law. What should the District Court do?

19 MR. SEARS: Let me state it in my view, sir, what it  
20 is that the Commission should do. The Commission should with  
21 draw the complaint, for the law is perfectly clear on this  
22 point. The statute is explicit that a complaint may be issued  
23 by the Commissioner only upon the basis of a reason to believe  
24 determination that the respondent has violated Section 5. The  
25 answer to your question is, they must withdraw the complaint.

1 QUESTION: Say they add to their affidavit that we  
2 could remedy this situation either by withdrawing the complaint  
3 or by amending the complaint and saying that as of the present  
4 we have reason to believe there is a violation. We don't want  
5 to lose the benefit of the discovery we've had, so it's sort  
6 of a futile gesture to start all over. Are they still required  
7 by law to move to withdraw the complaint?

8 MR. SEARS: They must, for the reason I've already  
9 stated, an explicit legal requirement, they must withdraw  
10 the present complaint. Now, what, sir, the Commission might  
11 elect to do in that circumstance is obviously something I  
12 would not predict. One of the extraordinary circumstances,  
13 one of the very important considerations that exists here,  
14 is that this case, if it were to proceed on this unlawfully  
15 issued complaint, would conduct an examination into a period  
16 of time prior to July, 1973, when the complaint issued.  
17 That's the period on which it must make a determination of  
18 liabilities, as Your Honor well knows.

19 As your Honor equally well knows, the petroleum world  
20 today is an entirely new world from what it was prior to July  
21 1973. We have a Department of Energy, 20,000 employees plus;  
22 we have pervasive regulation of the industry; the entire  
23 international and national oil world is a new world. In that  
24 circumstance, sir, I don't know what the Commission might choose  
25 to do. It is not going to lose anything which it has done to

1 date, however. Let me make that very clear to Your Honor.  
2 All the Commission has done to date in this case is to secure  
3 production of massive volumes of documents from the eight  
4 respondents. Those documents are not going to disappear if  
5 the complaint were properly to be withdrawn. They would remain  
6 available to the Commission, to be applied in what would then  
7 be a proper investigation of what the world of today is like.  
8 If they chose after that examination to reissue a complaint  
9 on a proper basis, they then could do that. Sir?

10 QUESTION: They could do it for the period prior to  
11 1973, couldn't they?

12 MR. SEARS: Or--and as well; yes, sir.

13 QUESTION: I really don't understand what you accom-  
14 plish by this lawsuit. They are now electing to go forward on  
15 their existing complaint, which you strongly suggest they  
16 think they hope to prove their allegations.

17 MR. SEARS: I have not made myself fully clear, Your  
18 Honor.

19 QUESTION: Not to me.

20 MR. SEARS: Well, I am saying to you, sir, that the  
21 Commission, the Commission may or may not today have reason to  
22 believe that Standard of California has violated the law. It  
23 may assert that, but I'm suggesting to Your Honor that you are  
24 assuming something that very plainly is not in evidence.

25 QUESTION: Well, it is in evidence if the Commission

1 resisted your motion to dismiss and they're still defending their  
2 right to prosecute this action, and we presume that public  
3 agencies are acting in good faith for the most part; they are  
4 public officers and I think there is some presumption of  
5 validity to their action.

6 MR. SEARS: There is a presumption of regularity,  
7 which is, as Your Honor knows, a rebuttable presumption, and  
8 the point of this complaint is that Standard of California has  
9 shown a proper basis for a judicial inquiry into whether the  
10 Commission, when it issued the complaint, did have any basis  
11 for a reason to believe determination. That's exactly the --

12 QUESTION: I take it you concede that it's regular on  
13 its face? The complaint is regular on its face?

14 MR. SEARS: The complaint includes as all Commission  
15 complaints include, a recital, a formal recital at the outset,  
16 that there has been a finding of reason to believe, and that the  
17 action is in the public interest. The contention here, sir,  
18 again is that there has been a basis shown, a prima facie  
19 basis for a judicial inquiry shown in the allegations of  
20 Standard's complaint, indicating that in this extraordinary  
21 instance -- and to repeat, there were extraordinary circum-  
22 stances that preceded the issuance of the complaint of July,  
23 1973.

24 In this instance those are truly bare recitals.  
25 There is not a fact behind them which would serve to relate

1 the conduct of the Standard Oil Company of California in the  
2 relevant area on the one hand, to a violation of Section 5 on  
3 the other.

4 QUESTION: Mr. Sears, let me try it another way.  
5 If the letter from Senator Jackson was not here, would you be  
6 here?

7 MR. SEARS: That's an interesting question, Your  
8 Honor. I think that the answer is, yes, I would still be here.

9 QUESTION: And what would you be alleging or indi-  
10 cating or urging?

11 MR. SEARS: I'll tell you why I hesitated: because  
12 it is the existence of the Jackson letter coupled with subse-  
13 quent developments of public record that provided very appar-  
14 ent reason for inquiry into what if anything it was the Com-  
15 mission had done.

16 QUESTION: Where do you get the right to inquire  
17 into the motive of a Government agency?

18 MR. SEARS: There may be an inquiry into motive of  
19 an agency in appropriate cases, sir. There may be. I think  
20 I need not go that far in this case. The core of this case  
21 goes to the absence of any basis for Commission action.  
22 That's what this case goes -- as Your Honor very well knows,  
23 federal judges make determinations of whether there is probable  
24 cause to believe that the defendant committed a crime, every  
25 day of their lives. And they make those determinations without

1 any suggestion from a prosecutor that that kind of an evalua-  
2 tion of whether there is or is not basis for probable cause,  
3 either invades the prosecutor's mental processes, or incurs  
4 the proper exercise of his prosecutorial discretion. As I say,  
5 Your Honor well knows that isn't the case. Probable cause  
6 reviews are made every day.

7 QUESTION: Well, Mr. Sears, if you go to prosecu-  
8 torial discretion, then I have a lot of trouble. Suppose you  
9 show in a case that a man convicted of eight crimes, the con-  
10 viction was set up by a man that wrote a letter and said, I  
11 think this man committed some crimes. Would that vitiate that  
12 conviction?

13 MR. SEARS: No, I would think that would clearly  
14 not vitiate that conviction.

15 QUESTION: And if a Senator had written a  
16 letter, would it vitiate it?

17 MR. SEARS: No, that would not vitiate that convic-  
18 tion.

19 QUESTION: So where do you get your prosecutorial  
20 discretion in this case? It's not here. It's not the same  
21 thing, is it? I thought you said that in the beginning, that  
22 it was not the same thing.

23 MR. SEARS: Well, that is why I was responding the  
24 way I was. It seems to me that the issue here in this case  
25 is entirely different than the one you posed. It's simply a

1 different issue.

2 QUESTION: I thought that's what you said.

3 QUESTION: But if we rule in your favor, don't we  
4 have to say that every time a respondent is made a party by  
5 the Federal Trade Commission that party has a right to go into  
6 Federal District Court before there's been any trial before the  
7 administrative law judge and say, the agency doesn't have any  
8 facts to back up its allegations?

9 MR. SEARS: Your Honor, one of the great things  
10 about the United States is that the courts are open to liti-  
11 gants. There may be other claims of this kind advanced, but  
12 I am not aware, to take a federal example, that there has been  
13 any abuse of the provisions of Rule 12 of the Federal Rules of  
14 Criminal Procedure, which permit an examination into absence  
15 of probable cause to support either information or indictment.  
16 I'm not aware that there has been any abuse of Rule 11 of  
17 the Federal Rules of Civil Procedure which permits an immediate  
18 inquiry into whether there was any support for the filing of  
19 the complaint. I'm not aware that that exists, Your Honor.  
20 And, of course, two more factors that apply here.  
21 What has been approved by the Court of Appeals in this case?  
22 And I think what was approved by this Court in Dunlop v.  
23 Bachowski is a very narrow scope of review. It is a most  
24 stringent standard which we must meet in this case, or which  
25 other prospective litigants must make in some other case.

1 I think that the threat of some kind of massive  
2 infusion of cases into this judicial system is simply not true  
3 in fact.

4 QUESTION: Suppose the record were opened and we  
5 knew or it was stipulated that three Commissioners thought  
6 there was reason to believe, and two thought there was not  
7 reason to believe. What would that do? What impact would  
8 that have? It would show among other things that the matter  
9 was contested, and therefore perhaps more closely examined,  
10 at least under some theories, than a unanimous opinion.

11 MR. SEARS: The Federal Trade Commission Act permits  
12 complaints to issue on the vote of three Commissioners. And  
13 assuming for a moment, sir, and I think this is the direction  
14 of your question, that the three Commissioners had factual  
15 foundation for their determination of reason to believe. Let  
16 me assume that with you. Then I think we have a situation  
17 which is quite close to the Boise-Cascade case which the  
18 Solicitor General referred to this morning. I am answering  
19 your question by saying that then, in that case, I think the  
20 complaint issuance would be proper. You had three proper votes  
21 for the issuance of a complaint. And again, that was true in  
22 Boise-Cascade.

23 QUESTION: Could I ask you, are you suggesting that  
24 the courts review, must review, or that you're entitled to have  
25 the courts review whether or not there was actually probable



1 cause to issue the complaint?

2 MR. SEARS: That's precisely my analogy -- the dif-  
3 ferent -- the concerns --

4 QUESTION: What did the Court of Appeals hold?

5 MR. SEARS: Yes. The Court of Appeals held --

6 QUESTION: The Court of Appeals held that the only  
7 thing that was reviewable was whether they had purported to  
8 make the determination.

9 MR. SEARS: Well, let me address that. I thought  
10 that perhaps --

11 QUESTION: What did it reject? What did you claim  
12 that it rejected?

13 MR. SEARS: Let me state what my understanding of  
14 the narrow scope of review directed by the 9th Circuit is.

15 QUESTION: All right.

16 MR. SEARS: We have to go to the court's language,  
17 of course.

18 QUESTION: All right.

19 MR. SEARS: The court said this in its opinion:

20 "A restriction on the FTC's discretion is embodied in the very  
21 terms of 15 U.S.C. 45(b). The FTC must first in fact make a  
22 reason to believe determination that the law has been violated.  
23 See Hunt Foods and Industries, 286 F.2d 803, 806. At that  
24 page the relevant sentence from the Hunt Foods case, also a  
25 9th Circuit decision, says, "The Commission cannot have reason

1 to believe unless it is in possession of facts warranting such  
2 a belief."

3 Now, coming back to where we started on this, Your  
4 Honor, yes, I am saying that the reason to believe review, that  
5 very narrow review, open to the District Court, is comparable  
6 to the very narrow review permitted to a district judge of  
7 whether there is probable cause.

8 QUESTION: Well, I had misunderstood then, apparently.  
9 I thought the Court of Appeals said that whether or not there  
10 was actually probable cause to issue the complaint, or reason-  
11 able cause to issue the complaint, it wasn't reviewable. But  
12 whether or not the Commission had made such a determination  
13 was an open issue.

14 MR. SEARS: I think not, Your Honor, for the reason --

15 QUESTION: Well, let's suppose for the moment that  
16 I am correct in reading the Court of Appeals opinion the way  
17 I do. Just suppose that. Would you be entitled to urge what  
18 you're now urging, as a respondent?

19 MR. SEARS: If I may, sir, I know no way --

20 QUESTION: Is there -- do you suppose there's an  
21 answer to my question, or do you have an answer for it?

22 MR. SEARS: The answer to your question, sir, is,  
23 yes, I would be entitled to proceed to explore, as the 9th  
24 Circuit said, as you interpret the opinion, whether a determi-  
25 nation of reason to believe was made by the Commissioner.

1 QUESTION: Yes, whether a determination had been  
2 made, not whether it was a correct determination?

3 MR. SEARS: That's correct, Your Honor; yes, sir.

4 QUESTION: But you are now urging that it is also  
5 open to a court in this case to say whether the determination  
6 was correct?

7 MR. SEARS: Not whether it was correct in the opinion  
8 of the District Court. And again, the 9th Circuit made this  
9 explicit in its opinion. And that's -- the 9th Circuit said  
10 that the District Court, on review, may not substitute its  
11 view of what constitutes a violation of Section 5 for that of  
12 the Federal Trade Commission. It said that, and that's why  
13 I'm saying there is such a very narrow scope of review that  
14 is directed by the 9th Circuit. It is the kind of very narrow  
15 review that was directed by this Court in *Dunlop v. Bachowski*.

16 QUESTION: Is this what the Court of Appeals said?  
17 "Under this standard a determination by the FTC that there is  
18 reason to believe a violation of law has occurred is within  
19 the agency's discretion and not reviewable in the District  
20 Court under the APA."

21 MR. SEARS: That's what the court said; yes, sir.

22 QUESTION: And that's what it held.

23 MR. SEARS: That happens to be what it held; right.

24 QUESTION: And you're suggesting, however, that  
25 whether there is reason to believe, is open to review.

1 MR. SEARS: I am, sir, and again --

2 QUESTION: And I again suggest to you that you may  
3 not be able to urge that as a respondent without having cross-  
4 petitioner, because it expands the relief.

5 MR. SEARS: I don't understand that, Your Honor.  
6 I am not seeking relief, I am not seeking relief in Docket  
7 8934, Your Honor. I have filed an independent suit in United  
8 States District Court, which is my proper remedy.

9 QUESTION: If you sustain, if we agreed with every-  
10 thing you've argued today, you would get more relief out of  
11 this Court than the Court of Appeals gave you.

12 MR. SEARS: Oh, I don't agree with that, with great  
13 deference, Your Honor. I don't agree with that. I have read  
14 to you --

15 QUESTION: I don't blame you.

16 MR. SEARS: I have read to you the precise sentences  
17 from the 9th Circuit, which to my mind indicate the definition  
18 of a very narrow scope of review directed by the court. I'm  
19 going to have to stand on that statement and not repeat myself.

20 QUESTION: All right. Well, that's fair enough.

21 MR. SEARS: The nature of Standard's claim points  
22 the way to the necessary relief in District Court and dissolves  
23 arguments about exhaustion of administrative remedy and  
24 finality of administrative -- agency action. Standard brought  
25 its suit in District Court because it has no other remedy for

1 the Commission wrongdoing in question. It is essential in  
2 this connection to bear in mind that the Commission has a pro-  
3 secutorial function as well as an adjudicative role. The ad-  
4 judicative proceedings in Docket 8934 are directed to Commis-  
5 sion allegations against respondents, not to determination of  
6 wrongful conduct by the Commission itself. There will be no  
7 record in Docket 8934 of the conduct of the Commission in issue  
8 for any ultimate review in the Court of Appeals upon a cease  
9 and desist order against the respondents. The unlawful  
10 Commission conduct here in issue is not a procedural ruling  
11 or other action by the Commission in its adjudicative role in  
12 the course of Docket 8934. It is unlawful conduct by the  
13 Commission in its prosecutorial function, antecedent to com-  
14 mencement of Docket 8934. There's a crucial distinction.

15 Now, Standard accordingly has no administrative remedy  
16 to exhaust, nor any judicial remedy in a Court of Appeals.  
17 there is no question about the finality of the Commission's  
18 denial of Standard's right to due process in regard to the  
19 charges the Commission issued against Standard. Standard's  
20 suit in District Court is the only remedy it has, it is the  
21 remedy that the law provides for the Commission's unconstitu-  
22 tional and unlawful conduct here in issue.

23 Thank you, Your Honor.

24 MR. CHIEF JUSTICE BURGER: Do you have anything fur-  
25 ther, Mr. Solicitor General?

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MR. McCREE: Mr. Chief Justice, with the Court's permission, we will rest our argument on our brief.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:30 o'clock p.m., the case in the above-entitled matter was submitted.)

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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-900

Federal Trade Commission, et al.

v.

Standard Oil Company of California

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Bill J. Wilson  
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