

# 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:

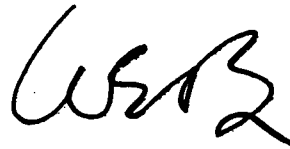
"I concur in that part of the Court's judgment  
sustaining the finding of a violation of the Sherman Act.  
I cannot agree that judicial power extends to authorize  
a court to enjoin the petitioner from announcing its  
view that competitive bidding by professional engineers  
is unethical, that being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

P.S.  
✓

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

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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,

*T.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

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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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 1st 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.
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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

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Recirculated: **APR 21 1978**

2nd 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.
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[April —, 1978]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHN-  
 QUIST 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

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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,

*L. Lewis*

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

Circulated: 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.
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[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.<sup>1</sup> The Court of Appeals affirmed.<sup>2</sup> 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

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

<sup>2</sup> — 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

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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.
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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

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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.
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[April —, 1978]

MR. JUSTICE STEVENS delivered the opinion of the Court.

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