Statement of J. L. Robertson,
Member of the Board of Governors of the Federal Reserve System,
before the Subcommittee on Domestic Finance
the Banking and Currency Committee of the House of Representatives
on S. 1698 and related bills

August 23, 1965

Mr. Chairman and Members of the Committee:

As passed by the Senate, S. 1698 contains two quite separate provisions, although they both rest, in part, on the same justification. The first of these relates to the mechanics of administration of the antitrust laws with respect to banks; the second--embodied in the last sentence of the bill--would exempt from antitrust prosecution virtually all bank mergers (or similar transactions) that were consummated prior to the enactment of the proposed law. Both provisions are based primarily on the disadvantages of requiring the breaking up of a banking institution--"unscrambling", in the popular jargon--after it has actually come into existence through the amalgamation of two separate institutions.

The "administrative" aspect of the bill would leave bank mergers subject to both the Sherman Act and the Clayton Act, but would provide that if a proposed merger is approved by one of the Federal bank supervisory agencies, a proceeding under the antitrust laws must be commenced, if at all, within 30 days after the date of supervisory approval.

Legislation to this effect would seem to be desirable. It is a cliche, in this connection, to refer to the sword of Damocles, but the cliche is apropos. Under existing law, persons charged with responsibility for managing banking institutions may well hesitate to consider, plan, or consummate a merger, no matter how beneficial it promises to be. There is always the possibility that an antitrust suit may be instituted

long after the transaction has been completed pursuant to supervisory authorization. The costs and the other adverse effects of such a suit, and particularly the possibility that the merged institution may have to be dismantled, are risks that men of sound judgment often hesitate to assume.

Under the amended bill, as others have brought out, in connection with every proposed bank merger the Department of Justice would have a period of not less than 60 days, and in most cases much longer, to study and evaluate the situation and to decide whether action under the antitrust laws appears to be appropriate. If no action was brought within the prescribed period, the transaction could be consummated with assurance that it could not thereafter be attacked under the antitrust laws. On the other hand, if a Sherman Act or Clayton Act proceeding was initiated within the prescribed time, the merger could not be consummated unless and until its legality had been judicially affirmed. In either event, the provisions of the bill would avoid the public and private disadvantages incident to a decision that a merged institution must be broken up. I consider this arrangement to be fair and in the public interest.

The bill, if enacted, would have another effect, one concerning which I have reservations. It provides that "any merger . . . which was consummated prior to the enactment of this amendment . . . shall be exempt from the antitrust laws."

The question raised by this provision concerns the appropriate relationship between the judicial and legislative branches of the

Government; that is, whether the legislative branch should overrule the judicial branch or deprive it of jurisdiction over particular members of a broad group to which existing laws are applicable. I doubt the wisdom--as well as the benefit--of seeking the advice of the supervisory officials on a problem of this kind, because their views are likely to be suspect in view of their prior involvement in merger cases. Many of the mergers that would be exempted by this proposal--all that have been consummated since enactment of the Bank Merger Act in 1960--have been considered by the Federal bank supervisors from the standpoint of effect on competition, and some of the most important were approved by the Board of Governors of which I am a member. In some of these it was my conclusion that the general welfare would not be promoted by the merger. In such circumstances, it is perhaps difficult to avoid being influenced, subconsciously, by one's related convictions. But having been asked to testify on the matter I feel obliged to express my views, however reluctantly.

I am fully aware that "unscrambling" any institution months or years after it is created by the amalgamation of two separate organizations--while not impossible--involves substantial difficulties, inconveniences, and even injury not only to the corporation's stockholders and personnel but also to its customers. Nevertheless, the continued existence and enforcement of the antitrust laws evidence the conviction of Congress, confirmed again and again, that the general welfare calls for such laws and their enforcement even at the cost of

some injury to individuals. Accepting that principle, I am unable to find justification for this aspect of the proposal, which would single out a particular group of mergers and confer upon them complete exemption from the laws that embody an important aspect of our national policy in favor of a vigorously competitive economy.

The principal objection to such a retroactive exemption--even more disturbing than its economic implications, in my judgment--is its potentially adverse effect upon respect for law, obedience to law, and the vigor and effectiveness of enforcement of the laws enacted by Congress. The vice of this proposal is that it amounts to an appeal to the legislature, in particular cases, in an effort to escape from general laws and their judicial enforcement. Certain transactions of a kind that presumably could not be carried out hereafter, under the provisions of this bill, would be granted a special dispensation solely on the ground that they were "consummated prior to the enactment of this amendment". If the underlying philosophy of the antitrust laws reflects the national will and belief--and this is the case, under our constitutional system, until Congress repeals those laws generally--exclusion of a particular group of situations for no other reasons than the difficulties and hardships involved in the unscrambling process and the fact that they were consummated prior to an arbitrary date seems to me impossible to justify.

From the practical viewpoint, I should perhaps express my belief that the "dangers" of antitrust law enforcement in this field

have been exaggerated. It has been pointed out that two thousand bank mergers have taken place since 1950, with the intimation that all of these institutions will continue to be in antitrust jeopardy unless they are accorded relief of this nature. On the basis of three decades of experience in bank supervision, necessarily involving some familiarity with the application and enforcement of antitrust laws in the banking field, I am satisfied that failure to grant such a special exemption from the antitrust laws will not result in wholesale antitrust litigation involving merged banks or a major disturbance and upheaval in the financial community.

These are the reasons why I support the "administrative" provisions of S. 1698 but question the advisability of the provision that would confer retrospective exemption upon a particular group of merged corporations.