

November 23, 1946

Re: Nos. 4 and 5

Dear Frank:

You will recall that upon reading your opinion, promptly after its first circulation, I indicated that I deemed your discussion regarding the requirements for notice and hearing under §11 (b) uncalled for, in view of the facts of these cases. I so stated my position again at last week's Conference. I returned your second draft with the statement that you improved the discussion, needless as I deemed it, and I was ready and I am ready, to shut up about it if no question were raised and what you say could go out as the unanimous view of the sitting Court.

But that, in view of Wiley's opinion, is not to be. In view of the fact that there are only six of us, it seems to me most undesirable to make such a needless construction when the case does not call for it and when, even on Wiley's views, the petitioners in this case could not avail themselves of what he conceived to be the correct construction. The fact that we disposed of the notice and hearing claim in this case gives the SEC a hint to reconsider fully the proper construction of §11 (e) and, in any event, leave the matter for future disposition here by what one has a right to hope may be a full Court.

Accordingly, I will ask you to append the following to your opinion:

“Mr. Justice Frankfurter agrees with this opinion except that he believes that consideration of the requirements of notice and hearing under §11 (e) (1) does not arise, in view of the circumstances under which the order under §11 (b) (2) was here made.”

Since this matter may come up at Conference, I am sending a copy of this letter to the brethren.

Ever yours,

Felix Frankfurter

Mr. Justice Murphy