OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FEDERAL TRADE COMMISSION, Petitioner V. SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.; and
SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL., Petitioners V. FEDERAL TRADE COMMISSION

CASE NO: 88-1198 & 88-1398

PLACE: WASHINGTON, D.C.

DATE: October 30, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

FEDERAL TRADE COMMISSION, :
Petitioner :
v. : No. 88-1198
SUPERIOR COURT TRIAL LAWYERS :
ASSOCIATION, ET AL.; :
and :
SUPERIOR COURT TRIAL LAWYERS :
ASSOCIATION, ET AL., :
Petitioners :
v. : No. 88-1398
FEDERAL TRADE COMMISSION :

Washington, D.C.

Monday, October 30, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

ERNEST J. ISENSTADT, ESQ., Assistant General Counsel, Federal Trade Commission, Washington, D.C.; on behalf of the Petitioner/Cross-Respondent.

WILLARD K. TOM, ESQ., Washington, D.C.; on behalf of the Respondents/Cross-Petitioners.

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PROCEEDINGS

(11:06 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 88-1198, Federal Trade Commission v. Superior Court Trial Lawyers Association and vice versa.

Mr. Isenstadt, you may proceed.

ORAL ARGUMENT OF ERNEST J. ISENSTADT

ON BEHALF OF THE PETITIONER/CROSS-RESPONDENT

MR. ISENSTADT: Mr. Chief Justice, and may it please the Court:

This case involves a group of competing private practice criminal defense attorneys who agreed among themselves to withhold their services from the District of Columbia until the District increased the price it paid for those services. The court of appeals held that the lawyers' boycott was the essence of price-fixing, and that the First Amendment does not immunize such price-fixing from antitrust review, even if it is used in an effort to induce the passage of legislation. I shall argue this morning that in these two respects, the court of appeals was clearly correct and its decision should be affirmed.

Then, however, the court reversed course and held that the First Amendment requires the Commission to prove market power in order to condemn a price-fixing boycott that is used in part to express the views of the boycotters on a matter of

public importance. I shall argue that this novel exception to the Sherman Acts per se prohibition against naked price-fixing agreements is unsupported by law and would have serious effects for antitrust enforcement if left to stand.

A brief review of the facts demonstrates the correctness of the court of appeals' conclusion that the lawyers' boycott was the essence of price-fixing. Prior to the boycott the District of Columbia government offered $30 per hour for court time and $20 per hour for out-of-court time to any attorney who volunteered to represent indigent defendants in Superior Court under the Criminal Justice Act.

No attorney was required to offer his services at that rate. Attorneys who wished to do so competed for the city's legal business by calling in each morning and asking that their names be placed on a list from which counsel was assigned that day. And the record shows that, right up to the day before the boycott, enough attorneys volunteered at the rates offered by the city to provide counsel for all indigent defendants who required it. In an effort to obtain an increase in the CJA rate, the lawyers conducted a lobbying campaign in late 1982 and '83 with which no one takes issue, but when they grew dissatisfied with the pace and results of the city's legislative process, they met, on August 11, 1983, and agreed among themselves that if the rate increase were not forthcoming by September 6th they would collectively cease to

accept new case assignments.

The boycott began as intended, and as the lawyers expected, it had a severe impact on the District of Columbia Superior Court. The participants in the boycott comprise nearly all those who had at the time made a practice of accepting Criminal Justice Act cases. The few attorneys who showed up to accept cases during the boycott became quickly overloaded, prompting the head of the Public Defenders Service to write Mayor Barry on September 15 and advise him that the available attorney pool was no longer sufficient to continue to assure the appointment of counsel for all indigent defendants. In response to that communication, the Mayor recommended and the city council enacted legislation increasing the CJA rate to $35 an hour for both in court and out-of-court time.

QUESTION: Counsel, could you -- just a preliminary question. Does the boycott have to be somewhat successful before it is a boycott?

MR. ISENSTADT: No, Your Honor.

QUESTION: Suppose just three attorneys agreed that they would do this. Would that be a boycott, subject to the per se rules?

MR. ISENSTADT: Technically, Your Honor, if three attorneys agreed among themselves, of course any attorney in the exercise of his own individual judgment may refuse to

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accept case assignments, but if three attorneys agreed, that would be per se unlawful -- agreed that they would not accept assignments until the price was increased. That is not, of course, the situation that occurred here.

QUESTION: Well, the reason I ask it, because you do indicate that you had looked to the actual market effect of what occurred in order to prove that there was a boycott.

MR. ISENSTADT: Your Honor, the Commission found both that the boycott was unlawful per se and under rule of reason analysis, and we think it was correct on both counts. The -- what is per se unlawful is an agreement among competitors as to the price at which they will deal, and that is true whether the competitors number only a few or number here more than a hundred. But, of course, one doesn't find typically that only two or three competitors in a market served by one hundred will make such an agreement, because it would have no effect. And that is not what happened here.

QUESTION: (Inaudible) boycott do you -- you just have an agreement -- we just won't work for any less than a certain amount?

MR. ISENSTADT: It's price-fixing boycott, Your Honor. It was price-fixing that was implemented by means of a boycott. And the court of appeals recognized that it was, as it said, the essence of price-fixing and a classic restraint of trade within the meaning of Section 1 of the Sherman Act.

And this Court has never wavered in its recognition that naked price-fixing agreements are unlawful per se, without regard to whether the conspirators have market power.

The court of appeals also correctly recognized that there is no First Amendment immunity for such conduct. The Noerr doctrine establishes that competitors may associate together for the purpose of attempting to persuade the legislature to enact legislation, and even though that legislation may itself result in fixing prices or restricting output, that does not convert the joint effort to achieve such legislation into a contract in restraint of trade. But the Noerr doctrine does not permit competitors to fix prices or restrict output themselves as a means of pressuring the legislature.

In the Noerr case, the only conduct involved was a joint publicity campaign: the railroads conspired to run advertisements. And this Court recognized that they did not jointly give up their trade freedom or otherwise engage in boycotts, price-fixing or agreements traditionally condemned by Section 1 of the Sherman Act. The lawyers here did precisely that.

Although the court of appeals correctly recognized that there is no First Amendment immunity for the boycott in this case, it then reversed course and held that if the boycott were characterized as expression, and if one applied the test

in United States v. O'Brien rather than the test in Noerr, that the boycott would be entitled to constitutional protection from application of the per se rule against naked price-fixing agreements.

We think the court's application of the O'Brien test in this situation was both incorrect and unnecessary. It was unnecessary because this Court, in the Noerr doctrine, has already balanced the rights of competitors to act in collusion to petition the legislature against the rights of the public to be protected from anti-competitive restraints of trade. And the balance struck in Noerr is that competitors may jointly lobby, but they may not jointly fix prices. And to apply a further O'Brien test in this context basically subverts the test established by the Court in Noerr.

Even, however, if one does apply the O'Brien test here, it does not result in the conclusion that the Sherman Act is unconstitutional as applied to the facts of this case. The per se prohibition against naked price-fixing agreements proceeds from the recognition that such agreements are always -- are almost always harmful to competition, and are never helpful to it. And the O'Brien test does not prevent the government from enforcing categorical prohibitions against generally harmful conduct, merely because such conduct may not be harmful in particular instances.

As this Court said in United States v. Albertini, the

First Amendment does not bar application of a neutral regulation that incidentally burden speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests.

Put another way, the per se rule against price-fixing serves important values of business certainty and litigation efficiency. And those in themselves are substantial governmental interests that the court is required to consider in conducting an O'Brien analysis. The court of appeals did not credit those interests here.

The Respondents maintain that it is inappropriate to apply the per se rule because of the assumption that underlies it, that naked price-fixing agreements are generally harmful, does not apply in the case of such agreements directed at legislative targets. But I think that the facts of this case themselves demonstrate the validity of that assumption, even assuming the court felt it appropriate to reexamine it in the circumstances of this case.

As I have said, the lawyers who engaged in this boycott comprised nearly all those who made a practice at the time of accepting Criminal Justice Act assignments. They expected the boycott to have a severe impact on the District's criminal justice system by depriving it of the attorneys it needed to operate, and the boycott had that effect.

QUESTION: If you show -- if that is shown before the

Commission pursuant to the court of appeals' remand, the Commission would prevail, I guess.

MR. ISENSTADT: The problem, Your Honor, is it was shown in the court of appeals. This time, the court said that it was inadequate to demonstrate the requisite power even under rule of reason analysis.

QUESTION: What did the court of appeals say you would need to show?

MR. ISENSTADT: We're not really certain. It said it was not --

QUESTION: What do you think it --

MR. ISENSTADT: It said it was not sufficient to show that the boycott had harmful effects, such as threatening a shut down of the court system, because those effects might have resulted from the communicative impact of the boycott rather than its coercive impact. And so therefore we must demonstrate that the CJA lawyers had market power so that we could, from that, infer that the actual demonstrated harmful effects were the result of such power rather than of communication. And we find this a rather baffling command, because, of course, the same objection could be raised in almost any case. This Court has said that, even in a rule of reason case where the conduct is not per se unlawful, market power need not be shown precisely. It is sufficient to demonstrate that the boycott actually restrained trade.

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QUESTION: So, this was not a case of the court of appeals saying we want you to separate the lobbying effort from the boycott. They said you have got to split up the boycott itself, in effect?

MR. ISENSTADT: That is correct. We -- we did not challenge the lobbying effort that preceded the boycott, and the dividing line is very clear. Nor do we challenge the communicative activities that were conducted at the same time as the boycott, such as contacts with the press and so forth. We challenge only the collective refusal to supply services to the city at the price it was offering.

I think, for the reasons I have indicated, that under a rule of reason analysis properly conceived, the conduct here could properly be condemned, and the Commission so held in the alternative in its opinion. But I also cite these facts to demonstrate that there is no reason in this case to revisit the Sherman Act's -- the validity of the Sherman Act's per se prohibition against naked price-fixing agreements. Even when directed against legislatures, they are typically just as harmful as when directed against private parties. And we think it is important for the Court to reiterate the applicability of the per se rule in the facts of this case.

It is the oldest and clearest prohibition in the antitrust laws. We think if there is one thing that most business persons understand, or ought to understand, about

their obligations under those laws, it is that they must decide for themselves, and not in concert with their competitors, whether they will deal and at what price they will deal. And it is obedience to that command that ensures everyone the benefits of competition, and dilution of that command jeopardizes those benefits.

QUESTION: Mr. Isenstadt, I suppose it was perfectly all right for the lawyers to get together and agree on a price they would request from the city council, wasn't it?

MR. ISENSTADT: That is basically what they did before the boycott, Your Honor, and we have not challenged that.

QUESTION: They asked for what? They were getting $30 an hour, and they wanted $55, didn't they?

MR. ISENSTADT: Different lawyers had different requests.

QUESTION: Wasn't one of their original demands for $55 an hour for court time and $45 for office time?

MR. ISENSTADT: That was the demand of some lawyers, yes, Your Honor.

QUESTION: And what did they get?

MR. ISENSTADT: The final bill was $35. That was the request of other lawyers.

There is a question, by the way, as to whether, as a general matter, competitors, in markets where sellers set the price, can agree among themselves even on a lobbying price,

because if you allow such an agreement, then that agreed lobbying price may become the price that is established in the market. But I think in this case, where the seller -- the buyer, rather, posted the price, there is certainly no objection to the sellers getting together and agreeing on a lobbying price. And we certainly, we have not challenged it here.

The court of appeals stated that the novel rule that it was created rested heavily on the peculiar facts of this case, but the court did not identify any facts that could serve to distinguish this case in a principled and legally significant way from any others. If it is -- lawyers permitted or given special antitrust consideration when they withhold their services in an effort to obtain an increase in the price, then there is no way to deny the same treatment to doctors who would withhold their services in an effort to obtain an increase in state Medicaid reimbursement rates, or pharmacists who would withhold their services in an effort to increase the rates for which states reimburse them under prepaid prescription plans, or a great many other government suppliers who believe, as sincerely as the lawyers did in this case, that the public would benefit from increased expenditures on the particular good or service that they sell.

QUESTION: Mr. Isenstadt, where is the market power here? You -- you say this is similar to the medical

profession, that a court had no power to compel a physician to perform services. It does have power to, I assume, or I am asking you, whether they couldn't make every member of the D.C. bar come in and perform services for these indigents?

MR. ISENSTADT: Your Honor, the lawyers in this case were not compelled to offer their services. So the city attempted to provide indigent legal services by utilizing the operations of the free market. It offered a price and asked those who wished to do so to sell it legal services at that price. It did not force anyone to come in. Now --

QUESTION: All I am saying is, I think your analogy to the medical profession is a flawed one, and I am still concerned about where there is market power here, when the court could order the full bar to perform.

MR. ISENSTADT: Your Honor, I must say, parenthetically, it is not, it is not clear to me the extent of the court's authority to order lawyers to report. I guess in the Mallard decision last year the majority seemed to indicate that it is at least an open question as to whether such compulsion can be exercised. But assuming that it could be, there would nevertheless be a very substantial cost in this case to the courts utilizing that extraordinary power.

In 1974 Criminal Justice Act funds ran out in the District, and so it was essential then to implement a draft. And the record shows that a large number of attorneys did not

respond and the District bar commenced a lawsuit against the institution of the draft. That led the late Chief Judge Moultrie, who had been on the court at the time, to conclude that he did not wish to reimpose a draft under these circumstances. This is not a case of just calling up one lawyer and asking them to come down for an important case. This would have involved compelling hundreds of lawyers to accept the representation of thousands of cases. And while, I am sure as a theoretical matter, the city might have been able to do it, that would have entailed severe costs of its own. And market power is simply the power to force a buyer to pay more for what it is you're selling, or to incur other extraordinary costs to obtain a substitute.

QUESTION: Isn't that a political choice on the part of the --

MR. ISENSTADT: Well, by definition, since the rate was set by legislation, any increase in the rate would be a political act. But it was the use of economic power in this case, it is the use of economic power to which we are objecting, the power that these lawyers had, by collectively withholding their services, to require the city to pay more to regain those services.

QUESTION: Mr. Isenstadt, in requesting relief in this case -- did the Commission ask for a roll back to $30?

MR. ISENSTADT: No, Your Honor.

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QUESTION: They are satisfied with the political decision?

MR. ISENSTADT: We are simply asking that the lawyers not do this again, whenever they decide that the rate is inadequate to satisfy their belief as to what the appropriate rate should be. A cease and desist order.

QUESTION: If you are correct on your contention that the per se rule applies, is anything left to be tried in the case, or will judgment just be entered in your favor?

MR. ISENSTADT: We are asking simply that you reverse the court of appeals in the respects we have indicated --

QUESTION: But what happens then?

MR. ISENSTADT: It will just consider the scope of the order. The effect of reversal would be that the Commission's determination that a violation has occurred would be affirmed. And the court of appeals would consider the unaddressed objections that the Respondents have made to the scope of the order.

This Court's precedence, we think, already accord competing business persons, such as Respondents, very extensive rights to act in concert to express their views on matters of economic importance to themselves. Adding the novel right of expressive price-fixing, as the court of appeals has done here, comes at too high a price to the economic liberties guaranteed all citizens by the Sherman Act.

QUESTION: What do you do with Claiborne Hardware? How -- how does the Commission explain -- explain that consistently with its position here?

MR. ISENSTADT: There are several grounds of distinction, Your Honor. This Court said in the Allied Tube case that Claiborne was limited to consumers who did not stand to profit financially from a lessening of competition in the boycotted market. Claiborne involved black consumers who withheld their patronage from white businesses in order to achieve racial equality. There was no suggestion that they proceeded from parochial economic interests.

QUESTION: As -- as Judge Silberman pointed out in his concurring opinion, you could have said the same in the, in International Longshoremen's Association case, where we did not allow the boycott, despite the political motivation and not the economic.

MR. ISENSTADT: Which is why, Your Honor, we think that you meant what you said when, in Allied, that Claiborne is limited to consumers who did not stand to profit financially, because when you face this problem with the union you didn't --

QUESTION: Oh, I see. I didn't understand how you said it.

MR. ISENSTADT: Oh, excuse me.

QUESTION: You mean, it is limited to consumers, who did not stand to profit financially, not limited to consumers

who did not stand to profit financially.

(Laughter.)

QUESTION: Is that the point you are making?

MR. ISENSTADT: Yes, Your Honor. It is limited both to, in our view, to consumers and to those who do not stand to profit financially from a lessening of competition in the boycotted market. You have neither condition satisfied here, because these are not consumers, and they do stand to profit, quite substantially, from a lessening of competition. They were seeking a price increase for themselves.

If you don't apply that limitation, then Claiborne swallows up enormous portions of the antitrust laws, because most price-fixers believe sincerely that benefits would accrue to consumers from spending more on their product, and that they could do a better job if more were spent. And it is very hard to distinguish between the motives of one group and those of another.

If the Court has no further questions, I will reserve the balance of my time.

QUESTION: Thank you, Mr. Isenstadt.

Mr. Tom, we'll hear now from you.

ORAL ARGUMENT OF WILLARD K. TOM

ON BEHALF OF THE RESPONDENTS/CROSS-PETITIONERS

MR. TOM: Mr. Chief Justice, and may it please the Court:

The FTC's central theme, I believe, is that unless you adopt its flat per se prohibition, there will be no principled way to contain the consequences. The FTC recognizes that this case involves individuals publicly seeking legislation. It understands that the lawyers sought not just private gain but to further the Sixth Amendment interests of their clients, and that Respondent Slaight, one of the leaders of the boycott, sought no private gain at all, because she had already decided to leave CJA practice and had stopped picking up new cases.

It does not deny, although it tries to minimize, the fact that the superior court could have exercised it appointment power to break the strike. But, says the FTC, we must ignore all of that and deem this to be hardcore price-fixing, cartel behavior, because otherwise there will be no stopping point.

With all due respect, I submit the FTC is wrong. There are, in fact, a variety of rules to resolve this case, each with its own limiting principles. First, there is the court of appeals' rule of reason test. There is nothing novel or unprincipled about a rule of reason test. The rule of reason is the standard mode of antitrust analysis. It is used for mergers, for vertical nonprice restraints, for most joint venture problems and for some types of boycotts. Second --

QUESTION: What types of boycotts, Mr. Tom? I understood your -- your opponent to say that price -- price-

fixing implemented by a boycott had always been deemed a per se violation.

MR. TOM: Well, the FTC approaches the characterization of this conduct as -- as price-fixing in a somewhat peculiar fashion.

QUESTION: Well, both the Federal Trade Commission and the court of appeals found it was price-fixing, did they not?

MR TOM: Your Honor --

QUESTION: Did they not?

MR. TOM: Your Honor, they did. They found that this type of boycott was price-fixing. But in order to do that, I suggest, they had to take this really in two steps, and two steps that I think are contrary to the analysis of Noerr. First they say, is this the type of conduct that, assuming a private buyer, ignoring the political context, taking a purely commercial context, is this the type of conduct that we call price-fixing?

And the second step is, well, if it is price-fixing, if it is unlawful under that first step, then is it -- is reaching this conduct, does the political conduct -- context, make reaching this conduct unconstitutional under the First Amendment. And I think what is missing in that analysis is any attention to whether First Amendment principles inform the interpretation of the antitrust laws and the very broad and general prescriptions of the Sherman Act.

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QUESTION: Mr. Tom, if we take that approach, your -- brief suggests that, you know, it can sort of be limited to these situations where the government is somehow the objective, or the object of the activity, so that it has a Noerr coloration to it. But in fact, the First Amendment contains not only the right to petition the government for address of grievances, but also the right to communicate to other people as well. So why couldn't any group that -- that has a price-motivated boycott against a private concern make the same argument: the only way we can get public attention, the only way we can really make our point in the press, is to have the kind of restriction of business that attracts national press attention, like the coalers' strike, or something like that? Why couldn't you make the same argument in every case where a group even -- even goes after a private employer, or a private buyer of services?

MR. TOM: Justice Scalia, the Noerr doctrine is based both in the First Amendment and in an examination of the Sherman Act and its legislative history and its purposes, and I think it recognizes that there is something special about the legislative process, and that the types of consequences that are likely to flow from conduct directed at the legislature is different from the kinds of consequences that you see in private commercial markets.

And so, I think it is not an argument that is available

to everyone for every conduct in whatever context. And I think one of the reasons your decision in Allied Tube placed so much emphasis on the context and nature of the activity is for that very reason.

QUESTION: Do -- it would be all right for a bunch of steel suppliers to boycott the legislature, to boycott selling to a particular state, even though -- as long as they had a campaign going on to raise the prices that that state would pay for the steel? You wouldn't go that far, would you?

MR. TOM: Your Honor, under -- there is a rule which is one that we did not -- that my client, the Association, did not propound, did not urge on you in the brief, that would say that if you have a public boycott aimed at the legislature, it is by that fact alone simply not within the scope of the antitrust laws.

QUESTION: You say there is a rule. Where --

MR. TOM: I would say it is a potential rule --

QUESTION: Oh, a possibility of a rule.

MR. TOM: -- one that could be adopted, and one that could reasonably be adopted because it is limited first by the fact that Congress, or any legislative body, could draw the line in a different place, that is, it is a rule of statutory construction and does not require you to reach the constitutional question in the first instance. And second, by the fact that it applies only to public boycotts directed at

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the legislature, that is to conduct that has a dual character to it: to boycott a conduct that has been a traditional means of expression but also a conduct that the antitrust laws sometimes reach.

QUESTION: The situation here is where a public body is going to set the price that is going to be paid for services it gets, so there is just only going to be one price. And I suppose, in the steel case, if they announced we will pay -- the government announced we will pay X dollars a ton for steel, the steel companies would nevertheless be in -- in competition with each -- one another, no matter what the price was. They would be bidding and they, they would be chosen based on nonprice factors. But here, these lawyers aren't in competition at all, are they, with one another?

MR. TOM: That -- that is correct, Your Honor. The facts are entirely distinguishable. I was simply, in response to the Chief Justice's question, responding that at least one of the briefs in this case has urged a bright-line rule, and that there are limited principles even to that bright-line rule. But I -- I would also say that one need not --

QUESTION: But the per se rule, I take it is -- is --it is so often that price-fixing is so often fatal to competition, that what is treated per se.

MR. TOM: That is right. And what I would suggest is that that inference, or that presumption, does not apply in

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the circumstances of this case.

QUESTION: Because these -- these lawyers just aren't -- don't compete.

MR. TOM: These lawyers don't compete. They have got the price set by statute, and -- and they are -- they are in a position where the council -- the council and the superior court both really have them entirely at their mercy.

QUESTION: Well, who -- how are individual lawyers chosen for individual cases?

MR. TOM: The lawyers call in in the morning to volunteer for new cases, and assuming that they are -- at the time of this case, they would generally get a case in response to any volunteering. As a result of the increase, there was then an influx of lawyers into the CJA system, and the cases were no longer automatically given, but were apportioned out by the appropriate officials.

QUESTION: So there is some degree of competition among the lawyers, who calls first on the telephone?

MR. TOM: Well, that was about the extent of the competition, Your Honor.

QUESTION: May I ask, on this no competition principle, what about doctors supplying services for Medicaid or something like that? Are they in competition with one another? Does the principle -- the principle that you are seeking us to adopt apply to doctors serving -- providing

services pursuant to a set rate by the government?

MR. TOM: They are in competition in a sense. They certainly are in competition as to whether they will offer their services (inaudible) --

QUESTION: Is it a different sense from the way in which these lawyers are in competition?

MR. TOM: I think the difference, Your Honor, is not so much whether they were in competition in a formal sense, but -- whether the facts and circumstances here indicate any possibility of the exercise of market power. In --

QUESTION: Well, how can you say there is no possibility? They had the boycott and the price went up.

MR. TOM: Well --

QUESTION: I mean, maybe it wasn't caused by it, but surely there is a possibility there was some causal connection between the two events.

MR. TOM: That is right. And one possible way to resolve this case is to take the court of appeals' approach and say if market power can be proven, then it may be that this strike was coercive.

QUESTION: Right. But what I'm just really trying to find out, the rule that you ask us to adopt would apply to doctors serving the government too, wouldn't it?

MR. TOM: The rule --

QUESTION: Performing services pursuant to a statute

that authorizes reimbursement pursuant to fixed schedules.

MR. TOM: The bright-line rule that -- that I stated a moment ago, which was urged on you by the individual Respondents in this case, would include those -- that kind of hypothetical.

QUESTION: Well, but at least in the doctors case the patients are choosing the doctors --

MR. TOM: That is true.

QUESTION: And the doctors are competing with one another to be chosen by patients. That -- that isn't true here. They aren't being hired by people in jail.

MR. TOM: That is correct, Your Honor, and that is why I think there is a third potential rule --

QUESTION: And so, this case is no different than we are choosing lawyers by lot. We have a list of lawyers here, and we choose them by lot.

MR. TOM: And that distinction, I think, is only one of may distinctions that could be drawn here, which is why the Association proposed in its brief a third possible rule: that one could hold that while lack of self interest or lack of market power should each be sufficient to characterize the conduct as political, they should not be the only means of demonstrating the political context and nature of the conduct.

QUESTION: Who is in competition with the court?

MR. TOM: There is no one in competition with the

court, Your Honor.

QUESTION: Who is in competition with the lawyers?

MR. TOM: The -- there is no one in competition with the lawyers, except in the sense --

QUESTION: Well, don't we have somebody to be in competition, to get you involved?

MR. TOM: That -- there are -- I -- I'm sorry, I didn't hear the last part of the question.

QUESTION: Don't we have to have somebody in competition with somebody in order to get you involved?

MR. TOM: In order to get the antitrust laws involved?

QUESTION: Yes.

MR. TOM: That is correct, Your Honor. The FTC --

QUESTION: Well, now, tell me -- tell me who is in competition with who, that gives you a standing?

MR. TOM: The FTC's position is that all of the CJA lawyers were in competition with each other in the sense that they could decide or not decide to offer their services.

QUESTION: The group that raises the competition point is all in competition with itself? If I appear confused, I am.

(Laughter.)

MR. TOM: Your Honor, I am sorry, I don't entirely understand the import of your question. I think our position --

QUESTION: Well, isn't competition necessary for you, the antitrust division --

QUESTION: Well, you're for the lawyers --

MR. TOM: I am representing the lawyers, Your Honor, the -- people who went on strike in this case.

QUESTION: Well, you can give me -- there is no bar to you giving me some help.

(Laughter.)

MR. TOM: I confess, I don't fully understand why the FTC thinks that there is the kind of competitive harm here that calls the antitrust laws into play entirely.

QUESTION: That makes two of us.

QUESTION: Mr. Tom, I must say I don't understand this discussion at all. You -- you seem to be equating competition with market power, and you seem to be saying if there is no market power, there is no competition. That is not true. I mean, the classic violation of the -- of the common law was conspiracy of workmen to fix their wages. Very often they in fact had very little economic power. Here was, you know, here was the job. You take it at this price or -- or leave it. And it was never thought that simply because there was not, you know, real competition in the sense that you are saying it, that somehow the antitrust laws didn't apply. Is that what you're asserting? That there has to be market power before -- before the -- it's the kind of a situation that the

antitrust law even applies to?

MR. TOM: No, Your Honor. The -- the antitrust laws, however, are directed at preventing the exercises of economic collusion on consumers in the marketplace.

QUESTION: Well, that may be, but -- but it regards people as being in competition with one another, and proper subjects for application of the common law, whether or not they effectively can compete. Isn't that right?

MR. TOM: Whether or not, Your Honor, the lawyers are regarded as being in competition in some form, I would suggest that the principles of Noerr and Allied Tube would characterize this conduct as political, regardless of whether it is in competition or not.

QUESTION: All I am saying is, you -- you have been talking about whether they are in competition as equating that with whether they have market power. And it doesn't seem to me that the two, that the two --

MR. TOM: If I said that, Your Honor, I misspoke.

QUESTION: That is what I -- that is how I thought this discussion was going.

MR. TOM: I think they are separate points. And the point that I was trying to make about market power is that under Noerr and Allied Tube this -- the courts or the agencies enforcing the antitrust laws, have the responsibility of determining whether the conduct is political or whether it is

commercial. And I would suggest that where there is no market power the conduct is clearly political, as Judge -- Judge Silberman's concurrence suggested. And that one can make that decision without even reaching the constitutional analysis offered by the majority of (inaudible) --

QUESTION: Is market power -- if you don't have market power, you haven't violated the rule of reason? Or did they say that if you have market power, it is a per se rule?

MR. TOM: No. What the court of appeals below did was to say that if you have market power -- if you do not have market power, then we have to recognize this kind of conduct, it was public boycotting directed at the legislature, that kind of conduct has to be recognized as political in the absence of market power, because it could not have its effect through economic coercion. And so it must be political.

QUESTION: But it -- it rejected the claim that this kind of an agreement was a per se violation of the antitrust laws?

MR. TOM: In effect, that -- that is the result of what it did. The analysis took a somewhat different course and relied on O'Brien and on First --

QUESTION: I would think that if on remand they can't, unless market power, whatever that means -- if that isn't proven, there is no violation of the antitrust laws at all?

MR. TOM: Your Honor, I think that would be the

appropriate result here.

QUESTION: Mr. Tom, under -- I don't see why, under O'Brien, it isn't equally attractive to say if you have a people, a group of people who have no market power staging a buying or a selling boycott against a particular private company, just to get press attention, that that should be immune from the normal per se rule.

MR. TOM: But I don't think you have --

QUESTION: Not just the government, but any private company. All you have to do is say, well, we didn't really have market power. We're just trying to get press attention.

MR. TOM: But I don't think you have to reach the O'Brien analysis because this case can be decided under Noerr.

QUESTION: Oh, I suppose, but the principle, the principle you are asking us to buy into is as applicable to the -- to the First Amendment expression of objection to what a private individual is doing as it is to the First Amendment expression of the right to petition the government.

MR. TOM: Well, and yet Trucking Unlimited said that the legislature is unique and that the -- that even administrative bodies or courts are different from legislatures in that regard.

QUESTION: (Inaudible.)

MR. TOM: Yes, we did, Your Honor.

QUESTION: So you are urging the Noerr solution which

would -- under Noerr, if the court of appeals is wrong, the case is over. No remand.

MR. TOM: We are urging Noerr both as part of our cross-petition and in response to the FTC's petition --

QUESTION: Yes, all right.

MR. TOM: -- because we believe that the court of appeals can be affirmed on the basis of Noerr, namely that --

QUESTION: But we have to disagree with the court of appeals then, on that point.

MR. TOM: On that point I think it -- I think yes.

QUESTION: Well, the court of appeals treated Noerr, and thought that Noerr said you can lobby but you can't boycott. Which, frankly, is what I thought Noerr said too.

(Laughter.)

MR. TOM: But, Mr. Chief Justice, it was the lower courts in Noerr that had tried to draw the distinction between pure speech and -- and some kind of speech plus, and this Court reversed. One could say that a -- that a deceptive publicity campaign was more the speech than conduct, but it is hard to see why that wouldn't equally be true of the boycott in this case or --

QUESTION: But Noerr didn't approve any price-fixing boycott, did it?

MR. TOM: That is correct, Your Honor. What I -- what I'm saying Noerr did is to say that you need to distinguish

between political conduct and commercial conduct, and the market power test does give you one way of doing that. In our cross-petition, we are saying that that should not be the only way of distinguishing political from commercial conduct.

And we do that for a number of reasons. First of all, it would seem inconsistent with the spirit of Allied Tube itself, because in Allied Tube you had highly self-interested actors who had gotten their hands on the levers of the most influential electrical code (inaudible) --

QUESTION: Well, are you saying that your clients in this case were not self interested?

MR. TOM: No, Your Honor, I am saying that -- that there was more than self interest at stake, witness Joanne Slaight, witness the fact that any of these lawyers could have raised their incomes individually, if you take the ALJ's observation that the ones who were close to the ceiling on compensation did so by taking a lot of simple misdemeanors and pleading them out. And the fact that most of these lawyers did not do that, I suggest, shows that there is more than self interest at stake.

QUESTION: Well, I think you could find that, probably, in any boycotting group, not that they are totally, dominantly self-interested, but that self-interest played a significant part. And you could probably find too that, with other boycotting groups, you know, some of them could have gone into

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some other business and made more money. I don't know what that adds.

MR. TOM: That's right, Your Honor. We are not suggesting that that single point should be dispositive, or that each individual point must be examined in isolation and the slate wiped clean after each.

But I think it is significant that we had strong issues of public concern that were certainly not a sham, that you had a debate that was long ongoing about whether the Sixth Amendment rights were actually being adequately served. And these lawyers -- these lawyers -- this lawyers boycott should not be viewed totally in isolation from that. When you combine that with some of the strong evidence of lack of coercion in the case, such as the courts' appointment power, such as the fact that these lawyers announced their strike long in advance, giving the PDS time to adjust its caseloads to help alleviate the burden, such as the supportiveness of the ostensible targets, I think when you take all those facts together there is really a strong indication that the conduct here was political.

QUESTION: Suppose Boeing and Lockheed and all the airplane manufacturers simply say we're not going to make anything more for the government because we don't think the government is buying enough planes. This country is in dire danger; we need to beef up the Air Force a lot, and we are not

going to sell you any planes unless you buy a whole lot more than you have been buying. Now, that is certainly a public issue, I mean, there are many people think we need more planes, or, you know, more -- bigger defense establishment in general. That converts a commercial thing into a public spectacle.

MR. TOM: Well, one, you do have the sham exception. Two, while the bright-line rule would require that result, I don't think a context and nature rule would require similar treatment at all.

QUESTION: Well, why not? I mean, you've got the same, you've certainly got an important political issue there. You've got to have adequate defense, and these airplane companies aren't making enough money.

MR. TOM: That is correct, Your Honor.

QUESTION: And they're not producing enough planes.

MR. TOM: But what -- what you don't have in that example is 14,000 members of the D.C. bar waiting in the wings as potential competitors. You don't have the court's appointment power. You don't have Joanne Slaight, who didn't have any interest at all --

QUESTION: But the 14,000 members of the bar didn't storm into the courts and take care of the boycott when it arose, did they?

MR. TOM: No, that's true.

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QUESTION: They were waiting in the wings and they stayed in the wings.

(Laughter.)

MR. TOM: That is right, Your Honor, but they could have been brought in from the wings by the (inaudible) --

QUESTION: Well, maybe we could have bought airplanes from Japan, too, but -- I mean, you've always got a potential additional source of supply. There is always potential competition out there somewhere.

MR. TOM: Well, there is -- there is always a certain degree of line drawing, and Allied Tube itself this Court recognized was a very close case. Unless you adopt a bright-line rule, and I think there are some advantages to the bright-line rule that the individual Respondents urge, then you are going to be faced with close cases. I don't think this was a close case. This is one where the circumstances all clearly point very strongly in the direction of highly political conduct.

Let me add one more point, that is the FTC's rule itself does not offer much of a stopping point in the other direction. It would proscribe all expressive boycotts against the government, so long as the participants can be said to be in competition with one another. It would have condemned the lawyers strike even if it had lasted two days and consisted of only the four individual Respondents. It would condemn the

dairy farmers who pour their milk down the drain to get their protests on the evening news. And indeed, since this Court has long recognized that buyers as well as sellers can be competitors for antitrust purposes, the boycotters in Claiborne Hardware would have been condemned per se if one of their claims had been that the white merchants were price gouging them. In fact, since those boycotters opened a retail store in competition with the white merchants, perhaps the FTC's rule would condemn them even without changing the facts.

QUESTION: But why is that so horrible, that Claiborne would have come out differently if -- if a substantial motivation in the boycott was to get lower prices? You -- you -- that is unimaginable to you, that it should come out differently?

MR. TOM: I think it would be --

QUESTION: I thought that was the whole basis.

MR. TOM: I think it might have been unimaginable to Senator Sherman, and certainly I think, given the fact that you have a choice, you have a statute that has very broad and general commands, we ought to construe it with sensitivity to the First Amendment and -- and let Congress, if it really wants to reach that conduct, to say so explicitly.

Let me just say one other thing about the cost of the court of appeals' approach. Remember, the court of appeals said if you have no self-interest, you are okay under

Claiborne; if you have no market power then you are okay under O'Brien. But if there are cases, and I believe this is one, in which the totality of the circumstances clearly point in the direction of political conduct before even reaching a formal market power inquiry, then a gratuitous requirement of such an inquiry not only wastes judicial resources but also imposes an unnecessary burden on the speech and petitioning of those who can afford it least. After all, it is individuals, particularly the poor and disenfranchised, who are most likely to need to resort to conduct like a boycott. And it is also individuals who are going to be least in a position to offer a market power defense and to be able to afford the kind of inquiry that would be necessary. And I suggest that nothing in the antitrust laws requires that result.

Your Honors, if there are no further questions, I --

QUESTION: Thank you, Mr. Tom. Mr. Isenstadt, you have eight minutes remaining.

REBUTTAL ARGUMENT OF ERNEST J. ISENSTADT

ON BEHALF OF THE PETITIONER/CROSS-RESPONDENT

MR. ISENSTADT: I won't use them all, Your Honor, but there was some discussion as to whether the lawyers competed here. They did compete, and the Commission and the court of appeals both found that they competed by providing the same service to a buyer. And that is the only way that businessmen ever compete in the antitrust sense. The city was not -- the

city depended on their competition to obtain the supply of lawyers that it required. The number of assignments that a lawyer would receive each day depended upon how many other lawyers called in and volunteered for them. If not enough lawyers had called in in the exercise of their own independent judgment, the city could not have obtained the supply it needed at the price, and it would have had to raise the price without a boycott. But that's not what happened. It was only when the boycott occurred --

QUESTION: Back in the '30s they paid the lawyers nothing in the District of Columbia.

MR. ISENSTADT: Yes, Your Honor --

QUESTION: So you don't need any money to get them.

MR. ISENSTADT: The -- I think the question here, Your Honor, is not how much the District ought to be paying lawyers under CJA, it is the process by which those rates are established. And, you know, in an ideal world the District would pay lawyers far more than it does even now, but when you pay lawyers more that leaves you less money to spend on other vital city services, and the antitrust laws are designed to give the buyer the freedom to make that choice, through the benefits of competition. And competition here yielded an adequate supply prior to the boycott at the price the city offered.

The second point I wanted to make is that the court of

appeals did not reject our contention that this was a per se violation. It recognized that this was a per se violation of the antitrust laws without regard to whether there was market power. But it held that the First Amendment, as construed in O'Brien, made that law unconstitutional as applied to the facts of this case. And our point is simply that the per se rule is based on the assumption that price-fixing is generally harmful, and the Constitution doesn't prohibit enforcement of a categorical ban upon generally harmful conduct merely because it is claimed that in a particular circumstance the harm is not being caused. And the court of appeals, I think, disregarded that admonition in the way it construed O'Brien.

I have no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Isenstadt.

The case is submitted.

(Whereupon, at 11:58 a.m., the case in the above-entitled matter was submitted.)

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No. 88-1398 - SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL., Petitioners V. FEDERAL TRADE COMMISSION

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BY Lynn M. May

(REPORTER)