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

IN THE MATTER OF :

TRANSAMERICA CORPORATION :

BRIEF OF COUNSEL FOR THE BOARD

Dec 31, 1948 ?

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There are now before the Board four motions for decision. They are: (1) Motion to dismiss for alleged lack of jurisdiction; (2) Motion to dismiss for alleged lack of due process of law; (3) Motion to dismiss for alleged improper venue, alleged insufficiency of the allegations of the complaint and alleged failure to comply with the Administrative Procedure Act; and (4) Motion to disqualify Governor Clayton. We shall discuss these motions in that order in this memorandum. In doing so we shall refer herein to the two briefs filed by counsel for respondent as follows: Br. 1 to refer to the brief filed herein on the date of oral argument, and Br. 2 to refer to the one filed on December 27th.

MOTION TO DISMISS FOR ALLEGED LACK OF JURISDICTION

At the oral argument we demonstrated why each of the seven grounds stated in support of this motion is without merit. (R. 87-114) Here we shall confine our discussion to the two principal grounds which have been argued at length in respondent's briefs. Br. 1 in its entirety, and more than a quarter of Br. 2 (pp. 42-57) have been devoted to

showing (a) that commercial banks are not "engaged in commerce" within the meaning of Section 7, and (b) that in any event the Board lacks authority to enforce Section 7 against Transamerica because Transamerica is not itself a bank, banking association or trust company.

ARGUMENT THAT COMMERCIAL BANKS ARE NOT "ENGAGED IN COMMERCE"

More space by far is devoted to this argument in respondent's briefs than to any other. A host of reasons are suggested why the Board should conclude that commercial banks are not "engaged in commerce" within the meaning of Section 7 and hence why Transamerica should be permitted to continue unchecked in its march to absolute monopoly of commercial banking in the west. As we shall show, none of the reasons urged in support of the argument is sound. Before doing so, however, we wish to stress the fact that there is no reason why the Board should consider any of them at this time.

This is a motion to dismiss for lack of jurisdiction. For the purposes of the motion the jurisdiction of the Board must be determined from the allegations of the complaint. The situation in this respect is no different from that which obtains when the question of jurisdiction is raised before a District Court. In such a case the District Court's jurisdiction is to be "determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not." Hart v. Keith Exchange, 262 U. S. 271, 273 (1923). Cf. Utah Fuel Co. v. Coal Commission, 306 U. S. 56, 60 (1938).

In the instant case Paragraph 4 of the Board's complaint specifically and unequivocally charges that "Each of the banks so acquired and now operated and controlled by respondent is engaged in interstate commerce within the purview of Section 7 of the Act of Congress approved October 15, 1914 (Clayton Act)." This allegation, like all of the others in the complaint, must be proved during the hearing. For the purposes of this motion, however, it must be taken as true. Cf. Utah Fuel Co. v. Coal Commission, supra. It follows, therefore, that unless the Board can say, without awaiting proof of the allegation and wholly upon its own recognition of judicially noticeable facts, that the allegation is not susceptible of proof and is frivolous, the motion to dismiss on this ground should be denied. Cf. Hart v. Keith Exchange, supra. This is not to argue that if, upon the completed record, the Board finds insufficient evidence to support the allegations of the complaint, it could not then find that the Transamerica banks are not "engaged in commerce". It is to argue, however, that unless, as indicated above, there be judicially recognizable matter which precludes any possibility in this case that proof could be forthcoming to demonstrate that the banks which Transamerica has acquired in violation of Section 7 are "engaged in commerce", the Board's jurisdiction is clear to afford counsel an opportunity to produce that proof.

Counsel for respondent have not pointed to any facts respecting the business of commercial banks, judicially recognizable by this Board, which require the conclusion that banking can never be "commerce".

Indeed, aside from the grudging admission contained in Br. 1 (p. 9) that "banks make incidental use of interstate transportation and communication facilities", and the statement made in oral argument that the activities of banks "unquestionably have an effect upon commerce" (R. 71-72), counsel for respondent have not discussed the factual aspects of commercial banking at all. Of course the obvious reason for counsel's failure to develop this most crucial aspect of the matter (while developing, in most meticulous detail, their purely technical points) is that to have done so would have been to show that, far from not constituting "commerce", the everyday activities of commercial banks are inextricably woven into and constitute an integral part of interstate commerce in its most basic sense.

In his oral argument counsel for respondent challenged the Board to make use of what it "knows" about the operations of banks in deciding this question. He stated that: "this Board knows, as a matter of fact, that banks are not engaged in commerce as that phrase is used in the Clayton Act." (R. 71) Repeatedly in Br. 2 counsel advert to what the Board "knows" in arguing various of their points. We, too, suggest that the Board draw upon its great wealth of expert knowledge in the banking field to assist it to a proper conclusion, and we can suggest facts which the Board "knows" and of which we think it may properly take judicial notice.

As one of the three federal bank supervisory agencies the Board "knows" that the two principal activities of a commercial bank are

the acceptance of deposits subject to check and the making of loans and investments. It "knows" that both of these activities involve constant "commercial intercourse" between such bank and others engaged in similar activities in all of the 48 states. Thus, every commercial bank holds itself out to accept for deposit both currency and checks. The Board of course "knows" that the number of checks issued each year which clear through the Federal Reserve System exceeds two billions (Annual Rept., Board, 1947, p. 69), and that this number is probably more than doubled by those which are cleared or paid through other means. Currency of course is rarely used in effecting either the intrastate or interstate transfer of funds; "currency payments probably comprise not over 10 per cent of total money payments in this country". Banking Studies, p. 304. On the other hand, the volume of check payments are annually well over a trillion dollars. Federal Reserve Bulletin, November 1948, p. 1382. Of this staggering amount the Board "knows" that a very great amount is cleared through the Federal Reserve System and involve payments effected across state lines.[1/]

1/ About half of the dollar amount of check payments handled through the Federal Reserve Banks involve interdistrict transactions. Of this total the amount of interstate transactions is considerably higher because all of the Federal Reserve Districts embrace more than one state. Furthermore, the total of check payments which involve interstate transactions carried on through correspondent banks throughout the country would likewise greatly increase the total of such interstate payments effected through the commercial banking system.

The Board "knows" that when a commercial bank accepts for deposit checks drawn on other banks, both within and outside the state of deposit, the acceptance of such checks instantly sets in motion a chain of events which is not completed until such checks have actually been collected or returned to the receiving bank, in which event they are charged back against the account of the customer who deposited them; that this process of collection involves the daily transportation of such checks by means of the instrumentalities of interstate commerce; that it likewise involves the daily transfer between banks across state lines of the funds represented by such checks, also via the instrumentalities of interstate commerce; and that the same process of transportation and transmission of funds is employed in reverse when checks come from without the state which are drawn upon the bank of deposit.

The Board "knows" that, as an adjunct to its commercial deposit business, the average commercial bank accepts for collection maturing bonds and coupons payable outside the state, as well as bills of exchange and drafts (frequently with bills of lading attached) covering the interstate transportation and sale of goods; that they sell or cash traveler's checks; that they obtain for customers information concerning, and arrange the purchase and sale of, securities listed on the various stock exchanges throughout the country as well as those sold "over-the-counter" in various cities. All of these transactions, like those attendant upon the bank's activities in accepting commercial deposits, involve the interstate transfer of funds and intelligence through the means of interstate transportation and communication.

The other principal activity of a commercial bank is that of making loans and investments. The Board "knows" that the average commercial bank makes loans, among others, to persons and companies which are daily engaged in the manufacture, production, sale or purchase of goods destined to move in the channels of interstate commerce, and that such goods in many instances could not be manufactured, produced, bought or sold if such loans were not made. Consequently, the making of such loans is the very foundation upon which the structure of much of the nation's commerce is built. They are as essential to the consummation of the ultimate interstate transactions in all types of goods as are the rails and rolling stock of a railroad in physically transporting the same.

On the investment side of the bank's operations, the Board "knows" that every such bank invests considerable portions of its funds in United States Government securities, in securities of states and municipalities located in various parts of the country, as well as in eligible securities of corporations located throughout the United States. It "knows" that the purchase and sale of these securities likewise involve the constant interstate movement of intelligence, funds and the physical securities which are the subject of purchase and sale by the bank. So that here are other examples of daily commercial intercourse between banks and others located in different states.

The above examples are but a few which demonstrate the essentially interstate character of the commercial banking business, all of

which the Board "knows" as a result of its more than thirty years' experience in supervising the member banks of the Federal Reserve System. They show that every commercial bank, whether large or small, could not open its doors for a single day and confine its operations to purely intrastate activities. To argue that these facts support any other theory than that all commercial banks are "engaged in commerce" would, we submit, be utterly inconsistent with reality. And this observation seems doubly apposite when we consider those facts in the light of the definition of "commerce" given in 1824 by Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 189-190: "Commerce undoubtedly is traffic, but it is something more: It is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all of its branches . . ." Or, as was pointed out by the Court over a hundred years later, "for more than a century it has been judicially recognized that in a broad sense [commerce] embraces every phase of commercial and business activity and intercourse." Jordan v. Tashiro, 278 U. S. 123, 127-128.

This brings us to a final and conclusive reason why what the Board "knows" requires that it fully anticipate that proof can and will be produced in this proceeding to show that banks are "engaged in commerce". It is that the banking business of one of the Transamerica banks has already been judicially declared to be "commerce". In N. L. R. B. v. Bank of America N. T. & S. A., 130 F. (2d) 624, 626 (cert. denied 318 U. S. 792), the Circuit Court of Appeals for the Ninth Circuit, in

speaking of the activities of the Bank of America, made the following statement:

> "But apart from the undeniable effect of respondent's operations upon commerce among the states and with foreign nations, it is itself directly and every hour of the business day engaged in interstate activities not describable otherwise than as commerce. To mention but a few of many examples, it sends to banks elsewhere notes, bills, coupons, and drafts for collection, a very large percentage of which latter are drafts covering bill-of-lading shipments of commodities to points outside of California or to foreign countries. It makes telegraphic transfers of money in huge sums to places in other states. And it receives like transfers of money from banks outside the borders of California. Like the news association held to be within the reach of the Act in Associated Press v. N. L. R. B., 301 U. S. 103, 128, 129, 57 S. Ct. 650, 81 L. Ed. 953, respondent's operations 'involve the constant use of channels of interstate and foreign communication.' These activities 'amount to commercial intercourse and such intercourse is commerce within the meaning of the Constitution,' Associated Press v. N. L. R. B., supra, 301 U. S. at page 128, 57 S. Ct. at page 654, 81 L. Ed. 953. And see Electric Bond & Share Co. v. Securities and Exchange Commission, 303 U. S. 419, 432, 433, 58 S. Ct. 678, 82 L. Ed. 936, 115 A. L. R. 105; Gibbons v. Ogden, 9 Wheat. 1, 189, 229, 230, 6 L. Ed. 23."2/

On the basis of the considerations outlined above, we submit (1) that the allegation in the complaint that the Transamerica banks are engaged in commerce must be taken as true for the purpose of deciding this ground of respondent's motion, and (2) that, in any event, what the Board "knows" about the commercial banking business establishes the

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2/ In Br. 2 (p. 46) counsel for respondent attack the excerpt as mere dictum. But reference to the statute under which the jurisdiction of the N. L. R. B. attached shows that the Act applies to labor disputes "affecting commerce" and that the expression "affecting commerce" is defined in the Act as meaning "in commerce, or burdening or obstructing commerce * * *" (underscoring ours) It follows, therefore, that the passage quoted rises above the quality of mere dictum; it is directly responsive to the definition contained in the Act itself.

interstate character of that business. Either one or both of these propositions is sufficient to dispose of respondent's argument that commercial banks are exempt from the prohibitions of Section 7. However, we do not mean by this to suggest that there are not ready answers to the many technical contentions made on behalf of respondent to the effact that banking is not commerce within the meaning of Section 7. Those contentions may all be easily answered, and we turn now to a brief discussion of them.

We have already demonstrated the fallacy of counsel's contention (unsupported by any factual discussion) that the commercial banking business is not conducted across state lines. (Br. 1, p. 16) Most of their remaining contentions on this point seem directly patterned upon arguments made -- and rejected -- in the case of United States v. Southeastern Underwriters Association, 322 U. S. 533 (1944), in which the Supreme Court recently decided that the business of insurance, as presently conducted, is "commerce" and within the reach of the Sherman Act. In fact, an examination of the dissenting opinions in that case convinces us that respondent's arguments have been extracted in their entirety from such opinions. The first of these is the argument that banking was not thought of as commerce at the time of the enactment of the Clayton Act and that Congress, therefore, did not intend to include banking within the prohibitions of Section 7. In support of this position counsel refer to a statement contained in a book written by an economist in 1931 who is quoted as saying "The banking business is not

commerce."[3] They also refer to one Supreme Court decision which, although not involving the business of banking, nevertheless by analogy is said to demonstrate that banking was not regarded as "commerce" by that Court at the time of the enactment of the Clayton Act.[4] These points are augmented at considerable length in Br. 2, p. 42, et seq. Examination of the Underwriters case shows that these identical contentions were made against a finding that the business of insurance is commerce. In that case, however, counsel for the underwriters were able to make a much more convincing showing in support of their factual allegation. There, as a dissenting opinion pointed out, counsel were able to present an "unbroken line of decisions of the [Supreme] Court beginning

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3/ Br. 1, p. 7, Cartinhour, "Branch, Group, and Chain Banking", p. 172. The author's statement that "the banking business is not commerce" is followed immediately by a further statement which elucidates his reasons for that conclusion. He said: "It is well established that the element of transportation is essential to commerce or constitutes commerce itself. It is also essential that the subject of transportation be a commodity." As we have shown above, however, the business of banking does to an overwhelming extent involve the element of interstate transportation, and the Supreme Court has long since rejected the idea that the subject of transportation must be a "commodity", as Cartinhour uses that term. See Caminetti v. United States, 242 U. S. 470 (transportation of a woman); Brooks v. United States, 267 U. S. 432 (transportation of a stolen automobile); Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1 (transportation of intelligence).

4/ Nathan v. Louisiana, 8 Howard (49 U. S.) 73 (1815). This case held that a state might legally require a license tax on the occupation of a foreign exchange broker. Its reasoning, and that of the insurance cases which followed it, were of course overruled in the Underwriters case. See also the destructive analysis of Nathan v. Louisiana in Gavit, "The Commerce Clause of the United States Constitution", p. 131, et seq.

with Paul v. Virginia seventy-five years ago and extending down to the present time" specifically holding the business of insurance not to be commerce and, hence, subject to state regulation. Furthermore, those determinations had been made in cases in which insurance companies were parties and where the insurance business was talked about by name. Yet, the majority of the Court rejected them as controlling precedents and held the business of insurance to be within the reach of the Sherman Act. In so doing it stated, inter alia, as follows:

> "Appellees argue that the Congress knew, as doubtless some of its members did, that this Court had prior to 1890 said that insurance was not commerce and was subject to state regulation, and that therefore we should read the Act as though it expressly exempted that business. But neither by reports nor by statements of the bill's sponsors or others was any purpose to exempt insurance companies revealed. And we fail to find in the legislative history of the Act an expression of a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power. Cf. Helvering v. Griffiths, 318 U. S. 371; Parker v. Motor Boat Sales, 314 U. S. 244. We have been shown not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power. On the contrary, all the acceptable evidence points the other way. That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements such as the indictment here charges admits of little, if any, doubt. The purpose was to use that power to make of ours, so far as Congress could under our dual system, a competitive business economy."

Counsel also refer to a number of cases which have been decided since 1914 and which are alleged to hold that banking is not "commerce". It is enough for the purposes of this reply simply to point out that none of those cases involved the business of commercial banking, and that, contrary to counsel's bald assertion (Br. 2, p. 43), none of

them hold that "a national bank is not engaged in commerce". Consequently it can hardly be said that they overcome the effect of the ruling of the Ninth Circuit Court of Appeals in N. L. R. B. v. Bank of America, supra, that the Bank of America "is itself directly and every hour of the business day engaged in interstate activities not describable otherwise than as commerce".

Another of respondent's principal contentions, likewise made and rejected in the Underwriters case, is that official action by the Board and the conduct of Congress since the enactment of the Clayton Act in 1914 demonstrate that both the Board and Congress have consistently remained of the opinion that the business of banking is not commerce. Thus, respondent points to an opinion of the Board's General Counsel published in 1933 which suggests that Congress might legitimately cause the creation of a unified banking system to protect interstate commerce but that such conclusion was "not based upon the theory that the banking business is itself interstate commerce." Again, counsel point to a number of statements made before Congress by Board representatives seeking bank holding company legislation that the Board lacked authority to control the acquisition of banks by bank holding companies.5/ They also point to

5/ Nothing in these statements is in any sense contradictory of the power now asserted. The statements to Congress must be interpreted in the setting in which they were made. So considered they show that the Board was seeking a revision of existing bank holding company legislation, and the statements made were made concerning the deficiencies of that purely supervisory legislation. Furthermore, the transcript of the hearings conducted by the House Committee on Banking and Currency shows that, when appearing before that group on July 16, 1947, Mr. Eccles pointed out that the antitrust statutes might provide a method for dealing with bank holding companies which had expanded beyond lawful limits. He said: "I think, as a last resort, that is possibly a way to get at it. And I think that may be done and could be done, either by the Board or by the Attorney General."

Congressional appearances of Board representatives seeking an amendment to Section 7 of the Clayton Act to include prohibitions against the acquisition of assets in addition to those respecting the acquisition of stocks already contained in the Act.6/ So, too, they quote an excerpt from "Branch, Chain and Group Banking", published by the Board in 1941, that: "The Board had no means other than conditions of membership through which to control the acquisitions of bank stocks by corporations". (p. 132)

With respect to the Congressional attitude counsel adverts to the fact that in the years following the enactment of the Clayton Act Congress "repeatedly vested jurisdiction with respect to the expansion of national banks in the Comptroller of the Currency rather than in the Reserve Board"; that in the Banking Act of 1933 only state member banks are subjected to the limitation of Section 5136 of the Revised Statutes relating to investments by banks; and that Section 23 of the Banking Act of 1933 authorized the Comptroller to approve additional branches for national banks but in so doing prescribed no limitations having to do

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6/ Here, too, counsel have distorted the meaning of such appearances. Since the decisions of Federal Trade Commission v. Western Meat Co., 272 U. S. 554 (1926), and Arrow-Hart & Hegeman v. Federal Trade Commission, 291 U. S. 587 (1934), the prohibitions of Section 7 had been held not to apply to acquisitions of assets. The Federal Trade Commission had tried for a number of years to secure an amendment which would place assets in the same category as stocks. As originally presented, their amendment would have applied only in those situations subject to the Commission's jurisdiction. The purpose of the Board's appearances was to extend that amendment to the banking field, a move that plainly implies that the Board felt it had jurisdiction under Section 7 respecting acquisition of bank stocks having the prohibited effect.

with the effect of the establishment of such branches upon competition. And there is more to the same general effect in Br. 2, p. 47, et seq.

The short answer to each of these points is that when similar arguments of a far more persuasive nature were presented in the Underwriters case, they were rejected by the Supreme Court. There, in addition to the "unbroken line" of cases, above referred to, in which the Supreme Court itself had specifically and unequivocally declared the business of insurance not to be commerce, the Court's attention was also called to the fact that, after the enactment of the Sherman Act, a number of proposals were made to the Congress and rejected by it, which were predicated upon the express assumption that the Sherman Act did not reach the business of insurance. Thus, as pointed out in the dissenting opinion of Chief Justice Stone:

> "In 1904 and again in 1905 President Roosevelt urged 'that the Congress carefully consider whether the power of the Bureau of Corporations cannot constitutionally be extended to cover interstate transactions in insurance.' The American Bar Association, executives of leading insurance companies, and others joined in the request. Numerous bills providing for federal regulation of various aspects of the insurance business were introduced between 1902 and 1906 but the judiciary committees of both House and Senate concluded that the regulation of the business of marine, fire and life insurance was beyond Congressional power. Sen. Rep. No. 4406, 59th Cong., 1st Sess.; H. R. Rep. No. 2491, 59th Cong., 1st Sess., 12-25. The House committee stated that 'the question as to whether or not insurance is commerce has passed beyond the realm of argument, because the Supreme Court of the United States has said many times for a great number of years that insurance is not commerce.' (p. 13.)
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> "And when in 1914, one year after the decision in New York Life Ins. Co. v. Deer Lodge County, supra, Congress by the Clayton Act, 38 Stat. 730, amended the Sherman Act and defined the term 'commerce' as used in that Act, it gave no indication that it questioned or desired this Court to overrule the decision of the

Deer Lodge case and those preceding it. On the contrary Mr. Webb, who was in charge of the bill in the House of Representatives, stated that 'insurance companies are not reached as the Supreme Court has held that their contracts or policies are not interstate commerce.' 51 Cong. Rec. 9390."

See also notes 6, 7, 8, 9 and 10 to Justice Stone's opinion.

Just as the majority of the Court in effect overruled the contention that the Court's pronouncements prior to the enactment of the Sherman Act were conclusive on the question of whether the business of insurance was covered by that Act, so also did it reject the notion that these many manifestations of Congress' attitude were conclusive in establishing that the business of insurance was outside the proscriptions of the Sherman Act. In so doing the majority stated:

"Appellees further argue that, quite apart from what the Sherman Act meant in 1890, the succeeding Congresses have accepted and approved the decisions of this Court that the business of insurance is not commerce. They call attention to the fact that at various times since 1890 Congress has refused to enact legislation providing for federal regulation of the insurance business, and that several resolutions proposing to amend the Constitution specifically to authorize federal regulation of insurance have failed of passage. In addition they emphasize that, although the Sherman Act has been amended several times, no amendments have been adopted which specifically bring insurance within the Act's proscription. The Government, for its part, points to evidence that various members of Congress during the period 1900-1914 considered there were 'trusts' in the insurance business, and expressed the view that the insurance business should be subject to the antitrust laws. It also points out that in the Merchant Marine Act of 1920 Congress specifically exempted certain conduct of marine insurance companies from the 'antitrust' laws.

"The most that can be said of all this evidence considered together is that it is inconclusive as to any point here relevant. By no means does it show that the Congress of 1890 specifically intended to exempt insurance companies from the all-inclusive scope of the Sherman Act. Nor can we attach significance to the omission of Congress to include in its amendments to the Act an express statement that the Act covered insurance. From the beginning Congress has used

language broad enough to include all businesses, and never has amended the Act to define these businesses with particularity. And the fact that several Congresses since 1890 have failed to enact proposed legislation providing for more or less comprehensive federal regulation of insurance does not even remotely suggest that any Congress has held the view that insurance alone, of all businesses, should be permitted to enter into combinations for the purpose of destroying competition by coercive and intimidatory practices."

With regard to the official acts and opinions of the Board, which are alleged to show that the Board has consistently been of the opinion that the business of banking is not commerce, little need be said. If neither the manifestations by Congress, both at and after the enactment of the Sherman Act, showing its opinion to be that insurance is not commerce, nor the long line of previous decisions holding to the same specific effect, were held to be controlling by the Supreme Court in determining the reach of the Sherman Act, then surely the opinion of the Board, even if entertained and expressed, that the business of banking is not commerce would hardly be held to be controlling in determining the reach of the Clayton Act. Presumably, counsel's reference to these matters is premised on the theory that they constitute administrative interpretation, which casts some weight in the scales for determining the extent of the Board's jurisdiction. But the plain fact of the matter is that the Board has never interpreted its authority to enforce Section 7, and none of the references made by counsel can be so construed. Hence, the situation here is different from that which obtained in Federal Trade Commission v. Bunte Bros. Inc., 312 U. S. 349, 352, cited by respondent, wherein the court, after stating that "Authority actually granted by

Congress of course cannot evaporate through lack of administrative exercise", went on to say "the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." In that case the majority interpreted the failure of the Federal Trade Commission for over thirty years to assert jurisdiction to prevent unfair trade practices of a wholly intrastate character as evidence of its lack of such power. Inasmuch as the Commission had conducted hundreds of hearings over the life of that statute, not one of which had attacked practices not of an interstate character, its continued failure so to do might legitimately be considered relevant in determining the scope of the power actually conferred upon the Commission.7/ But the situation there presented was vastly different from that presented here. As stated above, the Board has never attempted to interpret its powers to enforce Section 7 of the Clayton Act, and the reason for this is obvious. Until now no situation has developed in the commercial banking field which calls for the exercise of such power. It was not until Transamerica attained the percentage of control which the complaint alleges it now possesses

7/ But see the dissenting opinion of Justice Douglas (312 U. S. 359) wherein it was pointed out that the failure of the Commission to assert jurisdiction was not "relevant" to the question of the extent of the power granted. He said: "Mere nonuse does not subtract from power which has been granted. The host of practical reasons which may defer exhaustion of administrative powers lies in the realm of policy. From that delay we can hardly infer that the need did not or does not exist."

over the banking offices, deposits and credit in the five States of California, Oregon, Washington, Arizona and Nevada that the need for resort to these powers became apparent. Obviously the Board's failure to assert power to enforce Section 7 under these circumstances can have no significance.

The final principal contention urged in respondent's briefs on this point is that the interlocking directorate provisions of Section 8 of the Clayton Act establish a Congressional intent to exempt banks from the prohibitions of Section 7. The argument is that when Congress legislated to outlaw interlocking directorates among banks, it did so only with respect to those banks which had been chartered by the Federal Government. This, they say, indicates that Congress deemed itself without power to prohibit the same result in state banks. Therefore, it is argued that Congress could not have intended to reach state banks in enacting Section 7.

There are a number of answers to this argument. The first is that there is conclusive evidence that Congress in enacting Section 7 intended to reach all banks. When the bill was being considered by the Senate, after having been passed by the House, an amendment was offered by Senator Cummins to what is now Section 7 of the bill, which amendment contained the following exemption: "Provided, That this section shall not apply to banks, banking institutions, or common carriers". (Congressional Record, Vol. 51, p. 14473, August 31, 1914) This amendment was debated at some length and finally rejected by the Senate (p. 14476). It is interesting to note that in the course of the debate Senator Poindexter,

in opposing the amendment proposed by Senator Cummins, made the following statement:

> "I am also opposed, Mr. President, to weakening the prohibition of corporate stock ownership of competing companies by making an exception of so-called investment companies. The Senator mentions insurance companies and he mentions savings banks. Among the abuses of monopoly in recent years have been the control of banks and the control of insurance companies as investing agencies by those persons who were forming a monopoly."

Having thus considered and rejected an amendment which would specifically have exempted banks (without classification as between state or federal), it can hardly be said that in enacting the section Congress intended that they should be exempted nevertheless.

Even if we did not have the light which the rejection of Senator Cummins' amendment sheds upon the question, however, there still remains the fact that, in limiting the application of Section 8 to federally chartered banks, Congress did no more than indicate a doubt as to its power to interfere with the internal affairs of state banks. But this does not indicate a positive intent on the part of Congress to exempt from the sweeping language of Section 7 any persons or companies legitimately embraced by such language. The language of Section 7 is all-inclusive in its terms: "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" having the prohibited effect. "Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." United States v. Southeastern Underwriters

Association, supra, p. 553. "That Congress wanted to go to the utmost extent of its Constitutional power in restraining . . . monopoly . . . such as the [complaint] here charges admits of little, if any, doubt." Id., p. 558.

A final word on this subject. While not necessary for present purposes counsel for the Board want to make it plain that they also feel that the "affectation" doctrine is applicable here. In other words, they are satisfied that a showing that the banks dominated by Transamerica substantially "affect" commerce or that a monopoly of such banks would similarly "affect" commerce renders such banks "engaged in commerce" within the meaning of Section 7. This contention is predicated upon the following reasoning: The "affectation" doctrine is applicable to the Sherman Act. (See extended discussion of the evolution of this doctrine and its application in Sherman Act cases contained in Mandeville Farms v. Sugar Co., 334 U. S. 219, 229-235.) Under that Act, then, a monopoly of commercial banking could be reached and dissolved, because even counsel for respondent admit that banks "unquestionably have an effect upon commerce". (R. 71-72) The purpose of the Clayton Act was "only to supplement" the Sherman Act and "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation". (Senate Rept. 698, 63rd Cong., 2nd Sess.) It would therefore be an anomaly to suggest that, while a banking monopoly as a fait accompli is within the reach of the Sherman Act because banks "affect" commerce, an incipient banking monopoly is not within the reach of the

Clayton Act because banks are not "engaged in commerce". The evident Congressional purpose was that the two acts should be given a similar construction so that they could provide effective and complementary means for dealing at various stages with the same evils.

ARGUMENT THAT BOARD LACKS JURISDICTION BECAUSE TRANSAMERICA IS NOT A BANK

Respondent argues that, even if Section 7 be construed as applying to banks, the Board's authority under Section 11 to enforce compliance therewith is limited only to "banks, banking associations, and trust companies". Therefore, it is argued, the Board has no authority to enforce Section 7 against Transamerica because Transamerica is not a "bank, banking association or trust company". (Br. 1, pp. 31-34, Br. 2, pp. 55a-57)

The answer to this contention is obvious. Each of the enforcement agencies mentioned in Section 11 is under a duty to police the particular field in which it has peculiar competence, and each must enforce the Act where "applicable" to a particular "character of commerce". The Board's function is to enforce the Act where "applicable to banks, banking associations, and trust companies". "Applicable" means "pertinent" or "having relevance". (Webster's Collegiate Dictionary and Webster's New International Dictionary, 2nd Ed.) It follows therefore that, under the plain language of Section 11, the Board has to enforce Section 7 whenever the violation of that section is one "having relevance" to the "character of commerce" engaged in by "banks, banking associations, and trust companies".

And this has been the construction placed upon Section 11 by the Circuit Court of Appeals for the Seventh Circuit in the only case

raising the question which respondent raises. In Fruit Growers' Express Incorporated v. Federal Trade Commission, 274 Fed. 205 (1921), the Trade Commission asserted jurisdiction under Section 11 to determine whether Fruit Growers' Express had violated Section 3 of the Clayton Act in entering into a certain contract with a railroad by which the latter was required exclusively to use equipment owned by the former in the transportation of fruits and vegetables. The Court held that, even though Fruit Growers' Express was not a common carrier, the Commission was without jurisdiction because the subject matter of the controversy involved common carriers, and that jurisdiction to enforce the Act in such cases was placed in the Interstate Commerce Commission. The Court said:

> "The words 'where applicable to common carriers,' in section 11 of the Clayton Act, must mean that where the facts involve common carriers, or the business of common carriers, then the jurisdiction is solely in the Interstate Commerce Commission. The action complained of involved common carriers and tended to very greatly affect their business. Respondent was therefore without jurisdiction."

But respondent argues that for the Act to be given this construction would mean that if Transamerica made prohibited acquisitions of stock in railroad companies, radio companies, airplane lines, and other corporations, it would be subject to separate actions under Section 11 by the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board and the Federal Trade Commission.

Such is precisely our contention, and we submit that it is the only one consistent with the plainly expressed intent of the statute.

MOTION TO DISMISS FOR ALLEGED LACK OF DUE PROCESS

This motion is based entirely upon the admitted fact that the Board does not possess the power of subpoena. From this factual premise respondent argues that it cannot obtain a fair trial in the present proceeding and that, if Section 11 be construed to authorize the Board to proceed in spite of its lack of subpoena power, such Section is unconstitutional because violative of the due process clause of the Fifth Amendment.

Here again we wish to preface our reply to respondent's arguments by suggesting that for the Board now to consider and decide this motion would be premature. It has long been settled law that the due process requirements of the Constitution do not require any particular form or method of administrative procedure. Those requirements are met if respondent "has reasonable notice, and reasonable opportunity to be heard and to present [its] claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it." Hurwitz v. North, 271 U. S. 40, 42 (1926). Cf. Morgan v. United States, 304 U. S. 1 (1938). Until the hearings have been completed herein it obviously will be impossible to tell whether respondent has had a "reasonable opportunity to be heard". At that time it may well appear that the absence of subpoena power in the Board has not in any way interfered with that opportunity. In such event, of course, respondent's present contention becomes moot. Only if the record then shows that the lack of compulsory process has prevented respondent

from adequately defending itself against the charges of the complaint does the need arise for the Board to determine whether, in spite of this defect, respondent has been accorded its full rights under the Fifth Amendment. In the light of these observations counsel for the Board respectfully suggest that respondent's motion be denied at this time, without prejudice to respondent's right to renew the same upon the termination of the hearings.

This suggestion aside, however, the fact remains that the Supreme Court already has decided that the right of subpoena is not an indispensable element of procedural due process in an administrative action. In Low Wah Suey v. Backus, 225 U. S. 460 (1912), this question was decided in unequivocal language. The Court said:

> "It is next averred that the Secretary of Commerce and Labor and the Commissioner of Immigration refused to take the necessary steps to enforce the attendance of witnesses to testify on behalf of the petitioner, although it is said that the immigration officers did use their power to procure witnesses to testify against her; and that had such witnesses as she wished been produced, she says, upon information and belief, that the testimony in the record would have been such as to require a different order by the Secretary of Commerce and Labor, and sufficient to prevent the issuing of the order of deportation. The statute does not give authority to issue process to compel the attendance of witnesses. It does not appear from the record that any witnesses offered on behalf of the petitioner were not heard or that anything was done to prevent the production of such witnesses, and the nature and character of the proposed testimony offered is not set forth. This objection was urged in the Yeung How v. North case, and the lack of power to compel witnesses by the immigration officer was alleged as depriving the appellant of due process of law. This court dismissed the case upon reference to other cases which indicate its view that no constitutional right was thereby taken from the petitioner. The former cases have sustained the right to provide for such hearing, and nothing was done to prevent the production of such witnesses as the petitioner might have seen fit to produce. (Underscoring supplied)

And this ruling has its exemplification in another and vitally important branch of the government. As we pointed out at the oral argument, the Post Office Department, without enjoying the subpoena power, has conducted approximately a hundred hearings a year for almost three-quarters of a century to determine whether "fraud orders" should issue against the respondents in such cases barring their further use of the mails in carrying on their businesses. In all that time, during which such proceedings have been held reviewable in the courts (see School of Magnetic Healing v. McAnnulty, 187 U. S. 94 (1902), and cases cited in 39 U. S. C. A. 259, note 10), no court has held that the Postmaster's lack of subpoena power deprived the respondents in such hearings of due process of law. However, there is authority to the contrary. In McTaggart Supply Co. v. Hannegan (Civil Action No. 3254-47) a proceeding was commenced in the District Court of the United States for the District of Columbia to secure judicial reversal of an order of the Postmaster denying mailing privileges to the plaintiff. In its suit plaintiff alleged, inter alia, that it had been denied a fair trial because unable to secure the attendance of a certain person "whose testimony would show that the therapeutic effects of [plaintiff's] Compound were not misrepresented in any way." Notwithstanding this allegation the District Court entered summary judgment in favor of the Postmaster General.[8/] (This case is unreported.)

8/ See also the learned discussion of this whole question by the Supreme Court of Kansas in Brinkley v. Hassig, 289 Pac. 64 (1930).

Counsel for respondent attempt to avoid the ruling in the Low Wah Suey case and the presumption which flows from the long established practice of the Post Office Department by arguing that those two types of situations require the application of different legal considerations from those applicable here. Thus, in discussing the Low Wah Suey case respondent states that there the Supreme Court was dealing with the alien problem, a problem which they describe as "predicated upon purely political considerations", and that "proceedings for the exclusion of aliens . . . are in no sense comparable to the antitrust laws and the quasi-judicial functions of administrative agencies . . ." (Br. 2, pp. 36-37) In speaking of the fraud order hearings of the Post Office Department respondent states that such hearings do not affect "a property right" and that "such proceedings are clearly not analogous to a quasi-judicial administrative proceeding to impose a penalty by requiring a divestment of property". (Br. 2, p. 39)

But these statements fall far short of establishing the difference which respondent must prove if it is to avoid the controlling effect of the decision in Low Wah Suey or the presumption arising from the long established practice of the Post Office Department. Indeed the only proof which could help respondent in this respect would be to show that the Fifth Amendment casts no protection about aliens or those who use the mails; otherwise, we submit, such persons and respondent stand on identical legal footing so far as the requirements of procedural due process are concerned. That respondent made no attempt to meet this

burden is not surprising when we consider that the authorities are all the other way. The Supreme Court has ruled that an alien is entitled to all of the safeguards of due process in a proceeding looking to his deportation. Thus, he is entitled to notice (Tisi v. Tod, 264 U. S. 131, 134), a fair hearing (Bridges v. Wixon, 326 U. S. 135, 154;[9] Chin Yow v. United States, 208 U. S. 8, 12), and an order supported by some evidence (Vajtauer v. Commissioner, 273 U. S. 103, 106; Zakonaite v. Wolfe, 226 U. S. 272, 274). And the same is true of fraud order hearings because the Supreme Court has said that even the Congressional power over the mails must be exercised in a manner "consistent with the rights of the people as reserved by the Constitution." Burton v. United States, 202 U. S. 344, 371.[10] Or, as more fully stated by the Court in Pike v. Walker, 121 F. (2d) 37, 39 (App. D. C., 1941):

> "It would be going a long way, therefore, to say that in the management of the Post Office the people have no definite rights reserved

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9/ As stated by the Court in this case:

> "Here the liberty of an individual is at stake. Highly incriminating statements are used against him--statements which were unsworn and which under the governing regulations are inadmissible. We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty--at times a most serious one--cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

10/ See also the much quoted dissenting opinion of Justice Brandeis in Milwaukee Publishing Co. v. Burleson, 255 U. S. 407, 430, wherein he said that the power of Congress over the postal system, "like all of its other powers, is subject to the limitations of the Bill of Rights".

by the First and Fifth Amendments of the Constitution, and if they have, it would follow that in administering the laws established to protect the mail and the regulations thereunder the duty of the Postmaster General would be,--to use the language of Justice Brandeis in the Burleson case, supra,--that:

"'In making the determination he must, like a court or a jury, form a judgment whether certain conditions prescribed by Congress exist, on controverted facts or by applying the law. The function is a strictly judicial one, although exercised in administering an executive office. And it is not a function which either involves or permits the exercise of discretionary power'--which is to say, that his authority is governed by the Acts of Congress which confer it, and by the law of the land."

See also Hannegan v. Esquire, 327 U. S. 146, 156 (1945); Jones v. Securities and Exchange Commission, 79 F. (2d) 617, 620 (C.C.A. 2nd, 1935); Jarvis v. Shackelton Inhaler Co., 136 F. (2d) 116 (C.C.A. 6th, 1943).

The cases cited by respondent are not in point. In fact, the ruling in one of them is actually misstated in its brief. In Br. 2, p. 33, counsel state that, in Bethlehem Steel Co. v. N. L. R. B., 120 F. (2d) 641 (App. D. C., 1941), "It was claimed that the National Labor Relations Board had violated the Fifth Amendment in refusing to issue subpoenas on behalf of the appellant unless he first disclosed the exact nature of the testimony he sought to produce and the facts sought to be proved thereby". Their brief then goes on to say that: "In holding that the appellant was entitled to subpoena, free of any condition precedent, the court stated"[11/] and then follows an extended quote purportedly taken

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11/ Underscoring supplied

from the Court's opinion in the case. Reference to the report will show, however, that the Court in fact rejected appellant's contention respecting its right to subpoenas and ruled that it was not deprived of due process. (See p. 651) The excerpt quoted by respondent is taken from the dissenting opinion of Judge Stephens, not from the opinion of the Court. Perhaps this obvious mistake accounts for the charge which follows respondent's misleading version of this case that: "Counsel for the Board did not cite such a case in saying appellant [respondent?] had no constitutional right to compulsory process." (Br. 2, p. 33)

Another case cited by respondent is that of Inland Steel Co. v. N. L. R. B., 109 F. (2d) 9 (C.C.A. 7th, 1940). That case dealt with a situation where the administrative agency had the statutory power of subpoena and discriminated in its use of that power by requiring the Steel Company to meet onerous conditions before that Company could obtain a subpoena -- conditions which the opinion points out did not apply to agency counsel. We agree with the conclusion of the Court that under these conditions the hearing was unfairly conducted. But the decision is of no help in determining whether the absence of the subpoena power vitiates an agency proceeding. Nor do we derive any assistance in this inquiry from the case of Anniston Manufacturing Co. v. Davis, 301 U. S. 337 (1937), also cited by respondent. That case simply held, inter alia, that an administrative hearing which embraced the elaborate procedure set out in the statute (see pp. 343-344) fulfilled the requirements of due process. Here again, however, there was no suggestion that the

absence of the subpoena power would have nullified the proceeding. And this same observation is sufficient to dispose of respondent's reference to vom Baur, Federal Administrative Law, Vol. 1, Sec. 306.

MOTION TO DISMISS FOR ALLEGED IMPROPER VENUE

We do not deem it necessary to discuss this motion at length. In their brief (Br. 2, pp. 40-41) counsel for respondent have not attempted to meet our contentions, made at the oral argument (R. 123-131) that Section 12 was intended only to liberalize the jurisdiction of the courts under the antitrust laws and was not intended to restrict the jurisdiction of administrative agencies. We then demonstrated that, at the time Section 12 was written into the Act, there was no section at all placing jurisdiction in administrative agencies to enforce any part of the Act; on the other hand, there were at that time a number of sections in the bill all of which referred to court actions, in some of which the word "proceeding" was used interchangeably with "suit" and "action".

Furthermore, as we also pointed out at the oral argument, settled administrative interpretation sustains our contention, for the Federal Trade Commission, which has conducted approximately five hundred proceedings under the Clayton Act, has uniformly ordered each hearing to be commenced in Washington, regardless of the domicile of the corporate respondent. And finally, this construction is in harmony with the plain purpose of Section 5 of the Administrative Procedure Act which states

that: "In fixing the . . . places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives." This plainly "includes an agency party as well as a private party". Senate Rept. 752, 79th Cong., 1st Sess.

MOTION TO DISQUALIFY GOVERNOR CLAYTON

More than thirty pages of respondent's Br. 2 is written in relation to this motion. Not one line, however, is devoted to discussing the only question which the motion raises, namely, whether the affidavits of L. M. Giannini and Sam H. Husbands allege facts which demonstrate the existence of personal bias in Governor Clayton. Yet, that question, we repeat, is all that is now before the Board. Counsel's failure to discuss it, therefore, is at least suggestive of their own lack of conviction that the remote occurrences mentioned in the Giannini affidavit could so far influence the present judgment of Governor Clayton that he could not render an impartial decision on the facts of this case. On this subject we adhere to our statement made at the oral argument that the charge that Governor Clayton is personally biased, made upon the basis of so flimsy a set of circumstances as is disclosed by this record, is absurd.[12/] Furthermore, we submit, the allegations of the Giannini affidavit, that the entire Board has in effect stultified itself as a result of the alleged bias of Governor Clayton (see statements on page 4, and particularly the last paragraph on page 5 of the affidavit), appear to have been so incontinently and irresponsibly made as to convince any reasonable man that little weight should be accorded the other accusations and conclusions which that affidavit contains.

12/ For the type of evidence needed to establish personal bias see In the Matter of Segal and Smith, 5 F. C. C. 1, cited in respondent's Br. 2.

As suggested above, however, the contentions which are labored at such length in respondent's brief are irrelevant to the motion. Aside from urging that the Board has the inherent power to disqualify a member for personal bias in a particular case, which we admit, they all relate to matters which need not be considered unless and until the Board has, in fact, disqualified Governor Clayton. Thus, it is argued that if the Board disqualifies Governor Clayton, the Board is required to reconsider all of its actions to date in this proceeding, including the issuance of the complaint. (Br. 2, pp. 3-6) In replying to this contention it is enough to say that, while the Board can, of course, "reconsider" any of its actions herein at any time prior to the date when the record is filed in the Circuit Court of Appeals, it does not follow that a legal duty to do so would arise if the Board grants respondent's motion. In issuing its complaint the Board did not act in a quasi-judicial capacity. It decided nothing in so acting. It simply ordered that a record be made for the purpose of enabling it later to decide whether, upon the basis of all the facts appearing in such record, its remedial powers under Section 11 of the Clayton Act should be called into play. This fact distinguishes the situation here from that appearing in Berkshire Knitting Mills v. N. L. R. B., 121 F. (2d) 235 (C. C. A 3rd, 1941), cited in respondent's brief, where the National Labor Relations Board, acting as a quasi-judicial body, had actually decided the case, a disqualified member having participated in the decision.

Respondent's remaining argument is even more remote. It is that if the Board disqualifies Governor Clayton, and if it reconsiders

its action in issuing the complaint, it should then take into account a long list of legal principles which it is alleged would require the Board to conclude to withdraw the complaint. (Br. 2, pp. 6-31) Without replying to each of the many points made in support of this contention it is sufficient for present purposes to point out that, even assuming the correctness of the abstract legal principles stated, their application to the present case could not be demonstrated until the record has been completed, at which time the facts respecting the development and growth of the Transamerica-controlled banking empire will have been made to appear.

No amount of reconsideration, however, could possibly change the basic facts which were developed in the Board's preliminary investigation and which have been summarized in its complaint. They show that for over forty years, ever since A. P. Giannini caused the Bank of Italy to be formed in 1904, he has used first one company and then another to acquire existing competitive commercial banking institutions in California, Oregon, Washington, Arizona and Nevada; that Transamerica is but the latest of these companies to be fitted into this pattern of bank expansion by buying out competitors; that through this process almost 600 independent banking offices have been acquired over the years, of which approximately 250 have been acquired by Transamerica since its organization by A. P. Giannini in 1928; that only 46 banks now remain of all of the banks which have been so acquired, the rest either having been converted into branches of the principal banks in the Transamerica group or eliminated; and that Transamerica now controls approximately 40 per

cent of all of the banking offices in the five states mentioned above and 38 per cent of all of the commercial deposits in that area. These facts, if true, establish a pattern of activity which is clearly in violation of both the spirit and letter of the Clayton Act. Certainly they constitute "reason to believe" that the Act has been violated and require the issuance of a complaint. If and when proved at the hearings, they would plainly require the issuance of an order pursuant to Section 11 directing Transamerica to divest itself of the bank stocks which it holds in violation of law.

Respectfully submitted,

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