

# The Burger Court Opinion Writing Database

*SEC v. Sloan*

436 U.S. 103 (1978)

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



*[Signature]*  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 27, 1978

Dear Bill:

Re: 76-1607 Securities and Exchange Commission  
v. Samuel H. Sloan

Like you I am content to let this fellow argue his case, even though he plainly gave a false response when he said he had not received a letter from the Clerk. I am willing to assume that even this brash gentleman was a trifle nervous and innocently responded as he did.

However, as to the SEC I think Mike should be authorized to write a letter telling the Commission that the Rules govern them as well as all other counsel.

Mike did not inform me on the Bench that both had taken liberties with our Rules.

*[Signature]*  
Regards,

*WSB*

Mr. Justice Brennan

cc: The Conference  
The Clerk

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

CHAMBERS OF  
THE CHIEF JUSTICE

May 6, 1978

Dear Bill:

Re: 76-1607 SEC v. Sloan

You have resolved my reservations on  
this case, and I join. It is now up to Congress.

Regards,

WB

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

March 27, 1978

RE: No. 76-1607 Securities and Exchange Commission v.  
Sloan

Dear Chief:

I think you should know that Sloan registered with the Clerk between 1:15 and 1:30 and that Pitt, General Counsel for the S.E.C., registered with the Clerk only some three-quarters of an hour earlier, between 12:30 and 12:45 P.M. I would feel that if any point is to be made of Sloan's tardiness I would have to ask Pitt to acknowledge that he too was tardy. In other words, I really think the whole matter should be dropped.

Sincerely,



The Chief Justice

cc: The Conference

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

From: Mr. Justice Brennan

Circulated: 3 MAY 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES Recirculated: \_\_\_\_\_

\_\_\_\_\_  
No. 76-1607  
\_\_\_\_\_

Securities and Exchange Commission, Petitioner ) On Writ of Certiorari to  
v. ) the United States Court of Appeals for the Second  
Samuel H. Sloan ) Circuit

[May --, 1978]

MR. JUSTICE BRENNAN, concurring in the judgment.

Although I concur in much of the the Court's reasoning and in its holding that "the Commission is not empowered to issue, based upon a single set of circumstances, a series of summary orders which would suspend trading beyond the initial 10-day period," ante, at 2, I cannot join the Court's opinion because of its omissions and unfortunate dicta.

I

The Court's opinion does not reveal how flagrantly abusive the Security and Exchange Commission's use of its § 12(k) authority has been. That section authorizes the Commission "summarily to suspend trading in any security . . . for a period not to exceed ten days . . . ." 15

To: The Chief Justice  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Clark  
Mr. Justice Brewster

5/8/78

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1607

Securities and Exchange  
Commission, Petitioner, } On Writ of Certiorari to the United  
v. } States Court of Appeals for the  
Samuel H. Sloan. } Second Circuit.

[May —, 1978]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

Although I concur in much of the Court's reasoning and in its holding that "the Commission is not empowered to issue, based upon a single set of circumstances, a series of summary orders which would suspend trading beyond the initial 10-day period," *ante*, at 2, I cannot join the Court's opinion because of its omissions and unfortunate dicta.

I

The Court's opinion does not reveal how flagrantly abusive the Security and Exchange Commission's use of its § 12 (k) authority has been. That section authorizes the Commission "summarily to suspend trading in any security . . . for a period not to exceed ten days . . ." 15 U. S. C. § 78l (k) (1970 ed., Supp. V). As the Court says, this language "is persuasive in and of itself" that 10 days is the "maximum time period for which trading can be suspended for any single set of circumstances." *Ante*, at 7. But the Commission has used § 12 (k), or its predecessor statutes, see *ante*, at 1 n. 1, to suspend trading in a security for up to 13 years. See App., Brief *Amicus Curiae* of Canadian Javelin Limited, at 1a. And, although the 13-year suspension is an extreme example, the record is replete with suspensions lasting the better part of a year. See App. 184-211. I agree that § 12 (k) is clear on its face and that it prohibits this administrative practice.

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

CHAMBERS OF  
JUSTICE POTTER STEWART

May 1, 1978

Re: No. 76-1607, SEC v. Sloan

Dear Bill,

I am glad to join your opinion for the Court  
in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 1, 1978

Re: 76-1607 - SEC v. Sloan

Dear Bill,

Please join me.

Sincerely yours,



Mr. Justice Rehnquist  
Copies to the Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 3, 1978

Re: No. 76-1607 - SEC v. Sloan

Dear Bill:

Please join me.

Sincerely,

*J.M.*

T.M.

Mr. Justice Brennan

cc: The Conference

Mr. Justice BREWSTER  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: MAY 8 1978

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

No. 76-1607 - Securities and Exchange Commission v. Sloan

MR. JUSTICE BLACKMUN, concurring in the judgment.

I join the Court in its judgment, but I am less sure than the Court is that the Congress has not granted the Securities and Exchange Commission at least some power to suspend trading in a non-exempt security for successive 10-day periods despite the absence of a new set of circumstances. The Congress' awareness, recognition, and acceptance of the Commission's practice, see ante, p. 15 nn. 8 and 9, at the time of the 1963 amendments, blunts, it seems to me, the original literal language of the statute. The 1975 Report of the Senate Banking Committee, stating that the Commission was "expected to use" § 12(j)'s amended suspension-of-registration

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

From: Mr. Justice Blackmun

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## SUPREME COURT OF THE UNITED STATES

No. 76-1607

Securities and Exchange  
 Commission, Petitioner, } On Writ of Certiorari to the United  
 v. } States Court of Appeals for the  
 Samuel H. Sloan. } Second Circuit.

[May —, 1978]

MR. JUSTICE BLACKMUN, concurring in the judgment.

I join the Court in its judgment, but I am less sure than the Court is that the Congress has not granted the Securities and Exchange Commission at least some power to suspend trading in a nonexempt security for successive 10-day periods despite the absence of a new set of circumstances. The Congress' awareness, recognition, and acceptance of the Commission's practice, see *ante*, p. 15 nn. 8 and 9, at the time of the 1963 amendments, blunts, it seems to me, the original literal language of the statute. The 1975 Report of the Senate Banking Committee, stating that the Commission was "expected to use" § 12 (j)'s amended suspension-of-registration provision "in cases of extended duration," *ante*, p. 17, certainly demands new circumspection of the Commission, but I do not believe it wholly extinguished Congress' acceptance of restrained use of successive 10-day suspensions when an emergency situation is presented, as for instance, where the Commission is unable adequately to inform the public of the existence of a suspected market manipulation within a single 10-day period. Section 12 (j)'s suspension remedy provides no aid when a nonissuer has violated the securities law, or where the security involved is not registered, or in the interim period before notice and an opportunity for a hearing can be provided and a formal finding of misconduct made on the record.

Here, the Commission indulged in 37 suspension orders, all

To: The Chief Justice

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

From: Mr. Justice Blackmun

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

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Recirculated: MAY 10 1978

## SUPREME COURT OF THE UNITED STATES

No. 76-1607

Securities and Exchange  
 Commision, Petitioner, } On Writ of Certiorari to the United  
 v. } States Court of Appeals for the  
 Samuel H. Sloan. } Second Circuit.

[May —, 1978]

MR. JUSTICE BLACKMUN, concurring in the judgment.

I join the Court in its judgment, but I am less sure than the Court is that the Congress has not granted the Securities and Exchange Commission at least some power to suspend trading in a nonexempt security for successive 10-day periods despite the absence of a new set of circumstances. The Congress' awareness, recognition, and acceptance of the Commission's practice, see *ante*, pp. 15-16, nn. 9 and 10, at the time of the 1964 amendments, blunts, it seems to me, the original literal language of the statute. The 1975 Report of the Senate Banking Committee, stating that the Commission was "expected to use" § 12 (j)'s amended suspension-of-registration provision "in cases of extended duration," *ante*, p. 18, certainly demands new circumspection of the Commission, but I do not believe it wholly extinguished Congress' acceptance of restrained use of successive 10-day suspensions when an emergency situation is presented, as for instance, where the Commission is unable adequately to inform the public of the existence of a suspected market manipulation within a single 10-day period. Section 12 (j)'s suspension remedy provides no aid when a nonissuer has violated the securities law, or where the security involved is not registered, or in the interim period before notice and an opportunity for a hearing can be provided and a formal finding of misconduct made on the record.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 1, 1978

76-1607 SEC v. Sloan

Dear Bill:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist  
Submitted: APR 18 1978

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-1607

Securities and Exchange  
Commission, Petitioner,  
*v.*  
Samuel H. Sloan. } On Writ of Certiorari to the United  
States Court of Appeals for the  
Second Circuit.

[May —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Under the Securities Exchange Act of 1934 the Securities and Exchange Commission has the authority "summarily to suspend trading in any security . . . for a period not exceeding ten days" if "in its opinion the public interest and the protection of investors so require."<sup>1</sup> Acting pursuant to this

<sup>1</sup> This authority is presently found in § 12 (k) of the Act, which was added by amendment in 1975 by Pub. L. No. 94-29 § 9, 89 Stat. 118. It provides in pertinent part:

"If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days . . . No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended." 15 U. S. C. (Supp. V) § 78l (k).

This power was previously found in §§ 15 (c) (5) and 19 (a) (4) of the Act, which for all purposes relevant to this case were substantially identical to the current statute, § 12 (k), except that § 15 (c) (5) authorized summary suspension of trading in securities which were traded in the over-the-counter market, while § 19 (a) (4) permitted summary suspension of trading in securities which were traded on the national exchanges. 15 U. S. C. §§ 78o (c) (5) and 78s (a) (4) (1970 ed.). Congress consolidated those powers in § 12 (k).

✓  
 Pp 3-6, 11, 12, 16-18  
 Footnotes Renumbered

To: The Chief  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Stevens

Mr. Justice

Mr. Justice

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 76-1607

Securities and Exchange  
 Commission, Petitioner, } On Writ of Certiorari to the United  
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 Samuel H. Sloan. } Second Circuit.

[May —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Under the Securities Exchange Act of 1934 the Securities and Exchange Commission has the authority "summarily to suspend trading in any security . . . for a period not exceeding ten days" if "in its opinion the public interest and the protection of investors so require."<sup>1</sup> Acting pursuant to this

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 1, 1978

Re: 76-1607 - SEC v. Sloan

Dear Bill:

Please join me.

Respectfully,



Mr. Justice Rehnquist

Copies to the Conference