In the

# Supreme Court of the United States

RICHARD A. GORDON, etc., et al.,

Petitioners,

v.

NEW YORK STOCK EXCHANGE, INC., et al.,

Respondents.

No. 74-304

Washington, D. C.
March 25, 1975

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Washington, D. C.
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Washington, D. C.,

Tuesday, March 25, 1975.

The above-entitled matter came on for argument at 2:04 o'clock, p.m.

BEFORE:

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

APPEARANCES:

I. WALTON BADER, ESQ., 40 Morrow Avenue, Scarsdale, New York; on behalf of the Petitioners.

HOWARD E. SHAPIRO, ESQ., Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae, supporting petitioners.

WILLIAM ELDRED JACKSON, ESQ., Milbank, Tweed, Hadley & McCloy, 1 Chase Manhatten Plaza, New York, New York 10005; on behalf of the Respondents.

APPEARANCES [Cont'd]:

LAWRENCE E. NERHEIM, ESQ., General Counsel, Securities and Exchange Commission, Washington, D. C. 20549; on behalf of the S.E.C. as amicus curiae, supporting respondents.

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C O N T E N T S



[Second day - pg. 42]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-304, Gordon against the New York Stock Exchange.

Mr. Bader, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF I. WALTON BADER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BADER: Mr. Chief Justice, and may it please the Court:

This case involves the legality of the fixed-commission rates which have been charged by brokerage houses in the securities business since the Buttonwood Tree Agreement of 1792, which of course antedates the passage of the Sherman Antitrust Act in the 1890's.

The minimum-fee schedules charged by the securities industry brokerage houses thus are the longest sustained conspiracy in restraint of trade that this country has ever seen.

In 1792, the brokerage community got under a buttonwood tree, and they agreed that they would do the following things: they first would have minimum commission rates, which would be charged, and that no broker would have the right to charge beneath the fixed minimum.

If a broker in fact charged beneath the fixed minimum, he would be expelled from the Exchange. So that we had at that

time a clear per se violation of the antitrust laws, but of course it wasn't a per se violation of the antitrust laws at that time, because the Sherman Act hadn't been passed.

QUESTION: Where was the Buttonewood Tree, down in Wall Street somewhere?

MR. BADER: Down in Wall Street. It was a tree, Mr. Justice Stewart, that was, I think, somewhere around the present area of Bowling Green, Manhattan, but I don't want to be pinned down to that.

In 1890 the Sherman Act was passed, that didn't affect the practice of the brokerage community in charging fixed rates of commission, and apparently the reason for that was that the requirements of interstate commerce at that time had not been broadened by this Court in the decisions that were passed during the Rooseveltian New Deal era. And therefore that was considered to be a mere local problem, which would not fall within the reach of the antitrust laws.

In 1934, the Securities Act was passed, and in 1934 the Pujo Committee, which was considering the passage of the Securities Act, considered the practices of the Stock Exchanges, which had been charging fixed rates of commission in accordance with the Buttonwood Tree Agreement, and there was discussion at that time that the fixed rates of commission again, because of the restricted decisions of interstate commerce that had been in effect at that time, would probably not go and fall

within the reach of the antitrust laws.

But now, when the Securities and Exchange --

QUESTION: Mr. Bader, what grant of authority was Congress legislating under to regulate the Securities and Exchange Commission in '34? Wasn't that the commerce problem?

MR. BADER: Yes, that's true, Mr. Justice Rehnquist, but the question of fixed rates of commission, there had been a discussion in the Pujo Committee. That does appear in the Attorney General's brief, where that legislative history is set forth. Where, apparently, the Pujo Committee had felt that the legislation with respect to commission rates might possibly be beyond the commerce power of Congress.

I don't think we have to go that far. I think the legislative history amply determines -- I will point out in my subsequent argument, Mr. Justice Rehnquist, that the fixed rates of commission are, per se, illegal, and that the Congress never intended to give the Securities and Exchange power -- the Exchange Commission regulatory power over commission rates, which I will get to in a moment.

Now, the Securities and Exchange Act basically says that unless there is a specific provision repealing any other statute with respect to the protection of the public and the protection of investors, that this, the Securities and Exchange Act, will not repeal such prior statutory enactment.

However, the Securities and Exchange Act does have a

provision in it, which is Section -- I believe it's 19(b)(9) -- Section 19(b)(9), and that section provides that under certain conditions, which I will allude to a little bit more fully in my subsequent argument, the Securities and Exchange Commission has the right to fix reasonable rates of commission.

Now, originally, the proposal that had been put into that section was to fix uniform rates of commission. The word "uniform" was subsequently taken out and the word "reasonable" was placed therein.

Now, it is absolutely clear, and I think that none of the other parties arguing this matter will deny that if the Securities and Exchange Act of 1934 had not been passed, and that if the practice of the Stock Exchanges and the brokerage members thereof, in fixing reasonable -- in fixing minimum rates of commission, were before this Court at this time, there would be no question that there would be a per se violation of the antitrust laws involved.

We have here a conspiracy in restraint of trade, and with a penalty that if you fail to maintain the minimum rates of commission, that you become expelled from the Exchange.

However, the Exchanges contend, and the lower courts in this case also found, that because of the supervisory ability of the Securities and Exchange Commission in fixing the various matters in which the Exchange community does busi-

ness, therefore there is a different method of regulation proposed for securities transactions than there is in the normal course of commerce. And that whereas I, in selling various widgets in the marketplace, must abide by the antitrust laws, I as a member of the Securites and Exchange brokerage community do not because there is another method of regulation to protect the public interest. Namely, a Securities and Exchange Commission which is standing over the head of the brokerage industry and insuring fair deding to the public.

Now, Your Honors are well aware, of course, of the large amount of literature that has been written about the effectiveness of regulatory oversight over an industry, and that in general regulatory oversight of an industry is considerably inferior to the regulation by the laws of the marketplace.

What happens, of course, is that the regulatory agency gets its input primarily from the industry regulated; whereas the public normally does not have the ability to put that input into the agency.

But interestingly enough, the defendants in this case argue for even a more less stringent rule. They say we are a self-regulatory agency, the SEC merely has supervisory authority over our self-regulation, and not -- but despite that, despite the fact that we are not subject to regulations such as, for example, the railroads are or the airlines are, or the other regulatory segments of the nation's economy are; we're still

exempt from the antitrust laws. And that is what the district court in effect found, and that is what the circuit court in effect found, and I submit to this Court that that is not correct.

As a matter of fact, in this particular case, the Securities and Exchange Commission really did nothing effectively against fixed-minimum commission rates until this action was started.

When this action was started, then the Securities and Exchange Commission did start considering the particular problem with respect to minimum commission rates. And the first time around, when we participated in a proceeding before the Securities and Exchange Commission, we of course said that the fixed-minimum rates were bad in connection with public interest, and we presented various arguments to the Commission.

The Commission nevertheless agreed to a certain fixed scale of commission rates, which the State Exchange had requested.

We went to the Circuit Court of Appeals for the Second Circuit, attempting to review that under the Securities Act provisions with respect to review. The Securities and Exchange Commission brought on a motion to dismiss, and that was in Docket No. 71-1924, which was before the Circuit Court of Appeals for the Second Circuit, and in effect the Securities and Exchange Commission said to that Court: We have not issued

any order, we have not told the Exchanges to do anything; all we've said is that we wouldn't object to this particular commission rate being in effect, and therefore you have no right of judicial review.

This is not an order, and therefore this does not fall within the ambit of review granted to you under the Securities and Exchange Act of 1934.

So we went ahead and we went down to the District Court for the District of Columbia. We said, well, maybe they're trying to proceed in accordance with the manner of the Independent Broker-Dealers' case, maybe we're in the wrong court, maybe what we really should do is go after the determination as not constituting an order but constituting a determination which we wanted to review.

We proceeded in the United States District Court for the District of Columbia. The SEC promptly filed a brief to dismiss. And as I quoted on page 6 of my brief, the Commission in effect said:

"However, the question of the type and extent of immunity that may flow from Commission determinations regarding exchange rules ... need not be decided in this case. The appropriate forum for resolution of that question is in an antitrust action against a self-regulatory organization challenging its rules or the administration of such rules. Indeed, plaintiffs recognize that they may seek to challenge

exchange rules directly; they have instituted suit against the New York Stock Exchange for this very purpose." Which is this action which is now pending before this honorable Court.

The SEC, while this action was pending, then made a further study of the commission rate structure, and based upon the further study they permitted fixed-commission rates to remain in effect in accordance with the proposal that the New York Stock Exchange had submitted and which we opposed in another proceeding before the Commission, and the Commission at that point, while determining that their jurisdiction was in effect and that they would, on May 1st, 1975, mandate the end of fixed-commission rates, they nevertheless held that prior to that time, essentially the proposal presented by the New York Stock Exchange for maintaining fixed-commission rates would be permitted to stand.

We again went to the United States Circuit Court of Appeals for the Second Circuit. Again the SEC came in and said this is no order, you can't review it. The Court of Appeals for the Second Circuit, without opinion again, dismissed the petition.

And again we had no judicial review.

Meanwhile, this case was coming along. We went to the Second Circuit Court of Appeals with respect to this determination, the Second Circuit Court of Appeals came along and said: Well, we feel that the fixed-commission rates under the

oversight of the New York Stock Exchange constitute the appropriate administrative regulatory authority, and therefore constitute the, quote, "different case", close quotes, that this Court held to be involved in the Silver case, where they held that there was no specific antitrust immunity with respect to the New York Stock Exchange or with respect to matters that the self-regulatory agency carried out; but, nevertheless, there might be an area of immunity if it was necessary to make the Securities Act work.

Well, the Circuit Court of Appeals said that this is the different case necessary to make the Securities Act work; and they therefore held that there was no antitrust liability on the part of the defendant exchanges.

Interestingly enough, the Circuit Court of Appeals said: We do not say that the petitioner does not have an appropriate forum for judicial review.

How we are supposed to get judicial review is something I don't know. We've been to six courts already and we still haven't gotten judicial review.

Now, I say this to this Court:

First, the Court has held, in the Silver case, that the self-regulatory agencies, such as the securities industry, does not have a blanket immunity from the antitrust laws. So that the immunity in each case must be considered on a case-by-case basis.

This is not the "different case" that is necessary to make the Securities Act work.

The fixation of commission rates by the Securities and Exchange Commission is not necessary to make the Securities Act work --

QUESTION: Let's assume the Commission had set a schedule of fees, ordered it into effect.

MR. BADER: Yes. A schedule of minimum fees?

QUESTION: Yes.

MR. BADER: I don't think they would have the power to do it. I think that what they would have to do --

QUESTION: Well, let's assume that it did have the power to do it. And up until today it hasn't done it, but then, all of a sudden, it does order it into effect. Would you then say that the Antitrust Division would be put out of business for a while at least?

MR. BADER: That's a very interesting question.

QUESTION: Yes, it is, but it's --

MR. BADER: A very interesting question.

[Laughter.]

QUESTION: But you say at least until it does that, there is no -- it isn't necessary, they haven't done it and so it can't be necessary.

MR. BADER: Well, that's precisely it. That's precisely what I do say. And I say that the Act -- the Act,

furthermore, does not provide for the fixation of rates of commission. It says to fix reasonable rates of commission.

Now, this is the reason why it was done, in my opinion, but of course I'm not a -- I was not in Congress at the time, and I don't have the wisdom to know what Congress really intended.

But when the Congress took the word "uniform" out and put the word "reasonable" in, I would think that it would be logical to consider that what Congress really wanted to do was this: they wanted the marketplace to fix commission rates.

However, if the marketplace, for one reason or another, didn't do it properly, so that the rates were excessive, then I think the Securities and Exchange Commission could come in and fix the rates. And the reason for it is that the fixation of rates here is not the usual fixation of rates that is provided for in the normal regulatory statute.

In the normal regulatory statute, the regulatory agency holds hearings to determine what a reasonable rate is to be, such as the Federal Power Act, and the utility involved, attempting to justify a rate, comes in with their cost data, comes in with their fixed rates, their fixed expenses, the public who oppose the rate increase come in and attempt to argue against this. And the agency then makes a determination.

This isn't the way this is done.

In this case the Commission has to first ask the Exchange to supplement its rules. Then if the Exchange doesn't do it, then the Commission can go ahead and order a hearing, and, after that hearing, can direct the Exchange to do it with the Exchange then having the right of normal appeal review.

I think that in my opinion, for whatever it's worth, -- and it's probably not worth very much -- that the determination here was only with respect to excessive rates of commission, and that the minimum rates of commission that were involved here at this point are, of course, not excessive rates of commission.

QUESTION: Do I remember correctly from reading the briefs that the change from the word "uniform" to the word "reasonable" was made after some testimony by Mr. Samuel Untermeyer before the committee?

MR. BADER: Yes, sir.

QUESTION: In which he took the position that -- what, do you remember?

MR. BADER: I believe he took the position that there was a question as to whether or not the Commission did have the right to determine -- to fix commission rates in view of the non-interstate aspect of the stockbrokers' commission field.

QUESTION: In the view of the law at that time?

MR. BADER: In view of, and it was under the law at that time, sir.

QUESTION: Unh-hunh. And beyond that, is there any legislative history that you know of explaining the word change from "uniform" to "reasonable"?

MR. BADER: Not that I know of. All I can say is that I have attempted to find that; my learned colleague from the SEC has attempted to find that; my learned colleauge from the Department of Justice attempted to find that. I think we've had one of the most thorough expositions of the law that anybody could hope for, and that's all we've been able to come up with.

QUESTION: His testimony and then the subsequent change and the like?

MR. BADER: His testimony and the subsequent change.

QUESTION: Unh-hunh.

MR. BADER: I'm not sure whether or not the legislative history is really necessary in this particular case to make a determination. I think that the fact that you have a clear per se violation involved, plus the determination of this Court in Otter Tail, plus the Silver case, would seem to indicate to me that we may not have to go that far.

But all I can tell Your Honor is that that's all that I've been able to find.

QUESTION: Right.

MR. BADER: Now, the only thing that I have further to say -- I've just about run out of my time -- was that the Court did have a very similar case in, of course, Otter Tail Power Company v. United States, and there it is perfectly well within the statutory and regulatory scheme to have regulatory agency oversight over a group of individuals or a trade and, at the same time, to make the trade subject to the antitrust laws.

QUESTION: Could I ask you, does the Exchange -- or does the Commission purport to have any authority to adjudicate particular violations of its rules?

MR. BADER: Well, that --

QUESTION: Or is it just --

MR. BADER: -- there is -- the Commission of course does have power to proceed against violations of the Act, and has proceeded against violations of the Act in a number of cases. And at the same time individuals have the right to proceed against violations of the Act.

QUESTION: Let's assume the Commission did put out a -- assume it had the power to, and that it did propound a minimum charge for brokers, and then an individual broker didn't live up to the rule. Could the Commission move against him?

MR. BADER: I would think the Commission probably could, under those circumstances. I wonder whether or not,

in view of the statutory provisions involved, that if the Commission did do something of that kind, whether the Commission itself might not be subject to attack for exceeding its authority.

QUESTION: Unh-hunh. Well, I understand your position on that.

MR. BADER: I thank this Court for its consideration.

MR. CHIEF JUSTICE BURGER: Mr. Shapiro.

ORAL ARGUMENT OF HOWARD E. SHAPIRO, ESQ.,
ON BEHALF OF THE UNITED STATES AS AMICUS
CURIAE, SUPPORTING PETITIONERS

MR. SHAPIRO: Mr. Chief Justice, may it please the Court:

Subsequent to the grant of the writ in this case, the Securities and Exchange Commission, on January 23rd, this year, adopted Securities and Exchange Act Rule 19b-3. This rule prospectively abolishes fixed commission rates to the public, effective May 1st, 1975; and as to members or associated members of the Exchanges, in what's called floor brokerage, as of May 1st next year.

The decision appears in the Securities Exchange Commission Documentary Appendix at page 109, and I'll refer to it from time to time in my argument.

It concisely reviews the history of Exchange price-

fixing before and after the Securities Act of 1934, and sets forth very effectively the reasons why the problem has not been given attention until the last decade.

The position of the United States as amicus curiae is that when Congress enacted Section 19(b), it created no blanket exemption from the antitrust laws. Instead, the question of exemption should be resolved by the method defined in Silver v. New York Stock Exchange.

Respondent's contention that this method is inapplicable really amounts to a reassertion of the same claim of blanket immunity which they advanced in the Silver case, and which the Court rejected in Silver as to the application of the method.

Now, under the Silver test, as applied to Section 19(b), including Section 19(b)'s express reference to the fixing of rates of commission, the usual antitrust standards are changed. Silver indicates that there must be a particularized inquiry to determine whether Exchange rules within 19(b) are necessary, but no more restrictive than necessary to make the Securities and Exchange Act work.

Thus, exemption is implied only when an irreconcilable conflict is found as to particular instances of Exchange self-regulation.

Now, this accommodation of the antitrust and regulatory requirements serves to reconcile the statutory schemes, rather

than to hold one or the other ousted. It rests on the Court's recognition that the antitrust laws and the regulatory scheme of the Exchange Act are complementary, not antithetical.

Now, its application here, we think, is confirmed by Ricci v. Chicago Mercantile Exchange, and Merrill Lynch v. Ware. The question of whether, when this method of Silver is applied in this case, an exemption actually arises cannot be answered on this record.

The courts below did not attempt to make the Silver type inquiry. They found a blanket exemption.

Now, Silver did three things.

As I have said, first, it defined a method for reconciling antitrust laws and the duty of collective self-regulation, which the Exchange Act requires.

Second, in Silver, the Court applied the method to the case before it and made a determination in the circumstances of that case as to exemption. Thus, whether there is exemption or nonexemption is really a product of the application of the Silver method.

And the third thing the Court did in Silver was to state that a different case as to exemption would arise where the Act provided SEC jurisdiction and ensuing judicial review of particular Exchange rulings.

So what was reserved in Silver was not the method for reconciling the two statutes, that is the requirement for

a particularized inquiry; the Court reserved decision on the effect of SEC jurisdiction on cases where the SEC has jurisdiction and where there's ensuing judicial review when the Silver test is applied to particular instances of Exchange self-regulation.

Now, the Court in Silver was fully aware of Section 19(b) and its relation to the rules of the Exchange. Because, in this case, we are dealing with a jurisdiction over rules, the rules fixing commission rates, as listed in Section 19(b).

The Court, in footnote 16 of the Silver decision -- at page 364 -- assumed that under Section 19(b) the SEC could adopt a rule imposing that very notice and hearing requirements whose absence from the Exchange rules involved in that case had led the Court to the conclusion that there was no justification to support the exemption under the 1934 Act. Since the record in that case fully explored the question of necessity, and there was no possible basis on which the SEC could find that notice and hearing were not required by the 1934 Act, the Court itself resolved the exemption question, despite the SEC's reserved jurisdiction over Exchange rules.

Now, because Section 19(b) expressly refers to the fixing of commission rates, we have to consider the effect of that language.

Section 19(b) does not authorize the Exchanges to

do anything. It confers a reserved or secondary jurisdiction on the SEC over any rules the Exchanges may adopt in carrying out their duty of self-regulation, which fall within the enumeration of particular matters contained in Section 19(b).

In our view it adds to the panoply of remedies available under existing law.

Section 28 of the Exchange Act expressly declares that the rights and remedies defined by the Exchange Act are in addition to all others that may exist at law or equity.

With respect to Section 19(b)'s reference to fixed commissions, we agree, subject to qualifications that I'll state, with the SEC's brief at page 11, where it says, "Congress recognized the existence of fixed commissions but chose neither to outlaw that practice nor to endorse it, but rather to bring it under the complete control of the Commission."

I express three qualifications to that.

First, Congress gave the Commission complete but not exclusive power within the purposes of the Exchange Act.

Second, Congress recognized price-fixing, as it had existed since 1792, but did not endorse it.

And third, Congress neither condemned nor endorsed what it had recognized.

So that the fixing of commission rates is thus permitted as a matters of securities law until the SEC acts on the practice, as it now has; but, even though it's permitted under

the Securities Act, that's not enough. It's fundamental that even though a practice may be permitted under a regulatory statute, that does not exempt it from the antitrust law.

Thus, with the Power Commission's approval, the acquisition of the Northwest Pipeline Company by El Paso Natural Gas was permitted by the Natural Gas Act; but it was still subject to antitrust scrutiny, as in California v. FPC.

And the banks that merged in Philadelphia with the approval of the Comptroller of the Currency were permitted to do so under the old Bank Merger Act, but they still had to pass muster under the antitrust laws.

Now, the amici and the respondents have reviewed the legislative history of the 1934 Act at some length. What it boils down to is this:

Congress knew about commission rate-fixing by Exchanges, but it never specifically considered the practice in relation to the antitrust laws. I think the history is well summarized in the Commission's decision abolishing fixed commission rates, where, at pages 116 and 117 of the SEC's Documentary Appendix, the Commission says that Congress was "focused primarily upon such obvious evils as corners, pools, manipulations, insider trading, and other fraudulent and deceptive practices which seriously injured investors. With respect to commission rates, there was some concern that the possible overcharging -- with the possible overcharging of

unsophisticated investors, and with possible monopoly profits, and the Commission was therefore given regulatory authority."

As the SEC's report on 19b-3 also shows, Congress didn't substitute pervasive public utility type regulation for competition, it just doesn't fit this industry. Thus the assemption that the antitrust laws are ousted because the regulatory scheme leaves no room for them, even where there's a reference to rate-fixing, cannot be sustained here.

What Congress adopted was a system of private initiative and self-regulation subject to a reserved Commission oversight.

Now, where there is a system in which an industry is given collective power to control its own affairs through voluntary commercial relationships, governed in the first instance by private business judgment, then it cannot be assumed that the antitrust laws are overridden, absent some expression by Congress.

QUESTION: Or by the Commission.

MR. SHAPIRO: Or by the Commission. And that opens another aspect of it.

I said a moment ago that the SEC's jurisdiction is complete. I think that the Commission could, in an appropriate case, make a determination that fixed commissions are required. And at least as far as the antitrust laws are concerned, that would be the end of the matter, since the --

QUESTION: But you do maintain -- you take that position in your brief and you maintain it here, that if the Commission -- that the Commission does have -- would have the power to do that, and that if it did it, then there would be an irreconcilable conflict between antitrust laws and -- so that the antitrust principles must give way?

MR. SHAPIRO: That is correct. The Exchange would be under an enforcible -- under a duty which is enforcible against them to obey the SEC's order.

Now, the SEC's report on 19b-3 also reflects that until --

QUESTION: I'm not sure that I track that with what you said just previously about Congress not giving the Securities and Exchange Commission exclusive power, but only a shared power -- at least I got that impression.

MR. SHAPIRO: Yes, Your Honor.

QUESTION: If I got the wrong impression --

MR. SHAPIRO: No, it is a shared power, as we view it. And the answer lies in the fact, as occurs elsewhere in the law, that there may be overlapping jurisdictions where the regulatory agency has some powers to compel conduct not authorized, or otherwise authorized by the antitrust laws.

QUESTION: But I understood you to say to Mr. Justice White just now that if they exercise the power, then

that ousts the antitrust jurisdiction.

MR. SHAPIRO: Yes.

QUESTION: Or did I misunderstand you then?

MR. SHAPIRO: No, I think you understood me correctly, Your Honor.

The question is -- it turns on whether they actually require the particular conduct --

QUESTION: In an enforcible way; I see.

MR. SHAPIRO: In an enforcible way. That is it.

QUESTION: I see the distinction.

If they do it and actually carry it out in good faith, then the antitrust is set aside?

MR. SHAPIRO: Well, no, not -- if they volunteer -- well, the scheme in Section 19(b) is a little peculiar, because it does call first for a request from the Commission to the Exchange, and if the Exchange complies with just the request, it's doing so voluntarily, it's not compelled to do so. We would say in that situation the necessary to make the Act work would apply, the Silver case would apply.

I can envision a range of activities. If the SEC requests fixed-commission rates, and the Exchanges comply, without a formal 19(b) proceeding, the Silver test applies.

If the SEC accompanies its request with a public -- with a reasoned determination of necessity, which it usually does, and it simply requests that the change be made, this

has to be given appropriate weight by the antitrust laws.

Now, if the SEC disapproves or terminates the rule, wall, then, of course, there's no defense under the Silver test at all, there's nothing left.

If the SEC orders price-fixing after a 19(b) proceeding, the Silver test doesn't apply. If the Exchange -- I mean if the SEC simply acquiesces or tolerates or takes no action in what the Exchanges have been doing over the years, then the Silver test applies; there's no immunity from that.

Finally, I suppose one could say that if the SEC determines, as it argues it has here, that rates should be phased out step-by-step, this determination of a need for a transition period has to be weighed with the rest of the Silver test.

Now, one of the questions that comes up whenever we discuss this is: Why has everyone waited until now to start talking about the validity of fixed-commission rates, after all these years of --

QUESTION: Let me see if I'm clear about this, Mr. Shapiro. At page 48 of your brief you say, "If the SEC were to order the exchanges to adhere to a fixed commission rate system of some kind, no antitrust liability could arise."

MR. SHAPIRO: That's correct.

QUESTION: And what you're telling us is that that is the only situation where immunity is clear.

MR. SHAPIRO: Where the immunity is clear, yes, Your Honor.

QUESTION: And all other situations, anything short of that, then the Silver test applies?

MR. SHAPIRO: Then the Silver test applies.

QUESTION: Yes.

MR. SHAPIRO: With various amounts of weight being given to what the SEC has done in relation to the Exchange rule.

I was about to mention the long period which had gone by without anyone challenging these rules.

Now, the SEC report on Section 19b-3, at page 136, I think succinctly summed that up also. It reflects that until the Special Study of Securities Markets was published in 1963, everyone just sort of assumed that fixed commission rates were normal, and a necessary feature of the exchange market. Nobody, the Antitrust Division, private bar, the SEC itself, had questioned the assumption, either as a matter of economic policy or under the antitrust laws, or even under the Securities Exchange Act, as the report points out at page 118.

Now, the Special Study itself did not address this particular problem of fixed commission rates. But it found that the practice of fixed commission rates was leading to attempts to evade them on such a massive scale, particularly by institutional investors, that the system was not only not working, it was harming the industry. And this, over the years, slowly,

led the SEC to conclude that there was a need to abolish them. And it has finally come to that conclusion this year.

There's a further argument made about applying the Silver test in the context of this case. That is, that as a matter of policy it's going to have severe adverse effects on the industry; that the administration of the Act will be paralyzed because exchanges will be afraid to carry out their duty of self-regulation.

Silver has led to no such paralysis, nor have there been any kind of flood of antitrust cases challenging every aspect of Commission rule making.

The handful of cases have concerned the consequences of price-fixing, and most of the antitrust problems will disappear with its abolition.

The possibility that Exchange rules may be tested under Silver in a Sherman Act suit will have a salutary effect upon the Exchanges' exercise of their duty of self-regulation.

QUESTION: Just a minute. If the Court were to hold that the power given to the SEC, whether exercised or not, preempts the antitrust laws, then whether the Commission has a rule or whether it doesn't, or whether it requires price-fixing or whether it forbids it, the antitrust law just would have no application.

MR. SHAPIRO: That's right. If the Act -- if the

Court construes the Act as conferring a blanket immunity --

QUESTION: Yes.

MR. SHAPIRO: -- then you never worry about --

QUESTION: Well, had immunity in this area.

MR. SHAPIRO: In this area, that's --

QUESTION: Well, I take it that that's the position of some people in this case, that this reserved -- this granted, but unexercised power, preempts the antitrust laws.

MR. SHAPIRO: That is the contention.

QUESTION: Yes.

MR. SHAPIRO: And our answer to that is that that --

QUESTION: Well, you just answer Silver --

MR. SHAPIRO: We answer Silver in reaching --

QUESTION: Right.

MR. SHAPIRO: And also using Merrill Lynch v. Ware, because, just using that word "preemption" for a moment, in a State preemption case the Silver analysis was applied.

QUESTION: Yes.

MR. SHAPIRO: Now, the point that I'm really making is that under those cases, the determination of preemption, if you want to use that, or exemption or immunity, is not made in the abstract on the face of the statute. It is applied to particularized instances of Exchange action, and it takes a record to do that, which doesn't exist here.

QUESTION: Now, what's the antitrust situation under

the new order, after it becomes effective?

MR. SHAPIRO: The new order?

QUESTION: The one you told us about.

QUESTION: Effective May 1st.

QUESTION: Yes, May 1st, this year.

MR. SHAPIRO: Abolishing fixed commission rates?

QUESTION: Yes.

MR. SHAPIRO: Well, once that becomes effective, there will be no defense under Silver for any price-fixing thereafter.

QUESTION: Well, yes, but there would if -- there would if the Commission power preempts the antitrust laws.

MR. SHAPIRO: If it does, that's right, sir.

QUESTION: And if it did, it would have the exclusive power to enforce or not to enforce its rules.

MR. SHAPIRO: That's right. Our contention, of course, --

QUESTION: Yes.

MR. SHAPIRO: -- goes to the claim that there is no blanket immunity but a more particularized immunity.

QUESTION: Yes.

MR. SHAPIRO: I was discussing the policy question, which is argued. Of course, when we talk about policy here, you must recognize that policy has to be assessed under existing law. It's the antitrust laws as they stand, and the

Securities Act as it stands, without any express immunity; and of course, the principle that repeals of the antitrust laws by implication from a regulatory scheme are strongly disfavored.

There are policy arguments that the SEC should have absolute authority in this area, that the Exchanges should be completely immune. But this is not the forum in which that kind of a broad contention can be made.

If it is to be considered, I point out that there are some important arguments the other way. The possibility that Exchange rules will be tested in the Sherman Act suit will have a salutary effect upon the Exchange's exercise of their duty of self-regulation. They will be stimulated to scrutinize closely any rules involving seriously anticompetitive consequences, to be certain that they are actually necessary to make the Exchange Act work.

The SEC will benefit, because the heightened attention to the Act's requirements by the Exchanges under the stimulus of the Silver test, with its attendant minimization of practices that do not benefit investors will reduce the need for regulatory intervention by the SEC itself.

Far from having a chilling effect, therefore, we think that continued application of the Sherman Act will serve to complement that self-regulation under the SEC's reserved jurisdiction.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Shapiro.

Mr. Jackson, you may proceed whenever you're ready.

ORAL ARGUMENT OF WILLIAM ELDRED JACKSON, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. JACKSON: Mr. Chief Justice, members of the Court:

I think I am not going too far when I say that the position taken by the Department of Justice in this case is nothing less than an effort to exalt the antitrust laws to a quasi-constitutional status. A status in which this particular statute is a far greater force than another later statute passed by Congress, with which the antitrust laws are inconsistent.

I think this is the most extreme position the Department has taken with respect to the doctrine of implied repeal that I know of. Because inherent in its position that there is no exemption here is that the following circumstances are of no moment whatsoever.

First, that the Exchanges are authorized and permitted by the Exchange Act to adopt rules fixing commissions.

Secondly, that Congress created the SEC to act as the guardian of the public interest in supervising and changing, if necessary, rules relating to commissions, under regulatory standards that are broader than those of the antitrust laws.

And thirdly, despite the references to the regulators,

as this record shows, that the SEC has actively exercised these powers and has been an active watchdog.

Indeed, major changes, seven of them, in Commission rules of Exchanges have taken place in the past seven years. All of them at the request or with the approval of the SEC, and after hearings in which the Department of Justice participated.

All this counts for naught in the Department's world of antitrust absolutism. There can be no antitrust exemption here, despite a perfectly apparent head-on collision between the antitrust laws and the Exchange Act.

And this means that in any case, and in every case, where a rule of an Exchange is challenged under the antitrust laws, if this theory were to apply, there would have to be a trial de novo of the facts, even after review and approval, and even after modification of the rule in question by the SEC. And this would be a trial under the standards not of the Exchange Act, but of the antitrust laws.

This is to ignore the Exchange Act. This is to second-guess the SEC. This is to say that Exchanges should be regulated by district courts with the aid of the Department of Justice and with the assistance of juries, rather than by the expert agency to which Congress has created the task.

With the greatest of respect, I submit that this is dogma run wild. And that it was properly rejected by the lower

courts.

I would submit, Your Honors, that the question before the Court is that which was left open in Silver. The different case, with respect to antitrust exemption, where the SEC has jurisdiction over the practice attacked. We submit, of course, that this is the case, the different case, and that its resolution has been foreshadowed in Silver itself.

There is no issue here of blanket immunity for Exchanges or for all Exchange activities. As this Court recognized in the Hughes case, a regulatory scheme may not be sufficiently pervasive to result in a total exemption; but, nevertheless, it may result in exemption in particular and discreet instances.

That's all we're dealing with here. Because the issue here of antitrust exemption relates only to a single aspect of Exchange activities: the fixing of reasonable rates of commission to be charged by members, as permitted by Section 19(b)(9) of the Exchange Act, subject to SEC review jurisdiction.

Now, the Buttonwood Tree has been referred to, and it is not without significance, I submit, that commission rate-fixing by Exchanges has been enaged in in this country, openly and above-board, since the Buttonwood Tree Agreement in 1792.

We all know horizontal price-fixing and rate-fixing

by competitors has been unlawful at least since the passage of the Sherman Act, and yet exchange commission rate-fixing was not challenged by the Department of Justice at all, prior to the Exchange Act of 1934, despite this Court's ruling in Trenton Potteries that price-fixing was per se unlawful.

And then Congress, in 1934, in enacting the Exchange Act, an Act which we all recognize was designed to correct abuses, nevertheless permitted the exchanges to continue their historic and well-known practice of fixing rates of commission.

Subject, however, for the first time, to regulation of that practice by a government agency.

And in giving the SEC jurisdiction to review those rates, the standards established by the Act were those of reasonableness and other standard listed in the Act, the primary one of which was the protection of investors.

So that after the passage of the Exchange Act, the Exchanges were no longer engaging in unfettered rate-fixing by custom, but they were engaging in statutorily permitted and government supervised rate-fixing, which even the Seventh Circuit, in the Thill case -- with which we thoroughly disagree -- described as a system of authorized price-fixing.

And so the question is whether Congress, by providing for SEC supervised commission-fixing in Section 19(b)(9) of the Exchange Act, intended by necessary implication to exclude such commission-fixing from the scope of the antitrust laws.

QUESTION: Well, what if the Commission doesn't fix, what if it's just a power which has been granted to the SEC, is it your position that just the grant of the power --

MR. JACKSON: It is, Your Honor; yes, indeed.

QUESTION: -- whether it exercises it or whether it doesn't --

MR. JACKSON: Exactly.

QUESTION: -- or whether it forbids it or whether it permits it, or whether it requires it.

MR. JACKSON: Exactly. It's still a conflict of regulatory schemes, a conflict of jurisdictions; the existence of the power is sufficient.

On that point we think the Thill Court went off the track.

QUESTION: Well, suppose the Commission has -- the Exchange has a rule, which it does, on commissions, and the SEC says nothing at all about it, and you say the anti-trust laws have nothing to do with it.

MR. JACKSON: We say that that commission-fixing is authorized --

QUESTION: Well, that isn't commission-fixing, I mean it hasn't fixed anything, it just hasn't disapproved an Exchange rule.

MR. JACKSON: No, sir; but we say the commission-fixing by the Exchange, being passively permitted by the SEC, --

QUESTION: Yes.

MR. JACKSON: -- is not subject to the antitrust laws.

QUESTION: But in that event does the SEC have any authority to enforce specific violations of the Exchange rule?

MR. JACKSON: Of the fixed-commission rule?

QUESTION: Yes.

It really doesn't, does it?

MR. JACKSON: No, I don't think so, Your Honor.

QUESTION: So that if the Commission rule -- if the Exchange rule is going to be enforced at all, the Exchange enforces it?

MR. JACKSON: Yes, that's right. That's right. And has done so.

QUESTION: And so if certain brokers engage in price-fixing inconsistent with the Exchange rule, that's an Exchange matter; right?

MR. JACKSON: Yes, it is. They would be violating the Exchange rule.

QUESTION: Thank you.

MR. JACKSON: Or might be engaging in other practices which would be inconsistent with just and equitable principles of trade under the Exchange Act.

We submit, Your Honors, that a pro tanto implied repeal of the antitrust laws in this case is compelled by two

separate considerations.

The first is the doctrine of repugnancy, which applies where the application of the antitrust laws would collide with the regulatory scheme of a later statute.

We submit that the Sherman Act prohibition against horizontal rate-fixing simply cannot be reconciled with the Exchange Act provisions permitting commission-fixing. Because the Exchange Act authorizes, under government aegis, the very conduct which is prohibited by the earlier statute.

The two statutes we think cannot be harmonized. One says "thou shalt not", the other says "thou may"; and one must yield to the other.

And under the cases of this Court we think it's perfectly plain that the earlier statute must give way to the later one, as the expression of Congress's intent on this particular matter.

QUESTION: What if the Commission comes along and says "thou shalt not"?

MR. JACKSON: That's what it has done.

QUESTION: Yes.

MR. JACKSON: And --

QUESTION: And then its sanctions would be the exclusive sanctions, I take it?

MR. JACKSON: Yes.

QUESTION: According to your position?

MR. JACKSON: Yes, Your Honor. That's right.

QUESTION: And the antitrust laws would still have no --

MR. JACKSON: Would still have no effect.

QUESTION: -- no effect.

MR. JACKSON: For two reasons. One is the existence of Commission authority; and the other is the rule which they have adopted, which we think has the effect of an order. It's mere semantics to talk about a formal order. Where they have the power to order you to do something, and you comply with their request, without forcing them to go through an order procedure, the result should be the same.

QUESTION: They would order you to adopt a rule, really, that there shall be no price-fixing, or there shall be no uniform fee.

MR. JACKSON: That's right, and that's what they did.

QUESTION: And that's what they did. So it still is an Exchange rule?

MR. JACKSON: It is -- it will be an Exchange rule adopted in conformity with the SEC rule.

QUESTION: And still not be -- and in the case of individual violations, still a matter for the Exchange to enforce.

MR. JACKSON: Yes, Your Honor.

QUESTION: Unh-hunh.

QUESTION: And policed only by the Exchange.

MR. JACKSON: Yes. Yes, Your Honor, that's correct.

QUESTION: What would the power of the Commission be if they thought there was a breakdown in enforcement?

MR. JACKSON: By the Exchange?

QUESTION: Yes. What would be SEC's -- the Commission's power be?

MR. JACKSON: Well, since the change in the Exchange rule will have been adopted pursuant to an SEC rule, adopted under the Act, then I think the full panoply of power is available to the Commission for violations of the Act to come into play, including, at the most extreme of course, deregistration of exchanges, also termination of the officers of exchanges, and of course civil and criminal proceedings are available for violations of the Act.

QUESTION: There are no remedies for any person hurt by a violation?

MR. JACKSON: Yes. There is a remedy, which is provided by the Administrative Procesures Act; also a remedy provided --

QUESTION: How about damages?

MR. JACKSON: Damage remedies would not be provided, nor are they required, I would submit.

QUESTION: But if there are violations, the

Exchange rule against fixed fees, and someone violates it, and somebody is hurt by it, there are no damage remedies?

MR. JACKSON: Well, there might be. There is a developing body of law in which individuals have sought to sue for violation of Exchange rules.

QUESTION: Exchange rules?

MR. JACKSON: Yes. For damages.

MR. CHIEF JUSTICE BURGER: We will resume there at ten o'clock in the morning, Mr. Jackson.

[Whereupon, at 3:00 p.m., the Court was recessed, to reconvene at 10:00 a.m., Wednesday, March 26, 1975.]

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