

# The Burger Court Opinion Writing Database

## *United States v. National Association of Securities Dealers, Inc.*

422 U.S. 694 (1975)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

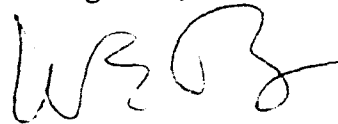
March 5, 1975

Re: 73-1701 - U. S. v. National Association of  
Securities Dealers

Dear Lewis:

Re your memorandum of March 5, my tentative  
disposition is to leave this problem with the litigants.  
They have known of the matter since the November 22, 1974  
letter and I would wait on them.

Regards,



Mr. Justice Powell

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 16, 1975

Re: 73-1701 - U. S. v. National Association of Securities Dealers

Dear Lewis:

I join your May 20 circulation.

Regards

A large, stylized handwritten signature, likely "W.B.B.", written in dark ink.

Mr. Justice Powell

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U.S. DEPARTMENT OF COMMERCE

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

June 19, 1975

Re: No. 73-1701 - U.S. v. Nat. Asso. Securities  
Dealers

Dear Byron:

Please join me, though I may be influenced  
by the fact that I drafted the Maloney Act.

Sincerely,

William O. Douglas

Mr. Justice White

cc: The Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 10, 1975

RE: No. 73-1701 United States v. National Association of  
Securities Dealers, Inc.

Dear Byron:

Please join me in your dissenting opinion in the  
above.

Sincerely,

*Bill*

Mr. Justice White

cc: The Conference

✓

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U.S. SUPREME COURT ADVANCE

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

March 5, 1975

No. 73-1701 U. S. v. National Association of  
Securities Dealers, et al.

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Dear Chief,

In light of the information contained in Lewis' letter to you of today's date, I agree that the issues in this case seem to have taken a new turn. I think we should ask the parties to file supplemental briefs in typewritten form before argument. If, however, it is thought that this would be an unreasonable request to the parties in view of the limited time available, I would at least specifically ask the parties to address the effect of the SEC Chairman's letter on this litigation at oral argument, with the thought that supplemental briefs might thereafter be filed at our request.

Sincerely yours,

P.S.

The Chief Justice

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Supreme Court of the United States  
Washington, D. C. 20543

✓

CHAMBERS OF  
JUSTICE POTTER STEWART

May 21, 1975

No. 73-1701 - United States v. National  
Association of Securities Dealers

Dear Lewis,

Although I knew that this was no easy case, I did not realize at the time of oral argument and at our subsequent Conference discussion what a massive and complicated job the opinion would entail. I think you have done that job most admirably, and I am glad to join your opinion for the Court.

Sincerely yours,

P.S.  
/

Mr. Justice Powell

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P.S.

I dictated this before receipt  
of the \$0.50 from you.

P.S.  
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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 21, 1975

Re: No. 73-1701 - U.S. v. National Association  
of Securities Dealers Inc.

Dear Lewis:

I hope to circulate a partial dissent in  
this case.

Sincerely,

*Byron*

Mr. Justice Powell

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U.S. SUPREME COURT RECORDS



To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: White, J.

Circulated: 6-10-75

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SUPREME COURT OF THE UNITED STATES

No. 73-1701

United States, Appellant,

v.

National Association of Securities  
Dealers, Inc., et al.

)  
) On Appeal from the United  
) States District Court  
) for the District of  
) Columbia

MR. JUSTICE WHITE, dissenting.

The majority repeats the principle so often applied by this Court that "[i]mplicit antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." Ante, at 23. That fundamental rule, though invoked again and again in our decisions, retained its vitality because in the many instances of its evocation it was given life and meaning by a close analysis of the legislation and facts involved in the particular case, an analysis inspired by the "felt indispensable role of antitrust policy in the maintenance of a free economy . . . ." United States v. Philadelphia National Bank, 374 U.S. 321, 348 (1963). With the seeming waning of that inspiration among members of this

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STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 1-3, 5-8, 13

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: White, J.

Circulated: \_\_\_\_\_

Recirculated: 6-18-75

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 73-1701

United States, Appellant,	}	On Appeal from the United States District Court for the District of Columbia.
v.		
National Association of Securities Dealers, Inc., et al.		

[June —, 1975]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The majority repeats the principle so often applied by this Court that "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *Ante*, at 23. That fundamental rule, though invoked again and again in our decisions, retained its vitality because in the many instances of its evocation it was given life and meaning by a close analysis of the legislation and facts involved in the particular case, an analysis inspired by the "felt indispensable role of antitrust policy in the maintenance of a free economy . . ." *United States v. Philadelphia National Bank*, 374 U. S. 321, 348 (1963). Absent that inspiration the principle becomes an archaism at best, and no longer reflects the tense interplay of differing and at times conflicting public policies.

Although I do not disagree with much of the Court's opinion in its construction of §§ 22 (d) and 22 (f) of the Investment Company Act, its ultimate holding, which in contrast to the earlier portions of its opinion is devoid of detailed discussion of the applicable law, I find unacceptable. Under that holding, in light of the context

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U.S. SUPREME COURT RECORDS

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 11, 1975

Re: No. 73-1701 -- United States v. National Association  
of Securities Dealers, Inc.

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Dear Byron:

Please join me in your dissent.

Sincerely,

*T.M.*

T.M.

Mr. Justice White

cc: The Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 7, 1975

Re: No. 73-1701 - U. S. v. National Association  
of Securities Dealers, Inc.

Dear Chief:

I note that the letter of November 22, 1974 from the Chairman of the SEC to the President of the NASD is reproduced on Addendum page 18 of the brief filed by eight appellee dealers (the red brief) and that, in addition, a number of the briefs cull out pertinent passages from the 1974 study. I mention this in connection with the recent correspondence among us about this case. I am inclined to feel that we should let this matter simmer until the oral argument on March 17, and take it from there.

Sincerely,



The Chief Justice

cc: The Conference

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U.S. SUPREME COURT RECORDS

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 26, 1975

Re: No. 73-1701 - United States v. National Association of  
Securities Dealers

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Dear Lewis:

Please join me.

Sincerely,

*Harry*

Mr. Justice Powell

cc: The Conference

✓  
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U.S. SUPREME COURT

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 5, 1975

No. 73-1701 U.S. v. National Association  
of Securities Dealers, et al

Dear Chief:

The Clerk's Office circulated yesterday a copy of a letter dated November 22, 1974, from the Chairman of the SEC to Gordon S. Macklin, President of the National Association of Securities Dealers (NASD), a respondent in the above case.

This letter is a request by the Commission that the NASD amend its Rules of Fair Practice to prohibit its members from making agreements with broker-dealers which restrict them in making a secondary market for mutual fund shares.

Although I have taken only a preliminary look at some of the briefs in this case, it seems to me that this action of the SEC may be highly relevant to this case. Indeed, if the NASD acquiesces in the request (and no doubt the SEC is in a position to encourage acquiescence), we may have before us a different case from that presented in the courts below and briefed in this Court by the parties.

In view of this possibility, it occurs to me that it may be desirable to have the Clerk request the parties to file supplemental briefs, before argument, commenting on the effect of this action on the pending litigation. If this is to be done, we should act promptly as the case is now set for Monday, March 17.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

P.S. The Clerk did not receive the letter until March 3.

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To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

From: Powell, J.

Circulated: MAY 20 1975

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 73-1701

United States, Appellant,

v.

National Association of  
Securities Dealers,  
Inc., et al.

On Appeal from the United  
States District Court for  
the District of Columbia.

[May —, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

This appeal requires the Court to determine the extent to which the regulatory authority conferred upon the Securities and Exchange Commission by the Maloney Act and the Investment Company Act of 1940 displaces the strong antitrust policy embodied in § 1 of the Sherman Act. At issue is whether certain sales and distribution practices employed in the marketing of open-end management companies, popularly referred to as "mutual funds," are immune from antitrust liability. We conclude that they are, and accordingly affirm the judgment of the District Court.

### I

An "investment company" invests in the securities of other corporations and issues securities of its own.<sup>1</sup>

<sup>1</sup> The Investment Company Act of 1940 defines "investment company" to include any issuer of securities which

"(1) is or holds itself out as being engaged primarily, or proposed to engage primarily, in the business of investing, reinvesting, or trading in securities;

"(2) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 24, 1975

No. 73-1701 U.S. v. National Association  
of Securities Dealers

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Dear Harry:

I would be most grateful if you would deliver my NASD case on Thursday, when you bring down Gordon.

After the Chief Justice decided not to attend the Fourth Circuit Conference, and after the progress we have made this week, I decided that I would adhere to my previous plan. I am on the program at the Executive Session of the Circuit and District Judges on Thursday morning. I will return to Washington on Saturday and be here for our final session on Monday.

I enclose a brief statement which I think will suffice for purposes of your oral presentation. In addition, in the event you prefer a somewhat more detailed summary, I also enclose a statement prepared by David Boyd - who worked with me on this case. David will be happy to assist you.

With my thanks.

Sincerely,

*Lewis*

Mr. Justice Blackmun

lfp/ss



✓  
Stylistic and catechecking  
changes throughout  
~~\_\_\_\_\_~~

✓  
To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
- Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

From: Powell, J.

Circulated: \_\_\_\_\_

Recirculated: JUN 24 1975

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 73-1701

United States, Appellant,

v.

National Association of  
Securities Dealers,  
Inc., et al.

On Appeal from the United  
States District Court for  
the District of Columbia.

[May —, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

This appeal requires the Court to determine the extent to which the regulatory authority conferred upon the Securities and Exchange Commission by the Maloney Act and the Investment Company Act of 1940 displaces the strong antitrust policy embodied in § 1 of the Sherman Act. At issue is whether certain sales and distribution practices employed in marketing securities of open-end management companies, popularly referred to as "mutual funds," are immune from antitrust liability. We conclude that they are, and accordingly affirm the judgment of the District Court.

### I

An "investment company" invests in the securities of other corporations and issues securities of its own.<sup>1</sup>

<sup>1</sup> The Investment Company Act of 1940 defines "investment company" to include any issuer of securities which

"(1) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

"(2) is engaged or proposes to engage in the business of issuing

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 11, 1975

Re: No. 73-1701 - United States v. NASD

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

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