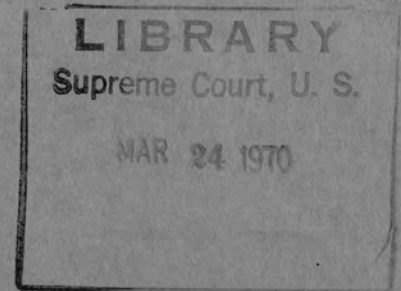


# Supreme Court of the United States

OCTOBER TERM, 1969



In the Matter of:

Docket No. 103

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 :  
 UNITED STATES OF AMERICA, :  
 :  
 Appellant :  
 :  
 vs. :  
 :  
 ARMOUR & COMPANY AND GENERAL :  
 HOST CORPORATION, :  
 :  
 Appellees :  
 :  
 ----- X

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Place Washington, D. C.  
Date March 5, 1970

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ARGUMENT OF:

P A G E

James van R. Springer, Office of the  
Solicitor General on behalf of Appellant

2

Herbert A. Bergson, Esq., on behalf  
of Appellees

18

REBUTTAL:

James van Springer

31

- - - -

JHAM

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

-----

UNITED STATES OF AMERICA,	)	
	)	
Appellant	)	
	)	
vs	)	No. 103
	)	
ARMOUR & COMPANY AND GENERAL	)	
HOST CORPORATION,	)	
	)	
Appellees	)	
	)	

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The above-entitled matter came on for argument at 10:35 o'clock a.m., on Thursday, March 5, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice  
 HUGO L. BLACK, Associate Justice  
 WILLIAM O. DOUGLAS, Associate Justice  
 JOHN M. HARLAN, Associate Justice  
 WILLIAM J. BRENNAN, JR., Associate Justice  
 POTTER STEWART, Associate Justice  
 BYRON R. WHITE, Associate Justice  
 THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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 Washington, D. C. 20530

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1 upon the business relationship that the packers would be allowed  
2 to have with enterprises engaged in the production and sale of  
3 food other than meat.

4 And, despite the efforts of defendants over the  
5 years, to relax these restrictions, they remained in effect.  
6 And the Court, most recently in 1961, rejected an attempt by  
7 the packers to relax the restrictions upon them.

8 The decree is complex and I will take the time here  
9 only to discuss the particular paragraphs that are in issue in  
10 this case. Thus, principally, paragraph Fourth in the decree,  
11 which begins on page 30 of the appendix. That paragraph pro-  
12 vides that the meat packing corporation, including, of course,  
13 Armour, are perpetually enjoined and ~~restrained~~ from either  
14 directly or indirectly, by themselves, or through their offi-  
15 cers, directors, agents, or servants, engaging in or carrying  
16 on the manufacturing, jobbing, selling, transporting, except as  
17 common carriers, distributing or otherwise dealing in some 114  
18 listed food products, including bakery products, most other  
19 groceries, vegetables and fruits.

20 Paragraph Fourth goes on to provide that the corpora-  
21 tion defendants are hereby further perpetually enjoined and  
22 restrained from owning, either directly or indirectly, severally  
23 or jointly, by themselves or through their officers, directors,  
24 agents or servants, from owning, that is: any capital stock or  
25 other interest, whatsoever in any corporation, firm or

1 association, except common carriers, which is in the business,  
2 the same business that I mentioned: manufacturing, jobbing,  
3 selling, transporting, distributing or otherwise dealing in  
4 any of the above described products or commodities.

5 Paragraph Six of the decree further perpetually  
6 enjoins the defendants from operating retail meat markets, and  
7 paragraph 8 enjoins the packers from dealing, directly or in-  
8 directly in fresh milk and cream.

9 In short, the Meat Packers' Decree perpetually ex-  
10 cludes Armour from having any direct or indirect interest,  
11 whatsoever, in any firm in the baking or general grocery  
12 business, and it prohibits Armour from otherwise dealing  
13 directly or indirectly in the enumerated products.

14 The Decree is what is commonly-referred to as a  
15 structural ; that is, rather than simply enjoining the  
16 defendants from particular anti-competitive acts, it establishes  
17 a prophylactic separation between the defendants, but excluding  
18 them from other businesses where it is felt that their involve-  
19 ment might create a danger to the competition.

20 General Host, which is the Appellee in this case, is  
21 a company that is widely involved in the baking business and  
22 the general grocery and restaurant business. It is known, until  
23 a couple of years ago, as General Baking Company and under the  
24 brand name Bond Baking Company and others as manufacturers, and  
25 sell throughout the country, a complete line of bread and other

1 bakery products. It also has a division called: "Little  
2 General Stores," which has some 380 convenience retail food  
3 markets in various parts of the South. And it also has sub-  
4 sidiaries that operate restaurants and other tourist facilities  
5 throughout the country.

6 It's plain and undisputed in this case that General  
7 Host's business is such that under the 1920 decree Armour  
8 could not have acquired any direct or indirect ownership interest  
9 whatsoever in General Host.

10 This litigation began about a year ago when General  
11 Host decided the reverse of that; he would take over Armour  
12 by acquisition techniques that have become familiar in recent  
13 years. Over the opposition of Armour's management, General  
14 Host made a tender offer to Armour's stockholders in which it  
15 sought to acquire a majority of Armour's stock in return for  
16 a package of debentures and stock warrants in General Host.

17 The tender offer was expressly conditioned upon the  
18 tender by shareholders of enough stock to give General Host an  
19 absolute majority of Armour stock and it provided that it would  
20 be called off if that amount of stock were not tendered.

21 When the tender offer was made, the Government  
22 immediately sought to block this takeover, on the theory that  
23 a corporate alliance between Armour's meat packing's business  
24 and General Host's bakery and retail grocery businesses would  
25 be just inconsistent with the Meat Packers' Decree if initiated

1 by Armour.

2 It was plain, of course, that General Host's acquisi-  
3 tion of Armour would not be directly punishable under the  
4 decree, since the active party, General Host, was not a party  
5 to that decree.

6 Accordingly, the Government went to the District  
7 Court in Chicago, which has had continuing jurisdiction, at  
8 least in recent years over the Meat Packers' Decree and there  
9 the Government requested a supplemental order to prohibit the  
10 takeover by General Host. It did this consistent with paragraph  
11 18 of the decree, which, like most decrees, expressly retains  
12 jurisdiction for the purpose of taking such other action or  
13 adding to the foot of this decree, such other relief as may be-  
14 come necessary or appropriate for the carrying out and enforce-  
15 ment of this decree.

16 Q Did the Government's request to the District  
17 Court subsume a request to amend the decree?

18 A Not in terms and of course, this is, I think, the  
19 semantic problem that is the heart of this case, that I keep  
20 coming back to back to.

21 Q Let's assume the Government has taken the  
22 approach that we think the decree should be amended expressly  
23 to prohibit matters like this. Would any different kind of a  
24 hearing or any different type of procedure have been required?

25 A I think we would contend that there would not be



1 be any requirement for a different kind of procedure on the  
2 theory that, I, of course, will elaborate, that we think that  
3 in a very real sense, the four corners of this decree do pro-  
4 vide a rather clear condemnation of this kind of situation.

5 In other words, the Government's theory of the case,  
6 to put it another way, has not been based upon any asserted  
7 change in facts, other than, of course, the undisputed fact --

8 Q Suppose if you accepted the fact that the pur-  
9 pose of the decree was to prohibit an alliance of any kind  
10 between the Armour entity and any of the other described  
11 entities. Then it wouldn't make much difference whether you  
12 amended it or just interpreted it; would it?

13 A No, I think not, and of course, I could make the  
14 further observation that it seems a little strange and incon-  
15 sistent with traditional equitable theories for a decree to say  
16 "Nobody in the world shall take over this company." That's an  
17 unusual form at the least, for a decree and of course, it  
18 doesn't have any operative effect in the normal sense.

19 Q You say it would have been an unusual provision.  
20 That's exactly your argument now.

21 A Yes, but when we say -- I was really just ad-  
22 dressing myself to the question of whether the presence or  
23 absence of such language in a decree would make any difference.

24 Q Yes.

25 A We say, and I will elaborate that substantively

1 this decree established a separation between these two busi-  
2 nesses and the establishment of that separation, as a substan-  
3 tive matter, is frustrated by this kind of take over.

4 Q Is there any suggestion here that the tender by  
5 Host was stimulated or initiated or originated or collaborated  
6 in by Armour?

7 A No; it's undisputable that the opposite is true.

8 Q Is the other way.

9 A Was proposed. Though I do find it hard to see  
10 why, under the theory followed below and the theory that the  
11 Appellees follow, why that should make any difference. Whoever  
12 does it, whatever the motives, what the intentions are, pre-  
13 cisely the same kind of situation would arise.

14 Q Doesn't that overlook the fact that traditionally  
15 and ordinarily you have to have a party in order to reach them  
16 with relief.

17 A Well, of course, Section 5 of the Sherman Act  
18 specifically does provide, and this was relied upon by the  
19 Government below that whenever the interest of justice shall  
20 require, the Court may bring in additional parties.

21 Q Did you follow that procedure that Mr. Justice  
22 White suggested --

23 A Well, I think --

24 Q But you are now bringing in another party; aren't  
25 you?

1           A    Yes, General Host, and of course, Section 5  
2 permits that to be done as a procedural matter and establishes  
3 the Court's jurisdiction over --

4           Q    Was General Host in existence in 1920?

5           A    I believe that its predecessor, General Baking  
6 Company, I think, was incorporated in 1911. Of course, it  
7 had no connection whatever with the packers and there was no  
8 reason for the Government even to think about bringing it in  
9 or foreseeing what might happen in a very different kind of  
10 business climate some 50 years later on.

11           Judge Hoffman of the District Court of Chicago, of  
12 course, denied the Government's petition to add General Host  
13 as a party and to add an order to the decree prohibiting the  
14 takeover. He relied, quite simply, on the proposition that --  
15 as I read what he said -- that the literal terms of the decree  
16 do not prohibit nondefendant owners of stock in meat packing  
17 companies from engaging in businesses prohibited to meat packers  
18 themselves by the decree.

19           In other words, as he explained orally, the decisive  
20 fact in the case is that Armour will not be the controlling  
21 force, but rather, the instrumentality of General Host. He  
22 said that since the villain of the piece, in the terms he used,  
23 was not Armour, but General Host, the decree could not be used  
24 to prevent the takeover.

25           If Judge Hoffman's rather scanty conclusions of law

1 rest on the proposition that he did not have jurisdictional  
2 power to supplement the decree in this kind of way, we think  
3 was plainly wrong, for the reasons which we set out in our  
4 brief, and which I believe are not basically disputed by the  
5 Appellees.

6 Q I didn't read the District Court as saying it  
7 was without jurisdictional power.

8 A It's not clear that it did. If it did, I think  
9 it was wrong. I think the power is really not the major issue  
10 here.

11 Q It's not an issue at all between you and your  
12 Appellees.

13 A I believe that's so; yes. There is a certain  
14 amount of back and forth, I think within the General Post --

15 Q There is a lot of back and forth in everything.

16 A So, I will direct my point only to the proposi-  
17 tion that the structural prohibitions of this decree are  
18 frustrated and sometimes violated by this takeover and I think  
19 General Host does, in the last analysis, agree that if that's  
20 the case, then the Court could and should, indeed, have granted  
21 the relief requested.

22 I think that perhaps the problem as I suggested in  
23 this case is a semantic one, basically. The basis for our  
24 whole case is the proposition that the decree is violated or  
25 frustrated because the takeover creates a situation that the



1 decree was designed specifically to prevent.

2 General Host in the court below, as I understand  
3 them, say that that can't be so, because nobody has disobeyed  
4 a command that the decree directed to it, because the decree  
5 does not, in terms proscribe Armour's acquisition by a grocery  
6 company.

7 Well, we think that's much too narrow reading. Of  
8 course the decree is not a — a civil decree is not a punitive  
9 document and it obviously does affect people other than the  
10 particular individuals who happen to be accused of wrongdoing  
11 at the time the decree was entered. So, I think it's not  
12 shocking or unusual the decree should affect parties in a  
13 business sense, people other than the initial parties to the  
14 case.

15 We think, in fact, the literal language of the  
16 decree condemns precisely the situation that has been created  
17 by the takeover. Paragraph Fourth not only prohibits Armour  
18 from directly engaging in General Host's business, but even  
19 more specifically, it prohibits Armour from having, directly or  
20 indirectly, any capital stock or other interest whatsoever in  
21 General Host or in General Host's subsidiaries that are en-  
22 gaged in the forbidden businesses.

23 It seems to me extremely literalistic to say that  
24 when Armour is a subsidiary of General Host it has no interest  
25 whatsoever, either in General Host's business or in the business

1 of its sister subsidiaries of General Host.

2 Certainly, as I suggested, this conclusion seems not  
3 difficult to reach if this kind of situation arose by actions  
4 in which Armour or its management joined, or perhaps even  
5 instigated, and equally, I think, it would not seem trouble-  
6 some to say that the decree would prohibit a situation where  
7 Armour or its stockholders or management or dissident stock-  
8 holders, through a proxy fight or something like that, created  
9 a holding company, which then had two subsidiaries, one of them  
10 being the old Armour and the other being General Host.

11 Toput it another way: the situation we now have is  
12 one corporation that directly or indirectly is in both busi-  
13 nesses, the meat packing business and the grocery business and  
14 that corporation is General Host. It's directly in the grocery  
15 business and it's indirectly in the meat packing business  
16 through its controlled subsidiary, Armour. And we think that  
17 that is just precisely what the structural provisions of the  
18 decree prohibited and, in fact, the only reason why there would  
19 have been structural provision inthe decree is to prevent that  
20 kind of situation from arising.

21 Q There were originally five corporate defendants?

22 A Five, and it became four through the merger of  
23 Morris into Armour.

24 Q And I suppose there are other large meat packers--

25 A Armour is number two I believe; Swift is --

1 Q Swift, Armour, Cudahy and --

2 A Cudahy is quite a bit smaller.

3 Q And whatever the other is. What if General Host  
4 had taken over the -- well, what if, in the meantime, since  
5 1920 another meat packing company had become the biggest in the  
6 country and General Host had taken it over. Would you be here  
7 saying that this decree could cover that situation?

8 A No; No; I think not and whether we could have  
9 a theory that the decree ought to be modified, I think it would  
10 be a very hard row to hoe, but that's a situation that arises  
11 in the case of any decree. It's well-established that on the  
12 basis of historic value --

13 Q They had an original lawsuit against that  
14 situation.

15 A Yes. But, historically --

16 Q The facts in that certainly might be true here,  
17 too.

18 A But, but old violations do give rise to perpetual  
19 decrees and of course it is a ground for modification if the  
20 defendants subject to the initial decree can prove that they  
21 are at some serious competitive disadvantage because of  
22 drastic changes in the market.

23 Q Is this that same old consent decree that's been  
24 around for about 40 years?

25 A Fifty years, Mr. Justice. It has been twice --

1 well, three times there was some current efforts. In the  
2 early 30s the packers tried to modify it to relieve them of  
3 just these restrictions on their involvement in the grocery  
4 business and they had another effort beginning in the late  
5 50s which ended in 1961 when this Court summarily affirmed the  
6 District Court's determination that the packers had not made  
7 the kind of showing which would be required to justify modifi-  
8 cation of the decree.

9 The decree, though it's old, has been, in a sense,  
10 revived within relatively recent years. We think it's  
11 highly pertinent to the problem here what the Court said in  
12 considering these earlier requests for modification, because  
13 we think that the language the courts used and the analysis  
14 of this Court and the District Court followed in those cases,  
15 gives rather explicit content to the substantive prohibitions  
16 and shows what their specific purpose was.

17 In 1932 Justice Cardozo, speaking for the Court in  
18 the second Swift case in this Court, rejected, as I said, con-  
19 tentions that the market had changed, that the wrongdoers were  
20 not in the picture any more and therefore it was not necessary  
21 to maintain this separation between the grocery business and the  
22 meat packing business and the Court used the following language,  
23 which I think is revealing here:

24 "Whether the defendants would resume their predatory  
25 practices if they were to deal in groceries again, we do not



1 know. They would certainly have the temptation to resume it.  
2 Their low overhead and their gigantic size, even when they are  
3 viewed as separate units, would still put them in a position  
4 to starve out weaker rivals."

5 "Mere size, according to the holding of this Court, is  
6 not an offense against the Sherman Act, unless magnified to  
7 the point at which it amounts to monopoly. But, size carries  
8 with it an opportunity for abuse. It is not to be ignored  
9 when the opportunity is proved to have been utilized in the  
10 past.

11 "The original decree, at all events, was framed upon  
12 that theory." And Justice Cardozo went on to say that "If the  
13 grocery business is added to the meat business, there may be  
14 many instances of unfair pressure upon retailers and others  
15 with the design of forcing them to buy from the defendants and  
16 not from rival grocers."

17 Such, at any rate, was the rationale of the decree  
18 of 1920. Its restraints, whether just or excessive, were  
19 born of that fear, the difficulty of ferreting out these  
20 evils and repressing them when discovered supplies an additional  
21 reason why the structural restrictions should be maintained.

22 Q Well, all those things are good arguments for  
23 proceeding against General Host, perhaps, in an independent  
24 proceeding, in an action. I think that if it's fundamentally  
25 unwise, unsound, to have these two branches of the food

1 industry combined, that can be reached in other ways than this;  
2 can't it?

3 A Yes, of course there are problems that, until  
4 -- enormous problems in a traditional Section 7 action in a  
5 case like this.

6 The point I was driving at was not that, as a general  
7 proposition the combination of a large packer in a meat company  
8 is a bad thing, but this Court has read this very decree, which  
9 as a party to it, Armour, as embodying a specific purpose to  
10 prevent that kind of addition of the grocery business to  
11 Armour's meat packing business.

12 And for that reason we think that the Government  
13 should not have to start from scratch, it having been speci-  
14 fically decreed that Armour's business should not be combined  
15 with the grocery business.

16 In none of the past history and the language that the  
17 Court has used, is there any suggestion that the importance of  
18 this separation depends upon who threatens to break it down.

19 The reason for the separation is, plainly, the danger  
20 of any corporate links, however created, between Armour's  
21 large size and power, which of course, when General Host owns  
22 and controls Armour, in a very real sense, becomes power that  
23 General Host has. And certainly there are separate corporate  
24 entities, but I find it very hard in my mind to say that when  
25 General Host wholly or in the sense of absolute control, owns

1 Armour, that General Host is not Armour in some very meaningful  
2 sense.

3 The ultimate owners are the same; Armour's destiny  
4 is controlled by General Host, so I think that apart from the  
5 conceptual fact that there are separate corporate shelves, if  
6 you will, Armour is, in a very real sense, or has become,  
7 General Host; General Host is Armour, and has the power that  
8 the decree was specifically designed to keep Armour from using  
9 in a business which is General Host's business.

10 Q There no suggestion by far that this is transi-  
11 tory impermanent situation. Greyhound is in the picture some-  
12 where --

13 A Greyhound is in the picture; yes. And there has  
14 been a contract signed, as I understand it, that Mr. Bergson  
15 will have the up-to-date information, I think, better than I  
16 do.

17 A contract was signed last fall whereby General Host  
18 would sell its interest to Greyhound. That contract has not  
19 been consummated. It's subject to several contingencies, one  
20 of which, and we don't know what meaning the parties attach to  
21 this, is the absence of any Government action against the con-  
22 firmation of the contract.

23 The Government has notified Greyhound that we feel  
24 that Greyhound's ownership of Armour stock would present sub-  
25 stantially the same problem as General Host, because Greyhound

1 owns a great many restaurants and also is a food distributing  
2 business. Now, whether that fact is enough to wash out this  
3 contract is something that I don't know, and perhaps General  
4 Host's counsel could speak more definitely.

5 Q If General Host is enjoined as a party, and the  
6 motion had been granted, would the scope of that litigation  
7 have been as broad as if General Host had been proceeded against  
8 independently?

9 A If I understand it, would the same kind of  
10 proceeding trial have been held? We say that under these cir-  
11 cumstances, there are no undisputed facts that are pertinent  
12 to the proposition that the Government is seeking to establish  
13 that the four corners of the decree prohibit this situation.

14 Of course, in the Greyhound situation, there might  
15 well be pertinent facts that would have to be explored in an  
16 evidentiary hearing. But we say that's not the case here.

17 I'd like, if I can, to reserve the rest of my time  
18 for rebuttal.

19 MR. CHIEF JUSTICE BURGER: Very well, Mr. Springer.

20 Mr. Bergson.

21 ORAL ARGUMENT BY HERBERT A. BERGSON, ESQ.

22 ON BEHALF OF APPELLEES

23 MR. BERGSON: Mr. Chief Justice and may it please the  
24 Court: Perhaps I should answer Mr. Justice Stewart's question  
25 first by describing the present status of the negotiations



1 between General Host and Greyhound.

2 The agreement was signed some time ago, subject to  
3 three things: approval of General Host's stockholders, approval  
4 of Greyhound's stockholders and approval of the I.C.C., because  
5 Greyhound is a motor carrier and under the Interstate Commerce  
6 Act, any acquisition of this type must be approved by the  
7 I.C.C.

8 Q And the agreement provided for the sale by  
9 General Host to Greyhound, of General Host's interest in  
10 Armour; is that it?

11 A That's it. And the Greyhound stockholders have  
12 approved; the General Host stockholders have approved the  
13 agreement. The I.C.C. has not yet acted on the application and  
14 I am not prepared to prognosticate as to when the I.C.C. might  
15 act on that application.

16 Now, as Mr. Springer indicated, there is also a  
17 problem as to what the department might do in attacking the  
18 Greyhound in the same manner as it attacked the General Host  
19 acquisition. But I don't believe that that is a condition to  
20 the consummation of a transaction.

21 Q Doesn't the present statute permit the Depart-  
22 ment of Justice to intervene in the Interstate Commerce  
23 Commission proceedings?

24 A I suspect that the Department of Justice can  
25 intervene or move to be heard as amicus or make their presence

1 felt at the I.C.C. in a way that their views would be made  
2 known to the I.C.C. I don't know, Your Honor, whether the  
3 Department could intervene. I believe it could. They inter-  
4 vened in railroad mergers and I don't know why they couldn't  
5 intervene in a situation like this.

6 But, even if they couldn't intervene, they certainly  
7 could make their views known as an amicus.

8 Now, I was delighted to hear Mr. Springer say that  
9 there is no issue as to the power of the Court here to --  
10 whether the Court has the power to protect its decrees from  
11 interference or obstruction. As I read the Government's  
12 brief in this case, I thought that this was their major point,  
13 and that the case has now become, what I think it was all  
14 along, a question as to whether or not this decree as it now  
15 stands, can be interpreted to prevent this transaction and if  
16 it can be so interpreted, what type of hearing is General Host  
17 entitled to before that interpretation is imposed on General  
18 Host?

19 What the Department did in this case was merely to  
20 go to the District Court, file an affidavit and say: "General  
21 Host is in the baking business; the baking business; the  
22 baking business is proscribed to Armour; therefore you must  
23 proscribe this transaction." And we don't think the only  
24 hearing that they thought was necessary was to show that  
25 General Host was in the baking business.

1           Now, I think it's somewhat shocking for the Depart-  
2   ment of Justice to take the position that a person who is not  
3   a party to an equity decree, who has never been heard on that  
4   decree, who was not joined at the time of the decree, although  
5   it was in existence at the time the action was maintained, be  
6   found by the decree without proof of anything else.

7           It seems to me that under any circumstances, even  
8   assuming that the Department's interpretation of the decree is  
9   right, that General Host is entitled to a hearing on whether  
10   or not it should be bound by the decree.

11           I don't believe that two parties to a lawsuit, with  
12   the imprimatur of the Court, can deprive anybody of his legal  
13   rights. Now, one of the basic legal rights that a person seems  
14   to have is the right to due process; the right to be heard.

15           Q    Mr. Bergson, what would you say if the original  
16   decree had said that Armour can't acquire any stock in a  
17   baking company and no baking company can acquire any stock in  
18   Armour, and then this transaction took place and the United  
19   States applied to the Court for an order preventing General  
20   Host from -- ~~which is never~~ a party to the case --

21           A    That's right.

22           Q    -- to prevent General Host from acquiring  
23   stock with Armour.

24           A    I think that under those circumstances General  
25   Host would be entitled to a hearing as to whether or not that

1 that type of order should have been entered in the first place.

2 Let me give you an illustration, Your Honor, and I  
3 think it's clearly important, especially in these days --

4 Q So you say that no parties to injunction suits  
5 can be held in contempt or even have the order amended to  
6 apply to them without relitigating the basic --

7 A Oh, no. General Host was not a party to the  
8 injunction suit.

9 Q I agree; I know. That's what I say, that your  
10 assertion is that unless you are a party to an injunction suit  
11 you can never be --

12 A You can't be held in contempt of that injunc-  
13 tion.

14 Q And nobody's attempted to --

15 A And the Department concedes that.

16 Q Yes, and nobody's attempted to hold General  
17 Host --

18 A But, I don't think that they can be made sub-  
19 ject to the injunctive provisions without having a hearing as  
20 to whether or not they should have been made so.

21 Q You mean without having a hearing as to whether  
22 or not on the whole basic substance of the injunction case.

23 A But, whether or not this case was based pri-  
24 mary on a proclivity by these meat packers to violate the  
25 anti-trust laws, that they had a long-standing conspiracy,



1 that encompassed not only horizontal agreements among them, but  
2 vertical agreements that they owned food businesses; they owned  
3 stockyards; they owned warehouses; they owned transportation  
4 facilities and as a result of this tremendous mass, they were  
5 able to effect commerce in the substitute food business.

6 Now, I think that they consented to this decree, but  
7 I don't think it makes any difference whether it's a consent  
8 to create a litigated decree, but nevertheless, it seems to  
9 me and it is my position that under the circumstances that you  
10 postulate, they would have to be shown that this decree should  
11 be imposed on General Host, and not merely because it was in  
12 the baking business.

13 Q Well, let's suppose that General Host and Armour  
14 made a contract to sell a large amount of Treasury stock of  
15 General Host to Armour, and the Government applied for an  
16 order against both --

17 A Well, I don't have any problem with that,  
18 Your Honor.

19 Q Well, why wouldn't you?

20 A Because I think an injunction is applicable not  
21 only to the parties, but anybody in privy or acting in concert  
22 with the parties, and under the circumstances that you pos-  
23 tulated they would be acting in concert.

24 Q There's a non-party being subjected to the in-  
25 junction without being able to relitigate anything.

1 A But he's doing it in privity with the --

2 Q Well, all right; that's the way you character-  
3 ize it, but nevertheless that's a non-party being --

4 A Well, I think I can state my position this way:  
5 that to the extent that any non-party is found to have been  
6 acting in concert or privity with a party, whether it says so  
7 in the decree -- it doesn't say so in the decree -- the rules  
8 make such a privy subject to the injunction, but the Government  
9 concedes here that there was no such concert, and that there  
10 was no such privilege.

11 And they are trying to make the decree applicable to  
12 a company that has absolutely nothing to do and no friendly  
13 relations with any defendant. And I think that this is carrying  
14 an equity decree far beyond the scope that it has ever been  
15 carried by this Court and probably ever would be carried by  
16 this Court.

17 Now --

18 Q Your suggestion about joining all the food  
19 companies in the country, at least I took it that way --  
20 joining all the food producers in the country -- grocery pro-  
21 ducers, isn't really very realistic; is it?

22 A I don't believe you correctly characterized my  
23 suggestion. You're talking about something that I said or  
24 something in our brief?

25 Q Something that you said.

1 A No.

2 Q The information that I got, at least, and per-  
3 haps you'd better clear that up, that if they wanted to take  
4 this position they should have joined General Host and a whole  
5 lot of other people similarly situated.

6 A Well, that's right. It may not be realistic,  
7 but I think that's the only thing that they can do, whether --

8 Q Well, it's a rhetorical position on your part,  
9 then, to make your point, I take it?

10 A That's right. But, our position here, Your  
11 Honor, is this: Number one that the decree can't be inter-  
12 preted the way the Government seeks to interpret it, and you  
13 just can't turn words upside down.

14 If you look at the decree as it is written, the de-  
15 cree was very, very carefully framed and it isn't a structural  
16 decree per se, as Mr. Springer would have you believe. There  
17 are many behavioral provisions in the decree. There were three  
18 types of defendants in this case: there were the meat packer  
19 defendants; there were individual defendants who were the major  
20 stockholders in the meat company; and there were some 50  
21 subsidiaries of the meat companies who were defendants. There  
22 were quite a few defendants in this case.

23 When the consent decree was negotiated, these various  
24 defendants were given different types of treatment. The pro-  
25 visions that Mr. Springer referred to, two of them: four and

1 eight, specifically refer to proper defendants.

2 Paragraph 6, which is another one that he referred to,  
3 applies to all defendants, and paragraph 5 of the decree  
4 applies to individual defendants. Now, in paragraph 5 of the  
5 decree the individual defendants, the people who were then in  
6 control of the meat packers, were permitted to own stock in  
7 the forbidden businesses, the businesses forbidden to the meat  
8 packers. And they were permitted to own up to 50 percent of  
9 the stock.

10 There is no question of control, and as this Court  
11 well knows, that you can control a company with much less than  
12 50 percent of the stock. These companies were permitted to  
13 engage in these forbidden businesses and there was an injunc-  
14 tive provision which says that you can't use them in a way  
15 that would help either Armour in its business or yourself, or  
16 use Armour in a way to help you in your business.

17 So that this decree did not declare a complete  
18 separation as the Government says, of the business of meat  
19 packing from substitute foods. It said only this, that the  
20 defendant meat packers -- the defendant meat packers, and that  
21 is the way that the language of the decree is, the packer  
22 defendants, corporate defendants are enjoined from doing this.

23 So that it seems to me that you can't characterize  
24 this decree as a prophylactic structural decree. This is a  
25 decree that was arrived at by negotiation and it was some



1 behavioral and the parties knew exactly what they were doing  
2 and they did not intend to reach the situation. Maybe they  
3 weren't aware of it; maybe it didn't occur to them, but ob-  
?????? 4 viously, they didn't intend, either sub silentio or actually,  
5 to reach the situation that is covered here.

6 So, that in effect, what the Department is seeking  
7 here is a modification of the decree, as Mr. Justice White  
8 indicated. And I might add here that the Department has con-  
9 strued this decree in the past the same way that we're con-  
10 struing it now, because they have -- one of the provisions of  
11 the decree prohibits the packers from engaging in the stock-  
12 yard business. But the people who control Armour, before  
13 General Host acquired the control of Armour, it also controlled  
14 the Chicago Stockyards. This is all set out in our brief.

15 Q Is that the Prince family?

16 A That is the Prince family; yes, YOUR Honor.

17 And our brief points out what the stock holdings  
18 were. They had 10 to 15 percent of the stock and it was a  
?????? 19 cross-fertilization of management and the Government hasn't  
20 contested this; and the Government has said in connection with  
21 that argument of ours, "Well, maybe we construed the decree  
22 erroneously before, but we're doing it right now."

23 Q You don't think it would make any difference  
24 if General Host acquires 100 percent of the stock?

25 A Oh, no.

1 Q Do you think the District Judge thought that  
2 would have made any difference?

3 A No; I do not believe that he thought that that  
4 would make a difference. I think that --

5 Q You seem to emphasize the lack of a possibility  
6 immediately of General Host getting control of the board.

7 A But I think what he went on to say, however,  
8 that he did not find that control itself would be bad, and ta  
9 that if General Host abused its control and caused Armour to  
10 violate the decree, "come on back, and I'll enjoin it quick as  
11 a flash."

12 But, mere ownership doesn't cause Armour to violate  
13 the --

14 Q What kind of a hearing would you say would be  
15 required for the Government to secure an amendment of the  
16 decree?

17 A Well, what happened -- there are a couple of  
18 precedents in this area: one is this Court's decision in the  
19 Hughes case, where the Government sought a construction of the  
20 decree and the Court set it back and said that this was an  
21 attempt to modify the decree and that an appropriate hearing  
22 should be had to determine whether this type of relief was  
23 necessary.

24 Now, I think we are entitled to a hearing -- at least  
25 a hearing as to whether or not this type of relief is

1 necessary to effectuate -- let us go this far -- I'm just  
2 conceding this for argument --

3 Q Effectuate what, Mr. Bergson?

4 A To effectuate what the Government claims were  
5 the purposes of this decree.

6 Q Well, what do you think the purposes were?  
7 You apparently deny that one of the purposes was to effect a  
8 separation between meat packers and other -- and substitute  
9 food companies.

10 A No. I say that it was the purpose of it was  
11 to prevent proven or admitted violators who had used their  
12 power in the past, from using it in the future, which is done  
13 in many, many anti-trust cases.

14 Q But, we're a non-proven violator and we --

15 Q You don't --

16 A and we're a non-admitted violator.

17 Q You don't treat it as a blanket prohibition in  
18 the terms that Mr. Justice White has postulated; that the  
19 food processers, bakers, non-meat food processers, should  
20 never be in combination with meat packers?

21 A Oh, no; I don't think that anything in this  
22 decree prohibits the largest meat packer in the country today,  
23 and this isn't in the record, but I hope you will pardon me,  
24 but Mr. Justice Stewart, I think, asked this question: The  
25 largest beef packer in the United States today, the Iowa Beef

1 Company, is not subject to this decree and they can go on and  
2 acquire General Host any day it wants. All the Government can  
3 do about that is bring a Section 7 case, and I think that's  
4 what the Government should do here.

5 And if they think that General Host's control of  
6 Armour constitutes a reasonable probability of a substantial  
7 lessening of competition in any line of commerce, they have a  
8 Section 7 case. They're not without remedy here, even apart  
9 from the decree.

10 What the Government has tried to do here, we submit,  
11 Your Honor, is to just short-circuit this whole business,  
12 probably out of fear that they can't successfully maintain a  
13 Section 7 case or couldn't successfully maintain the burden of  
14 modifying the decree, which is a heavy burden; the rule of  
15 which has been laid down in one of the prior decisions in this  
16 case.

17 And, to avoid th t burden, both the modification and  
18 for proving a Section 7 violation, they have adopted this  
19 arbitrary summary procedure or seek to have you sanction this  
20 arbitrary summary procedure, which deprives General Host of  
21 its day in court.

22 And we submit, Your Honor, that this is not an  
23 appropriate form of action in this area.

24 Thank you.

25 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Bergson.



1 Mr. Springer, you have about five minutes left.

2 REBUTTAL ARGUMENT BY JAMES R. SPRINGER, OFFICE  
3 OF THE SOLICITOR GENERAL ON BEHALF OF APPELLANT  
4 MR. SPRINGER: Thank you, Mr. Chief Justice.

5 Perhaps I should correct something I may have  
6 slightly misstated in answer to a question. Of course, we  
7 think what we're asking for here is very different from any  
8 hypothetical, general amendment of this decree to try to make  
9 it run against the world. We are, of course agreed that a  
10 decree can't run against the world, and that is precisely why  
11 we haven't contended and wouldn't contend that General Host is  
12 has done anything that would subject it to punishment for  
13 contempt of this decree.

14 The Government filed a petition and gave General Host  
15 the opportunity to have a hearing and to bring in anything  
16 they wanted to bring in on the issue of whether or not it's  
17 proper that this decree should give rise to a new order direc-  
18 ted directly to General Host, which then, of course, would  
19 subject it to contempt punishment.

20 But we don't see that there is any issue of due  
21 process in this case at all. General Host has had a hearing  
22 and the only issue was what ought to be said at that hearing.

23 If Mr. Bergson is asserting the proposition that  
24 it is only parties who are in direct, active concert with  
25 parties to a decree who, in any way can be affected by the

1 decree, and I think, for one thing he's suggesting a doctrine  
2 which is inconsistent with what appears to be accepted doc-  
3 trine, specifically in the civil rights area, where the simple  
4 fact that a man who comes in and tries to frustrate the per-  
5 formance of a school desegregation decree is not working to-  
6 gether with the school board against whom that decree, in  
7 terms, was directed, has never been a barrier for a supplemen-  
8 tal order, very much like the kind of supplemental order we're  
9 asking for here against that particular individual.

10           Although Mr. Bergson acknowledges that this decree,  
11 and we don't disagree with him -- contains the behavioral  
12 prohibitions and structural restrictions and then turns  
13 around, as I understand his argument, and treats the decree as  
14 if it contained nothing but behavioral prohibitions.

15           For that reason we think that's wrong and we think  
16 it's really beside the point to argue again and again that this  
17 decree could not possibly affect General Host, because no court  
18 has ever determined that General Host has done anything bad.

19           I think that argument, in substance, was rejected in  
20 the earlier modification proceedings in this case, where a  
21 very similar argument was made that the bad people who made  
22 Armour do bad things in the past and made the other packers do  
23 bad things, aren't here any more. Now we just have a new set  
24 of stockholders and a new management and we're totally innocent  
25 and, of course, they shouldn't be bound by past wrongdoings of

1 other people. And I think that's really beside the point.

2 One other matter: I think any suggestion that the  
3 fact that this decree contains a paragraph which relates to  
4 what might be done by particular individuals, none of whom by  
5 himself was a controlling stockholder, at least in the case of  
6 Armour, I believe, to say that that means that no other parties  
7 to the decree has any bearing on interlocking corporate in-  
8 terests, I think simply doesn't follow.

9 I think the problem of the individual defendants in  
10 1920 was a relatively small, separate problem and that to say  
11 that that precludes the Government taking action against what  
12 might be a 100 percent-owned, 100 percent owning corporate  
13 stockholder, I think doesn't follow.

14 Again, for that same reason we think that any  
15 attempt to say that the Government is bound because it didn't  
16 take any action against the Prince family problem, is  
17 erroneous; and this is so for a number of reasons. That  
18 wasn't a matter of an individual stock ownership. At the  
19 most, I believe by an amalgamation of people, various  
20 of the Prince family, various people who are said, perhaps to  
21 have had this kind of relationship with them, General Host  
22 has managed, perhaps, to reach a total of 13 percent stock  
23 ownership in Armour.

24 Here we're dealing with absolute corporate control  
25 by another corporation, and of course, also this is not a

1 matter of any past course of action between these two parties  
2 about this subject matter, but a collateral matter.

3 I notice my time is up.

4 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Springer;  
5 thank you for your submission, and you, Mr. Bergson. The  
6 case is submitted.

7 (Whereupon, at 11:30 o'clock a.m. the argument in  
8 the above-entitled matter was concluded)

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