IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1767

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

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OPINIONS BELOW

The Circuit Court's opinion herein (per Judges Wright, Tamm and Leventhal), dated March 14, 1977, is reported at 555 F.2d 978. It also appears in the Appendix to the Petition for Certiorari at A-2.[1] The first District Court

[1] The Appendix to the Petition for Certiorari is cited in this brief as "Cert. App." The Joint Appendix in the Court of Appeals, which is the Appendix herein pursuant to the Court's Order dated November 7, 1977, is cited as "J. App." Government exhibits are cited as "GX", defendant's exhibits as "DX". GX 1-439 were offered in evidence at J. App. 1581-84; DX 1-215 were offered at J. App. 1594.

opinion herein, dated December 19, 1974, is reported at 389 F. Supp. 1193 (J. App. 9928). The District Court entered judgment on December 31, 1974 (J. App. 9974), from which National Society of Professional Engineers ("NSPE") appealed directly to this Court. On June 23, 1975, this Court, as reported at 422 U.S. 1031 (J. App. 9984), unanimously vacated the District Court judgment, awarded costs to NSPE, and remanded for further consideration in light of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). On November 26, 1975, the District Court reinstated its judgment without modification. Cert. App. A-15-A-20. The second District Court opinion, of that date, is reported at 404 F. Supp. 457 (J. App. 9985). On December 4, 1975, the District Court denied NSPE's application under 15 U.S.C. § 29 (1970) for permission to appeal directly to this Court. Cert. App. A-14. The Circuit Court affirmed the District Court judgment except to the extent the Circuit Court held NSPE's First Amendment rights were infringed thereby.

JURISDICTION

The Court of Appeals judgment was entered on March 14, 1977. Certiorari was sought by Petition filed June 10, 1977. The Petition was granted on October 3, 1977. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

1. Whether the rule of reason governs application of Section 1 of the Sherman Act to an ethical principle of a learned profession in a case of first impression when there is substantial record evidence of reasonableness.

2. Whether an ethical principle of a learned profession which states the same policy regarding procurement of professional engineering services as stated in United States statutes and regulations, and state statutes, regulations and judicial decisions, is reasonable, and thus not illegal, under Section 1 of the Sherman Act.

3. Whether the judgment herein, which prohibits Petitioner from stating facts or views or advocating a policy Petitioner believes essential to the public interest and safety, abridges Petitioner's First Amendment rights.

4. Whether this Court's prior mandate herein required the District Court to consider the record evidence of reasonableness of the ethical principle at issue.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1970), provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

The Brooks Act, 40 U.S.C. §§ 541-44 (Supp. II 1972) provides:

> § 542. Congressional declaration of policy.
>
> The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

* * * *

§ 544. Negotiation of contracts for architectural and engineering services.

(a) The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government. In making such determination, the agency head shall take into account the estimated value of the services rendered, the scope, complexity, and professional nature thereof.

(b) Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the Government, negotiations with that firm should be formally terminated. The agency head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.

(c) Should the agency head be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached.

Numerous other United States and state statutes and regulations, set forth in the Appendix to the Petition for Certiorari at A-21-A-50, and in the Appendix herein at J. App. 3415-5477, prescribe the same policy against obtaining professional engineering work by bidding as that set forth in the Brooks Act and in NSPE's Code of Ethics.

STATEMENT

This is a Government civil antitrust case in which the District and Circuit Courts held the ethical principle against soliciting engineering work by "competitive bidding" set forth in Section 11(c) of NSPE's Code of Ethics illegal *"per se"*. A massive record of facts demonstrating not only the reasonableness but the necessity of the ethical principle was disregarded on the ground that it is "irrelevant". The lower courts thus permitted a facade of words to constitute a legally insuperable barrier to examination of the facts. But it is the facts, not the words, which are essential to rational consideration and determination of the legal issues. The facts are complex, but fully presented in the record and essentially undisputed, and are summarized in the following statement.

1. Professional Engineering is a Unique Field.

"Engineer" has many meanings, the most familiar of which have no bearing on this case. To some, the term signifies the person in charge of the engine on a railroad train; or the custodian who operates a boiler, and fixes faulty light switches in hotels and offices. Such meanings have nothing to do with this case.[2]

"Engineer" as used in this case refers only to the "professional engineer", practitioner of a learned discipline involving application of science to the solution of problems in the service of society.[3] This is an individual who has studied advanced mathematics, statics, dynamics, materials and stresses; fluid mechanics, solid mechanics, computer science, design theory and specialized structures. These and many other subjects are studied, by the problem-solving method, before the engineering student even begins to study his field of specialty.[4] His practice

[2] J. App. 1114. Citations to the Joint Appendix are illustrative, not exhaustive.

[3] J. App. 1098.

[4] J. App. 916-27.

may be in civil, mechanical, electrical, biomedical, environmental, structural, or numerous other specialties.[5] Engineering, the profession of applied science, requires knowledge of the most recent, recondite and complex principles of science.[6] It also requires the imagination, intelligence and persistence to apply those principles to solve unique problems relating to construction or production of useful structures and artifacts.[7]

The professional engineer is much like the scientist, with this difference: Scientists seek knowledge for its own sake and serve no client; whereas engineers employ the knowledge and methods of science to solve problems presented by clients.[8] In this respect, engineering and medicine have been termed "professions in essence", as they pursue knowledge to improve practice, and their essential nature is to deliver an esoteric service.[9]

Professional engineering's story is the untold story of modern industrial society. Popular history books record the names of the brilliant scientists who discovered basic principles of physics, chemistry and biology—Newton, Darwin, Faraday, Mendel, Curie, Einstein, Fleming and others. But science's discoveries are of only intellectual significance until developed and applied to social use by engineers. To choose but one of thousands of examples: penicillin when discovered by Fleming was a mere laboratory curiosity, of possible use to no more than a few patients a year. Only later, when engineers devised means to produce it in large quantities and under rigorous quality control, did penicillin become a "miracle" drug.[10] Nearly

[5] J. App. 94-95, 327-28, 914, 1098-99, 1777.

[6] J. App. 470, 941.

[7] J. App. 1096-99, 1777, 1974-75.

[8] J. App. 583-85, 1974-75.

[9] J. App. 610-12, 941-42, 944-46, 1096-98, 1777, 1970-71, 1974-75.

[10] J. App. 1986.

every useful structure and artifact of contemporary industrial civilization is the product of engineering, utilizing science's principles and discoveries.[11] To confirm this, one need only observe the contemporary landscape's skyscrapers, automobiles, hospitals, school buildings, airplanes, telephones, computers, waterworks, sewage systems, broadcast stations, and factories. Professional engineering's role in society is pervasive, unique, essential, and yet generally unnoticed.

Engineering shares with other learned professions, such as medicine and law, the characteristics of possessing a body of specialized and organized knowledge, a group of practitioners, an established intellectual discipline, and traditional ethical principles.[12] In one respect, however, engineering differs from other professions. Medicine and law are oriented toward processing individuals' cases: curing the individual patient, or counselling and representing the individual client. Engineering, on the other hand, deals with construction, or manufacturing, for wider use. Architects may design houses for individuals; engineers generally do not. Engineers design office buildings, factories, power plants, hospitals and the like, each of which immediately affects a population—and usually a large population—rather than an individual.[13] Engineers also design products, but with rare exceptions such design is of a prototype to be replicated many times in manufacturing, and not of a single artifact for use by an individual.[14]

As a result of these facts, the consequences of error, inadequacy and malpractice in engineering are generally greater than in medicine or law. The responsibility of a

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[11] J. App. 43, 130-32, 364-66, 602-03, 680-85, 1104-05, 1253-56, 1506, 1969-70, 1984-89.

[12] J. App. 582, 1220-21, 1436, 1976-76.

[13] J. App. 1984-89.

[14] J. App. 2098-99.

physician or lawyer is profound; and failure by either may grievously injure or destroy a patient or client. But an engineer's error or inadequacy can result in collapse of a building or bridge, epidemic, contamination of a community's water or food supply, or other public injury or disaster.[15]

2. Professional Engineering Deals With Unique Problems.

Clients come to engineers, as they generally do to physicians and lawyers, when they have problems. But there is a difference in the nature of problems presented to the professions. While in law, and presumably medicine, every client's problems are somewhat different than those of anyone else, certain categories of problems can be characterized as "routine", or substantially similar from case to case.[16]

However, no two problems presented to a professional engineer by his clients are ever the same.[17] Every engineering problem is unique in important respects.[18] Although, to a layman, one office building may appear similar to another, there are always essential differences—the location of the buildings; their proposed uses and functions; the clients' needs and resources; applicable legal requirements; soil conditions; climate; availability of materials; and dozens of other variables.[19] Designing the most simple structure requires analysis of more than a dozen interdependent systems, each of which comprises numerous interdependent elements, and all of which must be coordinated to solve the client's problem.[20] Basic ele-

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[15] J. App. 364-66, 1027-28, 1046-47, 1252-54, 1283-84, 1389.

[16] *Bates* v. *State Bar of Arizona*, 97 S. Ct. 2691, 2703 (1977).

[17] J. App. 247-51, 772-73, 1156-57, 1222, 1452, 1610, 1990.

[18] *Id.*

[19] J. App. 1613 *et seq.*

[20] *Id.*

ments in a very simple structure include, for example, building layout, size, number of floors, utility services and sources, transportation, siting and environmental impact, soil requirements, framework, exterior surface, fenestration, load bearing, ceilings, illumination, power source and load, heating and cooling, plumbing, waste disposal, fire protection, roofing, stairways, elevators, communications, hardware, security, and many others.[21] Thousands of permutations and combinations of elements figure in the most simple structure.[22] More complex projects present more elements and many more possible combinations and choices. In a project as relatively simple as a community hospital, there is no finite limit on the number of options the engineer must identify and evaluate.[23]

Engineers are able to solve the problems presented to them, and to make compatible choices among the almost limitless number of available options, by learning the client's specific needs and matching them against the available options; eliminating some options by choosing others; and using technical knowledge and informed judgment to narrow, then expand, and ultimately to narrow the range of choices. Adequate engineering is dependent on that combination of knowledge, intelligence and imagination called "creativity".[24]

Engineering problems are invariably unique; solutions of prior engineering problems are often instructive, but never dispositive.[25] It is not possible to draft specifications for an engineering assignment before consulting the engineer to deal with the problem.[26] Clients come to

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[21] J. App. 1613, 1620.

[22] J. App. 1624-25.

[23] J. App. 1625.

[24] J. App. 366-71, 937, 1624-25, 1784-85, 1990-92.

[25] J. App. 1999.

[26] J. App. 377, 410, 963, 1158, 1222, 1227-28, 3075, 3349, 3385.

professional engineers with problems, not projects, and clients usually cannot even articulate the problems, no matter how simple, in engineering terms.[27] For example, it might appear to the layman that a sewer line extension would involve repeating the engineering design employed to lay the original line. However, as every engineer knows, safe design of the extension must be based, at a minimum, on analysis of soil borings and topography, and consideration of the effects of the addition upon the existing system. Even design of a short, "simple" sewer-line extension often poses entirely different problems than those encountered in designing the original line.[28] The record establishes that engineering deals with unique problems.[29]

3. The Principle of Selection By Competence Developed Out of Clients' Practical Needs, and Concern for the Public.

In engineering, as in other learned professions, standards of propriety have developed pragmatically, over many years, out of the nature of the work.[30] In the development of the method of selecting engineering talent, a basic consideration has been the economic relation among the different stages of the project. The first stage is identification and preliminary analysis of, and development of a conceptual approach to, the problem. The next is engineering design. Plans and specifications produced by engineering design are then transmitted, often to construction firms invited to bid to construct the structure according to the design. After the structure is constructed, it is occupied and operated for the purpose for

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[27] J. App. 176-77, 227-29, 366, 948, 1717, 1991.

[28] J. App. 74-76.

[29] J. App. 247-51, 772-73, 1156-57, 1222, 1452, 1610, 1990.

[30] J. App. 595-96, 641, 1443-46, DX 40 at 207.

which designed.[31] Years later, it may be torn down and replaced.

Engineering design costs are a fraction of total project cost: Construction costs average thirteen times design costs; maintenance costs average six times design costs; operating costs average at least eighty times design costs; and life-cycle costs average more than one hundred times design costs.[32]

Although engineering design costs are a tiny fraction of project costs, optimum design is indispensible to economy and efficiency at all subsequent stages of the project.[33] For example, bidding at the construction stage absolutely depends on the adequacy of the engineer's design, plans and specifications.[34] If the plans and specifications contain ambiguities or other inadequacies, construction firms bidding will not be offering the same structure, but rather their own versions or interpretations.[35] Ambiguous or otherwise inadequate plans and specifications lead to disputes between client and constructor, changes in the bid amount, and cost overruns.[36] Thus, inadequate engineering in structure design wastes economic and physical resources, by increasing construction, maintenance, and operating costs, and decreasing the structure's functional efficiency.[37] Adequate engineering conserves economic and physical resources by decreasing construction,

[31] J. App. 1612 *et seq.*, 1999 *et seq.*

[32] J. App. 171-72, 378-79, 1146-47, 1223, 1280, 1628-29, 1631-32, 3398.

[33] J. App. 1106-07, 1109, 1150-52, 1223-24, 1283, 1629-31, 1994-95, 2003-05.

[34] J. App. 1027, 1223-24, 1628-31, 1994-95, 2003-05.

[35] J. App. 950-51, 1026-27, 1226-28, 1630-31, 1996-97.

[36] J. App. 950-51, 1026-27, 1226-28, 1630-31, 1994-96.

[37] J. App. 1106-07, 1109, 1150-52, 1223-24, 1283, 1629-31, 1994-95, 2003-05.

maintenance, and operating costs, and increasing the structure's functional efficiency.[38] Adequate engineering design thus saves clients money.[39]

The difficulty of obtaining adequate engineering design of structures is compounded by the fact that acquainting the engineer sufficiently with the client's problem to permit preparation of a conceptual solution is a substantial part of the entire design engagement.[40] Extensive communication between client and engineer, and the client's disclosure of confidential data, are required for the engineer to perceive the problem adequately and tentatively propose a design concept that will satisfy the client's need.[41]

Since the total cost of engineering design is a very minor part of the total cost to the client, and the adequacy of the design makes a very substantial difference in the total cost to the client, it has become obvious over the years that engineers should be selected on the basis of competence, or qualifications for the specific engagement, rather than on the basis of the amount of fee that might be charged.[42]

The competence principle is fitting in engineering for an additional reason: The variety of engineering problems, and of engineers and firms with specialized qualifications and competence, are such that there always appears to be one engineer or firm best qualified to handle the specific problems of a particular client in a specific location under the particular conditions prevailing. Variations among professional engineers and firms are such

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[38] J. App. 46, 1150-52, 1223-24, 1629-31, 1994-95, 2003-05.

[39] J. App. 175, 178-80, 380-81, 516, 1109, 1147-48, 1224, 1635, 1647-48, 1657, 1931, 3349, 3384, 3413.

[40] J. App. 693-94, 1456, 1613, 1626, 1665-66; DX 212 at 16.

[41] *Id.*

[42] J. App. 44-48, 175-80, 965-69, 1217-24, 1230-32, 1339-42, 1997-2005.

that no two are equally qualified for precisely the same assignment at the same time.[43]

Most fundamentally, basing selection of the engineer on his competence is predicated on the consideration, described below, that inadequate engineering design endangers public health and safety, and compromises structural integrity.

As a result of all these considerations, there has developed the "traditional method" of selecting engineers. Under that method, several professional engineers (or firms) are considered by a client with a particular problem, with a view to their possible engagement based on their prior relevant experience and performance; their professional training and reputation; their proximity; and the client's feeling of confidence or trust in each of them.[44] Under the traditional method, competence is at the very center of the process and is the principal basis of choice.[45]

Under the traditional method of selection by competence, clients typically identify design engineers by seeking advice of other engineering clients and engineers. Clients obtain detailed information from many sources as to qualifications, and consult the builders, owners, and occupants of structures designed by engineers under consideration.[46] The client then ranks engineers under consideration on the basis of his evaluation of their competence, taking into account all relevant elements, and then makes an *initial, tentative* selection based on competence and qualifications.[47]

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[43] J. App. 252-58, 510, 512, 782, 962-64, 1697, 3347-48.

[44] J. App. 384-86, 1718, 3347-48, 3417, 6711.

[45] J. App. 384-86, 1148-49, 1159-65, 1169, 1646, 3347-48.

[46] J. App. 384-86, 1642-43, 1718, 6717.

[47] J. App. 44-45, 54-55, 59-60, 72-73, 384-86, 781-82, 1006-07, 1126-27, 1148-49, 1163-65. 1236, 1639-43, 1718, 1782-83, 3347-48, 3417, 5485, 6717.

After the client has made an *initial, tentative* selection of an engineer on the basis of competence, the engineer generally spends one or two weeks, or more, locating and reviewing all available information about the prospective client's problem, learning the client's view of the assignment's scope, and discussing the client's needs with him.[48] The engineer then engages in time-consuming analysis of the problem and formulates a preliminary conceptual solution.[49] Engineer and prospective client continue to discuss the scope of the assignment, the client's needs, and the tentative conceptual engineering solution to the client's needs, until fundamental agreement is reached as to how best to proceed.[50] During these discussions engineers are free to provide, and frequently do provide, fee-related information, such as hourly billing rates for engineers who may be assigned, overhead costs, and historical data concerning fees charged in previous matters of comparable scope and complexity.[51]

When engineer and prospective client have reached tentative agreement as to the scope and nature of the structure and assignment, the client then addresses the method by which a fee shall be determined.[52] Frequently used methods of calculating engineering fees include payroll costs times a multiplier; costs plus a fixed fee; lump sum fees; per diem rates; percentage of construction costs; and combinations of these methods. NSPE recommends against use of the percentage of construction cost method, but makes no recommendation among any of the other methods, and does not attempt to prevent use of any method.[53]

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[48] J. App. 231, 447-48, 512, 804.

[49] J. App. 231, 396-97, 804, 1152-53, 1643-45, 1702-03.

[50] J. App. 227-32, 704, 801-02, 1643-45.

[51] J. App. 384-86, 1122, 1148-50, 3847-48, 3417.

[52] J. App. 397, 473, 705, 1374.

[53] J. App. 234, 378, 478-79, 704-05, 708, 799-801, 1790-95, 5480-93.

After the client has specified the method by which the fee should be calculated, he and the engineer engage in negotiations as to the amount.[54] These negotiations may be vigorous and extensive. *If the client is dissatisfied with the fee proposed or the fee negotiations, he is free to choose another engineer and negotiate with a second, third, or any number of engineers*, until the client is satisfied with the understanding he has reached with an engineer of his own choice.[55]

4. The Principle of Selection by Competence As an Ethical Matter Is Limited to Situations Where Required by Public Interest.

The principle of selection by competence has proved so advantageous to clients and the public that it has generally been followed. Situations have, however, arisen in which a prospective engineering client has sought a fee proposal before any engineer is fully informed as to the nature of the work involved. The question has arisen whether an engineer can ethically submit a fee bid in such circumstances. Since it is true in engineering, as in law and other disciplines, that general principles do not by themselves decide specific cases, NSPE has a Board of Ethical Review ("BER") to interpret and apply the ethical principles approved by NSPE.[56]

In a series of opinions, the NSPE Board of Ethical Review has held that the principle of selection by competence and against bidding applies where the public would be endangered by disregard of the principle. This is illustrated by an early limitation on the principle, in which BER held the principle not to apply to research and development ("R & D") contracts.[57] BER observed

[54] J. App. 438, 801-02, 1158-59, 1181, 1375.

[55] J. App. 1783.

[56] J. App. 712-13, 1763-64, 1950, 2508-09.

[57] J. App. 2599-2600.

that R & D projects are essentially contracts to produce a prototype.[58] Prototypes are thoroughly tested and examined before the product involved is manufactured for, sold to or used by the public.[59] Accordingly, when the engineering assignment is for research leading to production of a prototype, there is much less danger that inadequate engineering will result in injury to the public, for there is opportunity to test for flaws and correct errors before the public is exposed to the product.[60] By contrast, in design of buildings, bridges and similar structures, there can be no prototype.[61]

Over the years five major limitations upon the ethical principle have become recognized: R & D contracts; study contracts; "turnkey", or combined design and construction, contracts; sub-professional or non-professional work; and work not leading to an improvement to real property.[62] The rationale in each situation is the same—the procedure of bidding, when applied here, threatens little or no danger to the public.[63]

In study-contract work, the client is purchasing a specified amount of engineering effort. Although the effort may be directed toward solution of a problem, design will not directly result. The engineer will merely furnish data which may be used—or disregarded—if and when the client desires a structure or product to be designed.[64]

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[58] *Id.*

[59] J. App. 1790, 1873-74.

[60] J. App. 1790.

[61] J. App. 2600.

[62] J. App. 962, 1631-32, 1788-90, 2549-50, 2551, 2575-76, 2599-2600, 2620-21, 2667, 2751-52, 2788-89, 2790-91.

[63] *Id.*

[64] J. App. 1788-89.

"Turnkey", or "design-construct", work is construction work performed by firms which employ their own professional engineers. Typically, ninety-five percent of the cost of such projects is construction cost and five percent engineering cost. There is no incentive to limit the engineering work to an inadequate amount since the design-construct firm, as well as its client, will benefit from the economies and efficiencies of fully adequate engineering design.[65]

Sub-professional, or non-professional, contracts occur when an engineering firm offers services or equipment ancillary to engineering design work. For example, an engineering firm offers photogrammetric services, and owns an aircraft specially equipped for this service. BER has said that such firm may ethically bid to obtain rentals of the aircraft. BER's opinion stated: "The purpose of 11(c) is to prevent the furnishing of professional services on a basis which will or could lead to inferior performance in an area which involves the public health or safety by placing reliance on a low bid as distinguished from qualification for and quality of services rendered. This danger, which is real in the case of professional design services related to physical structures, is nonexistent or minimized to a point of no consequence when related to the furnishing of material or equipment." [66] Consequently, BER said, there is no ethical basis for refusing to bid for the rental of equipment such as aircraft, computers, and the like.[67]

Finally, there is an overriding limitation on the scope of the ethical principle. The principle, as stated in NSPE's Code of Ethics, is limited to engineering involv-

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[65] J. App. 1789.

[66] J. App. 2788.

[67] J. App. 2789.

ing design of improvements to real property.[68] The reason for this limitation is the same as for the other limitations—R & D, study contracts, turnkey projects, and non-professional work: risk to the public can be minimized to a point of no consequence with respect to all engineering design work except work relating to structural improvements to real property.[69] Structures constituting improvements to real property, whether factory buildings, bridges, hospitals, waterworks or nuclear power plants, are built only once, according to the design. Real property improvements are not first built in prototypes that can be tested; and once built they are used by members of the public. Real property improvements are part of the environment in which we all live and, if hazardous or inadequate, expose the public to danger.[70]

5. Selection By Bidding is Inconsistent With Selection by Competence and is a Practical Impossibility and Illusion in Engineering.

"Competitive bidding" normally connotes free competition in a market economy. In ordinary usage, it means selection of a buyer or seller of a specified product or service on the basis of price proposals, and "requires that all bidders be placed on a plane of equality, and that they bid on the same terms and conditions."[71] One example is an auction, where a specified article is sold to the highest bidder.[72] Competitive bidding is commonly used in the construction industry, where fully engineered

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[68] J. App. 2445.

[69] J. App. 1788-90.

[70] J. App. 106-07, 364-66, 1027-52, 1219, 1252-54, 1283-84.

[71] *Black's Law Dictionary* 356 (4th ed. 1968).

[72] J. App. 2334.

plans and specifications state the services and goods to be supplied, and bids are comparable.[73]

In engineering, "competitive bidding" has a meaning contrary to its ordinary usage. The reason is that the services an engineer is to render his client cannot be determined at the time or in the manner required by the process of bidding.[74] To determine with any reasonable degree of approximation what engineering services will be required, the engineer must extensively communicate with the client, study the client's problem and needs, analyze the available engineering options, and identify a tentative conceptual solution.[75] This must then be communicated to the client to insure that the engineer has properly ascertained the problem and is proposing to proceed in a manner acceptable to the client. One-sixth to one-third of the work required to provide adequate engineering design is consumed in the preliminary task of identifying the problem and determining a tentative conceptual solution.[76] Arriving at the best conceptual approach requires about thirty percent of the design effort; less effort is likely to be superficial.[77]

Thus, bidding as a method of selecting an engineer requires each engineer who seeks or receives consideration for selection to set a fee for his work *before*, not after, he has consulted with the client, or learned the client's problem, or proposed an approach to it.[78] At that point, the engineer is in no position to articulate

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[73] J. App. 377-78, 1226-28, 1466, 1638, 2334, 3349.

[74] J. App. 175-80, 374-77, 1152-53, 1633-34, 1638-39, 1784-85.

[75] J. App. 172, 175-80, 374-78, 395, 1025, 1152-53, 1223, 1633-34, 1638-39, 3349.

[76] J. App. 1153, 1627-28.

[77] J. App. 1152-53.

[78] J. App. 175-80, 374-77, 1152-53, 1633-34, 1638, 1639, 3349, 6771.

an adequate design concept. Consequently, the client cannot choose among prospective engineers on any basis but price.[79] The bidding process in engineering is thus inherently inconsistent with the principle of selection by competence.

It has been suggested by persons unfamiliar with the engineering field that the client should be entitled, if he wishes, to make a selection on the basis of price before he has evaluated competence. However, selection of an engineer based on proposed fees or price for design work is not, in fact, a selection actually related to price: An engineer necessarily estimates his costs, and therefore his fees, on the basis of the nature and scope of the client's problem, the engineering approach to the problem, and the time and personnel required to produce an optimum engineering solution to it.[80] Consequently "bids" submitted in engineering, before the facts are known, can be only guesses.[81] There is no way for a client to determine what kind or amount of engineering work is included in any bid.[82] Thus, bidding in engineering, unlike in other fields, gives no assurance that the service will be obtained for the lowest price in the end.[83]

Since bids in engineering are inherently speculative, and the services to which they relate cannot be specified, the process is no more than a lottery, a sham and an illusion, with merely the form of bidding and of competition.[84]

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[79] J. App. 69, 514-15, 1154-55, 1224-28, 1251, 1648-49, 3379-80.

[80] J. App. 45, 49-51, 53, 227-32, 374, 375, 377, 395-97, 410, 447, 475, 704, 801-02, 1158, 1280, 1325-26, 1467, 1627-28, 1720, 1992, 1999, 2006.

[81] J. App. 175-80, 374-77, 1152-53, 1633-34, 1638, 1639, 3349, 6771.

[82] J. App. 175-80, 374-77, 1152-53, 1638-39, 6771.

[83] J. App. 68.

[84] J. App. 175-80, 374-77, 1152-53, 1633-34, 1638-39, 3349.

The argument has occasionally been advanced that competition would be served by having three or four, or more, engineering firms propose design concepts and submit these with fee bids for selection by the client. However, as the Assistant Commissioner of GSA testified, it would be wholly infeasible to have three or four firms each expend a third of the effort needed to do a complete job in order to select one.[55] Such a procedure would require expending more than 100% of the engineering effort merely to make the initial selection. No matter what economic arrangements were devised, larger, rather than smaller, engineering costs would necessarily result.[56]

While bidding in engineering is a sham, deceptive and misleading to clients, the traditional process provides competition. The client selects an engineer on a judgment as to competence, and communicates and negotiates until there is a clear understanding as to the problem's scope and the fee. Until there is a meeting of the minds, the client is absolutely free to turn to another engineer. This process has produced real competition, and the competition is increasing.[57] Moreover, apart from all economic considerations, the traditional method—selection by competence—protects public safety, as described below.

6. The Principle of Selection by Competence, Rather Than By Bidding, Is Advocated But Not Enforced By NSPE, And Is Generally Accepted By Engineers.

No one disputes that engineers are generally selected to perform design services by the principle of competence and not by bidding. This process is followed because all parties involved desire it, and not because it is required or

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[55] J. App. 1153.

[56] J. App. 380-81, 1324-25, 1657-60.

[57] J. App. 1172, 1236-37, 1733-34.

imposed by NSPE. NSPE's role is limited to education and advocacy.[88]

There are many technical societies and associations in the engineering field.[89] The one national, non-profit organization devoted to engineering as a profession is NSPE,[90] which was organized in 1934.[91] Numerous state and local societies are affiliated with NSPE, but each has its own constitution and by-laws, and NSPE has no authority to order, compel, forbid or prevent any action by any affiliated group.[92]

The ethical principles observed by engineers developed over many years, long antedating NSPE's formation. The first statement in the profession of the principle of selection by competence and not by bidding was at least as early as 1911.[93] NSPE's Code of Ethics does not create ethical principles, but merely states them. The present Code was adopted in 1964 as a restatement of several earlier codes promulgated by a number of engineering organizations.[94]

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[88] J. App. 1756-60, 1767-68, 2500, 2534, 2647, 2703.

[89] J. App. 1752-53.

[90] J. App. 1753, 1755-56, 2434.

[91] J. App. 1755, 2434.

[92] J. App. 1757, 2494-95.

[93] By 1911, the American Institute of Consulting Engineers is known to have had the following provision among its stated ethics:

> To compete with a fellow Engineer for employment on the basis of professional charges, by reducing his usual charges and attempting to underbid after being informed of the charges named by his competitor [is unethical]. [E. Heermance, Codes of Ethics 166 (1924.)]

For a discussion of early codes of ethics in the engineering profession *see* Annals of the American Academy of Political and Social Science 68-104 (May, 1922).

[94] J. App. 956-57, 1255, 1288-91, 1768-69, 1770, 1837, 1842, 2007-08, 2534.

The ethical principles stated in NSPE's Code are widely published and disseminated, and are subject to authoritative interpretation by BER, which is completely independent within NSPE.[95] BER's opinions are published in NSPE's monthly magazine, *Professional Engineer*, and in bound volumes.[96] Each published volume of BER opinions states that, since ethical principles are necessarily couched in general terms, it is desirable to supplement them with specific statements relating to actual situations.[97] Each also states that BER's purpose is educational, not punitive or disciplinary; thus, the cases it considers are reported without use of actual names. BER opinions are "offered to the profession for guidance with hope that they will serve to make the profession's ethical principles a living and dynamic force".[98]

Ethical principles of the profession are taught in the engineering schools.[99] Every practicing engineer who testified stated that he and his firm follow the principle of selection by competence, and refuse to engage in fee bidding, because this course represents sound engineering practice, and not because it is a requirement or demand of NSPE.[100]

NSPE has never made any attempt to enforce its ethical canon against bidding and has had only one factual investigation that even related to that canon.[101] That one investigation involved charges of political influence in

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[95] J. App. 712-13, 1286-87, 1291-1306, 1763-65, 1766, 1770-71, 1831, 1950-51, 2508-09, 2532-2808.

[96] J. App. 1286-87, 2508-09, 2532-2808.

[97] J. App. 2534, 2647, 2703.

[98] *Id.*

[99] J. App. 1594-95, 1707-08.

[100] J. App. 175-76, 184, 1672, 1673, 1706, 1999.

[101] J. App. 1767, 1786-87.

the selection of an engineer, and of a required "kick-back" or payoff to a local engineer.[102] No action was taken as a result of the investigation, and it was made clear to all participants that NSPE was not undertaking to enforce any rules or principles.[103]

No one has ever been disciplined in any way for violating the ethical canon against bidding.[104]

7. Selection of Engineers By Competence Rather Than By Bidding Is The Policy Of The U.S. Government, Most State and Local Governments, and Private Clients.

United States policy with respect to procurement of engineering services dates from 1925. That year Congress authorized the then-novel step of retaining outside engineers, providing that they would be selected "without reference to civil service requirements",[105] and "in accordance with the usual customs of their several professions." [106]

In 1939, Congress authorized securing outside engineering and architectural services, declaring in a Senate report that "it is as illogical to advertise for the services of a shipbuilding or other engineering specialist as it would be to advertise for the services of a medical specialist. . . . The question in each case should be decided upon the special qualifications of the firms under consideration." [107]

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[102] J. App. 2420-21, 2423-24, 5711, 5713.

[103] J. App. 5714.

[104] J. App. 50, 53, 366-71, 1624-25, 1627-28, 1784-85.

[105] Pub. L. No. 68-463 (1925).

[106] *Id.*

[107] S. Rep. No. 263, 76th Cong., 1st Sess. 23 (1939), J. App. 3551.

Government policy as to the method of obtaining architectural and engineering ("A/E") services has been the subject of numerous Congressional hearings and reports, statutes and regulations, throughout the period since 1939.[108]

In 1972 Congress held a series of hearings on the so-called "Brooks Bill", which provided that the Government should continue to follow the traditional method of obtaining A/E services in all cases. Following hearings, the House Committee on Government Operations found, *inter alia*:

> [T]he committee concludes that the traditional system of architectural and engineering service procurement utilized by the Federal Government, as well as other public bodies, business and private industry, constitutes the most effective and efficient manner to acquire these professional services, and that regular competitive negotiation procedures not be applied to A/E procurement.[109]
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> * * * *
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> . . . regular competitive negotiation, where each potential contractor is pitted against the others in terms of fee and quality of his product or service, does not provide an optimum method of procuring A/E services for the Government or anyone else. Even were A/E fees reduced somewhat, the "savings" would inevitably be reflected in a reduction of the A/E's design costs rather than his projected margin of profit. This in turn means that the Government would tend to obtain lower quality plans and specifications which could mean high construction and maintenance costs and, generally, lower quality buildings and other facilities.[110]

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[108] *See* J. App. 2809-3682.

[109] H.R. Rep. No. 92-1188, 92d Cong., 2d Sess. 2 (1972), J. App. 3347.

[110] *Id.* at 4, J. App. 3349.

The Senate Committee on Government Operations similarly found that enactment of the Brooks Bill was in the public interest and would "insure the continuation of the Government's basic procurement procedure, with respect to architectual and engineering services, which has been in operation for more than 30 years." [111] The Brooks Bill was enacted into law and became 40 U.S.C. §§ 541-44 (Supp. II 1972).

Thus the Government's policy has always been to select engineers by the principle of competence rather than bidding; and this practice is required by numerous, extensive and pervasive statutes and regulations, including, for example, the Brooks Act, the Armed Services Procurement Regulations, the Federal Procurement Regulations, and the Military Construction Authorization Act.[112] Every department and agency of the United States which obtains the services of professional engineers, including the Department of Justice, follows the traditional method of selection by competence, not bidding.[113]

Likewise, the traditional method of retaining professional engineers is and has been for many years followed by state, local and regional governments and governmental bodies throughout the United States, pursuant to legislation, regulation, custom and practice.[114] Further, at least 49 decisions of state courts throughout the United States declare bidding an improper method of obtaining professional services.[115]

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[111] S. Rep. No. 92-1219, 92d Cong., 2d Sess. 6 (1972), J. App. 3398.

[112] *See* Cert. App. A-21-A-24, J. App. 3417-3682.

[113] *Id.*

[114] J. App. 1784, 3091-92, 3398, 3682-5477; DX 216.

[115] The decisions are cited at Cert. App. A-60 - A-62.

In the private sector, too, the traditional method of selecting engineers by competence rather than bidding has been followed for many years throughout the United States by engineering clients generally, including industrial corporations, schools, hospitals, and churches.[110]

8. The Record Shows Why The Principle Of Selection of Engineers By Competence Rather Than By Bidding Is In The Public Interest and Reasonable.

The record shows six principal ways in which selection by competence serves the public interest and in which, conversely, bidding on projects to which the ethical principle applies endangers the public, thwarts competency in engineering, and is unreasonable. These are:

(A) Bidding in engineering endangers life and safety;

(B) Bidding in engineering suppresses the free exchange of information necessary to the profession;

(C) Bidding in engineering frustrates and prevents competition in construction;

(D) Selection by competence tends to decrease, and bidding tends to increase, construction, maintenance, operating, and life-cycle costs;

(E) Selection by competence is the best way to secure optimum design, and bidding leads to functional inefficiency; and

(F) In engineering, bidding is inherently deceptive and fraudulent.

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[110] J. App. 388-94, 706, 1153-54, 1380, 1784, 3347, 3379, 3394.

(A) ***Bidding in engineering endangers life and safety.***

The evidence is uncontroverted that there is a relationship between inadequate or negligent engineering work and the awarding of such work by bidding or fee cutting.[117] The principal executive of the insurance carrier which provides malpractice insurance for sixty to seventy percent of the professional engineers in the country testified that he keeps records of all claims of inadequate engineering work, and that he investigates and analyzes the claims. Between 1957 and 1973 there were 17,500 claims of engineering error or inadequacy, and by 1974 the insurance carrier was receiving such claims at the rate of about ten per business day.[118] Approximately 15% of all claims involved death or bodily injury,[119] which amounts to an average of more than one claim every day involving death or bodily injury. From 1957 to the end of 1973 the insurance carrier paid more than $150 million on liability claims, $23.5 million of which had been paid for death or bodily injury.[120] Actual losses were even larger, since the foregoing sums exclude amounts deductible by the insurance carrier, settlements and other payments by insured persons.[121]

Testimony identified many examples of inadequate engineering caused by bidding or fee cutting in the solicitation of engineering work. Among these are an apartment house fire in California; collapse of a partially completed building at Bailey's Crossroads; the Crystal City collapse; collapse of a Smithsonian Institution building; collapse of the Silver Bridge between Ohio and West

[117] J. App. 262-65, 1036-37, 1044-45, 1284-86, 1634-35, 2003-05, 2012-14, 3349, 3379.

[118] J. App. 991, 993.

[119] J. App. 998.

[120] J. App. 1056, 1057.

[121] J. App. 1057.

Virginia (in which more than sixty persons were killed); collapse of the Tacoma Narrows Bridge; faults in the Envoy Motel in Washington, D.C.; collapse of St. Rose of Lima Church in Baltimore; the Knickerbocker Theatre collapse in Washington (which caused 90 deaths); failure of the sewer system in Ottumwa, Iowa; contamination of water systems in the Pittsburgh area; collapse of a silo in Puerto Rico; and the expense of correcting major structural faults in Wilcox Hall at Princeton University.[122]

The relationship between solicitation of engineering work by bidding and the frequency of claims arising from inadequate engineering is so well established by statistical data that the insurance carrier refuses to insure engineering firms that engage in solicitation by bidding, and excludes from insurance coverage projects on which engineers have engaged in bidding.[123]

(B) ***Bidding in engineering suppresses the free exchange of information necessary to the profession.***

It is vital in the learned professions that there be free exchange of information and ideas among the profession's members.[124] This is basic to progress in science and engineering.[125] Widespread sharing of knowledge through publication in technical journals, seminars, programs of continuing education and meetings of technical and professional societies is characteristic of and indispensable in engineering.[126] Valuable information freely exchanged

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[122] J. App. 1028-53, 2003 *et seq.*

[123] J. App. 1016-17.

[124] J. App. 597.

[125] J. App. 1099, 1972-74.

[126] J. App. 597-99, 1099-1100, 1459, 1490, 1752, 1971-73, 1999-2001; DX 40 at 213.

among engineers is of incalculable benefit not only to members of the profession and their clients, but also to the public and future generations.[127] Thus, engineering ethics, as stated in NSPE's Code of Ethics, include the duty to "cooperate in extending the effectiveness of the profession by interchanging information and experience with other engineers and students . . . ." [128]

On the other hand, commercial businesses profit by acquiring, accumulating and applying innovative information, methods and processes not known to their competitors.[129] Consequently, businesses tend to withhold valuable innovative information from public dissemination.[130] The law recognizes the value of such information to business, and the right of business to withhold it, in the doctrine of trade secrets.[131]

The trade secrets concept is inapplicable in engineering. Bidding in engineering would place a premium on hoarding valuable professional knowledge, as each engineer who became involved in bidding was increasingly forced to protect his economic self-interest by submitting the lowest bid.[132] Thus widespread bidding would erode the intellectual foundation of the profession, and with it the basis for much contemporary technological progress.

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[127] J. App. 1048-49, 1099, 1971-73.

[128] Cert. App. A-58, J. App. 5479.

[129] J. App. 1459, 2326.

[130] J. App. 1459, 2326; DX 40 at 213.

[131] J. App. 1469; DX 40 at 213; *see Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); 12, 12A R. Milgrim, *Business Organizations* (1976).

[132] J. App. 1469, 1999-2001, 2326-28.

(C) *Bidding in engineering frustrates and prevents competition in construction.*

As the evidence which is summarized above shows, selection of design engineers by bidding results in inadequate, incomplete and ambiguous plans and specifications.[133] This, in turn, makes construction bids non-comparable, and engenders disputes, additional construction costs and litigation between constructors and clients.[134] Thus, insistence on the form of bidding in the selection of design engineers frustrates the reality of competitive bidding in the awarding of construction contracts.

(D) *Selection by competence tends to decrease, and bidding tends to increase, construction, maintenance, operating, and life-cycle costs.*

If the selection of an engineer by bidding to design a structure resulted in any decrease in the engineering fee (which the evidence indicates is unlikely), such decrease would be negligible compared to the inevitable increase in the structure's construction, maintenance, operating and life-cycle costs, as the evidence summarized above establishes.[135] The Architect of the Capitol and others testified that competitive bidding is an unreasonable method of selecting a professional engineer since it inevitably increases the client's project cost by an amount much greater than the engineering fee.[136]

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[133] J. App. 111-12, 370-75, 376-77, 425-31, 432-34, 948, 950-51, 1025-27, 1227, 1244, 1614, 1629-30, 1633, 1638, 1990-96; DX 9-14.

[134] J. App. 1025-27, 1227, 1239-41, 1630-31, 1633, 1994, 3349.

[135] J. App. 48, 172, 173, 368, 379-81, 526-28, 951, 965-68, 1106-07, 1109, 1122, 1151, 1187-88, 1223-24, 1231-32, 1238-39, 1241, 1281, 1626, 1629-31, 1646-47, 1785, 3348-49, 3398, 3406, 3410, 6709-10, 6714-15; *see also* note 32, *supra*.

[136] *Id.*

(E) ***Selection by competence is the best way to secure optimum design, and bidding leads to functional inefficiency.***

One witness with impeccable credentials to establish that the best way to secure optimum engineering design is through the traditional method is the United States Government. The Government has vast experience in this matter. After making findings as to the advantages and benefits of this method on the basis of extensive hearings,[137] Congress declared it Government policy "to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required . . . ." 40 U.S.C. § 542 (Supp. II 1972). Congress prescribed by statute the specific means of engineering procurement known as the traditional method. *See* 40 U.S.C. §§ 543-44 (Supp. II 1972).

As the Senate Committee on Government Operations found:

> The Committee on Government Operations is always concerned with the element of cost in all Federal endeavors. In this instance, the committee feels that the Government's interest, which is the public interest, is best served by placing the emphasis on obtaining the highest qualified architectural and engineering services available. . . Failure for any reason to provide the highest quality plans and specifications may well result in higher construction costs, a functionally inferior structure, or troublesome maintenance problems.[138]

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[137] J. App. 2810-3038, 3100-3345.

[138] S. Rep. No. 92-1219, 92d Cong., 2d Sess. 6 (1972), J. App. 3398.

The House Committee on Government Operations found, similarly, that bidding in the engineering field would "adversely affect the quality of . . . design." [139]

The Assistant Commissioner of GSA, in charge of procurement of all non-military engineering services for the Government, testified in this case that selecting engineers by bidding would not only lower the quality of services and raise the cost of construction and life-cycle costs, but would also decrease the functional efficiency of structures and result in danger to the public.[140] Others testified similarly.[141]

The record thus establishes that, apart from economic and public safety considerations, the very purpose of procuring professional engineering design services is frustrated by a bidding procedure, since bidding in engineering leads to functionally inefficient design. The purpose of engineering design—to provide a functionally optimal structure—and the principle of selection by competence are thus corollaries.

(F) ***In engineering, bidding is inherently deceptive and fraudulent.***

To seek bids on an engineering design problem prior to the consultation, communication and negotiation with the client that is a part of the traditional method is like asking a physician to make a diagnosis before he has had a chance to examine the patient, or asking a lawyer to give a legal opinion before he has had the opportunity to consult the client and learn the facts of the case.[142]

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[139] H.R. Rep. No. 92-1188, 92d Cong., 2d Sess. 4 (1972), J. App. 3349.

[140] J. App. 1151-52.

[141] J. App. 44-48, 175-80, 965-69, 1217-24, 1230-32, 1244, 1339-42, 1997-2005.

[142] J. App. 175-80, 374-77, 1152-53, 1633-34, 1638-39, 3349.

A competent and ethical professional will not opine until he has consulted the client and learned the facts. In engineering, preliminary consultations and communications—which may be brief in many medical and legal situations—are always extensive.[143]

Bidding necessarily results in an entirely different arrangement than the normal professional one between engineer and client.[144] The normal relationship involves an undertaking by the engineer to design a structure which will meet the client's needs. Where bidding is involved, the engineer undertakes to provide a certain amount of work limited by the fee specified.[145] This is appropriate only when the work is R & D, or an engineering study, or the like; and, for that reason, such types of work are outside the principle against bidding, as shown above.[146]

All of the foregoing considerations led the Vice President of Catholic University, former Dean of its Engineering School and Chairman of the District of Columbia Board of Registration for Professional Engineers, to testify that the principle against solicitation of engineering work by bidding is inherent in the profession.[147] Engineers know that when an engineer is selected on the basis of a low fee bid, the amount bid is really immaterial and a kind of bait. Once the engineer has begun the project he can take refuge in the fact that the work to be performed was not specified,[148] and can provide

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[143] J. App. 247-51, 772-73, 1156-57, 1222, 1452, 1610, 1990.

[144] J. App. 1656-57, 2002.

[145] *Id.*

[146] J. App. 1789-90, 1873-74, 2599-2600.

[147] J. App. 2007.

[148] J. App. 1227-28.

wholly inadequate designs,[149] or demand higher fees from the client for providing adequate designs, or otherwise take advantage of the client.[150] It is not the NSPE Code of Ethics that is most influential in preventing engineers from soliciting work by bidding but the fact that, in the context of design engineering, "competitive bidding" is neither competitive nor true bidding but rather an inherently unprofessional and fraudulent practice.

9. The Procedural History of the Case Shows That The Government Relied Upon *Per Se* Because There Was No Evidence Of Unreasonableness.

This case was started by a complaint filed December 5, 1972, charging that NSPE engaged in unreasonable restraint of trade, in violation of Sherman Act Section 1, by adopting, publishing and distributing a Code of Ethics Section 11(c) of which prohibited members "from submitting competitive bids for engineering services."[151] The complaint also alleged that NSPE members abide by that section of the Code, and that NSPE and its members "police" that provision. No other section or provision of the Code of Ethics was mentioned in the complaint, and no other restraint of trade was charged.

NSPE filed its answer on January 8, 1973.[152] The answer denied the restraint of trade and admitted that NSPE had adopted, published and distributed a Code of Ethics containing Section 11(c), which was set forth verbatim. The answer also alleged as separate defenses that NSPE does not regulate or control, or seek to regulate or control, the conduct of professional engineers or

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[149] J. App. 178-80, 1150-52, 1635-36, 2003-05.

[150] J. App. 1239-41.

[151] J. App. 11 *et seq.*

[152] J. App. 16 *et seq.*

others,[153] and that Section 11(c)'s provisions are reasonable and necessary to public health, safety and welfare.[154]

During the ensuing year and a half, Government attorneys engaged in extensive discovery throughout the country. They were given unlimited access to NSPE's files and records, and inspected more than ten thousand NSPE documents.[155] They issued twenty-two notices of depositions, but did not actually take any depositions, rather collecting by subpoena voluminous documents from thirteen state engineering societies, and numerous engineers and engineering firms.[156] NSPE took the depositions of twelve individuals—two authorities on occupational sociology and ten eminent professional engineers.[157]

Stipulations as to the authenticity of documents were made, and it was agreed that deposition testimony was

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[153] J. App. 20-21.

[154] J. App. 21-22.

[155] J. App. 1570.

[156] J. App. 1-10, 1536.

[157] NSPE deposition witnesses:

Professor Everett C. Hughes, a founder of the field of occupational sociology, J. App. 555 *et seq.*;

Joseph Lawler, chief executive of a prominent environmental engineering firm, J. App. 319 *et seq.*;

Milton Pikarsky, Chairman of the Chicago Transit Authority and for a decade Chicago Commissioner of Public Works, J. App. 27 *et seq.*;

Louis Bacon, chief executive of a prominent structural engineering firm, J. App. 92 *et seq.*;

Dr. Robert Seamans, Jr., President of the National Academy of Engineering and former Secretary of the Air Force, J. App. 1070 *et seq.*;

William R. Gibbs, partner in a prominent engineering firm, and a member of the NSPE Board of Ethical Review, J. App. 1263 *et seq.*;

James Shivler, president of a prominent engineering firm and President of NSPE, J. App. 655 *et seq.*;

Walter A. Meisen, Assistant Commissioner for Construction

[continued]

to be used in lieu of calling a witness at trial. Trial was held June 5-11, 1974.[158] The Government's opening statement at trial asserted that ". . . the primary feature of plaintiff's case is that this case is governed by the *per se* rule which prohibits all price fixing conspiracies no matter what the context may be." [159]

NSPE's opening statement pointed out that neither price fixing nor *per se* is mentioned in the complaint; [160] that the principal defense is that the ethical principle attacked is reasonable, necessary and in the public interest; [161] and that NSPE's Code of Ethics is hortatory, not mandatory, and protected by the First Amendment.[162]

The Government case-in-chief consisted entirely of documentary exhibits.[163] NSPE then stated that it did not object to going forward with the evidence, although it believed the Government had not proved a case, but that it did not waive the rule that the Government has the burden of proof.[164] NSPE then offered the deposition testimony of twelve witnesses, and 215 exhibits.[165] NSPE

[footnote 157 continued]

Management and Public Building Service for the General Services Administration, J. App. 1135 *et seq.*;

George M. White, Architect of the Capitol, J. App. 1203 *et seq.*;

J. Sprigg Duvall, president of a liability insurance company, J. App. 974 *et seq.*;

Professor J. Neils Thompson, professor of engineering and Director of the Balcones Research Center at the University of Texas at Austin, J. App. 887 *et seq.*;

Professor Ernest Greenwood, sociologist eminent in the field of occupational sociology, J. App. 1413 *et seq.*

[158] J. App. 1529-2409.

[159] J. App. 1537.

[160] J. App. 1544, 1569.

[161] J. App. 1545-1564, 1567-1568.

[162] J. App. 1564-1565.

[163] J. App. 1578-1584, 1591-1593.

[164] J. App. 1576-1577.

[165] J. App. 1594.

then presented the additional testimony of four distinguished professional engineers.[166]

At the conclusion of the NSPE testimony the Government stated: "The Government has placed its case on the record. It relies on the documents offered in its direct case to prove the *per se* unreasonableness of the restriction charged in the complaint." [167] The Government proceeded to call three "rebuttal" witnesses: a manufacturer,[168] an engineer who is a Government employee,[169] and an economist employed in the Antitrust Division of the Justice Department.[170] NSPE presented a consulting economist in surrebutal.[171] The court then directed each side to prepare proposed findings.[172]

On December 19, 1974, the District Court filed its opinion.[173] The attorneys then visited the Judge infor-

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[166] NSPE witnesses at the trial were:

Admiral John G. Dillon, who had been in charge of U.S. Navy engineering procurement for years, J. App. 1597-1682;

James L. Polk, a professional engineer engaged as a sole practitioner, J. App. 1682-1737;

Paul H. Robbins, a professional engineer with practical experience who is Executive Director of NSPE, J. App. 1741-1957;

Dr. Donald E. Marlowe, Vice President of Catholic University, former Dean of the Engineering School and Chairman of the District of Columbia Board of Registration for Professional Engineers, and recipient of innumerable honors in engineering, J. App. 1958-2031.

[167] J. App. 2049.

[168] *Richard Horner*, who had several Government appointments but who is not an engineer, J. App. 2049-2050, 2057.

[169] *Richard Hirsch*, a professional engineer employed as a teacher at the U.S. Naval Academy, J. App. 2149, 2151-2152.

[170] *Richard J. Arnould*, J. App. 2210-2211.

[171] *Dr. Nevins Baxter*, a former member of the economics faculties at Princeton and at Wharton School of Finance and Commerce at the University of Pennsylvania, J. App. 2318-2398.

[172] J. App. 2406-07, 2409.

[173] 389 F. Supp. 1193, J. App. 9928.

mally and the Government presented its proposed judgment. NSPE objected that the judgment was far too broad, and the Judge indicated that he thought some of the provisions proposed were unnecessary and went too far. The Judge asked Government counsel if the Government would permit the proposed judgment to be modified or some of the proposed provisions to be omitted. When the Government attorney refused to agree to any modification, the Judge said that the judgment would be entered as proposed since the Government as the prevailing party was entitled to the judgment it desired. No record of these proceedings was made. On December 31, 1974, the District Court filed findings of fact and conclusions of law,[174] and the judgment drafted by Government counsel.[175] The findings were comprised entirely of findings proposed by the contending parties and were so denominated by the District Court. No independent findings were made by the District Court and no finding was made as to reasonableness, nor was any of the evidence on this subject discussed in the District Court opinion.

NSPE immediately filed a notice of appeal to this Court.[176] The Government filed a motion to affirm, arguing that a *per se* case had been made. On June 23, 1975, this Court vacated the judgment and remanded the case for further consideration in light of *Goldfarb*.[177] Upon remand the District Court held oral argument. The Government argued that the remand was purely routine and that *Goldfarb* supported application of the *per se* rule. NSPE argued that *Goldfarb* called for consideration of

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[174] 389 F. Supp. at 1201, J. App. 9944.

[175] J. App. 9974.

[176] J. App. 9982. The appeal was taken under the former Expediting Act, 15 U.S.C. § 29 (1970).

[177] *National Society of Professional Engineers* v. *United States*. No. 74-872, 422 U.S. 1031 (1975), J. App. 9984. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975).

the evidence of reasonableness in this case, and further specifically requested that if the Court decided to hold for the Government, NSPE be granted a hearing on the form of the judgment. On November 26, 1975, without further proceedings, the District Court filed its opinion, concluding that "the court adheres to its previous decision holding Section 11(c) of Defendant's Code of Ethics to be a *per se* violation of § 1 of the Sherman Act." [178] Simultaneously it re-entered the judgment previously entered and vacated.[179]

On December 3, 1975, NSPE filed notice of appeal to the Court of Appeals.[180] The case was briefed and argued, and on March 14, 1977, the Court of Appeals for the District of Columbia Circuit filed an opinion [181] which is now before this Court.

Throughout the exhaustive trial and appeals in this case the Government has contended, and both lower courts have held, that evidence of reasonableness is irrelevant. However, this claim was not advanced until the eve of trial, after the Government had completed a nation-wide investigation of engineering lasting a year and a half. The Government has not hesitated to attempt to expand the scope of the claims made in the complaint,[182] but it has made no attempt to prove the one charge explicitly made—that the ethical principle at issue is unreasonable.

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[178] 404 F. Supp. 457, 461, J. App. 9985, 9990.

[179] Cert. App. A-15, J. App. 9991.

[180] J. App. 10,000. The appeal was taken to the Circuit Court after the District Court declined to certify direct appeal to this Court. Cert. App. A-14.

[181] 555 F.2d 978, Cert. App. A-2.

[182] The Government has, over NSPE's objections, offered as exhibits fee schedules of other organizations, despite the continued and consistent position of NSPE that it does not have any fee schedule, does not desire to have or approve any fee schedule and does not defend fee schedules.

SUMMARY OF ARGUMENT

I. The rule of reason in restraint of trade cases dates from the 17th century, and has remained the prevailing standard of judicial analysis to the present day. *See especially Mitchel* v. *Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 374 (1711); *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 97 S. Ct. 2549 (1977). In *Chicago Board of Trade, supra*, the Court stated two basic antitrust principles: (1) that price-related agreements among competitors which restrain trade are lawful if they regulate the time, place and manner of competition in the public interest, whereas such agreements are unlawful if their purpose is to fix the level of prices; and (2) that the courts must ordinarily examine the history, purpose and effect of an alleged restraint, in its factual context, to determine whether it violates the Sherman Act.

"Per se" is a term first used by the Court in a restraint of trade case in 1940, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150. The term applies only to "pernicious" conduct lacking "any redeeming virtue." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958). In the instant case of first impression—which involves professional ethics and arises on a massive record on the issue of reasonableness—there is no warrant for purposefully declining, as the lower courts explicitly did, to consider whether the ethical principle is required by compelling public interests. In holding that they "need not consider" the evidence of reasonableness, *see* 389 F. Supp. at 1199, and in declining to make any findings on the issue, the lower courts did not do justice. Instead, they elevated judicial administration to a higher priority than public safety. Voluminous record evidence, which the lower courts would not consider, establishes that public safety is directly imperiled by the unethical practice involved.

No defense is asserted that abolition of the ethical principle would cause "ruinous competition" among engineers. Rather, the defense rests on the record evidence, which establishes that fee bidding to get an engineering assignment, before the facts can be known, pervasively endangers the public and harms clients. The lower courts do not say otherwise. A profession's ethical canon cannot rationally be judged without examining the evils against which the canon aims. Where, as here, a principal evil involved is hazardous engineering, the urgency of examining the facts is compelling.

II. United States statutory policy dating from 1925, and continuing to the present day, with periodic reaffirmations by Congress and the Executive, prohibits procurement of design engineering work by bidding. *See, e.g.*, 40 U.S.C. §§ 541-44 (Supp. II 1972). NSPE does not contend that the Government's statutes and regulations bar subject matter jurisdiction here or comprise an exemption from the Sherman Act—even though they state precisely the policy attacked in this case. NSPE contends that the Government's continuing requirement, after 52 years of experience, that engineers not be retained by bidding, and Congress' findings that bidding in engineering harms the public, cannot properly be disregarded, and establish that an ethical canon which says the same thing is not unreasonable.

The policy of virtually every State which has acted on the subject is also identical to NSPE policy at issue. State courts, too, have condemned the unethical practice. Statutes and regulations are the standard of reasonableness as a matter of law. *See, e.g., Martin* v. *Herzog*, 228 N.Y. 164, 168, 126 N.E. 814, 815 (1920) (Cardozo, J.).

III. Precedents and common sense establish that the burden of proving unreasonableness in a Sherman Act Section 1 case is on the plaintiff (here, the Government); otherwise, there would be a presumption of liability in every such case, which no court has ever held.

Although it had ample opportunity to do so, and made a massive search for evidence, the Government failed to produce any substantial evidence on the issue of reasonableness. It rested its case-in-chief without putting a single witness on the stand, and produced three rebuttal witnesses, whose testimony is its own best refutation.

Conversely, massive record evidence establishes that the ethical principle is reasonable. Undisputed evidence shows that the principle is limited in scope, applying only where public safety is directly at risk. Even if, contrary to the evidence, NSPE's formulation of the ethical principle were overbroad, the proper remedy would be to limit it to its valid scope, not to abolish it. *Bates* v. *State Bar of Arizona*, 97 S. Ct. 2691 (1977), demonstrates, if any demonstration were needed, that the judiciary is fully capable of limiting restraints on professional activities to a proper scope.

IV. The sweeping judgment in this case was first entered, without a hearing on its terms, precisely as drafted by Government counsel. After this Court vacated the District Court judgment, the District Court re-entered the judgment with no changes and again without a hearing.

On its face the judgment is an unconstitutional blunderbuss which abridges First Amendment speech, publication and associational rights. As detailed in the Argument, it prohibits NSPE, its officers, its members and every professional and technical society which is now or

may become affiliated with it, from: statement of facts, expression of views, publication of ideas, and association for advocacy of principles they believe the public interest requires. A very strong presumption of invalidity attaches to such prior restraints. *See, e.g., New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Carroll* v. *Princess Anne*, 393 U.S. 175 (1968). No effort was made here to employ the least restrictive means available. *See Linmark Associates* v. *Township of Willingboro*, 97 S. Ct. 1614 (1977); *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

The judgment is also irreconcilable with the doctrine of *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), since the purported "offense" on which it claims to be based consisted of communication with public officials, and because the ethical canon at issue has always been purely hortatory.

Although the Circuit Court properly recognized that the judgment violated the First Amendment to the extent the judgment compelled those affected by it to make statements they believe offensive (*see Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974)), the Circuit Court erred in failing to hold that the judgment's prior restraints are unconstitutional as well. Ironically, the First Amendment cases the Circuit Court cited hold not that compelling speech is unconstitutional, but that enjoining speech, as involved here, is unconstitutional.

The judgment's abridgements of associational rights are pervasive and unconstitutional. *See, e.g., NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Con-

gress intended the Sherman Act not to impair free association, as here.

V. This Court's vacation of the first District Court judgment and remand for reconsideration in light of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), was not a meaningless formality, as the Government contends. *See Henry* v. *City of Rock Hill*, 376 U.S. 776 (1964). NSPE believes the Court recognized there is no way to do justice here without considering the facts. *Goldfarb* supports such consideration.

VI. The Circuit Court and the Government wrongly suggest that NSPE should be penalized for defending the case instead of submitting to judgment. The adversary system depends on stubborn defense of principles. Engineering ethics, too, require that where, as here, non-engineers have made a wrong judgment on engineering matters, engineers must point out the consequences. Engineers, who deal with facts, cannot voluntarily accept the lower court decision which, "[t]o vindicate a juridical conception . . . shut out the best possible means of information." R. Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 620 (1908).

ARGUMENT

I. THE RULE OF REASON APPLIES TO THIS CASE.

A. The *Per Se* Rule Applies Only To Pernicious Conduct.

Section 1 of the Sherman Act of 1890, 15 U.S.C. § 1, does not on its face distinguish between lawful and unlawful restraints of trade, stating that "every" [153] contract, combination and agreement in restraint of trade is prohibited. It was clear to Congress in 1890, however, and

[153] As to Congress' use of the generic term, *see United States* v. *American Tobacco*, 221 U.S. 106, 181 (1911).

it remains clear to the present day, that the Sherman Act was intended to carry forward the common law of antitrust which recognized that distinction.[184] As Senator Sherman stated in Congressional debate, the Sherman Act

> does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.[185]

The leading commentator on the origins of the Sherman Act has stated:

> [T]he Sherman Act was intended to bring the body of common law on the subject within reach of the United States courts.[186]
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> . . . [I]n adopting the standard of the common law Congress expected the courts not only to apply a set of somewhat vague doctrines but also in doing so to make use of that 'certain technique of judicial reasoning' characteristic of common law courts.[187]

Since the 17th century, the common law has recognized that, to be unlawful, restraints of trade must be unreasonable; restraints reasonably limiting the time, place or manner of commerce are legitimate; and courts must examine the factual context in which the alleged restraint operates to judge its legality. *See Rogers* v.

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[184] The Act of July 2, 1890, 26 Stat. 209, 51st Cong., 1st Sess., was enacted under the title "An Act to protect trade and commerce against *unlawful* restraints and monopolies." (Emphasis added.)

[185] *See* 21 Cong. Rec. 2456 (1890). Senator Hoar, Chairman of the Judiciary Committee, also stated that the Act "affirmed the old doctrine of the common law." *Id.* at 3146.

[186] H. Thorelli, *The Federal Antitrust Policy* 228 (1955) (hereinafter "Thorelli").

[187] *Id.* at 228-29 (footnote omitted).

Parrey, 2 Bulst. 136, 80 Eng. Rep. 1012 (1613); *Broad* v. *Jollyfe*, Cro. Jac. 596, 79 Eng. Rep. 509 (1620); *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); *Bunn* v. *Guy*, 4 East 190, 102 Eng. Rep. 803 (1803); *Horner* v. *Graves*, 7 Bing. 735, 131 Eng. Rep. 284 (1831); *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64 (1874); *Fowle* v. *Park*, 131 U.S. 88 (1889).

In two 1911 cases, this Court held that the foregoing common law principles apply under Section 1 of the Sherman Act. *Standard Oil Co.* v. *United States*, 221 U.S. 1; *United States* v. *American Tobacco Co.*, 221 U.S. 106, 179-80; *see also Nash* v. *United States*, 229 U.S. 373, 377 (1913).[158] In *American Tobacco*, the Court stated that the rule of reason is "universal" in jurisprudence, and that not to apply it to the Sherman Act would give the statute an "unreasoning and unheard of construction." 221 U.S. at 180. The Court said,

> that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests . . . the words as used in the statute were designed to have and did have but a like significance. [*Id.* at 179.]

It was in *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918), however, that the Court, in an opinion by Justice Brandeis, definitively stated the scope of the rule of reason in antitrust. At issue was the legality under Sherman Act Section 1 of a Board of

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[158] Before 1911, the Court applied the same common law principles under the Sherman Act, but with a different semantic formulation. Reasonable restraints were upheld as not being "in restraint of trade", *Chicago Board of Trade* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 252 (1905); price fixing was condemned even if the *level* of prices fixed was claimed to be "reasonable", *United States* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897).

Trade rule which fixed grain prices by prohibiting the Board's 1600 members from buying grain, when the Board was closed, at any price other than the closing bid that day. The Court stated that "[t]he case was rested [by the Government] on the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, *fixed prices* at which they would buy or sell during an important part of the business day, is an illegal restraint of trade." [189] The Court rejected the Government's "bald proposition":

> But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. [*Id.* at 238.]

Applying each of the foregoing factors to the Board of Trade "price fixing" rule, the Court upheld the rule as a reasonable regulation of the time, place and manner in which prices may be quoted. *Id.* at 239-41. The Court reversed the district court, which had held that the evidence as to reasonableness need not be considered. *Id.* at 239.

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[189] 246 U.S. at 238 (emphasis added). As Professor Posner has noted, the facts in *Chicago Board of Trade* involved "a classic antitrust boycott", as well as price fixing. R. Posner, *Antitrust Law: An Economic Perspective* 210 (1976).

Nine years after its decision in *Chicago Board of Trade*—and more than three hundred years after the rule of reason was first applied in antitrust—this Court held that some restraints of trade are so inherently offensive that the courts may properly decline to consider evidence offered to justify them. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927), in which the Court so held, involved the exchange and fixing of prices by competing pottery manufacturers, and also a group boycott. In 1940, the Court for the first time characterized these restraints as "*per se*" illegal. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150. However, as the Court has repeatedly made clear, the *per se* rule is a narrow limitation on the rule of general application, and pertains only to those restraints of trade which the courts, after considerable experience, have found "pernicious." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958). Restraints, to be *per se* unlawful, must lack "any redeeming virtue." *Id.* The rule of reason continues to be "the prevailing standard of analysis" in restraint of trade cases, as it has been since the 17th century. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 97 S.Ct. 2549 (1977).

That the instant case is a case of first impression cannot be credibly denied. This is the first Sherman Act Section 1 case to reach this Court in which the defendant has made a record that the alleged restraint is indispensable to public safety and health. This is the first case to reach this Court involving application of that statute to ethical standards in a profession. This is the first case to reach this Court involving the relation of engineering practice and bidding. This case does *not* involve price fixing. It involves the time when prices for engineering services may be freely arrived at, in arms-length transactions, to avoid deception of clients—after, not before, the facts on which the engineer's diagnosis is based can

be known. This case does not involve conspiracy, overreaching, predation or consumer abuse (no consumer complains of the ethical canon at issue), but rather a profession's long-standing repudiation of a demonstrably dangerous and shabby practice.

In this case of first impression, to hold, as did the lower courts, that the judiciary "need not consider" [190] the evidence of reasonableness—to decide the case without findings on, analysis of, or reference to that evidence—is to abrogate in one stroke three centuries of the rule of reason in antitrust. To apply the *per se* standard here is tantamount to endorsing "the unreasoning and unheard of construction" of the Sherman Act which would have prohibited the rule of reason altogether; that is what the Government urged this Court to do in *United States* v. *American Tobacco Co., supra,* 66 years ago.

B. The Lower Courts Disregarded This Court's Teachings On The Rule Of Reason.

Neither the District nor the Circuit Court herein correctly perceived this Court's decisions in *Chicago Board of Trade; Northern Pacific Railway Co.* v. *United States, supra; White Motor Co.* v. *United States,* 372 U.S. 253 (1963); and *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975). Similarly, the lower court opinions cannot be reconciled with *Continental T.V., Inc.* v. *GTE Sylvania, Inc., supra,* which was decided after they were rendered.

The essential doctrine of *Chicago Board of Trade* consists of two basic antitrust principles. The first principle is that price-related agreements among competitors which restrain trade are lawful if they regulate the time, place and manner of competition in the public interest; whereas price-related agreements among competitors which restrain trade are unlawful if their purpose is to

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[190] 389 F. Supp. at 1199, J. App. 9938.

fix the level of prices. The second principle is that the courts must in the ordinary case examine the history, purpose and effect of an alleged restraint of trade, the evils against which it aims, and the factual context in which it operates, before determining whether it violates the Sherman Act. Neither of the lower courts in this case recognized either of those basic principles.

In *White Motor Co.* v. *United States*, *supra*, the Court was for the first time presented the question whether vertical territorial limitations violate Section 1 of the Sherman Act. Stating that it was confronted with a question of first impression, the Court reversed a judgment entered for the Government under the *per se* rule:

> This is the first case involving a territorial restriction in a *vertical* arrangement; and we know too little of the actual impact of both that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us. [372 U.S. at 261.]
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> We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' (*Northern Pacific R. Co.* v. *United States*, *supra*, p. 5) and therefore should be classified as *per se* violations of the Sherman Act. [*Id.* at 263.]

See also Maple Flooring Mfrs. Assn. v. *United States*, 268 U.S. 563, 579 (1925) ("[T]his Court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record. . . ."); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 555-56 (E.D.Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

Similarly, even in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), involving a lawyers' mandatory mini-

mum fee schedule which the Court described as "a classic illustration of price fixing", *id.* at 783, the Court conspicuously did not invoke the *per se* rule. To the contrary, in *Goldfarb* the Court indicated that the legality of restraints of trade must be judged on the basis of the evils against which they aim—which is at bottom a statement of the rule of reason:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today. [*Id.* at 788-89 n.17.]

The Court's historic skepticism of *per se* was described as follows in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 97 S.Ct. 2549 (1977):

> *Per se* rules . . . require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens

> on litigants and the judicial system of the more complex rule of reason trials, see *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958); *United States* v. *Topco Associates*, 405 U.S. 596, 609-10, 92 S.Ct. 1126, 1134, 31 L.Ed.2d 515 (1972), but those advantages are not sufficient in themselves to justify the creation of *per se* rules. If it were otherwise, all of antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law. [*Id.* at 2558 n.16.]

In light of these considerations, the Court in *Continental T.V.* reversed its 1967 decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365—in which it had held post-sale vertical restrictions as to customers or territories *per se* illegal—concluding that ". . . *Schwinn's per se* rule [cannot] be justified under the demanding standards of *Northern Pac. R. Co.*," 97 S.Ct. at 2558.

As Justice Brandeis observed in *Chicago Board of Trade*, the courts "ordinarily" must examine the evidence of reasonableness to determine the legality of the arrangement. 246 U.S. at 238. In the similar case presented here, the lower courts' explicit determination to disregard the evidence of reasonableness seems to have resulted from adoption of the opposite premise—that "ordinarily" reasonableness is irrelevant; that, contrary to this Court's decision in *Continental T.V.*, *per se* is "the prevailing standard of analysis." Thus, after determining that NSPE's ethical provision was somehow price-related, the District Court perfunctorily concluded that its "inquiry is ended and it need not consider the reasonableness of the ethical proscription." [101] There were no findings on the issue of reasonableness. The Circuit Court affirmed the District Court's truncated analysis, going little fur-

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[101] 389 F. Supp. at 1199, J. App. 9938; *see also* 404 F. Supp. at 461, J. App. 9989-90.

ther than to observe that the ethical canon relates to fees for services.[192]

C. The Propriety Of A Profession's Ethical Canon Cannot Be Judged Rationally Without Examining The Evils At Which The Canon Aims.

Contrary to the assertion contained in the Government's briefs in this case, there is no claim here that abrogation of NSPE's ethical rule would cause "ruinous competition" among engineers. *Cf. United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). The gravamen of NSPE's claim is entirely different from that, and is supported by massive evidence (all of it explicitly disregarded by the lower courts): that bidding in professional engineering would pervasively endanger the public and harm clients. NSPE contends, the record establishes, and no court has denied, that (1) two engineers who bid, before extensively analyzing the design problem, are bidding to provide services which cannot be rationally compared by a client;[193] (2) the submission of a bid in such circumstances—before the problem can possibly be comprehended or an adequate approach to it proposed—limits the amount and quality of analysis ultimately applied to the problem;[194] (3) bidding in engineering has materially increased the actual incidence of unsafe design, injury and loss of life;[195] (4) bidding in engineering prevents competition in construction, by depriving construction bidders of adequate specifications on which to bid, thus engendering construction bids which are not comparable;[196] and (5) bidding in engineering

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[192] 555 F.2d 982, Cert. App. A-8.

[193] J. App. 410-12, 513-14, 1221-22, 1639, 1999, 3384-85.

[194] J. App. 178, 374-78, 838, 1469, 1634-36, 1647, 1657, 1931, 2005.

[195] J. App. 262-65, 1036-37, 1044-45, 1284-86, 1634-35, 2003-05, 2012-14, 3349, 3379.

[196] J. App. 1025-27, 1227, 1239-41, 1630-31, 1633, 1994, 3349.

inexorably drives up construction, maintenance and life-cycle costs of structures.[197]

This Court will search in vain for any refutation of the foregoing points in the record of this case, in the Government's briefs, or in the lower court opinions.

The Circuit Court affirmance of the *per se* ruling in this case cannot be reconciled with statements in its own opinion. Thus, the Circuit Court, after affirming the District Court's refusal to consider the evidence on the issue of reasonableness, asserted that the "rationalization offered by the Society" was inadequate to support the ethical canon.[198] Similarly, the Circuit Court, while affirming the exclusionary *per se* decision below, erroneously asserted that the ethical canon relates to "situations where there are no . . . dangers." [199] The Circuit Court's own statements quoted above, in addition to lacking citation to or support in the record, are plainly inconsistent with its own holding, since the Circuit Court affirmed the District Court's refusal to consider either the so-called "rationalization" for the ethical canon, or any of the dangers to which the canon is addressed. At the beginning of its opinion, the Circuit Court accurately encapsulated the defense of this case, stating, "In sum, defendant argues that a ban on competitive bidding is necessary to prevent deception and poor execution." [200] However, the Circuit Court, while holding for the Government, never stated that the ethical principle is *not* "necessary to prevent deception and poor execution"—only that NSPE's defense is irrelevant.

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[197] J. App. 175, 178-80, 380-81, 516, 1147-48, 1224, 1635, 1647-48, 1657, 1931, 3349, 3384, 3413.

[198] 555 F.2d at 982, Cert. App. A-9.

[199] 555 F.2d at 984, Cert. App. A-12.

[200] 555 F.2d at 980, Cert. App. A-5.

How can an ethical rule be rationally judged without examining the evils against which it aims? Has antitrust enforcement become so mechanical and dessicated that it precludes consideration of those evils? Surely *per se*, which is essentially an irrebutable presumption of illegality, should not be applied to ethical limits on solicitation of clients, which are the "consensus of expert opinion as to the necessity of such standards." *See Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 612 (1935).

If, as has occurred so far in this case, ethical principles can be condemned solely upon a court's conclusion that they somehow affect "free price movement",[201] such principles cannot long survive, since it is undeniable that professional ethics of every type "affect price." Ethics relating to kickbacks; maximum fees for the representation of indigents; fee-splitting; limitation of practice to areas of competence; and contingent fees are but a few examples of ethical matters which undoubtedly "affect price." [202] Moreover, since it is the fundamental object of professional ethics to inhibit practitioners from adopting, to the detriment of the public, the commercial standards of the marketplace,[203] it is reasonable to assume that virtually all professional ethics are likely to "affect price." Are they all therefore *per se* illegal?

This Court has recently applied a rule of reason, and not a *per se* analysis, to a constitutional challenge to re-

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[201] 389 F. Supp. at 1200. J. App. 9939; 555 F.2d at 984. Cert. App. A-11.

[202] In economics parlance, professional ethics have "external effects", or "externalities". J. App. 2331-32; *see generally* J. Bain, *Industrial Organization* 269 *et seq.* (2d ed. 1968); F. Scherer, *Industrial Market Structure and Economic Performance* 341 (1970). Where, as here, consumers of professional services *save money* by reason of the ethical rule (*see* note 39, *supra*), "external economies" result. *See* P. Samuelson, *Economics* 474-78 (9th ed. 1973).

[203] J. App. 1443-45, 5478-79; DX 212.

straints on solicitation by advertising in the legal profession, *Bates* v. *State Bar of Arizona*, 97 S.Ct. 2691 (1977). Neither the Government nor the lower courts have advanced any reason why a different approach should apply in this antitrust case involving solicitation by bidding in professional engineering.

D. When Public Safety Is Involved It Must Be Considered In A Sherman Act Case.

Review of Sherman Act Section 1 cases decided by this Court in the 87 years since the statute was enacted indicates that in no prior case has an evidentiary showing been made that the practice attacked is necessary to public safety and health. In considering whether, as NSPE urges, this aspect alone requires examination of evidence of reasonableness, reference to the statute's basic purpose illuminates.

The Sherman Act was not grounded in dry economic theory or academic notions.[204] To the contrary, its purpose was to safeguard and protect the "common man" [205] against the predations of vast and impersonal forms of enterprise which were developing. Thus the Sherman Act reflects "an eminently 'social' purpose",[206] not an economic theory, and is in essence the first great consumer protection statute.

It would pervert that purpose to cast aside without consideration, under the *per se* rubric—which is but a legal abstraction—actual and essentially uncontroverted evidence that the principal beneficiary of the Sherman Act—the "common man"—will be exposed to bodily harm.

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[204] Economic theory was not considered by Congress, nor were academicians consulted. "Congress considered one antimonopoly bill after another without ever asking for the advice of [economists] or any other professionals." Thorelli, *supra* note 186, at 567.

[205] *Id.* at 227.

[206] *Id.*

Litigants often make extravagant claims of horrible consequences, and courts are accustomed to examining such claims skeptically. However, the lower courts in this case were not skeptical; rather, they chose simply not to consider the evidence of danger to the public, concluding that the judicially-created *per se* doctrine made the evidence superfluous.

E. The Government Opposes Application Of The Rule Of Reason Because The Government Has Failed To Develop Evidence Of Unreasonableness.

After the complaint in this case was filed, a team of several Justice Department attorneys spent months searching the United States for evidence that the ethical canon against bidding in engineering is unreasonable. They posed far-ranging interrogatories and combed NSPE's files (taking copies of more than 10,000 documents therefrom), as well as the files of many other local, state and national engineering societies, and the files of numerous engineering firms. Additionally, the Government attorneys noticed 22 depositions of individuals, associations and firms, and privately interviewed engineers, consumers of engineering services, economists and others.[207]

After all of its probing for evidence of unreasonableness, however, the Government ultimately did not take a single deposition, mounted no case-in-chief at trial on the issue of reasonableness, and has never briefed that issue on the facts. The Government's entire case-in-chief consisted of documents, all of which, according to the Government's trial attorney, were offered for the proposition that *per se* was the controlling rule in the case,[208] and not to elucidate the rule's reasonableness or unreasonableness. The Government's trial strategy is revealed in the

[207] *See generally* J. App. 1-10.

[208] *See* J. App. 2040.

following quotation from its Post-Trial Memorandum, filed in the District Court on July 29, 1974:

> [A]ssuming *arguendo* the accuracy of NSPE's predictions concerning the social and other evils resulting from price competition [sic] in the field of engineering, they should not be considered by this Court. [*Id.* at 21.]

(The District Court's conclusion that it "need not consider" [209] the evidence on the issue of reasonableness echoed the language of that plea, just as the District Court's opinions echoed the Government's briefs, and just as the District Court's "findings of fact" were adopted verbatim from among those submitted to it by the parties).[210] The Government did establish at trial the proposition, not contested here, that professional engineering is in interstate commerce.

Similarly, the Government did not even attempt to establish that the ethical canon is unreasonable during proceedings in the District Court on remand following this Court's vacation of the first District Court judgment. Instead, the Government stated then that the District Court had "correctly refused" to consider whether the canon "serves an honorable or worthy end." Plaintiff's

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[209] 389 F. Supp. at 1199, J. App. 9938.

[210] This Court and other appellate courts have strongly criticized, as an abdication of the judicial function, the verbatim adoption by trial courts of findings proposed by a party. *See United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964); *G.M. Leasing Corp.* v. *United States*, 514 F.2d 935, 940 (10th Cir. 1975), *modified on other grounds*, 429 U.S. 338 (1977); *Kelson* v. *United States*, 503 F.2d 1291, 1294-95 (10th Cir. 1974); *George W. Bennett Bryson & Co.* v. *Norton Lilly & Co.*, 502 F.2d 1045, 1049 n.17 (5th Cir. 1974); *FS Services, Inc.* v. *Custom Farm Services, Inc.*, 471 F.2d 671, 676 (7th Cir. 1972); *In re Las Colinas, Inc.*, 426 F.2d 1005 (1st Cir. 1970); *Roberts* v. *Ross*, 344 F.2d 747, 750-52 (3d Cir. 1965).

Memorandum On Remand, filed in the District Court on October 15, 1975, at 15.

It is plain that unless the *per se* rule is applied, the Government cannot prevail. The Government will ask this Court to affirm as *per se* unreasonable an ethical rule which the Government, notwithstanding great effort before, during and after trial, has failed to show is unreasonable on its facts.

Contrary to the Government's preconception in this case, bidding is consistent with the Sherman Act's purpose only in those situations where it fosters competition. Such situations are common, and perhaps characteristic of our economy, but as the Court has observed they are not universal. Where, as in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), bidding provides the form but not the substance of competition, no antitrust rule requires its maintenance. There the Court stated in striking down, in light of facts peculiar to the movie business at that time, competitive bidding provisions of the district court decree:

> The system [of competitive bidding in the district court decree] uproots business arrangements and established relationships with no apparent overall benefit to the small independent exhibitor. [*Id.* at 164.]
>
> * * * *
>
> . . . [W]e do not see how, in practical operation, the proposed system of competitive bidding is likely to open up to competition the markets . . . . [*Id.* at 165.]

It is to the substance, and not the empty form, of competition that this Court has looked; it is the form, and not the substance, which the Government's approach to this case exalts.

II. THE POLICY PRESCRIBED BY UNITED STATES AND STATE STATUTES AND REGULATIONS CANNOT PROPERLY BE DECLARED *PER SE* UNREASONABLE.

A. United States Statutory And Regulatory Policy On Point Dates From 1925 And Is Identical To NSPE Policy.

To understand the Justice Department position here, it is important to review some legislative background. Before enacting the Brooks Act, Pub. L. No. 92-582, 86 Stat. 1278, 40 U.S.C. §§ 541-44 (Supp. II 1972)—which codified United States policy, in effect since 1925, prohibiting selection of engineers by bidding—Congress conducted a study of the subject. Hearings, analyses, submissions, reports and debates consuming thousands of pages figured, and the many prior laws on point were studied.[211]

The Justice Department Antitrust Division participated actively in the legislative process, opposing the bill. The Acting Deputy Assistant Attorney General, Bruce Wilson, testifying at April 1972 House of Representative hearings, stated that the Department's opposition was based on "antitrust and competition policy and philosophy." [212] He said,

> I think we are all concerned that the Government receive highly qualified architectural and engineering services at a cost which is fair, reasonable, and in line with that which the Government would pay if

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[211] *See, e.g.*, J. App. 2810-3682.

[212] Architect-Engineer Selection Bill: Hearings on H.R. 12807 and H.R. 157 Before a Subcomm. of the House Comm. on Government Operations, 92d Cong., 2d Sess. 64 (1972) (hereinafter "1972 House Government Operations Comm. Hearings"), J. App. 3163. *See also* Procurement of Architect and Engineer Services by the Federal Government: Hearings on H.R. 16443 before a Subcomm. of the House Comm. on Government Operations, 91st Cong., 2d Sess. (1970), J. App. 2810 *et seq.*

> we had competitive bidding *as we hope to have in the private sector.*[213]

To those remarks, Congressman Brooks, Chairman of the House Government Operations Committee, responded as follows:

> I have not dealt with a great many engineers, but a couple of them and I have carefully tried to determine who will do the best job for me, keeping in the back of my mind how much will that distinguished character charge me. I really don't love architects and engineers. They are difficult to deal with. You and I know that, as lawyers. They are much more difficult than lawyers. And I chose people and selected them very carefully in my mind as to qualifications and experience and then talked to them about how much were they going to charge me. This has been my practice, and I think it is the practice of almost all the people that build buildings. So I would say we might want to rephrase that thought.
>
> We have bidding in many types of items on a straight competitive basis.
>
> But this is a little different operation and I think most private operations are based on a procedure very much like this legislation.[214]
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> * * * *
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> I think that the Government is pretty well served by a careful price evaluation after they determine which group they are going to utilize. I want you to remember that I feel that the Government and private individuals are all very much alike, and that we do want to get good services, as you do and I would as an individual, and as we would for the Government. But we also want them to be within the

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[213] 1972 House Government Operations Comm. Hearings 66, J. App. 3165 (emphasis added).

[214] 1972 House Government Operations Comm. Hearings 67, J. App. 3166.

price frame, as you point out, of what is reasonable, what is fair.

We would take cognizance of what is done in the private sector. None of this is precluded from the pretty stiff competition which is envisioned within this legislation. The architects themselves, the engineers, will talk business with you. They are willing to get that pencil out and decide whether or not this project is such a large project. They don't even talk about 6 percent, if it is a big project. They start talking about 5½ percent at the first meeting and work down to 5 and get well below that in many instances. And they will do it for that. And they have never apparently been criticized by their colleagues for any violation of the code.[215]

* * * *

The code and ethics, we would be delighted to leave to you. I don't think the code and ethics are a great problem for this committee. But the procurement of good service is. And the real difficulty and tremendous expense and risk that the Government runs by just shopping for bids is what really concerns me.[216]

After extensive colloquy with the Justice Department representative, Congressman Brooks asked him this:

To your knowledge, did the Attorney General go out and shop for an Acting Deputy Attorney in charge of the Antitrust Division . . . . before he selected you?

* * * *

Do you think they really just pick the man on the basis of his quality; do you feel that?

MR. WILSON: I like to feel that way, Mr. Chairman.

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[215] 1972 House Government Operations Comm. Hearings 67-68, J. App. 3166-67.

[216] 1972 House Government Operations Comm. Hearings 69, J. App. 3168.

MR. BROOKS: That is a good answer.[217]

In October 1972, Congress enacted the Brooks Act. In December 1972, the Justice Department, having failed to get its way in Congress, brought the instant lawsuit.[218]

NSPE does not now, nor has it ever, contended that either the Brooks Act or any of the other federal statutes and regulations which declare the same policy as NSPE's ethical provision comprise an exemption from the Sherman Act. In enacting these statutes and promulgating these regulations [219] the United States' object has not been amendment of the Sherman Act, but rather protection of the public from unreasonable and unwarranted risk and expense.[220]

It is anomalous that the Justice Department, after unsuccessfully attempting to persuade Congress that a prohibition on bidding in the engineering field was unreasonable, now argues that this Court should strike down such a prohibition without considering that issue.

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[217] *Id.*

[218] Even as late as the trial of this case, the Antitrust Division has continued to oppose the Brooks Act, 40 U.S.C. §§ 541-44 (Supp. II 1972), expressing to the District Court in its Post-Trial Memorandum (filed on July 29, 1974) at 41, the hope that the statute would be nullified. Neither the balance of the Executive Branch nor Congress has concurred with this sentiment.

[219] For illustrative statutes and legislative history, prior to the Brooks Act, on point, *see* Pub. L. No. 68-463, 43 Stat. 974 (1925); Pub. L. No. 69-141, 44 Stat. 305 (1926); Report of the Arlington Memorial Bridge Commission, S. Doc. No. 68-95, 35-36 (1925); H.R. Rep. No. 1312, 76th Cong., 1st Sess. 2-3 (1939), J. App. 3582; S. Rep. No. 263, 76th Cong., 1st Sess. 22-23 (1939), J. App. 3551; 10 U.S.C. § 4540 (1970), J. App. 3534; 10 U.S.C. § 7212 (1970), J. App. 3577; Pub. L. No. 91-511, 84 Stat. 1204 (1970), J. App. 3659; Pub. L. No. 92-145, 85 Stat. 394 (1971), J. App. 3638; Pub. L. No. 92-545, 86 Stat. 1135 (1972), J. App. 3617.

[220] *See, e.g.*, S. Rep. No. 92-1219, 92d Cong., 2d Sess. (1972), J. App. 3393; H.R. Rep. No. 92-1188, 92d Cong., 2d Sess. (1972), J. App. 3346.

If a litigant sued the United States, or any agency of the United States, claiming that the Brooks Act's requirements worked an injustice upon him, the Justice Department would certainly declare the Brooks Act to be a duly enacted statute, reasonable on its face and in its application, from the lawful enforcement of which no complaint lies but to Congress. But now the Government dons another hat, and states that the policy is "pernicious" and prohibited as a matter of law. NSPE submits, *per contra*, that endorsement and advocacy of statutory policy are not "pernicious", but are reasonable.

B. The Policy Of Virtually Every State Which Has Acted On The Subject Is Identical To NSPE Policy.

The record in this case also contains voluminous state laws and regulations prohibiting bidding as a method of obtaining professional engineering work.[221] The record shows 32 states as expressly prohibiting the practice by law,[222] and 14 more which appear to do so.[223] The record also shows that 16 of the 21 states which have promulgated statutes of general application requiring bidding in state procurement provide that engineering is outside the scope of the requirement.[224] At least 49 state court

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[221] J. App. 3683-5477.

[222] Alabama, Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Kentucky, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin and Wyoming. With respect to this and the two following footnotes, *see* J. App. 3683-5477; Cert. App. A-25 - A-50, *passim*.

[223] Arkansas, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Nebraska, New Mexico, Rhode Island, Utah and Vermont.

[224] Alabama, Alaska, California, District of Columbia, Florida, Idaho, Illinois, Kentucky, New Hampshire, New Jersey, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas and Wyoming. *See Recon-*

[continued]

decisions [224] reject bidding as a method of obtaining professional services, and no state court decision of which we are aware holds the contrary.

C. A Standard Promulgated By Congress, United States Departments and Agencies, State Legislatures, Regulatory Bodies And Courts Is Not Unreasonable As A Matter Of Law.

The proposition that statutes and prior court decisions are the standard of reasonableness as to their subject matter is hornbook law, applied in hundreds if not thousands of cases. *See* O. Holmes, *The Common Law* 89-90 (Howe ed. 1967); *Martin* v. *Herzog*, 228 N.Y. 164, 168, 126 N.E. 814, 815 (1920) (Cardozo, J.); W. Prosser, *Law of Torts* 188-204 (4th ed. 1971); *Head* v. *New Mexico Board*, 374 U.S. 424 (1963); *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963); *Olsen* v. *Smith*, 195 U.S. 332 (1904).

The Court's statement in *United States* v. *Morgan*, 118 F. Supp. 621, 697 (S.D.N.Y. 1953) is on point. There, in rejecting the contention that actions taken by investment bankers in accordance with policies expressed in the Federal securities laws were nonetheless illegal under the Sherman Act, the Court said:

> It must be borne in mind that this whole statutory scheme was worked out with the greatest care by members of the Congress thoroughly aware of antitrust problems, often in close contact and cooperation with those who were later to administer the intricate phases of this well articulated and

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[footnote 224 continued]

struction Finance Corp. v. *Beaver County*, 328 U.S. 204, 210 (1946). ("We think the Congressional purpose can best be accomplished by application of settled state rules . . . so long as it is plain, as it is here, that the state rules do not effect a discrimination against the Government, or patently run counter to the terms of the Act.")

[225] *See* Cert. App. A-60 - A-62.

> comprehensive plan of regulation of the securities business, and in possession of the fruits of many prolonged and penetrating investigations. *They intended no exemption to the Sherman Act;* and it is hardly probable that they would inadvertently accomplish such a result . . . *This recognition by the Congress of the legality and utility to the American economy of the general features of the* [*practice attacked*] *cannot lightly be disregarded by any court or judge.* [Emphasis added.]

Where, as here, the statutory declaration involved is the same as the practice attacked, it would be unseemly to declare the practice *per se* illegal.

In previous briefs in this case, the Government cited *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), for the proposition that consistency of private conduct and United States statutory policy has no bearing on Sherman Act liability unless the private conduct is specifically compelled by United States statute.[226] *Socony-Vacuum* does not in fact so hold, and is inapposite here. As the Government briefs have always failed to mention, the statute involved in *Socony-Vacuum*, the National Industrial Recovery Act (NIRA), contained a provision (§ 2(c)) authorizing the granting of Sherman Act immunity, on a case-by-case basis, to applicants who fixed price levels in connection with NIRA buying programs. 310 U.S. at 226. As this Court noted, no such immunity was ever sought by the respondents involved in *Socony-Vacuum*. *Id.* Moreover, although NIRA expired in June 1935 (having been declared unconstitutional on May 27 of that year in *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495) respondents' price-fixing "continued unabated during the balance of 1935 and far into 1936." *Id.* at 227. Thus, the alleged "Congressional sanction"

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[226] *See, e.g.*, the Government's Motion to Affirm filed herein in February 1975 (*National Society of Professional Engineers* v. *United States*, No. 74-872) at 9.

invoked in *Socony-Vacuum* was in fact no sanction at all, and was irrelevant to the outcome of the case. Further, the statute involved in *Socony-Vacuum* and the statutes identified in the instant case are not analogous. NIRA, far from identifying the restraint alleged in *Socony-Vacuum* to be reasonable, did not even advert to it. Instead, NIRA merely delegated to the President a generalized authority to regulate the economy—which delegation the Court in *Schechter Poultry*, *supra*, held so overbroad and unspecific as to be unconstitutional. Conversely, the Brooks Act, and other statutes cited here, precisely described United States policy on the subject of the instant case, and directly repudiate bidding in engineering. NSPE's ethical principle, in short, conforms exactly to the statutory arrangement prescribed in the Brooks Act and other United States statutes in effect for more than a half century; conversely, respondents in *Socony-Vacuum* were engaged in a price-fixing scheme which lacked any statutory analogue and which, for most of the time it was perpetrated, was not under even colorable "authority" of the unconstitutional statute involved in that case. Examination of the facts thus reveals that the Government's reliance on *United States* v. *Socony-Vacuum Oil Co.* is misplaced.

We emphasize that even 52 years of Congressional and Executive Branch approval and enforcement of the practice attacked in this case do not bar subject matter jurisdiction under the Sherman Act, in the absence of an express statutory exemption therefrom. No such exemption, express or implied, is claimed. We emphasize equally that Congressional and Executive Branch study, approval and enforcement, over a 52 year period, of the practice at issue are relevant, and powerfully tend to establish that the practice is reasonable. Congress first acted on the subject of this case long before NSPE came into ex-

istence.[27] The *per se* ruling below precluded all consideration of the foregoing facts, and thus neither of the lower courts made any analysis of the rationale underlying the relevant statutes and regulations, or of the laws themselves.

III. THE ETHICAL PRINCIPLE AT ISSUE IS NOT UNREASONABLE.

A. The Burden Of Establishing Unreasonableness Is On The Government.

Logic and precedents demonstrate that in a Sherman Act Section 1 case the plaintiff has the burden of establishing that the alleged restraint is (1) *per se* illegal or (2) unreasonable. As the Eighth Circuit recently stated in *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 308 (1976), *cert. denied*, 429 U.S. 1122 (1977):

> Counsel for the United States apparently believes that the burden is on Empire to establish the reasonableness of each of the more than 3,000 contracts with their varying terms. However, the burden of showing unreasonableness of a restraint of trade, except where there is a *per se* violation of the Act, is on the plaintiff.

See also United States v. *Citizens and Southern National Bank*, 422 U.S. 86, 97 (1975) (upholding district court determination that "the Government had not sustained its burden of proof as to the unreasonableness of the practices involved"); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 374 n.5 (1967) ("The burden of proof in antitrust cases remains with the plaintiff") (holding on this point not affected by *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, *supra*); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 228 (1947) (requiring Government "proof of an undue restraint of interstate

[27] Pub. L. No. 68-463, 43 Stat. 974 (1925); Pub. L. No. 69-141, 44 Stat. 305 (1926).

trade"); *cf. Times-Picayune* v. *United States*, 345 U.S. 594, 622 (1953).

Unless the plaintiff had the burden of proving unreasonableness in civil antitrust cases, every time such cases were brought by the Government a presumption of liability would attach, since *per se* cases would continue to impute an irrebutable presumption of liability, and rule of reason cases would impute a rebuttable presumption of liability. No court has ever stated that the Government is entitled to a presumption of liability in an antitrust case.

B. There Is No Evidence Of Unreasonableness In The Record.

The Court will find no evidence of unreasonableness in the record. NSPE called 17 witnesses. The Government called 3 witnesses, all in "rebuttal." The Government called one engineer, a Government employee. This individual was a teacher at a military academy whose practical experience was as an employee of military contractors and a jewelry manufacturer.[228] He testified that there is no difference between a customer of a manufacturer and a client of an engineer.[229] He had no experience in engineering design work that affects public safety, but was familiar with rocket ships[230] and like articles outside the scope of the ethical rule.[231]

The Government called an economist, an Antitrust Division employee. He admitted under oath that his testimony was coached in the courtroom by his superior in

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[228] J. App. 2150-52, 2188.

[229] J. App. 2198.

[230] J. App. 2190-91.

[231] J. App. 2180.

the Justice Department.[232] He also neither had experience in nor had he made a study of engineering; he relied on figures published in a magazine which he made no attempt to verify; he used a preposterous sampling technique; and he could not define rudimentary statistical terms.[233]

The Government's only other witness was a manufacturer who was a member of a procurement commission. His commission's own report, which he endorsed, expressly rejected bidding as a method of obtaining engineering services,[234] and he testified that no member of the commission favored bidding as a method of selecting engineers.[235]

C. In Addition To The Laws on Point, There Is Massive Evidence That The Ethical Principle Is Reasonable.

The massive record evidence relating to the issue of reasonableness in this case is summarized in the Statement of the Case, and not repeated here. The sources of this evidence are among the most distinguished individuals in engineering, and leading scholars, teachers, and consumers of engineering services—including, for example, the Architect of the Capitol, the Admiral responsible for Navy procurement of engineering services, and the Assistant Commissioner of the General Services Administration who hired the outside engineers used by the Government on its civilian projects. Each of these individuals testified that bidding in engineering is against the public interest. What the occupational sociologists said in this case, on the basis of their observations, turned out to be essentially the same as what the leading liability

[232] J. App. 2274-75.

[233] J. App. 2224-25, 2275-2308, 2311-16.

[234] J. App. 2110-11, 6713.

[235] J. App. 2108.

insurer testified on the basis of actuarial data: Bidding in engineering is ill-advised, dangerous and irreconcilable with professional engineering.

D. The Ethical Principle Applies Only Where Public Safety Is Directly At Risk.

Contrary to the Government's repeated statements, the ethical principle does not "comprehensively" [236] relate to all engineering work, but, as undisputed documentary evidence establishes, relates only to work which immediately affects public safety. Studies,[237] research and development projects,[238] construction of prototypes,[239] subprofessional work,[240] and work not relating to structures to be used by the public [241] are all outside the principle's scope. The foregoing facts—although neither of the lower courts adverted to them—are undisputed.

E. Even If NSPE's Ethical Canon Were Overbroad, The Proper Remedy Would Be Restatement Under The Rule Of Reason, Not Extinction Of The Principle Under The *Per Se* Rule.

If, notwithstanding the foregoing limitations on the scope of the principle against bidding, the principle were misapplied to a situation not involving public safety, or if the principle were in any other respect too broadly implemented, the obvious remedy would be to prohibit the misapplication or overbreadth, not to abolish the underlying principle. Even the Circuit Court in this case, while

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[236] Brief for the United States in Opposition at 5-6.

[237] J. App. 1788-89, 2805-06.

[238] J. App. 1788-90, 2599-2600, 2667.

[239] J. App. 2599-2600.

[240] J. App. 1788.

[241] Cert. App. A-56, J. App. 5479; J. App. 1788-89, 2445, 2599-2600, 2667, 2805-06.

affirming the District Court's *per se* holding, recognized as "legitimate" the objective of preventing deceptive bids.[242]

The preservation by courts of legitimate ethical principles, while limiting their application to situations which require them, is entirely feasible, as the Court's decision in *Bates* v. *State Bar of Arizona*, 97 S.Ct. 2691 (1977), demonstrates. While the facts in *Bates* are markedly different from those here, and while *Bates* was grounded on the First Amendment and not antitrust,[243] the Court's approach there is instructive.

In *Bates* the Court reviewed the history, purposes and effects of prohibitions on advertising by lawyers, and concluded:

> In sum, we are not persuaded that any of the proffered justifications rises to the level of an acceptable reason for the suppression of *all* advertising by attorneys. [97 S.Ct. at 2707. Emphasis added.]

The Court then stated that because the Bar's rule against advertising was unconstitutionally overbroad, under established First Amendment overbreadth doctrine it could be entirely struck down even if appellant's advertisement might have been constitutionally prohibited by a narrower rule. The Court said that, in the usual case involving a restraint on speech, a showing that the restraint was overbroad would suffice to invalidate it, and appellants would prevail regardless of the nature of their acts. *Id.*

However, the Court went on to say, since the overbreadth doctrine is "strong medicine", to be employed

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[242] 555 F.2d at 983, Cert. App. A-10.

[243] The Court held that the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), immunized the State Bar from application of the Sherman Act. 97 S.Ct. at 2698.

sparingly and only as a last resort, "we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective." 97 S.Ct. at 2708. The Court then analyzed the Bar rule's application to the routine and fungible legal services mentioned in appellants' advertisement.[244] Finding the prohibition unjustified in relation to such services, the Court struck down the rule only insofar as it applied to them. The Court carefully noted:

> In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. [*Id.*]

Thus, under the First Amendment, the Court expressly rejected a *per se* approach and adopted a rule of reason approach which permitted restatement of the rule against advertising within limits indicated by the Court. Such an approach is equally appropriate under the Sherman Act. *See Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 324 U.S. 570 (1945). The Sherman Act is no more compelling than the First Amendment, and no more requires inflexible application. *See Associated Press* v. *United States*, 326 U.S. 1, 20 n.18 (1945). Detailed consideration of arguments and evidence, carefully limited holdings, and recognition of the possibility of reasonable regulation in the field are surely as appropriate in applying the Sherman Act to professional principles as in applying the First Amendment to them.

The Circuit Court decision under review is internally inconsistent on this point. The Circuit Court recognized that the ethical principle at issue has "the legitimate objective of preventing deceptively low bids. . . ." 555 F.2d at 983, Cert. App. A-10. However, the Circuit Court also

[244] In engineering, there is no counterpart to such services. *See* J. App. 247-51, 772-73, 1156-57, 1222, 1452, 1610, 1990.

said that, to promulgate a rule to achieve the legitimate objective, NSPE must move the District Court for modification of the decree. *Id.* But if the Government's contention is correct there is no room for consideration of the legitimacy of objectives here. The Circuit Court view that (1) NSPE is not entitled to a hearing on the legitimacy of its objectives and the proper scope of its rules before entry of a decree, but that (2) NSPE can secure such a hearing on a motion for modification after entry, is illogical and unfair.

NSPE has contended since the beginning of the case that it is defending the principle embodied in Section 11(c), not the precise formulation. As with legal principles, such as the First Amendment, the Sherman Act, the commerce clause, and innumerable others, so with professional principles such as the one reflected in Section 11(c), the bare language of the provision does not fully determine the scope; ascertainment requires reference to authoritative interpretations. In the case at bar these show that the rule is not, as stated by the Circuit Court, a "broad ban on all competitive bidding", 555 F.2d at 982, Cert. App. A-9, but is limited to those particular situations, specified by BER opinions and NSPE statements, in which there is reason to believe that bidding endangers the public.

Of course it would simplify matters if the limitations on Section 11(c)'s scope were stated in plain language in the Section. But engineers can hardly be faulted for having failed to attain in their statement of professional principles a specificity that the lawyers have been unable to achieve in the statement of analogous principles of law. A blue-ribbon Task Force on Ethical Matters has been formed within NSPE for the purpose of reformulating and updating its Code of Ethics. Certainly it will eliminate any anachronistic reference to "recommended fee schedules prepared by various [other] engineering

societies." However, it cannot proceed much further until the governing legal principles under which it must operate have been determined. When that has occurred the NSPE Task Force will proceed promptly. In any event, if this case is dismissed, and the revised statement of ethical principles is not reasonable, the Government is free to institute another antitrust action. No threat to any interest protected by the Sherman Act, or to the public, will arise from dismissal of this case.

Public interest would be jeopardized by a holding that the *per se* rule applies to the ethical principle. If the *per se* rule applies, the engineering profession is presented with the dilemma of either disregarding the public interest in one of the crucial aspects of professional practice, or trying to formulate a new statement of the principle which will somehow avoid application of the *per se* rule by some means not yet suggested by the lower courts or the Government. On the other hand, if the rule of reason applies, there is both a legal path and guidance to appropriate revision of Section 11(c), as well as other sections of the Code. Until the issue in this case is decided, NSPE's Task Force on Ethical Matters cannot proceed with confidence.

As the record discloses, procurement of engineering services will continue to be a necessity for thousands of clients regardless of any decision this Court, or any court, may render. Legal precedent, analogy and common sense argue that even if the Court regarded the principle's present formulation as overbroad, the proper remedy would be not to extinguish the principle under the *per se* rule but to permit its formulation under the rule of reason.

IV. THE JUDGMENT IN THIS CASE, BY ENJOINING EXPRESSION OF FACTS AND BELIEFS, AND ASSOCIATION TO ADVANCE THOSE BELIEFS, ABRIDGES NSPE'S FIRST AMENDMENT RIGHTS.

A. The Judgment Is A Blunderbuss Drafted By Government Lawyers Prosecuting The Case, Not By A Court, And Entered Without A Hearing On Its Terms.

The District Court entered the same judgment twice. The circumstances of its entry are stated above.[245] In short, Government attorneys simply presented the District Court with a proposed judgment drafted by them. The District Court entered it without change, without a hearing, and with no more than a few minutes of informal discussion. At the argument on remand, NSPE requested an opportunity to be heard on the form of the order if one was to be entered. The request was not granted, and the judgment was entered, without further proceedings, in the same terms as the judgment previously vacated by this Court. Thus, there has never been a hearing on the judgment's form, and the District Court has not considered any judgment other than the one prepared by the Government prosecuting attorneys.

The judgment is an exhaustive order of eight legal-size pages which, in sweeping terms, prohibits NSPE and all associated with it from stating facts, expressing views or advocating a policy NSPE considers essential to public safety and welfare.[246] Because the judgment is prolix and redundant, analysis is required to lay bare its extraordinary sweep. The judgment applies to NSPE, its officers, and all of its members, since the term "de-

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[245] *See* point 9 of the Statement, *supra*.

[246] The judgment appears at Cert. App. A-15 *et seq*.

fendant" includes all of them.[247] The order's scope can best be indicated by stating the prohibitory terms in the words of the order itself, omitting excess verbiage.

Section IV states: Defendant is enjoined from participating in any course of action which in any manner discourages members from submitting price quotations for engineering services at such times as they may choose.[248]

Section V states: Defendant is ordered to amend its policy statements, Board of Ethical Review opinions, manuals, and any other of its statements or publications, to eliminate any references which in any manner discourage submission of price quotations for engineering services, or which state or imply that submission of price quotations for engineering services is against the public interest.[249]

Section VII states: Defendant is enjoined from disseminating in any of its publications or otherwise any opinion, policy statement, resolution or guideline which in any manner discourages submission of price quotations for engineering services, or which states or implies that submission of price quotations for engineering services is against the public interest. Defendant is ordered to state in any publication of its Code of Ethics that submission of price quotations for engineering services at any time is not unethical.[250]

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[247] By Section III the judgment applies to all persons in concert or participation with NSPE who receive notice of the judgment. Since Section VIII requires publication of the judgment in NSPE's magazine and newsletter, and also requires delivery of a copy to each new member of NSPE, it appears that the judgment applies not only to NSPE but also to all of its members.

[248] Cert. App. A-16.

[249] Cert. App. A-16.

[250] Cert. App. A-17.

Section IX states: Defendant is ordered to refuse NSPE affiliation to: (A) any state engineering society which in any manner discourages its members from submitting price quotations for engineering services at such times as they may choose; and (B) any state engineering society which has any local chapter which in any manner discourages its members from submitting price quotations for engineering services at such times as they may choose.[251]

It is evident from the summary of the record in this brief that the facts known to NSPE, and the opinions of its officers and members, would certainly tend to discourage engineers from submitting "price quotations for engineering services" before they have studied the problem involved, made an analysis, and performed the other functions which should precede any professional opinion. It is also evident that NSPE and its officers and members regard solicitation of engineering work by bidding as against the public interest. Yet the judgment would prohibit any statement of facts known to NSPE and its members on this subject, and any expression of the views of those who believe the public interest is affected by this matter. The judgment would prohibit advocacy of any policy or position with respect to any of the dangers or difficulties of soliciting engineering work by bidding. The judgment would prohibit any statement relating to the time or manner in which "price quotations for engineering services" should be submitted. Further, the judgment would require NSPE, under threat of contempt penalties, to police every state and local engineering society having any manner of affiliation with NSPE.

The sweeping blunderbuss character of this judgment can be illustrated by considering its potential application to a few facts in this record. Literally applied, the

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[251] Cert. App. A-18 - A-19.

judgment would prohibit stating United States policy with respect to procurement of engineering services; or advocating that engineers should comply with United States policy, or with the similar policies of the States. Literally applied, the judgment would prevent NSPE and its members from opposing repeal of the United States statutes on the subject of engineering services procurement, and from advocating passage of State laws embodying the same policy.

Under the judgment NSPE could not publish the testimony of Mr. Duvall on the subject of bidding, or an article summarizing the facts testified to by Mr. Duvall stating the number of engineering malfeasance cases and accidents related to bidding.[252] The judgment appears even to prohibit NSPE from advising its members of the unavailability of liability insurance to engineers who bid. Under Section IV of the judgment, NSPE would risk contempt if it even made the record in this case—not to mention any of its briefs herein—available to its members, since any review of the record or briefs would surely discourage engineers from submitting "price quotations" before they had an opportunity to analyze the problem involved.

The judgment is so repressive and broad that under it if a Justice of this Court writes an opinion in this case summarizing NSPE's position and commenting favorably on it, NSPE could not publish that opinion in its magazine or newspaper and could not state its agreement with a Justice of this Court. If this does not infringe First Amendment rights, it is difficult to conceive what does.

B. The Judgment Is An Unconstitutional Prior Restraint On Speech And The Press.

There is a very strong presumption against the constitutional validity of any prior restraint on speech or pub-

[252] *See* point 8(A) of the Statement, *supra*; and J. App. 976-1068 for the testimony of J. Sprigg Duvall.

lication. *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Near* v. *Minnesota*, 283 U.S. 697 (1931). In *New York Times Co.* v. *United States*, the Court, in the face of claims that the very security of this nation was imperiled by the publication sought to be enjoined, held that such an injunction is contrary to the First Amendment's guarantee of freedom of expression. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 559 (1976).

Even where a prior restraint has been imposed in support of valid governmental interests or important governmental objectives, the First Amendment prohibits it. In *Carroll* v. *Princess Anne*, 393 U.S. 175 (1968), this Court set aside a restraining order against the holding of a public rally by a white supremacist group, saying:

> An order issued in the area of First Amendment rights must be couched in the narrowest means that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). [393 U.S. at 183-84.]

The constitutional requirement that the Government employ the most limited means available "to achieve an important governmental objective" when acting in the area of First Amendment freedom applies even where speech is purely commercial. *Linmark Associates* v. *Township of Willingboro*, 97 S.Ct. 1614 (1977).

Even if, *arguendo*, the ethical principle advocated by NSPE were held illegal, and the *per se* rule applied, that would not warrant enjoining NSPE from publishing in

its monthly magazine (*Professional Engineer*) or its newspaper (*NSPE News*), or from otherwise advocating the view that the Justice Department is mistaken and that the principle serves the public interest. Even in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), where the Court held a statutory prohibition of commercial advertising of drug prices unconstitutional, the Court made clear that advocacy of such prohibition was fully protected by the First Amendment, saying:

> No one would contend that our pharmacist may be prevented from being heard on the subject whether, in general, pharmaceutical prices should be regulated or their advertisement forbidden. [425 U.S. at 761-62.]

Yet in the present case the Government is contending, and the lower courts have held, that our engineers may be prevented from being heard on the subject whether, in general, bidding should be used in engineering solicitation or procurement.

Enforcement of the Sherman Act does not justify disregarding or limiting First Amendment principles. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965). In *Noerr* the Court held that the Sherman Act cannot be applied to prohibit an organization from advocating a public position, saying:

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. [365 U.S. at 139.]

This Court also held that it was immaterial that the position taken may have had an anti-competitive purpose or effect.

The judgment in the present case runs directly contrary to the *Noerr-Pennington* doctrine. Even casual inspection of the record will show that the Government relied on exhibits which are NSPE documents, addressed to public officials, advocating procurement of engineering services on the basis of competence, as provided in Federal statutes, rather than bidding, and advancing arguments that this is in the public interest.[253] Obviously, the

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[253] *See, e.g.*, J. App. 6791-93; J. App. 9897; J. App. 9907.

The Circuit Court opinion refers to a 1970 proposed Defense Department (DOD) test of a new procedure for selection of A/E firms. The opinion asserts that NSPE advised its members that the proposed one-year procedure was unethical, and urged them not to submit price information. "As a result", according to the opinion, DOD was unable to obtain price proposals under the test procedure. 555 F.2d at 983, Cert. App. A-10. That description is erroneous and extremely misleading. In fact, the proposed test was contrary to existing Government regulations; failed to provide for the furnishing of information on which price proposals could be based; was inadequate in numerous respects; was nebulous due to DOD's failure to provide detailed information about the matter; and was prohibited by Congressional Act before it was implemented. All evidence relating to the matter comes from Government exhibits, from which the following facts appear.

On July 17, 1970, COFPAES (Committee on Federal Procurement of A-E Services), of which NSPE was a member, sent a letter to Barry J. Shillito, Assistant Secretary of Defense, thanking him for a meeting to discuss the proposed test procedure, and requesting further information. COFPAES requested a copy of the report on which the test proposal was based, and an implementation timetable. J. App. 6022-23. On August 14, 1970, Mr. Shillito replied, refusing to release the report, and stating that the time contemplated was a period of one year commencing August 1970. J. App. 6024-25.

On August 19, 1970, COFPAES replied, stating that any test should be conducted under controlled conditions and its results objectively evaluated, and that the proposal failed to meet these

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[footnote 253 continued]
criteria. The letter pointed out that the proposal directly contradicted Congress' expressed intent. J. App. 6026-27.

On August 25, 1970, the Consulting Engineers Council (CEC) informed its members of DOD's refusal to either release the report on the proposed test or provide other information; and advised that "we are leaving it to each firm to decide" whether a response would be proper. J. App. 6030-31.

On the same day, COFPAES issued a Press Release stating its reasons for objecting to the DOD test. These included the fact that the test could not be valid because it did not include any method permitting objective evaluation of the results, and provided no controlled conditions. Further, the test disregarded Congress' intent. J. App. 6048-49.

On September 11, 1970, CEC sent a memorandum to its members reviewing the matter and stating the main objections to the proposed test. These were: (1) The requirement of a technical proposal prior to a firm's analysis of a project "opens the door for incomplete solutions based upon insufficient and, possibly incorrect, information." (2) A savings of 1% in design costs could add 10% or more to the cost of construction, operation, maintenance, or all three. (3) No basic criteria for objectively evaluating the test have been established, and there are no controls. Since the test is planned for only one year it is doubtful that any of the facilities involved could be completed, thereby precluding meaningful results. (4) The proposed test ignores the expressed intent of Congress. J. App. 6040-43.

On September 11, 1970, NSPE sent a memorandum to its private practice members transmitting copies of the DOD announcement and of the COFPAES press release. It stated that there are many reasons for the long standing position of the engineering societies opposing bidding. "One of the important reasons is that usually it is not possible for a firm to submit a price with its initial proposal of qualifications in the absence of a full understanding of the scope of the project, time for its completion, assignment of designated personnel and changes in the scope relative to budget limitations. The submission of a price without the benefit of full-scale negotiations is contrary to the public interest and can be disastrous to the client and the consulting engineer." The memorandum did not instruct members on the position to take if requested to submit proposals. J. App. 6044-45.

On October 19, 1970, the Assistant Secretary of Defense withdrew the proposal because of a provision in the 1971 Military Construction Authorization Bill passed by Congress providing that

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interests to which the NSPE advocacy are directed as much deserve First Amendment protection as the interests protected in *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), *Noerr*, *Pennington*, and other cases cited above.

Further, as shown above, NSPE does not control its members' or affiliated organizations' actions, seeks no such control, has never attempted to exercise such control, and has never disciplined anyone in any manner for violating Section 11(c). NSPE has never denied that it has engaged in widespread, active and vigorous advocacy of its views on this matter. The record shows that this is all it has done. Accordingly, under the rule of *Noerr* and *Pennington*, its activity cannot violate the Sherman Act regardless of whether the Government judges the views advocated to be reasonable or unreasonable.

The Circuit Court did, properly, recognize that the scope of the judgment in this case impinges on protected First Amendment interests. It stated, correctly, that in this area "regulation by the state should not be more intrusive than necessary to achieve fulfillment of the governmental interest." [234] Accordingly, it ordered that the decree provision compelling NSPE to state that in its

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[footnote 253 continued]

A/E services "unless specifically authorized by the Congress . . . should continue to be awarded in accordance with presently established procedures, customs, and practices." J. App. 6072-73. Thus, the DOD proposed test procedure was withdrawn pursuant to Congressional directive before it was ever implemented. J. App. 6776.

In short, Government exhibits, which comprise all the evidence on the DOD incident, show that (a) the Circuit Court misapprehended the facts; (b) the disclosures DOD made to the engineers contained no suggestion that any of the dangerous consequences of bidding could be avoided; and (c) the engineering organizations, including NSPE, took no action except to inform their members of what was happening and attempt to persuade Government officials, including Congress, of the proper policy to follow. Clearly this was privileged conduct under the *Noerr-Pennington* doctrine.

[234] 555 F.2d 984, Cert. App. A-12.

view certain practices were not unethical should be excised from the judgment.[255] A month later this Court elucidated the principle implicit in the Circuit Court decision by holding in *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977), that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak and the right to refrain from speaking at all." *See also Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256-58 (1974).

However, the Circuit Court erroneously understated the scope of First Amendment protections applicable here, as the cases upon which it relied establish. The three First Amendment cases on which the Circuit Court relied are *Edward G. Budd Mfg. Co.* v. *NLRB*, 142 F.2d 922 (3d Cir. 1944); *NLRB* v. *Teamsters and Chauffeurs Union*, 241 F.2d 428 (7th Cir. 1957); and *International Union of Electrical, Radio and Machine Workers* v. *NLRB*, 127 U.S. App. D.C. 303, 383 F.2d 230 (1967), *cert. denied*, 390 U.S. 904 (1968). The cases sustain the view that a judgment enjoining speech, as involved here, is invalid—not the Circuit Court's more limited view that a judgment is only invalid to the extent it compels speech.

Edward G. Budd Mfg. Co. v. *NLRB*, *supra*, arose on an NLRB petition to hold a company in contempt of a court order requiring it to cease and desist from unfair labor practices. The petition was based on a company letter to employees which stated facts from the company's viewpoint, and advised that employees were not required to join any union and were free to form one of their own. The Third Circuit held that the letter did not violate the order, that neither the NLRB nor a court has the right under the Labor Act to interfere with an employ-

[255] This provision in the Court of Appeals decision is not in issue as the Government has stated that it does not contest this holding. Brief for the United States in Opposition at 12 n.14.

er's untrammeled expression of views, that the employer's free speech rights are not forfeited because of past misconduct, that the First Amendment applies to letters from employer to employees, and that the First Amendment privilege is not lost where there is no threat or act of discrimination, coercion or intimidation. The court observed that the Labor Act does not purport to authorize restraints on freedom of speech in any circumstances. 142 F.2d at 926.

NLRB v. *Teamsters and Chauffeurs Union, supra*, arose on an NLRB petition to hold a union in contempt of a Board order, embodied in a court decree, which required the union to desist from certain practices. The Board order and decree required the union to send a notice to its members. However, that was not at issue. With the required notice, the union sent a letter stating its view of the controversy, and claiming that its interests had in fact been upheld. The sending of the additional letter was the basis of the petition to hold in contempt. The Seventh Circuit held that this did not constitute contempt, as a limitation of free speech can be tolerated only where the speech is calculated to produce an illegal result, while letters containing no threat of reprisal or force, or promise of benefit, did not violate the decree and were constitutionally protected.

International Union of Electrical, Radio and Machine Workers v. *NLRB, supra*—the only other First Amendment case cited by the Circuit Court—involved a proceeding to enforce an NLRB order which required an employer who had violated the Labor Act to notify all employees of their statutory rights to be free from coercion, interference and restraint. The order also required the employer to have the notice read to the employees during working hours. The District of Columbia Circuit held that the part of the order which required the notice read to employees was beyond the NLRB's authority.

Nothing in any of the cases the Circuit Court cited supports the position that even violation of a statute warrants restricting the future exercise of First Amendment rights. On the contrary, these cases hold that (1) the Labor Act authorizes no restriction on either employer or union First Amendment rights, and (2) speech which does not threaten force, coercion, intimidation or the like is privileged under the First Amendment and cannot be restrained to serve the purpose of some supposed general statutory policy. Neither statute nor precedent suggests that the Sherman Act intrudes upon First Amendment rights any more than the Labor Act does—which is not at all.

C. The Judgment Unconstitutionally Prohibits Free Association.

As this Court has held, the right to associate with others of similar views is correlative to and co-extensive with the other First Amendment rights. Perhaps the most basic freedom protected by the First Amendment is freedom of thought. *See Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977). Association is a principal social manifestation of thought.

> The purpose of a system of freedom of expression—to allow individuals to realize their potentialities and to facilitate social change through reason and agreement rather than force and violence—cannot be effectively achieved in modern society unless free rein is given to association designed to enhance the scope and influence of communication. [T. Emerson, *The System of Freedom of Expression* 432 (1970).]

In *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court stated,

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech. . . .

> Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. . . . [357 U.S. at 460.]

Similarly, in *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964), the Court held that a group boycott, even if it violates a valid law, may not constitutionally be the basis for an injunction against the right to associate to advocate ideas.

It is beyond question that the Sherman Act was not intended to abridge the right of association in any manner. Senator Sherman, in advocating its passage, said that the Sherman Act

> does not interfere in the slightest degree with voluntary associations made to affect public opinion. [21 *Cong. Rec.* 2557 (1890).]

Despite these clear legal principles, the judgment not only purports to impose broad prior restraints on speech and publication rights of NSPE and anyone who is or becomes a member, but goes beyond this to impose similarly far-reaching restraints on the rights of engineers to associate to advance their belief that the public interest requires that engineers be selected on the basis of competence. Moreover, the judgment restrains every state and local organization in any way affiliated with NSPE, thus prohibiting association among professional societies and their members. No such order was requested in the complaint; nor was its possibility raised in any pre-trial or trial proceeding, or ever mentioned until the moment when the judgment prepared by the Government was presented to the District Court and signed. No state or local society is party to the litigation, and no notice was given NSPE that a judgment in this case might undertake to impose obligations on such other organizations, or impose a duty on NSPE to influence, control or

police other organizations. Consequently, the propriety, necessity and difficulty of reaching state and local organizations by the means attempted in this judgment were not considered by the District Court. No consideration was given to seeking less restrictive means of achieving whatever objective the Government is entitled to achieve, or to reconciling the demands of the Sherman Act, however construed, and the First Amendment. For that reason alone, the judgment should be set aside.

In effect the judgment says that no person and no state or local organization can ever be affiliated with NSPE, no matter what the object of affiliation is or how lofty and impeccable the goals, unless that person, or that state or local organization, accepts the Antitrust Division's view —that procurement of engineering services by bidding rather than competence is proper regardless of professional experience, evidence of injury to clients, and danger to the public. It is difficult to imagine a more basic assault upon associational rights. Not a scintilla of evidence suggests the propriety or necessity of such a broad restraint.

Whatever else may be disputed, one fact that cannot be denied is that the Department of Justice disagrees with NSPE and its members as to the public policy considerations involved in obtaining professional engineering services. Government lawyers from the Antitrust Division confronted engineers, including NSPE officers and members, in a debate of these issues before Congressional committees long before the complaint in this case was filed. In these circumstances it is frivolous for the Government to contend that the issues involved are not political and ideological.

Whatever Sherman Act theory is ultimately applied in this case, whatever antitrust result ultimately reached, the First Amendment rights of NSPE, and of all others

governed by the judgment, are of overriding urgency. On its face, the judgment is an unconstitutional blunderbuss. It was never thoughtfully considered. It broadly prohibits statement of facts, expression of views, publication of ideas and advocacy of principles which NSPE and its members believe required by the public interest. The judgment also forbids association among and between NSPE, its members, other organizations, and the members of other organizations for any purpose unless all those associating within and with NSPE subject themselves to the restraints imposed upon NSPE, and accept views they believe to be false and contrary to the public good.

If the Sherman Act requires this, it is no charter of economic freedom, but rather a charter of ideological repression.

V. CONTRARY TO THE GOVERNMENT'S POSITION AND TO THE LOWER COURTS, THIS COURT'S PRIOR JUDGMENT IN THIS CASE WAS NOT A MEANINGLESS FORMALITY.

Sometimes, as here, advocates may disagree as to the meaning of this Court's mandate in a particular case. Where there is disagreement, interpretations may be made and inferences may be drawn, and the disputants may say the Court meant this, or the Court meant that.

However, it is not proper to conclude in such an event that, in vacating an antitrust judgment and remanding for reconsideration in light of an intervening precedent, this Court meant *nothing*. That, essentially, is the Government's and the lower courts' view of this Court's prior mandate in this case. The Government's view is especially puzzling when considered in the context of its argument that *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the intervening case, was decided under the *per*

se doctrine. If that were true, why did not this Court, in the light of *Goldfarb*, summarily affirm, rather than vacate, the District Court's *per se* judgment here?

Contrary to the Government's and the lower courts' view, NSPE believes that this Court's vacation of the District Court judgment, remanding for reconsideration in light of *Goldfarb* v. *Virginia State Bar*, was not a meaningless formality.[258]

The Court has stated that vacation of a judgment with instructions to reconsider in light of an intervening precedent is tantamount to reversal. In *Henry* v. *City of Rock Hill*, 375 U.S. 6 (1963), the Court vacated a South Carolina Supreme Court judgment and remanded for reconsideration in light of *Edwards* v. *South Carolina*, 372 U.S. 229 (1963). On remand, the South Carolina court reaffirmed itself, notwithstanding this Court's action. Appeal was taken, and this Court reversed. 376 U.S. 776 (1964). Explaining the significance of its vacation of judgment and reversal of the lower court's second decision, the Court stated:

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[258] To the best of our knowledge, this was only the second antitrust case decided summarily by this Court since 1965 in which such mandate has issued. The other, *United States* v. *Continental Oil Co.*, 387 U.S. 424 (1967), arose under Clayton Act § 7. There the Court, on a direct appeal, summarily vacated a district court judgment and remanded for reconsideration in light of *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966). On reconsideration, the district court in *Continental Oil* reversed itself. 1968 Trade Cases ¶ 72,374 (D.N.M.). On the second direct appeal, this Court summarily affirmed. *Continental Oil Co.* v. *United States*, 393 U.S. 79 (1968).

During the same period, the Court has summarily affirmed in at least 24 antitrust cases brought by the Government.

> That has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent, we remand the case to the state court for reconsideration. . . .
>
> The South Carolina Supreme Court correctly concluded that our earlier remand did not amount to a final determination on the merits. That order did, however, indicate that we found *Edwards* sufficiently analogous and, perhaps, decisive to compel re-examination of the case. [*Id.* at 776-77 (footnote omitted)].

See McClatchy Newspapers v. *Noble*, 97 S.Ct. 2966 (June 27, 1977), and *Noble* v. *McClatchy Newspapers*, 97 S.Ct. 2972 (June 27, 1977).

NSPE believes that the Court, in vacating the judgment below, intended that the District Court should not slavishly adopt as the *ratio decidendi* of this case a theory, *per se*, never before applied to professional ethics. NSPE believes the Court intended that the District Court should take legal cognizance of the evidence regarding the dangers of bidding in engineering, to the end that the District Court could determine whether "features of [that] profession . . . require that [this] particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb, supra*, 421 U.S. at 788 n.17. That is the standard *Goldfarb* makes applicable here.

NSPE believes that the Court recognized that there is no way to do justice in this case without considering the facts.

VI. CONTRARY TO THE GOVERNMENT POSITION AND TO THE CIRCUIT COURT, NSPE SHOULD NOT BE PENALIZED FOR DEFENDING THIS CASE INSTEAD OF SUBMITTING TO JUDGMENT.

A. The System of Justice Cannot Be Offended By Consideration Of The Evidence.

The Circuit Court opinion, and the Government Brief in opposition to certiorari, state that NSPE should be severely treated because it defended this case. The Government suggests that NSPE's refusal to submit to a consent decree should be taken into account—reminding the Court that other professional societies recently pursued by the Government have submitted.[257] (The Government makes this claim knowing full well that consent decrees lack any precedential value.)[258] Similarly, the Circuit Court suggests in its opinion that "the situation might be different", and a decree "more limited in its objectives and restraints" justified, had not NSPE engaged in what the Circuit Court described as "all-out resistance to the lawsuit on the ground that its rules were necessary at the very core for sound regulation."[259] Thus do the Justice Department and a United States Court of Appeals warn litigants in civil cases that if they dare to state a defense, and take appeals, these facts will be cited against them.

The foregoing view, we submit, undermines the adversary system and assaults precious due process rights.

NSPE has done nothing more in this case than state to the courts its defense in the most effective manner known to it. Representing members located in every State, NSPE has sought to obtain the most expedited and

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[257] Brief for the United States in Opposition at 9.

[258] 15 U.S.C. § 16(a) (Supp. V 1975).

[259] 555 F.2d at 983, Cert. App. A-10.

definitive judgment possible on an issue it believes to be of paramount public importance. When the District Court peremptorily ruled against NSPE the second time —following this Court's vacation of the first judgment— NSPE sought permission to appeal directly to this Court. The Government objected, and the District Court refused to certify direct appeal,[200] thus requiring the engineering profession to stay in the limbo of appellate review for two additional years.

The principle involved in this case is to NSPE and its members no less compelling than have been the principles involved in every case of national importance to the litigants who brought them here. In every such case, a litigant vigorously and stubbornly resisted the imposition of a rule he thought was wrong or wrongly applied.

Judicial consideration of the evidence in this case cannot offend the system of justice. There could be no more devastating infirmity within the judiciary than the infirmity once described by Dean Pound: "To vindicate a juridical conception, the court shut out the best possible means of information."[201] Professional engineers, who deal with the hard reality of quantifiable, objective, palpable facts, facts which they know implicate public safety, cannot voluntarily accept a lower court ruling based on a "juridical conception" which purposefully excludes those facts.

B. Engineering Ethics Require That Where The Engineer's Judgment Is Overruled By Nontechnical Authority, He Must Point Out The Consequences.

Submission to judgment by NSPE in this case would have involved repudiation not only of the principle of competence but also of another overarching ethical prin-

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[200] Cert. App. A-14.

[201] R. Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 620 (1908).

ciple in engineering. As Section 2 of NSPE's Code of Ethics states,

> The Engineer will have proper regard for the safety, health, and welfare of the public in the performance of his professional duties. If his engineering judgment is overruled by non-technical authority, he will clearly point out the consequences. He will notify the proper authority of any observed conditions which endanger public safety and health.[202]

The so-called "all-out resistance" by NSPE to this lawsuit which the Circuit Court criticized was in fact the acquittal of an ethical mandate.

C. NSPE's Defense Is Evidence Of Respect For, Not Disregard Of, The Law.

Defense of this case is predicated on respect for, not disregard of, the law. The engineers must respect the ability of the legal process to reach the correct result here, for ultimately they have no choice. The engineers can no more resist the ubiquity of law than the lawyers can resist the ubiquity of engineering. The lawyers, like everyone else, must respect the ability of the engineering process to reach the correct result, for ultimately we have no choice. When an established method of preserving professional competence in one sphere is attacked in another, reason cannot support abolition of the principle without examination of the attendant perils.

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[202] J. App. 5478.

The engineers' confidence in the inevitability of a correct result in this case rests upon the confidence Senator Sherman had when he stated to the Senate in 1890,

> I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries. 21 *Cong. Rec.* 2460 (1890).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and judgment entered for Petitioner.

Respectfully submitted,

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