In the

# Supreme Court of the United States

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION, and THE UPJOHN COMPANY,

Petitioners,

vs

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF THE PHILIPPINES and THE REPUBLIC OF VIETNAM,

Respondents.

NO. 76-749

C.2

Washington, D. C.
November 1, 1977

Pages 1 thru 43



*Hoover Reporting Co., Inc.*
*Official Reporters*
*Washington, D. C.*
*546-6666*

Minks

IN THE SUPREME COURT OF THE UNITED STATES

| | | |
|---|---|---|
| PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION, and THE UPJOHN COMPANY, Petitioners, | : | |
| v. | : | No. 76-749 |
| THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF THE PHILIPPINES and THE REPUBLIC OF VIETNAM, Respondents. | : | |

Washington, D. C.,

Tuesday, November 1, 1977.

The above-entitled matter came on for argument at 1:54 o'clock, p.m.

BEFORE:

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

ckmun
t

APPEARANCES:

SAMUEL W. MURPHY, JR., ESQ., 30 Rockefeller Plaza, New York, New York 10020; on behalf of the Petitioners.

DOUGLAS V. RIGLER, ESQ., 815 Connecticut Avenue, N. W., Washington, D. C. 20006; on behalf of Respondents.

- - -

C O N T E N T S



- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-749, Pfizer and others again the Government of India and others.

Mr. Murphy, I think you can proceed whenever you're ready.

ORAL ARGUMENT OF SAMUEL W. MURPHY, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

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

These cases present the question of whether foreign governments may sue for treble damages under our antitrust laws.

More precisely, the question is: Did Congress intend to include the sovereign governments of foreign nations among those "persons" for whom it create a treble damage remedy in the Sherman Act?

There are three cases here which were consolidated for appeal. They are part of the so-called antibiotic antitrust litigation which, at one time, consisted of upwards of 160 damage cases.

The plaintiffs, respondents here are the Imperial Government of Iran, the Government of India, the Republic of the Philippines.

The principal allegations in their complaints are

the same, each of them alleges that the defendants fixed prices and otherwise suppressed competition in the manufacture and sale of certain antibiotic drugs in the United States and abroad. Each of them alleges that it purchased antibiotics which were exported from the United States. Each of them alleges that it sues on behalf of various classes, one of which is described as all individual consumers within the respective country. And finally, each of them alleges that it is an independent sovereign nation.

The issues was raised in the district court on motions addressed to the pleadings. The district court decided that foreign nations may maintain treble damages, resting its decision primarily on the judge's perception that that was necessary, as he put it, to the effective enforcement of the antitrust laws.

His decision was certified for immediate appeal, and a panel of the Eighth Circuit affirmed. The panel did not rest its decision on the same ground the district court had, but, instead, relied principally on this Court's decision in Georgia v. Evans, holding that States are persons for treble-damage purposes.

One member of the panel filed a concurring opinion, in which he observed that, in his view, Congress had had no intent on this question whatsoever; that he thought the result was dictated by this Court's Georgia v. Evans decision, but he

recommended that Congress should examine the question and clarify it.

There was a rehearing en banc, after which six of the eight active judges of the Eighth Circuit adopted the panel's opinion; three of those six also adopting the concurring opinion. There were two dissents. The dissenters relied on the Court's decision in United States v. Cooper, in which it was held that the United States is not a person. And the dissenters observed that in their opinion it would be anomalous to hold that the United States could not sue for treble damages, but a foreign sovereign could.

I think it fair to say that neither the district court nor the Court of Appeals made an independent examination of the legislative history; instead they looked entirely to this Court's two decisions which I have mentioned for guidance.

Now, if the Court please, we have a straight-forward question of congressional intention here. There's no issue in this case about whether a foreign nation may sue in United States courts if it has a proper claim. Of course it can. The question is: Did these foreign nations have the claim they pleaded?

And that, in turn, depends upon whether Congress gave it to them.

Now, our argument begins with the language of the statute, which confers the treble-damage remedy on any person

who shall be injured by reason of a violation, and so forth.

It's our contention that that language, just read in its ordinary and natural sense, would not be taken to include sovereign governments, and we have cited in our brief three decisions by this Court in which the Court made a similar observation, the Fox case in 1876, the Cooper case itself, and United Mine Workers, in 330 United States.

Now, if the Court please, we believe that there is evidence here, developed at some length in our briefs, that Congress in 1890 had a pretty clear understanding of the term "person", and a pretty clear understanding of what that meant and did not mean.

One point that we rely on as such evidence is the statute of 1871, in which Congress, as this Court's prior opinions have said, created its own dictionary, and an amendment in that statute, when the Revised Statutes of 1874 were enacted.

The 1871 statute had defined "person" by saying that it may extend and be applied to "bodies politic" and corporations, unless the context indicates a more limited meaning.

When the revisers of the statutes submitted their report to Congress, they suggested that the phrase "bodies politic" be deleted, on the ground that it introduced an unnecessary ambiguity, and that with that ambiguity it might be thought in future statutes necessary expressly to exclude governmental entities. For that purpose, the phrase was

deleted from the definitional statute when it was re-enacted in 1874, so that it read, then, and at the time of the Sherman Act and now, that the word "person" may extend and be applied to corporations and associations, unless the context indicates a more limited meaning.

We have cited in our brief evidence that Senators who were the principal draftsmen of the Sherman Act were familiar with that little bit of legislative history, specifically Senators Edmunds and Hoar.

And when those Senators wrote their definition in the Sherman Act, they nailed down the fact that "person" must include corporations. That is to say, the 1874 statute made it allowable, "'person' may extend", but in Section 8 of the Sherman Act it is written, "'person' shall be deemed to include corporations".

Now, when Senator Edmunds introduced the Sherman Act on the Floor of the Senate, he said that the legislation is clear in its terms and definite in its definitions. The definition of "person" is the only one in the Sherman Act.

And we submit that as a matter of logical construction if the Congress, in the light of the change in the definitional statute, thought it necessary expressly to include corporations, which might have been included as a matter of discretion in any event, it must follow that they had no intention whatever to include sovereign governments.

QUESTION: Mr. Murphy, would not your argument require us to overrule Georgia v. Evans?

MR. MURPHY: No, Justice Stevens, we don't think so. In the terms of the problem we're discussing, we submit that, first, Georgia was not really a sovereign; Georgia was not able to exercise sovereignty over the problem it was faced with, a combination and restraint of interstate trade.

QUESTION: No, but was it a corporation or a person as defined in Section 8 of the Sherman Act?

MR. MURPHY: No, my argument, Justice Stevens, is not that the definitional statutes are conclusive; our argument is that they are very weighty evidence of what Congress intended and that it should take a fairly clear expression of congressional purpose to read a government into that word.

Now, in the Georgia case, I think there is evidence that the Supreme Court intended to include Georgia, and the other States. One of the problems that Congress was dealing with in the Sherman Act was the inability of States to reach combinations and trusts. Senator Sherman used as an example, to illustrate the need for the statute, the inability of the State of New York to reach the sugar trust, because its members were beyond the then territorial jurisdiction of the State of New York, so that Congress had very much in mind and, we submit, intended to create a remedy for limited State jurisdiction, which was involved in the Georgia case.

QUESTION: Do you see any constitutional objection, counsel, to having the United States, if it elected to enter into conventions or treaties with certain countries, of granting them the rights the Eighth Circuit has given here, granting it by treaty or convention, either on a reciprocal basis or for any reason that the Executive Branch and the Congress agreed on?

MR. MURPHY: No, sir, I don't believe I do. And I don't see any reason why Congress, had it thought it desirable to do so, or if it should think it desirable to do so now, couldn't legislate that result.

QUESTION: In other words, if other countries didn't grant the same rights to the United States, then we could deny it to them?

MR. MURPHY: Yes, sir.

It seems to me that one of the very strong points in our position in just an ordinary practical sort of way is it simply is improbable that a Congress which intended to exclude the United States from the treble-damage remedy, as the Cooper case decided it did, could have intended to give that remedy to a foreign sovereign. Because the interests of the United States Government are closely associated, perhaps indistinguishable from those of the American public, for whose protection the antitrust laws were passed; whereas the interests of foreign sovereigns may, and frequently are, divergent and, on occasion, opposed to those interests.

And following along on that line of thought, it seems to me more than just improbable, but highly unlikely, that a Congress with that sort of intention might have intended to recruit foreign sovereigns to assist in the enforcement of our antitrust laws, which was the basis for the district court's decision and, as I read it, is essentially the argument which the Department of Justice has made in its amicus brief.

QUESTION: Particularly, I suppose, with the situation of 1890, recruting the Kingdom of Span, with whom we were going to go to war eight years later, and the United Kingdom, with whom we had almost gone to war twenty years before over the Alabama claim.

MR. MURPHY: Exactly, sir.

The speeches of the Congressmen who were prominent in this legislation at that time, which we have citad in our briefs, I think make it very clear that what they were interestad in doing was protecting domestic consumers, protecting the domestic market, and they had no interest whatever in protecting foreign governments.

In short, if the Court please, it appears to us that there is ample evidence in the legislative history of a congressional intent not to make the treble-damage remedy available to foreign nations, whereas it seems to us there is evidence in the legislative history of an intent to make it available to State governments.

Now, the decision of the Eighth Circuit at least, we suggest, brings about a peculiar result, peculiar in the sense that it gives, for example, the Imperial Government of Iran a right to sue for treble damages, when the United States Government now can sue only for actual damages.

We submit that an intent to bring about that result ought not be imputed to Congress without some very clear and strong evidence that that's what it intended to do.

QUESTION: Would it have included North Vietnam during the recent hostilities, while those hostilities were on-going?

MR. MURPHY: Well, Your Honor, one of the difficulties with the Eighth Circuit's result is it confers the remedy on a foreign nation, whether it's friend or foe.

Now, I'm sure that reasons could be thought of to keep the Government of North Vietnam out of court while hostilities were going on, but perhaps not. And any government in the world will be entitled to sue, unless the Eighth Circuit is reversed; and we ask that the Court do so.

QUESTION: Well, nothing would have prevented the North Vietnamese from hiring American lawyers to bring such a lawsuit, would it?

MR. MURPHY: Well, indeed, Your Honor, one of the complications we had in this litigation was one of the original foreign government plaintiffs was the Republic of Vietnam.

And in the midst of the litigation that government disappeared, was swallowed up, in my view, by North Vietnam, and the question was presented: should the Vietnam case be dismissed or suspended?

Now, there was counsel in court for Vietnam, whatever Vietnam was at that time, trying to keep his case alive. The district court and the Eighth Circuit held that it should be dismissed.

QUESTION: In other words, a suit of this kind is not barred under the Eighth Circuit opinion if we either have broken off diplomatic relations or have no diplomatic relations for any reason, they can still sue?

MR. MURPHY: Well, if we have no diplomatic relations at all, Mr. Chief Justice, it may be that our courts would not recognize that government as an entity which would be entitled to sue.

QUESTION: Well, recognition of the government as such and the presence of diplomatic representatives are not always exactly the same.

MR. MURPHY: Quite so, sir.

QUESTION: Mr. Murphy, are any of the petitioning companies in this case subject to the jurisdiction of respondent countries?

MR. MURPHY: I believe so, Justice Powell. Plaintiffs allege in their complaints, each of the plaintiffs allege in

its complaint that all five of the petitioning companies are engaged in the pharmaceutical business within those countries.

QUESTION: Do any of those countries have the approximate equivalent of our antitrust laws?

MR. MURPHY: Yes, sir, they do. We have cited them in our briefs.

QUESTION: Have any suits been brought in those countries against these particular United States companies?

MR. MURPHY: Not to my knowledge. We have pointed out in our briefs that the Government of West Germany, which has filed amicus, has commenced an investigation under its equivalent of the antitrust laws against one of the petitioning companies. A copy of that letter has been lodged with the Court.

QUESTION: Is there any evidence that the United States Government would have reciprocal rights to sue in any of these countries?

MR. MURPHY: There is no evidence in this record and I'm not sufficiently familiar with the laws of those countries to answer the question.

With the Court's permission, I'd like to reserve time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Murphy.

Mr. Rigler.

ORAL ARGUMENT OF DOUGLAS V. RIGLER, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

There are at least five compelling reasons for concluding that Congress intended foreign governments to have standing to obtain relief when they are the victims of antitrust violations launched at them from within the United States.

Conversely, there is no reason to suppose that Congress intended to create an area of damage-free conspiracy so that American companies could prey on friendly foreign governments engaged in making purchases to satisfy their needs in this country.

QUESTION: Well, is there any special significance to your use of the adjective "friendly"?

MR. RIGLER: No, there is not, Your Honor.

QUESTION: What about Cuba, could Cuba or --

MR. RIGLER: Turning to one of the questions that was just raised, it is our view that without diplomatic relations, a foreign government's right to enter the courts of this country would be governed by rules of comity, and that they would not have that privilege extended to them. It is a reciprocal privilege based on comity.

Indeed, this Court said, in Cuba v. Sabbatino, --

QUESTION: Taiwan could bring a suit, but the other,

China, could not; is that your suggestion?

MR. RIGLER: That is my suggestion, Mr. Chief Justice.

QUESTION: Doesn't that bring the courts pretty close to getting involved in political questions of the highest magnitude?

MR. RIGLER: I don't believe so, Your Honor.

QUESTION: To make decisions of that kind?

MR. RIGLER: I believe the test would be very simple. That is, whether or not we had diplomatic relations with the foreign government. I don't believe that any extensive judicial determination would be required.

QUESTION: Do you agree with Mr. Murphy that the United States could enter into conventions or treaties with other countries, granting those sovereigns the right to sue for treble damages if we had the same right in their courts?

MR. RIGLER: Well, it's our position, Mr. Chief Justice, that the right for foreign governments to sue here is already established. So that there would be no necessity for such a treaty.

However, we have entered into treaties with countries, such as West Germany, which brought their treaty to your attention in their amicus brief.

QUESTION: Well, there would be nothing to prevent the Congress of the United States from -- if the Eighth Circuit

opinion should stand,nothing would prevent the Congress from clarifying it so that that right to sue for treble damages did not exist, and then do you see any problem about negotiating treaties or conventions with reciprocity?

MR. RIGLER: If the Eighth Circuit opinion is affirmed, there would be no problem in the Congress entering into additional treaties or approving additional treaties to specify the mechanics as to how those rights might be gained or amplified.

Indeed, however, our State Department, through the Secretary, has appeared, as we note in our brief, repeatedly, urging other countries to adopt our antitrust principles. And one of the points we would make is that it is simply incomprehensible that we could go urge other countries to adopt our philosophy and throw them out of our own courts when they're over here to seek redress for antitrust --

QUESTION: The Secretary of State, in 1890, wasn't wandering around the world urging other countries to adopt the Sherman Act, was he?

MR. RIGLER: Not to my knowledge, Mr. Rehnquist.

QUESTION: And isn't that the time we take congressional intent as of?

MR. RIGLER: Yes, it is. However, among the five compelling reasons, which I hope to cite, we do come to the point that Congress intended foreign governments to be

included in 1890. I disagree very strongly with defendants' argument that that was not the intent of Congress in 1890.

QUESTION: But how does the conduct of the Attorney General in recent years, in urging other countries to adopt our antitrust principles, bear on the intent of Congress in 1890?

MR. RIGLER: The recent conduct of the Attorney General surely could not bear on the intent of Congress in 1890.

QUESTION: What policy considerations -- let me back up a little. Of necessity, your argument must be that Congress intended this result that the Eighth Circuit reached. I take it that's the premise of your whole case.

MR. RIGLER: Certainly that is a principal one, Mr. Chief Justice.

QUESTION: What policy considerations would compel the Congress of the United States to grant to a foreign -- other sovereign nations rights which it did not grant to the United States itself?

MR. RIGLER: Well, principles of comity, plus the fact that not only were these rights granted to --

QUESTION: Well, comity is usually something like reciprocity, isn't it?

MR. RIGLER: Yes, sir.

QUESTION: There's no reciprocity in my hypothetical.

MR. RIGLER: All right. With respect to the Cooper case, which is the case denying those rights to the United

States itself, the Cooper result was a direct and a deliberate congressional intent not to extend the damage remedy to the United States, and that deliberate intent was explicitly stated by Senator Sherman, who stated that the damage remedy was not to extend to the United States at all.

That appears on page 2461 and again on 2463 of 21 Congressional Record.

Senator Sherman was at pains to distinguish between the first section of his bill, which allowed the United States alternate remedies, criminal remedies, injunctive remedies, seizure remedies, and he said that these remedies were made available for the U.S. It turned upon the perceived obligations of the sovereign to enforce its own laws without reference to the added stimulus of the damage remedy.

Then, having distinguished the remedy made available solely to the U.S., he said that the damage remedy was to be made available to all other parties, as he put it. So that the Cooper result is a direct reflection of the intent of the sponsors of the bill.

All other parties were to have the benefit of the bill. Moreover, the treble-damage remedy has been extended to persons, to States, to foreign corporations. And since this Court has said, in Dunhill, that when a foreign nation enters this country in a commercial capacity, it is to be treated the same as every other trader, subject to the same strictures of

the marketplace, subject to the same penalties of the marketplace, it would be very unfair then to deny them any remedy when they are mulcted, as the Court said in Georgia, by a violator of the antitrust laws.

QUESTION: Mr. Rigler, you started out by telling us that there are at least five compelling reasons why your position is correct.

MR. RIGLER: Yes, sir.

QUESTION: And I am sure, by our interrogation, we have gotten you to give us probably all the reasons, but not in one, two, three, four five; I'd be interested to have that.

MR. RIGLER: I am not sure that I have covered them, but I will coar them briefly, Mr. Justice Stewart.

First, in 1890, Congress was aware of the prevailing canon and general rule that a sovereign, a foraign government may take advantage of a general remedial statute, whether or not it is named as a person, for purposes of that statute.

Second, in Georgia v. Evans, this Court recognized that governments were included as "persons" within the meaning of the Sherman Act. The rationale of that decision that these governments, notwithstanding their sovereignty within their own territory, within their own area of sovereignty, might have their own antitrust statutes; nonetheless, they would be denied any effective relief without reference to the federal statute.

Third, in both Cooper and in Georgia, this Court set forth five aids to construction. With reference to each of those five aids, we satisfy the test and should be granted standing.

Fourth, an anomaly would be created by extending the right to foreign corporations which are 100 percent owned by foreign governments and then denying that same standard to the government itself in making its direct purchases. We noted, coincidentally, that this would favor the Eastern Bloc nations, the Socialist and Communist Bloc nations, which carry out more of their trading through the mechanism of the State Trading Corporation, and would disfavor our traditional Western Allies who are more apt to purchase directly.

QUESTION: With foreign corporations, though, at least it's a wholly owned by the government -- at least it's a two-way street. They are suable as well as capable of being sued under your analysis, I think.

MR. RIGLER: The fifth reason I was about to come to, Mr. Justice Rehnquist, was Dunhill, which I had mentioned previously, and it seems to us that the government itself may be suable, as you put it, under the principles enunciated in Dunhill.

QUESTION: So your feeling is that if your position were adopted, not only could the government of Iran sue for treble damages, but it could be sued in the courts of this

country for treble damages?

MR. RIGLER: For its commercial activities, I believe that this Court has stated that rule. And indeed, since the Court stated that rule, it has been incorporated in the foreign sovereign immunity statute.

QUESTION: But we haven't yet decided whether or not a municipality of the United States is covered by the anti-trust laws as a defendant, let alone whether or not a foreign nation is.

MR. RIGLER: I'm not --

QUESTION: We heard a case argued last year --

MR. RIGLER: I heard the City of Lafayette argument, if it's that to which you refer, sir.

QUESTION: Yes.

MR. RIGLER: However, it seems to me that it's clear that a foreign government is subject, both under the Dunhill rationale and rule announced by this Court and under the Foreign Sovereign Immunities Act that, for its commercial activities, it would be subject to our laws.

By the way, it's interesting to note that in the House Report on the Foreign Sovereign Immunities Act, a "commercial activity" was defined as "the purchase by the armed services of a foreign government of goods and commodities in this country"; and of course some of the very purchases for which we are attempting to recover are purchases of medicines,

of antibiotics bought for the armed services of the Philippines, among other governments.

QUESTION: Is there anything in 1890 that mentioned foreign governments?

MR. RIGLER: There is, Mr. Justice Marshall. In responding to a question about the constitutional foundation of his bill, Senator Sherman referred to Article III, Section 2, and pointed out that this was -- that this gave the federal courts wide latitude to resolve disputes; and then he enumerated the type of disputes. And as one of those disputes he enumerated disputes between citizens of this country and the foreign nations.

And it seems to us inconceivable that on the one hand he would say, "Here is a constitutional basis for my bill, this among others", and yet turn around and say "But they are not to receive the benefits of a damage remedy."

QUESTION: Is there anything that Senator Sherman said, other than "I want to protect the American people"? Didn't he say that over and over again?

MR. RIGLER: No, he did not, as a matter of fact.

QUESTION: He said he was protecting foreign governments?

MR. RIGLER: He did not say specifically "foreign governments". However, he referred -- he did not -- Senator Sherman did not refer to the protection of the American

people as opposed to the exclusion of foreign interests.

QUESTION: I didn't say that. Did he say he was protecting the American people? Period.

MR. RIGLER: I do not -- no, "period", he did not. And he --

QUESTION: What did he say he was protecting?

MR. RIGLER: He said that he was trying to make effective pre-existing remedies, both common law and State remedies. In 21 Congressional Record 2460 he gave a speech which outlined his philosophy of the bill, and his philosophy was that the individual remedies then existing for antitrust defenses simply were ineffective to control the trusts. So --

QUESTION: He was talking about American people.

MR. RIGLER: No, sir. Because he went on to say that he referred to the foreign commerce of the United States, and from that --

QUESTION: That was taking advantage of the people.

MR. RIGLER: No -- oh, absolutely not.

QUESTION: Oh, yes, he was.

MR. RIGLER: Mr. Justice Marshall, I respectfully --

QUESTION: That's the way I read it.

MR. RIGLER: -- urge you to return to the reference at 2460 --

QUESTION: I did read it.

MR. RIGLER: -- and 2456. Because repeatedly he

referred to foreign commerce of the United States. In addition to which, the bill itself not only mentions foreign commerce, but, as the Eighth Circuit noted, trade and commerce with the foreign nations found its way into the statutory language.

And it seems to us that while respondents argue we were not concerned, --

QUESTION: Well, why didn't the statute say "persons and foreign governments"?

MR. RIGLER: It did say "foreign corporations", by the way.

QUESTION: Why didn't it say "persons and foreign governments"?

MR. RIGLER: Probably because --

QUESTION: It said "persons".

MR. RIGLER: It said "persons" included --

QUESTION: And when it said "persons", that included corporations, because this Court had already said that corporations were included in the word "persons" in the Fourteenth Amendment.

So corporations were meant to be included. But I don't know who else was meant to be included in "persons".

MR. RIGLER: Well, surely governments were meant to be included in "persons".

QUESTION: I thought this Court said the U. S. Government was not.

MR. RIGLER: But this Court said that State governments were. And this Court has recognized the right of municipal governments.

QUESTION: But it said the U. S. Government was not.

MR. RIGLER: But that is because Senator Sherman specifically excluded, in the legislative history, specifically indicated why the United States Government was to be excluded.

QUESTION: Well, do you equate -- I was going to say Texas, but let's make it California -- do you equate California with a, as a sovereign in the sense of Yugoslavia or --

MR. RIGLER: For purposes of the rationale in this Court's decision in Georgia v. Evans, I certainly do.

QUESTION: Well, then to pursue Mr. Justice Marshall's inquiry, why would they -- why would the Congress pinpoint foreign corporations as being included and --

MR. RIGLER: That is --

QUESTION: -- almost clearly exclude any others? Does that not exclude, under the usual rules of construction?

MR. RIGLER: But -- no, because the usual rule -- that's the point I want to make, the usual rule in 1890 was that foreign -- was that sovereigns are included. And this Court said so in 1893, a contemporary case.

QUESTION: Included in the term "foreign corporations"?

MR. RIGLER: Included in the term "foreign corporations"?

MR. RIGLER: Included in the term "persons". Whether or not -- if the definition said "persons", and "persons" may included natural persons and corporations, period.

If the statute said nothing more, and it is a remedial statute, then foreign governments, sovereigns are entitled to the benefits of that statute. And that's exactly what this Court said in Stanley v. Schwalby; and I might point out that in that instance it was the United States which was taking advantage of the remedy and the United States was a foreign sovereign. Because Stanley v. Schwalby was a case under Texas law, and this Court said: Although not mentioned by name, a remedial statute that does refer to persons generally, the United States may take advantage of it.

And that rule was announced only three years different from the passage of the Sherman Act. And we have referred to the treatises and to the authorities, specifically Black, on statutory interpretation, the 1896 edition, which repeated that rule.

QUESTION: Did Stanley comment on the S.R.1, the definition of "person" in the revised statute?

MR. RIGLER: No, it did not. The revised statutes, Mr. Justice Rehnquist, we do not believe support the argument of the petitioners here, for several reasons:

No. 1, this Court could not have reached its result in Georgia if the defendants were correct in their argument about their applicability; nor could this Court have reached the result it did in U.S. v. California arising under the Shipping Act, or U. S. v. Nardone under the Communications Act, because they all use "persons" in approximately the same sense, as was done in the Sherman Act.

Secondly, if you take the language, the very language, upon which the petitioners purport to rely, the fair and ordinary reading indicates that Congress specifically would have had to include governments in order to read them out of the statute.

Let me read exactly what the Revisers said: "It requires the draughtsman, in the majority of cases of employing the word 'person', to take care that States, Territories, foreign governments, et cetera, appear to be excluded."

But that is not what Senator Sherman and the other sponsors of the bill did. They took no care to see that they were excluded. They wrote a definition that was inclusive.

QUESTION: But wasn't that the draftsman's complaint about the existing state of the law before S.R.1, rather than how it would be if S.R. 1 were adopted?

MR. RIGLER: I don't believe that that's a fair reading of the statement. Moreover, the draftsmen were not to make a substantive change in the law. As a matter of fact,

they were, in essence, fired. And Congress -- there was a great deal of legislative history then, to the effect that no substantive change was intended. But if --

QUESTION: Well, of course, they wouldn't, in 1875, have been substantively changing a law that was enacted in 1890.

MR. RIGLER: No, no. But they would have been tampering with the general rule that the sovereign may avail himself of a general remedial statute, even though the sovereign not be expressly mentioned as a person.

QUESTION: Well, really, that's a basic general rule, but our federal courts in this country are open to sovereign nations as plaintiffs; it's a State cause of action. It isn't really directly applicable here. This is a different and somewhat narrower question. That is, is the word "person" in the Sherman Act inclusive of --

MR. RIGLER: Of governments.

QUESTION: -- of foreign sovereign governments? That's the question, isn't it?

MR. RIGLER: Certainly that's the question. The direct, the narrowest question --

QUESTION: And the general rule is interesting, but really doesn't bear on that question. Does it?

MR. RIGLER: Well, it does in terms of what Congress would have sought in 1890, Mr. Justice Stewart.

QUESTION: Well, it's the definition of the word "person", that's what we're interested in here, in a particular statute.

MR. RIGLER: Yes. But although that definition did not mention governments as such, we have seen that municipal governments may avail themselves of the provisions of the Sherman Act, State governments may, and, like them, we have no effective remedy except with reference to --

QUESTION: But municipal governments are corporations, aren't they?

MR. RIGLER: Some are, some are not. In the Chattanooga case, Atlanta did turn out to be a corporation. I did not read that as the turning point of the case, however.

QUESTION: Yes.

MR. RIGLER: Let me comment on another argument raised by the petitioners, namely, that in 1890 no damage rights existed. Remember that Sherman's intent was to consolidate the pre-existing remedies under the common law and under State statutes in order to make them effective.

Well, as long ago as 1623, in the English Statute of Monopolies, the remedy of treble damages had been extended. And if you consult that statute you will see that among the people to whom that was extended was "bodies politic", i.e., governments.

In 1890, no less than 13 States already had anti-

trust statutes on their books, some of which provided for damages. Kansas being an example.

Third, in --

QUESTION: Did any of them explicitly provide that a foreign nation could seek redress?

MR. RIGLER: Not to my knowledge, Mr. Justice Stewart.

QUESTION: Any of the State statutes is what I mean.

MR. RIGLER: I understand. No, sir.

However, you read that against Sherman's intent, which was to incorporate the general pre-existing rules and fashion them into a single federal statute so that trusts could be eliminated and so that antitrust principles would be enhanced.

QUESTION: What do you say to the argument that your brother makes that in 1890 there was a generalized atmosphere of Zenophobia, or something akin to it?

MR. RIGLER: Well, if you will consult his references, they are not to the direct legislative history of the Sherman Act, --

QUESTION: No, no --

MR. RIGLER: -- they were such things as speeches before the whole --

QUESTION: -- the generalized atmosphere of parochialism, if you will.

MR. RIGLER: But consult the references that I gave Mr. Justice Marshall, where Sherman is talking specifically of foreign commerce, and the words "foreign corporations"; how could you accommodate on the one hand Congress' extension of the remedy explicitly to foreign corporations, with a desire to read "foreign" out of the remedial provisions of the antitrust law?

It simply can't be done.

QUESTION: Well, except that they didn't grant comparable privileges or reciprocal privileges to foreign countries at that time.

MR. RIGLER: To? They did not grant -- I missed something.

QUESTION: Most countries did not grant comparable privileges to our country and remedies to our country, because it was a new, somewhat new concept at that time.

MR. RIGLER: Well, plainly, though, the remedy of treble damages was extended to foreign corporations, whether or not U. S. corporations could obtain comparable rights really is of no moment, because right there in the statute -- the question was: why do we assume that Congress didn't want to read out foreign interests altogether? And the answer is: because they specifically included some foreign interests, namely, foreign corporations in the --

QUESTION: Well, could it have been that then, as of

now, that a lot of those "foreign corporations" were owned by Americans?

MR. RIGLER: It could have been either way, Mr. Justice Marshall. Some were, some weren't, quite obviously. But the statute wouldn't raise that distinction.

QUESTION: Right.

QUESTION: Well, you have to argue, I gather, that a State is a corporation?

MR. RIGLER: No, indeed.

QUESTION: What do you argue?

MR. RIGLER: That a State is a sovereign.

QUESTION: I know, but how is it a "person"?

MR. RIGLER: Well, actually, as a matter of fact, we do argue that, although I don't think that our argument rests on that. I agree that the --

QUESTION: You say a foreign government is a "person"? Is that what you say?

MR. RIGLER: Yes, sir.

QUESTION: And why is it a "person"?

MR. RIGLER: Because it's --

QUESTION: It certainly isn't by any common, ordinary definition of the word "person".

Do you suppose that corporation would have been included if they had never put the definitional section in? Had just used the word "person"?

MR. RIGLER: Yes. Absolutely.

QUESTION: Do you think a foreign state would?

MR. RIGLER: Absolutely.

QUESTION: Well, is that your argument, that you have to -- you go directly from "person" to "foreign state" or do you go through "corporation"?

MR. RIGLER: Either way. That's -- I think that even if they weren't a corporation, they would be a person; but, yes, they are a corporation. And so, on that count as well, they are a person.

QUESTION: And you think that's just so clear from the face of the Act, you didn't need to argue it?

MR. RIGLER: From the face of the Act? No, sir.

QUESTION: What? Do you say it is or not?

MR. RIGLER: Not on the face of the Act, but it --

QUESTION: On the face of the Act, if all you had was the Act, the words of the Act, you would not include the "foreign state"; is that it?

MR. RIGLER: If the Act said "persons injured in their business and property may recover", --

QUESTION: Yes.

MR. RIGLER: -- foreign governments would be included. If the Act said "corporations injured in their business and property", foreign nations would be included.

So, either way, foreign nations would be included.

And that was the --

QUESTION: So you needn't go any further than just the face of the Act, you think?

MR. RIGLER: But that was the prevailing rule at the time. Contrary to the Fox case, which Mr. -- which the respondents have cited, the general rule, which was stated in 1889 in Republic of Honduras v. Soto, was that sovereigns were "persons" for availing themselves of remedial statutes. That was said there, it was said in Republic of Mexico v. Arangoiz in 1856, cases bracketing the Fox decision. And it was said again in Stanley v. Schwalby.

QUESTION: Were any of those involving treble damage claims?

MR. RIGLER: No, sir. However, there was a treble damage case, returning to my point that Sherman intended to consolidate the common law remedies, in 1887 in New York -- since this argument first was raised in the reply brief, we have not had a chance to address that. I would like to call the Court's attention to Buffalo Lubrication v. Standard Oil, part of the Standard Oil trust. In 1887 New York case, 106 New York 669, holding that damages were an available common law remedy.

QUESTION: But that's not in your brief?

MR. RIGLER: That's not in our brief, because the argument was not raised until the reply brief.

QUESTION: Will you tell me again why the revised statutes -- the usual rule or the rule stated in the revised statutes about defining "persons", why that isn't relevant here?

MR. RIGLER: Well, it isn't relevant for several reasons:

First, because the revisers were not entrusted with the task of making any substantive change in the law.

Second, because the revisers, in essence, were fired.

Third, even if you take the revisers' language, fairly read, it supports the concept that you had to specifically exclude a sovereign as a "person" or the sovereign would be included.

QUESTION: On the face of the provision -- on the face of the provision?

MR. RIGLER: Well, that's certainly what the language says.

QUESTION: Well, if Senator Sherman had been defeated at the election after the enactment of the Sherman Act, you wouldn't read the "Sherman Act" out of the text, would you? They did adopt the revised statutes. Congress did. Even though the revisers may have been fired.

MR. RIGLER: They did not intend to make any change in the substantive rule. And the remainder of my answer to

Mr. Justice White is that this Court simply could not have come out where it did in Georgia v. Evans or in U. S. v. California or in U. S. v. Nardone, or the other cases we cite, if the defendants' version of the 1874 revision were correct.

QUESTION: Well, maybe that's an argument that wasn't called to the Court's attention in those cases and perhaps they were wrongly decided.

MR. RIGLER: It's my recollection that the 1874 decision was called to the Court's attention, either in Cooper or Georgia -- I would have to check that. But I believe that to have been the case from our review of the briefs.

Mr. Murphy mentioned one other case, by the way, which is --

QUESTION: Well, it certainly wasn't in Justice Holmes' case, there was no issue raised about whether a municipal corporation was a "person".

MR. RIGLER: No, it was assumed that --

QUESTION: It wasn't assumed, he just said it.

MR. RIGLER: -- a municipality had standing.

QUESTION: And Evans relied on it?

MR. RIGLER: No. Evans may have recognized it, but they didn't -- I don't believe that that was the basic rationale of the decision, Mr. Justice White.

QUESTION: I didn't say that. I said it relied on it.

MR. RIGLER: It didn't dispute it; yes, in that sense,

it relied on it.

QUESTION: Oh, it said it would be ironic to let a city sue and not let a State sue. Didn't it?

MR. RIGLER: Yes. Correct.

QUESTION: Mr. Rigler, could I ask you one question about your argument that I didn't quite follow:

You made reference to the Statute of Monopolies --

MR. RIGLER: Yes, sir.

QUESTION: Is there precedent to the effect that foreign governments could sue for damages under that statute? I thought of that statute basically as a prohibition against grants of monopolies by the Crown. How did the damage remedy figure in that statute?

MR. RIGLER: Because the statute indicated that the remedy was available to "bodies politic". I believe that appears in the text of the statute itself.

QUESTION: Well, what remedy could it be under that statute? That's what I --

MR. RIGLER: Treble damages were specifically mentioned.

QUESTION: For doing what?

MR. RIGLER: For violating the statute. And I believe that one of the provisions, one of the wrongs covered by the statute was the illegal assertion of a patent monopoly, which, of course, is one of the allegations in the very case

before us here.

QUESTION: Are there cases that hold that a foreign government could sue -- you're just relying on the statutory language in that?

MR. RIGLER: On the Statute of Monopolies?

QUESTION: Yes.

MR. RIGLER: Yes, sir.

I wanted to address the United Mine Workers case, which the respondents say disputes the proposition that sovereigns may avail themselves of the language in a general remedial statute. United Mine Workers stands on a different proposition, namely, that sovereigns may not be stripped of pre-existing sovereign, as opposed to commercial, prerogatives, in the event a subsequent statute is passed.

I mentioned among my points the anomaly. It seems just inconceivable to conclude that, on the purchases of identical goods, say aircraft, on the one hand Great Britain could not recover for purchases by the Royal Air Force, whereas British Airways, a wholly-owned government corporation, could.

MR. CHIEF JUSTICE BURGER: I think your time has expired now, Mr. Rigler.

MR. RIGLER: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Murphy, do you have anything further?

REBUTTAL ARGUMENT OF SAMUEL W. MURPHY, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. MURPHY: Mr. Chief Justice, just one or two points.

These plaintiffs aren't just corporations, they can't get under this statute by saying that. They plead themselves in their complaints as "independent sovereign nations".

My brother referred to Senator Sherman's statement that the United States would be excluded from the treble-damage remedy as evidence of an express congressional intent. In making that statement, Senator Sherman was referring to the provision in his then draft which limited the remedy to, I think it was put, "persons damnified or injured". There was never, in any of Senator Sherman's drafts, any express exclusion of the United States, other than as may be implied from the use of the word "person".

My brother misspoke himself twice about the amendment of the 1871 statute and the revisers' report. The language he referred to, as I think Mr. Justice Rehnquist suggested, was from the revisers' report recommending that the phrase "bodies politic" be deleted from the statute, so that in future statutes it would not be necessary to exclude them expressly.

Neither the Cooper case nor the Georgia case mentioned

the 1874 statute. The Cooper case does cite the case of United States v. Fox, which was an 1876 decision of this Court, holding that the United States was not a "person" within the meaning of the New York Statute of Wills, and stating that ordinarily a statute employing the word "person" will be construed to exclude the sovereign.

Our friends on the other side suggest that the general rule in 1890 was that the word "person" include sovereigns. We just flatly disagree with that. We think they are wrong. The point is thoroughly in the briefs, and I won't repeat myself.

QUESTION: Well, what do you do with -- assume we agree with you, what do you do with Georgia v. Evans? Just confine it to its facts and say a State is a State and a foreign government is a foreign government?

MR. MURPHY: Yes, and I --

QUESTION: One is a "person" and one isn't.

MR. MURPHY: In a practical sense, the way an 1890 Congressman would look at it, I'm sure that's what he would say. He could think of all kinds of reasons why Georgia ought to be able to sue and Iran ought not.

QUESTION: But certainly -- that case does at least stand for the proposition that the word "person" can include a quasi-sovereign State?

MR. MURPHY: Yes, sir, it does stand for that

proposition, as I said --

QUESTION: At the very least.

MR. MURPHY: As I said in answer to Justice Stevens' question, I think that State fits our analysis for two reasons: One, because Georgia just didn't have sovereign power over --

QUESTION: In this area.

MR. MURPHY: In this area. And secondly, because there is evidence in the legislative history that a reason for the Sherman Act was the limited reach of State law.

QUESTION: Of course, India or Iran don't have sovereign power to do anything about illegal antitrust activity in the United States, unless they can be plaintiffs. I mean, they don't have sovereign power to do it.

MR. MURPHY: Oh, I think they clearly do, Justice Stewart, if --

QUESTION: To enforce the antitrust laws of the United States?

MR. MURPHY: No, no. No. They clearly have sovereign power to deal with trade restraining combinations which affect their commerce, either in terms of goods imported into that country from other places or in terms of activity within --

QUESTION: Well, since you were talking about the inability or the powerlessness of a State, such as Georgia or

any other State, to enforce the agreements in restraint of trade and other violations of the antitrust laws in the United States.

MR. MURPHY: Under their own laws.

QUESTION: Yes.

MR. MURPHY: And I say that a foreign sovereign has the ability to deal with trade restraining combinations affecting their commerce to the same extent as does the United States. It has full sovereign power.

QUESTION: Hardly. You don't really mean that. They can't bring criminal prosecutions under the antitrust laws.

MR. MURPHY: Not under our antitrust laws, no, sir, of course not.

QUESTION: No. Well, that's what I'm talking about. Our antitrust laws.

MR. MURPHY: Yes, we are. But the reason I feel Georgia fits into our analysis is because Georgia, under its laws, was powerless to reach a restraint in the interstate commerce of the United States.

QUESTION: Well, doesn't a foreign sovereign, whether it's Iran or Turkey, have certain powers which the State of Georgia or California does not have? Namely, they can boycott our commerce and prevent passage, and do a great many political things which, under our commerce clause, no State may do here.

MR. MURPHY: Exactly. Exactly. And that's why there seems to us to be just all the difference, as night and day, between the State of Georgia and the Government of Turkey.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:48 o'clock, p.m., the case in the above-entitled matter was submitted.]

- - -