

The Burger Court Opinion Writing Database

Securities Industry Association v. Board of Governors, FRS

468 U.S. 137 (1984)

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

June 25, 1984

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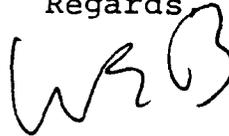
'84 JUN 26 10:18

Re: 82-1766 - Securities Industry Assoc., Et Al. v.
Board of Governors of the Fed. Reserve

Dear Harry:

I join.

Regards



Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 2, 1984

No. 82-1766

Securities Industry Association
v. Board of Federal Reserve System

Dear Sandra,

John, you and I are in dissent in
the above. Thank you for being willing
to take on the dissent.

Sincerely,



Justice O'Connor

Copy to Justice Stevens

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

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JUSTICE MARSHALL

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

84 JUN 19 A9:52

June 18, 1984

No. 82-1766

Securities Industry Association, et
al. v. Board of Governors of the
Federal Reserve System, et al.

Dear Sandra,

Please join me in your dissent.

Sincerely,



Justice O'Connor

Copies to the Conference

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Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

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JUSTICE MARSHALL

June 25, 1984

'84 JUN 25 P3:21

Re: 82-1766 -

Securities Industry Ass'n v. Board of
Governors of the Federal Reserve System

Dear Harry,

A close case indeed, but I will stay
with my Conference vote to reverse and join
your opinion.

Sincerely yours,



Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 21, 1984

Re: No. 82-1766-Securities Industry Assoc. v. Bd.
of Governors of the Fed. Reserve System

Dear Harry:

Please join me.

Sincerely,

JM

T.M.

Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 15, 1984

Re: No. 82-1766, Securities Industry Association v.
Board of Governors of the Federal Reserve System

Dear Sandra:

It is my understanding that you have been assigned the dissent in this case. Your clerk was given a xerox copy of the opinion, but a few minor changes from that copy appear in the printed copy.

Because this distribution is two weeks beyond the Chief Justice's May 31 rule, you may wish it to go over the Term.

Sincerely,

H.A.B.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 15, 1984

Re: No. 82-1766, Securities Industry Association v.
Board of Governors of the Federal Reserve System

Dear Lewis:

Here, at last, is a proposed opinion in the other SIA case. I believe that there is nothing in your opinion or in mine that conflicts in any way, but please let me know if you feel otherwise.

I can give you no very strong reason for it, but I think it would be well if both opinions came down the same day. Of course, because of its "lateness," this one may go over the Term.

Sincerely,



Justice Powell

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: JUN 15 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1766

SECURITIES INDUSTRY ASSOCIATION ET AL., PETITIONERS v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June —, 1984]

JUSTICE BLACKMUN delivered the opinion of the Court.

This case involves a challenge to the efforts of a state commercial bank to enter the business of selling third-party commercial paper. The Board of Governors of the Federal Reserve System (Board) concluded that such activity by state member banks is not prohibited by the Banking Act of 1933 (Act), ch. 89, 48 Stat. 162 (commonly known as the Glass-Steagall Act) because commercial paper is neither a "security" nor a "note" within the meaning of that Act and therefore falls outside the Act's proscriptions. The District Court disagreed with the Board, but the Court of Appeals deferred to the Board's interpretation and reversed the judgment of the District Court. Because commercial paper falls within the plain language of the Act, and because the inclusion of commercial paper within the terms of the Act is fully consistent with the Act's purposes, we conclude that commercial paper is a "security" under the Glass-Steagall Act, and we reverse the judgment of the Court of Appeals.

I

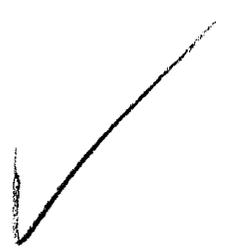
During 1978 Bankers Trust Company (Bankers Trust), a New York-chartered member bank of the Federal Reserve System, began serving as agent for several of its corporate

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Handwritten notes:
HTS
12-2
ME
[A large diagonal line is drawn across the page from the top left to the middle right, passing through the handwritten notes.]

Handwritten notes:
John
6/20

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



CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 26, 1984

Dear Lewis:

Re: No. 82-1766, Securities Industry Association v.
Board of Governors of the Federal Reserve System

I have made a few changes in my opinion that, I think, will alleviate the concern express in the third paragraph of your letter of June 16. This has gone to the printer and should be around tomorrow.

Sincerely,

Justice Powell

Stylistic changes
- Footnotes renumbered
pp. 2, 9-10, 12

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SUPREME COURT, U.S.
JUSTICE MARSHALL

'84 JUN 27 A9:48

2nd Draft

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: _____

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 82-1766

SECURITIES INDUSTRY ASSOCIATION ET AL., PETITIONERS v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 28, 1984]

JUSTICE BLACKMUN delivered the opinion of the Court.

This case involves a challenge to the efforts of a state commercial bank to enter the business of selling third-party commercial paper. The Board of Governors of the Federal Reserve System (Board) concluded that such activity by state member banks is not prohibited by the Banking Act of 1933 (Act), ch. 89, 48 Stat. 162 (commonly known as the Glass-Steagall Act) because commercial paper is neither a "security" nor a "note" within the meaning of that Act and therefore falls outside the Act's proscriptions. The District Court disagreed with the Board, but the Court of Appeals deferred to the Board's interpretation and reversed the judgment of the District Court. Because commercial paper falls within the plain language of the Act, and because the inclusion of commercial paper within the terms of the Act is fully consistent with the Act's purposes, we conclude that commercial paper is a "security" under the Glass-Steagall Act, and we reverse the judgment of the Court of Appeals.

I

During 1978 Bankers Trust Company (Bankers Trust), a New York-chartered member bank of the Federal Reserve System, began serving as agent for several of its corporate

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Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 16, 1986

82-1766 Securiites Industries Association v. Board

Dear Harry:

Please join me in your opinion for the Court in this case.

I have read it carefully with the question in mind whether there is inconsistency between my opinion in the "other" SIA case and yours in this case. I agree that certainly as to the basic reasoning and the holding, there is no conflict. Distinctly different issues are presented. Your opinion is well reasoned and I find it persuasive.

I do make one suggestion. Throughout your opinion, you use the term "investment banking" in drawing the distinction between it and "commercial banking". Simply as a matter of terminology, it may be desirable to make clear - possibly in a note - that you use the term to include the underwriting function of investment banking - the function at issue in this case. There are, of course, a number of common activities between the typical investment banking firm and a commercial bank, e.g., providing investment advice, safe-keeping of securities, and buying and selling government securities for the firm's or bank's own account. As you state, §16 of the Glass-Steagall Act prohibits "underwriting".

Sincerely,

Lewis

Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

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SUPREME COURT, U.S.
JUSTICE MARSHALL

'84 JUN 21 11:30

June 21, 1984

Re: No. 82-1766 Securities Industry Association v.
Board of Governors of the Federal Reserve System

Dear Harry:

Please join me.

Sincerely,

WHR

Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 19, 1984

Re: 82-1766 - Securities Industry Assn. v.
Board of Governors of the Federal
Reserve System

Dear Sandra:

While I agree with most of what you have written in dissent, I am troubled by a few points which I would like to identify in the hope that you might consider some slight revisions.

In the opening paragraph of your opinion you stress the specialized and technical character of the financial world and state the principle of judicial deference as applicable "in its strongest form." I am really not convinced that banking law is all that difficult or foreign to lawyers and judges. Personally, I was never particularly fond of the subject of negotiable instruments but I do think it is fairly routine stuff for a great many commercial lawyers. Moreover, I really think the force of your arguments do not need the extra crutch of such a strong principle of judicial deference. Accordingly, what I would like to suggest is that you simply adopt the same test of deference that the majority does on page 4 of its opinion. I think the arguments as you present them are strong enough to prevail under that test.

At three places in your opinion you in effect state that the argument favoring our construction is so strong that no other reading of the statute would be acceptable. Thus, on page 6, line 7 you use the words "simply cannot accommodate"; on page 14, the second sentence on the page seems to me to be a bit of an overstatement; and on page 22 you suggest that the statutory language "all but demands" the Board's reading. Although I think your argument is persuasive,

I am not sure it's quite that powerful and wonder if perhaps less positive language might be appropriate in those three places.

Finally, I would be a little more comfortable if you could omit the second paragraph of footnote 8. I am a little reluctant to foreclose the possibility that purchasing and underwriting prohibitions might be separated for some purposes.

If you can accommodate the substance of these concerns, I would very much like to join your opinion. I am sending a copy of this letter to Bill Brennan since he has already joined you.

Respectfully,



Justice O'Connor

cc: Justice Brennan

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

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'84 JUN 19 P1:32

June 19, 1984

Re: 82-1766 - Securities Industry Assn. v.
Board of Governors of the Federal
Reserve System

Dear Sandra:

Please join me in your dissenting opinion.

Respectfully,



Justice O'Connor

Copies to the Conference

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Justice Blackmun
Justice Powell
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Justice Stevens

From: Justice O'Connor

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1766

SECURITIES INDUSTRY ASSOCIATION ET AL., PETI-
TIONERS *v.* BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June —, 1984]

JUSTICE O'CONNOR, dissenting.

The question in this case is whether the Board of Governors of the Federal Reserve System (Board) adopted an erroneous interpretation of law when it concluded that commercial paper is not a "security" under, and hence is not subject to the proscriptions of, §§ 16 and 21 of the Glass-Steagall Act, 48 Stat. 184, 189, as amended, 49 Stat. 709, 12 U. S. C. §§ 24 (Seventh) and 378(a)(1). The area of banking law in which this question arises is as specialized and technical as the financial world it governs, and the relevant statutes are far from clear or easy to interpret. The question is accordingly one to which the principle of judicial deference to administrative constructions applies in its strongest form. Because of the Board's expertise and experience in this complicated area of law, and because of its extensive responsibility for administering the federal banking laws, the Board's interpretation of the Glass-Steagall Act must be sustained unless it is unreasonable. *Securities Industry Assn. v. Board of Governors*, post, at — — — and n. 16; *Investment Company Institute v. Camp*, 401 U. S. 617, 626-627 (1971); see also *Chevron, U. S. A. v. Natural Resources Defense Council*, — U. S. —, — — — (1984); *Board of Governors v. Investment Company Institute*, 450 U. S. 46, 56-58 (1981);

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 19, 1984

No. 82-1766 Securities Industry Association v. Board
of Governors of Federal Reserve System

Dear John,

I will be happy to make some modifications to the language of the draft in order to enable you to join it. I would propose on page 1 to modify the sentence in the middle of the page as follows:

"The question is accordingly one on which this Court must give substantial deference to the Board's construction."

On page 6, I propose to amend the second sentence in the first full paragraph as follows:

"A reading of §§16 and 21 reveals that petitioners' interpretation, like any other interpretation that treats commercial paper as a 'security,' does violence to the statutory language.

On page 8 in footnote 8, I propose to amend rather than eliminate the last paragraph as follows:

"The Court also treats the purchasing and underwriting prohibitions in the Act as if they were entirely separate. See ante, at _____. That treatment is inconsistent with the statutory language. There is no escaping the fact that any 'security' that the Act forbids a commercial bank to underwrite the Act also forbids the bank to purchase, unless it is an investment security. Although the purposes of the prohibitions are somewhat different, the link between the prohibitions, at least as far as this case is concerned, is indissoluble."

On page 14 I propose to amend the second sentence in the first full paragraph as follows:

"Indeed, petitioners have suggested no other construction that can be accommodated by the language of the statute."

Finally, on page 22, I propose to amend the first sentence of the first full paragraph as follows:

"In this case, the statutory language strongly supports the construction"

I hope these changes will satisfy your concerns.

Sincerely,



Justice Stevens

cc: Justice Brennan

pp. 1, 6, 8, 14, 22

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'84 JUN 20 P2:06

To: The Chief Justice
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Justice Stevens

From: Justice O'Connor

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1766

SECURITIES INDUSTRY ASSOCIATION ET AL., PETITIONERS v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June —, 1984]

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

The question in this case is whether the Board of Governors of the Federal Reserve System (Board) adopted an erroneous interpretation of law when it concluded that commercial paper is not a "security" under, and hence is not subject to the proscriptions of, §§ 16 and 21 of the Glass-Steagall Act, 48 Stat. 184, 189, as amended, 49 Stat. 709, 12 U. S. C. §§ 24 (Seventh) and 378(a)(1). The area of banking law in which this question arises is as specialized and technical as the financial world it governs, and the relevant statutes are far from clear or easy to interpret. The question is accordingly one on which this Court must give substantial deference to the Board's construction. Because of the Board's expertise and experience in this complicated area of law, and because of its extensive responsibility for administering the federal banking laws, the Board's interpretation of the Glass-Steagall Act must be sustained unless it is unreasonable. *Securities Industry Assn. v. Board of Governors*, post, at — — — and n. 16; *Investment Company Institute v. Camp*, 401 U. S. 617, 626-627 (1971); see also *Chevron, U. S. A. v. Natural Resources Defense Council*, — U. S. —, — — — (1984); *Board of Governors v. Investment Company Institute*, 450 U. S. 46, 56-58 (1981); *Federal Elec-*

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