ORIGINAL

In the

Supreme Court of the United States

NATIONAL BROILER MARKETING ASSOCIATION,

PETITIONER,

V.

UNITED STATES,

No. 77-117

Washington, D. C.
February 21, 1978

Pages 1 thru 38

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IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL BROILER MARKETING ASSOCIATION, Petitioner,	:	
v.	:	No. 77-117
UNITED STATES, Respondent.	:	

Washington, D. C.

Tuesday, February 21, 1978

The above-entitled matter came on for argument at 2:16 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
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

RICHARD A. POSNER, ESQ., 1222 East Fifty-Sixth Street, Chicago, Illinois 60637, for the Petitioner.

JOHN H. SHENEFIELD, ESQ., Assistant Attorney General of the United States, Department of Justice, Washington, D. C. 20530, for the Respondent.

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 77-117, National Broiler Marketing Association against United States.

Mr. Posner.

ORAL ARGUMENT OF RICHARD A. POSNER, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case, here on certiorari to the Fifth Circuit, is a Government civil antitrust suit, charging violations of Section 1 of the Sherman Act against an agriculatural cooperative, the National Broiler Marketing Association, or NBMA. NBMA is a cooperative of producers of broiler chickens.

The District Court granted some rejudgment for NBMA and dismissed the complaint on the basis of the Capper-Volstead Act. That Act grants a limited antitrust exemption to agricultural cooperatives composed of, and I quote, "persons engaged in agricultural production as farmers, planters, ranch men, dairy men, nut or fruit growers.

The Fifth Circuit reversed the District Court's decision because some of NBMA's members contract out the so-called "grow-out" phase of broiler production to independent contractors known as "contract growers." The Fifth Circuit held that such a producer is not entitled to join an exempt

cooperative.

Certain key issues are not in dispute here. For example, it is not disputed that a broiler chicken is an agricultural product under the Capper-Volstead Act. Thus, we are not concerned with producers of hot dogs, flour, refined sugar, textile products or other manufactured products.

QUESTION: Mr. Posner, I understand that isn't disputed but, frankly, I was kind of puzzled. What is it that the marketing organization sells for all its members?

MR. POSNER: The marketing organization, itself, the cooperative is not engaged in sale, other than some export sales. The actual sales are made by the producer members.

QUESTION: It is not the typical co-op then? It's more like a trade association, is it?

MR. POSNER: It has several functions. One that it has that many cooperatives have, it purchases products on behalf of its members, buys for them to get lower prices.

QUESTION: Buys chickens, or what?

MR. POSNER: No, it probably will buy various equipment used in production, other supplies. It also makes some export sales and it engages in dissemination of information and other trade association-like activities.

QUESTION: Getting back to my original question, what is the product as to which the price information is exchanged?

MR. POSNER: The product is a broiler chicken which has

been plucked and eviscerated and its head and feet cut off and it is then sold as fresh to the grocery stores or supermarkets.

QUESTION: Why isn't it like meat that has been dressed by the packers? I know the Government concedes it, but I frankly couldn't quite understand it.

MR. POSNER: It is really nothing more than a plucked chicken and as long as the chicken, itself, is a --

QUESTION: It has gone through the processing plant, hasn't it? It has been, as you say, eviscerated and the head cut off. Isn't that just like a piece of beef that's been packed for sale to consumers?

QUESTION: To put it another way, if I may, is there anything more to do before they sell it, just as they do with the beef that Justice Stevens is talking about, except perhaps cut it in half, if they want only half a chicken?

MR. POSNER: I don't know enough about the processing of beef to answer the question fully. One difference is that, as I understand it, most beef has been substantially sliced and segmented and dismembered before it is actually shipped from a meat-packing plant. But here, the chicken is basically just a plucked and eviscerated beast.

QUESTION: But it has gone through a processing plant much like a slaughterhouse, hasn't it?

MR. POSNER: It is a slaughterhouse. It is often called a processing plant. I think there is a profound

difference between what is done to prepare the bird for market and what, for example, is done to manufacture sugar or hot dogs or the like.

QUESTION: I don't understand the difference. I am sorry. I know the Government conceded the point, but I just don't see why this is different from a piece of meat. Well, I shouldn't take your time on it.

MR. POSNER: As I say, I don't know a great deal about the processing of beef. If all that was involved was taking a steer, killing it and shipping the meat to a grocery store, supermarket, and if that meat-packer or meat preparer for market engaged in the various activities that these producers do, then I assume they would also be entitled to form this type of co-operative.

I do want to differentiate, though, very sharply, the kind of manufactured product, of which hot dogs, flour or sugar made from beets would be good examples, because it is perfectly clear that the Capper-Volstead Act was not intended to allow manufacturers, in that sense, to form a cooperative. That would not be an agricultural product in the sense used in this Act.

QUESTION: I find some difficulty along the same lines expressed by Justice Stevens and the Chief Justice as to the precise facts that we are talking about here. Is there some place in the record or are the parties sufficiently agreed so that it could be quickly summarized as to exactly what it is

that the members of the association ship to Safeway or A&P and then what, more typically, A&P or Safeway does before they put them out on their retail shelves?

MR. POSNER: The record, the main part of the record, is a brief stipulation of facts, pages 6 to 30 of Volume 1. There is not a detailed description of what exactly is done at a processing plant. However, what is described and conceded as the agricultural product here is a ready to cook broiler, 90 and more percent of which are shipped fresh from the slaughterhouse. And the activities in the slaughterhouse are the plucking of the feathers and the evisceration.

QUESTION: Frequently, on a Safeway shelf, you will see chicken breasts or chicken legs. In other words, something more has happened from the time that the bird was shipped by the processor to the time those things appear on the shelf in that form.

MR. POSNER: Well, if I understand it, sometimes the producer will dismember the chicken and ship parts.

QUESTION: This isn't clear from the record?

MR. POSNER: No, it does not give that degree of detail.

Another conceded point, less controversial with the Justices, is that a completely integrated broiler producer, that is one who does his own growing, is a farmer under the Capper-Volstead Act. And this concession disposes of any

argument that this is a statute just to protect the little farmer, the dirt farmer. The fully vertically integrated producer is fully within the Act.

QUESTION: Would that concession cover, again, a meat packer that owned enough ranch land to grow his own cattle? Would it apply or be any different?

MR. POSNER: That is true if what the meat packer is shipping, is selling, is definable as a raw or original agricultural commodity.

QUESTION: The fact he killed it and chopped it up in pieces wouldn't make any difference?

MR. POSNER: If it is merely killed and sliced, it would retain its original agricultural character. If it were processed into lunch meats or hot dogs or hamburgers, it would be a manufactured product.

QUESTION: I know the Government has conceded. Are there any cases that hold that this kind of product is an agricultural product and this kind of vertically integrated entity is a farmer? I know the Government does concede it, but I was kind of surprised.

MR. POSNER: There are very -- Actually there are very few decided cases under the Capper-Volstead Act in the entire history of the Act, and in those cases these issues have not occurred, have not been raised.

QUESTION: Let me ask you one more and then I will

leave you --

Why, if the fact that two members don't even control any breeder flocks, under Case-Swayne, why doesn't that dispose of the case?

MR. POSNER: A producer who does not control a breeder flock -- and it is important to distinguish a breeder flock from a broiler flock. A breeder flock, that is the parents of the broiler chicken. A breeder flock are the pullets who produce eggs which are then hatched. Now, the producer who does not have a breeder flock, might, for example, have a hatchery. And that would mean he would purchase the eggs from the owner of the breeder flock. Those eggs he would hatch in his hatchery.

QUESTION: Do these two do that?

MR. POSNER: Yes.

He would take the chicks from the hatchery and place them with the grower and he would supervise the growing of the chickens, send his personnel to supervise them, ship them feed, capture, catch and coop the chickens after the grow-out stage.

QUESTION: Is it not correct, Mr. Posner, that we must conclude that those two members are farmers, within the meaning of the Act, in order for the whole co-op to be exempt? under Case-Swayne?

MR. POSNER: Yes. There is no question -- Well, let

me put it this way. The differences between these producers are not material producers.

QUESTION: If any one is not a farmer, the whole defense fails, if I understand Case-Swayne, isn't that correct?

MR. POSNER: Yes, that is correct.

QUESTION: So, we have to take the two most difficult examples from your point of view and satisfy ourselves that these are farmers in order for the co-op to prevail?

MR. POSNER: Yes. I have no particular difficulty with the ones that do not have a breeder flock or do not have a processing plant. I don't think those are the essential elements of being a producer or being a farmer. The essential element is the ownership of the broilers from chick to when they are ready to market.

QUESTION: And taking the market risks.

MR. POSNER: Taking the market risks, using your personnel to place the chicks, to supervise the growing, to pick up the chicks, coop them, haul them off and to furnish the feed. And those responsibilities are assumed by all of the producers. The fact that some of them may not have a particular type of plant which most of them have is not material.

QUESTION: Well, that has to be your position, doesn't it, Professor Posner, that you have no difficulty with it, otherwise your case goes down the drain?

MR. POSNER: Yes, but the essence of a farmer is not

the ownership of a feedmill or a slaughterhouse or a breeder flock, that is the parents of the agricultural commodity or flock in which we are interested. Now, if I don't regard the fact that some of these producers don't have all of the plants which are typical in this industry as harmful to our position.

QUESTION: Does the record disclose, incidentally, the attitude of the Department of Agriculture as to the appropriate interpretation of the Capper-Volstead Act?

MR. POSNER: Do, it does not. There is a footnote on page 21 of the Government's brief, Footnote 42, which states the Department's current position on two statutes discussed in that footnote, neither of which is the Capper-Volstead Act. Both are statutes under which these producers have received other forms of assistance from the Agriculture Department.

QUESTION: Mr. Posner, maybe I misheard you. If you said page 21, the Government's brief has run out at page 11.

MR. POSNER: You may be referring to the brief in opposition. The brief for the United States --

QUESTION: The new color --

MR. POSNER: I am sorry.

Let me take another moment to describe what these producers do and why we think they are farmers. And here I will discuss the typical member, the integrator, although there are some differences among them.

I stress the -- starting when the chicken is born, at

the hatchery. At that point, for all of these, all the members of this cooperative, they own those baby chicks and they will own the chickens throughout until they are sold to the supermarkets. They take the chicks to a grower. When the chicks are a day old, they haul the newborn chicks, more concretely to a poultry house, and that is where the chickens are going to grow for seven or eight weeks until they are ready for slaughter. This is the grow-out stage. And a poultry house will house up to 40,000 chickens at one time. Sometimes the integrator, the producer, the member of the cooperative owns the poultry house, himself, and when that is true, then he is uncontrovertibly the Capper-Volstead farmer. More commonly the poultry house is owned by these contract growers, independent contractors. And the grower then has the custory of the chickens for the seven or eight weeks, while they are growing. It doesn't follow, however, that the integrator relinquishes his control of the chickens during this period. Of course, he owns them throughout and bears the market risk, but in addition he supplies and delivers the feed for the chickens. The feed is the major input into the production of a chicken. He supplies them with all medicine, vaccines. He inoculates the chickens. He tells the grower what diet, what mixture of feeds to administer to the chickens at different periods of their growth. His employees, field men or supervisors, as they are called, visit the grower weekly to supervise the growing of the chickens. And at the end

of the seven or eight weeks, when they are mature, the integrator sends his employees to catch the birds, coop them and truck the cooped birds to the slaughterhouse. And these employees who catch and coop the birds, like the field men who visit the grower weekly, are as much farm laborers as the grower, himself, and his hired help.

If we look just at the costs which are incurred in the live production stage, before you get to the slaughterhouse, the integrator incurs 90% of those costs and the grower only 10%. If you added in the slaughtering costs, which is done entirely by the integrator, then his percentage of costs is even higher.

Because broilers are your typical perishable agricultural product, because these producers are not well informed about conditions of demand --

QUESTION: Let me ask you one more question that has occurred to me.

At the point immediately before the chicken goes to the slaughterhouse, or the processing plant, while it is still alive, does the owner of the chicken have an option to do something else with it?

MR. POSNER: The owner of the chicken is the producer, not the grower.

QUESTION: Does the producer have an option to do something other than kill it at that particular stage of its

life?

MR. POSNER: No, he does not. If the -- There is, as far as I know, no substantial market for a --

QUESTION: Larger chicken.

MR. POSNER: I was going to say there is no market, as far as I know, for the unplucked chicken. But, in addition to that --

QUESTION: These are 2½ pound chickens, or something like that, aren't they? Couldn't they let them get a little bigger and use them for some other market, like fryers?

MR. POSNER: No. A fryer and a broiler are identical. They are the same young chicken. If you let the chicken stay and grow, he becomes unmarketable. There is some market for a roast chicken, which is a larger chicken. But, ordinarily if the chickens are allowed to grow, if they can't be sold after eight weeks, they are generally written off or lost.

QUESTION: They are previously contracted out, anyway, aren't they?

MR. POSNER: The only thing that is contracted out is --

QUESTION: Don't they make a contract that we will furnish you so many on such and such a day every week? Sure they do. We will give you so many broilers Tuesday of every week.

MR. POSNER: To the retail store.

QUESTION: Yes, to the supermarket. That's a contract.

MR. POSNER: Well, it typically doesn't work that way, as I understand it. The details of the relationship with the supermarket are not in the record. What the record does say is that the retail demand for the chickens is unpredictable and variable, and that sometimes the producer will find himself with a flock that he must sell because he can't let them grow beyond their eight-week size and then he has to find a distress outlet.

QUESTION: I can understand why at the age of eight weeks the product is perishable in the sense that it has to be marketed right away, but after it has -- the chicken has been killed and dressed why can't it be frozen and stored indefinitely?

MR. POSNER: For reasons that are not explained in the record, that I do not understand, there is not a substantial market for frozen chicken. The record does show that more than 90% of the chickens sold by the producers are shipped fresh, not frozen. They are lightly chilled to preserve them for the week or so that it takes to be sold at the counter, but they do not keep. They are perishable.

QUESTION: Mr. Posner, perhaps you have covered this before, but it is suggested in at least one of these amicus briefs that we have that there is a choice here, an alternative, either the contract broilers are within the exception, the

Capper-Volstead exemption from the Antitrust Law or your clients are, but they can't both be. But you reject that, don't you?

MR. POSNER: Yes, in fact, until this case was brought, the grower and the producer were both conceded farmers. For example, this producer cooperative contains as members co-ops of growers. And, as I said, until this case, there was no suggestion that --

QUESTION: That one or the other is, and if one is the other isn't? That's the suggestion here.

MR. POSNER: The problem that has happened with poultry production is that the attributes of a complete or traditional farmer have become divided between two entities. The grower has some, in the sense that he actually has the day-to-day custody of the birds. The integrator has, we would argue, more or at least as many because he bears the market risks and markets the birds, supervises them. He formulates their diet. He inoculates them and does many of the things which, in traditional agriculture, are the farmer's job.

The Justice Department and the court below have said the only thing that counts in whether a firm is a farmer is whether it has ownership of the land or custody of a crop. And we say that's just a rule to decide this case. It can be very easily circumvented simply by rewriting the contracts with the growers to designate them as employees.

This Court has experience with the difficulty of a

rule which turns on the concept of title.

QUESTION: It is not title. Tenant farmers are surely under the Capper-Volstead, aren't they?

MR. POSNER: Yes, that would fall under the grant of the Government's rule by which the person with custody is the farmer and the person with title of the land is another farmer, thus, the plantation owner and the tenant farmer.

In the poultry case, the ownership of the land, that is to say the land under the poultry house, is in the grower and the custody is in the grower, though really divided with the integrator. But if these contracts with the growers were re-written so that the growers became employees, then under the Justice Department's test the integrator-producers would become farmers.

We have mentioned in our brief that the trend in poultry production is toward the complete integration of the operation, under the integrator. Two of the members of the cooperative grow 100% of their own birds, one 43%. Still most place most of their birds with outside growers. And yet that is a situation that is changing in the direction of greater integration. And if the Fifth Circuit's decision were upheld, that would just give the producers an additional impetus to continue this trend of buying out growers.

If there are no further questions, I'd like to reserve my time.

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

Mr. Shenefield.

ORAL ARGUMENT OF JOHN H. SHENEFIELD, ESQ.,

ON BEHALF OF THE RESPONDENT

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

This is a case about statutory interpretation, about the statutory interpretation of a word in a statute. The central legal question in the case is whether integrators or contract producers, that do everything in the production of chicken except do the actual growing, who have divorced themselves from the actual farming of chickens, whether those integrators are, nevertheless, farmers within the meaning of the Capper-Volstead Act.

Now, the importance of the case, it seems to me, lies in this single fact: Reading the legislative history of this statute, the 67th Congress in 1922, you come inevitably, it seems to me, to the conclusion that that Congress intended to safeguard actual farmers, farmers on the land and doing the tilling or shepherding of the crops and the flocks. They did that, they had that intention, in order to safeguard the farmers against the middle man, against the processors, against the marketers. And so, the case really raises a familiar question, namely, are we to honor that original exemption, that original intention in a limited way, focused on the fact situation that

was presented by that Congress, or whether we are now to interpret it in a somewhat more relaxed fashion.

QUESTION: Wasn't their intent also to treat as differently, under the antitrust laws, farmers because they bore the risks of drought and price depressions in a way that lots of other purchasers didn't?

MR. SHENEFIELD: The risk turns out not to be crucial, I believe, in the legislative history. You have to put into the context of the times, it seems to me, the legislative history. After World War I, this country went through an extraordinary agricultural depression. Senators described the state of agriculture as a shambles, as in the worst depression that it had ever seen. And so, when Congress sought to fashion these words and to focus its exemption it did so, not so much because there was a risk of one kind or another, but because they saw farmers leaving the farms and going to the city.

QUESTION: Wasn't one of the reasons the farmers were leaving the farms just because of this agricultural depression, whereas other parts of industry were prosperous and that was because farmers suffered from these peculiar risks?

MR. SHENEFIELD: When you look at the reasons that farmers at the land in the farmhouses suffer, the risk they bear, the cost they invest, and all of those factual things are the things one looks at. But it seems to me no single one of

them nor indeed any of them in an aggregate should be deemed to be determinative. It seems to me you have to look back at the words of the statute,themselves, and at the legislative history.

QUESTION: How long has the Antitrust Division thought that the farmer excluded the integrator?

MR. SHENEFIELD: That raises the question, Mr. Justice White, of the business review procedure. In 1971 --

QUESTION: I'll put it the other way. Did it ever consider the integrator to be a farmer?

MR. SHENEFIELD: It did. In 1969, it issued a business review which focused on the risk and came to the conclusion that the integrators were farmers, within the Capper-Volstead Act.

QUESTION: I suppose the Department then looked back and put the legislative history in context.

MR. SHENEFIELD: I think it refined its views and in 1971 it issued a second business review letter, making quite clear that these integrators were not to be considered farmers. And, indeed, a press release was issued at the same time. All business reviews, as a matter of fact, state, either in the relevant code of Federal regulations or within their own four corners, that they are to be taken as a snapshot of intention at that particular time and may, indeed, be revised or rescinded. And this is just such a situation. I think it is very difficult to argue that anyone was misled in this situation.

Let me say two things, three things, about what the case is not about. It is not about the legality of the Petitioner's conduct. The posture that the case finds itself here, the Court is simply required to construe a particular statute.

Second, it is not about the wisdom of the provisions of the Capper-Volstead Act. Really, the task, I guess, of the Court here today is to try to determine what that 67th Congress would have done had it adverted to the issue before the Court.

And third, it is not about the most economically efficient way to run the poultry business. We don't challenge vertical integration, backward or forward. We challenge only the notion that integrators who have withdrawn or who have divorced themselves from the actual farming of chickens have a right to fix prices behind an exemption intended only for active farmers.

QUESTION: But you would agree, I take it, that if the integrator integrates a little farther and does the growing that he is a farmer?

MR. SHENEFIELD: We would agree with that.

QUESTION: And then those larger and more integrated units could price fix as a cooperative?

MR. SHENEFIELD: That's correct. But I think the crucial point is not that we are objecting to vertical integration as a general concept. With particular emphasis on your

question --

QUESTION: The question is whether this is a cooperative of farmers, not whether vertical integration is permissible.

MR. SHENEFIELD: That's precisely correct. We do not challenge the vertical integration.

QUESTION: On that point, Mr. Shenefield, what if the meat packers bought up a lot of ranches and then formed this kind of an association? Would they be exempt?

MR. SHENEFIELD: It would depend on the resolution of the question whether meat in that form packed by meat packers were an agricultural product.

QUESTION: Suppose what they sold was just unfrozen.

MR. SHENEFIELD: The debates, the Capper-Volstead debates, themselves, particularly the words of Senator Cummings, make quite clear that he thought meat packed in that way was an agricultural product. And, if that were the conclusion, then they would be farmers in the situation hypothesis you proposed.

QUESTION: Of course, at the time the statute was passed we didn't have the art of freezing.

So you would say that the meat packers could get together and buy some ranches and they could come under the exemption?

MR. SHENEFIELD: That subject came up in the legislative history, as I recall it, and there are references to

Mr. Armour and Mr. Swift, who if they bought the ranch land and raised the cattle themselves and endured those particular kinds of risks, they too could be farmers. And that was regarded as a problem, but it was regarded as a necessary defect of trying to form some kind of standard in words that they had available to them.

QUESTION: Let me see if I understand you correctly. If the integrator owned the land where the chickens mature here, then you concede he would be a farmer.

MR. SHENEFIELD: That's correct.

QUESTION: How much land does he have to own?

MR. SHENEFIELD: He has to own, technically, only enough to have the buildings sit on them. As I recall, the average contract farmer, in effect, has about 5 acres of land to his disposal.

QUESTION: If ownership of only a part is enough, then why isn't it sufficient if the integrator owns the land for the breeding crops and hatchery facilities?

MR. SHENEFIELD: Well, first of all, six members of NBMA do not own either hatcheries or breeder farms.

QUESTION: Then why don't you go off in Case-Swayne?

MR. SHENEFIELD: We, I think, win on Case-Swayne, in any event, but I don't think it gets us --

QUESTION: You certainly don't put it forward as your main thrust.

MR. SHENEFIELD: No. The reason is that we would be, I assume, back here again next year because the Association will have reorganized to exclude these six, and the litigation isn't disposed of. But I think, just to go to that point, I think we do win on the basis of Case-Swayne.

QUESTION: Would it be enough if the integrator just owned the land but nevertheless got an independent contractor to come on his land to do the growing function?

MR. SHENEFIELD: The legislative history suggests that land ownership, on the one hand, and tilling the soil, on the other hand, are both separate and independent.

QUESTION: Contrarywise, I suppose, you would say that the integrator was a farmer if he actually did the growing.

MR. SHENEFIELD: That's correct. The legislative history, as I mentioned, speaks of plantation owners and tenant farmers. Both are farmers within the meaning of the Capper-Volstead Act. But the crucial standard is either ownership of the land itself or the tilling of the soil. And I call attention --

QUESTION: You don't mean literally the tilling of the soil, do you? I mean the growing of the chickens.

MR. SHENEFIELD: Tiller of the soil, grower of the chickens, shepherding of --

QUESTION: Doing the work of actually feeding the chickens.

MR. SHENEFIELD: Yes, sir.

In Footnote 27 of the Brief for the United States, on page 13, we tried to set out a list of representative selections from the debates that give that sort of an impressionistic feeling of precisely what it was that that Congress was moving toward, and what it was trying to do, albeit imperfectly. Any one of us could have picked other formulations of language that might have been more precise or done it better. But what it was trying to do was to safeguard the farmer and to preserve the values that that Congress associated with being close to the soil.

QUESTION: One of the problems is the extraordinary technological change in the agricultural -- it's now called agribusiness. It is a problem not unfamiliar in other areas of the law, the technological change that made the 1907 trademark, copyright law, so difficult to apply. Obviously, that Congress, back in 1922, wasn't thinking of anything like this because it didn't exist and they didn't imagine it ever would. Chicken raising back in those days was done by the farmer's wife, the egg money.

MR. SHENEFIELD: We have a slight indication of what that Congress might have done in the situation, because they were offered a chance to view something called the Phipps Amendment, which is referred to in our brief at page 15.

QUESTION: I have another problem. We've talked a

lot about what the legislators might have been thinking about between the debates, but if you look at the language of the statute, it talks about forming associations to act as marketing agents. And I don't understand that this organization does that. Do you read the statute as permitting -- if you had a group of farmers who presumably could form a cooperative marketing agent, do you think they would be exempt if instead of doing that they just agreed on prices and agreed to sell independently at agreed prices? And that's what this charge is, I believe.

MR. SHENEFIELD: Well, we have set the case in a way so that the sole question, I take it, is the applicability of the words "as farmers."

QUESTION: I know, but the ultimate question is whether these activities are within the exemption.

MR. SHENEFIELD: That's true.

QUESTION: And do you concede that the farmers may fix prices without acting through marketing agents?

MR. SHENEFIELD: No. We concede only that if they organize themselves into cooperative associations, associations of producers, as farmers dealing with the product that they farm, they themselves raise, they are then exempt from the antitrust laws.

QUESTION: Even though they don't do what the statute exempts, namely act through a marketing agent.

MR. SHENEFIELD: No, we concede only the exemption to

the extent that the activities they do are mentioned in the exemption.

QUESTION: But your complaint doesn't allege activities of the kind described in the statute.

MR. SHENEFIELD: The complaint alleges price-fixing.

QUESTION: That's right. It doesn't allege -- nobody tells us anything about a marketing agency.

MR. SHENEFIELD: Well, I -- the only thing one can say is that I suppose that if they are price-fixing and the exemption doesn't apply, we would argue that the antitrust laws apply. If they are --

QUESTION: Shouldn't you be arguing that in this Court today? And you don't seem to be making an argument that seems wide open to you.

MR. SHENEFIELD: I think at least the burden of my argument is precisely that. We charge price-fixing. If the exemption doesn't apply they are liable under the antitrust laws.

QUESTION: But there are two quite separate reasons why the exemption might not apply. One, because they are not farmers and two, because even if they are farmers they haven't formed the statutory marketing agency.

MR. SHENEFIELD: I am not aware of whether the record of the Appendix shows anything on that. We are focusing at this point on the question of whether they are farmers.

QUESTION: You may have another good argument but you are not particularly interested in it.

MR. SHENEFIELD: Well, I am very interested in it if it is good. I just don't have it at this point.

QUESTION: One of the difficulties with this case, to me, Mr. Shenefield, is that the record is so sparse as to actual facts. I realize this complaint and stipulated facts and no trial, but it seems inevitably the discussion does turn to what these people are doing, and not all of us, at least, are sure of what they are doing.

MR. SHENEFIELD: The case comes to this Court on the basis of sufficient facts, at least in my view, to dispose of the issue of whether these defendants are farmers, within the Capper-Volstead exemption. Other questions that the defendants raised in their answers, such as the applicability of the Cooperative Marketing Act of 1926, and all of those questions, never were reached by the District Court. So, as I see the case coming up, it comes up in a rather clear and narrow fashion. The applicability of the word "farmers" to these --

QUESTION: A group of lawyers trying to talk about what farmers do.

QUESTION: Mr. Shenefield, when you spoke a while ago of backward and forward, is it correct to take that to mean that if Mr. Armour and Mr. Swift bought ranches and herds

or if some ranchers bought -- large ranchers owning large herds bought Swift and Armour Company. Is that what you are talking about, the backward and forward process?

MR. SHENEFIELD: That was what I was talking about, and all I meant to say is that that issue isn't in this case and waits until another day, whether the same legal rules apply to backward as well as to forward integration.

QUESTION: It surely -- I shouldn't say anything is sure in this area -- It would be more likely, I take it, that the forward, that is if the farmers did their own processing, than if the processors, owning no farms, tried to reverse the process.

MR. SHENEFIELD: It seems to me that that's exactly correct, taking into account the concern that the Congress had for the farmers and their well-being, as opposed to Mr. Armour and Mr. Swift.

I was addressing, just briefly, the one opportunity the Congress had to confront a similar kind of problem to the situation we have here today, the Phipps Amendment, which is mentioned, as I said, on page 15 of the brief. Senator Phipps, in effect, proposed an amendment to exempt activities of manufacturers or producers of agricultural products, provided two things. Provided they entered into pre-planting contracts and provided the farmers compensation depended upon the price of the agricultural commodity in the ultimate market. Now, when

he talked of that amendment, he spoke of several kinds of products that he thought -- several kinds of processors that he thought might be covered by it. Milk was one. Fruits and vegetables. Supporters of the Capper-Volstead Act were steadfastly opposed to the Phipps Amendment, and it was defeated. But they were opposed because it seemed to them that it went far beyond that narrow concern that they had. And that whole incident is instructive to us for several reasons.

One, it was quite clear as a result of the debates that pre-planting contracts, the kind of arrangement for the sale of the crop in advance of planting, was not sufficient to make those processors farmers under the Capper-Volstead Act, as that Congress saw it, even though that meant that the processors bore much of the risk of market fluctuations up and down.

It also showed that the Congress thought an exemption or an amendment to the bill then on the floor was required to exempt those persons, that the Capper-Volstead Act did not do it. And it was rejected precisely because it addressed the question of middle-men and processors and sought to aid them. And that was one of the things Congress saw as the difficulty of the farmer.

So the defeat of the amendment is important; indeed, it is regarded as significant by this Court in the Case-Swayne opinion. And the reasons for the defeat are crucial

because, in effect, it shows that Congress wanted to narrowly focus the exemption, as much out of concern for the consumers, down the distribution chain, as out of concern for the farmers themselves.

Now the general theme of the language, plus the legislative history, was precisely the exercise this Court went through in Case-Swayne, which we regard as definitive in the explication of this exemption.

Let me just call attention to three or four things in connection with Case-Swayne. As we menioned earlier, given the fact that two of the members of NBMA are neither hatchery owners nor breeder flock owners -- or six of them are not -- and two, in addition, do not own feed processing plants, we win under Case-Swayne. But we go beyond that.

Once you look at the reports, particularly House Report Number 24, which is cited in our brief, the debates which are mentioned in our brief and recounted in Case-Swayne, the Phipps Amendment, which is set out in a footnote in Case-Swayne, you come, it seems to me, inevitably to the conclusion that these kinds of processors, the processors that were orange processors in Case-Swayne and one similar to that in this case, are not farmers within the Capper-Volstead Act.

And then the conclusion that Case-Swayne reaches is particularly instructive. What it says is that you could, it seems to the authors of the opinion, expand the exemption.

You could interpret it broadly. But because the purpose of Congress in enacting the Capper-Volstead Act was to create a special exception to a general rule, to a general legislative plan, the exemption is to be narrowly construed. And that is set out in full at 389 U.S. 384.

So, we argue strongly that NBMA members are not farmers because they do not meet the twin standards, ownership of the land or working of the land, and that that is the determining standard, both in the language "producers of agricultural products as farmers." It is the determing standard in the legislative history. You simply cannot read the legislative history without getting that clear signal. And it is the determining standard in cases in this Court that have construed that statute.

QUESTION: These days, does it have to be land? Among other things, it can be water, can't it, hydroscopic agronomy?

MR. SHENEFIELD: It doesn't seem to me that there is anything necessarily in the debates which would rule that out as a possibility.

QUESTION: But there wasn't any such thing in 1922.

MR. SHENEFIELD: As long as you are trying to divine the essence of what that Congress thought farmers were interested in, or what farmers did, it had to do with, not necessarily ownership of the land, but actually producing the crop,

being involved with the production of the crop or the shepherding of the flocks.

QUESTION: Well, shrimpers and oyster men were not covered by this, or were they?

MR. SHENEFIELD: I believe there is a separate act that governs fisheries.

QUESTION: Certainly the industry business analogy is there, is it not? The producer suffers from the same middle-man problem in the one case as in the other.

MR. SHENEFIELD: That's exactly correct. And as I understand the law under that Act, it is roughly parallel to the law under this one.

Thus, in our argument, in our view, Congress, in 1922, did not exempt these integrators from the antitrust laws. The Phipps Amendment shows that, to the extent it was addressed at all, the resolution was that they were not exempt.

Now, Petitioner argues -- and I think correctly -- that farming has changed in a major way since 1922.

Petitioner, in effect, is arguing here that the integrators are farmers in the true sense.

We agree that the poultry business has changed but we say two things, that the word "farmer" has changed not a whit since 1922, and the intention of that Congress has apparently not changed. The fact of industry change of evolving business circumstances does not, it seems to me, provide an

adequate basis on which to reverse a choice, rather self-consciously made, by Congress.

In the Sisson case, this Court wrote that "language is not a vessel into which you can pour a vintage that better suits present day tastes."

Petitioner's argument that the integrators must be, deserve to be and must be treated as farmers, it seems to me, should be addressed to Congress and not to this Court. The 67th Congress which passed the Capper-Volstead Act made its views plain enough.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Posner?

REBUTTAL ORAL ARGUMENT OF RICHARD A. POSNER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. POSNER: Thank you. I'll be very brief.

I think Mr. Shenefield made a critical concession when he said that hydroagronomy, growing plants in test-tubes, what General Electric is doing now, is agriculture within the meaning of the statute, even though it doesn't involve soil tending.

QUESTION: I don't know that he did concede that.

MR. POSNER: He said -- I thought he conceded. He next said that what is required is being involved with the production of an agricultural commodity. And that's what these

integrators are.

QUESTION: Or owning the water.

MR. POSNER: Let me add with regard to the Phipps Amendment, which keeps cropping up, the Phipps Amendment said that someone who made flour was not an agricultural producer merely because he had a deal with the wheat farmer that gave him a percentage of the crop. It has to do with what is an agricultural product and the difference between a raw agricultural product and a manufactured product, which is not within the scope of Capper-Volstead, even though it is produced from agricultural input.

And, finally, Mr. Justice Stevens, there is nothing in the Capper-Volstead Act that requires a cooperative to have a marketing agent. The statute permits producers to act together in processing and marketing their product. And one form of acting together is the exchange of information.

QUESTION: Do you think it necessarily follows that because you've got an exemption for common marketing agents, that you have an exemption for price-fixing in separate, individual marketing? It doesn't necessarily follow, does it? Can you read the statute that way?

MR. POSNER: Yes. It does not necessarily follow, but if the Justice Department concedes, as it has, that the activities of the Petitioner, of NBMA, are exempt if they are producers subject to Capper-Volstead Act, that, to us,

establishes that this is a completely legitimate --

QUESTION: It doesn't necessarily establish it to us, though, does it?

MR. POSNER: Well, that issue is not before --

QUESTION: Has not been decided by any court and the language of the statute doesn't compel that result. It may be right. You have to agree with that, I believe.

MR. POSNER: The issue has not been decided in this Court. There are lower court cases cited in the District Court's opinion which --

QUESTION: There is a rather substantial difference between the businessman's decision of whether to enter into a price-fixing agreement -- assuming it is all legal -- and his decision to turn over all his marketing activities to a common marketing agent. Those are rather different forms of marketing, are they not?

MR. POSNER: Yes.

Let me give you just one example. --

QUESTION: Let me ask you one other question.

Is it also not true that the legislative history shows a great interest in the cooperative movement, the idea of trying to market through common cooperative agencies? That was one of the things that Congress specifically intended to give its approval, just as it wanted to approve union organization, at the same time.

MR. POSNER: Yes, it did. It did not, however, prescribe the precise activities of co-ops. For example, three of the members of NBMA are grower co-ops. They don't have any common marketing agent because they don't have anything to market. They are not selling anything, but they have a co-op for purposes of negotiating with the integrators. Indeed, the co-op --

QUESTION: This record doesn't tell us that anybody negotiates on behalf of all the members of this association with anybody. You have told us they do some buying that way.

MR. POSNER: They do buying. They do export sales --

QUESTION: As to the selling of the broilers.

MR. POSNER: -- and surplus sales.

But, as I say, the growers do not have a marketing agent, and yet their legitimacy as co-ops has never been questioned.

QUESTION: But they have a bargaining representative, as I understand you, who bargains for them in negotiating, apparently, with the processing plants.

MR. POSNER: Yes, but it is not a marketing agent, because they are not engaged in marketing, since they do not have a product to sell.

QUESTION: Am I right in this? There is nothing -- and this is a summary judgment case -- there is nothing in the record to tell us that this association, the Defendant

here, does any common marketing on behalf of its members.

MR. POSNER: Yes. The record does show that it engages in marketing in the export trade and of surplus of chickens. And I might add the record is brief, Mr. Justice Rehnquist, but I think commendably so, and I don't think there is any -- it enabled this case to be disposed of rapidly. There isn't any fact which this Court needs to know that isn't in the record, which establishes that these are producers within the meaning of the Capper-Volstead Act.

QUESTION: I suppose we are the ultimate judges of that.

MR. POSNER: Yes.

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

(Whereupon, at 3:10 o'clock, p.m., the case in the above-entitled matter was submitted.)