United States of America

Board of Governors of the Federal Reserve System

In the Matter of:
TRANSAMERICA CORPORATION

REPLY BRIEF SUBMITTED TO HEARING OFFICER EVANS ON BEHALF OF RESPONDENT, TRANSAMERICA CORPORATION

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April 30, 1951

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT

The quickest way to bring this proceeding to an end is to point out the serious factual and legal misconceptions in the position advanced by the Solicitor in his brief. In view of this position, the duty of the Hearing Office is clear. On the Solicitor's own statement of the case, dismissal of the complaint and termination of this proceeding is required. The basic errors of fact and law underlying the Solicitor's contentions will be discussed in this brief as follows:

(1) The Solicitor asserts that Transamerica directs the operations of Bank of America. The evidence, however, shows not a single instance in which Transamerica exercised or attempted to exercise control, either to limit Bank of America's competitive efforts, or to remove substantial competitive barriers, or to affect its operations in any respect whatsoever. On the contrary, the facts show conclusively that Transamerica received its Bank of America stock, now constituting only 7.66% of the Bank's outstanding shares, as an investment and has always used it as such and nothing more. Transamerica does not control the Bank.

(2) The Solicitor's statistics as to the growth and size of the banking business conducted by the so-called "Transamerica group banks", and upon which he is willing to place his entire case, serve only to expose the weakness of that case. They reflect for the most part a half-century of the highest public service by Bank of America in bringing a new type of banking service to the people—an achievement unequaled in the history of American banking. Fully 90% of the growth shown by his statistics is attributable to superior service and efficient independent management and has not the remotest connection with stock acquisitions. Yet it is only the legality of stock acquisitions which is or can be challenged by the Complaint. The Solicitor's reams of statistics merely divert attention from the only inquiry the Board of Governors of the Federal Reserve System can properly make in this proceeding: What is the probable effect of the stock acquisitions by Transamerica challenged in Paragraph Four of the Complaint?

(3) The thoroughness with which the Solicitor plotted the growth of the Bank of America (a growth accomplished by completely legal and fully approved means) with all manner of statistics is in sharp contrast to his *failure even to inquire as to whether any of the banks in which Transamerica has acquired and held stock were in competition with each other.* Where there is no competition at the time of an acquisition, there can be no lessening of competition or tendency to create a monopoly as the probable result of that acquisition. The Solicitor has failed to show that Transamerica's stock acquisitions come within the substantive purview of Section 7 of the Clayton Act. This failure of proof is decisive of the outcome, since an essential element of the alleged offense cannot be shown.

(4) The Solicitor has not, moreover, even tried to prove there is a reasonable probability that the effects

upon competition prohibited by Section 7 of the Clayton Act will result from Transamerica's acquisitions of stock. After these two long years of hearings he now claims that no such finding is necessary. He contends that if a stock acquisition affects a substantial dollar amount of business, the Board need look no further, but can infer that the statute has been violated. This extraordinary and erroneous contention he bases upon (a) a decision of the Supreme Court, rendered after this Complaint was filed, which concerns not stock acquisitions, but a wholly different practice under a wholly different section of the Clayton Act, and (b) a wholly unwarranted effort to give retroactive application to his own distorted interpretation of a statute passed after the hearings in this case were completed.

(5) Application of the "public interest" test prescribed by Section 7 of the Clayton Act to Transamerica's stock acquisitions demands unequivocal findings that there is no reasonable probability that such acquisitions will substantially lessen competition, restrain commerce or tend to create a monopoly of any line of commerce. It is clear that no lessening of competition has taken place, and with Transamerica's ever decreasing investment in Bank of America it is most unlikely that any will take place. Moreover, the amount of competition affected by such acquisitions is quite small and wholly insignificant in view of the quantity of competitive services of all kinds that are available to the public.

The position which the Solicitor now takes is patently fallacious. We need not here press our reply to the many other issues and contradictory positions which he advanced during the two years of the hearing and has apparently now abandoned. Throughout the hearing Transamerica has contended that the proceedings were conducted in an arbitrary and improper manner and that the Board was without jurisdiction to hear this case. These contentions Transamerica does not waive, but will vigorously press before the Board at the proper time if necessary. A fair hearing which allowed the receipt of all pertinent evidence would have further revealed the complete lack of any basis for the contentions which the Solicitor now advances.

In reserving the right to reiterate our contention that the Board has no jurisdiction whatsoever in this matter, we must observe that the Solicitor's labored efforts to prove that banking operations affect interstate commerce are quite beside the point. The Clayton Act and its legislative history make clear that banks are not "corporations engaged in commerce" within the meaning of Section 7. Nor does *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944), upon which the Solicitor relies so heavily, advance the inquiry. There the Court held that insurance companies fell within the ambit of a statute in which the Congress intended to exercise the full power it held over commerce. But the Clayton Act is not such a statute. The Act itself, its legislative history, the decisions that have construed it, the subsequent pattern of legislative action with respect to banks, as well as the long-standing administrative interpretation by the Board itself all make abundantly clear that Section 7 of the Clayton Act was never intended to and does not extend to the acquisition of bank stocks. Respondent has not argued lack of jurisdiction in this brief only because a decision on that question is believed to be beyond the authority of the Hearing Officer and must be referred by him to the Board without recommendation.

I

Transamerica Does Not Now Control and Never Has Controlled the Bank of America

The Solicitor has conceded throughout this proceeding that this Complaint would have to be dismissed without further inquiry unless the Board decides that Transamerica controls and operates Bank of America. Paragraph Four of the Complaint charges specifically that Transamerica "has continued to operate [Bank of America] as a separate institution, although controlled by respondent." Only in the event of a finding to this effect, he has admitted, is there any possibility that Transamerica has violated Section 7 of the Clayton Act:

> "Now, I am saying that I am freely conceding that if the Bank of America . . . were no longer controlled by Transamerica, that there would be no case, and there does remain upon counsel for the Board the duty of establishing to the satisfaction of the Hearing Officer, and to the Board, that Transamerica does, for all practical purposes, operate the Bank of America and can carry out its will, and so forth, in much the same fashion as it can with all of the others." Tr. 2394.

Accordingly, Transamerica asked for a determination of the question of control before going ahead with a hearing on the other matters raised by the Complaint. This the Solicitor opposed and the Hearing Officer refused. Notwithstanding the volumes of evidence that have needlessly been accumulated on other issues since that time, the answer to this question is still completely dispositive of the entire Complaint.

The reason the Solicitor wants to consider Transamerica as if it were Bank of America is clear. Transamerica is a relatively small investment company, owning bank, insurance and general industrial stocks, and with only 23 officers and employees to administer them.* With its total assets diversified among many separate holdings, it cannot be mentioned in the same class with hundreds of larger industrial and financial enterprises. A description of Transamerica's investments is set out on the following page. But Bank of America is the largest bank in the world with resources comparable to those of other major financial organizations. As will be shown in greater detail subsequently, it is only by considering Transamerica and Bank of America as the same that the Solicitor can develop the statistics which constitute his atmosphere.

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* Record references for the facts discussed in this brief will be found in the Main Findings and Rebuttal Findings filed by Respondent and are not repeated herein.

THE NATURE AND VALUE OF TRANSAMERICA'S INVESTMENTS.

	Value
Majority interest in banks:	
In Oregon	$ 8,038,392
In California	13,362,727
In Washington	2,674,204
In Arizona	3,149,588
In Nevada	1,125,513
In Italy	3,248,351
Majority interest in insurance companies	24,227,205
Majority interest in real estate and property financing companies	15,550,000
Majority interest in industrial companies	8,281,901
Miscellaneous majority interests	551,454
Minority interest in Bank of America (7.6%)	21,874,475
Minority interest in National City Bank, New York (7%)	14,988,383
Miscellaneous minority bank interests	1,501,410
Miscellaneous minority industrial interests	5,179,791

NOTE: Values are as of December 31, 1950, except that allowance has been made for a dividend paid January 31, 1951, in stock of Bank of America having a carrying value of $10,569,568.

It does not prove the case, however, to assert, as the Solicitor does repeatedly through his findings and brief, the existence of a "Transamerica group" or the power of the "Giannini interests." Such are the techniques of economic and political propagandizing. But this is supposed to be in the nature of a judicial proceeding. If the Hearing Officer's findings are to be helpful to the Board they must clarify the facts so that the issues may be clearly considered. It is most important, therefore, that the recommended decision avoid the use of characterizations and descriptive phrases, which are themselves in controversy and, indeed, assume, many of the important points at issue in the case. The Solicitor's proposed findings are honeycombed with words and phrases such as "Transamerica group banks", "Transamerica group banks including Bank of America", "Transamerica banking group", "Transamerica group offices", "Transamerica *and* its predecessors", "Transamerica *or* its predecessors", "the Gianninis", "Giannini bank group", "Giannini organizations", "Giannini management", "associated with the Gianninis", etc. Such phrases are used interchangeably, sometimes to mean entirely different corporations, individuals or aggregations of banks and bank officers. The Solicitor by this device seeks to avoid the obvious fallacy which would appear from attributing a statement of MacNaughton to Wente, or contending that Transamerica purchased a bank in 1912, even though it was not organized until 1928. In this way he seeks to attribute to Transamerica as of today everything said or done by any officer or ex-officer of any bank named in the proceedings as far back as 1904. These characterizations carry confusing connotations to the Solicitor's liking and have been used as a substitute for factual proof, but they are wholly without basis in the evidence and cannot properly or intelligibly be used by the Hearing Officer.

Transamerica Corporation, and no one else, is charged with having acquired the stock of named banks in violation of Section 7 of the Clayton Act. Normally the Board's inquiry would extend to a consideration of what Transamerica is and does and the effect upon competition that can be reasonably expected from its acquisitions of stock. The Solicitor concedes that such an inquiry would not even show cause for filing a complaint. But, he argues, Transamerica must be viewed not only as Transamerica, but as the Bank of America as well. Not the least incongruous result of the Solicitor's approach is that while the sole action challenged is Transamerica's acquisition of stock, the only basis on which a complaint could even be put forward is to consider Transamerica as being the Bank of America, which never has acquired stock and is prohibited by law from doing so.

Though he has carefully refrained from stating it, the Solicitor's contention with respect to the manner in which Transamerica's investment in Bank of America has violated Section 7 of the Clayton Act can be simply stated. He must claim that it has had or probably will have the effect of substantially lessening competition between Bank of America and other substantial competing banks in which Transamerica has acquired stock. If it is valid, this contention is simple to prove. But the Solicitor's efforts miss the point entirely. He has failed to show a single instance in which Transamerica has influenced or attempted to influence, by use of its stock or otherwise, competition between Bank of America and any other bank. Moreover, he has failed to show that Transamerica has ever exerted any influence over the affairs and operations of the Bank of America in any respect. The preceding two assertions are most categorical and they are intended to be, because the evidence is uncontradicted that Bank of America has always conducted its banking business wholly independently of Transamerica.

A. THE EVIDENCE IS UNCONTRADICTED THAT BANK OF AMERICA HAS ALWAYS BEEN OPERATED WHOLLY INDEPENDENTLY OF TRANSAMERICA

Before Transamerica was formed, Bank of America had been conducting a banking business for 24 years. Its basic policies of making banking services available to the people, especially small depositors and borrowers, through convenient offices and hours, superior merchandising of traditional services and development of new financial services were well-established. The organization of Transamerica in 1928 had no effect whatsoever upon the Bank's policies. It was created by the Bank's stockholders for the principal purpose of eliminating market speculation in the Bank's shares, which had been having a prejudicial effect upon the Bank's relations with its customers. The Bank continued to be operated by its officers and directors, and no changes whatsoever were effected at the instance, suggestion or advice of Transamerica. Since 1928, the Bank of America has established about 200 new offices. In not a single instance was Transamerica even consulted as to the merits of establishing these branches.

By 1937, the reason for the creation of Transamerica was no longer present. There was little speculation in bank stocks. Moreover, Transamerica in the nine years since its creation had begun to diversify its investments and was concerned that too large a share of its assets was invested in Bank of America stock. For these reasons and because of the number of regulatory agencies with which it and the Bank were forced to deal, Transamerica distributed to its shareholders over half of its stock in Bank of America. Again, there was no effect upon the banking operations of Bank of America which continued under the supervision of its officers and directors as they had before Transamerica became a stockholder.

The undisputed evidence of Transamerica's consistent reductions of its investment in Bank of America from almost 100% in 1937 to 7.66% at present is wholly inconsistent with the claim that Transamerica has control of the Bank of

America or seeks to exercise such control. These continued reductions in Transamerica's holdings completely refute the Solicitor's contentions.* Moreover, the record demonstrates that no significant amount of the stock of Bank of America is held by shareholders of Transamerica. Since 1937, there has been active trading in the stocks of both Transamerica and the Bank. Throughout its existence Transamerica has had nothing to do or say about the management of the Bank of America. It has always been a small organization devoted to the supervision of its investments, whereas the Bank has been a large, complex organization with many branches. Each has been operated independently of the other.

The point of inquiry in this Clayton Act proceeding is whether Transamerica has substantially reduced or probably will substantially reduce competition between Bank of America and the other banks in which Transamerica owns stock. In its relations with other banks Bank of America never treated banks in which Transamerica owned stock on a different basis than other banks. It has participated in loans with some, enjoyed correspondent relations with others and opened up new offices in direct competition with other banks. In its relations with its customers Bank of

* Transamerica's holdings of Bank of America's outstanding voting stock by two-year periods were as follows:

1938	41.17%
1940	36.53
1942	25.05
1944	23.84
1946	22.32
1948	22.88
1951	7.66

America has operated independently, set its own interest rates on both loans and deposits, determined the portion of its resources to put into loans and investments, developed new lending services—all without consultation with Transamerica or any of the banks in which Transamerica owns stock. Such banks are subject to Bank of America's competition to the same extent as any other bank similarly located. In no instance has Bank of America adopted toward such banks an attitude or policy in any way based upon Transamerica's ownership of stock in such banks. Nor has there been any instance in which Transamerica has interceded with Bank of America on behalf of such banks.

The Solicitor had access to the voluminous reports of Bank Examiners who had visited Bank of America and other banks in which Transamerica owned stock, as well as the reports of the examinations of Transamerica. He used such reports wherever they supported the contentions he was making, and it is highly significant that not a single such report on Bank of America, Transamerica, or any of the banks in which the latter owns stock reflects a recognition of the "control" which is the very basis of the Solicitor's case. On the contrary, the only evidence in the record taken from these reports and bearing directly on control of operations was that Transamerica did *not* control the credit policies of one of its majority-owned banks, First National Bank of Corcoran. Respondent was prevented from introducing much relevant evidence of a similar character from these reports.

Faced by a complete failure of proof in support of his basic contention, the Solicitor turned to matters having nothing whatsoever to do with Transamerica's alleged control over the Bank of America. Even though Transamerica has never attempted to influence Bank of America's competitive activity he claims it should be treated as if it controlled Bank of America because: (1) there have been long-standing mutually satisfactory business relations in non-banking fields between Bank of America and various Transamerica subsidiaries; (2) personnel once employed by Bank of America have on occasion been subsequently employed by other banks in which Transamerica owns stock; (3) Mr. A. P. Giannini served originally in Bank of Italy, but after 1932 simultaneously as an unpaid director and officer of Transamerica and Bank of America; (4) Mr. L. M. Giannini served Bank of America as an officer from 1920 to 1928 and from 1932 to date. Meanwhile, he was an officer of Transamerica during the interval between 1928 and 1931, and has been a member of the Boards of Directors of both, the Bank since 1922 and Transamerica since 1928, except for about a year (1931-32) following his resignation from the Transamerica Board.

With all the time and effort that was put into this case and the complete access the Solicitor had to Bank Examiners' reports, he should have been able to show at least one specific instance where Transamerica "directed" Bank of America, for example, to curtail its activities in Oakland and leave the field to Central Bank or vice versa. Or, at the minimum, he should have shown, for example, that Transamerica consulted and advised with Bank of America upon the establishment of a new office so that it could have protected one of the banks in which it owned stock or that it directed the Bank as to interest rates or investment policy. But the Solicitor has made no showing of any instance of this kind. Instead he asserts a theory of "control by association." And the proof upon which he relies in support of that theory is so far removed from the issue of control as to border on the irrelevant.

The business relationships between Bank of America and various Transamerica subsidiaries have an historical basis fully explained in the evidence of record. Rather than giving rise to any inference that Transamerica controlled the Bank, such relations actually demonstrate the Bank's complete independence in the conduct of its entire banking business. The areas in which Transamerica subsidiaries have been hired by the Bank have been wholly incidental to the operation of the Bank. They include management of premises, supervision of foreclosed property, insurance of various kinds, brokerage business, and unimproved land development. From its earliest days, and unlike many other banks, Bank of America confined itself exclusively to the banking business and left fringe activities to specialists. Because such activities were capable of earning profits, however, it was determined that wherever possible they should be conducted on behalf of all the stockholders of the Bank, instead of a few officers and directors, as was the custom. Transamerica, which was owned by the Bank's stockholders initially, acquired the stock of a number of companies which had specialized and become proficient at various non-banking activities and which had been hired by Bank of America to perform such functions for the Bank. Some of the relationships that started in this way have continued to the present time, and have been negotiated at arm's-length on mutually agreeable prices and terms ever since there ceased to be identity of stockholders in 1937.

The most significant aspect of these relations is that none of them had anything to do with managing the Bank or with competition among banks. As to each of them the Bank decided for itself how it wanted to handle a particular activity such as care of its premises, and then sometimes hired a Transamerica subsidiary to do the job. By no stretch of imagination does this show that the Bank was controlled by Transamerica. Nor does the fact that the relationships have been satisfactory and long-standing add anything. A Bank retains legal counsel for advice or to conduct litigation. It may retain the same counsel regularly, or many times, over a period of years. It may have a similar long-standing relationship with a firm of accountants. But such relationships are most certainly not proof that the lawyer or accountant has told the Bank where to open an office, where to close one, when to raise its interest rate, or the kind of loan to make. It is all the clearer that a company hired to perform janitor service and a variety of other wholly incidental tasks, does not by virtue of such hiring direct the operations of the Bank. Yet that is the net of the Solicitor's contention based on long-standing relationships.

The most appropriate answer to the Solicitor's recitation of the names of people who have at one time been employed by Bank of America and at some other time by another bank or corporation in which Transamerica owns stock is—*so what.* Anyone remotely acquainted with the operations of financial organizations, and banks in particular, must realize that changes in employment from one institution to another are ordinary, common-place, the rule rather than the exception. Considering the pre-eminence of the Bank of America as a progressive, well-organized and well-managed institution, it is not surprising that banks and corporations all over the country have sought to employ its thoroughly trained personnel. Other large banking institutions have had the same experience. The Solicitor is, of course, much less than frank in failing to point out that ex-employees of the Bank are by no means confined to banks in which Transamerica owns stock, but are found in any number of banks and other institutions, large and small, with which Transamerica has no connection whatsoever. Even the members of the Independent Bankers Association, who provided witnesses for the Solicitor, employ a substantial number of ex-Bank of America employees. But the Solicitor's position is that the only situation in which it is significant that an employee of a bank formerly worked for another bank is when Transamerica is involved. He objected to receipt into evidence of a compilation showing not only the number of employees of the First National Bank of Portland that had formerly worked for Bank of America, or any other bank in which Transamerica owned stock, but also the number who had formerly been employed by banks with which Transamerica had no connection whatsoever.

The Solicitor's contention can be tested by two illustrations: (1) Francis Baer, recently Senior Vice Chairman of Bank of America, is now Senior Vice President of Bankers Trust Co. (2) Certain skilled executives of the Bank of America have worked for agencies of the United States Government upon request of such agencies, and, moreover, have returned to the employ of the Bank of America. Under the Solicitor's contention, both Bankers Trust Co. and the United States would become members of the "Transamerica group." His entire argument in this matter of ex-employees is without substance because there is no proof whatsoever that any of the shifts were directed by Transamerica, Bank of America or anyone other than the employee himself. So long as a man was employed by Bank of America he worked for it, and solely in its interests. When he went to another bank, whether it was owned by Transamerica or not, he became an employee of that bank, and worked entirely in the interest of that bank. Not a single employee testified to the contrary, and there is no evidence to the contrary.

His choicest characterizations the Solicitor reserves for Mr. A. P. Giannini and Mr. L. M. Giannini. The Solicitor's intemperate references to Mr. A. P. Giannini and Mr. L. M. Giannini have no proper place in this proceeding. The position of both of these men in banking is so well established that they cannot suffer from the Solicitor's distortions of fact. In particular, the Solicitor's characterization of Mr. L. M. Giannini's action in the recent injunction proceeding (Sol. Brief, p. 54) is wholly unwarranted. The facts of this matter are set forth in detail in Respondent's Rebuttal Finding No. 39. The facts concerning these two men, which were fully known long before this proceeding, do not support or have any relation to the Solicitor's contention that Transamerica controls or has controlled Bank of America.

Mr. A. P. Giannini had been the guiding spirit in the Bank of America from its earliest humble beginnings to his death in 1949. His son, Mr. L. M. Giannini, began to work in the Bank at an early age and has spent practically his entire working life in the service of the Bank. Both of them were employed by the Bank in important executive capacities long before Transamerica was organized in 1928. Their positions with the Bank, therefore, can in no way be traced to Transamerica. They were never representatives, and Mr. L. M. Giannini is not now a representative, of Transamerica on the Board or as officers of the Bank. Wholly independently of Transamerica, which was not in existence at the time, they became officers and directors of the Bank. Furthermore, not a single action taken by either of them at the Bank has the Solicitor pointed to as constituting an attempt to further the interests of Transamerica. The Solicitor cannot even contend that the stock interests owned or controlled by them have enabled them to control either Transamerica or Bank of America. The total family stockholdings in 1950 amounted to less than 2/10 of 1% of the Bank's voting stock and 3/10 of 1% of Transamerica's voting stock. These simple facts the Solicitor has slurred over with the hope of creating the "impression" that Transamerica placed these two men on the Bank's Board and in the Bank's management as representatives of Transamerica and in order to effectuate Transamerica's purposes. This, of course, is not unusual when a corporation or group has a stock interest in a corporation, and it is the Solicitor's intention to leave the impression that such was the case here. Two factors, however, which the Solicitor does not and could not deny, demolish that impression: both men were active as officers and directors of the Bank years before Transamerica was ever formed; and neither one has ever sought to further Transamerica's interest in the discharge of his responsibilities in the Bank, nor has the Board of Transamerica, nor any member thereof, ever sought to have either of them represent Transamerica.

Both Mr. A. P. Giannini and Mr. L. M. Giannini have held positions on the Board and as officers of Transamerica although the latter has not served as an officer since 1931. Whatever the degree of their activity in Transamerica it cannot support the Solicitor's charges because the business of the Bank never was a matter for discussion, consideration or decision in Transamerica. The Bank was well along in years and experience before Transamerica came into existence and it would have been most presumptive and foolhardy for Transamerica to have attempted to assume direction of the Bank. The Solicitor has pointed to a single instance in which he asserts Transamerica undertook to offer advice to its majority-owned banks. This incident falls far short of proving the control alleged by the Solicitor, but it does deserve reply for other reasons.

In 1934, the Board of Transamerica created an ''Advisory Council'' headed by Mr. L. M. Giannini to render such assistance as it could to the banks in which Transamerica held a majority stock interest, including Bank of America at that time. This was purely and simply an effort to provide a forum for discussion of common problems. The country had just passed through a most severe banking crisis. Such banks as remained were fighting for their lives. The people were not confident that banks were safe depositories of savings. This was the era of the NRA, the Blue Eagle, codes of fair practice and industry advisory committees—all in an effort to revive the country from the economic paralysis it had suffered. The Transamerica Advisory Council was merely one outgrowth of this nationwide effort to consult and confer back to prosperity. Like so many such efforts it never did anything tangible. In fact, it petered out before the end of 1935—sixteen years ago—and has been inactive since then. The Solicitor's reliance upon the Advisory Council demonstrates (1) a complete lack of candor and objectivity in failing to point out that it functioned only little over a year, and (2) how completely bankrupt his case is when an ancient incident of this insignificance is offered to prove the basic issue in the case.

The Solicitor's treatment of the Advisory Council is but one illustration of his persistent reliance on events taking place many years ago to establish facts as of 1951. The great preponderance of the incidents and statements on which he relies took place prior to July 30, 1937, when Transamerica owned almost all of the Bank of America's stock. The Solicitor gives no recognition to Transamerica's continuous reduction of its stockholdings down to 7.6% at present, or to the many other changes consistent with such reduction that have taken place in the last fourteen years. His proposed findings seek to convey the impression that there has been no change, despite Respondent's introduction of uncontradicted evidence to the contrary.

B. THE STATUTES AND CASES IN OTHER FIELDS OF GOVERNMENTAL REGULATION CITED BY THE SOLICITOR ARE WHOLLY INAPPLICABLE AND, IN ANY EVENT, ARE NOT PERSUASIVE

Realizing that the facts fail to support his contention, the Solicitor turned to the law to try to prove his point. The law he urges, however, and at length, is not the law applicable to the facts of this case. It is a law that has nothing to do with banks or companies such as Transamerica that own stock in banks. It is the Public Utility Holding Company Act that Congress passed in 1935 to put an end to the activities of those who were misusing their positions in utility operating companies at the expense of the public.* It was special legislation of the clearest kind directed at specific abuses that Congress in lengthy hearings had found prevalent in the utility business. Its basic purpose was to authorize the Securities & Exchange Commission to order the simplification of any holding company system as the public interest might require. Hence the name popularly applied to it—The Death Sentence Act. To enable the Commission to act intelligently, all holding companies were required to register with the Commission and file voluminous data with respect to their holdings and operations. The Congress provided that any person or company holding more than 10% of the stock in a public utility company should be classified as a holding company and should be required to register. It further provided that such a person or company could be exempted from

* 49 Stat. 803 (1935), 15 U.S.C. § 79 (1946).

registration if it showed that it did not "directly or indirectly control" or "exercise . . . a controlling influence" upon a public utility. 15 U.S.C. § 79b (7) (1946). This provision has been characterized as creating a presumption that 10% stock ownership of a utility company constitutes control.

The Solicitor cites the Public Utility Holding Company Act and cases under it in which companies have tried and failed to bring themselves within the exemption, as proving that Transamerica controls Bank of America. They are not even of precedential value, however, and constitute a last desperate effort to hold Transamerica "on the law" notwithstanding that the facts are all to the contrary. The legislation, in the first place, has no application whatsoever except to public utility holding companies. The Congress recognized them as requiring wholly different treatment than any other type of company.* Admittedly, a stingent test of control and controlling influence was enacted, but not for general applicability. Manufacturing companies, insurance companies, banks, every kind of enterprise but public utility holding companies was unaffected by the legislation. A 10% stockholding creates no presumption with respect to such companies. Control remains a matter of fact to be proved in each situation unobscured by any presumption arising from any percentage of stockholding. Indeed, if any percentage of stockholding is to be con-

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* The special applicability of this section to the utility field is seen from one of the cases cited by the Solicitor in which the court said:

"This phrase [controlling influence] should be construed in the light of the purpose of the Act of which it is a part, and when understood in this setting and in the light of its ordinary signification, it means the act or process, or power of producing an effect which may be without apparent force or direct authority and is effective in checking or directing action, or exercising restraint or preventing free action. The phrase as here used, does not necessarily mean that those exercising controlling influence must be able to carry their point. A controlling influence may be effective without accomplishing its purpose fully." *Detroit Edison Co.* v. *Securities & Exchange Commission,* 119 F.2d 730, 738-39 (6th Cir. 1941), *cert. denied,* 314 U.S. 618.

sidered of significance in determining control with respect to national banks it is 50%. That is the figure used in the 1933 banking legislation and, moreover, is the only figure Congress has ever used as having anything to do with control of banks. 48 Stat. 162 (1933), 12 U.S.C. § 221a (1946). Congress has not enacted legislation designed to apply the principles of the Public Utility Holding Company Act to banks, despite repeated requests for such legislation by the Board. H.R. 2776, 79th Cong., 1st Sess. (1945); H.R. 6225, 79th Cong., 2d Sess. (1946); S. 829, 80th Cong., 1st Sess. (1947); S. 2318, 81st Cong., 2d Sess. (1950). *Having lost the battle in the Congress, the Solicitor seeks to have the rejected legislation applied in a grossly discriminatory way in this proceeding.*

A further reason why the Public Utility Holding Company Act and cases thereunder have no value here lies in the far different consequences that follow from a finding of control here, and one under the Holding Company Act. Under the Act the only sanction is jurisdictional. The company found to enjoy control of a utility company must register its vital statistics with the Securities & Exchange Commission and subject itself to an inquiry as to whether or not it serves a useful public purpose. But here the finding of control urged by the Solicitor is to permit a finding that a violation of Section 7 of the Clayton Act has occurred, with the extreme sanction of divestiture imposed by that Act. Certainly this finding must be fully supported by reliable, probative and substantial evidence, and cannot rest upon the invocation of a presumption found in another statute dealing with special problems and carrying as its only sanction registration.

Finally, it should be recognized that the cases cited by the Solicitor under the control provision in the Holding Company Act by no means support a finding of control here even if that statute is considered. *Detroit Edison Co.* v. *Securities & Exchange Commission,* 119 F.2d 730 (6th Cir. 1941), *cert. denied,* 314 U.S. 618; *American Gas & Electric*

Co. v. *Securities & Exchange Commission,* 134 F.2d 633 (D.C. Cir. 1943), *cert. denied,* 319 U.S. 763. In those cases the stockholdings constituted respectively 19% and 17% of the outstanding shares—compared to Transamerica's 7.6% ownership in Bank of America. In addition, in both of those cases, and in the typical situation that has arisen under the Holding Company Act, the company charged with control actually organized the company it was charged with controlling. Here, Bank of America existed long before Transamerica, and Transamerica, far from forming Bank of America, was actually formed by Bank of America's stockholders. Moreover, the clear principle which those cases establish, and which is also found in cases in other regulatory fields cited by the Solicitor (Sol. Brief, pp. 66-67) is that a finding of control must be firmly anchored in the facts of record. It cannot be based upon hunch, surmise or suspicion. And the most important facts are those relating to the area in which the control is alleged to have been exercised. If the party in whom control is asserted, for example, is an investment banker it is immaterial that he exercised influence with respect to legal, engineering or personnel aspects of the company's operations. But what he did with respect to securities issues is highly relevant, almost to the exclusion of all other considerations. Here, Transamerica's interest in Bank of America must be shown to be the protection of banks in which it owns stock from Bank of America's competition or vice versa. The Solicitor can point to not a single instance where Transamerica exercised its influence for that purpose. Almost his whole "case" on control depends upon the relations of certain of Transamerica's non-banking subsidiaries with the Bank in matters and areas wholly irrelevant to the issues in this case.

At its best, the Solicitor's case requires a series of tenuous inferences from circumstantial evidence. Respondent has more than met that evidence with the direct testimony of numerous directors of Bank of America, each of them a successful executive in business and civic activities entirely independent of Transamerica or Bank of America and each a prominent and respected citizen of his community. These witnesses categorically testified that they had never received and knew of no directions or even suggestions from Transamerica as to the operation or management of Bank of America. On facts very similar to this case the Court of Appeals for the Second Circuit—sitting as the court of last resort—held that control and concert of action could not be found. *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 439-42 (1945). The court there made it clear that control must be determined "in harmony with the ordinary notions of delegated power" (148 F.2d at 441) and there must, therefore, be evidence that directions were issued by the one corporation and were followed by the management of the other. Such evidence was lacking in that case, just as it is here, and the court refused to find control notwithstanding a 48% identity of shareholdings and numerous intercorporate dealings.

We have dealt at length with the Solicitor's control contention because it is concededly basic to his case (though not to Transamerica's defense). Without further inquiry the Hearing Officer should recommend immediate dismissal of the Complaint because Transamerica never has controlled Bank of America and does not now. The remainder of this brief is necessarily based upon the assumption that it does, because only on that assumption is there any basis for inquiry as to whether Transamerica has violated Section 7 of the Clayton Act. Indulgence in that false assumption has been made necessary by the Hearing Officer's refusal to make a preliminary determination which would have disposed of the entire proceeding. It should not be taken as the least concession that Transamerica has controlled or does control Bank of America.

II

Bank of America Has Grown Through Efficient Management and Increased Public Acceptance of Its Services and Its Development Which Has Been Approved by the Appropriate Governmental Authorities Cannot Serve as a Basis for Finding that Transamerica Has Violated Section 7

Transamerica is the only respondent in this case. Only banks listed in Paragraph Four of the Complaint are involved in this case.* It must be shown that Transamerica acquired the stock of these banks under circumstances and in a manner that produced the effects specifically prohibited by Section 7 of the Clayton Act, the relevant portions of which are as follows:

> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
>
> "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."

The Solicitor has sought to avoid this statutory inquiry by various devious means. Because of his inability to meet the statutory requirements which must be met to prove an offense, he has, among other things, developed voluminous statistics designed to create an atmosphere of

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* The Solicitor states that he has no case as to Citizens National Trust and Savings Bank of Los Angeles, unless he proves that Transamerica has otherwise violated Section 7 of the Clayton Act (Sol. Brief, p. 78). His contentions respecting Citizens are refuted at p. 62 of this brief.

size and growth apparently in the hope that he may thereby avoid the statutory tests. Notwithstanding that Transamerica alone is the respondent and that only its bank stock acquisitions are challenged by the Complaint, he throws into his statistics the natural growth of banks, as well as transactions which Transamerica did not initiate and for which it had no responsibility, many of which involved no stock acquisition of any kind. Respondent's Main Finding No. 263 makes it clear that Transamerica had nothing to do with two-thirds of the banks listed in Paragraphs Five and Six of the Complaint.

The Solicitor's "statistical case" consists primarily of an indiscriminate lumping together of the banking offices, deposit liabilities and loans of all banks classified by the Solicitor as within the circle of his fictitious "Transamerica group". His year-by-year presentation of the growth of this "group" effectively obscures the fact that the growth of the banks making up his "group" has been mainly a natural growth resulting from successful business operations, that a very small remainder is attributable to purchases of assets which the Solicitor has conceded, as he must, that he cannot question, and that no part of the growth of those banks has been accomplished by stock acquisition. The statistics presented are entirely misleading and false.

The Bank of America alone constitutes about 80 to 85% of the Solicitor's "statistical case", a fact which when coupled with the conduct of this proceeding furnishes impressive evidence that Bank of America's growth through its efficient development of branch banking, rather than Transamerica, is the Solicitor's real target. Thus, the Solicitor's statistics begin with the year 1904 when Bank of Italy (predecessor of Bank of America) was organized, although Transamerica did not even come into being until 1928. Before Transamerica was ever organized or ever owned a share of stock in Bank of America, the Bank was well along in its development of a state-wide branch banking system.

The Solicitor's statistics are in large measure nothing more than a reflection of the fact that Bank of America has enjoyed a remarkable public acceptance from 1904 to the present. What the statistics fail to show is that this growth has been at all times motivated by logical business considerations and brought about by normal business activities which are in no way affected by Section 7 of the Clayton Act.

Throughout its history, the dominant purpose of the management of Bank of America has been the building of a bank which would provide maximum service to borrowers, depositors and others dealing with the Bank. The management felt that a widely diversified branch bank could not only provide a greater variety of services than a unit bank for individuals, businesses and communities, as well as permit increased efficiency of operation and safety of deposits, but that it would be of great aid in freeing California's economy from dependence upon Wall Street banks. Successful achievement of these purposes would quite naturally be profitable for its shareholders.

It was on this basis that the Bank of America has pursued a policy of establishing branches in a logical businesslike manner throughout California at all locations where surveys showed that the volume of business, existing or potential, would support a profitable operation. This policy at times required the purchase of the assets of other banks, not only for normal business reasons, but in large part because of a governmental regulation known as the *de novo* rule which prohibited establishment of most branches except by purchase (described in Respondent's Main Finding No. 86). Illustrative of the lack of foundation for the present attack upon Transamerica is the Solicitor's assertion that Bank of America's actions, not merely in conformance with but actually necessitated by governmental regulations, were "palpably unfair." (Sol. Brief, p. 55.) Bank of America sought no more than adequate representation in each section or community, and in numerous instances its management rejected opportunities to purchase the assets of other banks, both large and small, simply because their facilities did not fit into its plans for development.

Quite as important as the policy of bringing banking to the people through establishment of branches has been Bank of America's constant stress on the progressive development of new financial services, of which consumer credit is merely one conspicuous example, and the superior merchandising of traditional services, with particular consideration for the needs of the small borrower and depositor. Details concerning Bank of America services are set forth in Respondent's fully documented Main Findings (Nos. 73 to 75) and need not be restated here. What deserves repetition is that the growth of the Bank has been in large part, and in ever-increasing degree, the result of its superior business policies. Thus, since 1928 when Transamerica first came into existence, well over 90% of the Bank's growth has been the result of the public's response to the services provided, and in no way related to acquisitions of any kind. Whenever an effort was made to present fully the facts as to the nature and circumstances of the Bank's growth, the Solicitor sought to prevent the presentation of facts directed to these issues on the ground that the advantages of branch banking were not an issue. Yet it is these very advantages as developed through the Bank's efficient management that have been responsible for the Bank's growth, and the Solicitor's brief (p. 48) now admits the case is fundamentally an attack on legally authorized branch banking. Obviously the Solicitor's true interest was in seeking to have excluded from the record any evidence demonstrating that the Bank's growth resulted from factors other than those which the Solicitor seeks to impute through his statistical distortions.

Also ignored in the mass of statistical data is the crucial fact that not a single step in the growth of Bank of America has been accomplished by the acquisition of stock, since banks are prohibited by law from purchasing stock. The Supreme Court has explicitly held in *Federal Trade Commission* v. *Western Meat Co.,* 272 U.S. 554 (1926), not only that purchase of stock was the sole practice forbidden by Section 7 of the Clayton Act, but that the Federal Trade Commission (whose authority like that of the Board is derived from Section 11) had no authority to enforce Section 7 except as to stock held by an acquiring company at the time the Complaint issued. The Court explained its ruling as follows:

> "When the Commission institutes a proceeding based upon the holding of stock contrary to § 7 of the Clayton Act, its power is limited by § 11 to an order requiring the guilty person to cease and desist from such violation, effectually to divest itself of the stock, and to make no further use of it. The Act has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held. The purpose of the Act was to prevent continued holding of stock and the peculiar evils incident thereto. If purchase of property has produced an unlawful status a remedy is provided through the courts. Sherman Act, c. 647, 26 Stat. 209; Act to Create a Federal Trade Commission, c. 311, § 11, 38 Stat. 717, 724; Clayton Act, c. 323, §§ 4, 15, 16, 38 Stat. 730, 731, 736, 737; *United States* v. *American Tobacco Co.,* 221 U.S. 106. The Commission is without authority under such circumstances." 272 U.S. at 561.

It is clear, therefore, that the Board has no authority to question any part of the growth of Bank of America, no matter how accomplished. Whatever the outcome of this Clayton Act proceeding, Bank of America's 526 banking offices and deposit liabilities in excess of six billion dollars will remain completely undisturbed. Certainly, the Solicitor does not improve his right to challenge Bank of America's activities simply by adopting the phrase "Transamerica group'' and presenting statistics which incorporate Bank of America without identification.

Moreover, every significant step in the development of Bank of America, including every branch established, was taken with the complete approval of the appropriate state and federal supervisory authorities. Since Transamerica came into being, every branch established by the Bank has been with the full and unqualified approval of the Comptroller of the Currency. In giving his approval, the Comptroller is required to consider whether the establishment of the branch by the Bank would be prejudicial to other existing banks. The Solicitor's contentions amount, in effect, to a charge that the Comptroller has not properly performed his duties.

Only recently, Congress concluded that the Comptroller had ample authority to supervise acquisitions of bank assets and that he was exercising that authority in an entirely satisfactory manner. In December, 1950, it amended Section 7 to include acquisitions of assets by corporations subject to the jurisdiction of the Federal Trade Commission, but refused to grant any powers over asset acquisitions to the Board of Governors despite two requests for such powers by the Solicitor at Congressional hearings.*

The deficiencies in the Solicitor's ''statistical case'' likewise exist with respect to each of the large banks majority-owned by Transamerica: Central Bank, Oakland, First National Bank of Portland, First National Bank of Nevada, First National Bank of Arizona, and National Bank of Washington. While the details of their growth naturally vary from bank to bank, since each has established its branches and developed its business according to the views of its own management, the salient facts are the same: (1) By far the greatest part of the growth of each bank has

* Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 2357, 79th Cong., 1st Sess. 336-40 (1945); Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H.R. 515, 80th Cong., 1st Sess. 57-61 (1947).

been brought about solely by its management's highly successful business operation. (2) No part of the growth of any bank has consisted of a purchase of stock. (3) Each bank has established branches only with the approval of the appropriate supervisory authorities. (4) The Board has no authority, under the *Western Meat* decision of the Supreme Court, to question any purchase of bank assets made by any of these banks or any office established by them, and whatever the outcome of this proceeding, each of these banks will continue to operate undisturbed.

It is therefore clear that the statistics relating to the activities and growth of Bank of America and the Transamerica majority-owned branch banks—comprising approximately 95% of the Solicitor's "statistical case"—have nothing whatsoever to do with this proceeding. The Solicitor's entire emphasis is upon what he calls a concentration of economic power, yet the charges—which are the only charges before the Board—have nothing to do with the greater part of the alleged concentration, which has been brought about through normal, legitimate growth over the years without the acquisition of stock and with the complete approval of those authorities delegated by Congress and the state legislators to supervise such matters.

Though the Solicitor is guilty of innumerable inaccuracies in his description of the manner of growth of Bank of America and of banks majority-owned by Transamerica, we will not make a detour in this brief to correct such inaccuracies because the entire subject is wholly irrelevant and immaterial to the issue before the Board. That issue is whether Transamerica has acquired stock of the banks listed in Paragraph Four of the Complaint in such a manner and under such circumstances as to constitute a violation of Section 7 of the Clayton Act. No more than a statement of this narrow issue is required to demonstrate how far and wide the Solicitor has strayed in his findings, and how immaterial and irrelevant is the great bulk of the statistics covering a half-century of activities which he presents to support a finding of violation.

The remainder of this brief will be addressed to the basic issues of this proceeding—issues which the Solicitor has ignored. It will first examine the stock acquisitions of Transamerica challenged in Paragraph Four of the Complaint to determine whether, at the time stock in a particular bank was acquired, there existed any substantial competition between that bank and any other bank in which Transamerica held stock. The evidence fails to show that substantial competition did exist, and further inquiry is unnecessary because it is settled that the acquisition of stock in non-competing corporations does not violate Section 7. Respondent will also demonstrate that, in any event, Transamerica's stock acquisitions have not had, and there is no reasonable probability that they will have, the effect of substantially lessening competition or tending to create a monopoly in violation of Section 7, judged by the long-established test of whether the public interest will be injuriously affected.

III

Transamerica's Stock Acquisitions Do Not Violate Section 7 Because There Was No Substantial Pre-existing Competition Between the Banks in Which It Has Acquired Stock

Acquisition of stock in corporations which do not compete with one another can neither lessen competition, restrain commerce, nor tend to create a monopoly and cannot, therefore, possibly constitute a violation of Section 7. In the Solicitor's preoccupation with generalities based upon unproven assumptions and misleading statistics he has overlooked the specific nature of the Act under which he is proceeding. Section 7 does not authorize the Board or any other agency to regulate stock investment policies and practices in accordance with its own notions of what best serves the public. The sole action prohibited by that section is the acquisition of stock in circumstances which may affect competition adversely to the degree proscribed therein. But before any consideration need be given as to how competition may be affected, it must first be determined that the corporations whose stock has been acquired are in competition with each other. Unless there was competition at the time of the acquisition, the inquiry under Section 7 is at an end because there can be no impact—adverse or otherwise—upon competition which, to begin with, is non-existent. The Solicitor has failed to make this statutory inquiry before launching into bold assertions that Transamerica's every stock acquisition has been in violation of Section 7, and in view of this failure it is profitable to consider the Clayton Act, its legislative history and the various judicial and administrative decisions construing and enforcing it, which establish that the acquisition of stock in corporations that are not in substantial competition cannot possibly violate Section 7.

A. THE LEGISLATIVE HISTORY OF THE CLAYTON ACT ESTABLISHES THAT THE ACQUISITION OF STOCK IN NON-COMPETING CORPORATIONS DOES NOT VIOLATE SECTION 7

The legislative history of the Clayton Act makes it clear beyond any doubt that Congress was concerned only with the acquisition of stock in competing companies. The House Report on the bill pointed out that Section 7 (then Section 8) dealt with what was commonly known as a holding company. The Report was careful to state, however, that the bill did not reach all holding companies, but only those that acquired stock in competing companies. The precise language of the House Report is as follows:

> "'Holding company' is a term, generally understood to mean a company that holds the stock of another company or companies, but as we understand the term a 'holding company' is a company whose *primary* purpose is to hold stocks of other companies. It has usually issued its own shares in exchange for these stocks, and is a means of holding under one control the *competing companies* whose stocks it has thus acquired." H.R.

Rep. No. 627, 63d Cong., 2d Sess. 17 (1914) (italics partly supplied).

The Report of the Senate Committee adopted all of the House Report. Sen. Rep. No. 698, 63d Cong., 2d Sess. 13 (1914). Thus, both Houses of Congress understood clearly that they were dealing with a specific type of holding company, one which acquired stock in competing companies. It was in this sense that the proponents of the legislation used the term when they described the evil at which Section 7 was aimed. Illustrative are the statements of Representatives Kelly and Barkley:

> "Mr. Kelly. . . . Then came the discovery of the ideal scheme—the 'holding corporation.' It provided for a corporation to own the stock of *competing companies,* and it was proved in a short time to be a method in which to legally violate both law and justice." 51 Cong. Rec. 9086 (1914) (italics supplied).
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> "Mr. Barkley. . . . Under this method one corporation may buy up all the stock of several *competing corporations* engaged in commerce, or enough of their stock to give the 'holding company' control of them all, and thereafter all the different corporations whose stock has been thus bought up are under the same control and are operated as though it were one concern. As thus defined, a 'holding company' is created for the sole purpose of fostering monopoly and stifling competition, and is simply an incorporated likeness of the old-fashioned trust." 51 Cong. Rec. 9554 (italics supplied).

Representative Carlin, who was a House Committee member and one of the principal advocates of the bill on the floor of the House, made clear the close relationship between the "lessening of competition" language in Section 7 and the competitive relationship between the companies whose stock was acquired. He pointed out that a lessening of competition may be brought about through "a holding company of two corporations that are natural competitors . . ." 51 Cong. Rec. 9271.

Proponents of Section 7 as written were not the only ones who interpreted it as dealing with acquisition of stock in competing companies. One effort to ban all acquisitions of stock by a holding company was defeated without debate. 51 Cong. Rec. 14462. Almost all members of Congress who attacked Section 7 as not going far enough complained that the language did not reach all situations where stock of competing companies was acquired, and they desired to reach all. Thus, Representative Green complained:

> "Section 8 [which ultimately became Section 7] is a sham, pure and simple. It pretends to be that which it is not and which it can not be. It pretends to forbid the consolidation of competing railroad companies by means of holding companies. As an actual fact it facilitates such consolidation." 51 Cong. Rec. 9595.

To the same effect were the statements of Representatives Volstead (51 Cong. Rec. 9077-78) and Representative Nelson. H. R. Rep. No. 627, 63d Cong., 2d Sess., Part 3, pp. 7-8 (1914).

Perhaps the most significant statements in the course of the legislative debate were made by Senator Cummins in opposing the imposition of criminal penalties for violation of Section 7. He urged that the provisions of Section 7 were not sufficiently explicit to put an acquiring corporation fairly on notice that it was violating the law, and explained his position as follows:

> "The reason that I am not in favor of a criminal penalty attached to sections 8 and 9 [which ultimately became Sections 7 and 8] in the first instance is this—I am now speaking of the two parts of sections 8 and 9 which I have already mentioned: *There must always be found somewhere, by some tribunal, the fact as to whether the two corporations involved are competitive,* and that is a question upon which there will be from time to time the widest difference of opinion among honest men. There are some corporations which you can take up and instantly declare that they are competitive or ought to be competitive; but there are a

> great many corporations doing business so dissimilar in one respect and yet so united in another that it requires the exercise of sound judgment to determine whether they are or are not competitive. This is not only true with respect to the character of the business, but it is true of the location of the business." 51 Cong. Rec. 14254 (italics supplied).

Senator Cummins' statement is important because it explicitly sets forth the necessity of a threshold inquiry into pre-existing competition between the corporations whose stock is acquired. But the statement does more than that. It makes clear, as does the entire legislative history, that the inquiry must deal with the specific competitive facts surrounding the particular acquisitions. Generalization and speculation will not suffice; a precise inquiry into the extent of actual competition is mandatory.

B. NUMEROUS DECISIONS ENFORCING SECTION 7 ESTABLISH THAT THERE CAN BE NO VIOLATION IN THE ABSENCE OF SUBSTANTIAL COMPETITION BETWEEN THE CORPORATIONS WHOSE STOCK HAS BEEN ACQUIRED

The views of Senator Cummins provide a good starting point for a discussion of the court decisions on this matter, since, as we shall see, the courts have insisted upon precisely the kind of inquiry the Senator had in mind. In determining whether two companies were sufficiently in competition with each other to be within Section 7, the courts have not been content with the fact that the companies have the same generic business name and operate in the same general areas. They have made an analysis of the exact types of products or services furnished by each and the amounts of each type, the classes of customers served by each company, and the precise areas of effective competition of each company, down to a consideration of separate communities where necessary. In short, the courts have required a determination of the percentage of each company's business effectively competing with the other company's in the same market and for the same consumer's dollar, and they have then asked whether these percentages are substantial. Unless the answer has been in the affirmative, no further inquiry has been needed.

These principles are most clearly driven home by the decision of the Supreme Court in *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291 (1930). In that case, the International Shoe Company had acquired substantially all of the capital stock of the McElwain Company, and the Federal Trade Commission had concluded that the acquisition violated Section 7.* The Supreme Court held that the competition between the two companies was insubstantial and reversed the Commission's ruling.

The Court explained that there can be no violation of Section 7 unless there is substantial pre-existing competition between the two companies concerned:

> "Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree [citation omitted]; that is to say, to such a degree as will injuriously affect the public. *Obviously, such acquisition will not produce the forbidden result if there be no pre-existing substantial competition to be affected; for the public interest is not concerned in the lessening of competition, which, to begin with, is itself without real substance.*" 280 U.S. at 298 (italics supplied).

Furthermore, the Court refused to accept generalizations and speculation on the part of the Federal Trade Commission to the effect that substantial competition had existed between the two companies. That the companies

* The Commission had invoked the first paragraph of Section 7, which covers acquisitions by one corporation engaged in commerce of the stock of another corporation engaged in commerce, rather than the second paragraph, which covers acquisitions by one corporation of the stock of two or more corporations engaged in commerce. The tests of violation, however, are the same for both paragraphs.

were "two of the largest shoe manufacturers in the world" (280 U.S. at 304) did not prove that they competed with each other. While "both companies were engaged in selling dress shoes to customers for resale within the limits of several of the same states," (280 U.S. at 295) the Court insisted upon a more penetrating inquiry into the communities where the shoes were sold. The Court summarized the facts which led it to reverse the Commission, as follows:

> "It is plain from the foregoing that the product of the two companies here in question, because of the difference in appearance and workmanship, appealed to the tastes of entirely different classes of consumers; that while a portion of the product of both companies went into the same states, in the main the product of each was in fact sold to a different class of dealers and found its way into distinctly separate markets. *Thus it appears that in respect of 95 per cent. of the business there was no competition in fact and no contest, or observed tendency to contest, in the market for the same purchasers;* and it is manifest that, when this is eliminated, what remains is of such slight consequence as to deprive the finding that there was substantial competition between the two corporations, of any real support in the evidence." 280 U.S. at 296-97 (italics supplied).
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> "To hold that the 95 per cent. of the McElwain product, sold in the large centers of population to meet a distinct demand for that particular product, was sold in competition with the 95 per cent. of the International product, sold in the rural sections and the small towns to meet a wholly different demand, is to apply the word 'competition' in a highly deceptive sense. And if it be conceded that the entire remaining five per cent. of each company's product (although clearly it was materially less than that) was sold in competitive markets, it is hard to see in this, competition of such substance as to fall within the serious purposes of the Clayton Act." 280 U.S. at 298-99.

The principle thus established by the *International Shoe* case—that there must be substantial competition between the companies whose stock is acquired—has been uniformly accepted in all decisions of the courts and administrative agencies under Section 7. In fact, the principle itself was not challenged by either the Federal Trade Commission or the dissenting justices in the *International Shoe* case. The Solicitor can point to no case holding a violation of Section 7 without a supporting finding that there was substantial pre-existing competition between the companies.*

On the other hand, there are numerous decisions on all fours with the *International Shoe* decision, including *Beegle* v. *Thomson,* 138 F.2d 875 (7th Cir. 1943); *V. Vivaudou, Inc.* v. *Federal Trade Commission,* 54 F.2d 273 (2d Cir. 1931); *United States* v. *Associated Press,* 52 F. Supp. 362 (S.D. N.Y. 1943); *In re Pressed Steel Car Co.,* 16 F. Supp. 329 (W.D. Pa. 1936); *Parkersburg Rig & Reel Co.,* 34 F.T.C. 1527 (1941). In the last decision cited, one of the most recent by the Federal Trade Commission, a charge of Section 7 violation was dismissed with nothing more than a succinct statement that

> "prior to the acquisition by respondent of the voting capital stock of the Oil Country Specialties Manufacturing Co. only a small portion of respondent's business was competitive with the business of the acquired corporation . . . ." 34 F.T.C. at 1527.

* It should be noted that *Standard Oil Co. of California* v. *United States,* 337 U.S. 293 (1949), has no bearing whatsoever on this issue. The Solicitor's interpretation of this decision is fully discussed in a later section of this brief, and it is sufficient here to point out that the *Standard Oil* case found that requirements contracts between an oil company and operators of independent gasoline stations were in violation of Section 3 of the Clayton Act because they deprived other oil companies of the opportunity to sell to the independent operators, and thereby affected competition among the oil companies. No one disputed that such competition existed, and the sole issue was the impact of the requirements contracts on that competition. On the other hand, acquisition of stock in two companies cannot possibly have any competitive effect unless there is competition between those companies and the fact of acquisition itself throws no light on whether the competition exists or has been affected.

The facts and reasoning of some of these cases deserve elaboration, for they show the undeviating insistence of the courts upon making the preliminary inquiry which Section 7 entails, without regard to the over-all size of the corporations involved or to other activities shown to violate other laws. Moreover, they further illustrate how precise must be the investigation of pre-existing competition.

United States v. *Associated Press,* 52 F. Supp. 362 (S.D. N.Y. 1943), holds that even proof of activities which might violate other antitrust laws does not substitute for proof of the substantial pre-existing competition essential to finding a violation of Section 7. The Associated Press was found by a three-judge court headed by Judge Learned Hand to have violated the Sherman Act through a conspiracy to restrain and monopolize trade. Yet, in dealing with a charge that Associated Press had also violated Section 7 of the Clayton Act by acquiring all of the stock of Wide World Photos, Inc., the court put all of Associated Press's other activities to one side and addressed itself to whether Associated Press and Wide World had been substantial competitors. Despite the fact that both were engaged in supplying photographs to newspapers and that Associated Press was by far the largest company in the business, Judge Hand found that the competition was not substantial and dismissed the Section 7 charge with a few well-chosen words:

> "The third charge is the purchase of all the shares of Wide World Photos, Inc.; and—no intent to monopolize being shown—*that charge necessarily rests upon section seven of the Clayton Act, and, so in turn, upon whether the existing competition between AP and Wide World Photos, Inc., was 'substantial.'* Plainly, it was not; AP did not sell its picture service to outsiders, so that the only possible competition of Wide World Photos, Inc., was in diverting from AP its members who might otherwise have taken AP's picture service. There were however only seven AP members, who subscribed to Wide World Photos, Inc., and did not subscribe to AP service. In these circumstances we cannot

> see how the purchase could have suppressed any but the most trivial competition. This part of the complaint must be dismissed." 52 F. Supp. at 374 (italics supplied).

In re Pressed Steel Car Co., 16 F. Supp. 329 (W.D. Pa. 1936), demonstrates that the large size of the companies involved does not eliminate the necessity for inquiring as to the extent of their competition. A plan for the reorganization of Pressed Steel Car Company was in part to be carried out by the acquisition of some of its stock by General American Transportation Corporation, and the court, in passing upon the reorganization plan, had to determine whether the acquisition was in violation of Section 7. Pressed Steel was the third largest producer of freight cars in the United States as well as a major tank car producer, while General American also produced freight and tank cars. Despite the importance of Pressed Steel in the industry, the court held that the stock acquisition was not in violation of Section 7 since the competition between the two companies was not substantial.

In *V. Vivaudou, Inc.* v. *Federal Trade Commission,* 54 F.2d 273 (2d Cir. 1931), a cosmetic manufacturing corporation had acquired stock in two other cosmetics manufacturing corporations, and the Federal Trade Commission had determined the acquisitions to be violative of Section 7. The Court of Appeals for the Second Circuit, however, following the lead of the Supreme Court in *International Shoe,* analyzed the "cosmetics manufacturing" businesses involved and found that in fact they consisted of separate and distinct groups of products, such as talcums, compacts, extracts, and creams. The three corporations involved each specialized in different lines, and while some overlap existed, the court concluded:

> "It is properly claimed that, in view of this division of the toilet article business, the competition between these companies was not substantial and the acquisition

> did not substantially lessen competition in view of the respective volumes of sales.'' 54 F.2d at 276.

In *United States* v. *Columbia Steel Co.,* 334 U.S. 495 (1948), the legality of a purchase of the assets of Consolidated Steel Corporation by United States Steel Corporation and its subsidiaries was in issue before the Supreme Court. While the suit was brought under the Sherman Act by the Department of Justice, the relevance of the decision to a proper interpretation of Section 7 of the Clayton Act is made clear by a footnote to the opinion:

> ''This was not a purchase of stock of a competing company. See § 7, Clayton Act, 38 Stat. 730, 731; *Federal Trade Comm'n* v. *Western Meat Co.,* 272 U.S. 554. It must be assumed, however, that the public policy announced by § 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets of Consolidated by United States Steel with the same economic results as the purchase of the stock violates the prohibitions of the Sherman Act against unreasonable restraints. . . .'' 334 U.S. at 507.

The simple first sentence of the footnote deserves special attention. While it describes what the *Columbia Steel* case is not about, it is also stating the scope of Section 7: ''purchase of stock of a *competing company''* (italics supplied). So basic is the principle, and so well-settled, that it required no explanation beyond simple statement.

In applying the ''public policy'' of Section 7 to the case before it, the Supreme Court described its problem as follows:

> ''We turn now to a discussion of the significance, as to possible violation of the Sherman Act, of the fact that Consolidated has been a competitor of United States Steel in structural steel fabrication and in the manufacture of pipe. The same tests which measure the legality of vertical integration by acquisition are also applicable to the acquisition of competitors in identical or similar lines of merchandise. *It is first*

> *necessary to delimit the market in which the concerns compete and then determine the extent to which the concerns are in competition in that market.*" 334 U.S. at 507 (italics supplied).

The Court then made an exhaustive inquiry into the extent of the competition between the two companies. It considered not merely competition in general, but the precise character and geographic extent of the competition between the two companies with respect to each major product manufactured. The District Court had found that competition between the two companies was not substantial, and its decision was affirmed by the Supreme Court.

C. THE SOLICITOR HAS COMPLETELY FAILED TO PROVE THE EXISTENCE OF SUBSTANTIAL COMPETITION BETWEEN ANY OF THE BANKS LISTED IN PARAGRAPH FOUR AS OF THE TIME TRANSAMERICA ACQUIRED THEIR STOCK

Paragraph Four of the Complaint in this proceeding charges Transamerica with a violation of the Clayton Act through the acquisition and retention of a majority-stock interest in 47 banks and a minority-stock interest in Bank of America. These stock interests were acquired by Transamerica at various times since its organization in 1928. To sustain his charge of violation, the Solicitor must first prove—before the inquiry can go any further—with respect to each of the 48 situations, that at the time Transamerica acquired the stock of a particular bank, Transamerica already held stock in some other bank or banks in substantial competition with the one whose stock was acquired. Thus, for example, the Solicitor must show that when Transamerica acquired a stock interest in First National Bank of Portland, that bank was in substantial competition with Bank of America. Or to take the most recent acquisition as an example, the Solicitor must show that when Transamerica acquired a stock interest in State Bank of Malheur County, Ontario, Oregon, that bank was in substantial competition with at least one of the other 47 banks listed in Paragraph Four. The Solicitor, however, has failed to make the inquiry required by Section 7, and as a result the record does not show that there was any substantial competition between banks in which Transamerica acquired stock at the times of such acquisitions.

The proof of substantial competition between two specific banks must come from the facts concerning those banks. These facts must provide the answer to two questions: (1) What services being offered by the two banks are sufficiently similar to be effectively competitive? (2) To what extent are such competing services being aimed at the same consumers' patronage in the same marketplace? Both inquiries are needed in order to show what percentage of the business of the two banks is effectively competitive. And only that percentage can demonstrate the *substantiality* of the competition, upon which the courts have unanimously insisted in enforcing Section 7. Obviously, a very specific and detailed inquiry is necessary.

It proves nothing to say that the institutions whose stock Transamerica acquired were all "banks" or "commercial banks", since "banks" perform various distinct services that are not competitive one with another. The truth of this fact, respecting banks generally as well as the banks listed in Paragraph Four, is fully established by evidence produced by both sides. Bank of America holds an unusually large percentage of its assets in the form of loans, rather than investments, particularly real estate and installment credit loans. Many other banks are content to put most of their funds into Government bonds. Moreover, bankers called as witnesses by the Solicitor testified that their banks would not make installment credit loans or certain kinds of real estate loans, such as "FHA" or "GI". To find competition in such situations is "to apply the word 'competition' in a highly deceptive sense." *International Shoe, supra* at 298.

The court decisions already reviewed in this brief have all rejected the notion that a common generic label proves competition between two companies, and have inquired into the business activities of the companies and the precise extent to which those activities were competitive. In the *International Shoe* case, the two corporations were both "dress shoe manufacturers", but the Supreme Court was not satisfied with the label and insisted on going behind it to see what types of shoes were involved. The court in the *Vivaudou* case analyzed the "cosmetics business" in terms of the different products made. Most recently, the Supreme Court in *Columbia Steel* broke down the "steel business" not only into structural fabrication and pipe fabrication but the different kinds of each. These analyses were not made for the sake of pedantry; they represented an effort to see what products effectively competed. So here, an inquiry must be made into the nature and extent of the services offered by each of the banks whose stock Transamerica has acquired, the degree to which those services compete, and the substantiality of such competition.

Just as precise an inquiry must be made into the geographic area of effective competition of each of the banks listed in Paragraph Four. It is obvious that two banks cannot be substantial competitors of each other even though their services be the same, unless a substantial portion of those services effectively compete *in the same market area.* Here again, broad assumptions cannot be a substitute for a determination of the facts. A showing that two banks have offices in the same state or in the same five-state area is in itself meaningless. What is needed is an analysis of their effective areas of competition. It was this reasoning which led the Supreme Court in *International Shoe* to conclude that, although the two corporations were selling shoes in the same states, they were not competing in the same cities and towns within those states. Furthermore, the area of effective competition may itself vary as between different banks. In the *Columbia Steel* case, the court found that there were different market areas for different steel products; likewise, the different services offered by banks may compete over areas of varying extent. And the testimony of Mr. MacNaughton and Mr. Langsdorf makes it plain that special geographic features, road conditions, and the like, in a particular community, will have an important bearing on the area of competition.

The conclusion is inescapable that a detailed inquiry into the activities of each of the banks listed in Paragraph Four —the services they offer and the area they cover—is a necessary prerequisite to a finding that any of them is in substantial competition with another. The Solicitor has failed completely to produce the proof necessary to his case. His evidence is not merely inadequate. It is totally lacking, because he has not made the necessary inquiry. The fact is that he has been too busy amassing a conglomeration of statistics relating to size and growth. Certainly, the Solicitor cannot avoid his burden of proof by this device. The *International Shoe, Columbia Steel, Associated Press,* and *Pressed Steel Car* decisions all rejected attacks on size as a substitute for proof of pre-existing competition.

This gap in the Solicitor's case is far more than a formal defect. It is fatal. Respondent is not here insisting on proof which can easily be supplied but was inadvertently omitted. It seems far more likely that the Solicitor did not try to produce evidence because he knew he could not. So far as an inquiry into the geographic area of competition is concerned, such evidence as there is in the record, *and particularly the Solicitor's own proof,* demonstrates that most of the banks listed in Paragraph Four were not in substantial competition with one another at the time Transamerica acquired their stock.

The Solicitor takes the view that the area of effective competition between banks is quite narrow. He has presented evidence to this effect, on which he has asked for a finding which states his position, as follows:

> "The commercial banking business is essentially a retail business, requiring ubiquitous contacts with the public all day and every day; most of the customers of commercial banks are located within the immediate locality of the bank; while the need for some services may be largely seasonal, the bulk of transactions re-

> quires daily access to bank facilities; because of the size and multiplicity of transactions rendered by the bank for the customer it is impossible for him to travel far for service, hence, banking services cannot be properly and adequately performed by distant institutions; . . . " Solicitor's Proposed Finding No. 140.

On the basis of the Solicitor's own view, we may proceed to consider the banks listed in Paragraph Four. Among those banks are five in which Transamerica acquired a stock interest at a relatively early date: Bank of America (1928), First National Bank of Portland (1930), First National Bank of Nevada (1934), National Bank of Washington (1936), and First National Bank of Arizona (1937). Each of these banks has branches located in various localities, but since banks are forbidden by law to establish branches in more than one state, and since each of these banks operates offices in a different state, it is obvious that their offices are not in "the immediate locality" of one another. The Solicitor has offered no evidence that these banks are in competition with one another and, on his own view of the case, these banks cannot be found to be in substantial competition. Likewise, inherent in his position is the concession that no bank listed in Paragraph Four is a substantial competitor of another bank if their offices are located in different states. We may proceed, therefore, to the situation within each state. Neither Arizona nor Washington requires any further discussion since Transamerica has a stock interest in only one bank in each state.

While continuing to hold a stock interest in First National Bank of Portland, Oregon, Transamerica has since 1937 acquired stock in fifteen banks with offices located in Oregon. With but one exception, these banks and First National Bank of Portland have their banking offices in separate communities. The single exception is the Moreland-Sellwood Bank, located in the City of Portland. The fact that two banks are located within a large city is in itself no certain indication that they compete. In any event, the proof that there was no substantial competition between any two of the Oregon banks was conclusively established by the testimony of Mr. E. B. MacNaughton, who is intimately familiar with banking conditions in Oregon. Mr. MacNaughton stated categorically that not one of the Oregon banks in which Transamerica owns stock was a substantial competitor of any other at the time Transamerica acquired its stock. The agreement between the Solicitor and Respondent on these banks is practically complete and makes clear that none of them is a substantial competitor of any other bank listed in Paragraph Four.

While continuing to hold stock in First National Bank of Nevada, Transamerica in 1937 acquired the stock of Farmers Bank of Carson Valley, a small bank not located in the same community as any branch of First National of Nevada. Thus, it follows that there was no substantial competition between them. In 1941, Transamerica provided a large part of the capital for the organization of the Bank of Nevada. The head office of Bank of Nevada was established in Las Vegas, where First National Bank of Nevada had a branch at the time. The Solicitor has never explained why he regards the organization of a *new* bank, where one had never existed before, as within Section 7. How could competition possibly be affected, except to become sharper? Viewing the situation most unfavorably to Transamerica, this Bank would nevertheless be within the exception provided in Section 7 for "the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches thereof."

While continuing to hold a stock interest—though a rapidly declining one—in Bank of America, Transamerica has since 1937 acquired majority stock interests in 26 banks with offices located in California. Eighteen of those banks are located in communities separate from each other and from Bank of America, except for two which were under common ownership when Transamerica acquired their stock and which occupy the same office today. Once more following the reasoning of the Solicitor's findings, these eighteen banks must be taken to be non-competitive. The remaining eight California banks all have offices in communities separate from one another, except for two banks which were under common ownership before Transamerica acquired their stock. All eight, however, have offices in communities where Bank of America has branches.

The record as a whole, and particularly the Solicitor's own evidence, furnishes affirmative proof that 40 out of the 48 banks listed in Paragraph Four were not in substantial competition with each other or with the other 8 at the respective times when Transamerica acquired their stock. Such affirmative proof is lacking as to the remaining eight banks, since they were so located that the *possibility* of competition with Bank of America cannot be ruled out. But the Solicitor can take no comfort in a possibility. As has been pointed out, on him rests the burden of proving the extent of the pre-existing competition among the banks with sufficient precision to demonstrate its substantiality. There can be no doubt that he has failed to do so.

He has made no effort at all to demonstrate the nature and extent of the services offered by these banks and by Bank of America, so that it is impossible to see whether competition exists, and, if it does, whether it is substantial. The need for such an inquiry is made clear by the testimony of Mr. L. M. Giannini. He pointed out that, while Bank of America and First National Bank in Turlock have offices in the same community they are located on "different sides of the railroad tracks", so that in fact they serve entirely different groups of persons in the community. Similarly, First National Trust and Savings Bank of Santa Barbara and Bank of America have offices in the same community, but First National Trust of Santa Barbara has built up a large amount of trust business whereas the Bank of America branch has very little. This evidence alone does not conclusively prove that the competition between these banks and Bank of America is insubstantial, but it makes clear the wisdom of the court decisions which have insisted upon an affirmative showing of the precise percentage of competitive activity such as is completely lacking here.

In both his findings and brief, the Solicitor has completely ignored the issue of pre-existing competition and has limited his argument to the imaginary possible consequences of Transamerica's stock acquisitions. This argument is untenable since there can be no effects upon competition unless there is competition to begin with. And there can be no tendency to monopoly unless there is a lessening of some pre-existing competition, since monopoly itself is brought about only through the elimination of all effective competition.

The Complaint should be dismissed without further inquiry, therefore, because the Solicitor has failed to prove and, indeed, has made no effort to prove one of the essentials to a violation of Section 7, *i.e.,* the pre-existence of substantial competition between the corporations whose stock has been acquired. Notwithstanding this fatal failure of proof, the Solicitor has urged that there are grounds for finding that Transamerica has violated Section 7. The remainder of this brief will be devoted to showing the invalidity of his contentions. We will first dispose of his latest argument, *i.e.,* that Transamerica's stock acquisitions have violated Section 7 if they can be shown to involve a substantial amount of business, without regard to their actual or probable effect upon competition. We will then demonstrate that application of the long-established test of probable effect upon the public interest to Transamerica's stock acquisitions shows conclusively that they have not violated Section 7.

IV

The Solicitor's Contention that Transamerica's Stock Acquisitions Violate Section 7 if Only They Involve a Substantial Amount of Business Is Wholly Erroneous

Transamerica's position as to the Solicitor's burden of proving a violation of Section 7 may be shortly stated. Transamerica asserts that the Solicitor must prove either, that the stock acquisitions have already resulted, or that there is a reasonable probability that they will result, in a monopoly or a lessening of competition to such a degree as injuriously affects the public.

The Solicitor, on the other hand, conceives that his burden is satisfied when he shows merely that the stock acquisitions involved a "substantial amount" of business; that, when the latter condition obtains, the Board may assume that injury to the public has followed or will follow; and, in short, that stock acquisitions involving a "substantial amount" of business automatically violate Section 7.

However, the Solicitor evidently feels constrained to admit, and indeed he could hardly do otherwise, that Transamerica's position, and not his, is fully supported under the judicial opinions construing Section 7.

First, he concedes that these cases establish that stock acquisitions are not unlawful *per se* and that acquisitions are unlawful only when accompanied by a prohibited result. (See Sol. Brief, pp. 33-34.)

Second, he concedes that these cases have made it clear that the statutory conditions are not satisfied by a showing of the "mere possibility" of the prohibited result, but only by a showing that there is a "reasonable probability" that the acquisitions will have the prohibited result. (See Sol. Brief, p. 29.)

Finally, he concedes that these cases, like the cases under the cognate Sherman Act, applied the "Rule of Reason" and held that the prohibited result under Section 7 is "lessening competition to a substantial degree [citation omitted]; *that* *is to say, to such a degree as will injuriously affect the public.*" *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 298 (1930) (italics supplied). See also *Pennsylvania R. Co.* v. *Interstate Commerce Commission,* 66 F.2d 37, 39 (3rd Cir. 1933), *aff'd,* 291 U.S. 651 (1934); *V. Vivaudou, Inc.* v. *Federal Trade Commission,* 54 F.2d 273, 274 (2d Cir. 1931); *Temple Anthracite Coal Co.* v. *Federal Trade Commission,* 51 F.2d 656, 660-61 (3rd Cir. 1931); *United States* v. *Republic Steel Corp.,* 11 F. Supp. 117, 120-22 (N.D. Ohio 1935). (See Sol. Brief, pp. 33-34.)

Each of these cases expressly or by necessary implication rejected the "substantial amount" test urged now by the Solicitor. The courts' analyses were qualitative, not quantitative. All facts were considered which were relevant to whether there actually was a probability that there would come about, as a result of the stock acquisitions, a condition prohibited by the Sherman Act. Recognizing that Section 7 does not require that there be already in existence a condition prohibited by the Sherman Act, the courts nevertheless have made it clear that there must be at least a reasonable probability that there will result a condition prohibited by the Sherman Act. As stated in the *Republic Steel* case, for example:

> "Though differing somewhat from other laws, as we have indicated, the Clayton Act, nevertheless, deals with matters within the realm of monopoly. Therefore in determining whether given acts . . . substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act . . . in the words 'restraint of trade or commerce' and 'monopolize, or attempt to monopolize,' and by the courts in construing the Sherman Act with reference to acts 'which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade,' and 'restrict the common liberty to engage therein.'" 11 F. Supp. at 121.

See also the *Vivaudou* case, *supra* at 275.*

The courts in the cases cited above required far more than the mere fact that a "substantial amount" of business was involved to hold that there was a reasonable probability of an "undue" restraint. They inquired in detail as to the extent and quality of the existing competition, as to the effect on existing competition, prices, etc., as to whether there was any existing injury, as to the economic purpose of the acquisition, and as to whether the purpose was beneficent or otherwise.

The Solicitor does not deny the foregoing but, instead, pitches his entire case on two developments that have occurred subsequent to the filing of the Complaint as demonstrating that the *International Shoe* case and the other cases cited above no longer represent the law.** He argues

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* The reference by the courts to the Sherman Act and the application of the "Rule of Reason" which has authoritatively been held to be an integral part thereof, does not, as the Solicitor apparently thinks, mean that the courts have required that a Sherman Act violation already exist before Section 7 is violated. It means only that there must be a reasonable probability that a Sherman Act violation will occur.

** The Solicitor also places incidental reliance on *Fashion Originators' Guild of America* v. *Federal Trade Commission,* 312 U.S. 457 (1941), and *International Salt Co.* v. *United States,* 332 U.S. 392 (1947). These cases, however, have little, if any, bearing on the problem. The first case involved a commercial boycott and the second a patent tying case. The Supreme Court, in *United States* v. *Columbia Steel Co.,* 334 U.S. 495 (1948), has specifically explained that both of these practices are illegal *per se:*

> "A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal *per se.* For example, where a complaint charges that the defendants have engaged in price fixing, *or have concertedly refused to deal with non-members of an association* [footnote reference to the *Fashion Guild* case omitted], *or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device* [footnote reference to the *International Salt*

that the *International Shoe* case has in effect been overruled by the Supreme Court in a case which dealt, not with Section 7 and stock acquisitions, but with Section 3 and requirements contracts. He goes on to argue that, in any event, in the recent amendment to Section 7, passed some two and one-half years after this proceeding was begun, the Congress expressed an intention to adopt the latter Supreme Court decision as the proper test in determining whether stock acquisitions have violated Section 7, and that this intention should be given retroactive effect.

A. STANDARD OIL CO. OF CALIFORNIA V. UNITED STATES, 337 U.S. 293 (1949), DOES NOT ELIMINATE THE LONG-ESTABLISHED PUBLIC INTEREST TEST FOR DETERMINING A SECTION 7 VIOLATION

As to *Standard Oil Co. of California* v. *United States,* 337 U.S. 293 (1949), on which the Solicitor relies as in effect overruling the *International Shoe* case, it should first be noted that nowhere in the opinion did the Court even mention the *International Shoe* case, the leading case under Section 7, despite the Court's most exhaustive consideration of all its prior decisions, and most of the lower court decisions, under Section 3. This fact, says the Solicitor, is

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case omitted], *then the amount of commerce involved is immaterial because such restraints are illegal per se.*" 334 U.S. at 522-23 (italics supplied).

From the very inception of the doctrine of the "Rule of Reason," it has been recognized that restraints may be unreasonable because of their intendment or results or because of their inherent nature regardless of intention or results. The latter class are regarded as unreasonable and therefore illegal *per se* because of their "actual or potential threat to the central nervous system of the economy." *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 226 (1940). The mere *possibility* of public injury has been deemed to outlaw this class of restraint. Stock acquisitions, however, have never been regarded by the courts as involving illegality *per se,* as indeed they could not be under the express provisions of Section 7 making illegality turn on *actual* or *probable* effects, and expressly exempting certain types of acquisitions.

without significance because Section 3 decisions apply to Section 7.

The Solicitor's explanation fails, however, to explain the fact that the Supreme Court not only did not even refer to the *International Shoe* case, but was very careful to point out that:

> "We are dealing here with a particular form of agreement specified by § 3 *and not with different arrangements, by way of integration or otherwise, that may tend to lessen competition.*" 337 U.S. at 311 (italics supplied).

It is difficult to perceive why the *Standard Oil* case can be said to apply automatically to Section 7, when the Supreme Court took such pains to confine its holding to Section 3 and to point out that it was not dealing with practices covered by Section 7. Furthermore, the Court itself has provided some evidence as to the reason for its precision. In the preceding court term, the Supreme Court, in *United States* v. *Columbia Steel Co.,* 334 U.S. 495 (1948), an asset acquisition case under the Sherman Act, stated that, while Section 7 was applicable only to stock acquisitions and not to asset acquisitions:

> "It must be assumed, however, that the public policy announced by § 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets . . . with the same economic results as the purchase of the stock violates the prohibitions of the Sherman Act against unreasonable restraints." 334 U.S. at 507.

The Court then proceeded to reject the "appreciable segment" test now urged by the Solicitor.

Moreover, one of the principal considerations in the Court's decision in the *Standard Oil* case was the legislative history of Section 3, which the Court interpreted as indicating an intention on the part of Congress to prohibit requirements contracts without inquiry into their effect upon competition wherever a substantial portion of commerce was involved. But the purpose of Section 7 was fundamentally different from the purpose of the Congress in enacting Section 3 of the Clayton Act. The purpose of Section 7 was not to protect competitors but rather to protect the public. Sections 2 and 3 of the Clayton Act, in prohibiting discriminatory prices, tying clauses and requirements contracts, are aimed at protecting competing producers from the effects of practices that have historically been used as unfair methods of competition. Section 7, on the other hand, was not intended to freeze the *status quo* or to prevent any reduction in the number of competitors. Its purpose was to assure that the public would not suffer from a dearth of competition in the provision of any product or service. The elimination of a particular competitor, or any number of competitors, for that matter, was not the vice at which the section was aimed. Rather, its purpose was to proscribe such stock acquisitions as would have a seriously prejudicial effect upon competition.

This difference between Section 3, which was involved in the *Standard Oil* case, and Section 7, which is the pertinent section here, was fully recognized by Congress when it enacted the Clayton Act. This is made plain by the different legislative courses of action with respect to the two sections. The qualifying language of Section 3 (*i.e.*, that the effect may be to substantially lessen competition or tend to create a monopoly) was added by the Conference Committee. When the Conference version of Section 3 was attacked on the floor of the House and Senate as going beyond the versions of either house, the conferees very carefully and explicitly declared that the qualifying language would make little difference in the meaning of Section 3. The importance of this history to the decision in the *Standard Oil* case was articulated in the Court's opinion as follows:

> "In this connection it is significant that the qualifying language was not added until after the House and

> Senate bills reached Conference. The conferees responsible for adding that language were at pains, in answering protestations that the qualifying clause seriously weakened the section, to disclaim any intention seriously to augment the burden of proof to be sustained in establishing violation of it." 337 U.S. at 312.

Section 7, on the other hand, was from the very outset of its legislative course subject to detailed and specific qualifications recognized to be substantive in character. These qualifications were understood by all to require actual proof that, as the result of a particular acquisition, there was a reasonable probability that the effect prohibited by Section 7 would come about. It was realized that the burden of proving violation might present difficulties, and various efforts were made to amend Section 7 in order to eliminate that burden. Senator Cummins, for example, criticized the section as follows:

> "I have already called attention to various imperfections of the section; but the chief one is that it requires the Government, or whoever enforces the law, to prove that the fact that when one corporation holds a part of the stock of another it has the effect of substantially lessening competition between the two corporations. We ought not to be compelled to enter upon that inquiry. It is a statement that is immensely difficult of actual proof, although every reasonable, sane man knows that it does have the tendency to eliminate or lessen competition. We ought to go one step further back and say that, inasmuch as we know that the ownership by a corporation engaged in commerce of the stock of another corporation engaged in commerce does tend to eliminate competition and does tend to destroy the rivalry that should exist, therefore, when that one fact is shown—namely, that the two corporations are or ought to be competitive with each other—the stockholding becomes unlawful, without requiring any further inquiry or investigation." 51 Cong. Rec. 14255.

Senator Cummins subsequently proposed an amendment to incorporate his views above quoted, but it was defeated. 51 Cong. Rec. 14473-76. Senator Reed proposed an amendment to prohibit the acquisition by a corporation of stock in another corporation engaged in the same line or lines of business, urging that otherwise a violation of Section 7 would be too difficult to prove. His proposal was likewise defeated. *Id.* at 14419, 14459. Senator Poindexter proposed an amendment banning all acquisition of stock in competing companies, which was likewise defeated. *Id.* at 14464-68.

The Solicitor argues that he really doesn't have to prove even the probability that competition will be substantially lessened, or trade restrained, or a tendency to monopoly created. Yet, when it was proposed to Congress that Section 7 take that form and that such proof not be required, Congress rejected the proposals. Congress even insisted on an exception for stock acquisitions made for investment unless an actual substantial lessening of competition was proved. Certainly Section 7 cannot now be made to mean what Congress refused to make it mean when it had the opportunity in the form of specific proposed amendments.

But in any event, says the Solicitor, "reason" supports his contention, and, if the "substantial amount" test applies to Section 3, it obviously ought also to apply to Section 7. The Solicitor neglects to point out, however, that there are certain differences in the economic effects of requirements contracts under Section 3 and stock acquisitions under Section 7, and that it was the presence of the particular effects of the requirements contracts which was the express basis for the holding of both the trial court and the Supreme Court in the *Standard Oil* case.

Under exclusive dealing arrangements there is a *pro tanto existing* exclusion of competitors of the vendor, even if there is no injury to the vendees or to the public purchasing from the vendees. While the exclusive dealing contracts are in effect, the competitors of the vendor cannot, as a practical matter, sell to the vendees under contract.

This was the basis of the trial court's holding that the requirement of showing an actual or potential lessening of competition or a tendency to a monopoly was adequately met by proof that the contracts covered a "substantial number" of outlets, whether considered comparatively or not.

> "Given such quantitative substantiality, the substantial lessening of competition—so the court reasoned—is an automatic result, for the very existence of such contracts denies dealers opportunity to deal in the products of competing suppliers and excludes suppliers from access to the outlets controlled by those dealers." 337 U.S. at 298.

Having adopted this standard of proof, the trial court then excluded from consideration the economic merits or demerits of the contracts, whether Standard's competitors had increased or decreased, and other matters showing any other effects, good or ill, of the contracts.

The Supreme Court noted this effect of *existing* injury of the requirements contracts and endorsed the reasoning and conclusions of the trial court. The Supreme Court said:

> "We conclude, therefore, that the qualifying clause of § 3 is satisfied by proof that competition *has been* foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard *does effectively foreclose whatever opportunity there might be* for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial." 337 U.S. at 314 (italics supplied).

In contradistinction to requirements contracts where *necessarily* there is *existing*—not potential—injury to competitors, and substantial injury as the volume of products involved becomes substantial, stock acquisitions do not necessarily involve any public injury.

There is no necessary and automatic exclusion of competing banks, either in the loaning of money or in the securing of depositors, as there is exclusion in the case of requirements contracts; there is no contractual impediment preventing competing banks from obtaining the business. Moreover, as an *a priori* matter, it is difficult to see how the potential exclusion of competitors is any greater than when the acquired banks operated under different stock ownership. As an *a priori* matter, the principal possibility of public injury is to the users of banking facilities. Here, too, the "substantial amount" test is inappropriate. What is "substantial" is a relative question. With the billions of dollars involved in banking transactions, a figure which might elsewhere be regarded as a "substantial amount" has no necessary significance. There is, in short, no automatic injury to the users of banking facilities.

But whether these *possibilities* of public injury are also *actual* injuries or *probable* injuries is a question for inquiry which is not automatically resolved by the mere fact that the stock acquisitions may, by non-banking standards, involve a "substantial amount" of business. Proof is not, as the Solicitor contends, merely a matter of "statistics."

B. THE RECENT AMENDMENT TO SECTION 7 EFFECTS NO CHANGE IN THE PUBLIC INTEREST TEST FOR DETERMINING VIOLATION OF THAT SECTION

The second major prong of the Solicitor's argument is that the Congress, by the recent amendment to Section 7, indicated an intention that the test under Section 7 be changed to be in conformance with the *Standard Oil* case test under Section 3. He must go further, of course, and establish that the alleged change is to be applied retroactively.

In the first place, it is by no means clear that the Congress intended to substitute the "substantial amount" test of the *Standard Oil* case for the "injuriously affect the public" test of the *International Shoe* case, even acting prospectively.

The Solicitor relies, in his argument to the contrary, chiefly on some ambiguous language in the House Report to the effect that the tests of illegality "are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act." He points to this and other language in the Committee Reports as showing that Congress wanted to avoid a Sherman Act test requiring an existing unreasonable restraint. The Solicitor does not stop here. He then reads into this language what it does not itself contain, namely, a reference to and approval of the "substantial amount" test of the *Standard Oil* case.

Opposed to the Solicitor's conclusion is the fact that although the *International Shoe* case was referred to and discussed many times in the hearings, debates and reports of both houses (including the very reports cited by the Solicitor), *at no time was disapproval of the case indicated, but rather the contrary.* And, in fact, the *International Shoe* case did not require a Sherman Act test, but merely the test of the reasonable probability of substantial lessening of competition to the injury of the public.

Perhaps the best example of the foregoing is contained in H.R. Rep. No. 1191, 81st Cong., 1st Sess. 7 (1949), the document on which the Solicitor places his strongest reliance. Quoting from the *International Shoe* case the following language,

> "Mere acquisition by one corporation of the stock of a competitor even though it results in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree . . . that is to say, to such a degree as will injuriously affect the public",

the Report goes on to say:

> "The language in the amendment it will be noted follows closely the purpose of the Clayton Act as de-

> fined by the Supreme Court in the International Shoe case."

This occurs on the page immediately preceding the ambiguous language from the Report quoted by the Solicitor.

In fact, the specific references to the *Standard Oil* case contained in the legislative history of the amendment rely on that case only as demonstrating that "may be" means "reasonable probability." *E.g.,* Kefauver, 96 Cong. Rec. 16662 (Dec. 13, 1950).

However, assuming *arguendo* that the Solicitor is correct and that the Congress did intend such a change in the test under Section 7, nevertheless the change would have no retroactive application. The section applies merely to "acquisitions" of stock, not to the holding of acquired stocks. An acquisition is a transaction completed and over with when it is accomplished—it is not a continuing event and, therefore, a change in the law would not apply to an event completed before the change.* See *Hyams* v. *Calumet & Hecla Mining Co.,* 221 Fed. 529, 537 (6th Cir. 1915). Even more conclusively, not only did the proponents of the amendment declare that the amendment was not intended to be retroactively applied—see, for example, the statement of the General Counsel for the Federal Trade Commission (Hearings before a Subcommittee of the Senate Committee on the Judiciary on H.R. 2734, 81st Cong., 2d Sess. 47 (1950))—but, in addition, the amendment specifically provides that "Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired."

Transamerica submits, therefore, that the Board cannot, as the Solicitor contends, find that Section 7 has been violated merely upon a statistical showing that a "substan-

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* With this situation compare that where, as under Section 3, tying contracts and exclusive dealing arrangements are entered into before the law was enacted, but which, because of the continuing acts necessary to carry them out, are covered by the Act. See, *e.g., Motion Picture Patents Co.* v. *Universal Film Mfg. Co.,* 235 Fed. 398 (2d Cir. 1916), *aff'd,* 243 U.S. 502 (1917).

tial amount'' of business is involved in the stock acquisitions, but that its determination must be made on all the surrounding circumstances and competitive results of the acquisitions, and that the test of illegality is the actuality or reasonable probability of public injury.

V

Transamerica's Stock Acquisitions Have Not Produced Results Prohibited by Section 7, and There Is No Reasonable Probability that They Will Produce Such Results

The Solicitor's effort to avoid the character of inquiry that the courts, without exception, have undertaken in determining whether acquistions of stock in competing corporations violate Section 7, is certainly understandable. Any such inquiry destroys his entire case. Such evidence as Respondent has been able to introduce over the Solicitor's objection demonstrates beyond doubt that (1) to the extent there existed any competition between banks in which Transamerica acquired stock, there has been no lessening of such competition; (2) the contemplated purchases by Bank of America and First National Bank of Portland, of the assets of certain Transamerica majority-owned banks will have a completely insignificant effect upon competition; and, finally, (3) there is no probability whatsoever that Transamerica's stock acquisitions, considered singly or as a whole, will injuriously affect the public.

A. THERE HAS BEEN NO LESSENING OF SUCH COMPETITION AS MAY HAVE EXISTED BETWEEN ANY OF THE BANKS LISTED IN PARAGRAPH FOUR AT THE TIME TRANSAMERICA ACQUIRED STOCK IN THEM

The Solicitor's consistent abhorrence of specifics and his complete reliance upon generalities is further seen in his failure to inquire into whether any one of Transamerica's stock acquisitions has, as a matter of fact, actually brought about any lessening of competition, and if so, the degree of such lessening. In his view, the effect upon competition actually produced by a stock acquisition is not even a material issue. He has consistently resisted the introduction of evidence relating to lessening or strengthening of competition, and has explained his objection as follows:

> "I haven't put in anything about the subject of competition in Santa Ana, and I repeat I haven't put it in because I don't regard it as material to the case. I have put in the fact that Transamerica Corporation owns a bank in Santa Ana and has recently bought it. If, according to Mr. Stewart's ideas of the case, I repeat, it should be a fatal defect because the Board hasn't proved the true competitive position in Santa Ana, bankingwise, that is, then the Board will sustain him, if there is no proof on it . . . " Tr. 3622-23.

Such evidence as the Respondent has been able to introduce on the question of the effect of Transamerica's acquisitions upon competition establishes that they have not reduced competition.*

The uncontradicted testimony of the witnesses who know and are familiar with the competitive situation surround-

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* The Solicitor's consistent effort to avoid the inquiry that must be made to prove a violation of Section 7 is illustrated by his charge that Transamerica's acquisition of stock in Citizens National Trust and Savings Bank of Los Angeles is in violation of that section. His claim is based not upon Transamerica's acquisition of Citizens stock but entirely upon assertions relating to the growth and present size of the other banks in which Transamerica owns stock. With respect to Citizens the facts are clear. There has been no lessening of competition between Citizens and Bank of America or any other bank in which Transamerica owns stock. The evidence shows on the contrary that Citizens has continued in vigorous competition with Bank of America. Moreover, contrary to the flat statement of the Solicitor (Sol. Brief, p. 78) which is wholly unsupported by evidence, Transamerica has no intention of acquiring control of Citizens nor of attempting to influence competition between Citizens and Bank of America in any way. Nor does Bank of America have any intention of assuming the deposit liabilities of Citizens. Consequently an application of the statutory tests will not permit of the finding of a violation by Transamerica because there has been no substantial lessening of competition and all of the evidence indicates no probability of any such lessening in the future.

ing each acquisition and the history of the particular bank's operations since then is that there has been absolutely no slackening in competition with any bank in which Transamerica owns stock. All of the banks in which Transamerica has acquired and holds stock have continued to operate after Transamerica's stock acquisitions as they did before. There has been no change in their policies, no softening of competition. They provide at least the same quantity and quality of service as they did prior to Transamerica's stock acquisitions. Indeed, the evidence indicates that the quality of service offered by such banks has actually improved. All the evidence on the actual effect upon competition of Transamerica's stock acquisitions has been offered by Respondent and completely negates any finding that competition has been or probably will be lessened.

Transamerica acquired stock in the First National Bank of Portland, First National Bank of Nevada, National Bank of Washington, and First National Bank of Arizona, prior to 1938, during the period when it held a majority stock interest in Bank of America. The evidence in this case could not be tortured into even a suggestion that competition between each of these banks, and between these banks and other banks in which Transamerica owns stock, has been affected in the slightest by reason of Transamerica's stock acquisitions. These are four of the major banks in which Transamerica's stock acquisitions have been challenged by Paragraph Four of the Complaint. They are a significant part of the "statistical case" presented by the Solicitor. The First National Bank of Portland, alone, accounts for about 500 million dollars of deposit liabilities, and, other than the Bank of America, is the largest unit in the Solicitor's statistical computations. Yet, upon inquiry, the conclusion is inescapable that Transamerica's acquisition of the stock in each of these banks has not diminished competition by even the smallest unit of measurement.

Central Bank, Oakland, is an excellent example of the effect that Transamerica's acquisitions of stock have had upon competition among banks in California. Transamerica acquired a majority of the stock of Central Bank of Oakland in 1937, the same year in which it gave up its majority stock interest in Bank of America. During the same year the assets and business of Central Bank of Oakland were transferred to Central Bank, Oakland, which had no other assets or business.* Bank of America was at that time operating approximately twenty branches within the same area served by the head office and two branches of Central Bank in the City of Oakland. Since 1937, both Central Bank and Bank of America have increasingly made their services available to the public in undiminished competition with each other. Between 1937 and 1948 the total deposit liabilities of Central Bank, Oakland, have grown about 200% and those of Bank of America about 300%. The uncontradicted testimony of numerous witnesses in this proceeding is that from 1937 to date competition between Central Bank, Oakland, and Bank of America has not been reduced in the slightest but on the contrary has increased.

One need only list the other banks located in Oakland to demonstrate that competition is thriving and there is no probability whatsoever that the public will become dependent upon a single institution, or will in any significant degree be limited in its choice of banking institutions. At the time that Transamerica acquired stock in Central Bank of Oakland, that bank's deposits amounted to $37,700,000. Five banks with numerous offices, in addition to both Central Bank, Oakland, and Bank of America, provide banking service at Oakland. Included in this number are American Trust Company, a sectional branch banking system with aggregate deposits of $927,800,000, and Anglo-California National Bank, another sectional branch banking

* While Central Bank, Oakland, was in corporate form a continuation of Bank of America, State, which had come into existence in 1930, the latter had by 1937 no assets and no business. In fact, as distinguished from form, Central Bank, Oakland, as it is now known began its operations in 1937.

system with total deposits of $468,700,000. Since 1937, the total deposits of American Trust have increased 300%, and those of Anglo-California, over 100%. If this inquiry is one of fact, competition has most certainly not been lessened.

Admittedly, the past or existing effect of an acquisition upon competition is not the entire inquiry under Section 7, but in determining the probable effect of an acquisition the most reliable indication must unquestionably be the result that has already been brought about. Especially must this be so where the acquisition has been accomplished for many years, and any changes that might be anticipated have been made, and the future situation can be predicted with reasonable certainty. The four major Transamerica majority-owned banks in each of the states of Oregon, Washington, Nevada and Arizona have been operating wholly independently during the past 15 to 20 years of Transamerica stock ownership. It is clearly contemplated that they will remain independent and it was so testified. The Solicitor has offered no proof that any lessening of competition can be reasonably expected and on the basis of this record no such finding can be made. The facts of record and the intentions of Transamerica with respect to Central Bank, Oakland, are identical with those relating to the major Transamerica majority-owned banks in Oregon, Washington, Nevada and Arizona. Central Bank is a self-contained sectional branch banking system that offers a sound public service and makes a satisfactory profit for its stockholders.* Transamerica has no intention of disturb-

* Three other small majority-owned banks in California are in the same category as Central Bank, Oakland: First National Bank of Mountain View; First National Bank of Oakdale; and its former affiliate, Stanislaus County Bank. Their aggregate deposit liabilities at the time of acquisition were less than 14 million dollars. They have continued to operate independently of all other banks in which Transamerica owns stock and there has been no lessening of competition between any one of them and any other banks, and Transamerica has no intention to sell or dispose of them in any way.

ing its present operations which have promoted, not lessened, competition and has every intention of continuing to hold its investment in Central Bank, Oakland.

In the complete absence of factual proof that competition has been lessened between these banks, the Solicitor turns, as he has on other points, to an argument based on "the law" and again the law, as found in the pertinent cases under Section 7, lends no support to his position. He contends that the bringing of competing banks under common majority stock ownership automatically eliminates competition, and in the case of Central Bank, Oakland and the other California majority-owned banks his contention is that there is an automatic lessening of competition with Bank of America simply because Transamerica holds a minority stock interest in that bank. It will be observed that this argument by the Solicitor, even if it were sound, is inapplicable here because he has failed to show the existence of substantial competition between the banks in which Transamerica has acquired stock. Even he could not urge that as a matter of law a stock acquisition lessens competition that does not exist.

But the Solicitor's argument of law has been expressly rejected by the courts. They have consistently held that the mere bringing of competing companies under even 100% common stock ownership is not a violation of Section 7 where the evidence is clear that the companies have continued to compete and no effort has been made to bring about a reduction in such competition. *Temple Anthracite Coal Co.* v. *Federal Trade Commission*, 51 F.2d 656 (3rd Cir. 1931); *Pennsylvania R. Co.* v. *Interstate Commerce Commission*, 66 F.2d 37 (3rd Cir. 1933), *aff'd*, 291 U.S. 651 (1934). These courts recognized that the inquiry demanded by Section 7 was whether there was a real probability that the effects prohibited by that section would result. In *Pennsylvania R. Co.* v. *Interstate Commerce Commission*, the court said:

> "The mere possession of power is not, under all circumstances, sufficient to bring the acquisition of stock by one corporation of another within the inhibition of the act. The possession of power must be accompanied by the probability that it will be exercised to lessen competition to a substantial degree, before it is prohibited by the act.
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> "*We cannot assume that this will result from the mere acquisition of the stock. As a matter of fact, there has not been any lessening of competition since the stock was acquired.* On the contrary, the evidence affirmatively shows increased competition between the Pennsylvania Railroad Company and the other two companies. This was recognized by the Commission, which did not even attempt to controvert the facts showing increased competition, but suggested that it might be due to decrease in traffic. This, however, cannot be the explanation, for increased competition was carried on in 1929 when traffic was at its height." 66 F.2d at 38-39 (italics supplied).

They concluded, moreover, that the clearest indication of what was probable in the future was what had actually happened in the past and was happening in the present. It would have been wholly incongruous and unreasonable in those cases, as it would be in this case, to find that even though there had been absolutely no lessening of competition in the years that had elapsed since the acquisitions in question, and even though there was no indication that any action which would bring about such effect was contemplated, nonetheless there was a probability of such an effect upon competition. That, however, is what the Solicitor is forced to argue by reason of his failure to show any actual effect upon competition arising from Transamerica's stock acquisitions.

B. THE PURCHASE BY BANK OF AMERICA AND FIRST NATIONAL BANK OF PORTLAND, RESPECTIVELY, OF THE ASSETS OF CERTAIN BANKS IN CALIFORNIA AND OREGON NOW MAJORITY-OWNED BY TRANSAMERICA WILL NOT SIGNIFICANTLY AFFECT COMPETITION

Bank of America has contracted to purchase the assets of 22 banks in California now majority-owned by Transamerica, and First National Bank of Portland has filed applications with the appropriate banking officials for authority to establish offices at the locations of 15 banks in Oregon majority-owned by Transamerica. It may be urged that if and when Bank of America's purchases have been consummated and First National of Portland's applications granted, some lessening of competition will take place. Assuming *arguendo* that such lessening is a proper concern of the Board, notwithstanding that it does not result from stock acquisitions (the only practice prohibited by Section 7 as it may apply to banks either in its old or new form), and that the transactions contemplated have been fully approved by the proper Governmental authorities, it cannot constitute the basis for any finding of a violation of Section 7.

The amount of banking competition that will be affected even in the slightest is so insignificant that there is little wonder the Solicitor has refrained from measuring it. His case depends upon keeping to the forefront the 6½ billion dollars of deposits and 650 banking offices, and collapses upon inquiry into the probable effect upon competition either in a specific situation or generally.

We have already seen in Section III of this brief that the record fails to show that there is any substantial competition between Bank of America and any of the 22 banks whose assets it proposes to buy or between First National Bank of Portland and any of the 15 banks at whose locations applications for branches have been filed. Moreover, if we accept the limited area of effective competition urged by the Solicitor, it is inescapable that 18 of the California banks and 14 Oregon banks cannot possibly be in competition with Bank of America or First National Bank of Portland, respectively. The contemplated purchase and subsequent branching can have no conceivable effect upon competition with respect to such banks.

The remaining 4 banks in California and the single bank in Oregon are located in communities in which Bank of America or First National Bank of Portland, respectively, also have branches. This, then, is the proper size of the case which the Solicitor has sought to measure by statistics which calculate deposits in the billions and offices in the hundreds. A grand total of 5 communities throughout the five-state area defined in the Complaint may have banking competition lessened to some slight extent.

The alleged Oregon lessening can be disposed of summarily. The Moreland-Sellwood Bank is located in the city of Portland, which is served by a large number of banks and other institutions including the United States National Bank, one of the 25 largest banks in the United States. When Transamerica acquired the Moreland-Sellwood Bank in 1938, it had total deposit liabilities of $433,000. Obviously, such an acquisition has an imperceptible effect upon banking competition in the large city of Portland.

In California, the First National Bank in Turlock has total deposits of only $6,000,000, and none of the other banks whose assets are to be purchased by Bank of America are large banks. In Pasadena, in addition to the Bank of America and the First Trust and Savings Bank, whose assets it proposes to purchase, 5 other banks provide banking service including 4 strong local banks, 2 of which have branches, and the Security-First National Bank of Los Angeles, the eighth largest bank in the United States with total deposits of over 1.6 billion dollars. This bank operates two branches in Pasadena. Rather than suffering from any limitation in banking services, Pasadena has the reputation in the banking community of being "thickly banked". In both Santa Ana and Santa Barbara, the other two communities in which the Bank of America's contemplated purchases may conceivably affect competition, there is ample remaining competition including in both cases the Security-First National Bank of Los Angeles and strong local banks.

The record is replete with evidence as to the legitimate business reasons Bank of America has for establishing offices at these locations. There is no suggestion of an intention to suppress competition or to prevent others from establishing or acquiring banking offices in these communities. In none of these communities is there a probability, or even a possibility, that Bank of America will acquire a monopoly of banking services. Moreover, the amount of business involved is so insignificant in relation to the remaining competition that it must be found that there will be no substantial lessening of competition within the meaning of Section 7 of the Clayton Act.

C. TRANSAMERICA'S STOCK ACQUISITIONS, INDIVIDUALLY AND IN THE AGGREGATE, HAVE PROMOTED COMPETITION, AND THERE IS NO PROBABILITY THAT THEY WILL INJURE THE PUBLIC INTEREST

After it has been determined that an acquisition of stock falls within the substantive purview of Section 7, *i.e.,* that there was substantial competition at the time of the acquisition and that there has been a substantial lessening of such competition, it then becomes necessary to decide whether the section has been violated. The Supreme Court has made clear that the ultimate criterion of violation is whether the acquisition will probably lessen competition to a degree that will injuriously affect the public. *International Shoe Co.* v. *Federal Trade Commission,* 280 U. S. 291, 298 (1930). And the Congress in the recent amendment to Section 7 expressed its acquiescence in this ultimate test.

In determining the effect upon the public interest, the courts have looked not only to the precise area of competition affected by the challenged acquisition, but have always looked beyond to the state of competition generally within the industry. This examination serves the same purpose as an overall medical examination when a patient complains of a particular illness. First, the medical inquiry is as to the particular ailment, but the patient's overall condition must also be considered.

If there is one fact undeniable on this record, it is that banking competition in the five-state area described in the Complaint is stronger and more progressive than in any other section of the United States. The Bank of America has, by advertising, convenient location of its offices, and imaginative thinking, brought banks into many areas of the communities' business never before entered. The whole field of consumer financing was once one that banks refused to touch. Bank of America pioneered the extension of consumer credit and now many banks, and in particular those in competition with Bank of America, do a thriving consumer credit business. The Solicitor must have recognized that any inquiry into competition as a factual matter rather than by unsupported statistical hypotheses would have utterly demolished his case. He resisted to the utmost the introduction of evidence dealing with the nature and character of the competition met by the banks in which Transamerica owns stock. Substantial quantities of such evidence were excluded, but a sufficient amount of evidence was introduced to leave no doubt as to the health and strength of the relevant competition. The banking systems throughout California, Oregon, Washington, Arizona and Nevada are extremely strong. The number of failures experienced in those states has been significantly less than the average for the entire country. Banks in those five states have enjoyed a continued and in many cases a phenomenal growth. In California, over 60 banks operating in competition with those in which Transamerica owns stock have experienced a rate of growth of from 400 to well over 800 per cent in the last 10 years. Many individual banks operating a number of branches in the same pattern as Bank of America and the First National Bank of Portland have grown at a far more rapid rate than have those banks. Over the past 20 years, at a time when throughout the country a limited number of new banks were organized because of the small return on capital in prospect, over 70 new enterprises sprang up in the banking field in these five states. There is no practical limitation on the ability of anyone to enter the banking business provided approval of the appropriate Governmental authorities is obtained.

It is indeed a curious paradox that an action of this kind alleging a lessening of competition should be directed at the one area of the country that has succeeded in freeing itself from dependence on eastern financial interests. Historically the entire country has looked to the eastern financial centers, and in particular Wall Street, for financing. The growth and development of industry everywhere were controlled from eastern financial centers. The effect of such dependence upon the economic growth of the other sections of the country is most apparent from the experience of the South. The West, largely through the efforts of the Bank of America aided by other banks who followed its lead, has been able to finance its own remarkable economic and industrial development over the last 20 years. If the proof of the pudding is still the eating, one need only compare the strength of the banking organizations in the West and see the extent to which they have met and anticipated the financial needs of the communities they serve to realize that only a strong competitive industry could have accomplished what the banks in the West have accomplished. No support for the Solicitor's charge that Section 7 of the Clayton Act has been violated can be found by an examination of the actual competition that has existed, continues to exist and will exist in the areas and communities served by banks in which Transamerica owns stock.

D. THE SOLICITOR'S STATISTICS DO NOT MEASURE THE CHARACTER AND EXTENT OF THE COMPETITION THAT MIGHT BE AFFECTED BY TRANSAMERICA'S STOCK ACQUISITIONS

The Solicitor, however, avoids any inquiry into actual competition. Even the suggestion by an impartial witness that there was very vigorous competition in the area in question brought forth objections from him. His inquiry into competition is wholly statistical. He began the proceeding with volumes of statistical evidence. He ended the proceeding with additional volumes of statistics, and when it came time to submit findings of fact he produced an even different arrangement of the same statistics. In view of the Solicitor's position that banks compete only within extremely narrow geographical limits, his presentation of statistics on a state-wide basis, and on a five-state area basis, can only be construed as his effort to show the effect of Transamerica's stock acquisitions upon the public interest generally. But it is a wholly inadequate effort. No court in any antitrust case has ever attached to statistics the weight which the Solicitor would have the Board give his numbers. Indeed, many courts, experienced in the distortions to which statistics are susceptible, have refused to admit them in evidence, or have stated their intention to give them little weight. Anyone who has had experience with figures, whether on a balance sheet or in support of an expert's testimony, realizes full well that they must be treated with the most extreme caution.

The statistics reflect no geographic area of effective competition.—To serve as a measure of existing competition, or the probability of competition being lessened, it would seem elementary that statistics should include all of the competitors within the area of effective competition and should exclude everything else. The Solicitor's statistics, however, violate both these elementary principles. He has asserted, and asked for findings, that banks compete with each other within a very narrow local geographical area. In his own words, banks must have "ubiquitous contacts with the public all day and every day." They must be in daily and convenient contact with their customers in order to provide adequate service. On this view it necessarily follows that banks compete only within a limited geographical area—perhaps a neighborhood, or community, or trade area, depending upon individual circumstances, but certainly the area of effective competition is limited.* The Solicitor's statistics are based upon an examination, not of the area of effective competition of the banks in which Transamerica has acquired stock, but upon a statistical examination of all banks located within each of the five states, or alternately all banks within the entire five-state area. It is clear, on his own concept of bank competition, that neither the five-state area nor any one individual state constitutes the area of effective competition for any bank. His five-state and state-wide statistics are therefore meaningless in determining the nature and character of competition at Los Angeles, or San Francisco, or Pinole, or Reno, or any other community in which Transamerica may have acquired the stock of a bank.

Similarly, by limiting his statistics to banks physically located within the five states named in the Complaint, the Solicitor has excluded from his calculations many banks which actually compete within that area.** The evidence of record establishes that New York, Chicago, and Boston banks carry substantial deposits and extend lines of credit to persons and corporations with offices in California, Oregon, Nevada, Arizona and Washington. The amount of such deposits and lines of credit, though their substantiality is indicated in written offers of proof, has been excluded from the record, but it is clear that such banks do

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* "Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition." *Standard Oil Co. of California* v. *United States,* 337 U.S. 293, 299-300 (1949).

** The artificiality of the selected five-state area in exposed by the manner in which the Solicitor's "statistical case" is expanded to bring in an additional state as soon as Transamerica acquires stock in a bank located in that state. Arizona, for example, becomes part of the area under inquiry only as of the time Transamerica acquired stock in an Arizona bank, but not before. An area that expands so readily, and presumably that will contract just as readily, cannot be considered as an area of effective competition for any bank.

provide substantial competition for a number of the larger banks located in the five states who would overwise obtain the deposit and loan business of the local corporations. Anyone who sells steel to the auto companies in Detroit most certainly competes for their business wherever the steel may be produced. Similarly, any bank or other institution that extends credit to a west coast movie, utility, or aircraft company competes with west coast banks that try to make such loans and sometimes do. Certainly any inquiry into competition must give consideration to whomever provides that competition, regardless of where that competitor may be located. It would no doubt have complicated the Solicitor's statistical presentation to have made allowance for competition from the major eastern banks, but competition is a very complicated subject, as the decisions on the antitrust laws make clear, and does not lend itself to slick statistics.

A further factor which the Solicitor's statistics completely ignore is the deposit and loan business which banks, such as the Bank of America, do with corporations located outside the chosen five-state area and even outside the United States. The Bank of America, for example, has a number of foreign offices which account for a sizeable portion of the loans and deposits carried by the Bank. No other California bank has such foreign offices and consequently no other California bank competes with the Bank of America in any respect whatsoever for such business, although the competition from foreign offices of New York and foreign banks is plentiful. Nonetheless, the Solicitor's statistics assume that every bank in California and every bank in every one of the other four states is in competition with Bank of America for such foreign business, and that other banks are not.

Banking offices and loans are worthless measures.—The Solicitor's statistics in their use of banking offices and loans as measuring sticks are worthless as an inquiry into the nature and extent of competition. Any comparison based solely upon total number of banking offices is nothing more than a confusing mixture of unequals. In such a comparison as the Solicitor makes, a store-front office with two or three employees, a situation not unusual in the Bank of America's experience, is given a weight equal to that accorded the monumental First National Bank Building at the corner of First and Main.* Offices in a sense are a measure of competitive activity, but not in the sense used by the Solicitor. The Bank of America as well as other progressive banks have continually tried to bring banking to the people, and one of the most effective ways of accomplishing that purpose was to make banking facilities easily accessible to a greater number of people. Many other banks sat back and forced the people to come to them. If anything, the number of banking offices occupied is a measure of the public service offered by a bank. To use it as a measure of monopoly is a hopeless distortion.

Moreover, the measure "banks and branches," which is the basis of the Solicitor's office count, has no practical meaning. It is no more than a contrivance to produce the largest possible number. For example, where a national bank has a savings bank affiliate doing business in the same premises, a not infrequent situation, there are two "banks" but only one "banking office," and it is just as accurate to describe that office as a "savings bank office" as it is to describe it as a "commercial banking office." Yet the statistics sponsored by the Solicitor, almost without exception, use whatever method of counting will produce the largest possible percentages for the various ephemeral "groups" conjured up by his theories. Every banking corporation is counted as an office, whether it has a separate office or not; every banking office which has a dollar

* The Wells Fargo Bank and Union Trust Company, San Francisco, with deposits of approximately $390,000,000, has but two offices, both in downtown San Francisco. It alone has greater deposits than the total deposits of 84 Bank of America branches, which are the total number of branches located in 31 of the 58 counties in California.

of demand deposits subject to check is treated as a "commercial banking office," even though the bulk of the business is savings bank business; and every dollar of deposits is treated as "commercial bank deposits" even though *billions* of dollars of such deposits are not demand deposits subject to check.

The Solicitor has submitted voluminous statistics showing the proportion of all bank loans held by so-called "Transamerica banks". This, again, is no reliable measure of the character of competition within the area in question—certainly not without far more explanation than the Solicitor's statistics provide. It was brought out in this record and is commonly known that the proportion of a bank's resources invested in loans is a matter of policy at any given time and depends entirely on the individual bank's concept of the banking business. Far too many banking managements have been content to sit back and make a fair profit through investing their depositors' funds in Government bonds without making any effort to put those funds into productive industrial use. The Bank of America, in particular, as well as the Transamerica majority-owned banks, have been noted for their desire to make good loans which will contribute to the productive growth of the country. Certainly, this policy, which is reflected in the statistics presented by the Solicitor and which is most certainly in the public interest, should not be used as an instrument of condemnation.

The statistics exclude substantial competition from nonbanking institutions.—The final defect in the Solicitor's statistics, as a measure of competition, is that they fail to give any consideration to large groups of institutions which provide some of the strongest competition faced by the banks in which Transamerica owns stock. The Solicitor's statistics are confined to banks. We have already seen that some banks have of their own volition practically withdrawn from competition at least with respect to loans. The record is clear that some of the strongest competition which banks face comes not from other banks but from finance companies, insurance companies and from the United States Government itself, through various agencies such as the Federal Reserve Banks, Production Credit Corporations and the Reconstruction Finance Corporation. The strength and importance of non-bank credit sources are well-known to the Board. Its efforts to regulate or restrict the extension of credit have included institutions other than banks. And a former Chairman of the Board has conceded that credit control is ineffective unless it covers all such lending institutions.

The Solicitor, however, while he recognizes the existence of such competition, refuses to give it any consideration in his statistical inquiry into the nature and extent of competition involved in this proceeding. Admittedly the inclusion of such competition would somewhat conflict with and confuse the neat, statistical presentation relied upon by the Solicitor, but that most certainly is no reason for excluding it from consideration. The Solicitor's only excuse is that banks provide services such as extension of credit and safekeeping of funds in a somewhat different manner than do other institutions such as the Federal Government and the huge life insurance companies. The alleged differences are far more apparent than real, but the important consideration is that, so far as the public is concerned, it makes no difference whether an automobile loan is obtained at a finance company or at a bank, or whether a house is mortgaged to a bank or a life insurance company.

The Supreme Court, years ago, rejected the effort to draw a distinction for antitrust purposes based upon the manner or method by which a particular product or service was produced or distributed. It was argued that gasoline produced by the cracking process, which constituted about one quarter of all gasoline used by the public, should be considered as not competing with gasoline produced by other methods. Justice Brandeis, speaking for the Court, emphatically declared that the manner of production was immaterial.

Standard Oil Co. (Indiana) v. *United States,* 283 U. S. 163 (1931). The inquiry must be directed to the point of public use. Since the public used both kinds of gasoline interchangeably, the competition offered by the producers of the non-cracking gasoline had to be considered in any antitrust inquiry. The principle of that case is clearly applicable here. The Board cannot disregard loans by an insurance company because they are made on the second floor instead of the first floor, or consumer credit extended by finance companies because the finance company has a different and sometimes cheaper location than the competing bank.

The Solicitor's statistics may present an interesting history of some aspects of banking operations as conducted in each of the five western states. They do not, however, advance the inquiry into the nature and extent of competition in the areas and communities served by the banks in which Transamerica owns stock. That is the only inquiry that has relevance in this proceeding. It is an inquiry that must look to the actual facts of competition to see how banks compete, where they compete and with whom they compete. It is not an inquiry that can possibly be answered by statistics prepared to support a previously conceived position rather than to reflect the actual state of competition. The test of whether an acquisition is in violation of Section 7 requires an inquiry into whether the probable effect of an acquisition or acquisitions will be to lessen competition to a degree that will injuriously affect the public. This inquiry involves the facts of competition. Indeed, any finding that results from such inquiry must have substantial support in factual evidence. The Solicitor has consistently sought to foreclose such inquiry. Neither his tailor-made statistics nor his eleventh-hour legal argument based upon a case having nothing to do with stock acquisitions should be allowed to defeat the proper inquiry. Such inquiry clearly shows that none of Transamerica's stock acquisitions has so lessened competition as to injuriously affect the public interest.

CONCLUSION

The argument presented by the Solicitor in support of the Complaint is artificial and will not stand the test of factual inquiry or legal authority. It is most significant that, after this two-year inquiry into the questions whether competition has been substantially lessened or there was any probability of creating a monopoly as a result of Transamerica's stock acquisitions, the Solicitor rejects the record completely as being irrelevant. He grasps a Supreme Court decision, having nothing to do with Section 7 or stock acquisitions but relating to a wholly different business practice, and asserts that that decision makes unnecessary the statutory inquiry which every court that ever considered a Section 7 charge has made.

He has failed to prove that the challenged stock acquisitions are of competing companies so as to fall within the substantive purview of Section 7, and his only concession to the existence of competition as an issue in the case is confined to the volumes of statistics which he has rearranged and re-grouped in order, it would seem, that their bulk, if nothing else, would give them probative value. To compound the artificiality of his argument, he claims with countless characterizations but with no proof whatsoever that Transamerica Corporation controls and directs the operations of the Bank of America.

No showing of a violation of Section 7 of the Clayton Act has been made, and the hearing officer should recommend immediate dismissal of the Complaint.

Respectfully submitted,

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April 30, 1951