Banking

PUB-1

UNITED STATES OF AMERICA
BEFORE THE
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

APR - 1 1952

In the Matter of)
)
TRANSAMERICA CORPORATION)

DISSENTING STATEMENT OF GOVERNOR OLIVER S. POWELL

I am reluctant to disagree with my esteemed colleagues, some of whom have had long experience with the respondent in this case. But to bring out principles which in my judgment need to be clearly determined for the future guidance of the Board of Governors and of bank holding companies, I submit below my views which have led to a dissenting vote.

I. It is my judgment that the case was tried on too narrow a basis. The Solicitor's argument boils down largely to the fact that the respondent has 40 per cent of the banking offices and 39 per cent of the deposits in five states, that this is too large a percentage to be controlled by one party and that the respondent has intentions of further expansion. On page 22 of the Brief of Counsel for the Board there appears the following language:

". . . In presenting the Board's case we have consistently adhered to the view that the determination of this issue is largely governed by statistics, that is, by showing how many commercial banking offices and how much of the commercial bank deposits and credit in the five-state area are now controlled by Transamerica. Our contention has been and is that these statistics, coupled with the facts that the greater part of the Transamerica bank expansion over the years has been accomplished by buying up independent banks and branches, that such acquisitions have been going on without interruption for over forty-five years, and that

"unless restrained they will continue to occur in the future, support all inferences necessary to demonstrate as a matter of 'reasonable probability' that the Transamerica acquisitions will have the 'effect' prohibited by Section 7." (Underscoring mine.)

Principal reliance, as I understand, is based on the Standard Oil case, 337 U.S. 293 (1949), a five-to-four decision involving not Section 7 but Section 3 of the Clayton Act. This decision is said by the Board's Solicitor to require the Board to hold that any stock acquisition resulting in control of a "quantitatively substantial" amount of business may have the effect of substantially lessening competition, restraining commerce and tending to monopoly, and is therefore in violation of Section 7. I am unable to agree with this. Although contending in his brief that the Standard Oil case governs the case at bar, the Board's Solicitor admitted on oral argument that:

". . . there is not one single case under the Clayton Act that has ever decided at what point percentage-wise a concern can be found maybe to move in the direction of monopoly. There have only been a few cases under the Clayton Act, as I am going to develop in just a moment but for the time being it is sufficient to say there has never been a case where an accumulation of repetitive acquisitions has been before the courts for determination under this section of the law, and so in a sense, this is a new case under Section 7. There has never been anything like it." (Underscoring mine.)

In the Columbia Steel case, 334 U.S. 495, 528 (1948)--a Sherman Act case, but nevertheless relevant in my judgment--the Court thus stated the type of evidence which it should consider in a case dealing with restraint of trade:

"In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed."

II. The Board of Governors of the Federal Reserve System is unlike a court in that the Board is supposed to be an expert in banking and can weigh special factors in banking cases over and above reliance on court decisions based on non-banking business.

III. In my judgment the Board did not have a clear objective in bringing this proceeding against the Transamerica Corporation. Such an objective is needed because this decision will have an important bearing on equitable treatment of other bank holding companies. In the evidence and arguments to support the claim that competition has been restrained and a tendency to monopoly has been created, all of the following questions have been mentioned but not placed in clear focus:

(1) Is there a threat to the dual system of banking?

No such threat has been proven. Holding companies can operate either state or national banks, and they do so in many instances.

(2) Is it monopolistic to cross state lines in the ownership of banks?

The Board of Governors has itself acquiesced in this practice in the cases of several holding companies by granting them permits to vote bank stock owned by them.

(3) Is there a threat to independent banking?

While this is a major point, it is hardly touched on in the Solicitor's brief or in the evidence. Furthermore, under the Board's order, Transamerica is permitted to retain ownership of the great branch banking organization, Bank of America National Trust and Savings Association.

(4) Is competition lessened?

The record makes it clear, and the Board's Solicitor has never denied that keen competition is present in the five states in which Bank of America affiliates operate.

(5) Is there a tendency to monopoly?

The Board's position, it seems to me, fails to recognize that a certain amount of monopoly is inherent in banking. Over-banking has been a curse in past years and the supervisory authorities protect a banking monopoly in hundreds of communities. In this way, banking differs from gasoline stations, which were involved in the Standard Oil case, upon which the Board relies as a major legal basis for its decision.

(6) Is 40 per cent of the banking offices and deposits in a five-state area the critical point beyond which a tendency to monopoly is clearly evident?

This is a specious argument which over-simplifies the problem. If Transamerica had happened to control an affiliated bank in the State of New York, the addition of New York State to the number of banking offices and the amount of deposits against which Transamerica holdings were measured would have brought the level well below 40 per cent. As a matter of fact, the percentage of banking offices and bank deposits controlled by Transamerica in the five states varies widely. For example, at page 37 of the Board's findings, there appear the following figures:

Percentage of all Bank Deposits Held by Transamerica Group Banks by States in 1948

California	43.75
Oregon	44.12
Nevada	78.46
Arizona	20.10
Washington	4.81
Five states	38.85

It is obvious from the above figures that the 38.85 per cent of bank deposits in the five states held by Transamerica group banks lacks significance. The statistical picture would have been more adverse to Transamerica if it did not control banks in the State of Washington where its 4.81 percentage holdings drag down the five-state average. The statistical picture would have been still more damaging if Transamerica operated banks in the State of Nevada only where its holdings are 78.46 per cent of total deposits.

Going one step further, banking, as the Board expressly finds, is essentially a local business; the monopoly by Transamerica banks and branches ranges from 100 per cent in some towns to zero in other regions.

(7) Is this proceeding a means of stopping practices on the part of Transamerica and its affiliates which seem not to be in the public interest?

The Board's findings list such things as:

(a) Options held by Transamerica to repurchase the qualifying shares in the case of 249 directorships.

(b) Special inducements to obtain controlling interests in a bank through higher payments to officers of the desired bank or to shareholders representing control of such bank.

(c) Channeling of Bank of America earnings to Transamerica Corporation through service corporations rather than in the normal course of dividend payments on stock holdings, which have been reduced to a nominal amount.

If these practices are unlawful, it would seem that they should be corrected or controlled through ordinary legal processes.

IV. In the findings of the Board, I get no clear picture to support its order against Transamerica Corporation. Here is my evaluation of the paragraphs in the findings as to the facts:

Paragraph 1: Basic facts.

Paragraph 2: Transamerica owned banks are commercial banks and engaged in interstate commerce. I agree.

Paragraph 3: History of the growth of the Giannini organization up to the formation of Transamerica.

Paragraph 4: The growth of the Transamerica bank holdings in five states.

Paragraph 5: Convincing evidence of the close relationship between Transamerica and Bank of America.

Paragraph 6: Facts as to acquisition of individual banks. Here much proffered evidence was rejected.

Paragraph 7: Principally an argument that evidence as to competition from non-bank sources should be excluded from the hearing. I would agree.

Paragraph 8: Statistics as to the growing importance of Transamerica in five states. This is not convincing without analysis of what has happened to the principal competition. I would also suggest a variety of other information as pertinent to determining the existence of undesirable trends, such as: (a) distances to the nearest independent banking office in towns served only by Bank of America; (b) was the public poorly served measured by interest rates on loans, interest rates on savings, variety of services offered, the trend of loans to small business, the trend of loans to home owners, underwriting of municipal securities, etc.

The Board finds that 38.85 per cent of all deposits and 49.97 per cent of the loans in the five states are owned by Transamerica banks. This might well indicate merely better service to the public by Transamerica banks. As it stands, it is purely a statistical compilation without validity.

On pages 40-41 of the Board's findings the tables on deposit accounts by size seem to show that the small depositor likes the Transamerica bank, especially in California.

Paragraph 9: This is the Citizens National Trust and Savings Bank of Los Angeles episode. Transamerica's action here might have been high-handed but it was probably not illegal. It is evident from the record that control of this bank is strongly held by interests very much opposed to Transamerica. There is no evidence to warrant a finding or conclusion that Transamerica's minority interest is such that it may lessen competition, restrain

commerce or tend to monopoly.

Paragraph 10: Sub-paragraphs (a) and (b) are generalities largely unsupported by proof. As to the establishment of new banking offices, this procedure is subject to consent of the proper bank supervisor and thus competition to that extent is already under public control. Sub-paragraph (c) is a mixture of statements, some of doubtful validity. For example, it is not necessarily bad to have a large number of communities where "the only banking services now existing are Transamerica controlled". I doubt the validity of the inference involved in the reference to "the absorption by Transamerica of practically all of the total increase in bank loans". One is led to assume from this that the competing banks have not been making loans. Even if that were true, is it a sound reason for a divestment order?

V. I have previously referred to the statement of the Board's Solicitor that "this is a new case under Section 7. There has never been anything like it." This being true, the respondent should have been given full opportunity to present its evidence. In the narrow view taken by the Board's Solicitor as to the legal foundation of the case--namely, the so-called quantitative substantiality theory said to have been established by the Standard Oil case--much evidence offered by the respondent was not allowed to be entered. In my judgment the following types of evidence which the respondent requested permission to enter should have been received:

". . . evidence offered by respondent which would establish the geographical area in which banks involved in this proceeding compete with respect to the various services they offer."

". . . evidence offered by respondent which would prove the

"nature and effect of other factors, which are more important than acquisitions, upon the growth, development and competition of banks, including particularly those banks involved in this proceeding, and which would establish that the nature and amount of services provided by banks are continually changing and that they change in accordance with (a) the nature and amount of bank and nonbank competition; (b) management policies; and (c) the aggressiveness with which particular services are offered either by banks or by their nonbank competitors." (However, as indicated above I would not favor admission of evidence as to "nonbank competition.")

". . . evidence offered by respondent which would prove that Bank of America and the Transamerica majority-owned banks grew as a result of providing a greater variety of services to a greater number of people, and by constant effort to render services which were better in quality and cheaper in cost than those offered by competitors."

". . . evidence offered by respondent which would prove that the intent and effect of the transactions by which Bank of America and the Transamerica majority-owned banks have extended their facilities have been to give more and better service to more people over a wider area."

". . . evidence offered by respondent which would prove that there has been and is no tendency to create a monopoly or lessening of competition in the banking business in the five states or elsewhere."

In effect, by excluding the above testimony this proceeding has denied to the respondent the principal means at its disposal to defend or justify its actions.

VI. In summary, it is my judgment that regardless of the ultimate decision as to the respondent's violation of Section 7 of the Clayton Act, the Board of Governors has not clearly defined its complaint against respondent, the Order does not in all respects square with the facts and the respondent has not had its day in court.

(Signed) Oliver S. Powell
Oliver S. Powell