In the

Supreme Court of the United States

WILLIAM RUBIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 79-1013
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

Washington, D.C.
November 12, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM RUBIN, Petitioner,	:	
v.	:	No. 79-1013
UNITED STATES OF AMERICA, Respondent.	:	

Washington, D.C.

Wednesday, November 12, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:58 o'clock p.m.

APPEARANCES:

LOUIS BENDER, ESQ., Bender & Frankel, 225 Broadway, New York, New York 10007; on behalf of the Petitioner.

STEPHEN M. SHAPIRO, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of 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'll hear arguments next in William Rubin v. United States, 79-1013.

Mr. Bender, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF LOUIS BENDER, ESQ.,

ON BEHALF OF PETITIONER

MR. BENDER: Mr. Chief Justice, and may it please this Honorable Court:

The question before this Court is a single point, referred to in Point 1 of petitioner's brief, and that is whether the pledge of securities as collateral for a loan is a sale or a purchase for the purpose of invoking the anti-fraud provisions of the Securities Acts. It is our contention that the pledge is not a sale or purchase under either the 1933 definition of the anti-fraud provisions of the Act, or under Section 10)b) and Rule 10b-5 of the 1934 Act.

The pledge occurred in this case as the result of a series of loans totaling approximately $475,000, by Tri-State Energy, a corporation, by whom petitioner was employed from October 19th, 1972, through December 6th, 1972. That is to say, the loans were obtained over that period, October 19th, 1972, through December the 6th, 1972.

The loans were evidenced by promissory notes that were executed by the borrower corporation and were individually

guaranteed by some of the officers, including the petitioner who was not a stockholder of the corporation. Side collateral was given for the loan. And at page 8 of petitioner's brief, the principal witness for the government, an employee of the bank, describes his definition of side collateral to be: that when the loan was made initially the loan was envisioned that it would be repaid from the ongoing operations of the corporation, namely from the sale of coal or natural gas, the collateral was taken as a secondary source of repayment in the event that the primary source, the ongoing operations of the corporation didn't materialize.

Also given by the borrowers at the time were blank stock powers, corporate resolutions authorizing the pledging and hypothecation of securities of the stock as security for the loan. The loan was defaulted, and I don't think it's disputed here that the bank sued the petitioner in the state court, in New York, on the promissory note based upon his individual guaranty. The evidence of the lawsuit is set forth in the joint appendix at 174(a), which is an affidavit of confession of judgment.

It is undisputed that there was no foreclosure of the securities by the bank, so that actually this Court does not really have to reach any interest in what may have occurred, or interest in the securities as to what may occur if there was a foreclosure. To that extent, the Fifth and the Seventh

Circuit Courts which support petitioner's position here, and goes that far, we submit, is unnecessary for this Court's decision any more than the Second Circuit Court's decision in Mallis, Bankers Trust Company against Mallis, which considers the release of the security by the bank or the pledgee as being a sale within the anti-fraud provisions, is likewise unnecessary to reach the decision in this case.

The charge is set forth, that is, the indictment in this case, is set forth in page 3 of petitioner's brief. This was a conspiracy plus two substantive counts, Counts I, II, and III. The conspiracy encompassed a charge of violating three objects: the only one that we're concerned with is the one which charged a violation of Section 17(a)(1) in the offer and sale of a security, pursuant to a scheme to defraud. And that was under Section 77X of the 1933 Securities Act.

I should add that petitioner was acquitted of the substantive charge in Count III, which was a violation of Section 17(a)(1) of the 1933 Act. He was convicted of the conspiracy which encompassed the three objects. With respect to the second count which was a substantive count, also one of the objects of the conspiracy, to defraud the bank of the half million dollars in violation of Section 1014 of Title 18, the jury had -- and incidentally, which subsumed all of the alleged fraud in the pledging of the securities in Count I, and that appears at page 28 of our brief footnote in the

statement of the prosecutor, the jury did not reach a verdict on Count II. But the prosecutor, after the jury had convicted of conspiracy, agreed to concede to a judgment of acquittal.

Petitioner does not mount any challenge to the fraud alleged in this case,and of course, that's prominently brought out by my learned brother; but the fact is that since the issue, we feel, is one of law, we assume the fraud for that purpose. It does not necessarily mean that we concede the fraud. Petitioner contends that no matter how the fraud alleged in the pledge of the collateral, the pledge transaction did not constitute a sale under Section 17(a)(1) of the 1933 Act or Section 10b or Rule 10b-5 of the 1934 Act, and that therefore, the conviction must be reversed.

Now we take this position because in accordance with the decisions in the Fifth Circuit and in the Seventh Circuit, with which we agree, we believe that if we were to, as the government argues, or my learned brother argues, extend the anti-fraud provisions of the 1933 Act to a pledge, an ordinary, garden variety pledge of stock as collateral for a loan to the terms sale in the 1933 Act or purchase in the 1934 Act, it would add a gloss to the operative language of the statute which, we submit, was not intended by Congress in view of the commonly accepted meaning of those words, sale and purchase.

QUESTION: Well Mr. Bender, do you concede, however, that the literal language of the definition of sale in the

'33 Act is broad enough to embrace a pledge transaction?

MR. BENDER: Mr. Justice Blackmun, I personally do not. I do say, however, that the Courts of Appeal in the Fifth and the Seventh Circuits do say that the language is broad enough in the sense that it includes a disposition of an interest in the security as being broad enough to include a pledge.

And the reason why I don't, frankly, think so, is because I think that what a pledger does in -- and what he did in this case -- is simply to buy credit. He doesn't sell anything. And then the motion --

QUESTION: What does the word disposition include other than sale, if you're right?

MR. BENDER: The word disposition, under the Webster's Dictionary, is such a broad thing, Mr. Justice Rehnquist. It even includes a donation, a giving. And the point I'm trying to make is that you could say that the realities of the transaction is that a pledger says to a bank, I'm going to borrow half a million dollars from you and I'm going to put up security, I'm going to give you an agreement. And that agreement is that in the event I default on this loan, you have an interest in my collateral. So that actually what I'm saying is that the most a pledger does is give an agreement that if there's a default the bank will acquire an interest. But there is not an effective in praesenti

disposition of an interest at the time the collateral agreement is entered into. In any event, even if we were to assume as my learned brother stresses that the literal definition of the statute clearly embraces a pledge, it must be apparent that if Congress intended to include a pledge in the definition, it would have said so. It did so, but a year later, in 1935; that is two years later, in the Public Utility Holding Act, which I will come to --

QUESTION: Which is the -- the Solicitor General seems to rest, pivot his case more on the word sale than on the word dispose. I'll confess I'm a little puzzled by his willingness to do that.

MR. BENDER: My learned brother also finds in the legislative history, a very distinct Congressional intention to include a pledge in the definition. I must confess that the Courts below, that are contrary to the Court of Appeals of the Second Circuit and the Seventh, find no such clear legislative history. I must confess further that the legislative history as set forth is rather suspect.

And the reason why I say that is because on November 10th, 1977, right before this Court, in the Bankers Trust Company against Mallis argument, that's number 76-1359, at page 45 of the transcript, I believe it was Mr. Justice Powell who asked the question, "Is there anything in the legislative history of either Act of 1933 or 1934 that supports

your position that a pledge is a sale?" Mr. Pitt, who has been identified as general counsel of the SEC, "If there is anything or something specific on pledges, I must confess I am not aware of that." Secondly --

QUESTION: Mr. Bender, that doesn't estopp the Solicitor General from doing further research, does it?

MR. BENDER: No, it -- it does not, Mr. Justice Stevens, and if that was the only area in which there might have been a difference, I would be hard put to say the legislative history is suspect. But I have an even more significant fact, and that is that the SEC conceded before this very Court on the same argument, that it had never taken a position that the Securities Act of 1933 or 1934 embraced in its definition a Congressional intent to include pledges.

QUESTION: Of course, as a practical matter, I suppose this issue will only come up in criminal cases? Because in a civil case, if you've got a loan secured by stock you've got your liability established by the note. So there's really no reason to fuss about it in a civil case, is there?

MR. BENDER: Well, except that the, in the government's position -- I mean, since these cases all come up, for example, Gentile, in the Court of Appeals, was on a criminal case. But all the other cases are civil cases.

QUESTION: Are they?

MR. BENDER: There are civil cases under 17(a)(1),

and civil cases where, under 10(b)(5). And for example, the -- I believe, so that actually, to answer your question, although the government, or my learned brother, would like to separate this issue by saying that this is a criminal case it should not and will not affect what may happen as far as civil actions are concerned.

The fact remains that the Securities Exchange Commission's general counsel and so did the Court of Appeals in the Second Circuit indicate that the same rule that would apply in the criminal case, at least with respect to whether a pledge of collateral for a loan is a sale, would apply in any civil action. And the courts seem generally to take that position.

And of course, the general counsel of the SEC told this Court the last time that you also can't separate the 1933 Act definitions from the 1934, even though there's a slight difference in the wording. Because the statutes are entire materia, they said, so that what you hold with regard to the definition of a sale under the 1933 Act applies under the 1934 Act.

When Congress wanted to say that a pledge was a sale, it had no trouble saying so; and it did so in the Public Utility Holding Act.

QUESTION: But that was a different Congress wasn't it?

MR. BENDER: It is -- I beg your pardon, Mr. Justice Rehnquist?

QUESTION: It was a different Congress, so one was 1933 and one was 1935.

MR. BENDER: Yes, you're absolutely right. It was a year after the 1934 Act. But the point is, that if, as the government argues, the 1933 Congress that passed the Securities Act of 1933 had before it a 1929 definition of the Uniform Sales of Securities Act, and presumably adopted that definition which included a pledge, it seems highly unlikely that Congress, passing the Public Utility Holding Act in which the Securities and Exchange Commission was the administrative agency enforcing that act and certainly didn't have before it the 1933 and 1934 definitions of sale, and yet it went out of its way to include a pledge as a sale --

QUESTION: Well now, in the '33 Act definition, where it's defining sale, it says, "it shall include every contract of sale". So I suppose that goes further than an actual physical delivery, right there, when you're talking about a contract of sale, would include an agreement to transfer possession in 60 days or disposition -- now that, wouldn't that include any agreement to transfer by pledge, if disposition is such a broad gauge term, as you have suggested?

MR. BENDER: Well, as I said before, Mr. Justice Rehnquist, the Sixth and the Seventh Circuits seem to agree

that it's broad enough. That the language itself is broad enough to include a pledge. What I -- what they say, however, is that the economic underlying realities of a pledge indicate that it's so far from what a sale or a purchase really was intended by Congress, that the literal interpretation should not be followed in the sense of reality.

And the reason for that is set forth in the totally different kind of rights that exist as between a pledge and as between an actual sale. And the fact remains that for 25 years, the Securities and Exchange Commission, the administrative agency who sat with the Congress at the time that this act was enacted, never took a public position that a pledge was included. It was only until the late 1950's that they conceded that they did; and it's interesting, because Professor Loss points out that it was only when the Guild Films decision in the Court of Appeals for the Second Circuit on which the Second Circuit's Gentile decision relies came down did the Securities and Exchange Commission adopt the decision to its corporate bosom and take the position that a pledge was included as a sale.

Now my learned brother makes no mention in his brief as to why, if the legislative history intended to include a pledge even though it didn't say so, why the Securities and Exchange Commission never took that position publicly. And this Court had occasion to remark about the divergent views of

the Securities and Exchange Commission in the International Brotherhood case, dealing with the includability of the non-contributory pension. I believe Mr. Justice Powell, speaking for the Court, said "when the instant litigation arose, the public record reveals no evidence that the SEC had ever considered the Securities Acts applicable to a non-contributory pension". Similarly here, the SEC never took the position that pledges were included in the Act.

And as I say, the Public Utility Holding Act, in 1935, clearly includes pledge in its definition of a sale. Now my learned brother says that we shouldn't look to what Congress did in 1935 to determine what it did or intended to do in 1933. This Court, we submit, had no trouble in doing just that very thing, even where a greater span existed between the 1933 and 1934 Acts in the International Brotherhood case against Daniel.

Now my learned brother says that Congress intended to protect banks, corporate businesses, lenders -- even if the bank was not an investor in this particular instance and of course the bank, really, if you look at the underlying transactions, was not an investor.

QUESTION: But if it foreclosed on a default it would be an investor, wouldn't it?

MR. BENDER: It might very well, Mr. Chief Justice. But as I say, that is an issue that I don't think the Court

has to reach.

QUESTION: But when the transaction was initiated, it had to contemplate the risks, the investor-type risks; does not every bank do that with respect to collateral?

MR. BENDER: It certainly does. And I think that they would be foolish not to. But that doesn't necessarily mean that when they entered into the transaction and they simply got a contract right to acquire an interest, that that -- any fraud involved in that kind of a pledge would constitute a sale. The issue we have here is there was no foreclosure. And what we're dealing with is an ordinary garden variety pledge at the moment of the pledge, not what might happen when there's a foreclosure.

QUESTION: The bank was induced to part with some of its funds, conditionally of course, but to part with some of its funds in reliance upon what was tendered to them, is that not so?

MR. BENDER: That, I believe, is -- would be normally so in the ordinary pledge case. I would say that it would be normally so. As a matter of fact, here, the loan, the first part of the loan at least as far as the record is concerned, prior to the fact that any security was put up -- although, there was an agreement that collateral security would be supplied. But the primary purpose was not for the bank to require an interest in the securities; the primary purpose

was for the bank to make a loan and get paid. And this was the intention of the bank, this was the intention as far as the pledge agreement is concerned.

And it seems to me, we submit, that in determining whether you have a sale or a disposition of an interest, and Congress intended a pledge to be covered, you've got to look at what the realities of the situation was. Now we raised, Petitioner raised the fact that the bank was not interested at the time of the pledge in obtaining any profits on the securities, the bank was not interested in making anything more on its loan than interest, which it was to get. And the government --

QUESTION: Well it was interested in getting its capital back.

MR. BENDER: Well of course, I mean plus its capital. But it was not interested in trading on the securities, Mr. Chief Justice. Or at least making any money on the sale of a security at the time that it was entering into the loan transaction. It was solely interested in making a loan, getting its interest, and then in getting a repayment of the loan at the time.

QUESTION: Mr. Bender, this investor approach is somewhat impinged upon by the Court's decision in the United States against Naftalin, isn't it? And I notice you don't cite that, although the government in its brief, seems to

give a lot of attention to it. Do you have any comment about that?

MR. BENDER: If the government relies -- Mr. Justice Blackmun, if the government relies substantially upon that, I think this case is totally inapposite. In that case, you had a clear appearance of a sale; there, the defendant calls up his broker and says I want you to sell short securities. The broker sells short the securities at a time when the defendant didn't own the securities. So that you actually have, as Mr. Justice Brennan quite properly pointed out, an absolute sale that occurred. Either you had a sale, an offer and a sale at the time the sale was requested, or you certainly had an attempt to sale when the securities were disposed of. And this was a part of the entire selling process.

This is totally unlike what we have here. If you had any fraud here at all, the fraud, which is essential, occurred in the obtaining of the credit. And that was not the fraud in connection with the offer and sale of a security. Now, the government, I mean my learned brother--

QUESTION: Well who owned the securities?

MR. BENDER: I'm sorry?

QUESTION: Who owned the securities?

MR. BENDER: The --

QUESTION: I'm not worried about the fact that if I own something I can spend it, and the owners of these securities

couldn't spend them, could they?

MR. BENDER: Some of these securities were rented?

QUESTION: I don't know, they were simply pledged?

MR. BENDER: No, no. No, according to the record, Mr. Justice Marshall, there's no question, some of them were rented.

QUESTION: But they were pledged, weren't they?

MR. BENDER: Oh, absolutely.

QUESTION: Then they couldn't be sold by the owner, could they?

MR. BENDER: Well there is, there's contradictory evidence to that extent. There is an agreement by the rental to the corporation which permits the bank to dispose of it just as if the borrower owned the stock. And it's a perfectly legitimate transaction. But it seems to me that, I have to stand on the assumption and I am doing that here --

QUESTION: I have great problems, I know the technicalities of the stocks, but the fact that he says Mr. Bank, I want to sell you $50,000 worth of stock, and says Mr. Bank, I want the $50,000 and I'll let you hold this stock. That seems so close to me.

MR. BENDER: Well --

QUESTION: If it's the same stock.

MR. BENDER: Well, Mr. Justice Marshall, you know,

if --

QUESTION: We're talking about fraud, now.

MR. BENDER: Yes, if Congress --

QUESTION: You're not talking about, you know, niceties.

MR. BENDER: Yes, that's true. Congress however, did not intend the Securities and Exchange Commission, or the Securities Acts to be the panacea for penalizing all the frauds that existed. As a matter of fact, in this case, we are confronted with the --

QUESTION: Well I have great difficulty upholding, sanctioning and permitting to continue, frauds. I have great difficulty doing that.

MR. BENDER: Well I don't disagree with you, Mr. Justice Marshall. But I do say that there's sufficient other statutory, federal and state law to protect any individual who is victimized by fraud. We have a very narrow technical question: whether or not the securities law was intended to punish anyone for committing a fraud under these circumstances if it was not technically an offer and sale, then there are other provisions, just like 1014 of Title 18 there are state court provisions.

The government indicates that there was evidence before the Congress in 1975 that were -- that it appeared that organized crime and Mafia were utilizing pledges to -- may I

just conclude -- to obtain monies on securities. Well it's, I mean, it's incredible that Congress would say that SEC enforcement personnel would go out and mount a challenge to Mafia on the pledges. Certainly there are other law enforcement agencies that are quite capable of doing this.

QUESTION: Mr. Bender, certainly under the recent Aaron case, the Court drew almost precisely the distinction to which you just made reference, is that not so?

MR. BENDER: That is correct; that is quite correct, Mr. Justice Blackmun. And in that case, even though as you point out, Mr. Justice Stewart indicated that because one of the frauds involved is -- one of the remedial purposes of the Act, that doesn't mean that you have to extend the operative language beyond what Congress intended. Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Shapiro.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO, ESQ.,

ON BEHALF OF RESPONDENT

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

The government contends that Section 17(a) of the Securities Act of 1933 prohibits fraudulent pledges of securities. In making this contention, we rely on the literal terms of the statute, the ordinary meaning of those terms in 1933 and the legislative history. I'd like to take up each of these

points in turn with a concluding reference to Petitioner's policy arguments.

Section 17(a) forbids fraudulent or deceptive practices of any kind in the offer or sale of securities. Petitioner doesn't deny that he and his co-conspirators pledged securities with the bank or that they deliberately made misrepresentations about the value, marketability and ownership of those securities. Instead he contends that pledge transactions should not be deemed to be offers or sales within the meaning of the statute.

In our submission the literal terms of the Securities Act leave no room to doubt that the Petitioner both offered and sold securities. Under the statute, the word sale is not limited to a common law sale in which title or fee simple ownership is transferred. It expressly includes every, and I emphasize the word every, disposition of an interest in a security for value. The word offer is defined by Congress in equally expansive terms. The word offer includes every attempt to dispose of an interest in a security for value. Petitioner and his co-conspirators offered and sold securities because they attempted to and did convey a legal interest in those securities to the bank-pledgee. The bank stipulated that it would not part with its money without obtaining that legal interest. The interest of course was the pledgee's legal right to possess the securities and to sell them in the event of a

default for its own benefit. That legal interest which Petitioner correctly describes in his brief as a security interest was formalized by stock powers and powers of attorney which gave the bank the right to sell those securities if necessary to satisfy its economic claim.

If Congress had meant to exclude this well-recognized legal interest of a pledgee from the definition of offer and sale, it surely would not have used the language that it did in the Securities Act. It would be a remarkable example of legislative inattention if Congress wrote this statute to extend to every disposition of an interest in a security. If it really had meant to say every disposition of an interest except for a pledge. The dictionary meaning of the word interest, which Congress used without qualification, is the legally enforceable right to have an advantage accruing from some thing, or any right in the nature of property but less than title. It was settled law in 1933 that a pledgee obtained just such a legal right. Decisions of this Court and the learned treatises of the time, confirmed that a pledgee received a special property interest in pledged securities and that it gave value for that special property interest when it extended credit. Indeed, by 1933, it was a black letter principle of commercial law that a pledgee that received negotiable securities without notice of adverse claims, enjoyed the status of a bona fide purchaser for value, whose legal interest was

superior to that of third parties, claiming prior ownership rights.

In short, looking to the ordinary meaning of the terms used by Congress when the Securities Act was enacted, it's clear that the Petitioner's pledge of securities was a disposition of an interest in those securities for value. I might add in this connection that although Mr. Bender has addressed the question in this case with great competence, I have yet to hear him explain to the Court what it was that the bank got, if it wasn't a legal interest in these pledged securities. Petitioner of course also argues that the Court should not apply the statute literally, as Congress has written it, because the legislative history doesn't refer to pledge transactions. That omission however, is not sufficing, because the legislative history doesn't describe any of the interests that Congress meant to embrace within its definition of offer and sale. Congress took care of the problem of specifying which transactions it meant to cover, by drafting the statute to apply to every disposition of an interest in a security.

And even more fundamentally, omissions from the legislative history can't nullify the plain meaning of the statute as this Court pointed out, last term, in Harrison v. P.P.G. Industries, where the Court stated and I quote, "it would be a strange cannon of statutory construction that would require Congress to state in committee reports or

elsewhere, that which is obvious on the face of the statute." I don't mean to suggest from these remarks that the legislative history doesn't shed light on the issue in this case. It does shed substantial light and confirms the appropriateness of the literal statutory construction.

In the first place --

QUESTION: Well if we have a literal statutory construction available, why do we look at legislative history?

MR. SHAPIRO: It's completely unnecessary, Your Honor, if -- unless the legislative history were to completely conflict with the plain meaning, the legislative history is merely icing on the cake. And we offer it in that spirit, because the literal terms of this statute do prohibit fraud in the pledge of securities. But just to assure the Court that there is no disharmony in the legislative history in the plain text, I'll refer briefly to the antecedents of the statute. This history shows that Congress intended its definitions of offer and sale to be broad and expansive definitions, as this Court recently emphasized in United States against Naftalin. For this reason, the statutory definitions which reach every disposition or attempt to dispose of an interest in a security for value, should not be given an interpretation which narrows the broad language deliberately selected by Congress.

In the second place, the legislative history shows

that Congress based its definitional language on the language used in the Uniform Sale of Securities Act of 1929. The literal terms of that Uniform Act apply to pledge transactions and the language was so construed by the Ninth Circuit, one year before Congress incorporated that language. This reinforces the ordinary presumption that Congress intended that the language that it used would be given a literal statutory construction.

QUESTION: Mr. Shapiro, may I interrupt you a minute? The evils that brought about the enactment of the Act of '33 related primarily to the stock markets of the United States. What evils did Congress intend to protect banks, like Bankers Trust Company, from, when it enacted the Act of 1933?

MR. SHAPIRO: The evil is fraud and the disposition of an interest in a security for value --

QUESTION: Were the great banks of our country the members of the public who Congress intended to protect?

MR. SHAPIRO: We believe that they clearly were. We refer to the preamble of the Securities Act of '34, a companion piece of legislation --

QUESTION: Was there any evidence that the bank needed this protection? The bank makes loans primarily on other considerations.

MR. SHAPIRO: Yes, as I hope -- I hopt to take this point up at some length, in the preamble to the '34 Act,

Congress pointed out the deceptive and manipulative practices affecting securities interfered with bank evaluation of collateral pledged for loans. That was specifically addressed by Congress only one year after the enactment of the '33 Act.

QUESTION: And yet the language of 10(b) is quite different from the language of this Act of '33; it's not as broad?

MR. SHAPIRO: We agree that the definitional language in the two statutes can be distinguished, we don't disagree with that. But I was merely responding on the level of the evils that Congress was concerned with during this era. And Congress did identify this very evil in 1934. Because --

QUESTION: Now that you've been interrupted, Mr. Shapiro, how do you respond to Mr. Bender's argument that it took the SEC a long time to realize that this language covered a pledge?

MR. SHAPIRO: I would respond by saying that the first time that it came up which was 1958, the SEC filed an action to restrain the fraudulent pledges and it was affirmed by the Second Circuit, that was the first occasion that it arose and the Commission has taken that position ever since. So there is no hiatus in the Commission's interpretation.

QUESTION: Well you don't mean that there were no instances of the fraudulent pledges between 1933 and 1958?

MR. SHAPIRO: There were none that were -- that I'm

aware of that were brought to the Commission's attention. Certainly the Commission never interpreted the statute differently than it is now interpreting it; it's been a consistent interpretation ever since this issue first came up in litigation in '58.

Because the language that Congress has used is unambiguous and is not at odds with the legislative history, it's unnecessary to dwell at any length on the contentions of policy or statutory purpose that Petitioner has presented in his brief. But I wouldn't want to leave the impression that those contentions are supportive of his position.

To the extent that policy is relevant here, it supports the government's interpretation. Petitioner, of course, argues that Section 17(a) should protect investors only, and not defrauded banks. That's the very line of argument that this Court rejected in United States against Naftalin. In Naftalin, the defendant defrauded several brokerage houses which served as financial intermediaries; they weren't investors, they didn't purchase securities. This Court, nonetheless, applied the statute literally, concluding that it forbids all fraudulent devices and transactions that meet the statutory definition of offer or sale, regardless of the identity of the victim. The statute protects honest businesses, as well as investors, as this Court held unequivocally in Naftalin. Petitioner also argues that the bank here

assumed a commercial risk rather than an investment risk, and therefore his fraud should be immune to punishment. But there is nothing in the statute which suggests that the nature of the risk assumed by the victim of the fraud has any relevance. I need hardly point out, moreover, that Congress has not defined these terms investment risk and commercial risk, which Petitioner relies on. It would therefore be most inappropriate to construe a criminal statute such as Section 17(a) by reference to these undefined concepts.

Congress has drafted the statute without ambiguities, to apply to every disposition of an interest in a security for value. It makes no difference that that disposition occurs in a commercial or a business environment, or that involves a risk that might be characterized as having commercial attributes.

I should point out, also, in this connection that although Petitioner asks the Court to look to the economic realities of the transactions in which he engaged, the reality of those transactions was that the bank gave value and acquired an interest in several hundred thousand shares of stock. The bank attempted to obtain the same kind of high quality investment range securities that an investor might select. And the fraud practiced on the bank deceived it, into believing that it was obtaining valuable securities traded on the public securities markets --

QUESTION: Mr. Shapiro, is that argument really critical to your position? I was wondering, supposing you had -- here you say, there was fraud that misrepresented the value of the securities, the ownership and the fictitious quotations and all the rest. But supposing you had a loan in which the borrower gave the bank a fraudulent balance sheet and pledged General Motors stock that was in fact worth -- listed on the New York Stock Exchange and worth precisely what it was supposed to be worth, would that violate the Securities Act under your view of the law?

MR. SHAPIRO: That would present the question whether the fraud was in the disposition of the security for value.

QUESTION: In connection with the sale of the security, it would be a fraud in connection with the pledge of the stock, it's all one ball of wax.

MR. SHAPIRO: It's possible that that would -- the language is in, rather than in connection with, Section 10(b) says "in connection with the purchase or sale" --

QUESTION: Oh, you're right, yes.

MR. SHAPIRO: -- 17(a) says "in a disposition of an interest or security" -- and it may be that those fraudulent representations are sufficiently related to the disposition of an interest to be embraced; that would be a factual question I would submit, that would be presented to the finder of fact. But it may be that --

QUESTION: Does there have to be a misrepresentation with respect to something such as the value or nature or ownership of the security itself, as part of the government's theory?

MR. SHAPIRO: That would certainly be covered, and it may be that the statute reaches a bit beyond that, but --

QUESTION: But you say we don't have to decide that in this case?

MR. SHAPIRO: -- we don't have to reach that here, since the fraud went directly to the value of these certificates. Petitioner finally argues that there is no reason for the federal government to concern itself with fraudulent pledges which he believes to be a matter of primary concern to the states.

QUESTION: But do you take that argument seriously?

MR. SHAPIRO: We don't take it terribly seriously, no. Most banks today are insured by the federal government, and the welfare of those banks and the nation's banking system, is of profound importance to the federal government. It's therefore not surprising that Congress expected that the federal securities laws would play an important role in protecting banks against this kind of misconduct.

As Congress stated, in the Securities Exchange Act, "Federal regulation and control of securities transactions is essential", and I quote, "to protect and make more effective

the national banking system and the Federal Reserve System, Congress expressly declared that manipulation of securities prices is injurious to the national banking system because it tends to "prevent the fair valuation of collateral for bank loans and obstructs the effective operation of the national banking system". In this case, Petitioner's activities had precisely that effect. Petitioner prevented the fair valuation of collateral for bank loans through manipulation and deception which caused the bank to believe that it was receiving valuable securities rather than worthless pieces of paper. The hearings that preceded the 1975 amendments to the federal securities laws reiterate that fraudulent pledges are of great importance to the federal government. Those hearings which are summarized at the end of our brief, point out that organized criminal groups today prey on federally insured banks by pledging worthless, counterfeit, and stolen securities on a massive scale.

QUESTION: Well even if they were of no importance to the federal government, if Congress is exercising its power to regulate interstate commerce and has made it a crime, isn't that the end of the story?

MR. SHAPIRO: I quite agree, Your Honor, I quite agree. I only raised this in response to the argument that policy works against the position we're taking. We think policy considerations strongly support the plain meaning of

the statute. And as Your Honor suggests, the plain meaning is dispositive here, and that's -- we rely four-square on the plain meaning principle. But in response to Petitioner, I merely point out the grave policy issues that are stake here. Congressman Pepper summarized those issues in the hearings on conversion of worthless securities, where he stated, "our investigation discloses that there is a national apparatus of individuals who are continually engaged in organized criminal conduct, directly concerned with commercial transactions. The essence of their activities is to give worthless securities a facade of value and respectability, and then convert the worthless paper into hard cash. These individuals move across state lines, victimizing small banks, insurance companies and stock brokerage institutions. Local law enforcement is entirely inadequate to cope with the scheme which is planned in California, prepared in New Jersey, and executed in Ohio." These hearings refer again and again, to fraudulent pledges as a primary means for victimizing banking institutions.

QUESTION: These are in 1975?

MR. SHAPIRO: They are, Your Honor. We refer to them not as legislative history, but as answers to the policy arguments that the federal government isn't concerned in this area.

QUESTION: You surely wouldn't contend that the '33 and '34 Acts were primarily directed at the Mafia, would

you?

MR. SHAPIRO: No sir. They were directed at frauds of all kinds, including organized crime frauds.

As Senator Jackson concluded in the hearings on thefts and frauds, and I quote, "the situation is so dangerous and serious, and strong federal action is warranted." In sum, if this Court were disposed to look to policy considerations in this case, those considerations provide additional compelling reasons for enforcing the literal terms of the statute precisely as Congress has written them. For these reasons, we respectfully request that the decision of the Court of Appeals be affirmed.

Thank you.

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

(Whereupon, at 2:47 o'clock p.m. the above-entitled matter was submitted.)

CERTIFICATE

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

No. 79-1013

William Rubin

v.

United States of America

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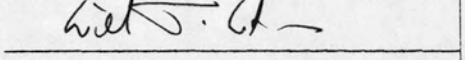
BY: 

William J. Wilson