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

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TABLE OF CONTENTS

	Page
STATEMENT	2
LEGAL DISCUSSION	2
ARE COMMERCIAL BANKS ENGAGED IN COMMERCE	4
SUBSTANTIVE QUESTION OF SECTION 7 VIOLATION	22
PURPOSE OF THE CLAYTON ACT	23
THE WORDS "MAY BE" AND "TEND TO" AS USED IN THE CLAYTON ACT	28
EVIDENTIARY TEST FOR DETERMINING VIOLATION OF SECTION 7	30
CONTROL OF BANK OF AMERICA N. T. & S. A.	56
Historical Ties of "Personnel and Tradition"	67
Stock Ownership	71
Proxy Machinery of the Bank	72
Interlocking Officers and Directors	72
New York Office of the Bank	73
Intercompany Relationships	73
CITIZENS NATIONAL TRUST AND SAVINGS ASSOCIATION	77
CONCLUSION	79

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http://fraser.stlouisfed.org/
Federal Reserve Bank of St. Louis

TABLE OF CASES

Page

Alexander v. Mayor of Alexandria, 5 Cranch 1 52
American Gas & Elec. Co. v. S.E.C., 134 F(2d) 633,
cert. den, 319 U.S. 763 62
Arrow-Hart & Hegeman Elec. Co. v. F.T.C.,291 U.S. 587 ... 49
Assoc. Gen. Utilities Co., 1939, 4 S.E.C. 526 58
Associated Press v. N.L.R.B., 301 U.S. 103 .... 6, 11
Bailey v. Clark, 21 Wall. 284 52
Chicago Board of Trade v. U.S., 246 U.S. 231 .... 32, 33
Community Gas & Power Co., 1940, 7 S.E.C. 643 58
Corn Products Co. v. F.T.C., 324 U.S. 726 29
Detroit Edison Co. v. S.E.C., 119 F(2d) 730,
cert. den., 314 U.S. 618 .... 58, 63, 78
Employees Welfare Assoc., 1939, 4 S.E.C. 792 58
Fashion Originators' Guild v. F.T.C.,
312 U.S. 457 .... 35, 37, 41
F.T.C. v. Morton Salt Co., 334 U.S. 37 29
F.T.C. v. Sinclair Co., 261 U.S. 463 42
H. M. Byllesby & Co., 1940, 6 S.E.C. 639 58
Hartford Gas Co., 1941, 8 S.E.C. 758, pet.den.,
2 Cir., 1942, 129 F(2d) 794 58
Hyams v. Calumet & Hecla Mining Co., 221 Fed. 529,
(C.C.A. 6) 67
In re Hillmert, 71 F(2d) 411, cert. den., 293 U.S. 583... 53
Internat. Assoc. of Machinists v. N.L.R.B., 311 U.S.72... 76
International Business Machines Corp. v. U.S.,
298 U.S. 131 41
International Shoe Co. v. F.T.C., 280 U.S. 291....33, 34, 47
International Salt Co. v. U.S., 332 U.S. 392......30, 36, 37
Jordan v. Roche, 228 U.S. 436 52
Manchester Gas Co., 1940, 7 S.E.C. 57 58
Mandeville Farms v. Sugar Co., 334 U.S. 219 .... 22, 24
Minnesota v. Keeley, 126 F(2d) 863 53
Moulton v. Field, 179 Fed. 673 (C.C.A. 7) 67
N.L.R.B. v. Bank of America N.T. & S.A., 130 F(2d)
624, cert. den., 318 U.S. 792 .... 8, 10
Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300 67
North American Co. v. S.E.C., 327 U.S. 686 .... 6, 7, 11
Northern Natural Gas Co., 1939, 5 S.E.C. 228 58
Penn R. Co. v. I.C.C., 66 F(2d) 37, Aff'd., 291 U.S.651.. 34
Pick Mfg. Co. v. General Motors Corp., 299 U.S. 3 42
Rochester Telephone Corp. v. U.S., 307 U.S. 125 66
Shinn & Co., 1940, 7 S.E.C. 333 58
Standard Fashion Co. v. Magrane-Houston Co.,
258 U.S. 346 .... 29, 40, 45
Standard Oil Co. v. U.S., 221 U.S. 1 .... 32, 33

Digitized for FRASER
http://fraser.stlouisfed.org/
Federal Reserve Bank of St. Louis

Standard Oil Co. v. U.S., 337 U.S. 293 .... 29, 37, 38
45, 47, 53
Temple Anthracite Coal Co. v. F.T.C.,
51 F(2d) 656 34
United Shoe Machinery Corp. v. U.S., 258 U.S. 451......... 41
U. S. v. Columbia Steel Co., 334 U.S. 495 33
U. S. v. Lehigh Valley R. R. Co., 254 U.S. 255 67
U. S. v. Reading Co., 253 U.S. 26 55
U. S. v. Republic Steel Corp., 11 F. Supp. 117 34
U. S. v. Southeastern Underwriters Assoc., 332 U.S. 533... 5
U. S. v. Standard Oil Co., 78 F. Supp. 850,
Aff'd. 337 U.S. 293 .... 28, 39
U. S. v. Union Pacific R. R., 226 U.S. 61 67
U. S. v. United Shoe Machinery Co., 247 U.S. 32 46
Vivaudou Inc., v. F.T.C., 54 F(2d) 273 34

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http://fraser.stlouisfed.org/
Federal Reserve Bank of St. Louis

MISCELLANEOUS

	Page
15 U.S.C. 1	5, 23
15 U.S.C. 2	23
15 U.S.C.13	25, 28
15 U.S.C.14	25, 28
15 U.S.C.18	1, 25
15 U.S.C.19	25
15 U.S.C.21	1
15 U.S.C.41	35
15 U.S.C.79	7, 57, 58
29 U.S.C.152(6)	8
Clayton Act §2	1
Clayton Act §3	1, 30, 36, 39, 40, 41, 47, 48
Clayton Act §7	1, 3, 4, 5, 20, 22, 26, 28, 29, 31, 38, 45, 47, 48, 49, 50, 52, 53, 56, 79
Clayton Act §8	1
Clayton Act §11	1, 49
Cong. Rec. Vol. 51, pp. 14,463-14,464	28
Federal Trade Commission Act §5	35
Holding Company Act Release, No.2778, May 28, 1941	58
Holding Company Act Release, No. 2854, July 1, 1941	58
Holding Company Act Release, No. 2868, July 9, 1941	58
Holding Company Act Release, No. 2998, Sept. 15, 1941, pet.den., 3 Cir., 1942, 129 F (2d) 899	58
H. Rept. 1191, 81st Cong., 1st Sess.	50
H. Rept. 1318, 74th Cong., 1st Sess.	57
National Labor Relations Act, §2 (6)	8
Public Utility Holding Company Act	7, 57, 61, 66
S. Rept. 698, 63rd Cong. 2nd Sess.	22, 24, 26, 27
S. Rept. 1775, 81st Cong. 2nd Sess.	29, 51
Sherman Act § 1	5, 32, 36
Sherman Act § 2	32
Webster's Internat. Dict., 2d ed.	29

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Federal Reserve Bank of St. Louis

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BRIEF OF COUNSEL FOR THE BOARD

This is a proceeding under Section 11 of the Clayton Act (15 U.S.C. 21). That section, *inter alia,* authorizes the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board) to enforce Sections 2, 3, 7 and 8 of that Act "where applicable to banks, banking associations, and trust companies." The proceeding was commenced on June 24, 1948, on which date the Board issued a complaint against Transamerica Corporation (hereinafter referred to as Transamerica), charging that company with having violated Section 7 of the Act (15 U.S.C. 18). In substance, Section 7 prohibits one corporation from acquiring the stocks of two or more other corporations which are engaged in commerce whenever the "effect" of such acquisitions "may be" to substantially lessen competition between the companies acquired, to restrain trade, or to tend to create a monopoly. The essence of the Board's charge against Transamerica

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is that, for over forty-five years, Transamerica (including its predecessor companies) has been continuously expanding its banking interests by acquiring the stocks of commercial banks in the five States of California, Oregon, Nevada, Washington and Arizona, and that the effect of such acquisitions may be to substantially lessen competition, restrain trade, or tend to create a monopoly of commercial banking offices, commercial bank deposits and commercial bank loans in the five-state area or parts thereof.

STATEMENT

We will not lengthen this brief by repeating the many facts which are fully set out in the requested findings of fact submitted herewith. A knowledge of all of them is essential to a complete understanding of the development and growth of the Transamerica banking empire, and the Hearing Officer is respectfully referred thereto. We hereby adopt, for the purpose of this brief, each and every fact set forth in the requested findings of fact submitted by counsel for the Board, and ask that they be read as a part hereof.

LEGAL DISCUSSION

The legal issues in this case are very simple. They started out so and they have remained so, notwithstanding the voluminous record and the fact that the hearings dragged out for so long a period of time. From the beginning,

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counsel for the Board have contended that the case is to be decided largely on the basis of statistics. We reassert that proposition now, and in due course will demonstrate that, other incidental legal questions aside, the basic substantive question of Section 7 violation is to be determined solely on the basis of the quantitative substantiality of the bank acquisitions which have taken place under the aegis of Transamerica and its predecessors over the years.

Inasmuch as the legal issues in the case must derive from the statute, we turn at once to Section 7. The second paragraph of that section -- the paragraph relevant here -- provides 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."1/

1/ By amendment of December 29, 1950, this paragraph was amended to read as follows:

> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

As is developed commencing at page 48, *infra*, the *fact* of this amendment and its legislative history is very important in shedding light upon the constructions to be given to Section 7 in this case.

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As a reading of this paragraph plainly suggests, there are two basic legal inquiries which must be resolved in order to determine whether a violation of Section 7 has been demonstrated. The first is whether or not the companies whose shares have been acquired are "engaged in commerce" within the meaning of those words as used in that section. The second is whether or not the "effect" of the acquisition of the stocks of such companies "may be" to substantially lessen competition, restrain trade, or tend to create a monopoly. We shall now proceed in the order named to discuss these questions in relation to the Board's charges against Transamerica.

ARE COMMERCIAL BANKS ENGAGED IN COMMERCE

This case deals with acquisitions of the stocks of commercial banks. The evidence shows that, over a forty-five year span, Transamerica and its predecessors have acquired 682 banks and branches located in the five-state area.[2] The banking business of most of these banks and branches has long since been taken over by one or another of the large branch banks which have been developed by and are now a part of the Transamerica group. This group now consists of 48 commercial

2/ Approximately 45 of the banks so acquired did not accept deposits subject to check, and hence were not "commercial banks"; the savings deposits and other business of these banks, however, were taken over by one of the Transamerica group banks, and the acquiring bank (*which was a commercial bank*) usually opened a branch in the premises of the acquired bank.

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banks operating 619 branches in the five-state area. The first question for consideration, therefore, is whether commercial banks are "engaged in commerce" within the meaning of Section 7. In discussing this question we shall demonstrate, first, the legal standards for determining whether commercial banks are "engaged in commerce" and, secondly, that, measured by such standards, all commercial banks are unquestionably so engaged.

In commencing this discussion it is important to point out that Section 7, like other sections of the Clayton Act, was designed by Congress to supplement the provisions of the Sherman Act (15 U.S.C. 1). As both Congress and the courts have repeatedly stressed, the Clayton Act, by prohibiting specific practices which it was felt might not have been included within the prohibition of the Sherman Act, sought to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation. It is therefore correct to say of the Clayton Act, as the Supreme Court has said of the Sherman Act, that "Congress wanted to go to the utmost extent of its Constitutional power in restraining...monopoly". *United States* v. *Southeastern Underwriters Association*, 322 U. S. 533, 558. It follows, therefore, that the expression "engaged in commerce", as used in Section 7, was intended to cover the broadest reach of Congress' constitutional power over interstate commerce.

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Perhaps no constitutional question has been presented to the Supreme Court more often or in so many different settings than that of the extent of federal authority under the Commerce Clause. Fortunately, we do not have to wend our way through the maze of the literally hundreds of such cases because the Court only recently has clearly and unequivocally enunciated certain precise legal criteria for determining whether a company is engaged in commerce in the constitutional sense. These criteria, as we shall see, are completely determinative of the issue in this case.

The recent cases to which reference is made are those of *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, and *North American Co.* v. *Securities and Exchange Commission*, 327 U. S. 686. Both of these cases held that a company is engaged in interstate commerce *if the nature of its activities is such as to require it to make regular and continuous use of the mails or other channels of interstate communication*. Thus, in *Associated Press* the Court found that the petitioner, in collecting and distributing its news items, made constant use of leased telegraph and telephone wires, messenger service, wireless, and the mails. In holding that, *because of that fact alone*, the Associated Press was "engaged in interstate commerce", the Court said (pp. 128-129):

> "The Associated Press is engaged in interstate commerce within the definition of the statute and the meaning of Article I, § 8 of the Constitution. It is an instrumentality set up by constituent members who are engaged in a commercial business for profit, and as such

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instrumentality acts as an exchange or clearing house of news as between the respective members, and as a supplier to members, of news gathered through its own domestic and foreign activities. *These operations involve the constant use of channels of interstate and foreign communication. They amount to commercial intercourse, and such intercourse is commerce within the meaning of the Constitution. Interstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution.* This conclusion is unaffected by the fact that the petitioner does not sell news and does not operate for profit, or that technically the title to the news remains in the petitioner during interstate transmission. Petitioner being so engaged in interstate commerce, the Congress may adopt appropriate regulations of its activities for the protection and advancement, and for the insurance of the safety of, such commerce." (Italics ours)

The same rule was reiterated in the *North American* case. There the Court held North American Company to be engaged in interstate commerce and subject to regulation under the Public Utility Holding Company Act of 1935 (15 U.S.C. 79). A major basis for this determination is to be found in the following excerpt from the Court's opinion (pp. 694-695):

"The interstate character of North American and its subsidiaries is readily apparent from the Commission's survey of their activities. North American is more than a mere investor in its subsidiaries. See Northern Securities Co. v. United States, 193 U. S. 197, 353-354. It is the nucleus of a far-flung empire of corporations extending from New York to California and covering seventeen states and the District of Columbia. Its influence and domination permeate the entire system and frequently evidence themselves in affirmative ways. *The mails and the instrumentalities of interstate commerce are vital to the functioning of this system.* They have more than a casual or incidental relationship. Cf. Ware & Leland v. Mobile County, 209 U. S. 405; Blumenstock Bros. v. Curtis Pub. Co., 252 U. S. 436; Federal Baseball Club v. National League, 259 U. S. 200. Without them, North American would be unable to float the various security issues of its own or of its subsidiaries, thereby selling securities to residents of every state in the nation.

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Without them, North American would be unable to exercise and maintain the influence arising from its large stock holdings, receiving notices and reports, sending proxies to stockholders' meetings, collecting dividends and interest, and transmitting whatever instructions and advice may be necessary. Nor could North American maintain its other relationships and contacts with its own subsidiaries without the use of the mails and facilities of interstate commerce. Such interstate commercial transactions involve the very essence of North American's business. See International Textbook Co. v. Pigg, 217 U. S. 91. They enable it 'to promote the sound development' of its investments from its headquarters in New York City. In short, they are commerce which concerns more states than one. Gibbons v. Ogden, 9 Wheat. 1, 194; Second Employers' Liability Cases, 223 U. S. 1, 46; Minnesota Rate Cases, 230 U. S. 352, 398. As stated by this Court in Associated Press v. Labor Board, 301 U. S. 103, 128, '*Interstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution.*'" (Italics ours)

These cases clearly establish one simple test for determining whether a company is "engaged in commerce": If that company, as a routine part of its business, makes regular and constant use of the mails or other instrumentalities of interstate communication, it is engaged in interstate commerce and subject to the control of Congress under the Commerce Clause. And under this test the business of commercial banking has already been judicially held to constitute interstate commerce. This was decided in *National Labor Relations Board* v. *Bank of America*, 130 F. (2d) 624, cert. den. 318 U. S. 792, wherein the Ninth Circuit held that Bank of America N. T. & S. A., one of the present Transamerica group banks, is engaged in interstate commerce within the meaning of Section 2(6) of the National Labor Relations Act (29 U.S.C. 152(6)). The Court said (p. 626):

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"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."

Because of this ruling by the Ninth Circuit counsel for the Board at first concluded that evidence touching the interstate activities of commercial banks was unnecessary in this case. After all, commercial banks all perform the same basic functions, the only difference between them being that some perform those basic functions to a greater extent than others, and some, depending upon their size, provide a greater diversification of non-basic services than do others. Under these circumstances it would surely be an anomaly to find that one bank, simply because it is a *big* bank, is engaged in interstate commerce, and yet to find that another bank, which performs identical functions in serving the economy, is not so engaged simply because it is a *small* bank and performs those functions less

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often than the big bank. And the obvious absurdity of such inconsistent findings would be accentuated in such a situation as is involved here, because, according to such a theory, it would be possible for the Board to find and destroy a tendency to monopoly of the commercial banking business if such a tendency resulted from the acquisition of big banks, but it would not be possible to do so if the tendency resulted from the acquisition of small ones, even though the harm to the public would in both instances be the same. Consequently, it was reasoned, the decision in *National Labor Relations Board* v. *Bank of America N. T. & S. A.*, *supra*, should be decisive of the question of interstate commerce here.

Notwithstanding these considerations, however, it was concluded to introduce evidence respecting the interstate activities of the Transamerica group banks. In the first place, while confident of the reasoning set out above, we did not want to run the risk of counsel for Transamerica successfully contending that, because the finding of the Ninth Circuit was made in respect of the largest bank in the world, such a finding is inconclusive of the issue of interstate commerce where, as here, smaller institutions are involved. In the second place, counsel for Transamerica have already argued that the above-quoted portion of the Court's decision was not necessary to support its action in affirming the order of the Labor Board in that case, contending that it was sufficient for that purpose for the Court simply to find that the bank's activities

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"affected" commerce. While we do not concede the validity of this contention, again we wished to take no chances. We wanted a record which could leave no doubt on this important point.

Going about the development of such a record was quite a different matter, however. We were handicapped in the task by our inability to subpoena the officers and records of each of the Transamerica banks, and therefore of necessity had to rely upon other methods of developing this evidence. In doing so, however, we had constantly in mind the primary objective of satisfying the test laid down in *Associated Press* and *North American, supra.* To that end we concentrated upon evidence that would reach the everyday activities of the *smallest* commercial bank, the idea being to demonstrate that there is a common denominator of interstate activity of *all* commercial banks. We submit that the existence of such a common denominator, once shown, requires the conclusion that *all* commercial banks, regardless of size or geographical location, are "engaged in commerce" within the meaning of Section 7, and hence requires the conclusion that all of the Transamerica banks are so engaged. We believe the record contains ample evidence disclosing the existence of a common denominator of the kind referred to. As we shall see, it also pinpoints that evidence to each of the banks in the Transamerica group.

As will be more fully hereinafter developed, commercial banks perform three basic functions which are not performed

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by any other institution of a private nature in our economy. One of these is the money payment function. That function is the mechanism supplied by commercial banks through their checking account service whereby money payments are effected in a smooth, efficient and economical manner between persons in the same or widely separated sections of the country. Through this mechanism transfers of credit, reflected by bookkeeping entries made at various places throughout the commercial banking system, eliminate the necessity of physical transfers of currency or coin in effecting such payments.

The importance of the money payment service provided by commercial banks can be better judged in the light of the fact that between 80 and 90 per cent of all money payments made throughout the country each year are made by check; that more than four billion checks are used each year in the making of such payments; that in dollar volume these checks aggregate approximately one-and-a-half trillion dollars; that all business concerns and many individuals require the use of the checking account service as a necessary part of their business activities; and that there is no practical substitute for the checking account service in making money payments.

A system geared to handle so large a proportion of the country's total money payments as is indicated by the figures set out above must of necessity be one of national, as distinguished from purely local, proportions. And such are the proportions of the money payment system which has been evolved

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by the fourteen thousand commercial banks in the country. The record shows that over the last twenty-five to fifty years this mechanism has been improved and refined to the point where all of these banks are today as effectively linked to each other through their checking account services as if they were physically interconnected in some way. In fact, this system has become so efficient and has produced so few burdens upon the populace at large that only those within the framework of the system itself generally are aware of the stupendous amount of interstate activity which it generates in its day-to-day operations. Yet, as the record amply attests, *every commercial bank, however small or wherever situated, receives daily a steady stream of checks for deposit which are drawn on banks in out-of-state locations, and daily receives a steady stream of checks drawn upon it which were used by its customers in making out-of-state payments.* No commercial bank could survive should it refuse to accept for deposit checks drawn on out-of-state banks or should it refuse to allow its depositors to issue checks in making out-of-state payments.

Let us consider for a moment some of the figures which are available to demonstrate to a minimum extent the extraordinary number and amount of these interstate transactions. There is evidence in the record respecting the Interdistrict Settlement Fund. That Fund, as the record shows, consists of balances on deposit with the United States Treasury to the account of the

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twelve Federal Reserve Banks. Each such Reserve Bank is located in a separate geographical district comprising usually a number of states and parts of states. The books of the Fund are maintained by the Board in Washington, D. C. Among other things, the Fund is used to settle each day the interdistrict clearances of checks which have been collected, in the manner hereinafter described, by the various Reserve Banks acting for the commercial banks located within their respective districts. For the year 1948 total clearings between Reserve Banks amounted to 447 billion dollars. For the month of March 1949 they totaled in excess of 40 billion dollars. In excess of 50% of these totals represent interdistrict check clearances within the commercial banking system.

Some figures respecting the clearings of the Reserve Bank for the Twelfth District at San Francisco (which includes the five-state area with which we are concerned in this case) are equally revealing. During 1948 the Twelfth District had total debits and credits in the Fund in excess of 40 billion dollars, more than 50% of which involved interdistrict check clearances of commercial bank checks. Breaking these figures down still further we find that in a period of one week (selected while the hearings were in progress) the San Francisco Reserve Bank and its branches (other than Salt Lake) and member banks sent to other Reserve Banks and their branches (and to the Salt Lake Branch of the San Francisco Reserve Bank) a total of 305,303 checks aggregating $171,635,000. In addition, 38,793

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government card checks were so sent, totaling $5,262,000. On the other side of this picture, the San Francisco Reserve Bank and its branches (other than Salt Lake) received during that week from other districts or across state lines within the district 595,087 checks drawn on banks within the district aggregating $232,079,000. In addition, they received 163,639 government card checks aggregating $26,534,000.

During the four-week period ending April 30, 1949, while these hearings were in progress, a record was kept by the San Francisco Reserve Bank of the number and amount of checks received for collection by that bank from out-of-state sources which were drawn upon the *twenty-five smallest banks* in the Transamerica group. This count revealed that, with the exception of First Savings Bank of San Jacinto which does not accept deposits subject to check, the Reserve Bank received for collection a steady stream of checks drawn upon these banks bearing out-of-state endorsements. The number and dollar amounts of such checks varied according to the size of the bank.

It should be emphasized that these statistics represent minimal totals. As we shall see, not all interstate check transactions are handled by the Federal Reserve System. Many are handled by direct mailings to the drawee banks or by sending them to correspondent banks for collection. While the record does not show the number or dollar amount of this type of interstate check clearings, nevertheless it does support the inference that the amount is very substantial.

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All commercial banks, then, render the checking account service. Not just the largest, centrally located banks, but all commercial banks, however small and however remotely situated. And all of them receive a steady stream of checks either drawn on out-of-state banks or drawn upon themselves and reflecting out-of-state payments. The larger the bank, the larger the daily stream of these checks; but all commercial banks constantly receive them as a regular part of their business. It is obvious, therefore, that the *handling* of these checks requires each commercial bank to make regular and constant use of the channels of interstate communication. Only if the out-of-state checks received for deposit are presented for payment at the banks upon which they are drawn, and only if the checks presented for payment from out-of-state sources results in an actual transfer of funds to the out-of-state payees, is the checking account service producing the end result for which it was invented. Let us now examine the record to see how such items are handled in the day-to-day operations of commercial banks.

As the record shows, most collections of out-of-state checks are effected through the national check collection system operated by the twelve Federal Reserve Banks and their twenty-four branches. All member banks are permitted to avail themselves of this service, as are those non-member banks which maintain what are called "non-member clearing accounts"

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at a Reserve Bank. At the end of each day's business the member bank or bank maintaining a non-member clearing account (the bank of deposit) sendsto the Reserve Bank or branch of its district the out-of-state checks which it has received for deposit that day. The Reserve Bank or branch sorts all of the checks so received and mails them to the various other Reserve Banks and branches in whose districts are located the banks upon which such checks are drawn (the banks of payment). If the volume of out-of-state checks received by the bank of deposit is large, that bank sometimes itself sorts the checks and mails them directly to the Reserve Banks and branches of the districts in which the banks of payment are located. When the latter procedure is followed, the bank of deposit sends a copy of these "cash letters" to the Reserve Bank of its district. Whichever method is followed, the account of the bank of deposit with the Reserve Bank of its district is then increased by the amount of such checks.

The Reserve Banks and branches of the districts in which the banks of payment are located each day send to each bank of payment the checks which have been received by them in the manner hereinabove indicated. Having done so, the Reserve Bank or branch in that district, after notice of payment, usually reduces the balance on its books to the credit of each such bank of payment by the amount of such checks. Sometimes, however, the banks of payment remit by bank draft to the collecting Reserve Bank.

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The Reserve Banks adjust between themselves the interdistrict balances resulting from the interdistrict flow of all such checks. This settlement is effected in the Interdistrict Settlement Fund which was hereinabove identified. Each day the Reserve Banks report to the Board, over the System's leased wire facilities, the amount which each bank and branch is paying to each of the other Reserve Banks and their branches arising, *inter alia*, out of interdistrict check clearances. When entries reflecting these advices have been effected in the books of the Fund, the Board advises each Reserve Bank and branch of the amount that each other Reserve Bank and branch is paying to it and the amount of the net debit or credit as a result of the settlement for the day.

As has been said, not all collections of out-of-state checks are effected through the Reserve Banks. Another method whereby these checks are gotten from the banks of deposit to the banks of payment is by sending them through correspondent banks. Most banks maintain correspondent bank relationships with one or more other banks. The larger the bank, the greater the number of correspondents such a bank will have. A considerable amount of out-of-state checks are collected through these correspondent banks. The mechanics of this operation are much the same as those which characterize the Reserve Bank check collection system. In fact, this method is a sort of system-within-a-system, because most of the correspondent banks in turn send all but local items through the Reserve Bank of

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its district. Some, however, collect these items by direct mailings to the banks of payment. Whichever way they are handled, however, the ultimate interstate transfers of the credits involved flow, sooner or later, through the Reserve Banks in the form of entries made in the books of the Interdistrict Settlement Fund.

A final method used in collecting out-of-state checks is by direct sending, that is, by mailing these checks directly to the banks of payment. In such cases the banks of payment usually remit by draft drawn on a correspondent bank or on a Reserve Bank, and this interstate transfer, too, sooner or later is reflected in the Interdistrict Settlement Fund.

It is clear that, whichever of these methods it uses to effect collection of out-of-state checks, the commercial bank regularly and constantly uses the mails or other instrumentalities of interstate communication (including the Federal Reserve System). The net result of its use of these facilities is just the same as if a messenger of the bank of deposit manually carried out-of-state checks across state lines and returned carrying the currency and coin received in payment. For all practical purposes each commercial bank, in performing the all-important money payment function, may be regarded as connected by an invisible tube of communication with every other commercial bank in the country. Back and forth through these tubes flow the checks which each has received drawn upon the others. And back and forth through the same tubes

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flow the transfers of money which the payment of those checks produces. Truly, the money payment function of the commercial banking system was aptly described by Dr. Goldenweiser when he called it "a money transportation system".

We have emphasized the checking account service rendered by the commercial banks as the common denominator of interstate activity of all such banks, and as requiring the conclusion, patent on this record, that each of the Transamerica banks is "engaged in commerce" within the meaning of Section 7 of the Clayton Act. This does not mean, however, that the record is barren of evidence touching other activities of the Transamerica banks, which similarly require the regular use by them of the mails and other channels of interstate communication. There is an abundance of such evidence. For example, twenty-seven of the Transamerica group banks have out-of-state correspondent bank relationships, the maintenance of which could not be continued otherwise than by interstate communication of some sort. (Eight of the remaining Transamerica group banks had out-of-state correspondents at the time they were acquired by the group.) As a regular part of their business all of the Transamerica group banks receive drafts, coupons, bonds, and other paper which must be sent out of the state for collection. All of the Transamerica majority owned banks are required to submit regular reports to Transamerica concerning loans, earnings and other matters. For those outside of California this involves the regular use of the instrumentalities of interstate

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communication. These and the many other services rendered by commercial banks as a regular part of their business activities, including the purchase and sale of government securities for its own account, the purchase and sale of stocks and bonds for its customers, the effecting of wire transfer of funds for its own or customers' accounts, all require the constant and regular use of the channels of interstate communication.

Apart from these direct interstate activities, commercial banks, through the performance of their various normal functions, also continuously "affect" interstate commerce in a great many ways. Through their checking account service they facilitate interstate payments of all kinds, including the great volume of such payments which are incident to transactions of interstate purchase and sale of goods and property. Through the exercise of their lending function they facilitate and make possible interstate commerce of all kinds: By loans to manufacturers they facilitate the manufacture of goods destined for interstate commerce; by loans to farmers they make possible the growth of crops, livestock and other farm products which will be consumed in other states; by their loans to dealers and retailers in the community they finance the importation of goods, wares and merchandise of all kinds for resale in the state; by loans to consumers they contribute extensively to the great interstate flow of consumer goods of every kind. By discounting and/or collecting bill of lading drafts the actual interstate shipment of goods is expedited

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and effected. Numerous other similar examples might be found in the record.

The fact that commercial banks thus "affect" commerce also brings such banks within the meaning of the words "engaged in commerce" used in Section 7. This contention is predicated upon the following reasoning: The "affectation" doctrine is applicable to the Sherman Act. *Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219, 229-235. Under that Act, then, a monopoly of commercial banks could be reached and dissolved because such banks "affect" interstate commerce. Id. The purpose of the Clayton Act was "to supplement" the Sherman Act and "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." Sen. Rept. 698, 63rd Cong., 2nd Sess. It follows, therefore, that if an actual monopoly of banking is prohibited by the Sherman Act because banks "affect" commerce, then an incipient monopoly of banking must also be included within the prohibitions of the Clayton Act.

SUBSTANTIVE QUESTION OF SECTION 7 VIOLATION

This brings us to a discussion of the substantive charge of Section 7 violation. There is, of course, no question but that Transamerica has "acquired" the stocks of the various banks which it controls. It now owns those stocks. The real issue, therefore, turns on whether or not the "effect" of such acquisitions "may be" to substantially lessen competition

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between such banks, to restrain trade, or to tend to create a monopoly of commercial banking offices, deposits, or loans. In discussing this subject we shall again first develop the legal principles for determining the "effects" of such acquisitions, and then demonstrate that, tested in the light of these principles, Transamerica's acquisitions are palpable violations of the Act.

PURPOSE OF THE CLAYTON ACT

The first consideration in construing any statute is to ascertain the nature and purpose of that statute. This is a particularly relevant inquiry here because of the consistent though erroneous attempts of counsel for Transamerica throughout the case to import rules of construction borrowed from another statute which, though also dealing with the subject of monopolies, dealt with that subject in an entirely different manner and, because it was a criminal statute, established entirely different evidentiary standards for proving violations.

The Clayton Act was passed in 1914, some twenty-five years after the passage of the Sherman Act. The latter Act made it a crime to enter into any "contract, combination...or conspiracy, in restraint of trade or commerce" (15 U.S.C. 1) or "to monopolize...any part of the trade or commerce among the several states" (15 U.S.C. 2). The Sherman Act, while applied in numerous instances to break up actual monopolies and to dissolve existing restraints upon interstate commerce, nevertheless

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failed to prevent a considerable number of important mergers and consolidations, as well as other acts and practices which were harmful to free competition. This failure was due largely to the strict evidentiary tests which were made necessary because of the criminal nature of the statute, and to certain rules of interpretation which at various times seriously restricted its application in particular cases.[3/]

It was to cure just such defects in the enforcement of the national policy against monopoly and restraints of trade that Congress enacted the Clayton Act. In this Act Congress prohibited a bundle of *specific* acts and practices which experience had shown were destructive of free competition and were the forerunners of monopoly. There were those who opposed the passage of the Clayton Act on the ground that each of the practices which the Clayton Act prohibited in specific terms was prohibited in general terms by the Sherman Act. But Congress rejected these arguments and in doing so was at particular pains to point out that the Clayton Act was designed to "supplement" the Sherman Act by getting at the seed of monopoly before it could grow to fruition. Thus, the report of the Senate Committee of the Judiciary, dated July 22, 1914,[4/]

3/ See, for example, discussion of the limiting effects of the early doctrine that "manufacture is not commerce" contained in the opinion of the Supreme Court in *Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219.

4/ Sen. Rept. 698, 63rd Cong., 2nd Sess.

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recommending passage of the Clayton Act, stated as follows:

"It is well, at the outset, to state the theory of the bill, both as it passed the House of Representatives and as it is proposed to be amended, for the general scope of the House measure is unchanged. It is not proposed by the bill or amendments to alter, amend, or change in any respect the original Sherman Antitrust Act of July 2, 1890. The purpose is only to supplement that act and the other antitrust acts referred to in section 1 of the bill. *Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.* Among other of these trade practices which are denounced and made unlawful may be mentioned discrimination in prices for the purpose of wrongfully injuring or destroying the business of competitors; exclusive and tying contracts; holding companies; and interlocking directorates." (Italics ours)

The "practices" which Congress prohibited in order to "arrest" monopolies "in their incipiency" were price discriminations,[5/] exclusive and tying agreements,[6/] stock acquisitions by holding companies,[7/] and interlocking corporate directorates.[8/] With respect to each of these practices Congress found a common ground of evil: Each was an instrument for lessening competition and fostering monopoly. As to price discriminations, Congress found that this practice enabled "certain great corporations and also certain smaller concerns...to destroy competition and render unprofitable the business of competitors by selling

5/ 15 U.S.C. 13.
6/ 15 U.S.C. 14.
7/ 15 U.S.C. 18.
8/ 15 U.S.C. 19.

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their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country."[9] As to exclusive and tying contracts, Congress found that these were "unjust to the local dealer and to the community and...monopolistic in [their] effects."[10] As to interlocking corporate directorates, Congress found that the "only real service" which is rendered by the director who acts in such dual roles "is in maintaining uniform policies throughout the entire system for which he acts" and that this "usually results to the advantage of the greater corporations and to the disadvantage of the smaller corporations which he dominates by reason of his prestige as a director and to the detriment of the public generally."[11]

Congress' findings about holding companies deserve special emphasis because of their particular application here. In commenting upon Section 8 (now Section 7) of the Act, the Committee stated, *inter alia,* as follows:

> "HOLDING COMPANIES -- Section 8 deals with what is commonly known as the 'holding company,' which is a common and favorite method of promoting monopoly. '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

9/ Sen. Rept. 698, 63rd Cong., 2nd Sess., p. 3.
10/ Ibid., p. 6.
11/ Ibid., p. 16.

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acquired. As thus defined a 'holding company' is an abomination and in our judgment is a mere incorporated *form of the old-fashioned trust*."12/ (Italics ours)

It is apparent from this brief analysis of the legislative history of the Clayton Act that, in attempting to protect commerce from the ravages of monopoly, Congress departed in a very important respect from the method which it had theretofore used in dealing with that subject. Instead of attempting to apply criminal sanctions *after* the injury to commerce had been done or seeking to disestablish monopoly *after* it has been obtained, as it had done in the Sherman Act, Congress undertook in the Clayton Act to *preserve* competition and to *prevent* monopoly from developing through the timely institution of purely civil proceedings of either an administrative or judicial nature. The acts and practices prohibited by the Clayton Act had demonstrated their potency for harm. By singling them out and dealing with them in a specific fashion Congress meant to denounce each of them in the strongest terms. Anyone who made use of such practices was to be instantly suspect, because by their very nature those practices become the aiders and abettors of monopoly. The Act, therefore, looks forward and not backward, and its construction requires a prospective and not a retrospective interpretation.

12/ Ibid., p. 13.

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THE WORDS "MAY BE" AND "TEND TO" AS USED IN THE CLAYTON ACT

The words "may be" as used in the Clayton Act lend added emphasis to the conclusion that the Act was designed to prevent, not cure, the economic disease of monopoly. As we have seen, the stock acquisitions prohibited by Section 7 are those where the effect "may be" to lessen competition, etc. These words are to be found in almost identical settings in Sections 2[13/] and 3[14/] of the Act. By thus deliberately choosing the words "may be" in preference to the word "is"[15/] Congress was indicating as plainly as it knew how its desire to *prevent* the development and growth of monopoly and to do so by tests less stringent than those required to prove violations of the Sherman Act, where such language is noticeably absent. Particularly pertinent in this connection are the luminous words of Judge Yankwich in *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 866-867 (affirmed 337 U. S. 293), wherein he pointed out that:

> "The history of Anti-Trust legislation shows that less is required to prove illegality under the Clayton Act

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13/ 15 U.S.C. 13.

14/ 15 U.S.C. 14.

15/ In the bill as originally introduced Section 7 prohibited stock acquisitions where the effect "is" to eliminate or lessen competition between the corporations. It was amended during the Senate debate to read "may be" instead of "is" (Cong. Rec., Vol. 51, pp. 14463-14464). The bill as thus amended was passed by the Senate, and was later approved in conference.

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> than under the Sherman Act. Rightly. For the object of the Clayton Act was to declare illegal, in their incipiency, acts which would only be illegal under the Sherman Act *in their full fruition*. Differently put, what, *in its result*, is an unreasonable restraint under the Sherman Act is, *in its beginning*, a substantial restraint under the Clayton Act, *if it is of a nature* likely to achieve such a result."

The words "may be" as used in the Clayton Act have been before the Supreme Court on a number of occasions. Without reviewing these cases in detail, it is sufficient for present purposes to point out that they hold that the words "may be" signify "reasonable probability", as distinguished from "mere possibility". In other words, they hold that the "effect" of a particular act or practice prohibited by the Clayton Act "may be" to lessen competition or tend to monopoly if there is a "reasonable probability" of that result obtaining. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356-357; *Corn Products Co.* v. *Federal Trade Commission*, 324 U. S. 726, 738; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46, n. 14; *Standard Oil Co.* v. *United States*, 337 U. S. 293, 300-301. See also *Senate Report 1775*, 81st Cong., 2nd Sess., p. 6.

The words "tend to" as used in the Act are equally significant Section 7 prohibits stock acquisitions when the effect may be to "tend to create a monopoly". To "tend" to a certain result is to "move or direct one's course in a certain direction". *Webster's International Dictionary, Second Edition*. Obviously the words "tend to" do not mean "to achieve" the end result. Hence, tests

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which might be appropriate for determining whether or not a monopoly has in fact been achieved are patently inappropriate for determining whether there is a movement "in the direction of" monopoly. In thus using the words "tend to" Congress gave further evidence of its explicit intent to enact a prophylactic as distinguished from a curative statute.

In the case of *International Salt Co.* v. *United States*, 332 U. S. 392, the Supreme Court took particular note of the words "tend to" as used in Section 3 of the Clayton Act. In that case the evidence showed that the Salt Company, in leasing a number of its patented salt machines, required the lessees to use therein only salt products of the Salt Company. The effect of these agreements, it was charged, was to substantially lessen competition and to tend to create a monopoly. In declaring the leases illegal, the Supreme Court said (p. 396):

> "Under the law, agreements are forbidden which 'tend to create a monopoly,' and *it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement.*" (Italics ours)

EVIDENTIARY TEST FOR DETERMINING VIOLATION OF SECTION 7

The ultimate legal issue in the case, therefore, is, what is the evidentiary test for determining whether there is a "reasonable probability" that the effect of Transamerica's stock acquisitions may be to substantially lessen competition or tend to create a monopoly. Naturally, it is on this issue

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that the most fundamental disagreements between Board's counsel and counsel for Transamerica have existed. As pointed out at the outset of this brief, in presenting the Board's case we have consistently adhered to the view that the determination of this issue is largely governed by statistics, that is, by showing how many commercial banking offices and how much of the commercial bank deposits and credit in the five-state area are now controlled by Transamerica. Our contention has been and is that these statistics, coupled with the facts that the greater part of the Transamerica bank expansion over the years has been accomplished by buying up independent banks and branches, that such acquisitions have been going on without interruption for over forty-five years, and that unless restrained they will continue to occur in the future, support all inferences necessary to demonstrate as a matter of "reasonable probability" that the Transamerica acquisitions will have the "effect" prohibited by Section 7.

On the other hand, counsel for Transamerica have insisted that statistics alone are not enough; that to prove a violation of Section 7 it must be shown that commercial bank competition in the five-state area has diminished to a point where there is actual injury to the public because of the lack of such competition. The Hearing Officer will recall that, in his oral argument at the conclusion of the Board's case, counsel for Transamerica vigorously emphasized the point that the Board had failed to call a single witness to testify that he

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had been victimized in any way because of Transamerica's bank acquisitions. While presenting evidence in Transamerica's defense, counsel offered to produce hundreds of customers of Transamerica's banks to testify that they had obtained valued services at Transamerica's banks, sometimes even after other banks had allegedly denied them such services. All of this evidence, as well as the argument mentioned above, were offered in support of counsel's contention that, absent proof of demonstrated actual malevolent injury to the public, the Board's case must fail.

As justifying their theory on this all-important phase of the case, counsel for Transamerica have argued that the so-called "rule of reason" applicable in Sherman Act cases is also applicable in Clayton Act cases. The "rule of reason" is a rule of interpretation first announced by the Supreme Court in the case of *Standard Oil Co.* v. *United States*, 221 U. S. 1, wherein it was held that Sections 1 and 2 of the Sherman Act prohibit only such contracts and combinations which constitute "unreasonable" or "undue" restraints of trade or commerce. In determining whether particular contracts and combinations are "unreasonable" under the Sherman Act, the Court generally has had recourse to extensive investigations which were designed to measure, in terms of present injury, the exact economic effects of such contracts and combinations upon the public. Cf. *Chicago Board of Trade* v. *United States*,

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246 U. S. 231;[16] *United States* v. *Columbia Steel Co.*, 334 U. S. 495. Since the promulgation of the "rule of reason" in *Standard Oil Co.* v. *United States*, *supra*, the courts have uniformly required proof of actual present injury to the public as an essential element to prove Sherman Act violations.

Some of the earlier Clayton Act decisions applied the "rule of reason" test to cases arising under that Act. Thus, in *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291, the Supreme Court (Justices Stone, Holmes and Brandeis dissenting) reversed an order of the Federal Trade Commission requiring the International Shoe Company to divest itself of the capital stock of the McElwain Company on the grounds, first, that actual competition between the two companies was insubstantial and, secondly, that the acquired company was in a failing condition and, therefore, its acquisition by the Shoe Company mitigated the probability of serious public

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16/ In this case the Court stated:

> "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." (246 U. S. p. 238)

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injury which might have ensued upon its failure. In the course of its opinion the Court said (pp. 297-298):

> "Section 7 of the Clayton Act, as its terms and the nature of the remedy prescribed plainly suggest, was intended for the protection of the public against the evils which were supposed to flow from the undue lessening of competition. In Standard Oil Co. v. Federal Trade Commission, 282 F. 81, 87, the Court of Appeals for the Third Circuit applied the test to the Clayton Act which had theretofore been held applicable to the Sherman Act, namely, *that the standard of legality was the absence or presence of prejudice to the public interest by unduly restricting competition or unduly obstructing the due course of trade.* ...
>
> "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, Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346, 357; *that is to say, to such a degree as will injuriously affect the public.*" (Italics ours)

This test was applied by lower federal courts in a number of cases decided around the time or shortly after the decision in *International Shoe*. These cases include *Temple Anthracite Coal Co.* v. *Federal Trade Commission*, 51 F. (2d) 656, 660-661 (1931); *Vivaudou Inc.* v. *Federal Trade Commission*, 54 F. (2d) 273, 274 (1931); *Penn R. Co.* v. *Interstate Commerce Commission*, 66 F. (2d) 37, 39 (1933) aff'd, per curiam by equally divided Court, 291 U. S. 651; *United States* v. *Republic Steel Corporation*, 11 F. Supp. 117, 122 (1935).

If the course of judicial opinion had not radically changed after these early decisions, it might well be that proof of present economic injury to the public would have to

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be met in this case.[17] But it has changed. In a number of its very recent decisions interpreting the Clayton Act, the Supreme Court has specifically rejected the "rule of reason" test of Sherman Act cases in construing the former Act. Furthermore, as we shall see, the Court has established for Clayton Act cases a simple standard or measure of proof which rejects in their entirety the arguments of counsel for Transamerica and which is easily applied to the facts in this case.

The first rumblings of this change of approach is to be found in *Fashion Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941). While this was a case brought to enforce Section 5 of the Trade Commission Act (15 U.S.C. 41, et seq.) prohibiting "unfair methods of competition", the Court pointed out at the outset of its opinion that the "determination of the correctness of the decision below require[d] consideration of the Sherman, Clayton, and Federal Trade Commission Acts." Id., p. 460.

The Court then went on to describe the arrangements by which the defendants, who sold 38% of all women's garments wholesaling at $6.75 and up, and more than 60% of those selling at $10.75 and above, had combined to refrain from selling their creations to those retailers who also bought garments from other sellers who "copied" styles created by the defendants.

17/ We do not mean by this to suggest that such a test could not be met; we think it can. But the question is: Must it be met?

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The Court then observed that, if this practice "runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition." Id., p. 463.

After describing the numerous respects in which the combination violated both the Sherman and the Clayton Acts, the Court considered the defendants' claim that their conduct was *reasonable* and necessary to protect themselves from the evils of style piracy practiced by others in the trade. In disposing of this contention the Court said (pp. 467-468):

> "The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts. For this reason, the principles announced in Appalachian Coals, Inc. v. United States, 288 U. S. 344, and Sugar Institute v. United States, 297 U. S. 553, have no application here. *Under these circumstances it was not error to refuse to hear the evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination."* (Italics ours)

The departure from the "rule of reason" approach in Clayton cases next gained momentum in the case of *International Salt Co. v. United States*, 332 U. S. 392 (1947). As we have seen, that case involved the validity of certain leases entered into between the Salt Company and certain lessees of its patented salt machines, under the terms of which the lessees agreed to use only salt products of the Salt Company in such machines. It was the Government's contention that the leases violated both Section 1 of the Sherman Act and Section 3 of the Clayton

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Act. The pleadings established the fact that the Salt Company had over 900 machines under leases containing the tying provision and that in 1944 the Salt Company sold approximately 119,000 tons of salt of the value of $500,000 for use in these machines. Judgment on the pleadings having been entered by the lower court in favor of the Government, one of the questions before the Supreme Court was whether summary judgment was authorized, it being contended that such a judgment "precluded trial of alleged issues of fact as to whether the restraint was *unreasonable* within the Sherman Act or substantially lessened competition or tended to create a monopoly in salt within the Clayton Act." (Italics ours) In affirming the judgment below, the Court said (p. 396):

> "We think the admitted facts left no genuine issue. Not only is price-fixing unreasonable, per se, United States v. Socony-Vacuum Oil Co., 310 U. S. 150; United States v. Trenton Potteries Co., 273 U. S. 392, but also it is unreasonable, per se, to foreclose competitors from any substantial market. Fashion Originators Guild v. Federal Trade Commission, 114 F. 2d 80, affirmed, 312 U. S. 457. *The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious.* Under the law, agreements are forbidden which 'tend to create a monopoly,' and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement." (Italics ours)

If, after the decisions in the *Fashion Guild* and *International Salt* cases, any doubts remained that Sherman Act tests are not applicable to Clayton Act cases, they were forever dispelled in the case of *Standard Oil Co.* v. *United States*, 337

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Federal Reserve Bank of St. Louis

U. S. 293, decided on June 13, 1949 (more than four months after the hearings in our case were commenced). In fact, aside from the issue of interstate commerce, this case is dispositive of all major issues of Section 7 interpretation which are involved here. It behooves us, therefore, to consider this case in more than ordinary detail, and we respectfully request the Hearing Officer and his legal adviser to do likewise.

In this case the United States commenced an action under the Clayton Act to enjoin Standard Oil of California from entering into or enforcing any contracts with independent dealers under the terms of which the dealers obligated themselves to buy all their petroleum products exclusively from Standard Oil The evidence showed that Standard Oil is the largest seller of gasoline in the seven-state area of Arizona, California, Idaho, Nevada, Oregon, Utah and Washington; that its sales of gasoline totaled 23% of the entire total in the area; that 6.7% of this total was sold to independent dealers under the exclusive supply contracts; that there were 5,937 independent dealers under exclusive supply contracts with Standard Oil; that these constituted 16% of the retail gasoline outlets in the seven-state area; and that in 1947 these dealers purchased $57,646,233 worth of gasoline from Standard Oil. The evidence further showed that, prior to 1934, Standard Oil had sold its products pursuant to agency agreements, but that in that year it adopted the first of its exclusive requirements contracts; that by 1938

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these contracts had entirely superseded the agency system; and that between 1936 and 1946 Standard Oil's sales remained at practically the same proportion of total sales in the area.

The lower court held that, upon this evidence, violation of Section 3 of the Clayton Act was shown and issued an injunction as prayed in the Government's complaint (78 F. Supp. 850). The Supreme Court allowed an appeal.

After reciting the facts substantially as outlined above, the Court began its discussion of the case by pointing out that the District Court had held that the test of substantially lessened competition and tendency to monopoly was adequately met merely by proof that the contracts covered "a substantial number of outlets and a substantial amount of products, whether considered comparatively or not" and that, having adopted this test, the District Court had excluded evidence bearing upon "the economic merits or demerits of the present system as contrasted with a system which prevailed prior to its establishment and which would prevail if the court declared the present arrangement invalid". It also pointed out that the District Court had refused to make any findings as to whether the number of Standard Oil's competitors had increased or decreased since the requirements contracts were put into effect, "and as to other matters which would have shed light on the comparative status of Standard and its competitors before and after the adoption of that system." The Court then went on to quote the following passage from the opinion of the District Court (pp. 298-299):

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Federal Reserve Bank of St. Louis

"Grant that, on a comparative basis, and in relation to the entire trade in these products in the area, the restraint is not integral. Admit also that control of distribution results in lessening of costs and that its abandonment might increase costs... Concede further, that the arrangement was entered into in good faith, with the honest belief that control of distribution and consequent concentration of representation were economically beneficial to the industry and to the public, that they have continued for over fifteen years openly, notoriously and unmolested by the Government, and have been practiced by other major oil companies competing with Standard, that the number of Standard outlets so controlled may have decreased, and the quantity of products supplied to them may have declined, on a comparative basis. Nevertheless, as I read the latest cases of the Supreme Court, I am compelled to find the practices here involved to be violative of both statutes. For they affect injuriously a sizeable part of interstate commerce, or,--to use the current phrase,--'an appreciable segment' of interstate commerce."

Having set out the facts, the statute, and the ruling of the District Court as above quoted, the Court then stated the issue before it as follows (p. 299):

"The issue before us, therefore, is whether the requirement of showing that the effect of the agreements 'may be to substantially lessen competition' may be met simply by proof that a substantial portion of commerce is affected *or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish.*" (Italics ours)

In proceeding to determine this question the Court then analyzed its rulings in a number of cases in which it had been called upon to construe Section 3. It pointed out that *Standard Fashion Co. v. Magrane-Houston Co., supra,* had settled one rule of interpretation of that section, namely, that it was not intended to reach every remote lessening of competition but only those which were substantial. However, the Court called attention to the fact that in *Standard Fashion* it had not stopped to

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consider what was "remote" and what was "substantial" because "it deemed the finding of two lower courts that the contracts in question did substantially lessen competition and tend to create monopoly *amply supported by evidence that the defendant controlled two-fifths of the nation's pattern agencies...*" (Italics ours) (We pause to note that that is exactly the proportion of the commercial banking offices in the five-state area now controlled by Transamerica.)

The Court then pointed out that, with one exception, all of the remaining cases in which it had construed Section 3 "also regarded domination of the market as sufficient in itself to support the inference that competition had been or probably would be lessened" and quoted language in *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 457-458, *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 136, and *Fashion Originators' Guild* v. *Federal Trade Commission*, *supra*, to bear out this statement. The Court then went on to say (p. 302):

> "It is thus apparent that none of these cases controls the disposition of the present appeal, for Standard's share of the retail market for gasoline, even including sales through company-owned stations, is hardly large enough to conclude as a matter of law that it occupies a dominant position, nor did the trial court so find. The cases do indicate, however, that some sort of showing as to the actual or probable economic consequences of the agreements, if only the inferences to be drawn from the fact of dominant power, is important, and to that extent they tend to support appellant's position."

In support of its statement that "some sort of showing as to the actual or probable economic consequences" must be made

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the Court then referred to its rulings in *Federal Trade Commission* v. *Sinclair Co.*, 261 U. S. 463, 475, and *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, 4. Thereupon the Court proceeded as follows (pp. 304-305):

> "But then came International Salt Co. v. United States, 332 U. S. 392. That decision, at least as to contracts tying the sale of a nonpatented to a patented product, *rejected the necessity of demonstrating economic consequences once it has been established that 'the volume of business affected' is not 'insignificant or insubstantial'* and that the effect of the contracts is to 'foreclose competitors from [a] substantial market.' ... It is clear, therefore, that unless a distinction is to be drawn for purposes of the applicability of § 3 between requirements contracts and contracts tying the sale of a nonpatented to a patented product, the showing that Standard's requirements contracts affected a gross business of $58,000,000 comprising 6.7% of the total in the area goes far toward supporting the inference that competition has been or probably will be substantially lessened." (Italics ours)

The Court then considered the relative economic differences between tying agreements and requirements contracts. It found no economic justification for the former, stating that they "serve hardly any purpose beyond the suppression of competition". Requirements contracts, on the other hand, were found to have economic advantages to the public under certain conditions. After reviewing a number of these possible advantages, the Court pointed out that "the coverage by such contracts of a substantial amount of business affords a weaker basis for the inference that competition may be lessened than would similar coverage by tying clauses..." Consequently, as the Court went on to point out, if economic considerations are a necessary part of the judicial inquiry, then the lower court should have considered evidence on a variety of subjects to ascertain

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whether justifiable economic objectives or the purpose to suppress competition was the basic purpose of the requirements contracts. But the need for any such inquiry was finally and conclusively rejected, and much of the language by which the Court arrived at this ruling is directly apposite to the situation in our case. The Court said (p. 308, et seq.):

> "Yet serious difficulties would attend the attempt to apply these tests. We may assume, as did the court below, that no improvement of Standard's competitive position has coincided with the period during which the requirements-contract system of distribution has been in effect. We may assume further that the duration of the contracts is not excessive and that Standard does not by itself dominate the market. But Standard was a major competitor when the present system was adopted, *and it is possible that its position would have deteriorated but for the adoption of that system*. When it is remembered that all the other major suppliers have also been using requirements contracts, and when it is noted that the relative share of the business which fell to each has remained about the same during the period of their use, it would not be farfetched to infer that their effect has been to enable the established suppliers individually to maintain their own standing and at the same time collectively, even though not collusively, to prevent a late arrival from wresting away more than an insignificant portion of the market. If, indeed, this were a result of the system, it would seem unimportant that a short-run by-product of stability may have been greater efficiency and lower costs, for it is the theory of the antitrust laws that the long-run advantage of the community depends upon the removal of restraints upon competition. See Fashion Originators' Guild v. Federal Trade Comm'n, 312 U. S. 457, 467-468; United States v. Aluminum Co. of America, 148 F. 2d 416, 427-429 (C. A. 2d Cir.).
>
> "Moreover, to demand that bare inference be supported by evidence as to what would have happened but for the adoption of the practice that was in fact adopted or to require firm prediction of an increase of competition as a probable result of ordering the abandonment of the practice, would be a standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts...

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"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. *To interpret that section as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out*...We are faced, not with a broadly phrased expression of general policy, but merely a broadly phrased qualification of an otherwise narrowly directed statutory provision.

"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. *It seems hardly likely that, having with one hand set up an express prohibition against a practice thought to be beyond the reach of the Sherman Act, Congress meant, with the other hand, to reestablish the necessity of meeting the same tests of detriment to the public interest as that Act had been interpreted as requiring.* Yet the economic investigation which appellant would have us require is of the same broad scope as was adumbrated with reference to unreasonable restraints of trade in Chicago Board of Trade v. United States, 246 U. S. 231. To insist upon such an investigation would be to stultify the force of Congress' declaration that requirements contracts are to be prohibited wherever their effect 'may be' to substantially lessen competition...

"*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. In view of the widespread adoption of such contracts by Standard's competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive. Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of § 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity." (Italics ours)

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We cannot emphasize too strongly what we said before we began our analysis of the opinion in the *Standard Oil* case, viz., that this opinion is dispositive of virtually all questions of Section 7 interpretation which are involved in our case. In the first place, the Court held that "domination of the market" in any area, when accompanied by evidence of the use of practices prohibited by the Clayton Act, *a fortiori* requires the conclusion that the "effect" of the prohibited practices may be to substantially lessen competition and tend to create monopoly. "Domination of the market", the Court said, might be found from evidence that a company controlled two-fifths of the market in a particular line of commerce, as was the situation in the *Standard Fashion* case. Here we have a similar total of controlled outlets and even a higher total of deposits and loans, plus, of course, proof of stock acquisitions going back over thirty years. We can surely say here, what the Court said in *Standard Oil*, that it is entirely possible that Transamerica's position "would have deteriorated but for the adoption of" the practice of buying out more and more banks. Indeed, the Transamerica banking group would never have attained its present size had it not been for such acquisitions. And certainly the effects of this practice may well have been "to prevent a late arrival from wresting away more than an insignificant portion of the market". Furthermore, there is evidence here that the *potential* competition of those who might otherwise be disposed

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to open new commercial banks has in all probability been deterred by the presence in the field of such a gigantic organization as the Giannini group. The Act protects against injury to future competition as well as to existing competition. "Neither the letter of the law nor its purpose 'distinguishes between strangling of commerce which has been born and preventing the birth of a commerce which does not exist'". *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 53.

Next, the Court held that even though a record does not contain evidence showing "domination of the market", it nevertheless will support the inference that the "effects" prohibited by the Clayton Act have occurred if it appears that the extent of market control is "substantial" in a purely quantitative sense. In applying this rule it held that slightly under 7% of market control and $58,000,000 in sales were "substantial" and supported the inference that the "effects" of Standard Oil's use of requirements contracts "may be to substantially lessen competition". Furthermore, in applying the quantitative test of substantiality, the Court brushed aside any need for exploring the minds of those who make use of practices prohibited by the Clayton Act as a means of furthering their business, and rejected economic utility as an excuse for their having done so. This disposes of Transamerica's attempts to justify its bank acquisitions on the alleged theory that they were all incidental to the development of state-wide branch banking systems in each of the five states.

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Finally, the Court rejected the notion that the strict rules of interpretation applicable in Sherman Act cases are applicable to those brought under the Clayton Act. To require Clayton Act cases to meet such tests, said the Court, would be to "stultify" the force of the Congressional mandate. "It seems hardly likely that, having with one hand set up an express prohibition against a practice...Congress meant, with the other hand, to reestablish the necessity of meeting the same tests of detriment to the public interest as [the Sherman] Act had been interpreted as requiring." This disposes of Transamerica's contention that the "rule of reason" applicable in Sherman Act cases is applicable here.

But it may be argued that, because the Court was considering requirements contracts and not acquisitions of stock, the tests announced in *Standard Oil* are applicable only to cases arising under Section 3 and not to those arising under Section 7. And in support of such a contention it might be pointed out that the Court made no mention in *Standard Oil* of its ruling in 1931 in *International Shoe*, which, as we have seen, suggested that the "rule of reason" is applicable in Section 7 cases.

There are a number of answers to such a contention. In the first place, no significance should be attached to the Court's failure in *Standard Oil* to mention *International Shoe*. As a matter of fact, *International Shoe* itself supports our view that Section 3 interpretations are applicable to Section 7. For it will be remembered that the ruling in *International Shoe*

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that the "rule of reason" is applicable in Section 7 cases was directly predicated upon the Court's previous ruling in *Standard Fashion, which was a Section 3 case.* (See portion of opinion from *Standard Fashion* quoted *supra*, at page 36.)

Reason, too, supports our contention. If the test of quantitative substantiality is sufficient to prove violation of Section 3 where requirements contracts are used -- contracts which the Court admitted might well have economic advantages to the public under certain conditions -- it certainly should be sufficient to gauge the validity of prohibited practices where no such qualitative advantages could possible be urged in their support. Requirements contracts close out markets, it is true; but the competitors are left alive and kicking, and they may still get some of the business by competitive effort at the expiration of such contracts. But where, as here, the practice is to acquire independent banking institutions "lock, stock and barrel" and then merge them into state-wide branch banking systems, all existing and potential competition of these institutions is eliminated forever.

There remains still another compelling reason for applying to Section 7 cases the rule announced in *Standard Oil*. Congress itself only recently has declared that the tests of illegality under Section 7 were intended to be similar to those applied by the courts in interpreting the other sections of the Act. This declaration accompanied an amendment to Section 7 which became effective December 29, 1950. The primary purpose of the

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latter was to plug a loophole in the Act which has existed since the Supreme Court in 1934 decided *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U. S. 587. In that case the Court held that the authority of enforcing agencies under Section 11 of the Act is limited to ordering divestiture of *stocks* acquired in violation of Section 7; that it does not extend to requiring a company to dispose of *assets* which it acquired and merged with other assets. In fact, Section 7 has been virtually a dead letter since that decision, for it is obvious that the manner in which one company acquires another can just as easily take the *form* of an acquisition of assets as of an acquisition of stock. Many mergers and consolidations which would have been prohibited if stock had been acquired have been consummated with impunity by the acquisition of assets instead. In fact, while this case was in progress, Bank of America N. T. & S. A. attempted to take advantage of this loophole by taking over and merging the assets of a number of the California Transamerica owned banks named in this proceeding, and were only prevented from doing so by the institution of injunction proceedings in the Ninth Circuit.

Congress plugged this loophole by amending Section 7 to prohibit acquisitions of assets[18] as well as of stocks having the prohibited effects. As we said before, this was the primary objective of the amendment. In addition, however, Congress

18/ Only acquisitions of assets by corporations "subject to the jurisdiction of the Federal Trade Commission" are covered by the amendment.

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also rearranged somewhat the other language in Section 7 in order to prevent remedial action in those situations having such a purely local or insubstantial effect upon competition as to constitute little or no hazard to the free flow of interstate commerce.[19] Otherwise existing prohibitions were retained in their entirety. As to these Congress was very explicit on the subject of interpretation. The report of the Judiciary Committee,[20] which accompanied the bill, stated, *inter alia*, as follows:

> "3. Would the bill merely duplicate the Sherman Act?
>
> "Acquisitions of stock or assets by which any part of commerce is monopolized or by which a combination in restraint of trade is created are forbidden by the Sherman Act. The present bill is not intended as a mere reenactment of this prohibition. It is not the purpose of this committee to recommend duplication of existing legislation.
>
> "Acquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as the result of a series of acquisitions. *The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching*

19/ Thus it changed the language reading

> "Where the effect of such acquisition, or the use of such stock...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"

to

> "...Where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks... may be substantially to lessen competition, or to tend to create a monopoly".

20/ H. Rept. 1191, 81st Cong., 1st Sess., p. 8.

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as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, *increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive,* undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.

"Under H. R. 2734 a merger or acquisition will be unlawful if it may have the effect of either (a) substantially lessening competition or (b) tending to create a monopoly. *These two 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. Thus, it would be unnecessary for the Government to speculate as to what is in the 'back of the minds' of those who promote a merger; or to prove that the acquiring firm had engaged in actions which are considered to be unethical or predatory; or to show that as a result of a merger the acquiring firm had already obtained such a degree of control that it possessed the power to destroy or exclude competitors or fix prices."* (Italics ours)

The Senate Report[21] contains language equally cogent on this point. Among other things, it states:

"The committee believe that the excessive sweep that has been given to section 7 of the present Clayton Act by these two features of that section has been largely responsible for the tendency of the courts in cases under that section to revert to the Sherman Act test. *By eliminating the provisions of the existing section that appear to reach situations of little economic significance, it is the purpose of this legislation to assure a broader construction of the more fundamental provisions that are retained than has been given in the past. The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.*

21/ S. Rept. 1775, 81st Cong., 2nd Sess., pp. 4-5.

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"The type of problem to which this bill is addressed was described by the Federal Trade Commission in these words:

"'Under the Sherman Act, an acquisition is unlawful if it creates a monopoly or constitutes an attempt to monopolize. Imminent monopoly may appear when one large concern acquires another, but it is unlikely to be perceived in a small acquisition by a large enterprise. *As a large concern grows through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act test against them* * *'" (Italics ours)

The legal effect of these Congressional declarations is clear. They are mandates to the courts and other deciding bodies to decide cases arising under Section 7 in conformity with such expressions. And when, as here, they accompany amendments which do not fundamentally change applicable provisions of existing law, they are to be given effect in all cases whether they arose prior to such declarations or subsequent thereto. These principles are established in a number of Supreme Court cases. Thus, in *Alexander* v. *Mayor of Alexandria*, 5 Cranch 1, the Court stated the rule as follows (p. 8):

"Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law".

Or, as was stated in *Bailey* v. *Clark*, 21 Wall. 284, 288:

"This enactment was evidently intended to remove any doubt previously existing as to the meaning of the statute and declare its true construction and meaning. Had it been intended to apply only to cases subsequently arising it would undoubtedly have so provided in terms".

To the same effect is the following quotation from *Jordan* v. *Roche*, 228 U. S. 436, 446:

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> "The law was not the declaration of a new policy but a more explicit expression of the purpose of the prior law, made necessary by the judicial construction of that law."

See also: *In re Hillmert*, 71 F. (2d) 411, 413, cert den. 293 U. S. 583; *Minnesota* v. *Keeley*, 126 F. (2d) 863, 866.

Upon the basis of all of the foregoing discussion it is clear beyond cavil that the evidentiary test of quantitative substantiality applied in *Standard Oil Company* v. *United States*, *supra*, is applicable here. That being so, it must follow automatically that the Transamerica stock acquisitions are violative of Section 7, for it would be difficult to conceive of a case, short of complete monopoly, wherein competition, both actual and potential, has been foreclosed in a more "substantial" way than here. The Transamerica acquisitions are substantial in every sense of that word. They are more than substantial; they are overwhelming. They have concentrated more economic power in one small group of men -- perhaps only one man -- than probably has ever happened before in the business life of our country. Not even the great railroad, steel, oil, tobacco or aluminum cases disclosed the existence of greater power in one organization directly to affect the economic life of so great a geographical area or the business lives of so many people and companies as does the record in this case.

Like so many of the predatory goliaths which have preceded it at the bar of justice, the Transamerica banking group has literally grown by what it has fed upon. It has never learned

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or been willing to curb its insatiable appetite for more and greater power and, unless effectively restrained, obviously it never will. No more perfect example of this truth can be found than the joint action of Transamerica and the Bank of America N. T. & S. A. in attempting, while these hearings were in progress, to frustrate the Government's action by branching twenty-eight of the Transamerica owned banking offices in California into the Bank of America N. T. & S. A. Or when, after the Ninth Circuit Court of Appeals refused their request to vacate an injunction issued by it to prevent these mergers, they "flaunted" the Court's order and went ahead and branched them anyway. Only after L. M. Giannini was ordered to go to jail if the mergers were not undone were the banks restored to their former status as separate institutions.

It would serve no useful purpose to review here the many statistics representing the Transamerica banking group which are set out in Requested Findings Nos. 6 to 41, inclusive, submitted herewith. It is sufficient for present purposes simply to call attention to the fact that, since 1904, the Transamerica banking group has acquired 682 independent banks and branches in the five-state area; that Transamerica now controls 667 banks and branches or 40% of all of the banks and branches in the area; that the Transamerica controlled banks and branches have in excess of $6,700,000,000 or 39.5% of all of the bank deposits of the area; and that the Transamerica controlled banks have in excess of $3,200,000,000 or 50.6% of all of the bank

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loans of the area. These figures, without more, clearly establish the "substantiality" of the competition which has been foreclosed as a result of the long history of Transamerica bank acquisitions.

In concluding this phase of our discussion there is one point we should like to emphasize. That is that the great number of Transamerica bank acquisitions over the years have added not one new banking office to the sum total of such offices now serving the public in the five-state area. Indeed, as the record shows, many of those offices have been closed by Transamerica and are no longer serving the public. Had the major part of the Transamerica bank expansion been accomplished via the de novo process, certain it is that this case would never have been commenced. For in such case the Transamerica banks would have achieved their present size under "rules of the game" open to all; their present ability to render a wide variety of services, which officials of the Bank openly boast are too costly for smaller banks to provide, would have resulted in such case from fair competitive practices, not from the palpably unfair one of buying their great size and by this method achieving their dominant position in the banking field of the five-state area. This dominating position is precisely of the kind which impelled the Supreme Court, in *United States v. Reading Company*, 253 U. S. 26, 57, to state:

> "Again, and obviously, this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising

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management, but by deliberate, calculated purchase for control.

"That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act, has been frequently held by this court."

We submit that the evidence abundantly supports the Board's charge that the effect of the Transamerica acquisitions may be to substantially lessen competition between the banks so acquired, to restrain commerce, or to tend to create a monopoly of commercial banking offices, deposits and credit in the five-state area.

CONTROL OF BANK OF AMERICA N. T. & S. A.

There is a final issue under Section 7 which remains to be discussed, namely, control of Bank of America N. T. & S. A. (hereinafter referred to as the Bank). That issue grows out of the contention by counsel for Transamerica that, because the latter now owns less than a majority of the shares of the Bank, it is improper to consider the Bank as a member of the Transamerica banking group. Hence, they argue, the Board's statistics showing totals of banking offices, deposits and loans, which include those of the Bank, are defective and should be ignored. The question, therefore, is whether ownership of more than a majority of the stock of a company is necessary in order to prove any of the "effects" prohibited by Section 7.

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Both Congress and the courts long since have recognized that "control" of one corporation by another or power in one corporation to exert a "controlling influence" over the management and policies of another may exist under circumstances other than the ownership of a majority of voting stock. These phenomena may take many "varied and subtle forms"[22] and their detection frequently requires an examination of many facts, principally those which show the extent to which intercompany relationships have existed in the past and are likely to continue to exist in the future. Such was the underlying theory of the Public Utility Holding Company Act (15 U.S.C. 79) passed by Congress in 1935. In Section 2 of that Act Congress declared that any company which owned 10% or more of the voting shares of an operating utility is a "holding company" and subject to regulation under the Act (15 U.S.C. 79b(a)(7)). An exemption was made in the case of those companies which, though they owned more than the prescribed amount of such shares, do not "control" the operating company or do not, directly or indirectly, exercise a "controlling influence" over the management or policies of such company.[23] Similar

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22/ See H. Rept. 1318, 74th Cong., 1st Sess., p. 9.

23/ The Act also recognized that a company owning less than 10% ownership of the voting shares of another might nevertheless control the latter or exercise a controlling influence in its affairs. Section 2 authorizes the Commission after hearings to declare that "any person", regardless of stock ownership, is a "holding company" and subject to regulation under the Act, if it finds that such person exercise a controlling influence over the management and policies of an operating utility. (15 U.S.C. 79b(a)(7))

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provisions were enacted in defining "subsidiaries" of holding companies (15 U.S.C. 79b(a)(8)).

The decisions of the Securities and Exchange Commission under this section constitute a veritable storehouse of cases which illustrate the wide range of factual inquiry for determining the existence or non-existence of "control" or "controlling influence" in cases where less than a majority of the shares of one company are owned by another. A number of these decisions are cited below.[24] We shall discuss only two decided under that statute, both of which have been reviewed by the courts, and both of which are particularly pertinent to the situation disclosed here.

The first of these cases is *Detroit Edison Co.* v. *Securities and Exchange Commission*, 119 F. (2d) 730, cert den. 314 U. S. 618. In that case Edison had sought an order from the Commission declaring it not to be a subsidiary of North American Company, which owned 19% of its voting shares, or of United Light and Power Company, which owned 20% of its voting shares. The Commission granted Edison's request as to United but denied it as to North American, holding that the latter exercised a

24/Moreau Manufacturing Corp., Holding Company Act Release No. 2868, July 9, 1941; Paul Smith's Hotel Co., Holding Company Act Release No. 2854, July 1, 1941; Panhandle Eastern Pipe Line Co., Holding Company Act Release No. 2778, May 28, 1941; Public Service Corp. of New Jersey, Holding Company Act Release No. 2998, Sept. 15, 1941, petition denied, 3 Cir., 1942, 129 F. 2d 899; Hartford Gas Co., 1941, 8 S.E.C. 758, petition denied, 2 Cir., 1942, 129 F. 2d 794; Community Gas and Power Co., 1940, 7 S.E.C. 643; Shinn & Co., 1940, 7 S.E.C. 333; Manchester Gas Co., 1940, 7 S.E.C. 57; H. M. Byllesby & Co., 1940, 6 S.E.C. 639; Northern Natural Gas Co., 1939, 5 S.E.C. 228; Associated General Utilities Co., 1939, 4 S.E.C. 526; Employees Welfare Association, 1939, 4 S.E.C. 792.

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Federal Reserve Bank of St. Louis

"controlling influence" in Edison's affairs. The question on review was whether the Commission's order refusing to declare Edison not to be a subsidiary of North American was supported by substantial evidence.

In sustaining the Commission's order the Court discussed at length the many evidences of past relationships which had existed between the two companies, including the fact that in 1903 Edison had been formed by North American; that upon its organization all of its officers and directors had been designated by North American; that since that time a number of Edison's directors had also been directors of North American; that two of the present members of Edison's board had served "continuously since North American chose them on the first board"; that, of the remaining seven members of Edison's board, one was a North American officer and another was a member of the law firm which was general counsel to North American; that Edison's two principal officers had been appointed by the board originally designated by North American; that the personal stock holdings of Edison's directors were negligible and that "none of [Edison's] officers or directors appear to have any relationships to any substantial stockholder...except North American". The Court concluded its discussion respecting the officers and directors of Edison as follows (p. 735):

> "A chronological statement of the succession of petitioner's presidents and directors indicates that since its organization in 1902, North American has maintained a position of importance and influence in the affairs of petitioner based on stock ownership or historical association or both. Two members of the present board trace their association with petitioner to their

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initial designation as such by North American while two others are directly associated with North American at the present time. Petitioner's present president, also a director, was selected as its vice president by a board made up in its entirety of North American selection or affiliation. At least half, and perhaps a majority, of the present board are either associated with North American or derive their connection with petitioner from North American."

The Court then went on to discuss other facts shown by the record, including the fact that North American had participated in various syndicates which underwrote and distributed Edison's securities; that Edison "always maintained offices in New York which have been located in North American's building at all times, except from 1909 to 1912"; that for some years Edison participated with North American and its acknowledged subsidiaries in joint purchasing contracts; that Edison had for many years designated representatives to an advisory committee, all of the other members of which were from acknowledged subsidiaries of North American; that until 1925 United Light and Power Company held none of Edison's stock; that in that year United commenced to acquire shares and by 1931 had acquired as much as North American owned; that United four times sought representation on Edison's board, but each time was refused by the Edison management; that, aside from the North American and United blocks of its shares, the remainder of Edison's stock is widely distributed; that each year since 1910 between 90% and 100% of all stockholders' votes cast at stockholders' meeting had been by proxy; and that each year the Edison management appointed a proxy committee to vote the proxies obtained by the management for directors of the management's choice.

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Federal Reserve Bank of St. Louis

As the Court further pointed out, prior to the passage of the Public Utility Holding Company Act in 1935, North American received $45,000 annually for acting as fiscal agent for Edison; with the passage of that Act, however, and "for the sole purpose of avoiding" its application, this relationship was discontinued; "all officers of [Edison] who were also officers of North American...resigned"; Edison's New York office was moved out of the North American offices to another floor in the same building.[25] All of Edison's "stock ledgers, its printed proxies and annual reports to stockholders were removed from the North American offices to [Edison's] new offices and thereafter no mail was either sent or received... through the North American offices"; and "by mutual consent, all existing contracts or inter-related services between the two companies were abandoned".

In holding that the record before it fully supported the Commission's findings, the Court stated, *inter alia*, as follows:

> "At the time of the enactment of the present statute, it was recognized by the Congress that the holding company was the most effective device theretofore used for combining, under single control and management, the properties of two or more hitherto independent corporations...
>
> "...The present Act undertakes to bring within its ambit all subsidiaries subject to 'controlling influence' of a parent. This phrase 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

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25/ The office was "put in charge [of a] former employee of North American, who thereafter discontinued his connection with [North American]". (p. 737)

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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...

"...Seven major types of corporate control were extant when the present Act was passed and others may develop from the urge of individuals to avoid public regulation...

"The types of control referred to are: (1) through complete ownership of capital stock, (2) a majority ownership, (3) through a legal device without majority ownership, such as pyramiding through holding companies or a large issue of non-voting stock with a comparatively small issue of stock with voting rights, or voting trusts, (4) *minority control, which exists when comparatively few shares of corporate stock are in the hands of one group and the remainder widely scattered,* (5) management control, which exists where all the stock is so widely distributed that no stockholder takes sufficient interest in the affairs of the corporation to influence or control it, (6) *proxy control through committees,* (7) *through interlocking corporate officers or directors.*

"The evidence in the case at bar shows marked features and significant incidences of the latent power of the North American Company to exercise a controlling influence over the petitioner.

"The fact that the North American Company had abandoned some of the characteristics of 'controlling influence' over the petitioner at the time of the hearing, did not require the Commission to disregard prior interrelated activities. There is no showing that its latent power to resume such control has been extinguished. The relationship is such that they may enter into similar activities in the immediate future. United States v. Trans-Missouri Freight Association, 166 U. S. 290, 308, 17 S. Ct. 540, 41 L. Ed. 1007; Labor Board v. Newport News Company, 308 U. S. 241, 60 S. Ct. 203, 84 L. Ed. 219." (pp. 738-739) (Italics ours)

The second case to which reference is made is that of *American Gas and Electric Co.* v. *Securities and Exchange Commission*, 134 F. (2d) 633, cert. den. 319 U. S. 763. In that case the American Gas and Electric Company had sought an order from the Commission declaring it not to be a subsidiary of

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Electric Bond and Share Company, which owned 17% of its shares. The Commission refused, holding that American was subject to the controlling influence of Bond and Share. This finding, as pointed out in the Court's opinion, was predicated upon the Commission's belief that the facts "show past relationships between [American] and Bond and Share which clearly 'have resulted in a personnel and tradition which make [American] responsive to Bond and Share's desires'". The question on review concerned the correctness of this finding, American contending that the Commission erred in drawing inferences of controlling influence from *past* facts, which were alleged by it to be "directly contrary to substantial, direct, contemporaneous and uncontradicted evidence dealing with the *present* situation." (Italics ours)

Like the opinion in *Detroit Edison Co.* v. *Securities and Exchange Commission, supra*, the Court's opinion in this case went into the facts in great detail. Among others, the Court mentioned the fact that American had been organized in 1906 by Bond and Share; that between 1907 and 1929 the latter owned 9% of American's shares and that, since 1929, its holdings had increased to 17%; that a number of American's present directors and officers had been elected and appointed when American "was clearly controlled by Bond and Share"; that there had always been a number of American's directors who "were directors, officers or employees of Bond and Share or of companies in the Bond and Share system"; that, aside from the shares owned by Bond

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Federal Reserve Bank of St. Louis

and Share, the remainder of American's shares were widely held, no person or organized group owning as much as 4% thereof; that Bond and Share holdings "have accounted for approximately 25% of all the votes cast at [American's] stockholders' meetings"; that the evidence "does not show anything but friendliness and cooperation between the management of the two companies"; that since 1927 more than 95% of all shares voted at American stockholders' meetings have been cast by proxy; and that Bond and Share "has always sent its proxies to [American's] proxy committees".

In sustaining the Commission's finding the Court said:

> "In brief recapitulation of the evidence, we find on one side Bond and Share's ownership of 17.51 per cent of petitioner's voting stock, from which the former derived 47.5 per cent of its total income in 1939; ownership of petitioner's voting stock widely scattered among approximately 20,000 shareholders so that, other than Bond and Share, no one person or group of persons owns more than four per cent, and the next largest block, 3.3 per cent, is held by Mitchell, life-long official and leading figure, until his retirement, in Bond and Share, and his wife; Bond and Share's voting of approximately 25 per cent of the total number of shares voted at petitioner's stockholders meetings, and doing so as late as 1940 by turning its proxies over to petitioner's proxy committee; intercompany directorships, the chairman of petitioner's board of directors and executive committee being the chairman of Bond and Share's board of directors and executive committee; and the long historical relationship between petitioner and Bond and Share in petitioner's organization, development and management.
>
> "On petitioner's side we find Bond and Share's relinquishment of its control as petitioner's fiscal agent; the resignation from Bond and Share affiliations by petitioner's directors and members of its executive and proxy committees; that neither Bond and Share nor its wholly-owned subsidiary, Ebasco Services, Inc., has ever provided operating services for the American Gas system; that construction and group purchase contracts with the Bond and

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Federal Reserve Bank of St. Louis

Share system ended in 1932; that many Bond and Share men have resigned from petitioner's board until only two with formal connections remain and only one is active; and the evidence of conflict between the management of petitioner and Bond and Share over petitioner's filing of a formal plan for its integration under Section 11(e) of the Act.

"Without doubt these facts constitute a weakening of the formal evidences of control and, it may be conceded, a contraction in the extent to which it has been exercised in fact. But they cannot be taken conclusively as a corporate 'declaration of independence' or as sufficient to establish such independence as fait accompli. The period of dependence was too long, the separation from influence too inconclusive, to establish as a matter of law that petitioner no longer occupies a state of dependency. The facts do not remove entirely either the existence of 'controlling influence' or the possibility of Bond and Share's exercising a 'latent power' to control, should business conditions make it appropriate. Cf. Detroit Edison Co. v. Securities and Exchange Commission, 6 Cir., 1941, 119 F. 2d 730, 739. *Under some circumstances 'controlling influence may spring as readily from advice constantly sought as from command arbitrarily imposed.'* Manchester Gas Co., 1940, 7 S.E.C. 57, 62. It is the Commission's duty to see that divestment of 'controlling influence' is actual and complete, not theoretical or partial. International Paper & Power Co., 1937, 2 S.E.C. 274, 278, rev'd on jurisdictional grounds, Lawless v. Securities and Exchange Commission, 1 Cir., 1939, 105 F. 2d 574. *Controls and influences exercised for so long and so extensively as were Bond and Share's over petitioner are not severed instantaneously, sharply and completely, especially when powers of voting, consultation and influence such as have been retained remain.* Petitioner may have advanced, in the terminology of empire, from status as dependency or colony to one of a dominion, but it has not become an independent empire as a matter of law.

"Giving due weight to the past relationships of petitioner and Bond and Share and the other evidences of Bond and Share's present position of authority and influence in petitioner's management and stock ownership, we cannot say that the inferences drawn therefrom by the Commission to find 'a personnel and tradition' which make petitioner responsive to Bond and Share's desires are unreasonable. The Commission therefore committed no error in denying petitioner exemption from the Act as a subsidiary of Bond and Share. *That Bond and Share has recently abandoned some characteristics of 'controlling influence' did not require the Commission to disregard the past relationships between the two companies.* (Italics ours)

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There are, of course, many other cases, not arising under the Public Utility Holding Company Act, which hold that ownership of more than a majority of shares is not necessary to establish the fact of control of one corporation by another. Thus, in *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 144-146, the Supreme Court sustained a finding by the Federal Communications Commission that the Rochester Company was "under the control of the New York Telephone Company". The latter owned less than a majority of the shares of Rochester, *all of the remaining shares being deposited in a voting trust.* Even under cumulative voting, the New York Company had elected only five out of fifteen directors on Rochester's board. Nevertheless, the Communications Commission concluded that

> "the New York Company, through stock ownership, is the dominant financial factor in the respondent company and also, that this, taken together with their contractual arrangements and other pertinent facts and circumstances appearing in the record, unquestionably gives the New York Company power to control the functions of the Rochester Telephone Corporation."

In sustaining this finding the Court said:

> "The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining 'control' of one company by another, Congress did not imply artificial tests of control. *This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities in such intercorporate relations."* (Italics ours)

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Other cases which are relevant on this question are *Natural Gas Pipeline Company* v. *Slattery*, 302 U. S. 300, 307 (holding that interlocking officers and directors between companies is indicative of common control); *United States* v. *Union Pacific Railroad*, 226 U. S. 61, 96 (holding that a single integrated ownership of a substantial number of shares may be effective in maintaining control of a corporation where other shares are widely distributed between many other stockholders); *United States* v. *Lehigh Valley R. R. Company*, 254 U. S. 255, 264-265 (holding that ownership of the shares of one company by the *stockholders* of another company may give to the latter control over the former); *Hyams* v. *Calumet & Hecla Mining Company*, 221 Fed. 529, 541 (C.C.A. 6); and *Moulton* v. *Field*, 179 Fed. 673, 675 (C.C.A. 7) (holding that control of a corporation may be maintained by effective use of proxies).

Tested in the light of these cases the question of control of the Bank is readily settled on this record. Requested Findings Nos. 95 to 131, inclusive, show in great detail the many facts which parallel those disclosed by the cases cited above. Without repeating them all here it might be appropriate to summarize a number of them so that the Hearing Officer may quickly perceive the present applicability of the rulings made in those cases.

Historical Ties of "Personnel and Tradition". Transamerica was organized in 1928 for the express purpose of "consolidation...into one organization of the control of not

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only Bank of Italy and Bancitaly Corporation, but of their affiliations as well". It was organized by A. P. Giannini, the man who had also organized the Bank (in 1904) and Bancitaly Corporation (in 1918). Immediately upon its organization A. P. Giannini became chairman of its board, he being also the chairman of the board of the Bank. His son, L. M. Giannini, who in 1918 had joined him in the management of the Bank and the various other companies which he had organized, including Bancitaly Corporation, was made executive vice president of Transamerica. He was also a director of both Transamerica and the Bank.

In 1930 A. P. Giannini announced his intention to retire and invited Elisha Walker of New York to become chairman of the board of Transamerica. This change was effected and at the same time L. M. Giannini was elected president of Transamerica, continuing also as an officer of the Bank. Shortly afterwards the Walker management undertook certain reforms in Transamerica of which the Gianninis disapproved. This brought A. P. Giannini out of retirement, and he and L. M. Giannini undertook a campaign to oust Walker and his associates from Transamerica. After a bitter proxy battle during the latter part of 1931 the Gianninis were returned to control of Transamerica at the annual stockholders' meeting in February 1932.[26] At the time the

26/ The Transamerica Annual Report for that year stated that "the policies of the *Giannini management* of Transamerica Corporation have been restored and are here reaffirmed." The Report for 1935 speaks of the "return of the *Giannini management* early in 1932". (Italics ours)

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Federal Reserve Bank of St. Louis

Gianninis returned to the control of Transamerica, A. P. Giannini was elected chairman of the board of Transamerica, which position he held until his death in 1949. L. M. Giannini was elected a director and made chairman of the executive committee. The Transamerica board now consists of eleven directors, seven of whom were chosen by the Gianninis upon their return to the control of Transamerica in 1932 and who have been directors ever since. Of the remaining four directors, three are officers of Transamerica or its acknowledged subsidiaries, and the other is a former officer of Transamerica and the Bank, who had retired prior to A. P. Giannini's death in 1949.

With his return to control of Transamerica, A. P. Giannini also "resumed control of the management of Bank of America N. T. & S. A."[27/] He again became chairman of the board of the Bank and L. M. Giannini was elected a director and executive vice president. In 1933 L. M. Giannini was made senior vice president, and in 1936 he was made president, the position which he now holds. In 1945 A. P. Giannini's title in the Bank was changed to Founder-Chairman. At all times after 1932 and until his death in 1949 A. P. Giannini, first as chairman of the board and later as Founder-Chairman, enjoyed the extraordinary power of formulating "the policies upon which the Bank's operations and affairs will be conducted".

27/ Statement appearing in 1935 Transamerica Annual Report to stockholders.

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Federal Reserve Bank of St. Louis

Immediately upon the return of the Gianninis to the control of Transamerica in 1932 the Transamerica board passed a resolution authorizing him as chairman of the board "to designate...the particular person or persons who shall represent the interests of this corporation on the Board of Directors of any other corporation of which this corporation owns stock". This resolution remained in force until August 23, 1940, when it was superseded by a new one which authorized him as chairman of the board "to execute for...this corporation, a proxy or power of attorney...appointing such person or persons...to vote the shares" which Transamerica owns at any and all stockholders' meetings.

Between 1928 and July 31, 1937, Transamerica owned all of the Bank's shares. Consequently, all of the Bank's directors during those years unquestionably were selected by Transamerica. Moreover, they were the deliberate choice of A. P. Giannini who, as we have seen, had the authority "to designate" them on behalf of Transamerica. Of the twenty-five Bank directors who were on its 1937 board (elected while Transamerica owned all of the Bank's shares), fourteen were still on the board twelve years later. Of the remaining eleven directors on the 1948 board, all but one had been long-time associates of the Gianninis, some of them tracing that association to the early days of the development of the Bank of Italy.

It is a fair statement on this record to say that every director and officer of Transamerica and the Bank have been

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Federal Reserve Bank of St. Louis

chosen by one or both of the Gianninis, and that the present officers and personnel of both institutions owe their advancement within the organization directly to them. As a result, there has never been a time, either before or after 1937, when the Giannini management in both organizations have had anything but the most intimate and friendly relations. The numerous and extraordinary nature of some of these relationships give ample proof of this fact. The latest example of the strength of these historical ties and tradition occurred only last summer when, as we have seen, Transamerica and the Bank jointly "flaunted" a court order enjoining them from consummating the sale of Transamerica majority owned banks in California to the Bank.

Stock Ownership. As we have seen, Transamerica owned all of the Bank's shares between 1928 and 1937. In that year, "as a preliminary step in order eventually that Transamerica Corporation may no longer be classified as a 'holding company affiliate' of member banks within the meaning of the Federal banking laws", [28] Transamerica distributed 58% of its Bank shares to Transamerica stockholders. Since that time it has made other distributions of a similar kind and on a number of occasions has sold some of these shares to the general public. It now owns 1,838,850 or 7.66% of the total Bank shares outstanding.

28/ Excerpt from letter of Transamerica to its stockholders under date of May 14, 1937, explaining the proposed distribution of Bank shares.

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Federal Reserve Bank of St. Louis

All of the remainder are widely distributed throughout the country and abroad. No one person or group owns as much as a substantial fraction of 1% of these shares.

Proxy Machinery of the Bank. The Giannini management of the Bank, selected while Transamerica owned all of the Bank's shares, has perpetuated itself in control of the institution by use of its proxy machinery. The evidence shows that each year since 1937 in excess of 95% of all shares voted at the Bank's annual stockholders' meetings have been cast by the management's proxy committee. The latter were always persons close to the Gianninis and they always voted the shares in favor of the incumbent directors, if they were available, or, if not, for those designated by the management. Since 1938 the Transamerica owned Bank shares have always been voted by this committee.

Interlocking Officers and Directors. Throughout the history of Transamerica there have been numerous interlocking directors and officers between the Bank and Transamerica and/or its acknowledged subsidiaries. Taking the 1948 Bank board as a sample, we find that there were twelve members of that board, including A. P. and L. M. Giannini, who since 1937 have also been directors and/or officers of Transamerica or its acknowledged subsidiaries. And since 1937 there have been at least thirty officers of the Bank (of the rank of vice president or higher) who simultaneously were directors and/or officers of Transamerica or its acknowledged subsidiaries.

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Federal Reserve Bank of St. Louis

New York Office of the Bank. Since 1929 Transamerica and the Bank have jointly occupied the same office in New York. This office has been the headquarters of J. A. Smith, who, since 1934, has been an officer of both Transamerica and the Bank.

Intercompany Relationships. Both before and after 1937 there have been numerous and continuous intercompany relationships of an important nature between the Bank and Transamerica or its acknowledged subsidiaries. From the standpoint of this case none of these relationships has been any more important than the traditional one whereby Transamerica has acted as the buyer of independent California banks and branches for the Bank. Since 1937 Transamerica has acquired 46 such banks and branches, and at all times one of the considerations taken into account in making such acquisitions has been the fact that they would be suitable for inclusion within the Bank.

There have been numerous other intercompany relationships as well. For example, a number of them have been between the Bank and Capital Company, a Transamerica subsidiary engaged extensively in the business of real estate, whereby (a) Capital Company manages and sells distress real estate acquired by the Bank upon foreclosure; (b) Capital Company manages all of the premises occupied by the branches of the Bank; (c) Capital Company makes loans to subdividers of unimproved real estate under arrangements with the Bank whereby the latter

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Federal Reserve Bank of St. Louis

pays to Capital Company the difference between the interest charged by it for such loans and 6%, in return for which Capital Company requires the borrower to "agree in writing to obtain from the Bank...any and all financing needed for the construction of the homes to be built on the property"; and (d) Capital Company participates with the Bank in residential loans made by the Bank, taking that portion of such loans which are in excess of the Bank's legal lending limit.

Another such relationship has existed since 1937 between the Bank and Inter-America Corporation, Pacific National Fire Insurance Company and Premier Insurance Company, all Transamerica acknowledged subsidiaries. Prior to July 31, 1941, Pacific wrote insurance of automobiles, the purchases of which were financed by the Bank. Since that time this insurance has been written by Premier. At all times Inter-America has acted as broker in the transaction. Under arrangements that have been in effect for some time a formula of premium adjustment between the Bank and the insurance companies has provided that if the sum of the actual losses incurred on such insurance, plus the expense of doing business, is in excess of the premiums earned by the insurance company, the difference is to be paid to the insurance company by the Bank; conversely, if the premiums earned exceed losses and expenses, the difference is to be paid to the Bank by the insurance companies. Under this formula the Bank has made net total payments to Pacific and Premier in excess of two million dollars.

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Federal Reserve Bank of St. Louis

Another intercompany relationship has existed between the Bank and Corporation of America, a Transamerica acknowledged subsidiary. In recent years the sole function of Corporation of America has been to act as trustee under deeds of trust in which Transamerica and its affiliated organizations have been named as beneficiaries. The great bulk of this activity is performed on behalf of the Bank. The trustee fees are split between the Bank and Corporation of America.

Another important relationship involving the Bank and Transamerica since 1937 grows out of the frequent use of Bank of America personnel in performing services on behalf of Transamerica and its acknowledged subsidiaries. Thus, Bank officers have been used extensively in assisting Transamerica to acquire independent banks and branches; the inspection department of the Bank makes periodic audits and examinations of the Transamerica majority owned banks; the vice president in charge of the bond and investment department of the Bank has been a member of the finance committee of Occidental Life Insurance Company, a Transamerica subsidiary; a vice president of the Bank (and two retired Bank officers) have represented Transamerica at annual stockholders' meetings of the Citizens National Trust and Savings Association in Los Angeles since Transamerica acquired an interest in that bank in 1943; full-time officers of the Bank have been used to handle legal matters for Transamerica, including the handling of this case. Various other of the Bank's-personnel perform a wide variety

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of other services for Transamerica and its subsidiaries, including tabulating, stock transfer, addressograph, mailing, mechanical maintenance, automotive, stationery supply, rent collection, burglar alarm inspection, telephone and other services. In addition, a considerable number of Bank officers and other personnel have been transferred from the Bank to key positions in Transamerica majority owned banks.

These are but some of the "potent imponderables permeating this entire record"[29/] on the question of "control" of the Bank. Taken together with the many others of a similar nature which also appear in the record, they fully demonstrate how completely the "Giannini management" of Transamerica has dominated the Bank both before and after 1937. It would be sheer stultification to suggest, in the face of this overwhelming array of evidence, that the Bank is not still an integral part of the Transamerica banking group. It is more than just a part, it is the very core, of that group. It has always been the Giannini plan, as soon as the law permits, to use this Bank as the nucleus of a far-flung interstate banking system.[30/]

29/ *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 79.

30/ The Transamerica Annual Report for 1934, issued while Transamerica still owned all of the Bank's shares, contained the following statement:

> "Should federal legislation be enacted to admit of regional branch banking, the way would then be open for Transamerica Corporation's banks to be merged into one interstate branch banking system."

The 1937 Report, issued after Transamerica distributed 58%

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Federal Reserve Bank of St. Louis

That is why all of the large Transamerica group banks in the other states have been patterned upon the operations of this Bank. That is why the Bank's manual of operations (or one similar to and copied from it) has been used by all of the other Transamerica banks. And that is why so many of the key personnel of the other Transamerica banks have been selected from the Bank. Like wheels in a machine, the activities of the entire group are now so closely meshed that they all function as one. We submit that the Bank has properly been included as a part of the Transamerica group.

CITIZENS NATIONAL TRUST AND SAVINGS ASSOCIATION

This brings us to the Transamerica acquisition of the shares of the Citizens National Trust and Savings Association of Los Angeles (hereinafter referred to as Citizens). Findings Nos. 156 to 173, inclusive, describe the shocking circumstances attending Transamerica's attempts to acquire control of this bank and its thirty-four branches. It now owns 58,142 or 23% of the shares of this bank, and has been able, by cumulative voting, to elect five out of twenty-one members on the present Citizens' board.

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of its Bank shares, pointed out that:

> "...should Congress enact legislation permitting branch banking over State lines, Transamerica Corporation, with the cooperation and consent of the other stockholders of the member banks in which it is substantially interested...will be among the first to launch a branch banking system beyond State lines."

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Obviously, Transamerica has not yet succeeded in obtaining complete control of this institution, in spite of its attempts to do so. Cf. *Detroit Edison Company* v. *Securities and Exchange Commission, supra.* The question, therefore, is whether the effects of Transamerica's acquisition of the shares which it has thus far acquired may be to substantially lessen competition or tend to create a monopoly.

In spite of the deliberate, indeed ruthless, manner in which Transamerica has attempted to thrust itself into the management of Citizens, we do not believe Transamerica's acquisition of Citizens' shares, standing by itself, would be violative of the Act. But it does not stand by itself; it is to be considered in the light of and in connection with every other fact in this record. So considered, it takes on an entirely different color and, we submit, is thereby brought squarely within the prohibitions of the statute.

Transamerica now controls 42.1% of the banking offices and 37.7% of the deposits in Los Angeles. If it acquires control of Citizens and its branches (all of which are located in Los Angeles), it will then control 51.4% of the banking offices and 45.7% of the deposits in Los Angeles. That such is its intention is abundantly clear. And that such an intention, viewed in the light of its past conduct, makes reasonably probable a further tendency to monopoly is so clear as to scarcely require argument. The noose has already been slipped into place; it awaits only tightening by the skilled executioner to

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snuff out the independent life of this bank. The Clayton Act was designed to prevent that from taking place. If our cause of action in the main case is well founded, then, *a fortiori*, it is well founded as to Citizens, and the Transamerica acquisition of Citizen's shares therefore violates Section 7.

CONCLUSION

In the light of all of the foregoing, counsel for the Board respectfully submit that Transamerica has violated and is now violating Section 7 of the Act. We further submit that such violation being established on this record, the Board should so find, and that an order should be entered requiring Transamerica to cease and desist from such violation and to divest itself of the stocks of each and every bank it now owns, including that of the Citizens National Trust and Savings Association of Los Angeles.

Respectfully submitted,

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