



10-1977

Securities and Exchange Commission v. Sloan

Lewis F. Powell Jr.

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even tho no suspension order was outstanding.

mootness issue - which is close -

I issue on merits is whether I'll
under § 12(k) of act of '34, SEC
is authorized to issue successive
10 day orders suspending
~~the~~ trading of a security.

Grant
10/18

CA 2 held notes. SEC says
- correctly - issue is important.

But Resp. claims issue is moot,
as no suspension order is outstanding.

PRELIMINARY MEMORANDUM

SEC argues

Oct. 14, 1977
Summer List 1, Sheet 2
List 1 →

No. 76-1607

SECURITIES AND EXCHANGE
COMMISSION

v.

SLOAN

Cert to CA 2 (Medina,
Anderson, Gurfein)

issues is capable
of repetition
& evading
review.

Federal/Civil

Timely

I would not apply
Weinstein v. Bradford as
strictly as
Drinkwater
does; I think
this case could
well come
within the
"capable of
repetition"
exception
to usual
mootness
doctrine. Cf. Bevilacqua.
On the merits,
this definitely
seems
certworthy.
- Dave

1. SUMMARY: The question presented is whether the SEC's authority under § 12(k) of the Securities Exchange Act of 1934 summarily to suspend trading in a security for a 10-day period includes the power to issue consecutive suspension orders, the effect of which is to suspend all trading for periods of extended duration. There is a question of mootness.
2. STATUTORY BACKGROUND: In § 19(a)(4) of the Securities Exchange Act of 1934, Congress gave the SEC the power "summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days," "if

in its opinion the public interest so requires." In 1964 this authority was extended to over-the-counter securities by enactment of former § 15(c)(5) of the Act, 78 Stat. 574, 15 U.S.C. § 78o(c)(5) (1970 ed.). In 1975 the two provisions were consolidated into the present § 12(k) of the Act, 15 U.S.C. § 78l(k) (Supp. V), which provides in part:

"If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days, or with approval of the President, summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding ninety days. . . ."

Consistently since 1944, the SEC has construed its authority to permit issuance of successive 10-day suspension orders which have the effect of suspending trading for a continuous period in excess of 10 days, where such orders are thought necessary to protect the investing public. According to the SEC, this power was used to create suspensions of more than 10 days 29 times between 1944 and 1964. Between 1964 and November, 1976, the SEC has used the consecutive suspension device to suspend trading for more than 10 days no less than 235 times. *used extensively*

3. FACTS: On April 29, 1975, the SEC suspended for 10 days public trading in the stock of Canadian Javelin, Ltd. (CJL), a Canadian corporation in which resp had extensive dealings and in which he owned stock. Simultaneously, the SEC launched an investigation into allegations of manipulative activities by CJL insiders. At the end of the first suspension period the SEC concluded that continued suspension was appropriate and imposed a second 10-day suspension. Successive determinations and suspensions were imposed for 370 days, until the suspensions were lifted in May, 1976, with the filing of a civil action by

the SEC.^{1/}

On April 23, 1976, while the suspension was still in force, resp brought an appeal before CA 2. The SEC had previously declined to grant resp a hearing or to agree with his claims that the practice of imposing successive suspension orders violated both the Act and his due process rights. By the time of CA 2's decision on November 18, 1976, all suspension orders against CJL had terminated, and the SEC had no plans to issue further orders against CJL in the future. Although no class had been sought or certified, CA 2 found a live controversy under the "capable of repetition yet evading review" rubric of Sosna v. Iowa, 419 U.S. 393.

Turning to the merits, CA 2 found that there was sufficient evidence of manipulation of CJL stock to justify the original 10-day suspension. But the court went on to hold that the Act did not authorize the practice of successive summary 10-day suspensions. CA 2 buttressed its view with reference to another section of the Act which authorizes the SEC to suspend registration of a security for a period not exceeding 12 months, after notice and hearing, if the SEC finds that "the issuer of such security has failed to comply with any provision of this title

1/ This was the second series of suspensions the SEC had imposed on trading in CJL stock, the first having run from November, 1973, through January, 1975. Resp had challenged these earlier suspension orders before CA 2, but for a number of reasons the CA had dismissed resps's appeal without prejudice so that further proceedings could be had before the SEC. See Pet. 8a-10a. The present petition arises from that remand.

or the rules and regulations thereunder." 15 U.S.C. 781(j)
(Supp. V).^{2/}

Viewing the statutory scheme as a whole, CA 2 thought Congress did not intend the 10-day summary suspension procedure to be used as a device to evade the more stringent procedural requirements established for suspensions of greater duration. In its opinion, the 10-day suspension order was designed for emergency use; the Act provided no authority for successive 10-day suspension orders. Accordingly, the SEC was ordered "to discontinue forthwith its adoption and use of successive ten-day suspension orders to order the suspension of trading in a security for an extended period, i.e., in excess of ten days." Pet. 17a. There was no need to reach any due process question.

? 4. CONTENTIONS: The SG first contends that CA 2 erred in not dismissing the petition as moot; there was no reasonable expectation that CJL would again be subjected to a 10-day suspension order, and the case is therefore not one capable of repetition yet evading review. See Weinstein v. Bradford, 423 U.S. 147. *SG says moot*

On the merits, the SG complains that CA 2 has crippled one of the SEC's principal tools for protecting the investing public, and has overturned 33 years of administrative practice. The SG

2/ CA 2 also pointed to the provision of § 12(k), quoted supra, which permits 90-day summary suspensions of trading, "on any national securities exchange or otherwise," "with the approval of the President." CA 2 devoted a good deal of attention to the 90-day suspension provision of § 12(k). On the SEC's petition for rehearing, however, all this discussion was deleted as unnecessary, see Pet. 18a-20a, apparently because CA 2 thought the 90-day suspension applied only to trading of securities on a national exchange. The SG does not mention the 90-day provision as part of the SEC's remedial arsenal available in this case.

notes that the Senate Report accompanying the 1964 extension of the suspension authority to over-the-counter sales expressed approval of the SEC's practice:

"The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the 10-day period, it determines that another suspension is necessary. The committee accepts this interpretation." S. Rep. No. 379, 88th Cong., 1st Sess. 66-67 (1963).

The SG argues that the normal judicial deference to the SEC's construction of its own statutory ^{authority} is enhanced where Congress has reenacted a statute without disapproving the agency's construction, as Congress did here in 1964 and 1975. The SG contends that the 12-month suspension-of-registration provision is designed for use only where there is misconduct by the issuer of securities; it is therefore not available as an alternative in cases in which the question is manipulation by third parties, and was not intended by Congress to be a preferred remedy in cases of this sort. Although there is no conflict among the CAs, the SG says that New York's position as the Nation's financial center makes CA 2's error certworthy.

5. DISCUSSION: If the case was not moot when CA 2 decided it, it is because "there was a reasonable expectation that [CJL] would be subjected to the same action again." Weinstein v. Bradford, 423 U.S., at 149. I see no basis for concluding that there was any such expectation at the time CA 2 issued its opinion; I therefore think this case is a candidate for summary reversal on the strength of Weinstein. I think resp's private ownership of CJL common stock confers standing on him to seek review in this case.

On the merits, one important measure of the correctness of CA 2's decision is the extent to which alternative remedies are available for the misconduct which would justify a 10-day summary suspension. The 1975 Senate Report accompany § 12(j) of the Act (providing for the 12-month suspension) states that "the Commission is expected to use this section rather than its ten-day suspension power in cases of extended duration." Senate Report No. 94-75, 94th Cong., 1st Sess. (1975), p. 105-106.

It is not clear, however, that the 10-day and 12-month suspension provisions are meant to be graduated responses to precisely the same problems. A 12-month suspension is available only if the issuer of a security has violated the security laws, while the 10-day suspension is available for broader purposes. Moreover, the 12-month suspension holds up registration of securities, while the 10-day suspension bars trading; brokers are prohibited from using any means of interstate commerce to effect or induce transactions of securities suspended under either section. In light of these differences, the Senate Report for § 12(j) may best be read as expressing a preference for the 12-month suspension procedure only in a limited class of cases, in which both suspensions apply.

Even if the SEC is overworking its summary suspension power when it ought to be using a remedy with more procedural safeguards, CA 2 may have devised a cure worse than the disease. There may well be situations where consecutive 10-day suspensions of trading in securities offer the only effective protection for private investors. So long as each suspension is preceded by an SEC determination that a continued trading embargo is necessary, as well as a finding that no alternate remedy is feasible to deal with the problem, at least some limited consecutive

suspensions appear to have been contemplated by Congress. If the Court is not daunted by the mootness problem, the long-standing administrative practice to the contrary appears to make this a certworthy case.

There is no response.

6/30/77
tap

Drinkwater

CA op in petn

Conf. - 10/14/77

10/4/77

Response received. Resp makes the following points.

(1) The case is not moot. Southern Pac. R. Terminal Co. v. ICC, 219 U.S. 498 (1911), holds that mootness is not a bar where short-term administrative orders, which may be repeated successively, have expired. (*Seems correct.*)

(2) The SEC cannot "bootstrap" itself into a position of exercising power it never received under the statute merely because Congress has not taken affirmative steps to restrict those ultra vires acts. Nor is this a case in which the agency is interpreting its own regulations, such as Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969).

(3) Nevertheless, the Court should grant cert. The SEC is making noises indicating that it does not consider itself bound to adhere to the order of the CA 2 to refrain from issuing successive orders. Therefore, this Court ought to make clear that the agency has no such power.

(4) If the Court does not accept Resp's statutory argument -- upheld by the Court below -- then it must consider the due process issues presented and strike the SEC practice down on that basis.

I agree with Dave's conclusion that the case is not moot, although some argument and briefing on the point would not hurt, in the event of a grant.

Merits close. Grant

Bob

preliminary
9/12

1. CA 2's decision
limits SEC's authority
to issue necessarial
10 day suspension of
trading in a security.

SEC has done this
frequently over the years
— ~~several~~ several hundred
times.

2. CA 2 ~~held~~ held issue was
not "moot". If we
disagree - i.e. think it is
moot - we should reverse
summarily. Otherwise, SEC
is bound by this precedent.

I'd Grant & request
writ ~~to~~ issue
be argued

BENCH MEMO

No. 76-1607 SEC v. Sloan

This case presents the question whether the SEC has the power under §12(k) of the Securities Exchange Act of 1934, which permits the Commission summarily to suspend trading in a security for a period not exceeding ten days, to "tack" ten-day suspensions for the same abuse into prolonged suspensions of more than a year's duration. There is also an issue of mootness.

I think the case should not be held moot, either *not moot* under the doctrine of Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911), or that of United States v. W.T. Grant Co., 345 U.S. 629 (1953). On the merits, a sensible reading of §12(k) and other provisions in the '34 Act

seems to support the view of the court below, which held that the SEC lacked power to issue successive ten-day orders on the basis of the same perceived harm.

The SG's brief and the brief of Canadian Javelin, Ltd., as Amicus Curiae are both quite good, although the latter gets a bit wordy. I doubt that you will find Sloan's 173-page pro se brief very helpful. But because the other two seem to cover all the issue adequately, this memo will merely hit the highlights.

Burn it.

I

MOOTNESS

The SEC argues that this case is moot because the last of the ten-day suspension orders expired in May 1976. There were two series of these orders. The first commenced in November 1973 and ended in January 1975. It came in response to certain false and misleading press releases concerning Canadian Javelin's business activities. Sloan filed a petition for review of these orders, alleging that he had sold short and that the allegedly illegal ban prevented him from covering his short position. By the time CA2 heard argument in this case, the first series of ~~orders~~^{orders} had terminated, but the second had begun. The second series came in response to a Canadian investigation into wash sale trading by some of Javelin's shareholders. (This series lasted from April 1975 to May

1976). CA2 noted that the series of orders of which Sloan complained had expired and that there was nothing in the record concerning the second series. It also observed that the SEC had indicated its willingness to grant Sloan some sort of an administrative hearing concerning the second set of orders, which might flesh out the record. It therefore dismissed Sloan's petition for review without prejudice to repleading after the administrative hearing.

Sloan requested the SEC to refrain from issuing any more suspension orders pending an administrative hearing. The SEC refused to grant him the hearing and continued issuing the orders.

Sloan then initiated this suit by petitioning for review of the second series of orders. Once again, the SEC stopped its issuance of the orders before CA2 could hear the case. The court rejected the SEC's mootness claim, however, by holding the orders "capable of repetition, yet evading review," under Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 514-515 (1911). In that case, the ICC issued an order requiring the terminal to cease and desist for a period of two years from granting undue preferences to a particular shipper. Before this Court could review the order, the two years had elapsed. The Court refused to hold the case moot, because otherwise review of such orders might be defeated.

Although Southern Pacific Terminal did not appear to rest on any finding that this particular type of order would likely be entered against this particular petitioner again, later cases added such a requirement. In Roe v. Wade, 410 U.S. 113 (1973), the Court declared that the petitioner might become pregnant again; hence, "repetition" was likely. And in Weinstein v. Bradford, 423 U.S. 147 (1975), the Court read Sosna v. Iowa as setting forth two requirements for application of the "capable of repetition, yet evading review" evidence in the absence of a class action: (1) the challenged action's duration must be too short to permit full litigation before expiration; and (2) a reasonable expectation that the same complaining party will be subjected to the same action again. Because Bradford had not demonstrated that North Carolina's parole system might ever again be applied to him, his due process claim was dismissed as moot.

A very harsh reading of Bradford might support a refusal to find the SEC's orders here "capable of repetition, yet evading review." Sloan has not put any evidence in the record regarding the likelihood that Canadian Javelin will be subjected ^{again} to the orders. Nor has he worked through the probability theory the SG wants him to follow with respect to other stocks in his portfolio.

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In common sense terms, however, such a reading of Braford seems too harsh. The SEC's use of §12(k) in this manner is not at all uncommon. See Amicus' Appendix. In actuality, Javelin was subjected to two sets of these orders. Moreover, one of Sloan's complaints was that he was trapped in a short position. As Amicus points out, Br. at 9 n. 8, the same thing could happen in the future with respect to stocks he does not even now own. This distinguishes the case from Bradford, where future criminal activity by Bradford would have to be presumed in order to find likelihood of repetition. Here, perfectly legitimate and ongoing activity could lead to repetition. Finally, such a harsh reading of Bradford would cast doubt on the holding of Roe v. Wade, since that case did not require any particular actuarial showing that women pregnant in 1970 (the time of the class complaint) would again become pregnant. I think the mootness judgment should turn on common sense, rather than on often misleading faith in the

precision of probability theory. Cf. Ballew v. Georgia.

Even if the "capable of repetition, yet evading review" doctrine is held not to apply, United States v. W.T. Grant Co., 345 U.S. 629 (1953), seems to support a holding that the case is not moot. In that case, the Government sued an individual and six corporations from violating the Clayton Act through the holding of interlocking directorates. After the complaint was filed, the interlocks were dissolved, and the defendants moved to dismiss as moot. Even though the District Court had found that there was not "the slightest threat that the defendants [would] attempt any future" violations, this Court held the case not moot. Otherwise, the defendants could always avoid law enforcement, yet remain free to return to their old ways. Moreover, there was a public interest in having the legality of the practices settled.

The same is true here. There surely is a public interest in having the legality of the SEC's practices under §12(k) settled. And if the SEC can always stave off review by terminating the series of orders prior to judicial review, it will remain free to engage in the challenged conduct without fear of oversight. Moreover, on these facts, it looks as though this is precisely what the SEC attempted to accomplish. Both series of orders expired just before CA2 considered Sloan's petitions.

If this case is held moot, it is hard to see how the issue will ever become subject to review, except for the grace of the SEC.

II

SEC POWER UNDER §12(k)

The Amicus' Brief does a pretty good job of responding to the SG's arguments on the merits. I will emphasize only a couple of points.

First, §12(j) permits the SEC to suspend registration for a period not exceeding 12 months, but only after notice and hearing. It is hard to believe that Congress intended to permit the SEC to avoid the hearing requirement - and the time limit - of 12(k) - by resort to trading suspension orders under §12(k). Professor Loss, whom the SG quotes at length for descriptions of the SEC practice, raises this issue in a section of his treatise not included in the SG's excerpt (§19(a)(2) was the predecessor of §12(k)):

The more serious question of statutory authority to do this arises not from one suspension onto another in the event of an emergency lasting more than ten days, but from the gradual evolution of this emergency power - not used at all during the first seven years of the Commission's life - into the pendente lite suspension power which is lacking under §19(a)(2). By 1959 the Chairman found it possible to say, by way of explaining a legislative proposal to insert a pendente lite suspension power [§19(a)(4)] has been used to

the lacking
of

keep in effect a suspension of trading pending final disposition of delisting proceedings," although "No express authority for such action is contained in Section 19(a)(4)." In at least one of the most recent of the seven cases in which suspension orders accompanied the institution of delisting proceedings, the suspension order is quite bare of any emergency findings. The pendente lite suspension power with respect to broker-dealer registration §15(b) not only stands in marked contrast to §19(a)(2) - though, to be sure, §15(b) was enacted two years later - but also requires "appropriate notice and opportunity for hearing." And the similar power which was proposed to be added to §19(a)(2) in the 1959 legislative program would have required a prompt hearing, on the issuer's request, as to the continuation of the suspension.

2 L. Loss, Securities Regulation 854-855 (2d ed. 1961).

In his 1969 Supplement, Loss cites the 1963 Senate Report, quoted at pp. 27-28 of the SG's Brief, as some evidence that Congress did contemplate a §12(k) power to issue orders in series. The answer to this contention, which Amicus makes at Br. 38-39, is that it is counter-balanced by a statement in a 1974 Senate Report, dealing with the recodification of the suspension powers into the preset §12(j) and of §12(k), to the effect that "the Commission is expected to use [§12(j) - suspension of registration] rather than its ten-day suspension power in cases of extended duration." The legislative history being in equipoise, I think we are free to examine the logic of the statute.

The logic of the statute seems to favor Sloan's position. As noted above, in view of the procedural

protections built into §12(j), it is difficult to accept the SEC's contention that §12(k) authorizes complete suspension of trading for periods up to 13 years, ~~see~~ Amicus' App. at 1a, without some kind of protections for the corporation and its shareholders. Moreover, there are no statutory guidelines as to what circumstances warrant imposition of protracted series of orders, and the Commission has published no regulations suggesting how its discretion will be guided. The elastic phrases "public interest" and "protection of investors" in § 12(k) certainly provide little guidance. In effect, the SEC's discretion is unreviewable. The sparse nature of the section ~~leads~~ support to the idea that it was viewed as an emergency, stop-gap measure, which ordinarily would not need to be reviewed because it would terminate so quickly.

The SEC has three major arguments in its favor. First, it contends that §12(k) covers a broader range of securities than does §12(j). Br. for SEC at 29-30. Section 12(j) covers only registered securities, while §12(k) covers any security. Thus, says the SG, there would be a statutory gap - no way for the SEC to effect long-term suspensions of trading in unregistered securities. This may be true, but it also may be true that Congress simply was not as concerned about manipulations of unregistered securities. Moreover, the argument proves too much,

because an ironic consequence^f of using §12(k) as a parallel to §12(j) for unregistered securities is ^{that} it[^] obviates any resort to §12(j) even for registered securities. In effect, §12(j) falls into desuetude.

Second, the SEC argues that §12(j) reaches only issuer misconduct, while §12(k) can be used to halt trading even where third-party manipulations are involved. Once again it might be answered that Congress well may have been more concerned with the former evil[^] than the latter. Furthermore, it seems backwards to grant the SEC power to suspend trading for long periods, without hearings, when third-party conduct is involved, and yet to create procedural protection via §12(j) when suspected issuer misconduct is present. When the issuer itself is culpable, at least it can be held partially accountable for the predicament into which suspension flings it. The shareholders - on a traditional representation theory - are stuck with the board and its management, which presumably engaged in the misconduct. When suspension results from third-party conduct,^{however,} the issuer and its shareholders are frozen in limbo through no fault of their own. One would expect more procedural protection in the latter situation. Yet in the SEC's reading of the statute, the issuer gets procedural protections for charges of its own^{misconduct} in suspension proceedings under §12(j), but gets no protection when

trading is suspended on account of third-party misconduct under §12(k). The lik^elier inference would seem to be that Congress did not feel that procedural protections were necessary under §12(k) because it did not believe §12(k) would be used to freeze the issuer and its shareholders in limbo for extended periods, as could be the case under §12(j).

Third, the SEC argues, Br. 31-32, that its interpretation of §12(k) is necessary to furnish a pendente lite suspension power. If Congress had wished to create such a pendente lite power in connection with §12(j) proceedings or injunction suits, it could have done so quite explicitly. Indeed, it was the transformation of §12(k)'s predecessor into such a pendente lite suspension statute that Professor Loss question in 1961. See, p. 8 supra. One would think that if Congress tended to create such a power, it would at least have created some sort of a preliminary injunction standard (likelihood that SEC will prevail on merits) that would have to be met before a long-term suspension pendente lite could be approved.

One could reasonably come out the other way, but I do not believe that the SEC's arguments carry the day.

R.C.

ss

§ 12(k) of '34 Act authorizes SEC ~~to~~ summarize to suspend trading in a security for period not more than 10 days.

CA 2 held that § 12(k) does not give SEC power to "tack" 10 day periods.

1. mootness . Not moot (as SEC argues), an issue is "capable of repetition, evading review".

2. merits . § 12(j) allows SEC to suspend registration of a security for up to 12 mos. - but only after notice & hearing.

Difficult to believe Congress intended to allow the notice & hearing requirements of 12(j) to be by-passed ~~only~~ repetitive resort to 12(k).

§ 12(k) provides no ^{specific} standards & there are no Regs.

A Co. whose shares are suspended has no assured way to having a D/P hearing.

(In this case, SEC suspended trading longer than one year under 12(k) - with no hearing. It could suspend under 12(j) ~~to~~ for one year - but only after hearing. Congress hardly could have intended this inconsistent result.)

12(k) is an emergency power. SEC has other remedies

Pitt (SEC)

Doing this for 33 years.

SEC makes a current & fresh review of facts before each extension.

Court can review discretion of S.E.C. to renew.

Argues this was orig. intent of Congress - but in 1964 the Act was expanded to cover all OTC trading & the practice of SEC under 12 (k) was made clear to Congress. This practice was disclosed in annual reports of SEC.

Purpose of suspension is to give SEC time to ~~not~~ obtain the necessary information to make the facts available to public. This took more than a year here.

This case was petition for review of SEC's order filed with CA - filed under § 25(a) of Act. §

Pitt

Thurs case is moot at time
It was decided by CA2 - this
is true because of the way this
case was ~~inst~~ instituted.

Sloan (per se)

Has been trying since 1974 to litigate
this issue.

Jovanovic is a registered security

Pitt

12(z) is inapplicable because of
manipulation was not by the company
- it was by broker-dealer

SEC's suspension under 12(k)
(10 days) is broader - ~~applying~~
issues, dealers, etc - than any other
remedy

Not meet 9-0

Affirm 9-0

76-1607 SEC v. SLOAN

Conf. 3/29/78

The Chief Justice Passed. Affirm

§ 12(k) is silent as to whether there can or cannot be renewals.

But Congress never intended 37 successive suspensions. Wrong, however, to say no renewals. SEC abused its discretion here.

Not meet.

Mr. Justice Brennan Affirm

If there is to be an extension, there must be a separate reason. Can't extend for same reason. If first extension is for reason A there must be reason B to renew it for another year.

Adm. agency that acts as SEC did is not entitled to usual deference.

Not meet.

Mr. Justice Stewart Affirm

On this particular suspension, case is not. I am not frowny. We can look at Resp. as an investor.

Meents: 12(k) means what it says. But SEC did advise Congress (not w/out some ambiguity) it was construing 12(k) to allow "roll-overs". And Senate Rep. appears to have agreed. But House Rep. was silent.

Despite their Senate Rep., 12(k) seems clear. Continuous suspension not authorized. Must be new reason

Mr. Justice White

Affirm

no comments

Mr. Justice Marshall

Affirm

no comments

Mr. Justice Blackmun

Affirm on abuse of discretion
No moot.

Administrative comments
are entitled to weight.

Would affirm on
"abuse of discretion theory" —
not on WJB's theory.

Congressional acceptance
of SEC action persuasive

Mr. Justice Powell

Affirm

Agree with Brennan & Stewart.

Mr. Justice Rehnquist

Affirm

Not moot.

Agree with WJ, B & P S

Mr. Justice Stevens

Affirm

Leg but not clear enough
to override language of 12(k)

No separate reason
here. This is all we need
to say. Need not invite
SCL to find a separate
reason.

G 10

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

APR 28 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1607

Securities and Exchange
Commission, Petitioner,
v.
Samuel H. Sloan.

On Writ of Certiorari to the United
States Court of Appeals for the
Second Circuit.

[May —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Under the Securities Exchange Act of 1934 the Securities and Exchange Commission has the authority "summarily to suspend trading in any security . . . for a period not exceeding ten days" if "in its opinion the public interest and the protection of investors so require."¹ Acting pursuant to this

¹This authority is presently found in § 12 (k) of the Act, which was added by amendment in 1975 by Pub. L. No. 94-29 § 9, 89 Stat. 118. It provides in pertinent part:

"If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended." 15 U. S. C. (Supp. V) § 78l (k).

This power was previously found in §§ 15 (c)(5) and 19 (a)(4) of the Act, which for all purposes relevant to this case were substantially identical to the current statute, § 12 (k), except that § 15 (c)(5) authorized summary suspension of trading in securities which were traded in the over-the-counter market, while § 19 (a)(4) permitted summary suspension of trading in securities which were traded on the national exchanges. 15 U. S. C. §§ 78o (c)(5) and 78a (a)(4) (1970 ed.). Congress consolidated those powers in § 12 (k).

Received
4/28
L.F.P.

A straight forward
& well
written
opinion
on ~~an~~ an
easy
question.
The SEC
was way
out-of-bounds

authority the Commission issued a series of consecutive orders suspending trading in the common stock of Canadian Javelin Ltd. ("CJL") for over a year. The Court of Appeals for the Second Circuit held that such a series of suspensions was beyond the scope of the Commission's statutory authority. 547 F. 2d 152, 157-158 (1976). We granted certiorari to consider this important question, — U. S. — (1977), and, finding ourselves in basic agreement with the Court of Appeals, we affirm. We hold that even though there be a periodic redetermination of whether such action is required by "the public interest" and for "the protection of investors," the Commission is not empowered to issue, based upon a single set of circumstances, a series of summary orders which would suspend trading beyond the initial 10-day period.

I

On November 29, 1973, apparently because CJL had disseminated allegedly false and misleading press releases concerning certain of its business activities, the Commission issued the first of what was to become a series of summary 10-day suspension orders continuously suspending trading in CJL common stock from that date until January 26, 1975. App. 109. During this series of suspensions respondent Sloan, who owned 13 shares of CJL stock and had engaged in substantial purchases and short sales of shares of that stock, filed a petition in the United States Court of Appeals for the Second Circuit challenging the orders on a variety of grounds. On October 15, 1975, the court dismissed as frivolous all respondent's claims, except for his allegation that the "tacking" of 10-day summary suspension orders for an indefinite period was an abuse of the agency's authority and a deprivation of due process. It further concluded, however, that in light of two events which had occurred prior to argument, it could not address this question at that time. The first event of significance was the resumption of trading on January 26, 1975. The second was the commencement of a second series of

summary 10-day suspension orders. This series began on April 29, 1975, when the Commission issued a 10-day order based on the fact that the Royal Canadian Mounted Police had launched an extensive investigation into alleged manipulation of CJK common stock on the American Stock Exchange and several Canadian stock exchanges. App. 11-12. This time 37 separate orders were issued, suspending trading continuously from April 29, 1975, to May 2, 1976. The court thought the record inadequate in light of these events and dismissed respondent's appeal "without prejudice to his repleading after an administrative hearing before the SEC . . .," which hearing, though apparently not required by statute or regulation, had been offered by the Commission at oral argument. 527 F. 2d 11, 12 (CA2 1975), cert. denied, 426 U. S. 935 (1976).

Thereafter respondent immediately petitioned the Commission for the promised hearing. The hearing was not forthcoming, however, so on April 23, 1976, during the period when the second series of orders was still in effect, respondent brought the present action pursuant to § 25 (a) of the Act, 15 U. S. C. § 78y (a)(1), challenging the second series of suspension orders. He argued, among other things, that there was no rational basis for the suspension orders, that they were not supported by substantial evidence in any event, and that the "tacking" of 10-day summary suspension orders was beyond the Commission's authority because the statute specifically authorized suspension "for a period not exceeding ten days."² The court held in respondent's favor on this latter point. It first concluded that despite the fact that there had been no 10-day suspension order in effect since May 2, 1976, and the Commission had asserted that it had no plans to

² Respondent also argued that the orders violated his due process rights because he was never given notice and an opportunity for a hearing and that § 12 (k) was an unconstitutional delegation of legislative power. The court found it unnecessary to address these issues.

consider or issue an order against CJL in the foreseeable future, the case was not moot because it was "capable of repetition yet evading review." 547 F. 2d, at 158, quoting from *Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498 (1911).

The court then decided that the statutes which authorized summary suspensions—§ 12 (k) and its predecessors—did not empower the Commission to issue successive orders to curtail trading in a security for a period beyond the initial 10-day period. *Id.*, at 157-158. We granted certiorari, specifically directing the attention of the parties to the question of mootness, — U. S. — (1977), to which we now turn.

II

The Commission does not urge that the case is demonstrably moot, but rather that there simply are not enough facts on the record to allow a proper determination of mootness. It argues that there is no "reasonable expectation" that respondent will be harmed by further suspensions because, "the investing public now ha[ving] been apprised of the relevant facts, the concealment of which had threatened to disrupt the market in CJL stock, there is no reason to believe that it will be necessary to suspend trading again." Brief for Petitioner 15, quoting from *Pet. for Cert.* 12 n. 7. Cf. *Weinstein v. Bradford*, 423 U. S. 147, 149 (1975). The Commission concedes, however, that respondent, in his capacity as a diversified investor, might be harmed in the future by the suspension of some other security which he owns. But it further contends that respondent has not provided enough data about the number or type or securities in his portfolio to enable the Court to determine whether there is a "reasonable" likelihood that a security which he owns will be subjected to consecutive summary suspension orders.³ Respondent, on the other hand, argues

³ The Commission contends that to determine the mathematical probability that at least one of the securities held by respondent will be subjected to consecutive suspension orders it is necessary to know, in addition to

that this case is not moot because, as the Court of Appeals observed, it is "capable of repetition yet evading review." He further contends that he has suffered collateral legal consequences from the series of suspension orders, and thus the case is not moot. Cf. *Sibron v. New York*, 392 U. S. 40, 57 (1968).

We find it unnecessary to address respondent's second contention or to undertake the Commission's suggested analysis of mootness because this case falls squarely within the general principle first enunciated in *Southern Pacific Terminal Co. v. ICC*, *supra*, and further clarified in *Weinstein v. Bradford*, *supra*, that even in the absence of a class action a case is not moot when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the *same complaining party* would be subjected to the same action again." *Weinstein v. Bradford*, *supra*, at 147 (emphasis added). A series of consecutive suspension orders may last no more than 20 days, making effective judicial review impossible during the life of the orders, and thus satisfying the first part of the test. And, to put it mildly, CJL has a history of sailing close to the wind.⁴ Thus, the Commission's protestations to the

other information admittedly available in the Commission's own records, the number of publicly traded corporations of which respondent is a shareholder. This datum cannot be ascertained with any accuracy on this record, however, claims the Commission, because respondent has made various representations regarding that number at various stages of the litigation. Cf. App. 153 with Brief in Opposition 18. The Commission adds that the probability could be determined with even greater accuracy if respondent revealed the nature of his portfolio because certain securities—those listed on the New York Stock Exchange, for example—are seldom summarily suspended.

⁴ Within the last five years the Commission has twice issued a series of orders, each of which suspended trading in CJL stock for over a year. In the various staff reports given to the Commission in connection with and attached to the second series of orders, the Division of Enforcement indicates in no less than six separate reports that either the Commission or the various stock exchanges view CJL as a "chronic violator." App. 20,

contrary notwithstanding, there is a reasonable probability that CJL stock will again be subjected to consecutive summary suspension orders. Accordingly, respondent, who apparently still owns CJL stock, very well may suffer the same type of injury he suffered before, and the second prong of the test is satisfied.

III

A

Turning to the merits, we note that this is not a case where the Commission, discovering the existence of a manipulative scheme affecting CJL stock, suspended trading for 10 days and then, upon the discovery of a second manipulative scheme or other improper activity unrelated to the first scheme, ordered a second 10-day suspension.⁵ Instead it is a case in which the Commission issued a series of summary suspension orders lasting over a year on the basis of evidence revealing a single, though likely sizable, manipulative scheme.⁶ Thus, the only

22, 24, 28, 29, 31. And reference is made to "the continuous [CJL] problems." App. 61. Furthermore, counsel for the Commission represented at oral argument that there were in fact three separate bases for the second series of suspensions—alleged market manipulation, a change in management of the company, and a failure to file current reports. Tr. of Oral Arg. 17-18.

⁵ Neither does the first series of orders appear to be of this type. Rather, like the second series, it appears to be predicated mainly on one major impropriety on the part of CJL and its personnel, which impropriety required the Commission, in its opinion, to issue a year long series of summary suspension orders to protect investors and for the public interest.

⁶ As indicated above, see *ante*, n. 4, the Commission advances three separate reasons for the suspensions, thus implicitly suggesting that perhaps this is a case where the Commission discovered independent reasons to suspend trading after the initial suspension. We note first that there are doubts whether these "reasons" independently would have justified suspension. For example, we doubt the Commission regularly suspends trading because of a "change in management." A suspension might be justified if management steps down under suspicious circumstances, but the suspicious circumstance here is the initial reason advanced for suspension—the

question confronting us is whether, even upon a periodic redetermination of "necessity," the Commission is statutorily authorized to issue a series of summary suspension orders based upon a single set of events or circumstances which threaten an orderly market. This question must, in our opinion, be answered in the negative.

The first and most salient point leading us to this conclusion is the language of the statute. Section 12 (k) authorizes the Commission "summarily to suspend trading in any security . . . for a period not exceeding ten days . . ." 15 U. S. C. (Supp. V) § 78l (K) (emphasis added). The Commission would have us read the underscored phrase as a limitation only upon the duration of a single suspension order. So read, the Commission could indefinitely suspend trading in a security without any hearing or other procedural safeguards as long as it redetermined every 10 days that suspension was required by the public interest and for the protection of investors. While perhaps not an impossible reading of the statute, we are persuaded it is not the most natural or logical one. The duration limitation rather appears on its face to be just that—a maximum time period for which trading can be suspended for any single set of circumstances.

Apart from the language of the statute, which we find persuasive in and of itself, there are other reasons to adopt this construction of the statute. In the first place, the power to summarily suspend trading in a security even for 10 days, without any notice, opportunity to be heard or findings based

manipulative scheme—and thus the change in management can hardly be considered an independent justification for suspension. More importantly, however, even assuming the existence of three independent reasons for suspension, that leaves 34 suspension orders that were not based on independent reasons and thus the question still remains. Does the statute empower the Commission to continue to "roll-over" suspension orders for the same allegedly improper activity simply upon a redetermination that the continued suspension is "required" by the public interest and for the protection of investors?

upon a record, is an awesome power with a potentially devastating impact on the issuer, its shareholders, and other investors. A clear mandate from Congress, such as that found in § 12 (k), is necessary to confer this power. No less clear a mandate can be expected from Congress to authorize the Commission to extend, virtually without limit, these periods of suspension. But we find no such unmistakable mandate in § 12 (k). Indeed, if anything, that section points in the opposite direction.

Other sections of the statute reinforce the conclusion that in this area Congress considered summary restrictions to be somewhat drastic and properly used only for very brief periods of time. When explicitly long term, though perhaps temporary, measures are to be taken against some person, company or security, Congress invariably requires the Commission to give some sort of notice and opportunity to be heard. For example, § 12 (j) of the Act authorizes the Commission, as it deems necessary for the protection of investors, to suspend the registration of a security for a period not exceeding 12 months if it makes certain findings "*on the record after notice and opportunity for hearing . . .*" 15 U. S. C. (Supp. V) § 78l (j) (emphasis added). Another section of the Act empowers the Commission to suspend broker-dealer registration for a period not exceeding 12 months upon certain findings made only "*on the record after notice and opportunity for hearing.*" 15 U. S. C. (Supp. V) § 78o (4) (emphasis added). Still another section allows the Commission, pending final determination whether a broker-dealer's registration should be revoked, to temporarily suspend that registration, but only "*after notice and opportunity for hearing.*" 15 U. S. C. (Supp. V) § 78o (s) (emphasis added). Former § 15 (b)(6), which dealt with the registration of broker-dealers, also lends support to the notion that as a general matter Congress meant to allow the Commission to take summary action only for the period specified in the statute when that action is based upon any single set of circumstances. That section allowed the Commission to

summarily postpone the effective date of registration for 15 days, and then, *after appropriate notice and opportunity for hearing*, to continue that postponement pending final resolution of the matter.⁷ The section which replaced § 15 (b) (6) even further underscores this general pattern. It requires the Commission to take some action—either granting the registration or instituting proceedings to determine whether registration should be denied—within 45 days. 15 U. S. C. (Supp. V) § 78o (b) (1). In light of the explicit congressional recognition in other sections of the Act, both past and present, that any long term sanctions or any continuation of summary restrictions must be accompanied by notice and an opportunity for a hearing, it is difficult to read the silence in § 12 (k) as an authorization for an extension of summary restrictions without such a hearing, as the Commission contends. The more plausible interpretation is that Congress did not intend the Commission to have the power to extend the length of suspensions under § 12 (k) at all, much less to repeatedly extend such suspensions without any hearing.

B

The Commission advances four arguments in support of its position, none of which we find persuasive. It first argues

⁷ The former § 15 (b) (6) provided in pertinent part:

“Pending final determination whether any registration under this subsection shall be denied, the Commission may by order postpone the effective date of such registration for a period not to exceed fifteen days, but if, after appropriate notice and opportunity for hearing (which may consist solely of affidavits and oral arguments), it shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of such registration until final determination, the Commission shall so order. Pending final determination whether any such registration shall be revoked, the Commission shall by order suspend such registration if, after appropriate notice and opportunity for hearing, such suspension shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors” 15 U. S. C. § 78o (6) (1970 ed.).

scheme. But if trading may be suspended a second time 30 that only its interpretation makes sense out of the statute. That is, if the Commission discovers a manipulative scheme and suspends trading for 10 days, surely it can suspend trading 30 days later upon the discovery of a second manipulative days later upon the discovery of another manipulative scheme, it surely could be suspended only 10 days later if the discovery of the second scheme were made on the eve of the expiration of the first order. And, continues the Commission, since nothing on the face of the statute requires it to consider only evidence of new manipulative schemes when evaluating the public interest and the needs of investors, it must have the power to issue consecutive suspension orders even in the absence of a new or different manipulative scheme, as long as the public interest requires it.

This argument is unpersuasive, however, because the conclusion simply does not follow from the various premises. Even assuming the Commission can again suspend trading upon learning of another event which threatens the stability of the market, it simply does not follow that the Commission therefore must necessarily have the power to do so even in the absence of such a discovery. On its face and in the context of this statutory pattern, § 12 (k) is more properly viewed as a device to allow the Commission to take emergency action for 10 days while it prepares to deploy its other remedies, such as a temporary restraining order, a preliminary or permanent injunction, or a suspension or revocation of the registration of a security. The Commission's argument would render unnecessary to a greater or lesser extent all of these other admittedly more cumbersome remedies which Congress has given to it.

Closely related to the Commission's first argument is its second—its construction furthers the statute's remedial purposes. Here the Commission merely asserts that it "has found that the remedial purposes of the statute require successive suspension of trading in particular securities, in order to main-

tain orderly and fair capital markets." Brief for Petitioner 37. Other powers granted the Commission are, in its opinion, simply insufficient to accomplish its purposes.

We likewise reject this argument. In the first place, the Commission has not made a very persuasive showing that other remedies are ineffective. It argues that injunctions and temporary restraining orders are insufficient because they take time and evidence to obtain and because they can be obtained only against wrongdoers and not necessarily as a stopgap measure in order to suspend trading simply until more information can be disseminated into the marketplace. The first of these alleged insufficiencies is no more than a reiteration of the familiar claim of many government agencies that any semblance of an adversary proceeding will delay the imposition of the result which they believe desirable. It seems to us that Congress, in weighing the public interest against the burden imposed upon private parties, has concluded that 10 days is sufficient for gathering necessary evidence.

This very case belies the Commission's argument that injunctions cannot be sought in appropriate cases. At exactly the same time the Commission commenced the first series of suspension orders it also sought a civil injunction against CJL and certain of its principals, alleging violations of the registration and antifraud provisions of the Securities Exchange Act of 1933, violations of the antifraud and reporting provisions of the Securities Exchange Act of 1934, and various other improper practices, including the filing of false reports with the Commission and the dissemination of a series of press releases containing false and misleading information. App. 109. And during the second series of suspension orders, the Commission approved the filing of an action seeking an injunction against the management of CJL to prohibit them from engaging in further violations of the Act. App. 101.

The second of these alleged insufficiencies is likewise less than overwhelming. Even assuming that it is proper to suspend trading simply in order to enhance the information in the

marketplace, there is nothing to indicate that the Commission cannot simply reveal all its information to the investing public at the end of 10 days and then let the investors make their own judgments.

Even assuming, however, that a totally satisfactory remedy—at least from the Commission's viewpoint—is not available in every instance in which the Commission would like such a remedy, we would not be inclined to read § 12 (k) more broadly than its language and the statutory scheme reasonably permit. Indeed, the Commission's argument amounts to little more than the notion that § 12 (k) *ought* to be a panacea for every type of problem which may beset the marketplace. This does not appear to be the first time the Commission has adopted this construction of the statute. As early as 1961 a recognized authority in this area of the law called attention to the fact that the Commission was gradually carrying over the summary suspension power granted in the predecessors of § 12 (k) into other areas of its statutory authority and using it as a *pendente lite* power to keep in effect a suspension of trading pending final disposition of delisting proceedings. II Loss, Securities Regulations 854-855 (1961 ed.).

The author then questioned the propriety of extending the summary suspension power in that manner, *id.*, at 854, and we think those same questions arise when the Commission argues that the summary suspension power should be available not only for the purposes clearly contemplated by § 12 (k), but also as a solution to virtually any other problem which might occur in the marketplace. We do not think § 12 (k) was meant to be such a cure-all. It provides the Commission with a powerful weapon for dealing with certain problems. But its time limit is clearly and precisely defined. It cannot be judicially or administratively extended simply by doubtful arguments as to the need for a greater duration of suspension orders than it allows. If extension of the summary suspension power is desirable, the proper source of that power is Congress.

Cf. *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U. S. 726, 744-745 (1973).

The Commission next argues that its interpretation of the statute—that the statute authorizes successive suspension orders—has been both consistent and longstanding, dating from 1944. It is thus entitled to great deference. See *United States v. National Assn. of Securities Dealers*, 422 U. S. 694, 719 (1975); *Saxbe v. Bustos*, 419 U. S. 65, 74 (1974).

While this undoubtedly is true as a general principle of law, it is not an argument of sufficient force in this case to overcome the clear contrary indications of the statute itself. In the first place it is not apparent from the record that on any of the occasions when a series of consecutive summary suspension orders was issued the Commission actually addressed in any detail the statutory authorization under which it took that action. As we said just this Term in *Adamo Wrecking Co. v. United States*, slip op. 11 n. 5 (Jan. 10, 1978):

“This lack of specific attention to the statutory authorization is especially important in light of this Court’s pronouncement in *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944), that one factor to be considered in giving weight to an administrative ruling is ‘the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.’”

To further paraphrase that opinion, since this Court can only speculate as to the Commission’s reasons for reaching the conclusion that it did, the mere issuance of consecutive summary suspension orders, without a concomitant exegesis of the statutory authority for doing so, obviously lacks “power to persuade” as to the existence of such authority. *Adamo Wrecking Co. v. United States*, *supra*, at 11 n. 5. Nor does the existence of a prior administrative practice, even a well-explained one, relieve us of our responsibility to determine

whether that practice is consistent with the agency's statutory authority.

"The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' *NLRB v. Hearst Publications*, 322 U. S. 111, 131; *Unemployment Commission v. Aragon*, 329 U. S. 143, 153-154. But the courts are the final authorities on issues of statutory construction, *FTC v. Colgate-Palmolive Co.*, 380 U. S. 374, 385, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB v. Brown*, 380 U. S. 278, 291." *Volkswagenwerk v. Federal Maritime Comm'n*, 390 U. S. 261, 292 (1968).

And this is just such a case—the construction placed on the statute by the Commission, though of longstanding, is, for the reasons given in Part III-A of this opinion, inconsistent with the statutory mandate. We explicitly contemplated just this situation in *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U. S. 726, 745-746 (1973), where we said:

"But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate."

And our clear duty in such a situation is to reject the administrative interpretation of the statute.

Finally, the Commission argues that for a variety of reasons Congress should be considered to have approved the Commission's construction of the statute as correct. Not only has

Congress re-enacted the summary suspension power without disapproving the Commission's construction, but the Commission participated in the drafting of much of this legislation and on at least one occasion made its views known to Congress in committee hearings.⁸ Furthermore, at least one committee indicated on one occasion that it understood and approved of the Commission's practice.⁹ See *Zuber v. Allen*, 396 U. S. 168,

⁸ In 1963, when Congress was considering the former § 15 (c)(5), which extended the Commission's summary suspension power to securities traded in the over-the-counter market, the Commission informed a Subcommittee of the House Committee on Interstate and Foreign Commerce of its current administrative practice. One paragraph in their 30-page report to the subcommittee reads as follows:

"Under section 19 (a)(4), the Commission has issued more than one suspension when, upon reexamination at the end of the 10-day period, it has determined that another suspension is necessary. At the same time the Commission has recognized that suspension of trading in a security is a serious step, and therefore has exercised the power with restraint and has proceeded with diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible. The Commission would follow that policy in administering the proposed new section 15 (c)(5)." Hearings on H. R. 6789, H. R. 6793, S. 1642 before a Subcommittee of the House Committee on Interstate and Foreign Commerce (Securities Exchange Act of 1934: Investor Protection), 88th Cong., 1st Sess., 219 (1963).

⁹ The Senate Committee on Banking and Currency, when it reported on the proposed 1963 amendments to the Act, indicated that it understood and did not disapprove of the Commission's practice. It stated:

"The Commission has consistently construed section 19 (a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the ten-day period, it determines that another suspension is necessary. The committee accepts this interpretation. At the same time the committee recognizes that suspension of trading in a security is a drastic step and that prolonged suspension of trading may impose considerable hardship on stockholders. The committee therefore expects that the Commission will exercise this power with restraint and will proceed with all diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible." S. Rep. No. 379, 88th Cong., 1st Sess., 66-67 (1963).

192 (1969); *United States v. Correll*, 389 U. S. 299, 305-306 (1967); *Fribourge Navigation Co. v. Comm'r of Internal Revenue*, 383 U. S. 272, 283 (1966).

While we of course recognize the validity of the general principle illustrated by the cases upon which the Commission relies, we do not believe it to be applicable here. In *Zuber v. Allen*, *supra*, at 192, the Court stated that a contemporaneous administrative construction of an agency's own enabling legislation "is only one input in the interpretational equation. Its impact carries most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings." Here the administrators, so far as we are advised, made no reference at all to their present construction of § 12 (k) to the Congress which drafted the "enabling legislation" here in question—the Securities Exchange Act of 1934. They made known to at least one committee their subsequent construction of that section 29 years later, at a time when the attention of the committee and of the Congress was focused on issues not even remotely related to the one presently before the Court.¹⁰ Although the section in question was re-enacted in 1963, and while it appears that the committee report did recognize and approve of the Commission's practice, this is scarcely the sort of congressional approval referred to in *Zuber*, *supra*.

We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a committee report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this. For here its invocation would result in a

¹⁰ The purpose of the 1963 amendments was merely to grant the Commission the same power to summarily deal with securities traded in the over-the-counter market as it already had to deal with securities traded on national exchanges. The purpose of the 1975 amendments was simply to consolidate into one section the power formerly contained in two.

construction of the statute which is not only at odds with the language of the section in question and the pattern of the statute taken as a whole, but is extremely far reaching in terms of the virtually untrammelled and unreviewable power it would vest in a regulatory agency.

Even if we were willing to presume such general awareness on the part of Congress, we are not at all sure that such awareness at the time of re-enactment would be tantamount to amendment of what we conceive to be the rather plain meaning of the language of § 12 (k). On this point the present case differs significantly from *United States v. Correll, supra*, where the Court took pains to point out in relying on a construction of a tax statute by the Commissioner of Internal Revenue that "to the extent the words chosen by Congress cut in either direction, they tend to support rather than defeat the Commissioner's position . . ." 389 U. S. 299, 304.

Subsequent congressional pronouncements also cast doubt on whether the prior statements called to our attention can be taken at face value. When consolidating the former §§ 15 (c) (5) and 19 (a) (4) in 1975, see n. 1, *ante*, the Senate Committee on Banking, Housing and Urban Affairs also commented on what became § 12 (j), which, according to the Committee, would allow the Commission "to suspend [the registration of a security] for a period not exceeding twelve months . . . after notice and opportunity for hearing . . ." if the Commission finds "that the issuer of such security has failed to comply with any provision of the Exchange Act or rules and regulations thereunder." S. Rep. No. 94-75, 94th Cong., 1st Sess., 105-106 (1975). The Committee went on to note that not only would this make unlawful any trading in any such security by any broker or dealer, but "[w]ith this change, the Commission is expected to use this section rather than its ten-day suspension power, in cases of extended duration." *Ibid.* (emphasis added). Thus, even assuming, *arguendo*, that the 1963 statements have more force than we are willing to attribute to them, and that, as the Commission argues, § 12 (j) does

not cover quite as broad a range of securities as § 12 (k), the 1975 congressional statements would still have to be read as seriously undermining the continued validity of the 1963 statements as a basis upon which to adopt the Commission's construction of the statute.

In sum, had Congress intended the Commission to have the power to summarily suspend trading virtually indefinitely we expect that it could and would have authorized it more clearly than it did in § 12 (k). The sweeping nature of that power supports this expectation. The absence of any truly persuasive legislative history to support the Commission's view, and the entire statutory scheme suggesting that in fact the Commission is not so empowered, reinforce our conclusion that the Court of Appeals was correct in concluding no such power exists. Accordingly, its judgment is

Affirmed.

May 1, 1978

76-1607 SEC v. Sloan

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 1, 1978

Re: 76-1607 - SEC v. Sloan

Dear Bill:

Please join me.

Respectfully,



Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART



May 1, 1978

Re: No. 76-1607, SEC v. Sloan

Dear Bill,

I am glad to join your opinion for the Court
in this case.

Sincerely yours,

P.S.
—

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 1, 1978



Re: 76-1607 - SEC v. Sloan

Dear Bill,

Please join me.


Sincerely yours,

Mr. Justice Rehnquist
Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 3, 1978

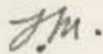


Re: No. 76-1607 - SEC v. Sloan

Dear Bill:

Please join me.

Sincerely,



T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

May 6, 1978

Dear Bill:

Re: 76-1607 SEC v. Sloan

You have resolved my reservations on
this case, and I join. It is now up to Congress.

Regards,

W B B

Mr. Justice Rehnquist

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. N.
Join W.H.R. 5/6/78	Concern in judgment 1st draft 5/3/78	Join W.H.R. 5/11/78	Join W.H.R. 5/11/78	Join W.H.R. 5/3/78	Concerning specimen typed draft 5/8/78 integrated 5/9/78 2nd draft 5/10/78	Join W.H.R. 5/11/78	1st draft 4/29/78 2nd draft 5/9/78	Join W.H.R. 5/11/78

76-1607

SEC V. Sloan