

The Burger Court Opinion Writing Database

*National Society of Professional Engineers
v. United States*

435 U.S. 679 (1978)

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

April 10, 1978

Dear John:

Re: 76-1767 National Society of Professional Engineers v. United States

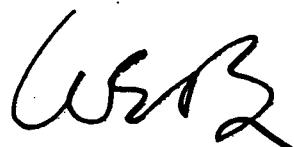
I will file a concurring and dissenting opinion along the following lines:

"I concur in that part of the Court's judgment sustaining the finding of a violation of the Sherman Act. I cannot agree that judicial power extends to authorize a court to enjoin the petitioner from announcing its view that competitive bidding by professional engineers is unethical, that being the Society's view of the matter.

"First, the difference between what professional engineers may legally do and what they may ethically do is one of the reasons for having ethical codes and professional societies. Any members who do not agree can resign from the Society. The issue is not whether the Society's conclusion is correct but rather its right to express the collective view. No court has power to throttle that kind of expression. Those members who carry out the Society's position by conduct may suffer consequences, but the expressions may not be forbidden."

Regards,

Mr. Justice Stevens
cc: The Conference



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

From: The Chief Justice

Circulated APR 21 1978

1st DRAFT

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 76-1767

National Society of Professional Engineers, Petitioner,
v.
United States. } On Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit.

[April —, 1978]

MR. CHIEF JUSTICE BURGER, concurring and dissenting.

I concur in the Court's judgment to the extent it sustains the finding of a violation of the Sherman Act but dissent from that portion of the judgment prohibiting petitioner from stating in its published standards of ethics the view that competitive bidding is unethical. The First Amendment guarantees the right to express such a position and that right cannot be impaired under the cloak of remedial judicial action.

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 5, 1978

RE: No. 76-1767 National Society of Professional
Engineers v. United States

Dear John:

Please note at the foot of your opinion that I
took no part in the consideration or decision of this
case.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 10, 1978

Re: No. 76-1767, National Society of Professional
Engineers v. United States

Dear John,

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

Sincerely yours,

PS
1/

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 6, 1978

Re: 76-1767 - National Society
of Professional Engineers
v. United States

Dear John,

I agree.

Sincerely yours,



Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 23, 1978

MEMORANDUM TO THE CONFERENCE

Re: No.76-1767, Nat'l Society of Professional Engineers v. U.S.

I vote to affirm the Court of Appeals. Since petitioner's rule precludes any direct price competition among engineers, it is a per se violation of the Sherman Act. Whether competitive bidding is in fact desirable is for the individual customers, not petitioners, to decide.

JM.

T.M.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 10, 1978

Re: 76-1767 - National Society of Professional
Engineers v. United States

Dear John:

Please join me.

Sincerely,

J.M.

T. M.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 10, 1978

Re: No. 76-1767 - National Society of Professional
Engineers v. United States

Dear John:

I shall probably write a brief concurrence. I'll endeavor
to get it to you as soon as possible.

Sincerely

HAB

Mr. Justice Stevens

cc: The Conference

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

From: Mr. Justice Blackmun
Circulated: APR 14 1978

Recirculated: _____

No. 76-1767 - National Society of Professional Engineers
v. United States

MR. JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I join Parts I and III of the Court's opinion and concur in the judgment. I do not join Part II because I would not, at least for the moment, reach as far as the Court appears to me to do in intimating, ante, at 16 and n.22, that any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden under the Sherman Act. In my view, the decision in Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-789 n.17 (1975), properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to

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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Printed
 1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1767

National Society of Professional Engineers, Petitioner, <i>v.</i> United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
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[April —, 1978]

MR. JUSTICE BLACKMUN, concurring in part and concurring
in the judgment.

I join Parts I and III of the Court's opinion and concur in the judgment. I do not join Part II because I would not, at least for the moment, reach as far as the Court appears to me to do in intimating, *ante*, at 16 and n. 22, that any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden under the Sherman Act. In my view, the decision in *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 788-789 n. 17 (1975), properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation. Certainly, this case does not require us to decide whether the "Rule of Reason" as applied to the professions ever could take account of benefits other than increased competition. For even accepting petitioner's assertion that product quality is one such benefit, and that maintenance of the quality of engineering services requires that an engineer not bid before he has made full acquaintance with the scope of a client's desired project, Brief for Petitioner 49-50, 54, petitioner Society's rule is still grossly overbroad. As petitioner concedes, Tr. of Oral Arg. 47-48, Rule 11 (c) forbids any simultaneous consultation between a client and several engineers, even where the client provides complete information to each about the scope and nature of the desired project before requesting price information. To secure a price estimate on a project, the client must

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: _____

2nd DRAFT

Recirculated: APR 21 1978

SUPREME COURT OF THE UNITED STATES

No. 76-1767

National Society of Professional Engineers, Petitioner,
v.
United States. On Writ of Certiorari to the
United States Court of Appeals for the District
of Columbia Circuit.

[April —, 1978]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring in part and concurring in the judgment.

I join Parts I and III of the Court's opinion and concur in the judgment. I do not join Part II because I would not, at least for the moment, reach as far as the Court appears to me to do in intimating, *ante*, at 16 and n. 22, that any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden under the Sherman Act. In my view, the decision in *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 788-789 n. 17 (1975), properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation. Certainly, this case does not require us to decide whether the "Rule of Reason" as applied to the professions ever could take account of benefits other than increased competition. For even accepting petitioner's assertion that product quality is one such benefit, and that maintenance of the quality of engineering services requires that an engineer not bid before he has made full acquaintance with the scope of a client's desired project, Brief for Petitioner 49-50, 54, petitioner Society's rule is still grossly overbroad. As petitioner concedes, Tr. of Oral Arg. 47-48, Rule 11 (c) forbids any simultaneous consultation between a client and several engineers, even where the client provides complete information to each about the scope and nature of the desired project before requesting price information. To secure a price estimate on a project, the client must

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 6, 1978

No. 76-1767 National Society of Professional
Engineers v. United States

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 17, 1978

Re: No. 76-1767 - National Society of Professional
Engineers v. United States

Dear Harry:

Please join me in your concurring opinion in this case.

Sincerely,



Mr. Justice Blackmun

Copies to 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 Rehnquist

2nd DRAFT

From: Mr. Justice Stevens

SUPREME COURT OF THE UNITED STATES

Recirculated: 4/5/78

No. 76-1767

Recirculated: _____

National Society of Professional Engineers, Petitioner
 v.
 United States.

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

[April —, 1978]

MR. JUSTICE STEVENS delivered the opinion of the Court.

This is a civil antitrust case brought by the United States to nullify an association's canon of ethics prohibiting competitive bidding by its members. The question is whether the canon may be justified under the Sherman Act, 15 U. S. C. § 1 *et seq.*, because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety. The District Court rejected this justification without making any findings on the likelihood that competition would produce the dire consequences foreseen by the association.¹ The Court of Appeals affirmed.² We granted certiorari to decide whether the District Court should have considered the factual basis for the proffered justification before rejecting it.

— U. S. —. Because we are satisfied that the asserted

¹ *United States v. National Society of Professional Engineers*, 389 F. Supp. 1193 (DC 1974).

² — U. S. App. D. C. —, 555 F. 2d 978 (1977). When the District Court's original judgment was entered, petitioner was entitled to appeal directly to this Court. We vacated the District Court judgment for reconsideration in the light of our then recent decision in *Goldfarb v. Virginia State Bar*, 421 U. S. 773, see 422 U. S. 1031. After reconsideration, the District Court re-entered its original judgment, 404 F. Supp. 457 (DC 1975), and petitioner then appealed to the Court of Appeals.

✓ p.17

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

From: Mr. Justice Stevens

Circulated: _____
Recirculated: APR 12 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1767

National Society of Professional Engineers, Petitioner,
v.
United States. | On Writ of Certiorari to the
United States Court of Appeals for the District
of Columbia Circuit.

[April —, 1978]

MR. JUSTICE STEVENS delivered the opinion of the Court.

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P.19

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

From: Mr. Justice Stevens

Circulated: _____

Recirculated: APR 21 1978

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1767

National Society of Professional Engineers, Petitioner,
v.
United States. } On Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit.

[April —, 1978]

MR. JUSTICE STEVENS delivered the opinion of the Court.

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