

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM

Filed
Office Correspondence

Date May 9, 1939.

To Chairman Eccles

Subject: _____

From Mr. Thurston

The Court of Appeals decision in the Bank of America vs. S.E.C. case spans the Commission pretty hard. It holds that the Secretary was justified in letting the S.E.C. have Bank of America examination reports, but that the S.E.C. had no right to broadcast the information contained therein in the way that it was done. The decision states that this was calculated "to cause serious prejudice to the bank and bring it, in advance of any hearing, into public disrepute". And that "there is nothing in the Act which authorizes publicity in advance of hearing".

The Court said further:

"Under regulations prescribed by the Administrative Committee of the Federal Register, notices of hearing must be published in the Register, but the rule does not require the publication as part of such notice of the evidentiary facts; and where, as in this case, the latter are obtained from confidential sources, neither the purpose nor intent of the Act contemplates their broadcast to the public. It is not difficult to see that such a power might easily be made an instrument of oppression and, lacking specific congressional authorization, we think it ought not to be indulged. In addition to this, pretrial publication of evidence--labeled as believed to be true--ought, we think, to be avoided, especially as emanating from the tribunal charged with the judicial responsibility of weighing it and assuring the accused a fair hearing. And, if this is the correct view, it is particularly pertinent here, for after all the Bank is not a party in the proceeding instituted by the Commission. Its connection with the investigation grows wholly out of the fact that its largest stockholder, Transamerica, in certifying its own financial condition, is believed by the Commission to have violated the provisions of the Securities Exchange Act. So far as the Bank is concerned, even if the charge, as to it, is true, any possible violation by it of the banking laws, is a matter not within the Commission's reach. And certainly until findings are made, the Bank is entitled to have judgment, public and official, suspended."

The opinion also holds in effect, as I read it, that the S.E.C. shall not go behind the Comptroller's findings, stating, "The Bank must follow the Comptroller's orders. And if Transamerica can show the Bank's compliance therewith, we may assume the Commission would have no right to substitute its opinion in place of the Comptroller's."

As to the subpoenas that were issued to the bank's officers, the Court states:

"It is perfectly clear, we think, that compliance with these demands will, for all practical purposes, close the Bank, and it is equally clear that by transferring the place of hearing from Washington to San Francisco the Commission may carry on its investigation without unduly and unreasonably hampering the Bank in its business. If this is so, then any other course is so unreasonable as to require correction."

Finally, on this point, the Court states:

"While it is true the Act authorizes the Commission to subpoena witnesses from any part of the United States, we think it a fair statement that Congress never intended that the power should be exercised to bring from one side of the country to the other the principal officers of a bank and the books and records covering a period of ten years to appear before an examiner of an administrative commission. The right to be free of suit except in the District of which one is an inhabitant is a fixed part of our federal judicial history. Its statutory requirement arose out of the experience of colonial days. Its wisdom has been proved in the passage of time, and no more obvious reversal of its spirit could be cited than is shown in the facts of this case. For all of these reasons, we are of opinion the subpoenas are unreasonable"

A handwritten signature in black ink, consisting of a stylized, cursive letter 'S' or 'G' followed by a horizontal line.