Before the

BOARD OF GOVERNORS
of the
FEDERAL RESERVE SYSTEM

In the Matter of:

TRANSAMERICA CORPORATION

CONFERENCE BETWEEN GOVERNORS OF THE FEDERAL RESERVE SYSTEM AND REPRESENTATIVES OF TRANSAMERICA CORPORATION, AND THE SOLICITOR'S STAFF, FEDERAL RESERVE SYSTEM.

Place of Conference: Washington, D.C.

Date of Conference: December 11, 1951.

VOLUME I

UNITED STATES OF AMERICA

BEFORE

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In the Matter of:
TRANSAMERICA CORPORATION

Board Room,
Federal Reserve Board Building,
Washington, D. C.,
Tuesday, December 11, 1951.
4:45 o'clock p.m.

Conference between Governors of the Federal Reserve System, and representatives of Transamerica Corporation, and the Solicitor's Staff, Federal Reserve System.

PRESENT:

WM. McC. MARTIN, JR., Chairman, Presiding.
M.S. SZYMCZAK
R. M. EVANS
JAMES K. VARDAMAN, JR.
EDWARD L. NORTON
OLIVER S. POWELL

J. LEONARD TOWNSEND
G. HOWLAND CHASE
GREGORY O'KEEFE, JR.
PAUL HODGE
GEORGE B. VEST
JOSEPH SMITH

SAMUEL B. STEWART, JR.
GERHARD A. GESELL
HUGO A. STEINMEYER

THE CHAIRMAN: Gentlemen, we thought that we would accept the designation that you have given us of judges, both sides in this case, and use the prerogative of judges and perhaps have a little session in chambers here to give some of the members of the Board and counsel an opportunity to ask some strictly legal questions, or other points that they would like to have cleared up.

So I will throw the meeting open now.

MR. SMITH: Do you want me to break the ice, Mr. Chairman?

THE CHAIRMAN: You can break the ice, Joe.

MR. SMITH: If I may, I would like to ask Mr. Gesell a question.

As I understand your distinction as to the meaning of Section 7, Mr. Gesell, it is that the Clayton Act has no application to stock acquisitions of non-competing corporations. I believe that is the position you take in your brief, unless there is pre-existing competition?

MR. GESELL: Pre-existing competition or an immediate probable affect upon competition demonstrably shown.

MR. SMITH: You make an alternative in your oral argument. Your brief takes the position that there must be pre-existing competition.

MR. GESELL: That is right.

MR. SMITH: If that is correct, what is the meaning of the language in Section 7 to the effect that the acquisition is unlawful where the effect may be, one, to lessen competition between the acquired and acquiring organizations, or, to restrain competition, or to tend to monopoly?

Aren't those three different alternatives, the showing of either one of which might justify an order?

MR. GESELL: Yes. I think any one of the three might justify an order, but I think an essential element of proof as to any of the three is competitive effect. It seems to me that is possibly, where the difference comes in between a substantial lessening, which is directed to existing competition primarily, and tendency, to create a monopoly, which may have implied in the term more questions of probability and immediate affect, but in either event, the probability must be clear and demonstrable and tangible and not simply a matter of speculation.

MR. SMITH: I was struck by Mr. Townsend's illustration and, frankly, it seemed to me a valid one, that you can have a tendency to monopoly without having a substantial lessening of competition. You don't agree with that?

MR. GESELL: I don't agree with that, no.

MR. SMITH: Why are the words "or tend to lessen monopoly" in the statute, why doesn't the statute just provide that the acquisition is unlawful where the affect may be to substantially lessen competition?

MR. GESELL: There are several different ways you can look at that. One is you can say that the tendency is directed more to potential competition than is substantial lessening, but in either event we are talking about probable affect on competition.

The other thing you could say is that the words "tendency to monopoly" may be there to deal with this sort of a situation, which is not comparable to anything we have here, the situation of vertical integration, where a manufacturer acquires distribution outlets on the one hand and then, on the other, acquires, let us say, the only source for the raw material.

Such a series of acquisitions would not have any competitive effect as between the acquired and acquiring company, but the affect of the acquisition would be very clearly in the direction of creating a monopoly because the acquirer would be sewing up distribution channels on the one hand and sources of raw material on the other.

There are many different kinds of situations where I think you could argue that a tendency might not necessarily have to involve a substantial lessening, but in a situation of this sort, a horizontal situation, concerned with the acquisition of banks, all concerns engaged in the same kind of business, it is our contention that unless those banks compete, or are clearly shown to be probable competitors, in a nonspeculative sense, the statute doesn't become operative.

MR. SMITH: Then you don't read either or provisions of the statutes as setting up distinctly different standards or judging or determining the affect of the aquisitions?

MR. GESELL: Not so far as applied to this case, this type of acquisition.

MR. SMITH: May I pass on to you a question that Governor Powell wanted to ask, Leonard: The statute as it stood at the time the complaint was filed referred to the effect substantially to lessen competition, or restraint of trade to create a monopoly. Governor Powell noticed that in the statute as it has been amended to provide that the acquisition is unlawful where the effect may be substantially to lessen competition or tend to monopoly.

Governor Powell inquired whether or not that word "substantial"

should be read to modify both restraint of competition and tendency to monopoly.

MR. TOWNSEND: No. I think that that is all clearly deliniated in the report of the committees, and I am perfectly willing to leave the matter, so far as that question is concerned, to what the committee said about it, and rather than try to paraphrase it, I will simply pass the question back by saying that the committees in Congress in adopting the change indicated that they were trying to get away merely from small, insignificant acquisitions, that the re-arrangement of the language was to do no other thing than to obviate the necessity of the courts having to play with completely trivial acquisitions.

I think that is made out in the committee reports.

MR. SMITH: You would reply, then, that principle of de minimis to tendency, as well as to the lessening of competition?

MR. TOWNSEND: I think it always has applied.

MR. SMITH: If either of you want to make any observation on the remarks made by the other, I think the Governors would like to have them.

Would you like to say anything?

MR. TOWNSEND: I have nothing to say.

MR. SMITH: All right.

Mr. Gesell, or Mr. Stewart, there has been a great deal said in the case about the necessity for a showing that Transamerica controlled Bank of America.

The statute, as I recall, prohibits the acquisitions, having the specified effect of all or any part of the capital stock of a corporation.

Now, in view of that language of the statute, why is it necessary for the Board to show that Transamerica controls Bank of America?

MR. GESELL: I think the answer to that, from our point of view, is this, that the statute is concerned also with affects, where the affect may be to substantially lessen, or to create a monopoly, and that is why, when the complaint was filed, it was said that that acquisition of stock involved control of the operations, and policies of the Bank of America.

Now, if the acquisition of stock does not involve control of the operations and policies, then, obviously, whether it is all or part of the stock, it can not have any of the prohibited affects and, therefore, the question of control, as I see it, and it is a shorthand expression for what we have been talking about, gets into this case because there is no case unless it can be shown that because of this part of the stock -- to use your expression -- Transamerica is in a position to influence and control the operations and banking policies of Bank of America.

MR. SMITH: Suppose you had a situation like this: Suppose that Transamerica owned none of the stock or owned two shares, an infinitesimal number for that matter of the stock of Bank of America, or none, and there was a contract between Bank of America, on the one hand, and Transamerica on the other, pursuant to which Transamerica undertook to shop around and buy the stocks of banks for Bank of America to sell the banks to Bank of America, there is no interlocking directors, no ownership of Transamerica by Bank of America.

If you could show in a given situation that Transamerica's ownership of the stock of B bank, if transferred to Bank of America, would have

a tendency to injure your competition, and you further showed a contract between Bank of America and Transamerica by which Transamerica was to buy that bank and merge it and sell it to Bank of America, wouldn't you make out a case for divesting Transamerica of the stock of the bank, even though there was no ownership of Bank of America stock at all?

MR. GESELL: Of course, that is an entirely hypothetical question.

MR. SMITH: It is.

MR. GESELL: We don't think you would, because we think the statute is related to the affect of the stock acquisitions, and if that contract came about unrelated to any stock acquisition, if it had existed, let's say, prior to the stock acquisition, to make the situation clear, there would be no showing that the acquisition of the stock had any of the prohibited affects on competition, to which the statute is addressed.

Now, on the other hand, if I may go on, Mr. Smith, if because of that acquisition the contracts came about and it was shown that the stock was the resulting reason for the continuation of the contract, then you would relate it to the stock acquisition.

That, I think, is our position on that, isn't it, Sam?

MR. STEWART: I think that is substantially right.

MR. SMITH: Do you want to say anything about that, Leonard?

MR. TOWNSEND: Yes, I think this is a matter that deserves a little consideration by me.

I have always felt that it would have been perfectly appropriate for me to have argued in this case that under the ruling of the Aluminum Company Case that control of Bank of America would not be necessary if the

affect of the Transamerica acquisitions can be shown to have had an affect of substantially lessening competition elsewhere, and if the result of Transamerica's buying stocks of banks, say, in California, and turning them over to the Bank of America, NT and SA, whether they had an agreement to do it or whether they didn't if it was a course of conduct which gave reasonable indication that it was a likely situation to continue, then it would be perfectly proper, I think, for the Board to find that the acquisitions in California made under those conditions would result in a substantial lessening of competition as between the companies the banks acquired and Bank of America.

In other words, if Bank of America can be shown to have existing or potential competition with institutions acquired by Transamerica, and Transamerica continued as a matter of policy to buy banks, the stocks of banks and to transfer the stock to the Bank of America so that the Bank of America could eliminate that competition by branching them, then I think the statute would be violated.

I have preferred, however, not to make that argument for the reason that I rather intended that the case could always be considered as a unit or in its entirety.

MR. SMITH: If the hypothesis implicit in my question to Mr. Gesell is right, then assuming that the Board finds no control, where is the Board left in view of your admission on the record that in the absence of control there is no case?

MR. TOWNSEND: Let me put it this way: If I were wrong in that admission, there is certainly nothing to prevent the Board, which is the

deciding body, from pointing out that error.

Certainly, in the course of my presentation, I have considered Bank of America to be an integral part of the Transamerica organization, and always the central part of it, in fact, quite candidly, I believe that it is going to be, if and when the situation ever permits, the name of the bank that is going to be the interstate branch banking system, as I have indicated right along.

I think it has always been the hub of the entire wheel. I have said so many times. Therefore, in my judgment, the finding of a control in the sense in which I used the term is probably essential to the making out of that case.

Now, if you are talking about control in the sense of just Transamerica's sitting at the other end of the wire dictating policies, then, of course, we might just as well forget it. On the other hand, if you are talking bout control that is derived from personnel and tradition, and the kind of organizational structure that has permeated the entire organization from the beginning that is an entirely different matter.

If you don't find that kind of a situation, then it would seem to me to be very difficult for the Board to find any kind of a situation that violates the anti-trust act.

MR. SMITH: I would like to advert to the quantitative substantiality theory. In the copy of the opinion that you gave us, copy of the majority opinion, on page 4, the Court, the Supreme Court, quotes Judge Yankwich as having said that a "substantial number of outlets and a substantial amount of products, whether considered comparatively or not, was

sufficient to establish a violation."

Now just where -- do you consider the Supreme Court approved that expression?

MR. TOWNSEND: Not only approved it, but specifically stated it, and I can give you my answer to that very shortly.

MR. SMITH: Yes. Where, then, are you going to draw the line in a case of this sort under Section 7, as distinguished from Section 3?

I can see a situation where you and I are competitors in a gasoline business, and Mr. Chase has a big filling station. He does a million dollars worth of business a year. Now, that is, I would assume, quantitatively substantial, but assume further that there is one hundred million dollars worth of business a year being done in that town.

I tie him up with an exclusive dealing contract. Then under Section 3, under the Standard Oil Case, Section 3, I violated Section 3, haven't I?

MR. TOWNSEND: I don't know. I have never seen that case decided.

MR. SMITH: Would you object to answering it on the basis of the hypothesis, to try to apply the decision, I want to see how far you contend this decision goes.

MR. TOWNSEND: I think that it unquestionably deals with a situation that goes into the billions of dollars, and to forty percent of the assets. Therefore, my job is at an end. If you are asking me whether a third of one percent, or a fifty of one percent would be enough, I don't know. I don't know what the Supreme Court would say about that.

The refinements of this doctrine have only just begun to appear.

I would say as a safe rule that the doctrine of de minimis would be the one that the court is actually adopting in Standard Oil.

MR. SMITH: If that applies to Section 7 then, how can you ever have any kind of a acquisition that will be lawful if the tendency to monopoly is to be governed by the quantitative substaniality rule and the quantitative substantiality rule applies to anything beyond de minimis, how can you ever have any kind of a stock or asset acquisition that would be lawful?

MR. TOWNSEND: I think under the doctrine of de minimis you could have any number of such acquisitions. It remains for the Supreme Court to say where the line shall be drawn. We say we don't have to worry about the doctrine of de minimis because clearly 40 percent and six billion dollars is a far cry from that total.

MR. SMITH: Let's get to the percentages, then. I have some difficulty in understanding just what there is about the five-state area which justifies you in drawing an iron curtain around that area, and refusing to look to anything either beyond it, or anything in it, which comes from outside of it.

Now if I correctly understand Governor Evans' findings, they are to the effect that banking is essentially a local business. Do you agree that that is a correct interpretation?

MR. TOWNSEND: Except where institutions are developed to an extent where they become statewide, as the Bank of America, and the other statewide institutions that Transamerica has.

MR. SMITH: It is essentially local, and a bank with the negligible exceptions mentioned in oral argument, a bank chartered in one state can't

establish offices in another, so that in that sense, California banks can't cross the state line into Washington or Oregon, Arizona can't come into or go into Nevada, or any other state.

Now, if that is true, if the law is agreed, and if the fact is assumed that one bank can't go into another, how can you say that the holdings of banks in California have any tendency to affect a monopoly in Washington, where there is only one bank owned by Transamerica?

MR. TOWNSEND: Well, you consider the locations, for example, if this were any other kind of a circumstance than banking, say, filling stations, it would be perfectly obvious that it is the outlet which is the unit of articulation in the business.

Now in banking, the outlets are severely limited by law and by supervisory permission. Therefore, all of the banking business that can be done in any particular outlet has got to be done in the available outlets in the areas in question. Consequently, a constantly increasing control over the available outlets of filling stations is, in my judgment, the same degree of monopoly control that you can get and which I think Transamerica possesses in connection with the banks in this case.

MR. SMITH: I suggest to you that there is a difference there in that Standard Oil Company can do business in any state, and put branches, and buy filling stations in any state.

MR. TOWNSEND: So can Transamerica.

MR. GESELL: May I interject here, Mr. Smith, a minute?

MR. SMITH: Go ahead.

MR. GESELL: In the Standard Stations Case, there was no question

of the competition between the filling stations, a point which Mr. Townsend overlooks in his discussion. It wasn't a question of the competition between the filling stations. The question was, the competition between the supplying oil companies, which one foreclosed from the other by the contract, so that the analogy breaks down, and our contention is that where you are dealing with competition between the banks, then the question of the area of their competition becomes important, and it would have become important in Standard Stations if you were concerned with the question of the competition between the filling stations, which you weren't.

I simply, in other words, want to emphasize that distinction.

MR. SMITH: I would like to go back to this point which gives me a great deal of trouble. Since Bank of America can not operate, in, say, Washington, where Transamerica owns only one bank, I have difficulty in seeing how you can carve out a five-state area, or even a two-state area and say that we won't pay any attention whatever to what goes on outside of this area, or to what comes into this area from outside of it.

We are going to look to what goes on in this area, and we are going to lump together the statistics of the whole area to have a five-state area monopoly.

It seems to me that a banking monopoly, in view of the finding that banking is essentially a local business, that if you are going to deal with banking monopolies, you have to deal with local monopolies, local to the extent that they are within the geographical limits of a state.

I would concede that you could have a state monopoly, one-state monopoly in banking, but since a bank can't cross a state line to establish

a branch, I have difficulty in my own mind in justifying the lumping of statistics for five states to come up with a five-state total. I can see how you can say that the statistics in California present a dangerous situation, but when you look at Washington, you have an entirely different picture.

What I am trying to get at is the justice for combining Washington and California, or combining Nevada and Oregon. What would be the Board's justification for lumping all of these statistics together to reach a conclusion that you have got a five-state area tendency to monopoly, when the bank in no one state can open a branch in another state?

MR. TOWNSEND: Well, it just seems to me that you misconceive the whole purpose of the monopoly statute, which is aimed --

MR. SMITH: I may do that.

MR. TOWNSEND: -- at the question of monopoly power. Banks can't go over state lines but holding companies can, and have, and they are doing it in this case, and by the process of buying out banks across state lines they are building up a vast amount of economic power which in its ever enlarging ratio, grows to the point where it can produce harm to the public.

MR. SMITH: In what way? How does Transamerica's ownership of, say, 40 per cent or even 50 per cent of the banks in California make it dangerous for Transamerica to own one bank in Ashton?

MR. TOWNSEND: I have never contended there is any tendency to monopoly in a single state. I have said and am free to admit that the monopolistic tendency so far as state lines is concerned, are merely the states in which they are operating. They have given every indication of buying more banks in each of the states in which they are located. Now, as long as they have that intention, and we may judge what they are going to do with that intention by what they have been doing in the past, the question is whether it should be halted.

MR. SMITH: Just because they have given an indication in the past that they were going to buy other banks, you wouldn't even allow them to own one bank in the State of Washington because you are afraid that that one bank, that the ownership of one bank has a tendency to monopoly?

MR. TOWNSEND: No. I think you are looking at it completely from a false angle.

MR. SMITH: It may be that I am.

MR. TOWNSEND: The ownership of a single bank means nothing. It is the drive, or continued accumulation of a lot of banks that creates the power in those who are in a position to control, or to affect the management of those institutions. In addition, it gives free purchasing power. It enables a holding company or anyone possessing that power at any one time that it wants to do it, to turn its power, malevolently if it should desire to do that, against the elimination of a local competitor somewhere. You can bring the resources of a whole group of banks to bear through the holding company just as easily as you can through one bank.

MR. SMITH: Yes, but the question here -- let's stick to Washington a minute -- that may oversimplify the problem, but I want to keep it as simple as I can for the time being; we have got a charge that Transamerica's ownership of the stocks of all these banks tends among other things to effect a monopoly in commercial banking in the State of Washington.

MR. TOWNSEND: Maybe, to do that.

MR. SMITH: All right. The ownership of one bank may tend to effect a monopoly in the State of Washington. Now, how can the ownership of banks in Arizona, which can't do business in Washington, or banks in Oregon, which can't do business in Washington, and so on, with Nevada and California, how can the ownership of those banks in the other states make the ownership of one bank in Washington tantamount to a tendency to monopoly in Washington?

MR. TOWNSEND: That just seems so perfectly clear to me that it doesn't provoke any question in me. Maybe I am looking at it wrong, but as the size of the holding companies dominion over banks grows, it has an

increased contact potential, all over the area, and when a local bank in Washington, for example, let's take the bank they own in Washington -- that now is the result of ten or eleven acquisitions -- I don't know how many -- they have gone out of existence. They are in the bank now, but let's talk about it as if it weren't in existence. Let's say every one of these were individual banks. Does not the accumulative power of all of these ownerships give to the man at the top or the management at the top the power to centralize how banking shall go in all of the areas covered by these institutions?

MR. SMITH: I don't recall any evidence to that effect.

MR. TOWNSEND: You are supposed to look at it presumably from the standpoint of the power that has been reached; that may have been reached, that may be reached. I am not saying there is any predatory action. There may have or may not have been, but we didn't proceed on that theory.

MR. SMITH: What power do they have in Washington other than over this one bank?

MR. TOWNSEND: I said in my oral argument I am perfectly willing for the Board to cut down its perimiter of operations in a finding of tendency to monopoly to the actual counties in which they are located. I don't have any brief for the argument that the Board has got to say these five states. Let them say every one of the counties in which they are located and that achieves the result. I put in the five states for the simple reason that I figured that I had to lean over backwards in order to give them a chance to develop all the facts that related to the states.

MR. SMITH: Well, if that -

MR. TOWNSEND: I did it on the theory, further, that I believe

that I had demonstrated an intention to go into each of these states and to build up the same kind of an organization in each of these states that they built up in California or Oregon.

MR. SMITH: Where wouldn't it be fair for the Board, then, to include statistics in New York, where Transamerica owns about as large a percentage of the National City Bank as it does of Bank of America?

MR. TOWNSEND: I don't have any trouble with that. They just don't have any control over that organization. They are not affiliated for the purpose of building up an interstate branch system. They have no desire to strike New York into the picture, and it hasn't been demonstrated. We are dealing with the areas in question where they have demonstrated that contention and where they have a continuing intention to do so.

MR. SMITH: Do you have any observations to make?

MR. GESELL: Yes, I have two. Much of which Mr. Townsend says has no basis in the record as far as proof is concerned. There is no proof as to what our relationship is with National City. He has percentage figures like he has as to Bank of America, but I would like to also point out this, that if his argument is true, the same results would apply if General Motors Corporation bought a bank in Washington. It would give all this accumulated power that comes from being a big company, a big stockholder which it could use as influence in Washington, and I think that we come back again on his remarks to the fact that he overlooks the absence of competition between these separate units.

MR. SMITH: Do you attach any significance to the fact that a bank, a California bank, may not have offices in Washington, for example? Do you

have any qyestions as to the validity of combining statistics for the five states to come up with a five-state area total?

MR. GESELL: Yes. We have said that you can't do that; that you will have to look at this situation either on a nation-wide basis, or on the basis of some economically established area. Now, Mr. Townsend has conceded this is not an economic area; that it has no validity as an economic area, and if you take less than the United States, we say you have to find some area that from a competitive standpoint of view is a separate and distinct market.

MR. SMITH: I would suggest to you that a state which permits branch banking might be regarded as a competitive area in view of the fact that any bank in that state could establish branches all over the state.

MR. STEWART: May I make one comment on that, Mr. Smith? I think there is some validity for your last suggestion, but I think in doing it you would have to take into account all of the competition which the bank faces in that state, which includes in many instances lending activities and deposit activities, new business activities, from banks which are situated outside the state, and you have that situation demonstrated at least in the offers of proof here, it didn't get into the evidence because it was excluded, but we put in a substantial number of offers of proof of the activities of the big New York and Chicago banks, the others who maintain representatives and in some cases actual offices in the five-state area, where they are soliciting the exact same customers that are solicited by the banks in that area.

MR. SMITH: I understand.

MR. STEWART: Before I leave that, I would like to add one other

thing in reference to the comment Mr. Townsend made about Transamerica being in all these states. It is conceded here that Transamerica isn't in the banking business and is not operating any banks. It is a stockholder and only a stockholder, and while we didn't discuss it at any length in the oral argument, it is quite apparent from the evidence that each of these banks directs its own policies. Some of the ones other than Bank of America do send Transamerica some reports of their activities, as it is the sole stockholder, but each of the banks own sets of directors and officers operates that bank. Transamerica doesn't do it.

MR. SMITH: Apart from that, going back to the sharp and narrow question, in view of the fact that a bank may not maintain branches in a state outside of which it is chartered, is there any objection to including Washington statistics, for example, with California statistics, to come up with a two-state or three-state or five-state total which justifies the divestment of the ownership of the stock in one bank in Washington, or one bank in Arizona, and all of the banks in all of the rest of the states?

MR. GESELL: We said on oral argument we didn't think you could do that, but that was putting together, adding up cats and dogs. There wasn't a group of figures that had any competitive significance.

THE CHAIRMAN: Governor Vardaman has a question.

MR. VARDAMAN: I don't know that it is important. I have been intrigued by this five-state arbitrary grouping and wondered why, for statistical purposes, it wasn't grouped by Federal Reserve districts. We have seen the arbitrary -- we have disregarded state boundaries throughout the Federal Reserve System, the districts divide states; it is done according to trade area, and I wonder if there was anywhere in this record or

available these statistics applied to the entire 12 Federal Reserve Districts, instead of these arbitraries applied to these five states.

I will grant for the sake of argument that you cannot in fairness apply statistics compiled in Washington to a bank that can't do business in Washington, but since that has been done here for the record, I wondered if there was any other compilation? Is there, Leonard?

MR. TOWNSEND: I know of none.

MR. VARDAMAN: Then the only other question I have on this particular point is the degree, or the percentage of stock ownership -- I am not talking about the question of control -- is there an agreed statement of fact as to the percentage of stock owned in Bank of America by Transamerica?

MR. TOWNSEND: There is.

MR. VARDAMAN: As of June 24, 1948, when this hearing was started?

MR. TOWNSEND: Yes. I think that is clear.

MR. STEWART: I don't think there is any disagreement between us on that.

MR. VARDAMAN. What percentage was owned at that time?

MR. STEWART. It was 22 and a fraction. The fraction is in the record.

MR. VARDAMAN: Then later on during the process of this hearing, Transamerica, allegedly or actually, or whatever the contention may be, disposed of a large portion of its stock holdings in Bank of America?

MR. STEWART: Yes. There is no question about that either.

MR. VARDAMAN: Is it agreed between counsel that the ownership as of a certain date was reduced from 20 per cent down to seven per cent?

MR. STEWART: Yes.

MR. GESELL: 7.6

MR. STEWART: That occurred in two steps.

MR. VARDAMAN: Is it the contention of respondent's counsel that the change in the status of the ownership, stock ownership, still disregarding this question of control, did that in any way change the question of jurisdiction? Did it relate directly or indirectly to jurisdiction?

MR. STEWART: The jurisdiction of the Board, sir?

MR. VARDAMAN: Yes.

MR. STEWART: I don't think that had any effect upon the jurisdiction of the Board. It does have an effect upon what the effects of the ownership may be and whether there is a potential lessening of competition.

MR. VARDAMAN: It does have an effect upon the contention of the Board, but it didn't relate back to jurisdiction?

MR. GESELL: It does not go back to jurisdiction.

MR. VARDAMAN: The only other question I had was this: A statement was made, I believe it was by respondent's counsel, that certain board records were requested to be put in evidence. The board records were requested. That was refused. You weren't given the records you asked for.

MR. STEWART: That is correct.

MR. VARDAMAN: Were those same records during this hearing available to the Solicitor in the prosecution of the Board's case?

MR. STEWART: I assume, sir, anything in the files of the Board was available to him, but I don't know that you gentlemen on the Board know better than I what has been available to him. All I know is that the orders

in the case show what was made available to me and were not.

MR. VARDAMAN: Were those records available to you in the preparation of your case?

MR. TOWNSEND: I have no idea. If you will identify the record --

MR. VARDAMAN: I don't know. I am going by the statement that certain records were excluded.

MR. STEWART: I can give you two illustrations, sir. There were, of course, bank examination records, there were the reports of the examiners, the materials they developed in their examination, there were matters such as the minutes of the Board in connection with the decision to initiate this proceeding. We asked for that information for the purpose of going into the question of what vote had been taken, what proceedings had been taken, and to what extent my judgment might have been formed, in advance. There were questions raised as to the records of Governor Eccles' activities, which we sought in connection with his cross examination which were not given to us. There may have been others. Those are the ones that I recall at the moment.

MR. VARDAMAN: Leonard, do you recall whether those records were available to you?

MR. TOWNSEND: I have never seen the records.

MR. VARDAMAN: To put it another way; Was there at any time in any degree any restriction put upon you and your staff in the examination of this board's records in conjunction with the preparation and prosecution of this case?

MR. TOWNSEND: No more than would be put upon any attorney for any governmental agency in referring to the official files of the Board

needed for the prosecution of a case.

MR. GESELL: And Mr. Townsend, it is clear that you did have access to bank examiner reports which were not made available to respondent?

MR. TOWNSEND: There is no doubt in the course of the proceedings that I have seen some bank examination reports. I did not put any bank examination reports in evidence.

MR. GESELL: You questioned the people who made some of those examinations and had the reports in the hearing room and we didn't have access to them?

MR. TOWNSEND: That is not so. I don't believe I have talked with any Examiners of the Federal Reserve System, outside of the Federal Reserve System, about bank examination reports. There is no doubt that in the course of my presentation of evidence, that I discussed with bank examiners of the Federal Reserve Bank of San Francisco, but that was information which they had gotten while they were engaged in a holding company examination at the behest of the Board.

MR. STEWART: But there, again, you brought out the information which had been developed upon their examination, and which was not available to us, which I think is the question Governor Vardaman was asking.

MR. VARDAMAN: That is right.

MR. TOWNSEND: There isn't any doubt that is done. That is done in any agency that conducts investigations. I can recall in the S.E.C., for example, the reports that the S.E.C. made of a similar situation to this, was naturally made available to counsel who was going to put the evidence in the record, for which the report stood.

You have got to remember this, and I would like the record to be

sure to show it, that any of the information which a bank examination report, or any other kind of examination report about these institutions could disclose would be information within the possession of the company that had been examined, and hence if there was any information that came to the knowledge of the Examiner, it must of necessity be information that the company itself had knowledge of, and therefore they can produce anybody --

MR. VARDAMAN: I am sorry. That is not the case.

MR. TOWNSEND: I don't think for the record I want to debate with one of the judges in the case --

MR. VARDAMAN: Let's keep the record straight because that is not a fact. The minutes of the Board show that certain reports of examination of the Transamerica Company were excluded, and were not given to Transamerica.

MR. TOWNSEND: That is a different question. I thought you were talking about the matter of information --

MR. VARDAMAN: That is the report of the examination of the holding company and it was not given. So let's keep the record straight on that

MR. STEWART: My recollection is in accordance with Governor Vardaman's on that for the record.

THE CHAIRMAN: Governor Powell has a question.

MR. VARDAMAN: My other questions are all answered by Joe's questions.

MR. POWELL: I have two questions, one a minor one: It seem that in listening to the discussion that there wasn't quite a meeting of the minds on this matter of the attempted check of 22 California banks in the summer of 1950. I wonder what the opinion of the attorneys for Transamerica are

on that, in a little more detail? That was rather brushed off today, I thought. There seemed to me anyway, come into the Federal Reserve Board after that fact and just hearing about it, that there was rather facility between Transamerica and the Bank of America for easy transfer of banks into branches of the Bank of America, which would seem a bit more of a normal working arrangement, than the lack of control of complete disassociation of the two organizations would lead me to believe from your discussion today. Am I wrong on that?

MR. STEWART: May I answer that?

MR. POWELL: Or is it an improper question to raise at this time?

MR. STEWART: No, I am glad to discuss that, Governor Powell, and you are quite right. I had expected to discuss it at greater length in my oral argument, but the time ran out on me and that was one of the things I had to curtail in argument. I will do it very briefly.

Those banks do not represent one block of acquisitions, which had been bought by Transamerica to be handed over to Bank of America, or anything like that. They were individual investments made one at a time over a number of years -- about how many, Hugo, 15 years?

MR. STEINMEYER: Yes.

MR. STEWART: Some such thing as that, and the testimony, the only testimony on it in the record is that they were bought for investment by Transamerica, but that in some instances -- I think three or four instances were identified -- at the time that they were bought, consideration was given to the fact that they might be logical branch locations for the Bank of America, and that enhanced their investment potential from Transamerica's

point of view because they thought they might be able to sell them to Bank of America at a profit.

Then there had been a running discussion with the Comptroller of the Currency by Bank of America over a period of a number of years, before this case ever started, over the possibility of obtaining branch permits from the Comptroller for those locations.

Finally, two years after this case started, those conversations reached the point at which it was suggested that the Board come into the conversations and have a three-way discussion. The Board did not accept that invitation. Those facts are in the record. There was a letter written by Mr. Giannini to Mr. McCabe, which was not answered and subsequently Mr. McCabe asked him to withdraw it and he did withdraw it. Then subsequent to that the bank, assuming that the Board didn't want to participate in it at all, continued the conversations with the Comptroller. The Comptroller investigated the situation, decided to approve the permits, and then meanwhile there had been two committees created; one by Bank of America, one by Transamerica, to discuss all the terms of the deal. They finally did work it out and the whole deal was at the point of consummation when, without having had any advance notice from the Board, Mr. Townsend came into the court out in San Francisco and got this injunction proceeding, just on the eve of the passage of title.

Now you say there seemed to be a greater ease than one would normally expect. It was a historical situation that had been developing over a long period of years, and so far as its significance in this case is concerned, it does not have any because there aren't anymore like it. There aren't any pending negotiations with respect to anymore banks, and as a matter of fact, there are only four others that Transamerica owns in California, and there has been no suggestion at any time of the possible integration of those with Bank of America, and so far as the ones across state lines are concerned, they couldn't be integrated with Bank of America if everbody wanted them to.

MR. GESELL: I think only four came in.

MR. STEWART: As Mr. Gesell just reminded me, of the 22 banks only four of them that have offices in the same communities with Bank of America. The rest of them are places where Bank of America is not represented, or for that reason logical locations for extension of their system.

MR. POWELL: I was not thinking of diminishing competition but more of the apparent community of interest between the Bank of America and Transamerica that was demonstrated by this situation.

MR. STEWART: I think one might almost think of them as distinctly relevant of the historical situation. I think if they go, that would be just about the cutting of the final tie, the final historical tie which is all that is left, all of the actual ties having been cut many years ago, like the telephone number that Mr. Townsend brought out in this case. It happened that back in the old days they had the same

telephone number, and frankly, I don't think anybody remembered it until Mr. Townsend put it in evidence in this case and then they changed it so they don't have the same telephone number anymore. Some of these historical things that you just don't change overnight are these, but this is all that is left and you are dealing with it right here.

MR. POWELL: May I ask one other question?

THE CHAIRMAN: Certainly.

MR. POWELL: This question is one that has not even been raised in the hearing. I raise it because I think we are breaking new ground in this proceeding.

It is a combination of the effect of states' rights. Several states have permitted branch banking. They must have assumed there were going to be branch banking systems and branch banking systems can be built up either by establishing new branches or buying out existing banks. I don't think California law specifies any particular method of developing branch banking.

When it comes to the question of monopoly, or reducing competition, one element in that is the element of making it less possible for competing institutions to live or to get started, and find the climate. In considering this lessening of competition, would you consider -- and I am asking this of attorneys on both sides -- would you consider it more important that unit banks could not live or that other branch banking systems could not live in the same state? I can conceive of a situation where it might be very difficult for unit banks in a branch-banking state to operate, but where other branch-banking system might operate very

successfully, as they do side by side in Canada.

MR. STEWART: The best illustration I could give you as answer to that, Governor Powell, is that in California, which has been set up here as the worst example which Mr. Townsend has been able to develop, you have probably had a more active creation of new banks and a more rapid growth of new banks than you have anywhere else in the United States, and we have a number of illustrations in this record of the rapidity of that growth in direct competition with the Bank of America and three or four other branch banking systems, so that I don't think it is a valid premise to say that you have got to have either branch or unit banks. There is room for both, and the California experience illustrates that they can grow and prosper side by side.

MR. TOWNSEND: I think --

MR. STEWART: Wells Fargo, for example, one of the biggest banks in San Francisco, is a unit bank and there are others among the largest ten.

MR. TOWNSEND: I think, Governor Powell, without getting into argument about facts, I guess what you wanted was an answer to the question.

MR. POWELL: Principle rather than facts.

MR. TOWNSEND: I think the answer is to be found in the purpose of the Anti-trust statute. The anti-trust statute must take the situation as it finds it. If there is state branch banking there is no reason why there shouldn't continue to be branch banks and the de novo process of opening new branches, of course, is available to all, within certain limits, but like our property, whatever it is, we hold it subject to the

overpowering control of the Government, so that the Government has picked out a particular practice in this instance that it wants to discourage, and that practice is the buying out of existing institutions. Now to the extent that you buy out existing institutions and do not substantially lessen competition or tend to create monopoly you are in the clear, but when you start to cross the line, then the statute applies, and no state question could rise superior to it.

MR. POWELL: Thank you.

MR. SMITH: May I ask you this, Leonard?

The complaint in this case specifically charges that the effect of the acquisitions referred to has been substantially to lessen competition between the acquired banks.

The first exception set out to the Trial Examiner's rulings is that Transamerica was prevented from showing the effect of these acquisitions upon the acquired banks.

Since the complaint specifically charges that there was such an effect, how can we justify the exclusion of evidence to meet that charge, to show that there was any such effect?

MR. TOWNSEND: I am afraid I will have to ask you to be a little more specific. I don't concede that any relevant evidence that was offered in connection with this case has been refused.

MR. SMITH: Assuming that Transamerica truthfully stated the facts in its first exception --

MR. TOWNSEND: I don't assume that.

MR. SMITH: I am giving it to you as a fact to assume for the

purpose of answering the question.

MR. TOWNSEND: The answer to that can be short circuited. If there is any relevant evidence that has been denied admission it ought to be received.

MR. SMITH: That is not my question. My question is much more narrow than that. The complaint charges that there has been a lessening of competition between the acquired banks. Transamerica asserts that it has been prevented from offering evidence to show that there has been no such lessening of competition. If that contention is correct, what is the basis for justifying the exclusion of that evidence?

MR. TOWNSEND: You are right back to where we started when you first asked the question. If there has been any relevant evidence excluded, it ought to be admitted.

MR. SMITH: Do you admit that would be relevant evidence?

MR. TOWNSEND: As to whether or not evidence between the acquired institutions --

MR. SMITH: Competition between the acquired institutions has been lessened.

MR. TOWNSEND: Well, let me put it this way: if there is sufficient evidence in this case to justify a conclusion on the basis of the premise that I have argued to the Board that there has been such a sufficient showing of substantially lessened competition over the years, then for the Board to stop and get individual evidence with respect to these particular banks, or any one or more of them, would be a perfectly obvious waste of time, because if the conclusion, if the overall conclusion must be reached regardless of an individual scintilla of evidence respecting

one or another of the institutions, then the answer, it isn't necessary to stop and get it.

MR. SMITH: Does it seem to you fair to make a charge in a complaint -- we are dealing with a hypothesis here -- to make a charge in a complaint and then say to the other side, "We won't let you offer any evidence to meet that charge because under our theory the evidence would be immaterial, but the charge is still there?"

MR. TOWNSEND: My point is I don't know of any evidence that has been excluded and if any evidence that is considered by this Board to be relevant, I am assuming it is going to order its admission. I cannot answer it any more fairly or openly than that. I don't believe it happened. I don't believe any can be introduced, but even if it were introduced, if it were of such insignificant proportions as to not overcome the presumption that arises from all of the past history we have been talking about, it would be a vain thing to stop and get it.

MR. SMITH: It seems to me, to take that argument, it comes down to this, that if we can get in enough evidence to support our theory before the others, before we rest, then we are not going to listen to any evidence from the other side which might proceed on a different theory.

MR. TOWNSEND: I cannot --

MR. SMITH: Isn't that what it comes down to?

MR. TOWNSEND: No, it certainly does not come down to that, but if it comes down to that in your mind, there is nothing I can do about it, is there?

MR. SMITH: Let me ask you this along the same lines and along

the basis of your quantitative substantiality theory. What do you do with the provision of the statute which provides that the acquisition of stock for investment is permitted provided that the stock is not actually used to lessen competition? Now do you read that out of the statute under the quantitative substantiality theory?

MR. TOWNSEND: Certainly not.

MR. SMITH: You don't? Well, then, what is the objection to admitting evidence on the part of the Respondent to show that some of its acquisitions were made within that exception?

MR. TOWNSEND: A perfectly simple answer to that. The evidence is already in the record that they have got applications to branch the institutions and therefore, they intended all along to branch them, therefore, they intended to eliminate the competition, actual or potential, and therefore, they are just waiting the day until they can get them out as independent banks and into the system as branches.

MR. SMITH: Then you assume from the mere fact that they have a contract to sell them that they couldn't possibly have bought them as an investment?

MR. TOWNSEND: Considering the last 40 years' history that Mr. Stewart talked about as the background?

MR. SMITH: That is my question.

MR. TOWNSEND: It just stands out to me just as clear --

MR. SMITH: In other words, the mere fact that they have entered into a contract to sell, regardless of whether it might be a profitable contract, would preclude them from offering evidence to show

that they acquired them in the first instance, because they thought they would be a profitable investment?

MR. TOWNSEND: No. They have put in all that evidence. They put in the president, who said all these were bought for investment and we destroyed that evidence, I think by showing --

MR. SMITH: Did you destroy it or did you object to its admissibility?

MR. TOWNSEND: On the contrary, Mr. Husbands got on the stand and talked about these acquisitions as having been bought for investment purpose and I demonstrated the fact that if they were such good investments as he was bragging, why was he selling them to somebody else who was not the true owner of Transamerica Corporation?

MR. SMITH: May I ask you a question, Sam?

MR. STEWART: Yes.

MR. SMITH: Do you have any observations to make either of you, about those questions? If I ask a question of either one of you and the other side wants to say anything about it, I would like for you to go ahead.

MR. STEWART: I would like to add one comment on this question of sale and investment purpose: It has always been my conception of an investment purpose, as including the desire to realize capital gains as much as to realize income. Mr. Townsend, in his reply brief, has raised the question why should Transamerica want to sell some banks which it owns one hundred percent to Bank of America, which it only owns seven and six-tenth percent because it is getting a hundred percent of the dividend now, and will only get 7.6 percent of Bank of America dividend?

The answer to that is perfectly obvious. When you have substantial capital gains, and it appears in this evidence that Transamerica has substantial capital gains in every one of these banks because they have all been profitable, there comes a time when you want to realize on a good investment and you feel that you have got all that it is worth to you as an investment out of it, and, therefore, I think this matter of a contract of sale being in existence has no bearing upon the question of investment purpose at all unless you determine whether they were trying to use it for something else or just to make money on it.

MR. SMITH: Leonard, I would like to suggest to you that evidence of competition in the five-state area, coming from banks from outside of the five-state area, was relevant on the ground that competition is not a question of source or location, but is a question of activity.

If, in fact, the Chase National Bank, for example, has a man in California who is trying to get Metro-Goldwyn-Mayer, we will say, to borrow from Chase, money which Bank of America is trying to get Metro-Goldwyn-Mayer to borrow from Bank of America, doesn't that seem to you to be competition in California between Chase and between Bank of America?

MR. TOWNSEND: There is some competition, if all you want is an answer yes or no; of course it is, but that isn't the point in the case. The admission of that testimony and all of it wouldn't change one iota the outcome of the case if it doesn't substantially affect the basic issues involved, and how it substantially affect the basic issues involved when eighty to ninety percent of all of the people in the State of California have got to look to their local banks for service?

The evidence is clear it is only the big accounts in which the branch banks or buying banks around the country compete. They are not competing for the little fellow out on the street. He is the corner grocery man, the fellow who is buying and selling automobiles, or whatever may be the fact, so that if you stop and took all that evidence and produced a great amount of evidence that there is competition between New York banks and banks in California, for the big accounts, you wouldn't, by any means, overcome the question of whether the little fellow in all of these areas should be continued to be protected.

MR. SMITH: That is your assumption and the basis or is that your assumption, on the basis of the exclusion of the evidence? How do we know what that evidence would have shown unless it is admitted?

MR. TOWNSEND: Because there is enough of that evidence in to already indicate it. There is enough answers in the record for you to make that determination. I always refrained from objecting until enough had come into the record to show what the nature of it was going to be.

MR. SMITH: As competition from outside states?

MR. TOWNSEND: As to competition from outside states. You will find, if you look into the record, that a man said that you only compete for the big accounts and it is in the record and has been received.

MR. STEWART: I gave a slight indication today in oral argument that these big accounts, so-called, involving out-of-state customers represented fifty percent of Bank of America's total loan volume over a hundred thousand dollars, and of the commitments that they had made, and represented 25 percent of the total loan volume.

MR. TOWNSEND: If it represented nine percent of all of the loans made by the Bank of America, it would still not change the fundamental picture that all of the people out there in California, or the majority of them, have got to look to local banks for service so it wouldn't change the picture at all.

MR. VARDAMAN: Following up Joe's contention, as distinguished and contrary to yours, I don't recall anything in the record other than two banks from out-of-state, eastern banks, which were allowed, or whose testimony was accepted in this case, and I would appreciate it if you would make a memorandum and give it to me to show me where I can go to the record and find where there is in the record that will go to court review, testimony tending to show competition from outside sources, similar to that?

MR. TOWNSEND: I won't have any difficulty doing that.

MR. VARDAMAN: I just skipped it. I want to see how many cases we have got of that.

MR. SMITH: Governor, I think you made a slip of the tongue, just in case anybody might have a feeling otherwise, I don't mean to be making any contentions when I am asking these questions. I am trying to bring out --

MR. VARDAMAN: Your theory of the case, what I should have said.

MR. SMITH: Yes. I am trying to develop counsel's theories to some point on which some members of the Board have indicated an interest and which I think they would be interested.

MR. STEWART: Before you leave this question of the out-of-state banks, I would just like to add one point, that if those were recognized to be in substantial competition with the banks that we have involved in this proceeding, it would certainly change the figures upon percentages of market occupancy quite strikingly, without saying the extent.

MR. SMITH: My suggestion is that competition is activity, that it doesn't make any difference where it comes from, that if two banks are in the anteroom of an office of a president of a big company trying to get his deposits or his loans, that those banks are competing for that business, regardless of where they are located, and that you have got a charge in the complaint here that there is a tendency to eliminate competition in each of these states, and I suggest that that is competition in those states.

MR. TOWNSEND: Well, apparently three years of trial and three years of review of the record and three years of looking at the rulings of

Governor Evans haven't convinced you as yet of what we have been trying to say all along; namely, that you don't look at competition that is remaining. You look at what has been eliminated.

MR. SMITH: I may be a hopeless case, Mr. Townsend.

MR. GESELL: It is our position that the affect on competition requires you to look at the nature and character of the existing competition, how it got there and where it is going, and Mr. Evans and Mr. Townsend have said it was not, and we argued vehemently today that we thought that was clear error.

MR. TOWNSEND: Let me make this point as strongly as I know how, because it stands out in bold relief here in the course of these discussions. When the Clayton Act was passed to arrest monopoly in its incipiency, and prohibit its stock acquisitions having the affect of substantially lessening competition, it was not thinking in terms of competition that remained after the acquisitions had been effectuated. It was thinking about the business of eliminating the competition that existed before the acquisition was made.

Hence, when you look at this picture, don't look and say "There is a lot more competition in the field." Look and see if there wouldn't be some more or a lot more if that which has been eliminated were restored. That is the way to look at this case. You look back at what happened. You don't look forward as to whether or not there still may be some.

Monopolies take care of that, in the monopoly statutes; namely, the Sherman Act.

MR. STEWART: I am a little bit at a loss as to how you can look

back and see whether there would be more or not when all the evidence which was designed to prove that has been excluded.

MR. TOWNSEND: I don't agree with that. The bringing in evidence on that hasn't the remotest bearing on whether or not they bought what they did buy was substantial enough to limit competition.

MR. VARDAMAN: Have we any statistics of the business existing in these areas prior to the acquisitions complained of in the Board's case?

MR. TOWNSEND: The best --

MR. VARDAMAN: In other words, I want to find out where can we go to find out what has been eliminated that you referred to.

MR. TOWNSEND: Just take a look at the progressive growth of the institutions.

MR. VARDAMAN: That has nothing to do with competition.

MR. GESELL: There is nothing in the record about competition.

MR. VARDAMAN: I want to find out if there is anywhere in the record we can go, because this is an inquiry as far as the Board is concerned -- to hell with the record -- if we can get some information from outside for our information, I think it should be gotten, and I want to find out is there any statistical data anywhere --

MR. TOWNSEND: Yes.

MR. VARDAMAN: -- upon which we can base even the roughest estimate of the business that existed these complained-of areas?

MR. TOWNSEND: Yes.

MR. VARDAMAN: Would you be good enough to give us a memorandum on where we can go and get it?

MR. TOWNSEND: I can tell you right now where you will find it. There is Board's Exhibit 257, the community exhibit. It shows, among other things, the acquisition of stock of bank after bank in individual communities. My contention made this afternoon is no different than the one I am making now, that as everybody agrees, local banks compete.

That Exhibit 257 shows the elimination of competition in those communities by the buying of banks at a time when these banks were operating as independent institutions, and that is all there is to it.

MR. SMITH: Sam, may I ask you this, in connection with your and Mr. Gesell's contention that the Board should have admitted evidence relating to competition inside the five-state area, as between commercial banks, on the one hand and insurance companies, building and loan associations, federal savings associations, etc., on the other?

Do you seriously contend that there is a substitute for the checking account, the payment of deposits on demand subject to check?

MR. STEWART: I would like to answer that this way, Mr. Smith: The witnesses here, our economists, as well as the Board's, agreed that there was no complete substitute now operating in that limited function of the commercial banks. The evidence shows that that is not even one of the major functions of the bank. Most of their functions and most of the matters in which they compete are the loan side rather than that side.

They are all glad to take all the deposits they can get, but there is evidence also that there is a substantial amount of potential competition available in that field; for example, Dr. Westerfield pointed out that the demand deposit checking account system, which is in vogue in this

country at the present time, has been developed only in the last fifty, seventy-five or a hundred years, and that there are many places all over the world which have different systems which accomplish the same purpose.

Dr. Goldenweiser said he had no doubt that if this particular system hadn't grown up here it would have been invented and there is evidence in the record here of the seedling of a new system now.

There is evidence that major corporations all over the country are being admitted to clearing houses in order to issue and pay their own checks through the clearing houses, without having to go through the commercial banks, so my answer to your question in brief is that in that particular segment of their business, commercial banks do not have a complete substitute actively functioning now, but there are other systems available and had wide use in other places.

MR. TOWNSEND: The other system available seems to me to constitute, we are all going to join the clearing house and draw checks on ourselves.

MR. GESELL: I think whether there is anything available or not overlooks the legal argument we are making. The legal argument is that that isn't the way commercial banks make money. That is not where they compete, that this is a competitive statute concerned with the lending of money which commercial banks do, and with the lending of money by other institutions, and if you want to measure competitive effect you have to look at those functions, and to think that we could have a case here, as we seem to have, about commercial banking that never looks at loans, I think is all you have to say to prove what a synthentic kind of a proposition that is.

Now, this cellophane case I was talking about that I am trying is one in point. The government contended, "Well, cellophane is the only chemically made wrapping material or it is the only purely transparent wrapping material." Those were characteristics of cellophane but the product competes in the market with things that may not have that characteristic and you have to measure the market by the full competitive circumstances.

MR. SMITH: That, then, would be your answer to my next question, I assume, that except as a hypothesis solely for the basis of argument that commercial banks occupy a unique and distinct position in our economy, because of the demand deposit checking service function, you would still contend that the evidence respecting competition between banks, on the one hand, and insurance companies and building loans, on the other with respect to loans, savings banks, and receiving deposits, is relevant to the issue of competition and tendency to monopoly here?

MR. STEWART: Absolutely.

MR. GESELL: Yes, and to use Mr. Townsend's phrase, relevant to the extent of whether or not there is a monopoly power because if you can't make the loans you don't have any deposits.

MR. SMITH: Your position is that even if we make the assumption as to the unique organization, evidence which was excluded as to the competition between this unique organization and the other organizations, is relevant to a determination of the case?

MR. GESELL: Yes.

MR. SMITH: You would not concede that if you make the assumption that evidence is not relevant?

MR. GESELL: No. We feel it is relevant.

MR. STEWART: I not only say it is relevant, it is essential if you would get adequate notion for what the completion is for the credit function, which is the business for which the banks compete.

THE CHAIRMAN: Five minutes.

MR. GESELL: We are trying to keep our answers short.

MR. SMITH: I am through. I retire now.

THE CHAIRMAN: Mr. Norton?

MR. NORTON: No further questions.

THE CHAIRMAN: I move we adjourn. I thank you all very much.

(Whereupon, at 5:55 o'clock p.m., the Conference was closed.)