

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: WILLIAM C. DUNN AND DELTA CONSULTANTS,  
INC., Petitioners v. COMMODITY FUTURES  
TRADING COMMISSION, ET AL.

CASE NO: 95-1181

PLACE: Washington, D.C.

DATE: Wednesday, November 13, 1996

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   WILLIAM C. DUNN AND DELTA                   :

4       CONSULTANTS, INC.,                   :

5                   Petitioners                   :

6               v.                   :   No. 95-1181

7   COMMODITY FUTURES TRADING                   :

8       COMMISSION, ET AL.                   :

9   - - - - -X

10                                   Washington, D.C.

11                                   Wednesday, November 13, 1996

12               The above-entitled matter came on for oral  
13   argument before the Supreme Court of the United States at  
14   1:00 p.m.

15   APPEARANCES:

16   GARY D. STUMPP, ESQ., New York, New York; on behalf of  
17       the Petitioners.

18   JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor  
19       General, Department of Justice, Washington, D.C.; on  
20   behalf of the Respondent.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 95-1181, William C. Dunn and Delta Consultants,  
5 Inc. v. Commodity Futures Trading Commission.

6 Mr. Stumpp.

7 ORAL ARGUMENT OF GARY D. STUMPP

8 ON BEHALF OF THE PETITIONERS

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

11 The Treasury Amendment to the Commodity Exchange  
12 Act, which is quoted in full on page 1 of our brief,  
13 provides in pertinent part, nothing in this chapter shall  
14 be deemed to govern or in any way be applicable to  
15 transactions in foreign currency unless such transactions  
16 involve the sale thereof for future delivery conducted on  
17 a board of trade.

18 The question presented in this case is whether  
19 the Treasury Amendment excludes off-exchange foreign  
20 currency options from CEA regulation, thus whether off-  
21 exchange foreign currency options are transactions in the  
22 foreign currency within the Treasury Amendment --

23 QUESTION: Now, if it were a -- an off-exchange  
24 futures deal --

25 MR. STUMPP: I'm sorry?

1 QUESTION: If it were an off-exchange futures -

2 -

3 MR. STUMPP: Yes, Your Honor.

4 QUESTION: -- agreement that we were dealing  
5 with, I guess the Commodity Futures Trading Commission --  
6 both parties agree, it wouldn't have jurisdiction?

7 MR. STUMPP: I believe -- yes, both parties  
8 would agree, Your Honor. The only dispute is because it's  
9 an off-exchange foreign currency option transaction rather  
10 than an off-exchange --

11 QUESTION: Why shouldn't futures and options be  
12 treated the same?

13 MR. STUMPP: I believe they should be, Your  
14 Honor, and I believe both of them are exempt by the  
15 Treasury Amendment, as long as they're off-exchange  
16 transactions in foreign currency, whether in futures or in  
17 options.

18 QUESTION: Although the Treasury Amendment  
19 didn't really speak of the options.

20 MR. STUMPP: No. The Treasury Amendment spoke  
21 broadly, Your Honor, of transactions in foreign currency.  
22 It did not limit it to foreign currency futures. It spoke  
23 broadly of transactions in foreign currency. And  
24 accordingly, the ordinary meaning of the phrase would  
25 indicate that any transaction in which foreign currency is

1 the subject matter would be excluded by the Treasury  
2 Amendment -- off-exchange.

3 QUESTION: But there are some holdings that  
4 distinguish transactions in from a future or an option  
5 agreement.

6 MR. STUMPP: I would think the holdings Your  
7 Honor is referring to are certain holdings that have  
8 distinguished off-exchange futures from off-exchange  
9 options, along the lines that an option until exercised  
10 does not become a transaction in the foreign currency  
11 itself. And if those are the decisions to which Your  
12 Honor is referring, I think they were -- first, I think  
13 both courts that decided that way were dicta because you  
14 were dealing with exchange traded futures, although that  
15 was not the ground on which the courts went, and therefore  
16 it would be subject -- it would not be subject to the act.

17 QUESTION: Exchange traded futures or exchange  
18 traded options?

19 MR. STUMPP: In the two cases I believe Justice  
20 O'Connor is referring to -- is the Chicago Board of Trade  
21 and the American Board of Trade case -- they both dealt  
22 with off-exchange options on foreign currencies, and --

23 QUESTION: She said futures I think.

24 MR. STUMPP: Thank you, Your Honor.

25 QUESTION: But you -- would you run by me what

1 you said about dictum because the Second Circuit said we  
2 might have gone on another ground but we didn't. The  
3 ground that we went on was the first one. So --

4 MR. STUMPP: As I said, Your Honor, I believe  
5 that the holding in the American Board of Trade case on  
6 which the court below relied in this case was dicta  
7 because it was on-exchange trading. However --

8 QUESTION: But in that earlier case, the court  
9 didn't decide it on the basis that it was on-exchange  
10 trading. It decided it on the basis that it was an  
11 option. Right?

12 MR. STUMPP: No. I agree, Your Honor. I'm not  
13 questioning the way the court got there. I'm saying they  
14 could have gotten there another way, but obviously the way  
15 the court did decide, they did not go on an on-  
16 exchange/off-exchange --

17 QUESTION: Is their holding. Is their holding.

18 MR. STUMPP: The holding in American Board of  
19 Trade was options do not become transactions in foreign  
20 currency --

21 QUESTION: Right.

22 MR. STUMPP: -- until they're exercised.

23 QUESTION: Right.

24 MR. STUMPP: The court below recognized that  
25 they could have gone on a different basis --



1 QUESTION: But didn't.

2 MR. STUMPP: -- but did not, and accordingly  
3 could not overrule the decision of the prior panel and  
4 noted the conflict with the Fourth Circuit and indicated  
5 that that -- such a conflict was for this Court to  
6 resolve.

7 QUESTION: Yes. Well, I just wanted to be clear  
8 that you recognized it was a holding.

9 MR. STUMPP: Oh, I -- my only point, Your Honor,  
10 was I said I thought it could have been dicta, but clearly  
11 that is not the way the court, the Second Circuit, went.

12 QUESTION: Right.

13 MR. STUMPP: The question, thus, is whether the  
14 off-exchange foreign currency options are transactions in  
15 foreign currency within the Treasury Amendment and thus  
16 exempt from regulation under the Commodity Exchange Act.  
17 We submit that that question should be answered in the  
18 affirmative for two reasons.

19 The ordinary meaning of the phrase transactions  
20 in foreign currency means any commercial dealings  
21 involving foreign currency or any dealings where foreign  
22 currency is the subject matter of the transaction. Here  
23 off-exchange foreign currency options that were traded are  
24 dealings and they are -- and they do have foreign currency  
25 as the subject matter. Accordingly, under the ordinary

1 meaning of the Treasury Amendment, they are exempt from  
2 Commodity Exchange Act regulation by the Treasury  
3 Amendment.

4 The second reason really confirms the first.  
5 The congressional purpose in enacting the Treasury  
6 Amendment was to exclude off-exchange foreign currency  
7 transactions of whatever type from the Commodity Exchange  
8 Act.

9 QUESTION: Well, you say whatever type. Now,  
10 this type was not known at the time of the amendment.  
11 Right?

12 MR. STUMPP: That's true, Your Honor. There was  
13 not the established market there is for off-exchange  
14 foreign currency markets in 1974.

15 QUESTION: Tell me who were the traders that the  
16 Treasury had in mind when it proposed this amendment. I  
17 take it it's the large banks I assume.

18 MR. STUMPP: The majority -- the off-exchange  
19 interbank market is primarily composed of the major banks.

20 QUESTION: All right.

21 MR. STUMPP: And in fact the trading in this  
22 case was done in such banks.

23 QUESTION: Now, are the major -- that's in part  
24 an answer to my next question. Are the same major banks  
25 for whom the Treasury had concern at the time the

1 amendment was proposed engaging in the kind of option  
2 trading which is the subject of this case?

3 MR. STUMPP: I'm only unclear, Your Honor, if  
4 you're asking back in 1974 or --

5 QUESTION: No. I know in '74 they couldn't  
6 have, but today. They're trading options the same way  
7 they used to be trading futures.

8 MR. STUMPP: They're trading --

9 QUESTION: As they're now --

10 MR. STUMPP: They are trading foreign currency  
11 options now, Your Honor. In fact, I believe from the  
12 amici briefs that were submitted by the banks and the  
13 industry associations, it indicates the hundreds of  
14 billions of dollars that are trade in that market on a --

15  
16 QUESTION: So that if the concern at the time  
17 the amendment was originally proposed was to keep this  
18 business within the United States, or keeps the -- keep  
19 the American banks competitive, that concern of policy I  
20 presume then would be just as applicable to options  
21 trading today as it was for future tradings then.

22 MR. STUMPP: I think that's precisely correct,  
23 Your Honor. I would also note that although the primary  
24 perhaps concern with the Treasury Amendment related to the  
25 large banks, that was not the only concern. The Treasury

1 Department noted that it was also to affect the traders  
2 and investors that were dealing in this off-exchange  
3 market. So, I will not deny that the majority of the  
4 traders were the major banks, but they are not the only  
5 traders who are dealing in this market either then or now.

6 QUESTION: If -- as I understood your answer to  
7 Justice Souter, there were very few traders other than the  
8 large banks in options in foreign currency. How about  
9 options in Government securities?

10 MR. STUMPP: Again, Your Honor, are we speaking  
11 then or now?

12 QUESTION: Then.

13 MR. STUMPP: I don't know what traders existed  
14 back in '74 in the Government securities market. I would  
15 certainly assume that the major banks were trading there.  
16 The Treasury Department in its letter spoke generally of  
17 this off-exchange market referring to banks, referring to  
18 investors. The CFTC itself has indicated there are other  
19 participants, abritrageurs, import-export companies, et  
20 cetera, dealing in the general foreign currency market. I  
21 have not individually focused underneath that in terms of  
22 --

23 QUESTION: One of the concerns that I have is  
24 that whatever we say here with reference to foreign  
25 securities -- options in foreign currencies is going to



1 apply also to options in Government securities. And  
2 there's a suggestion in some of the briefs that accepting  
3 your position would lead to a substantial regulatory gap.  
4 So, just during the course of your remarks, I hope you  
5 could address that.

6 MR. STUMPP: All right, Your Honor.

7 The second meaning that I -- or the second  
8 reason I was suggesting the question should be answer in  
9 the affirmative was the congressional purpose in enacting  
10 this to exclude the entire off-exchange market from  
11 regulation under the Commodity Exchange Act. And as has  
12 been suggested by the -- some of the questions today, that  
13 unless that decision is reversed and foreign currency  
14 options are held to be excluded by the Treasury Amendment,  
15 the congressional purpose in enacting it would be defeated  
16 and the vast majority of foreign currency options may move  
17 to banks and institutions without the United States.

18 Now, to provide just a brief description of  
19 petitioners' activities in this case, petitioner Dunn was  
20 the President of petitioner Delta Consultants which served  
21 as an advisor concerning foreign currency transactions to  
22 various investment companies.

23 However, the foreign currency options that were  
24 transacted were not traded with investors and they were  
25 not traded on a board of trade. Instead, the transactions

1 were entered into in the international off-exchange  
2 interbank market with major banks, primarily Credit  
3 Lyonnais, Bank Julius Baer, Societe Generale, and Chase,  
4 and are different from the foreign currency futures  
5 contracts that are traded on exchanges and which the CFTC  
6 does regulate.

7 The district court rejected the argument that  
8 the Treasury Amendment provided an exclusion for these  
9 off-exchange foreign currency options and therefore there  
10 was no subject matter jurisdiction. The Second Circuit  
11 affirmed but did not independently analyze the Treasury  
12 Amendment exclusion.

13 We submit the decision should be reversed.  
14 Petitioners here engaged in transactions in foreign  
15 currency. Those transactions were not conducted on a  
16 board of trade, and thus the Treasury Amendment excludes  
17 CEA regulation of petitioners off-exchange foreign  
18 currency trading.

19 As this Court has held, where the terms of a  
20 statute are not defined in a statute or have no common law  
21 -- established common law meaning, they must be given  
22 their ordinary meaning. And here the ordinary meaning of  
23 transactions in foreign currency are any dealings where  
24 foreign currency is the subject matter.

25 Really then we're dealing with the meaning of

1 four words in the Treasury Amendment, transactions in  
2 foreign currency. The CFTC concedes these are  
3 transactions. There is no issue that foreign currency is  
4 involved. So, the dispute comes down to the meaning of  
5 the word in as used in the four-word phrase transactions  
6 in foreign currency.

7 QUESTION: Why couldn't in have a narrower  
8 meaning given that the statute also uses the word  
9 involving? We think of transactions in interstate  
10 commerce as different from transactions affecting  
11 interstate commerce. We have that kind of difference in  
12 the law. Why shouldn't it apply here?

13 MR. STUMPP: Because there is no indication of  
14 any congressional purpose to indicate such a distinction.  
15 I think that the argument being made by respondents is  
16 that Congress selected the word in to draw a rather  
17 critical regulatory distinction, and I don't think there's  
18 any indication that that was the intent of Congress to do  
19 so. There would be no reason why if that in fact were the  
20 intent, the Treasury Amendment would not simply have been  
21 drafted as transactions in foreign currency futures as  
22 opposed to leaving the broad description of transactions  
23 in foreign currency.

24 QUESTION: Is there some reason in policy why  
25 you would want to distinguish between the two?

1 MR. STUMPP: There is no reason why I would wish  
2 to distinguish between the two.

3 QUESTION: Why one would wish to distinguish  
4 between the two then.

5 MR. STUMPP: I don't think that there would be a  
6 reason in light of the legislative intent indicated in  
7 enacting the statute. The Treasury Department letter  
8 which was submitted as the Commodity Exchange Act -- the  
9 amendments were being proposed and the definition of  
10 commodity was being substantially expanded beyond the  
11 traditional agricultural commodities, the Treasury  
12 Department was concerned that that language might include  
13 foreign currency transactions and communicated that  
14 concern to Congress.

15 Most of the specific discussion contained in the  
16 Treasury Department's letter referred to foreign currency  
17 futures. However, the specific language which the  
18 Treasury Department proposed and which Congress enacted as  
19 the Treasury Amendment does not speak of foreign currency  
20 futures. It speaks more generally and more broadly of  
21 transactions in foreign currency. So, there would be no  
22 reason to take that approach unless the intent were to  
23 exclude the entire field of off-exchange foreign currency  
24 futures.

25 Indeed, the respondents point out that, as has



1 already been commented on, in 1974 there was not an  
2 established market for off-exchange foreign currency  
3 options. Thus, it really doesn't make sense to suggest  
4 that without such a market Congress intentionally chose  
5 the word in to distinguish futures from an options market  
6 which did not yet exist to any real extent.

7 So, accordingly, I think the ordinary meaning  
8 and the most logical meaning, which is confirmed by the  
9 congressional purpose, is that transactions in foreign  
10 currency was a broad exclusion to this new expansion of  
11 the definition of commodity under the CEA and accordingly  
12 should be given that effect by this Court, namely, to  
13 exclude the entire field of off-exchange foreign currency  
14 transactions, whether those transactions happen to be in  
15 the nature of futures, options, or any other type of  
16 transaction that there may be.

17 QUESTION: Because we're going to have to draw  
18 the distinction with respect to the sort of recapture  
19 proviso at the end, aren't we, because that refers to  
20 sales for future delivery? So, that's going to draw back  
21 the futures contracts, but it's not going to draw back the  
22 options contracts.

23 MR. STUMPP: I do not agree, Your Honor, that  
24 the savings clause only relates to futures. I think the  
25 savings clause exempts from -- the Treasury Amendment

1 excludes all off-exchange transactions in foreign  
2 currency, and the savings clause brings back those in the  
3 language of the statute which involve the sale thereof for  
4 future delivery conducted on a board of trade.

5 QUESTION: But sale for future delivery is a  
6 fairly straightforward description, isn't it, of the  
7 future versus the options contract?

8 MR. STUMPP: I would say, Your Honor, that the  
9 description of sale for future delivery would include both  
10 futures and options. I think the act in different places  
11 uses phrases such as a contract of sale for future  
12 delivery. Here it's a broader phrased sale thereof for  
13 future delivery. So --

14 QUESTION: If you were describing an option  
15 alone, would you use the word delivery? You don't deliver  
16 under one of these kinds of options. You don't deliver  
17 anything, do you?

18 MR. STUMPP: Well, I think you deliver under an  
19 option as much as you deliver under a future because --

20 QUESTION: But you don't deliver until you --  
21 until somebody exercises the option; whereas, under the  
22 futures contract, if the contract is not canceled, you do  
23 have to deliver. Isn't that right?

24 MR. STUMPP: Oh, that's true, but my point is  
25 first that most futures contracts are offset rather than

1 actual delivery being made under them, and the nature of  
2 the transaction is both futures and options are derivative  
3 transactions. They are not transactions actually  
4 involving the underlying commodity, whatever that  
5 commodity might be. It's not --

6 QUESTION: Well, they're actually delivered or  
7 not, whether they're offset instead of executed, doesn't  
8 alter whether they are a sale for future delivery. When  
9 the sale occurs, it is a sale for future delivery.

10 MR. STUMPP: And I believe that is true for both  
11 options and futures.

12 QUESTION: An option is not a sale at all. It's  
13 an option to make a purchase and a commitment to make a  
14 future sale if the option to make a purchase is exercised.

15 MR. STUMPP: From the writer's standpoint, Your  
16 Honor, there's an obligation. Perhaps from the buyer's  
17 standpoint, he might have the decision to make as to  
18 whether to exercise the option, but from the standpoint of  
19 the writer of the option, he's obligated to make whatever,  
20 depending on whether it's a put or call option -- to make  
21 delivery or to get out of the contract, offset the  
22 contract in the same way you would do with a futures  
23 contract.

24 QUESTION: Mr. Stumpp, I thought section -- 7  
25 U.S. Code, section 6(c) had some specific bearing on this

1 case, and it's entitled Regulated Option Trading and says  
2 that no person shall offer to enter into or enter the  
3 execution of any transaction involving any commodity  
4 regulated under this chapter which is of the character of  
5 or is commonly known to the trade as an option contrary to  
6 any rule, regulation, or order of the Commission.

7 And then subsection (f) of the same section says  
8 that nothing in this chapter is deemed to govern or be  
9 applicable to any transaction in an option on foreign  
10 currency traded on a national security exchange.  
11 Apparently the purpose there is to preserve SEC  
12 jurisdiction.

13 MR. STUMPP: On 6c(f), that's exactly the  
14 purpose, Your Honor.

15 QUESTION: Yes, but on the first -- on  
16 subparagraph (b) it seems to give to the Commodity Futures  
17 Trading Commission the power to regulate or prohibit some  
18 transaction in the character of an option.

19 MR. STUMPP: That's true. I don't think there's  
20 a dispute that the CFTC has general jurisdiction over  
21 options. However, when specifically dealing with foreign  
22 currency -- or transactions in foreign currency, whether  
23 those transactions are options, futures, or any other type  
24 of transaction in foreign currency, those, provided they  
25 occur off exchange are exempt from the Commodity Exchange



1 Act pursuant to the Treasury Amendment.

2 There are other provisions. Section 2(i) of the  
3 Commodity Exchange Act also gives regulation authority to  
4 the CFTC over options.

5 But again, those are options -- regulation  
6 generally resides in the CFTC which is not disputed.  
7 However, if the option is in foreign currency, if it is a  
8 transaction in foreign currency, the Treasury Amendment  
9 pulls it out, exempts it from the Commodity Exchange Act,  
10 whether it be under section 6c(b), section 2(i), or any  
11 other section. The Treasury Amendment would exclude them  
12 from regulation under the act.

13 The ordinary meaning, as I've stated, of  
14 transactions in foreign currency basically is any  
15 transaction where the subject matter involved is foreign  
16 currency. The CFTC --

17 QUESTION: But to reach your conclusion, you  
18 have to say, as you do apparently, that an option with  
19 respect to foreign currency is a transaction in foreign  
20 currency. That's necessary for your result.

21 MR. STUMPP: An option is as much a transaction  
22 in foreign currency as a future is, Your Honor.

23 QUESTION: Would you look at, let's see, section  
24 6(c).

25 QUESTION: Where is it?

1 QUESTION: It's on page 6a of the Government's

2 --

3 MR. STUMPP: Brief on the merits, Your Honor.

4 QUESTION: Brief on the merits, and it's item 2  
5 on page 6a which is section 6c(d)(2). The Commission  
6 shall issue regulations that permit grantors and futures  
7 commission merchants to offer to enter into -- enter into  
8 -- or confirm the execution of, any commodity option  
9 transaction on a physical commodity subject to the  
10 provisions of.

11 Elsewhere the act speaks of an option  
12 transaction on a commodity, and you're saying that the  
13 earlier expression, transaction in, includes options.  
14 Doesn't this later language suggest that transaction in  
15 does not refer to options? Options are on a commodity,  
16 not in the commodity.

17 MR. STUMPP: Well, first, Your Honor, I don't  
18 agree with that kind of a conclusion. The CFTC or the  
19 respondents have spent a great deal of time arguing that  
20 transactions in are different from transactions involving.  
21 Your Honor is now suggesting transactions on.

22 The meaning, particularly in light of the way  
23 the Treasury Amendment came up, was clearly to exempt the  
24 field. The Treasury Department proposed the specific  
25 language and Congress adopted the language. I think it is

1 clear that again if the intent were only to exclude  
2 futures, it would have been easy to say transactions in  
3 foreign currency futures.

4 The language selected by Congress as proposed by  
5 the Treasury Department which wished to exclude CFTC  
6 regulation in the entire off-exchange foreign currency  
7 market was simply transactions in foreign currency. The  
8 fact that the act in different places may provide  
9 regulations for options generally does not detract from  
10 the exclusion that the Treasury Amendment provided for  
11 those transactions in foreign currency whether they happen  
12 to be options or any other type of transaction in that  
13 foreign currency.

14 I would also note that, and getting back to one  
15 of the prior points in terms of delivery as a future  
16 compared to an option, is that the CFTC respondents argue  
17 that options only create a right rather than an obligation  
18 to purchase or sell the commodity. That type of  
19 distinction is really inaccurate because it doesn't  
20 properly describe a future itself. Under the act there  
21 have been determinations that futures -- instruments can  
22 be futures without that type of purchase and sale  
23 obligation. The CFTC -- if purchase and sale of the  
24 underlying commodity were an actual requirement of being a  
25 futures contract, then the CFTC would not have been able

1 to approve a number of exchanged-traded, cash-settled  
2 futures.

3 Where there are no -- where they can be no  
4 delivery, there is no obligation to purchase or sell the  
5 underlying commodity, and in fact some of these, such as  
6 Eurodollars -- the underlying commodity doesn't really  
7 exist. You couldn't deliver. You have to cash settle.  
8 So, the delivery aspect in an attempt to differentiate  
9 futures and options simply does not work because that is  
10 not an accurate description of commodity futures contracts  
11 themselves.

12 QUESTION: Why couldn't you deliver Eurodollars,  
13 Mr. Stumpp?

14 MR. STUMPP: They don't exist as such.

15 QUESTION: That's a good reason.

16 (Laughter.)

17 QUESTION: May I ask --

18 QUESTION: In answer to the gap problem that has  
19 been raised, one of your friends said that what Dunn/Delta  
20 are doing -- that doesn't fall between the regulators  
21 because clearly what Dunn is doing falls within the SEC  
22 bailiwick because you are -- what you're doing is having  
23 contracts with your investors and those would count as  
24 securities. Do you agree that that would be so, that you  
25 might escape the CFTC, but you're with SEC?



1 MR. STUMPP: Speaking here, Your Honor, I don't  
2 think there is any regulatory gap because even the CFTC's  
3 complaint describes the investments that were entered into  
4 here as investment strategies, and I think that would fall  
5 within the definition of investment contracts for SEC  
6 jurisdictional purposes.

7 So, I don't think there is any regulatory gap.  
8 I think there is no jurisdiction of the CFTC over these  
9 transactions, but it is not to suggest that there is not  
10 jurisdiction of other agencies, most appropriately the  
11 SEC, to regulate those type of transactions.

12 As I said, the transactions were not made  
13 between petitioners and the individual investors. The  
14 transactions were made between -- with the major banks.  
15 The investors were not counter-parties to any of the off-  
16 exchange foreign currency options that were transacted  
17 here.

18 QUESTION: If we think that the language is open  
19 to either interpretation, and at the time they enacted it,  
20 nobody really thought about the options market developing,  
21 and if there's a good practical way to get your -- the  
22 industry's concerns dealt with through negotiations  
23 between Treasury and CFTC dividing responsibility, why  
24 wouldn't we then, other things being equal, say, all  
25 right, the people who administer this, apparently the

1 Treasury and the CFTC, think it's better to read the  
2 language as inclusive and then get the exclusion through  
3 negotiation with the industry between the agencies? It  
4 introduces more flexibility, deal more subtly with  
5 congressional and Treasury purposes, et cetera. Why not  
6 go in that direction? I'm not saying I would. I'm just  
7 trying to get your response to it.

8 MR. STUMPP: First, Your Honor, I'd note that it  
9 might not have been intended that way, but I think your  
10 question has a hypothetical element to it simply because  
11 the CFTC and the Treasury Department most certainly do not  
12 agree over the way this provision is read. I think  
13 perhaps the --

14 QUESTION: But I was thinking they could work  
15 out -- they don't agree.

16 MR. STUMPP: They don't agree. They have filed  
17 amicus briefs in the Fourth Circuit in Salomon Forex.  
18 They filed amicus briefs on opposite sides of the issue,  
19 and that was 4 years ago.

20 In fact, in the opposition to the petition for  
21 certiorari in this case, which was jointly submitted by  
22 the CFTC and the Treasury Department, one of the reasons  
23 that were offered why this Court should not grant cert was  
24 that there might be a chance the agencies would work it  
25 out between themselves.

1 QUESTION: Right.

2 MR. STUMPP: Obviously --

3 QUESTION: I noted that that brief was filed for  
4 the Commodity Futures Trading Commission and for the  
5 United States as amicus curiae, whereas the opposition on  
6 the merits is just for the CFTC.

7 MR. STUMPP: That's right. The Treasury  
8 Department, I think it's fair to say, does not share the  
9 view of the CFTC.

10 QUESTION: And this thing was called the  
11 Treasury Amendment, wasn't it?

12 MR. STUMPP: Yes, it was, Your Honor.

13 QUESTION: Because it was introduced by the  
14 Treasury Department.

15 MR. STUMPP: Specifically by -- or specifically  
16 enacted as they proposed it.

17 QUESTION: But if I may just vary Justice  
18 Breyer's question, yes, these agencies right now do not  
19 seem to be in agreement, but if this Court made a decision  
20 that would say what the law is, then does it follow that  
21 there are going to be this tight regulation then that  
22 would drive everyone to the London or other markets  
23 instead of reasonable exemptions being made?

24 MR. STUMPP: I think that that's -- obviously,  
25 it's a hypothetical because it hasn't happened, Your

1 Honor. I think that in the number of years the dispute  
2 has existed, if it were possible to reach some kind of  
3 agreement without a direction from this Court, I think it  
4 would have happened by this time.

5 QUESTION: Well, isn't your answer that if  
6 Treasury were that confident, they would never have  
7 introduced the Treasury Amendment? If they were content  
8 to rely upon the good offices of the communities --  
9 Commodity Futures Trading Commission, they wouldn't have  
10 introduced the amendment at all. They would have just  
11 said we'll cut our deal with the Commission. We know  
12 they're reasonable people.

13 MR. STUMPP: I will agree with that observation.

14 (Laughter.)

15 MR. STUMPP: If I may, Your Honor, if there's no  
16 further questions, Mr. Chief Justice, at this time I'd  
17 like to reserve whatever remains for rebuttal.

18 QUESTION: Very well, Mr. Stumpp.

19 Mr. Minear, we'll hear from you.

20 ORAL ARGUMENT OF JEFFREY P. MINEAR

21 ON BEHALF OF THE RESPONDENT

22 MR. MINEAR: Thank you, Mr. Chief Justice, and  
23 may it please the Court:

24 We submit that foreign currency futures are  
25 transactions in foreign currency, but foreign currency



1 options are not. We think that is the most accurate and  
2 sensible interpretation of the Treasury Amendment's text.

3 QUESTION: Well, so you both agree that it's a  
4 -- an option is a transaction in.

5 MR. MINEAR: No. I -- we disagree that --

6 QUESTION: Then I misunderstood you.

7 MR. MINEAR: Yes. A -- we say that a futures  
8 contract is properly described as a transaction in a  
9 commodity because it is an actual sale of the commodity  
10 although at a -- for settlement and delivery at a later  
11 date. An options contract by contrast is a sale of a  
12 future right to buy or sell the commodity. It involves  
13 the commodity, but it is not a transaction in the  
14 commodity itself.

15 QUESTION: Is it a transaction involving a  
16 commodity?

17 MR. MINEAR: It would be fair to characterize it  
18 as a transaction involving a commodity. And in fact, that  
19 is how the CEA actually characterizes it, and it's one of  
20 the reasons why we have concerns with treating a  
21 transaction in foreign currency as a transaction in  
22 foreign currency options.

23 Petitioners argue --

24 QUESTION: May I clarify one thing at the  
25 outset, Mr. Minear? Justice Kennedy pointed out that the

1 statute also applies to Federal Government securities.

2 MR. MINEAR: That's correct.

3 QUESTION: And the Chicago Board of Trade has  
4 filed a brief in which they express concern about the  
5 status of off-exchange transactions in Federal securities.

6 And as I understand your position, they would -  
7 - the options and the futures transactions would be  
8 treated differently in that security as well as foreign  
9 exchange.

10 MR. MINEAR: To a large extent, that is true,  
11 Your Honor.

12 Let me first say that Government securities are  
13 traded on the exchanges, on the Chicago Board of Trade.

14 QUESTION: Correct, but they're concerned about  
15 the off-exchange transactions.

16 MR. MINEAR: Yes. There the Chicago Board of  
17 Trade is concerned that that type of trading introduces  
18 the possibility of fraud, just as the CFTC is concerned as  
19 well.

20 QUESTION: And your position is that the trading  
21 in options will -- would be regulated, but trading in  
22 futures would not.

23 MR. MINEAR: That is true.

24 QUESTION: Yes.

25 MR. MINEAR: I think it's also important to

1 point out, however, that it's not clear if there is  
2 actually a market off -- over the counter in Government  
3 security options. There certainly is a market in  
4 Government security futures and there is a market on  
5 options on Government security futures, but we do not have  
6 anything in the record --

7 QUESTION: But the irony then is you would  
8 retain the power to regulate the less -- I mean, the  
9 market that may not exist, namely, the options, and you  
10 would have no power to regulate the market we know exists  
11 in futures.

12 MR. MINEAR: Well, that simply reflects what  
13 happened in 1974. When Congress enacted the CEA in 1974,  
14 it was sweeping in a large number of new commodities that  
15 were subject to regulation. At that time all options had  
16 been prohibited. There was no allowable option trading on  
17 the regulated commodities.

18 The Treasury Department noted that could raise  
19 problems with regard to certain futures trading in foreign  
20 currency, as well as trading in certain types of other  
21 financial instruments, and it responded to that market  
22 condition that existed at that time.

23 I think it's important to understand also that  
24 Congress also provided that the CFTC can exempt  
25 transactions if in fact it determines that it is

1 appropriate not to regulate them.

2 So, Congress actually did provide for these  
3 types of problems, these new markets that would emerge.

4 QUESTION: Well, it could exempt -- but it could  
5 not regulate the futures, the off-exchange trading in  
6 futures.

7 MR. MINEAR: It could not.

8 QUESTION: Yes.

9 MR. MINEAR: That is correct.

10 QUESTION: Now, what regulations has the CFTC  
11 imposed on the market in foreign currency options?

12 MR. MINEAR: Generally foreign currency options  
13 would be subject to the usual requirements of a contract  
14 market and the usual requirements that govern options  
15 trading. For the most part, options trading off of  
16 exchanges is not allowed. There are certain exemptions  
17 that do apply, however.

18 QUESTION: They just prohibit it.

19 MR. MINEAR: They have largely prohibited it  
20 with certain very important exceptions, however. There is  
21 a dealer exception which covers people who are dealing in  
22 the retail trade of a particular commodity at issue.  
23 There's a trade option exemption also that deals with  
24 people who are engaging in a transaction for a commercial  
25 purpose. And then there's also what is known as the swap



1 exemption which covers certain types of transactions which  
2 may or may not be futures or options but, the CFTC has  
3 determined, can safely be subject to -- can be engaged in  
4 without substantial problems of fraud.

5 QUESTION: Could it be said that the trade here  
6 was under one of the exceptions? Commercial?

7 MR. MINEAR: No, I do not believe that they  
8 would qualify for any of the exceptions here.

9 And in fact, the trading that was involved here  
10 is exactly the problem that Congress was concerned about  
11 in 1974, the so-called Ponzi scheme of trading in naked  
12 options and then not being able to cover --

13 QUESTION: I think Congress was also concerned  
14 that the Treasury Department ought to have control over  
15 matters that involve trading in foreign currency which  
16 probably affect our own currency as well.

17 The CFTC is an independent regulatory agency,  
18 isn't it?

19 MR. MINEAR: That is correct.

20 QUESTION: It can do what it wants and the  
21 President cannot alter its decision.

22 MR. MINEAR: That is largely true.

23 QUESTION: I think Congress was concerned that  
24 these decisions should lie with the President of the  
25 United States through the Treasury Department, and I don't

1 see, as far as the impact of that upon our national life  
2 is concerned, how options are any different from futures.  
3 You're talking about fiddling around with foreign  
4 currency, and given the international market that now  
5 exists, you're talking about fiddling around with our  
6 currency.

7 MR. MINEAR: Well, it's not clear, Your Honor,  
8 first of all, in the record what effects this will have on  
9 the foreign currency markets.

10 But I think more specifically to your point, I  
11 think we have to look to what Congress really intended,  
12 and what it said in the statute. That is what we have  
13 used as the guide here.

14 QUESTION: Well, I certainly don't think that  
15 just the use of the word in -- it bears the meaning you  
16 want to give it, but if that same terminology had been  
17 used in some legislation, I can just envision the  
18 Government coming up here and saying -- let's say, an SEC  
19 authorization says that it can regulate transactions in  
20 something, and you would say, well, it's ridiculous to  
21 think that you can avoid all of this by simply dealing in  
22 options. Of course, options are transactions in that kind  
23 of thing.

24 I don't think Congress had that distinction in  
25 its mind when it drew this thing. So, we're really --

1 MR. MINEAR: We think what -- we think --  
2 Congress had in its mind was the problem of futures  
3 trading and not options trading, and we think the language  
4 it used actually indicates that. And it's a good deal  
5 more than simply the word in.

6 We also ask you to look at two other provisions  
7 of the CEA, section 2(i) which describes the CFTC's  
8 exclusive jurisdiction, and section 6(c) which grants the  
9 CFTC authority to regulate options. In both of those  
10 cases --

11 QUESTION: Where are those in your brief?

12 MR. MINEAR: Yes, those are in our brief. The  
13 section 2(i) appears at page 1a of the appendix, and the  
14 relevant provision of section 6(c) which is subsection (b)  
15 appears at page 4.

16 What you note with regard to both of --

17 QUESTION: There's no sound coming out of your  
18 speaker. Are you not speaking into it or is there a  
19 problem?

20 MR. MINEAR: I'm not sure if there is a problem.

21 QUESTION: It's not connected.

22 MR. MINEAR: I will try and speak more loudly if  
23 that would be of assistance.

24 QUESTION: I think you'll have to because it  
25 isn't working.

1 QUESTION: That might be a good idea.

2 QUESTION: That or don't say anything important.

3 (Laughter.)

4 MR. MINEAR: I would much prefer to speak to the  
5 important matters here.

6 And in that regard, I think the provisions --  
7 these two provisions that I've cited are important and  
8 very significant because they both mention -- they discuss  
9 options and they both describe them as transactions  
10 involving the commodity, and they both use very specific  
11 language to talk about options.

12 I think what's clear throughout the CEA is that  
13 when Congress meant to deal with options, it dealt with  
14 them quite specifically. It either mentioned them by name  
15 or it used the transactions involving terminology. That  
16 same language is found also in section 2(a) of the CEA.

17 And we think that that is very significant in  
18 determining what Congress meant when it used the more  
19 restrictive phrase transactions in foreign currency.

20 QUESTION: To go back to Justice Scalia's  
21 question for a minute --

22 MR. MINEAR: Yes.

23 QUESTION: -- I'm -- it may well be that the  
24 language determines this in your favor, but if it does not  
25 and if it really is open and if Congress did in fact



1 regulate -- exempt the foreign transactions for the  
2 reasons set out in the Treasury letter, then is there any  
3 reason why, in a world where options transactions now  
4 serve the same purposes and are used to the same extent as  
5 futures transactions, the result should differ?

6 MR. MINEAR: Yes.

7 QUESTION: I mean if the language is open and  
8 the world is such that the purpose is the same and the  
9 Treasury Department apparently thinks that's what it  
10 meant.

11 MR. MINEAR: Yes, we think there is a very good  
12 reason --

13 QUESTION: What is that?

14 MR. MINEAR: -- that they should be treated  
15 differently, and that is Congress' historic concern that  
16 options posed a more serious risk of fraud than futures.

17 QUESTION: If that isn't so, that is to say, if  
18 in today's world it's just as easy to be fraudulent or not  
19 fraudulent in respect to a futures transaction when  
20 engaged in by thousands of people as a options  
21 transaction, then what do we do?

22 MR. MINEAR: Well, I think --

23 QUESTION: I mean, is it like the Commerce  
24 Clause not foreseeing the automobile?

25 MR. MINEAR: I think it's a matter of the Court

1 looking to the expertise of two bodies: first, Congress  
2 which has continued to regulate options more strictly and  
3 has vested authority for exceptions with the CFTC; and  
4 then the CFTC itself and its assessment of whether these  
5 markets do pose a serious risk or not.

6 The CFTC carefully examined the options market  
7 in the newly regulated commodities in 1976. It initially  
8 decided to deregulate that market and it found that there  
9 were numerous problems with fraud in the marketplace. In  
10 1978 it reimposed those limitations.

11 QUESTION: But if they trusted the FTC to make  
12 these determinations, they wouldn't have needed the  
13 Treasury Amendment. They would have said that the CFTC  
14 has exemption authority. We will rely upon their good  
15 offices, unreversible by the President of the United  
16 States, to exempt those things that need exempting. They  
17 were not willing to do that.

18 MR. MINEAR: I think what Congress was doing in  
19 1974, it was looking at the markets that existed at that  
20 time, and it was saying, yes, we feel we can safely exempt  
21 the foreign currency futures market, the only market that  
22 existed and the only market that was described in the  
23 Treasury Amendment's -- the Treasury Department's  
24 correspondence respecting the Treasury Amendment.

25 As to future markets that might develop, CFTC

1 would be given the authority to make those judgments based  
2 on its ability to gather the facts and make --

3 QUESTION: Well, no, but the legislative  
4 findings deal with -- in section 5 deal with both futures  
5 and options.

6 MR. MINEAR: Yes, that is true, and again I  
7 think section 5 is probably most notable for the fact that  
8 it distinguishes between transactions in commodities and  
9 options.

10 QUESTION: I thought you were saying that  
11 Congress really wasn't thinking about options at all when  
12 it passed this bill.

13 MR. MINEAR: It was not to a large extent, and  
14 with regard to section 5 --

15 QUESTION: Well, then why did it include options  
16 in the legislative findings?

17 MR. MINEAR: The legislative findings -- you're  
18 talking about the last two sentences of that section which  
19 appear on page 3a.

20 QUESTION: Well, I presume those are as good as  
21 any other findings.

22 MR. MINEAR: But those findings were added in  
23 1983, some time after 1974. Many of these markets have  
24 grown dramatically. I think that's the most remarkable  
25 effect about the commodities market, is they have been

1 subject to dramatic expansion since 1974.

2 And the CFTC is exercising judgment in terms of  
3 where there are serious problems of fraud. They believe  
4 there are serious problems of fraud in the foreign  
5 currency market as indicated by this very case, and in  
6 fact --

7 QUESTION: With respect to this very case, Mr.  
8 Minear, the point that was made I think in the Chase  
9 Manhattan brief about the SEC has ample jurisdiction to  
10 take care of this kind of operation.

11 MR. MINEAR: That is not necessarily true, Your  
12 Honor. That -- I think that that brief suggested that  
13 some of these transactions would be -- would fall within  
14 the description of an investment contract, and therefore  
15 would be a security for purposes of the Securities and  
16 Exchange Act. The problem with that is that you can avoid  
17 the investment contract terminology -- or the requirement  
18 -- the satisfy -- you can avoid a -- creating a  
19 transaction that is an investment contract by simply how  
20 you structure it. So, fraudulent bucket shops can in fact  
21 avoid that problem by simply avoiding a -- structuring  
22 their dealings in a way that does not create an investment  
23 contract.

24 So, there's still a residual need for CFTC  
25 oversight in some of these areas unless --



1 QUESTION: Isn't it true also, or is it -- it's  
2 something I picked up from one of the briefs -- that as  
3 the traders become more and more sophisticated, it's  
4 harder to tell a difference in a futures and an option,  
5 and you can even have an option on a future, et cetera, et  
6 cetera? Isn't it very difficult sometimes to tell which  
7 of the two it is?

8 MR. MINEAR: It could be. It depends. I think  
9 that the swap exemption is an example of that. It  
10 discusses the fact that there are very sophisticated  
11 transactions that are being engaged in that may have the  
12 aspects of a future but are not actually a future. And in  
13 those situations, the CFTC has carefully looked at the  
14 transactions, has indicated which ones they think are  
15 permissible and which ones are not. And that is in fact a  
16 very reasonable way to go forward with respect to these -  
17 -

18 QUESTION: But if they are so close that you  
19 can't tell them apart, what sense would it make to say  
20 that the futures are out but the options are in?

21 MR. MINEAR: Well, we think that what Congress  
22 did in 1974 is it looked at the futures market as it  
23 existed then and said those -- that area is exempt. There  
24 are no -- there will not be CFTC regulation in that area.

25 But as to these new instruments that come in,

1 we'll make a case-by-case determination. We'll vest that  
2 authority with the CFTC which has the authority and the  
3 time and the expertise to evaluate these transactions and  
4 determine whether or not they're serving a useful market  
5 purpose and whether or not they pose an unacceptable risk  
6 of fraud in the marketplace.

7 QUESTION: Mr. Minear, don't futures and options  
8 involve the same market participants? I'm not sure the  
9 sense of regulating one and not the other. And if you  
10 regulate the options market, it seems to me, particularly  
11 if they're the same participants and it's the same general  
12 market, that you're affecting futures anyway.

13 MR. MINEAR: Well, I think all of these can  
14 raise very complex economic questions in terms of the  
15 relationship between the options market and the futures  
16 market.

17 But I think we can say this, that with regard to  
18 commercial expectations, the futures market is secure.  
19 With regard to the newly created options market, those  
20 questions ought to be evaluated by someone. We shouldn't  
21 simply provide an open-ended exception that says -- simply  
22 says that anything that involves a foreign currency is  
23 going to be exempt from regulation.

24 QUESTION: Well, then maybe you need to adopt  
25 the Board of Trade's position that they're both subject to

1 the act.

2 MR. MINEAR: No. We think the problem with that  
3 position is it runs into the difficulty with the board of  
4 trade proviso that was discussed earlier. It's clear that  
5 Congress did want futures transactions to be -- that were  
6 conducted on a board of trade to be subject to CFTC  
7 regulation. So, we think that that's a textual problem of  
8 taking that approach.

9 QUESTION: Could you refer me to something just  
10 in respect to your answer to Justice Kennedy?

11 I had assumed throughout this we weren't  
12 discussing no regulation of fraud. I thought the issue  
13 was who would regulate: CFTC on the one hand or SEC and  
14 Treasury on the other.

15 Now you're saying that if we hold that the CFTC  
16 does not have the authority, no one has the authority in  
17 respect to a significant number of off-exchange option  
18 currency transactions. Now, is that so? Is that what  
19 you're saying, and if it is, where would I find out the  
20 scope of that problem?

21 MR. MINEAR: Yes, we are saying that there would  
22 be -- if you hold that options are excluded, there will be  
23 a significant portion of the market that will not be  
24 subject to regulation by anyone.

25 The Treasury Department does not directly

1 regulate these markets for fraud. It does regulate banks  
2 for safety and soundness, and as long as these  
3 transactions take place in the interbank market, that  
4 provides some substantial protection. But any other  
5 protection would have to come from another agency. Those  
6 agencies would be the CFTC or the SEC.

7 The problem with SEC regulation here is unless  
8 the transaction involved qualifies as an investment  
9 contract under this Court's decision in *Howey*, there would  
10 not be --

11 QUESTION: Who monitors futures contracts for  
12 fraud?

13 MR. MINEAR: No one is monitoring the futures  
14 contracts for fraud, and in part that was because --

15 QUESTION: So, it works there. Why can't it  
16 work here?

17 MR. MINEAR: The -- and again, we're talking --

18  
19 QUESTION: Is there some rule that everybody has  
20 to be regulated or --

21 MR. MINEAR: Let me clarify this again that with  
22 regard to the over-the-counter market, there is no CFTC  
23 direct regulation of futures, but that was based on the  
24 Congress -- congressional determination that that was not  
25 necessary. Congress has never made an --



1           QUESTION: That's begging the question. I mean,  
2     you're just begging the very question. Did they make that  
3     determination just for futures or for all transactions  
4     involving foreign currency?

5           You point out that they do use the term  
6     involving to refer to options.

7           MR. MINEAR: That's correct.

8           QUESTION: But they also use the term on to  
9     refer to options. So, they're obviously not using any  
10    consistent language.

11          MR. MINEAR: I think the context --

12          QUESTION: They use in, they use on, they use  
13    involving.

14          MR. MINEAR: I think you will find that they  
15    refer to transactions in options in only one case and  
16    that's in section 6c(f) where they say, transactions --  
17    where they actually refer to that the CFTC would have no  
18    jurisdiction over transactions in options on foreign  
19    currency traded on a national securities exchange.

20          Now, it's clear when Congress uses the term  
21    transactions in, I think they're talking about a very  
22    specific type of transaction. It is accurate to describe  
23    an option as a transaction in an option, a foreign  
24    currency option. I do not think it's accurate to describe  
25    as a transaction involving -- or an options transaction as

1 a transaction in the foreign currency, the underlying  
2 commodity itself.

3 QUESTION: But the problem with that argument is  
4 the unless such transactions involve at the end of the  
5 subsection. That is obviously a subcategory of those  
6 which are in.

7 MR. MINEAR: That's right. And so that -- and  
8 that supports our view I believe.

9 QUESTION: Not if involve is the broader term.

10 MR. MINEAR: Our view is this, that the  
11 transactions in foreign currency would include spot  
12 transactions, would include cash forward transactions, and  
13 would include futures transactions. All three of those  
14 transactions involve situations where you're actually  
15 purchasing the underlying commodity. If you enter into  
16 one of those transactions and do nothing else, you will  
17 receive the commodity that's involved.

18 We think that options are different because they  
19 do not have that distinction. All you're buying in that  
20 case is a right. You're not buying the underlying  
21 commodity.

22 QUESTION: But, Mr. Minear, now do you agree  
23 that if the petitioners had engaged in exactly the same  
24 scheme, including misrepresentations and all, with their  
25 customers in trading in off-exchange foreign currency

1 futures, the CFTC would have no jurisdiction over it?

2 MR. MINEAR: We think that would --

3 QUESTION: Same conduct exactly --

4 MR. MINEAR: There would be one --

5 QUESTION: -- but in connection with futures.

6 MR. MINEAR: Excuse me, Your Honor.

7 There would be one question that we'd ask,

8 whether this is conducted on a board of trade or not. But

9 let's assume it's not on a --

10 QUESTION: No. Let's say it's an off-exchange.

11 MR. MINEAR: Well, board of trade is not

12 necessarily --

13 QUESTION: They're off, not a board of trade.

14 MR. MINEAR: -- with your hypothetical assuming

15 it's not on a board of trade.

16 QUESTION: Yes.

17 MR. MINEAR: In that situation it's true that

18 the CFTC would not be able to bring an enforcement action,

19 but it might be far more difficult to bring that type of

20 fraudulent scheme and let me explain why. I think this is

21 important.

22 That options are peculiarly subject to fraud

23 because they're very easy to market to an unsuspecting

24 public. They can be sold very much like a lottery ticket.

25 The way --

1 QUESTION: An option can?

2 MR. MINEAR: An option can because what you're  
3 telling the person is, here, you pay this premium, a small  
4 premium, and you -- and the sky is the limit on what you  
5 might get in the form of your investment return.

6 A futures contract -- to explain a futures  
7 contract to an investor would be no simple matter to begin  
8 with. But beyond that, it also -- they have to explain to  
9 the person that you're making an investment in a future  
10 purchase and you might be obligated to buy that future  
11 commodity. Much of this has really to do with the market  
12 mentality.

13 QUESTION: Wouldn't there be even less reason to  
14 find an exception for an option where the buyer doesn't  
15 have to go ahead with it? He can not exercise the option.

16 MR. MINEAR: The difficulty here --

17 QUESTION: I mean, it's just a strange argument  
18 it seems to me.

19 MR. MINEAR: Well, I think that this -- the  
20 answer here is largely a part of history and largely a  
21 part of market psychology. But it has always been easier  
22 to market options than -- fraudulently than futures.

23 QUESTION: Well, how do you know that?

24 MR. MINEAR: I think Congress made that  
25 determination in terms of how it decided in 1922, since



1 1922, that there would be no options. Options would not  
2 be sold on agricultural commodities because they posed  
3 such a danger of fraud, but futures would be allowed. And  
4 that was the law from 1922 until 1974.

5 QUESTION: And so all that proves is what you're  
6 saying was true in 1922. It doesn't prove it's true now.

7 MR. MINEAR: And what it proves is that in 1974,  
8 the relevant time for determining the Treasury Amendment,  
9 Congress continued to hold that view.

10 QUESTION: Well, if we adopt your view of the  
11 Treasury Amendment, not if we adopt the petitioners'.

12 MR. MINEAR: Well, even apart from the Treasury  
13 Amendment, Congress continued to impose a ban options in  
14 1974 even though it was allowing trading in the futures  
15 market. It simply --

16 QUESTION: Mr. Minear, has anybody -- who's  
17 representing the President's position in this case? I  
18 assume that's Treasury's position since he controls  
19 Treasury.

20 MR. MINEAR: Yes, that's right.

21 Let me tell you candidly what occurred in this  
22 case. The Solicitor General was called upon to make a  
23 determination between the Treasury Department and the CFTC  
24 in terms of what is the appropriate position to take on  
25 this case. He looked at the statutory language here and

1 made the determination that the CFTC's view was more in  
2 accord with the statutory language, and that's why we're  
3 taking that position in this case. So, this does  
4 represent the view of the Solicitor General in determining  
5 what is the best reading of this statute.

6 QUESTION: Thank you.

7 MR. MINEAR: Now I'd like to point to some other  
8 textual indicia because I think we haven't really spent  
9 much time talking about those.

10 One of the things that I think is significant  
11 about the Treasury Amendment is it actually does include  
12 certain types of options within its reach. It makes  
13 specific reference to security warrants and also  
14 repurchase options.

15 So, Congress was aware that certain options  
16 would be included in the exclusion here. Yet, it  
17 nevertheless decided against including foreign currency  
18 options. One would think that if Congress had intended to  
19 include foreign currency options within the exclusion, it  
20 would have said so expressly like it did with regard to  
21 the other options that were involved here.

22 We think that they also -- that this -- we also  
23 find textual support from the board of trade proviso.  
24 This has been discussed by the --

25 QUESTION: Does the word transactions in modify

1 just foreign currency?

2 MR. MINEAR: No. It modifies all six of the  
3 items that are described there.

4 QUESTION: So, then you do have transactions in  
5 an option.

6 MR. MINEAR: Yes, in repurchase options which in  
7 that case were specialized -- is a specialized type of  
8 option.

9 But I think what it indicates here is that  
10 Congress --

11 QUESTION: That means you can have a transaction  
12 in an option.

13 MR. MINEAR: You can have a transaction in an  
14 option, and we -- our view would be different if Congress  
15 had said transactions in foreign currency options, but it  
16 simply said transactions in foreign currency. That's what  
17 lies at the heart of our view here on the statutory text.

18 In the Treasury Amendment, Congress said --  
19 exempted transactions in certain items. It did not  
20 include foreign currency options among those, even though  
21 it included foreign currency --

22 QUESTION: I guess there's no such thing --

23 MR. MINEAR: -- even though it included other  
24 kinds of options.

25 QUESTION: There's no such thing as a repurchase

1 future I suppose.

2 MR. MINEAR: I think not, and in fact I think  
3 that is true.

4 QUESTION: Would you help me out with the term  
5 repurchase options? What is the universe that that  
6 encompasses?

7 MR. MINEAR: This is actually an area where  
8 there's some uncertainty, but let me explain. We do know  
9 what repurchase agreements are, that the repurchase --

10 QUESTION: But we don't know what repurchase  
11 options are.

12 MR. MINEAR: We think options are options on  
13 repurchase agreements, and we think that Congress might  
14 have been looking forward to the possibility of options on  
15 repurchase agreements. Now, I don't know if that market  
16 exists or not.

17 QUESTION: And the universe that repurchase  
18 agreements covers, is that all agricultural commodities?

19 MR. MINEAR: No. It's primarily Government  
20 securities. In fact, I think it's -- that term is used  
21 almost exclusively. If you look to a financial  
22 dictionary, you'd find that when we talk about repurchase  
23 agreements, we're largely talking about parking Government  
24 securities with one holder for a temporary period and then  
25 selling them back. So, what we really have here with



1 repurchase options -- and I think this Congress was  
2 envisioning the possibility that repurchase agreements  
3 might be included. Repurchase --

4 QUESTION: Help me again. A repurchase  
5 agreement is a commitment by the Government to rebuy a  
6 previously issued security. Is that what it is?

7 MR. MINEAR: Yes, although this more often takes  
8 place between banks. They can take place between the  
9 Federal Reserve Board and a bank or between the banks.

10 QUESTION: I see.

11 MR. MINEAR: But these are all Government  
12 securities, so they fall within the Government security  
13 exemption anyway.

14 QUESTION: Mr. Minear, if we should disagree  
15 with you and hold that options are included within the  
16 exemption, do you think the language at the end of that  
17 Treasury Amendment, unless such transactions involve the  
18 sale thereof for future delivery conducted on a board of  
19 trade -- do you think that that is -- can be applied to  
20 options?

21 MR. MINEAR: We think it cannot be applied to  
22 options. There's a possible argument --

23 QUESTION: You're going to be in big trouble if  
24 we disagree with you then.

25 MR. MINEAR: Yes, I think that's right. I think

1 that might well be the case.

2 But again, we have to look at what the words of  
3 the statute say, and that is what we've used as our guide  
4 here. The term, unless such transactions involve the sale  
5 thereof for future delivery -- and I'm reading on page 2a  
6 of our appendix. We think that's a term of art that  
7 really refers specifically to futures, and I think you can  
8 see that if you look directly below at section 5 which  
9 says transactions -- this is the legislative finding  
10 section. Transactions in commodities involving the sale  
11 thereof for future delivery is commonly conducted on  
12 boards of trade and known as futures. So, that proviso -  
13 -

14 QUESTION: Mr. Minear, you said some part of  
15 that legislative finding was added in 1983?

16 MR. MINEAR: Yes.

17 QUESTION: What was added and what was put in in  
18 1974?

19 MR. MINEAR: The 1974 language actually I think  
20 can be traced back to 1922. I believe --

21 QUESTION: But what was added in 1983 that  
22 wasn't there -- but was there in 1974?

23 MR. MINEAR: The language respecting options  
24 which appears on page 3a of our appendix, and it begins at  
25 about halfway below the page.

1 QUESTION: Furthermore?

2 MR. MINEAR: Furthermore, transactions which are  
3 of the character of and are commonly known to the trade as  
4 options. Again, here's Congress using the term, very  
5 specific term, options when it means to deal with options.

6 QUESTION: And that was added in 1983.

7 MR. MINEAR: That was added in 1983.

8 Now, I would like to reemphasize a point here  
9 that I think is very important to bear in mind, and that  
10 is the Treasury Amendment is an exemption from a general  
11 regulatory program, and if there are doubts about its  
12 reach, we think the more narrow interpretation is the  
13 preferred one here.

14 That rule has particular force where Congress  
15 has appointed an expert agency, namely, the CFTC to -- and  
16 given it authority to provide further exemptions from the  
17 regulatory program. It's the CFTC that has the expertise  
18 in this area and can make those determinations of whether  
19 or not the transactions at issue pose the threat of fraud  
20 that was the underlying concern of the securities -- the  
21 Commodity Exchange Act when it was enacted in 1936 and  
22 when it was expanded in 1974.

23 We think that petitioners' non-textual argument  
24 really is ultimately unpersuasive. Their notion is simply  
25 that it would be illogical for Congress to exempt both

1 foreign currency futures and foreign currency options  
2 because they serve similar marketing and hedging  
3 functions.

4 But ultimately Congress has always recognized  
5 the difference between futures and options. It has done  
6 so in the agricultural commodities, and we believe it has  
7 done so in these other commodities as well. We think  
8 Congress has drawn a line here, and it has drawn a line  
9 between foreign currency futures and options. It had a  
10 reasonable and sound basis for drawing that line, namely,  
11 the fact that options pose more serious risks of fraud.

12 Finally, the last point I would like to make is  
13 although we believe that the statutory language here is  
14 clear, if you disagree with us on that, then it's  
15 appropriate to give deference to the CFTC's view as the  
16 administrative agency that is administering the statute.

17 QUESTION: But that would be a matter of the  
18 agency's jurisdiction, wouldn't it? We don't ordinarily  
19 give deference on the jurisdictional point.

20 MR. MINEAR: I think that you do in fact. In  
21 fact, in CFTC v. Schor, this Court made that point. It  
22 was a question whether CFTC had jurisdiction over  
23 reparation proceedings, but you did recognize that we do  
24 -- it's almost inevitable -- inevitably necessary to give  
25 deference to an agency's determination.



1 QUESTION: Yes, but that isn't a rule in thin  
2 air. That's the rule of what Congress would have liked  
3 the courts to do.

4 MR. MINEAR: Yes.

5 QUESTION: And if anything here where it's the  
6 Treasury Amendment, why wouldn't you think Congress would  
7 like the courts to pay particular attention to the  
8 Treasury, if anyone?

9 MR. MINEAR: Well, we think that the Court's  
10 explanation of deference in Smiley is that Congress has  
11 delegated this authority to the agency that's charged with  
12 administration of the statute.

13 QUESTION: But on this point, hasn't the  
14 Government taken different positions at times and said  
15 that both futures and options in foreign currency were  
16 excluded from CFTC jurisdiction? Isn't that the position  
17 the Government has taken at times in the past.

18 MR. MINEAR: The United States filed a brief in  
19 the Fourth Circuit --

20 QUESTION: Exactly.

21 MR. MINEAR: -- taking that position.

22 QUESTION: And so why is any deference owed  
23 here? Isn't it a litigation position and not anything  
24 entitled to deference?

25 MR. MINEAR: Well, the CFTC's position is not a

1 litigation position. The Commission voted on whether or  
2 not to bring this suit, and so it is conducted with  
3 sufficient authoritativeness and deliberateness to be  
4 entitled to deference.

5 I see my time has expired.

6 QUESTION: Thank you, Mr. Minear.

7 Mr. Stumpp, you have 1 minute remaining.

8 REBUTTAL ARGUMENT OF GARY D. STUMPP

9 ON BEHALF OF THE PETITIONERS

10 QUESTION: To just briefly touch on a few points  
11 raised, the exemptions, the dealer trade option and swap  
12 exemption, I think are adequately covered in the amici  
13 briefs. They're limited exemptions. They're certainly  
14 well subject to CFTC interpretation, modification, or  
15 withdrawal.

16 The point that continues to be made concerning  
17 that options have been dealt with differently by the CFTC.  
18 As I said it is not relevant once you -- once the CFTC  
19 acknowledges, as they have, that the foreign currency  
20 options market didn't exist at that time and the  
21 agricultural options regulation, whatever purpose may have  
22 been served specifically dealing with agricultural  
23 options, would not be relevant to the expansion of the  
24 definition of commodity in the '74 amendments beyond the  
25 traditional agricultural commodities.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Stumpp.

2 The case is submitted.

3 (Whereupon, at 2:00 p.m., the case in the above-  
4 entitled matter was submitted.)

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

*WILLIAM C. DUNN AND DELTA CONSULTANTS, INC., Petitioners*  
*v. COMMODITY FUTURES TRADING COMMISSION, ET AL.*

*Case No. 95-1181*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Don Mari Federico*  
(REPORTER)