

# The Burger Court Opinion Writing Database

*Gordon v. New York Stock Exchange, Inc.*  
422 U.S. 659 (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

May 6, 1975

PERSONAL

Re: 74-304 - Gordon v. N. Y. S. E.

Dear Harry:

In case you missed this, it is  
of interest.

Regards,

A handwritten signature in dark ink, appearing to be "Warren", written in a cursive style.

Mr. Justice Blackmun

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

CHAMBERS OF  
THE CHIEF JUSTICE

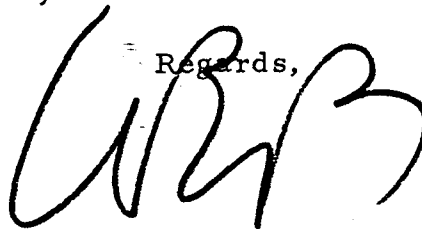
June 16, 1975

Re: 74-304 - Gordon v. New York Stock Exchange

Dear Harry:

Please join me in your June 10 circulation.

Regards,



Mr. Justice Blackmun

Copies to the Conference

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT RECORDS

✓

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

June 20, 1975

Re: No. 74-304 - Gordon v. New York Stock Exchange

Dear Harry:

Please join me. I will file a brief concurring opinion as well.

Sincerely,

William O. Douglas

Mr. Justice Blackmun

cc: The Conference

✓

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT MANUSCRIPT COLLECTION

Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

Richard A. Gordon et al., )  
 )  
 Petitioners, )  
 )  
 v. )  
 )  
 New York Stock Exchange, )  
 Inc., et al. )

On Writ of Certiorari to  
 the United States Court  
 Of Appeals for the  
 Second Circuit

Recirculated: \_\_\_\_\_

Mr. Justice DOUGLAS, concurring.

The Court relies upon three factors -- statutory authorization for regulation by the Securities and Exchange Commission (SEC), a long history of actual SEC oversight and approval, and continued congressional affirmation of the SEC's role -- in holding that the system of fixed commission rates employed on the securities exchanges is immune from antitrust attack. While I join that opinion, I write separately to emphasize the single factor which, for me, is of prime importance.

The mere existence of a statutory power of review by the SEC over fixed commission rates cannot justify immunizing those rates from antitrust challenges. The antitrust laws are designed to safeguard a strong public interest in free and open competition, and immunity from those laws should properly be implied only when some equivalent mechanism is functioning to protect that public interest. Only if the SEC is actively and aggressively exercising its powers of review and approval can we be sure that fixed commission rates are being monitored in the manner which Congress intended. Cf. Hughes Tool Co. v.

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas; J.

Circulate: \_\_\_\_\_

No. 74-304

Recirculate: \_\_\_\_\_

6-23

Richard A. Gordon et al., Petitioners, v. New York Stock Exchange, Inc., et al.	} On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
---	--

[June —, 1975]

MR. JUSTICE DOUGLAS, concurring.

The Court relies upon three factors—statutory authorization for regulation by the Securities and Exchange Commission (SEC), a long history of actual SEC oversight and approval, and continued congressional affirmation of the SEC's role—in holding that the system of fixed commission rates employed on the securities exchange is immune from antitrust attack. While I join that opinion, I write separately to emphasize the single factor which, for me, is of prime importance.

The mere existence of a statutory power of review by the SEC over fixed commission rates cannot justify immunizing those rates from antitrust challenges. The antitrust laws are designed to safeguard a strong public interest in free and open competition, and immunity from those laws should properly be implied only when some equivalent mechanism is functioning to protect that public interest. Only if the SEC is actively and aggressively exercising its powers of review and approval can we be sure that fixed commission rates are being monitored in the manner which Congress intended. Cf. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U. S. 363, 387-389 (1973).

152-2

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION

RECEIVED BY ADVISORY IN

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 17, 1975

RE: No. 74-304 Gordon v. New York Stock Exchange

Dear Potter:

Please join me in your concurring opinion in  
the above.

Sincerely,

*Stewart*

Mr. Justice Stewart

cc: The Conference

REPRODUCED FROM THE COLLECTION

OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT RECORDS

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

No. 74-304

From: Stewart, J.

Richard A. Gordon et al., )  
Petitioners, )  
v. )  
New York Stock Exchange, )  
Inc., et al. )

On Writ of Certiorari to the  
United States Court of  
Appeals for the Second  
Circuit.

Circulated: JUN 16 1975

[June —, 1975]

MR. JUSTICE STEWART, concurring.

While joining the opinion of the Court, I add a brief word. The Court has never held, and does not hold today, that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants. An implied repeal of the antitrust laws may be found only if there exists a "plain repugnancy between the antitrust and regulatory provisions."

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 351.

The mere existence of the Commission's reserve power of oversight with respect to rules initially adopted by the exchanges, therefore, does not necessarily immunize those rules from antitrust attack. Rather, "exchange self-regulation is to be regarded as justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act." Silver v. New York Stock Exchange, 373 U.S. 341, 351.

Oct 74  
Wm. Doyle



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

P. 1

1st DRAFT

**SUPREME COURT OF THE UNITED STATES** Stewart, J.

No. 74-304

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

Recirculated: JUN 17 1975

Richard A. Gordon et al.,  
Petitioners,  
v.  
New York Stock Exchange,  
Inc., et al.

On Writ of Certiorari to the  
United States Court of  
Appeals for the Second  
Circuit.

[June —, 1975]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, concurring.

While joining the opinion of the Court, I add a brief word. The Court has never held, and does not hold today, that the antitrust laws are inapplicable to anti-competitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants. An implied repeal of the antitrust laws may be found only if there exists a "plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia Nat'l Bank*, 374 U. S. 321, 351.

The mere existence of the Commission's reserve power of oversight with respect to rules initially adopted by the exchanges, therefore, does not necessarily immunize those rules from antitrust attack. Rather, "exchange self-regulation is to be regarded as justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act." *Silver v. New York Stock Exchange*, 373 U. S. 341, 361. The question presented by the present case, therefore, is whether exchange rules fixing minimum commission rates are "necessary to make the Securities Exchange Act work." *Id.*, at 357.

✓

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 18, 1975

Re: No. 74-304 - Gorden v. New York Stock  
Exchange, Inc.

---

Dear Harry:

Understanding that the change we chatted  
about on page 23 will be made, I join your  
circulating opinion in this case.

Sincerely,



Mr. Justice Blackmun

Copies to Conference

✓

REPRODUCED FROM THE COLLECTION

IN THE MANUSCRIPT DIVISION

U.S. SUPREME COURT LIBRARY

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 18, 1975

Re: No. 74-304, Richard A. Gordon v. New York  
Stock Exchange, Inc.

Dear Harry:

Please join me.

Sincerely,

*T.M.*  
T.M.

Mr. Justice Blackmun

cc: The Conference

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION

RECEIVED BY ADVISORY

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

From: Blackmun, J.

Circulated: 6/10/75

Recirculated: \_\_\_\_\_

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-304

Richard A. Gordon et al.,	} On Writ of Certiorari to the
Petitioners,	
v.	
New York Stock Exchange,	
Inc., et al.	United States Court of Appeals for the Second Circuit.

[June —, 1975]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the problem of reconciliation of the antitrust laws with a federal regulatory scheme in the particular context of the practice of the securities exchanges and their members of using fixed rates of commission. The United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit concluded that fixed commission rates were immunized from antitrust attack because of the Securities and Exchange Commission's authority to approve or disapprove exchange commission rates and its exercise of that power.

## I

In early 1971 petitioner Richard A. Gordon, individually and on behalf of an asserted class of small investors, filed this suit against the New York Stock Exchange, Inc. (NYSE), the American Stock Exchange, Inc. (Amex), and two member firms of the exchanges.<sup>1</sup>

<sup>1</sup> The member firms are Merrill Lynch, Pierce, Fenner & Smith, Inc., and Bache & Company, Inc.

P. 23  
STYLISTIC CHANGES

10. The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Blackmun, J.

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

Recirculated: 6/19/75

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-304

Richard A. Gordon et al., Petitioners, v. New York Stock Exchange, Inc., et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
---	---	--

[June —, 1975]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the problem of reconciliation of the antitrust laws with a federal regulatory scheme in the particular context of the practice of the securities exchanges and their members of using fixed rates of commission. The United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit concluded that fixed commission rates were immunized from antitrust attack because of the Securities and Exchange Commission's authority to approve or disapprove exchange commission rates and its exercise of that power.

### I

In early 1971 petitioner Richard A. Gordon, individually and on behalf of an asserted class of small investors, filed this suit against the New York Stock Exchange, Inc. (NYSE), the American Stock Exchange, Inc. (Amex), and two member firms of the exchanges.<sup>1</sup>

<sup>1</sup> The member firms are Merrill Lynch, Pierce, Fenner & Smith, Inc., and Bache & Company, Inc.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 12, 1975

No. 74-304    Gordon v. New York Stock  
                    Exchange

---

Dear Harry:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Blackmun

lfp/ss

cc: The Conference

✓  
REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION

SECRETED BY ADV. 1. IN

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 11, 1975

Re: No. 74-304 - Gordon v. NYSE

Dear Harry:

Please join me.

Sincerely,

WHR

Mr. Justice Blackmun

Copies to the Conference

✓  
REPRODUCED FROM THE COLLECTIO

THE MANUSCRIPT DIVISIO

SSA/CNOCJ OF ADV/BI I IN