

# The Burger Court Opinion Writing Database

*Board of Governors, FRS v. First Lincolnwood Corp.*

439 U.S. 234 (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

(6)

CHAMBERS OF  
THE CHIEF JUSTICE

November 27, 1978

RE: 77-832 - Board of Governors of the  
Federal Reserve System v. First  
Lincolnwood Corporation

Dear Thurgood:

I join.

Regards,

WBB

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

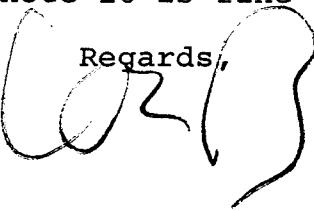
December 6, 1978

Re: 77-832 - Board of Governors of the Federal Reserve System v. First Lincolnwood Corporation

Dear Thurgood:

Your new footnote 18 is fine with me.

Regards,



Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 14, 1978

1

RE: No. 77-832 Board of Governors of FEderal  
Reserve System v. First Lincoln-  
wood Corporation

Dear Thurgood:

I agree.

Sincerely,

*Brennan*

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

(H)

November 14, 1978

Re: No. 77-832, Board of Governors, FRS  
v. First Lincolnwood Corp.

Dear Thurgood,

I am glad to join your opinion for the  
Court.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

December 4, 1978

Re: No. 77-832, Board of Governors of the  
Federal Reserve System v.  
First Lincolnwood Corp.

Dear Thurgood,

I have no objection to the addition of  
the footnote proposed in your Memorandum of  
today.

Sincerely yours,

P.S.

Mr. Justice Marshal

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 14, 1978 *3*

Re: 77-832 - Board of Governors of the  
Federal Reserve System v.  
First Lincolnwood Corp.

Dear Thurgood,

Please join me.

Sincerely yours,

*Byrn*

Thurgood,  
I enclose a memorandum from  
my clerk making a few points  
that may warrant your attention  
B.

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 5, 1978

Re: No. 77-832 - Board of Governors of  
the Federal Reserve System v.  
First Lincolnwood Corporation

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Dear Thurgood,

Your suggested footnote on page 18  
is fine with me.

Sincerely yours,



Mr. Justice Marshall  
Copies to the Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 13, 1978

Re: 77-832 - Board of Governors of the Federal  
Reserve System v. First Lincolnwood  
Corporation

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Memorandum to The Conference

On Friday, the President signed the Financial Institutions Regulatory Act of 1978. This statute amends the Bank Holding Company Act in a manner not critical to this decision. I will circulate a draft dealing with these amendments as soon as I am able to obtain the legislative material from Congress.

Sincerely,

*T.M.*  
T.M.

PP. 6, 10, '74

18 NOV 1978

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 77-832

Board of Governors of the  
Federal Reserve System,  
Petitioner,  
v.  
First Lincolnwood Corporation. } On Writ of Certiorari to the  
United States Court of  
Appeals for the Seventh  
Circuit.

[November —, 1978]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Section 3 (a) of the Bank Holding Company Act, 12 U. S. C. § 1842 (a), prohibits any company from acquiring control of a bank without prior approval by the Board of Governors of the Federal Reserve System (Board).<sup>1</sup> Under § 3 (c)(1) of

<sup>1</sup> More specifically, § 3 (a), 70 Stat. 134-135, as amended, 80 Stat. 237, 12 U. S. C. § 1842 (a), provides in pertinent part:

"It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company."

Section 2 (a)(1) of the Act, 70 Stat. 133, as amended, 84 Stat. 1760, 12 U. S. C. § 1841 (a)(1), defines a "bank holding company" as

"any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this Act."

A company has "control" over a bank or over any company if

"(A) the company directly or indirectly or acting through one or more

2  
pp. 3, 4, 12, 13, 14, 16, 18

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-832

Board of Governors of the  
Federal Reserve System,  
Petitioner,  
*v.*  
First Lincolnwood Corporation. } On Writ of Certiorari to the  
United States Court of  
Appeals for the Seventh  
Circuit.

[November —, 1978]

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<sup>1</sup> More specifically, § 3 (a), 70 Stat. 134-135, as amended, 80 Stat. 237, 12 U. S. C. § 1842 (a), provides in pertinent part:

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Section 2 (a)(1) of the Act, 70 Stat. 133, as amended, 84 Stat. 1760, 12 U. S. C. § 1841 (a)(1), defines a "bank holding company" as "any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this Act."

A company has "control" over a bank or over any company if "(A) the company directly or indirectly or acting through one or more

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 4, 1978

Re: No. 77-832 - Board of Governors of the  
Federal Reserve System v. First Lincoln-  
wood Corporation

MEMORANDUM TO THE CONFERENCE

If there is no objection from those who have joined the opinion, I propose to add the following footnote at the end of the first full paragraph on page 18 in answer to the dissent:

The dissent argues that because the proposed transaction would not exacerbate the financial difficulties of the bank, the Board's disapproval rests not on the effects of the transaction, but on "pre-existing or unrelated conditions." Post, at \_\_\_\_\_. In the dissent's view, the Board, by looking beyond the transaction before it, attempted to exercise the day-to-day regulatory authority over banks which Congress denied to it and conferred on the Comptroller. We disagree with the basic premise of the dissent's argument. As the Board found, the effect of this transaction would have been the formation of a financially unsound bank holding company. Thus, the Board's attempt to prevent this effect and to induce respondent to form a financially viable enterprise was entirely consistent with the language the dissent cites. Moreover, Congressional concern with financial soundness and capital adequacy is by no means "irrelevant," post at \_\_\_, to whether the Board's attempt exceeded its authority.

Sincerely,

*JM*

f 15

5 DEC 1978

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

**No. 77-832**

Board of Governors of the  
Federal Reserve System,  
Petitioner,  
v.  
First Lincolnwood Corporation. } On Writ of Certiorari to the  
United States Court of  
Appeals for the Seventh  
Circuit.

[November —, 1978]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

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<sup>1</sup> More specifically, § 3 (a), 70 Stat. 134-135, as amended, 80 Stat. 237, 12 U. S. C. § 1842 (a), provides in pertinent part:

"It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company."

Section 2 (a)(1) of the Act, 70 Stat. 133, as amended, 84 Stat. 1760, 12 U. S. C. § 1841 (a)(1), defines a "bank holding company" as "any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this Act."

A company has "control" over a bank or over any company if "(A) the company directly or indirectly or acting through one or more

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

(5)

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 16, 1978

Re: No. 77-832 - Board of Governors v. First  
Lincolnwood Corporation

Dear Thurgood:

Please join me.

I agree that it may be well, when the material is available, to add a reference to the 1978 Act.

Sincerely,

Harry

Mr. Justice Thurgood

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 4, 1978

Re: No. 77-832 - Board of Governors v. First  
Lincolnwood Corp.

Dear Thurgood:

Your proposed new footnote certainly has my approval, except that I have the usual discomfort with that word "viable." Yet it is not so bad as counsel's use of "parameter" this morning.

Sincerely,

*Harry*

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 14, 1978

No. 77-832 Board of Governors v. First Lincolnwood

Dear Thurgood:

Please join me in your opinion for the Court.

I note that, in a subsequent draft, you will make an appropriate reference to the recent amendment of the Act.

Sincerely,

*Lewis*

Mr. Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

December 4, 1978

No. 77-832 Board of Governors v. First Lincolnwood

Dear Thurgood:

Your addition is fine with me.

Sincerely,



Mr. Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 16, 1978

Re: No. 77-832 Board of Governors of the Federal  
Reserve System v. First Lincolnwood Corp.

Dear Thurgood:

Like John, I voted at Conference to affirm, so I shall await his decision as to whether to dissent or not.

Sincerely,

WR

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 4, 1978

Re: No. 77-832 Board of Governors of the Federal Reserve  
System v. First Lincolnwood Corporation

Dear John:

Please join me in your dissent.

Sincerely,



Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 14, 1978

Re: 77-832 - Board of Governors of the Federal  
Reserve System v. First Lincolnwood Corp.

Dear Thurgood:

Although I may cave in, I presently intend to  
circulate a dissent. Please bear with me.

Respectfully,



Mr. Justice Marshall

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

From: Mr. Justice Stevens

Circulated: DEC 1 1978

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

77-832 - Board of Governors of the Federal Reserve System v.

First Lincolnwood Corporation

MR. JUSTICE STEVENS, dissenting.

This case involves a proposal to restructure the ownership of a relatively small bank in order to reduce its income taxes. From the standpoint of the bank's competitors, its creditors, its owners, and its customers, as well as the public at large, the proposed transaction is at worst completely harmless, and at best substantially beneficial.

The Federal Reserve Board nevertheless refused to approve the transaction, not because of any concern about adverse effects of the transaction itself, but rather to induce the owners of the bank to take action that the Board has no authority to require of bank owners generally. In the Board's view, its approval power is a sort of lever that it may use to bend the will of independent bank owners and managers. I share the opinion expressed by Chief Judge Fairchild for the unanimous Court of Appeals for the Seventh Circuit sitting en banc that the application of this kind of leverage has not been

p. 1, 5

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

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_ DEC 5 1978

1st PRINTED DRAFT

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

## SUPREME COURT OF THE UNITED STATES

No. 77-832

Board of Governors of the  
Federal Reserve System,  
Petitioner,  
v.  
First Lincolnwood Corporation. } On Writ of Certiorari to the  
United States Court of  
Appeals for the Seventh  
Circuit.

[December —, 1978]

MR. JUSTICE STEVENS, with whom MR. JUSTICE REHNQUIST  
joins, dissenting. )

This case involves a proposal to restructure the ownership of a relatively small bank in order to reduce its income taxes. From the standpoint of the bank's competitors, its creditors, its owners, and its customers, as well as the public at large, the proposed transaction is at worst completely harmless, and at best substantially beneficial.

The Federal Reserve Board nevertheless refused to approve the transaction, not because of any concern about adverse effects of the transaction itself, but rather to induce the owners of the bank to take action that the Board has no authority to require of bank owners generally. In the Board's view, its approval power is a sort of lever that it may use to bend the will of independent bank owners and managers. I share the opinion expressed by Chief Judge Fairchild for the unanimous Court of Appeals for the Seventh Circuit sitting en banc that the application of this kind of leverage has not been authorized by Congress.<sup>1</sup>

The normal reason for subjecting any type of transaction

<sup>1</sup> "The Board assumes the stance that the tax advantage of bank holding company status is a reward which it may withhold until the applicant's financial status fulfills the Board's standard of desirability. We do not find this power or breadth of discretion in the statute." *First Lincolnwood Corp. v. Board of Governors*, 560 F. 2d 252, 262 (en banc) (CA7 1977).

P.5

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:

2nd DRAFT

REC'D 5 1978  
Recirculated:

## SUPREME COURT OF THE UNITED STATES

No. 77-832

Board of Governors of the  
Federal Reserve System,  
Petitioner,  
v.  
First Lincolnwood Corporation. } On Writ of Certiorari to the  
United States Court of  
Appeals for the Seventh  
Circuit.

[December —, 1978]

MR. JUSTICE STEVENS, with whom MR. JUSTICE REHNQUIST joins, dissenting.

This case involves a proposal to restructure the ownership of a relatively small bank in order to reduce its income taxes. From the standpoint of the bank's competitors, its creditors, its owners, and its customers, as well as the public at large, the proposed transaction is at worst completely harmless, and at best substantially beneficial.

The Federal Reserve Board nevertheless refused to approve the transaction, not because of any concern about adverse effects of the transaction itself, but rather to induce the owners of the bank to take action that the Board has no authority to require of bank owners generally. In the Board's view, its approval power is a sort of lever that it may use to bend the will of independent bank owners and managers. I share the opinion expressed by Chief Judge Fairchild for the unanimous Court of Appeals for the Seventh Circuit sitting en banc that the application of this kind of leverage has not been authorized by Congress.<sup>1</sup>

The normal reason for subjecting any type of transaction

<sup>1</sup> "The Board assumes the stance that the tax advantage of bank holding company status is a reward which it may withhold until the applicant's financial status fulfills the Board's standard of desirability. We do not find this power or breadth of discretion in the statute." *First Lincolnwood Corp. v. Board of Governors*, 560 F. 2d 252, 262 (en banc) (CA7 1977).