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

IN THE MATTER OF
TRANSAMERICA CORPORATION

REPLY BRIEF OF COUNSEL FOR THE BOARD

J. LEONARD TOWNSEND,
SOLICITOR

G. HOWLAND CHASE,
ASSISTANT SOLICITOR.

GREGORY O'KEEFE, JR.,
OF COUNSEL.

November 9, 1951.

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Respondent has filed two briefs in this proceeding. The first was submitted in support of its exceptions to Governor Evans' recommended decision and is therefore addressed to the merits of the case. The second was submitted in support of its renewal of an earlier motion, fully considered and denied by the Board, to dismiss the proceeding for lack of jurisdiction. We shall reply to these two briefs in the order named.

REPLY TO RESPONDENT'S BRIEF ON THE MERITS

To anyone who has read the opening briefs filed herein by counsel for the respective parties it must be obvious that there is a wide chasm separating the basic contentions of the parties as to what it takes to make out a case of Section 7 violation. Furthermore, that chasm has existed throughout the entire hearings, as Governor Evans is well aware. It inevitably led, especially in so protracted a trial as this one, to an extraordinary number of objections and arguments, and these are now all being rolled up at the door of the Board for final agency decision. We shall now attempt to bring these conflicting contentions into proper perspective and to show that, judged in the light of objective appraisal and tested by the application of proper legal principles, the recommended decision of Governor Evans should be sustained by the Board.

Respondent's brief is divided into three main parts. Part I discusses the legal tests which respondent contends are applicable to a Section 7 case and argues that the application of these tests requires a dismissal of the Board's complaint. Part II attacks Governor Evans' handling of the trial as "arbitrary and discriminatory". Part III discusses alleged erroneous factual findings relating to Transamerica and its relations with its controlled banks, including Bank of America. We shall reply to each of these parts in order.

PART I

Naturally it is on the crucial question of the legal tests for determining whether Section 7 has been violated that the most emphatic disagreements exist between the parties. The position of counsel for the Board on this question has been set out in our opening brief. In essence it is very simple and is this: The Clayton Act is a prophylactic statute, designed to arrest monopoly "in its incipiency and before consummation", as Congress itself said when it passed the law. Section 7 was specifically aimed at holding companies which buy up the stocks of companies in actual or potential competition and bring those companies under common ownership and control. The holding company which follows this practice was denounced by Congress as "an abomination". Here we have a case where just such a situation as Congress specifically visualized has come to pass. Transamerica and its predecessors have for over forty years been acquiring the stocks of small, medium and large sized commercial banks in an ever expanding area on the West Coast. To date they have acquired almost 700 separate banking offices in five states. As fast as these banks were acquired, they were merged into or became branches of one or another of the rapidly growing branch banks in the controlled group. The cumulative effect of these acquisitions has been to bring the Transamerica controlled group of banks to a point where they now comprise 40 per cent of all commercial banking offices in the five-state area, having 39 per cent of all commercial bank deposits and 50 per cent of all commercial bank loans in those states. Furthermore, the evidence clearly indicates that, unless restrained, Transamerica intends to acquire more banks and thus to increase further its growing monopoly power in that area. The net "effect" of these acquisitions, we contend, "may be substantially to lessen competition, or to tend to create a monopoly" of commercial banking offices, deposits and loans in the five-state area, contrary to the provisions of Section 7. The nub of our contention springs from the conviction that the only proper legal test for determining the "effect" of such a continuous series of acquisitions is to consider their cumulative effect upon both existing and potential competition in commercial banking in the area; and the further conviction that, so considered, the cumulative effect of such acquisitions *on its face* is quantitatively so great as, without more, to fall squarely within the ruling recently made by the Supreme Court in *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949).

Respondent, on the other hand, challenges this simple test. In fact, its brief brands this approach as an "oversimplification" of the legal issues before the Board. It also virtually ignores the *Standard Oil* case. It places main reliance upon a group of cases decided in the early thirties, just before or around the time of the Supreme Court's decision in *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U. S. 587 (1934), which, as we have seen, made virtually a dead letter of Section 7 until only last year when Congress acted to remedy the effects of that decision. None of those cases, as we shall see, even remotely involved the kind of case with which we are dealing here and, hence, with certain exceptions hereinafter noted, none of them is helpful in deciding the present question. Concededly the position of counsel for the Board has not been predicated upon any of those decisions. Quite obviously, as well, none of them can be used as authority for the proposition that the tests recently laid down in *Standard Oil*, which Congress itself only last year declared should always have been applied by the courts to Section 7, are not applicable here.

Aside from the argument that the "rule of reason" is applicable to Section 7 cases, which we shall discuss separately later on in this brief, respondent's main contentions as to the proper legal tests to be applied here are threefold. They are:

1. There must be a showing, as to each bank acquired, that at the time of its acquisition it was in actual existing competition with one or more of the banks already controlled by Transamerica;

2. There must be a showing that, at the time of acquisition, the amount of such existing competition was quantitatively substantial; and

3. There must be a showing that the probable effect of the acquisition is likely to have an adverse effect upon such existing competition.

These three arguments are used like bulldozers throughout respondent's brief. They are used to push forward virtually every contention which that brief thereafter makes on the fundamental issue of what it takes to prove a case against Transamerica. It follows, therefore, that if these arguments are not controlling here, the many others, which are predicated upon them throughout the remainder of respondent's brief, must fall with them.

Let us make it clear at the outset of our discussion that we do not contend that the tests suggested by respondent may not be *one way* of proving a Section 7 case. They undoubtedly are, and the cases cited in its brief to this extent support counsel's position. But the fault lies in the reasoning that these tests are the *only* ones for making a Section 7 case. The Board must remember that this is the first case of its kind ever tried under that section. All of the other cases which have been tried thereunder, and therefore all of the ones cited by respondent, involved at most only a very few acquisitions, and none of them involved the basic question of "tendency to monopoly". In fact, in several of those cases the court was careful to point out that no tendency to monopoly could possibly be involved, due to the fact that the sum total of a particular type of business brought under defendant's control was insignificant when compared to the total amount of such business in the entire field. This is the first Section 7 case which involves a great number of acquisitions stretching back over a long period of time, and where the principal issue is whether the *cumulative* effect of *all* such acquisitions results in a tendency to monopoly.

Let us examine for a moment what would be the situation if the tests suggested by respondent were the only proper ones for determining whether or not it has violated Section 7. In the first place, instead of being one hearing to ascertain the cumulative effect of almost 700 acquisitions, this proceeding would thereby be converted into almost 700 separate cases, each one to be decided upon the basis of the individual facts respecting each banking office acquired, the bank or banks already acquired, and the effect upon commercial banking competition only as between those banks and at the time of each such acquisition. Indeed, respondent urges this contention in so many words. "Where, as here," respondent's brief argues, "the complaint challenges a number of stock acquisitions, a separate inquiry must, of course, be made with respect to each. The thrust of the statute, which is directed at acquisition of competing companies, cannot be avoided by lumping a series of acquisitions, no one of which falls within the statutory prohibition." (Resp. Br., p. 6)

Under respondent's contention, what we would have to do here is to start in 1909, when Bank of Italy (a Transamerica predecessor in acquiring banks) acquired its first bank, Commercial and Savings

Bank of San Jose, California, with deposits of $345,000 and loans of $229,000 (BX 8, p. 163; BX 10, p. 70).[1] According to respondent the Board's duty is now to examine that transaction separately from every other acquisition that has occurred since that time and to determine whether the Commercial and Savings Bank of San Jose was at that time in actual existing competition with the Bank of Italy, whether the amount of that competition was quantitatively substantial, and whether there was a likelihood at the time of acquisition that such competition might thereafter be substantially less. If the answer to those literal questions all turned out to be in the negative, then the Board, according to respondent, must forever close its eyes to that acquisition and nevermore consider its effect in connection with any other acquisition or acquisitions which thereafter took place. And this despite the fact that, upon acquisition, the Commercial and Savings Bank of San Jose was promptly converted into a branch of the Bank of Italy, which from that day forward has continued as a banking office in the system and, with the impetus of the deposits and loans taken over, has contributed its share of growth to the ever expanding size and power of the Transamerica group of commercial banks.

Furthermore, under respondent's tests the Board would have to repeat this same process as to each one of the remaining nearly 700 acquisitions, always being careful not to take into account any

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1/ Board's exhibits sometimes will be referred to as BX; respondent's exhibits as RX; citations to pages of the record will be preceded by the designation R.

banking office which had been previously acquired if at the time of its acquisition it was not in direct and quantitatively substantial competition with one or another of the Transamerica controlled banks.

Merely to state respondent's contentions in this light is to demonstrate their utter inapplicability to such a case as we are dealing with here. Under its theory all acquisitions at the early stages of the development of the Transamerica banking group must be ignored because they were generally of banks in separate communities and, hence, at the time of their acquisition obviously were not in active day-to-day competition with each other for the patronage of the same persons or companies. Similarly, as is argued at pages 30 to 40 of respondent's brief, practically all of Transamerica's most recent bank acquisitions must likewise be ignored because they, too, were banks located at places not immediately adjacent to any of those in which a Transamerica controlled bank is located. It must be obvious that under such a test as this it would be virtually impossible ever to make out a tendency to monopoly case under Section 7 in the commercial banking business. For so long as the holding company was careful in its earlier acquisitions to buy banks not directly competing with each other, it could build up its size to a point where, when finally it did start to buy banks in direct and existing competition with those previously acquired, the later acquisitions could be justified on the ground that the amount of competition which was lessened as a result of the latest acquisitions was at most insignificant and insubstantial. As a matter of fact this very argument is made on page 27 of respondent's brief wherein it is pointed out: "The extent of growth through acquisition, especially in recent years, is so startlingly small as to drain the percentage of occupancy figures of all significance." To this statement is appended a footnote in which respondent points out that: "Between the middle of 1938 and the end of 1950 the total deposits of the so-called 'Transamerica group' increased from about $1,577,000,000 to about $7,489,000,000. During that period the total deposits added to the 'group' through acquisitions were about $201,000,000 *or only 3.4% of the total deposit growth experienced during the period."* (Italics ours) Accordingly, reasons respondent, $201,000,000, being the combined deposits of almost 60 banks, *all newly acquired during this period,* is "insubstantial" and should not be considered even cumulatively as contributing to a substantial lessening of competition in the five-state area![2]

What authority is there for such a purpose-defeating interpretation? Certainly it is not to be found in the words of the statute. Nowhere in the language of Section 7 -- whether as originally drawn or as more recently amended -- is there anything which refers to *existing* competition; or which requires that the "thrust of the

2/ Furthermore, respondent's comparison also ignores the fact that, included in the banking offices at the commencement of the period was a preponderant number which represented acquisitions and all of which contributed to the total "growth" during the period.

statute" be applied only at the time of a particular acquisition; or denies the right to enforcing bodies to consider the cumulative "effect" of a long series of acquisitions in appraising the probable effect upon competition between all of the companies thus acquired by a holding company. On the contrary, the very use of the words "may be" in the statute suggests that Congress intended a prospective, as distinguished from a present or past, test of violation. Indeed, both the courts and Congress have interpreted the words "may be" as meaning "reasonable *probability*".[3] And it must not be overlooked that the phrase "*tend* to create a monopoly" indubitably looks forward and not backward as a phrase designed for public protection. As the Supreme Court has said, "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."[4] Finally, the words of Congress itself remove any doubt as to the intention of the lawmakers on this point. "The intent here, as in other parts of the Clayton Act," states a recent Senate report in speaking of Section 7, "is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."[5]

3/ See citations at page 20 of our opening brief.

4/ *International Salt Co.* v. *United States*, 332 U. S. 392, 396 (1947).

5/ Sen. Rep. 1775, 81st Cong., 2nd Sess. 4, 5 (1950).

The cases cited by respondent do not support its contention that the tests urged by them are the *only* tests for determining violations of Section 7. As previously stated, not one of those cases was premised upon the basic charge of tendency to monopoly. In each of them only one or two acquisitions were involved and the question presented was whether the effect of such acquisitions might be to substantially lessen competition between the acquired companies. This was true of *Beegle* v. *Thompson,* 138 F. 2d 875 (7th Cir. 1943),[6/] *United States* v. *Associated Press,* 52 F. Supp. 362 (S.D.N.Y. 1943),[7/] *In re Pressed Steel Car Co.,* 16 F. Supp. 329 (W.D.Pa. 1936),[8/] *Federal Trade Commission* v. *Thatcher Mfg. Co.,* 5 F. 2d 615 (3rd Cir. 1925),[9/] and *Pennsylvania R. R.* v. *Interstate*

6/ In this case it was held that acquisition by defendant, which produced no anti-splitting irons, of a company which did produce them and which was also in a failing condition, did not substantially lessen competition between the two companies.

7/ Here it was held that the acquisition by Associated Press, which sold its picture service only to its members, of the stock of World-Wide Photos, Inc., which sold its picture service to outsiders, did not substantially lessen competition between those organizations because only seven AP members who subscribed for pictures of World-Wide did not also take AP pictures.

8/ In this case it was held that the acquisition by the General American Transportation Company of the stock of the Pressed Steel Car Company did not substantially lessen competition between the two companies because each was engaged almost exclusively in differing activities; and that as to the one phase of their operations where they did compete, the amount of such competition was entirely negligible.

9/ Here it was held that the acquisition by the Thatcher Company of the stock of three other companies which manufactured and sold milk bottles in competition with the Thatcher Company did violate Section 7, but that the acquisition by the Thatcher Company of the stock of a fourth company which manufactured mostly whiskey and condiment bottles, and which manufactured only an insignificant number of milk bottles, did not violate the section.

Commerce Commission, 66 F. 2d 37 (3rd Cir. 1933), aff'd mem., 291 U. S. 651 (1934).[10] Hence, in these cases there was nothing whatever to indicate whether the Court felt that a "tendency to monopoly" case might be determined by different tests, and the facts in those cases did not raise the question of whether the companies involved might be *potential* competitors.

But four of the remaining five cases cited by respondent did indicate that, if a "tendency to monopoly" case were presented, evidence of the kind introduced here would be decisive of that issue. And the fifth case specifically points out that Section 7 was designed to protect the public in the preservation of potential as well as existing competition.

Two of the four cases mentioned were *International Shoe Co. v. Federal Trade Commission,* 280 U. S. 291 (1930), and *United States v. Republic Steel Corporation,* 11 F. Supp. 117 (N.D. Ohio 1935). Examination of the opinions in those cases will disclose that, at the very outset of each, the Supreme Court and the District Court, respectively, took great pains to emphasize the fact that they were *not* called upon to pass on the issue of whether a "tendency to monopoly" case had been made out under Section 7. Surely such

10/ Here it was held that the fact of the acquisition by the Pennsylvania Company, an investment company owned by the Pennsylvania Railroad Company, of less than a majority of the outstanding voting shares of the Lehigh Valley and Wabash Railroads would not, without more, result in a showing of probably substantially lessened competition between the three railroads, especially as there was evidence that the stock had been purchased solely for investment, and in accordance with a long standing investment practice of railroad companies generally.

a specific disclaimer of the need to pass on this separate issue plainly indicated that both courts felt that some other test would have to be applied if that issue had been presented. And the other two cases show why this inference is a proper one, because in each the court pointed out the kind of statistical information which would be necessary to shed light on a charge of "tendency to monopoly". Thus, in *Temple Anthracite Coal Co.* v. *Federal Trade Commission*, 51 F. 2d 656 (3rd Cir. 1931), it appeared that the respondent, a holding company, had acquired the stocks of the Temple Coal Company and the East Bear Ridge Colliery Company, both producers of anthracite coal sold in interstate commerce. While the court's opinion was principally concerned with whether the effect of these acquisitions was to substantially lessen competition between the acquired companies, nevertheless the following language in the opinion shows on what basis it disposed of the question of "tendency to monopoly" in the case. The court said (p. 660):

> "There are no facts found, and we find no evidence produced before the Commission, to show the relation between the percentage of coal mined and sold by the Temple Coal Company and its subsidiaries and that sold by the East Bear Ridge Colliery Company to the total output of anthracite coal of the same kind and quality in the whole anthracite region. From the facts found as to the value of the annual output of the respective mines, it is quite apparent that the percentage of these mines to the total output cannot be consequential. Therefore, if competition were lessened, its effect upon the whole interstate trade in anthracite coal would not tend to create a monopoly through substantially lessening competition."

The same situation is disclosed in *V. Vivaudou, Inc.* v. *Federal Trade Commission*, 54 F. 2d 273 (2nd Cir. 1931). There it appeared that the Vivaudou Company, which was itself engaged in manufacturing and selling cosmetics throughout the United States, acquired the stocks of two other companies similarly engaged. There again the principal question presented to the court was limited to "whether the competition between these companies had been substantially lessened by reason of the stock acquisition . . ." As in the *Temple Anthracite* case, however, the court indicated that, if a "tendency to monopoly" question had been presented, statistical evidence of the kind adduced in the instant case might well have been determinative by saying (p. 275):

> "There can be no monopolistic tendency in acquiring control of properties which added four million dollars to the petitioner's already three millions' volume of business, when the total of the country's similar business, amounting to at least one hundred and twenty-five million, is considered."

The fifth case referred to above is *Parkersburg Rig & Reel Company*, 34 F.T.C. 1527 (1941), a case decided by the Federal Trade Commission. There the Commission held that the acquisition by Parkersburg of the stock of the Oil Company Specialties Manufacturing Company did not violate Section 7 because only a small portion of the business of the two companies was competitive. But in thus disposing of the matter the Commission noted that the effect of the acquisition "was not actually *or potentially* to substantially lessen competition" between the two companies. (Italics ours)

It is significant that the *only* case decided by the courts under Section 7 where evidence of "tendency to monopoly" was found (and which is referred to at some length in one of the cases cited by respondent) is not cited in respondent's brief. Yet it, too, holds specifically that the statute is aimed at protecting *potential* as well as existing competition and that measuring *potential* competition is a proper element in testing whether an acquisition or acquisitions may result in a "tendency to monopoly". This was the case of *Aluminum Co. of America* v. *Federal Trade Commission,* 284 Fed. 401 (3rd Cir. 1922), cert. den., 261 U. S. 616 (1923). In this case the Commission had found a violation of Section 7 by the Aluminum Company in its acquisition of the stock of the Aluminum Rolling Mills Company. The background of this acquisition was as follows: Until the First World War the Aluminum Company produced all aluminum ingots as well as all sheet aluminum in the United States. During the war two new companies were formed to roll aluminum and they competed with the Aluminum Company in the sheet aluminum field. One of the newcomers was the Cleveland Metal Products Company. After the war, faced with declining profits, the Cleveland Company and the Aluminum Company entered into an agreement whereby a new company, called the Aluminum Rolling Mills Company was formed -- one-third of its stock being acquired by the Cleveland Company and the remaining two-thirds by the Aluminum Company. The Cleveland Company then sold to the Rolling Mills Company its rolling mill, and that company was thereupon operated by the Aluminum Company. The Commission ordered the Aluminum Company to divest itself of the stock of the Rolling Mills Company.

On appeal it was argued, *inter alia,* that the statute did not apply because the newly organized rolling mill had not begun business at the time its stock was acquired and had not been in competition with anyone. Hence there was no "competition" between the two companies which could have been lessened by the acquisition of the stock of the new company. In disposing of this contention, the court said (pp. 407-408):

> "But the lessening of competition is not the only effect of the acquisition by one corporation of stock of another which the Congress sought to avoid. It intended as well to prevent a transaction 'where the effect' may 'tend to create a monopoly,' which is the effect which the Commission found in the acquisition of the stock of the Rolling Mills Company. A monopoly can be created by a transaction of stock acquisition when the effect is not to lessen competition with the corporation whose stock is acquired if the effect is to end competition existing elsewhere, United States v. New England Fish Exchange (D.C.) 258 Fed. 732, 746; as for instance the ending of competition with the Cleveland Company. This is for the reason that the lessening of competition and a tendency to monopoly are not always synonymous. There may be a lessening of competition between two corporations in a stock transaction that does not tend to monopoly. But, curtailing this discussion, we are not prepared to admit the premise from which the Aluminum Company deduces its conclusion. In other words, we do not find that at the time the Aluminum Company acquired the stock of the Rolling Mills Company the latter was not engaged in commerce and was not, *potentially*, engaged in competition with the Aluminum Company, for these reasons:
>
> "Prior to February 17, 1918, the Cleveland Company had been engaged in competition with the Aluminum Company. On that day it agreed with the Aluminum Company to organize, and later there was organized, a third corporation, which was to purchase, and later did purchase, the aluminum rolling mill and also the 'aluminum rolling mill business' of the Cleveland Company. . . . *Having purchased trade upon which to start, and having started upon the trade it had purchased, the new corporation was, we think, truly engaged in commerce at the time of the stock acquisition.*
>
> * * *
>
> "As we are not called upon to determine whether the Aluminum Company is a monopoly within the definition of the [Sherman Act], we limit our decision to the question whether, within the policy of the Clayton Act, the transaction comes within the definition of the section. In this we are of opinion

> that it does, and that its effect upon actual competition *as well as in destroying potential competition* in a way later to make actual competition impossible was substantially to lessen competition between the corporation whose stock was acquired and the corporation making the acquisition; and second, that without regard to whether its effect was substantially to lessen competition between these two corporations, the stock acquisition did, in effect, 'tend to create a monopoly.'" (Italics ours)

Nor do the various references in respondent's brief to the statements by "a number of Congressmen when the Act was passed" support respondent's contentions. Not one of them makes any reference whatever to the kind of tests to be applied in determining Section 7 violations or suggests that the words "tend to create a monopoly" mean the same thing as "substantially to lessen competition". Nor do any of them rebut the finding by the court in the case last hereinabove mentioned that the Act was designed to protect the public against the substantial lessening of potential, as well as existing competition. However, the best way to dispose of all of these references at one time is simply to call attention to the fact that every one of them was made before the expression "tend to create a monopoly" ever appeared in a draft of the Clayton Act. Those words were not added to the bill until after the House and Senate versions (neither of which contained the phrase) had gone to conference. All of the remarks of Congressmen and the House Report referred to in respondent's brief were made before that time.

But now let us see what was said by Congress about those words *after* they were added to the bill. As stated, they were added in conference, and were inserted simultaneously in Sections 2, 3 and 7 of the Act. So far as our inquiry has disclosed, there was only one explanation given to either House as to the reason for their insertion. That was given by Senator Chilton, a member of the Conference Committee, when the Conference Report was being debated in the Senate. It is significant that in his explanation he plainly stated that the conferees recognized that there might be a situation where stock acquisitions might not eliminate competition but would tend to create a monopoly. He said:11/

> "The Senate, however, Mr. President, adopted as its criterion the following, 'where the effect may be to lessen competition.' In other words, the Senate struck out 'eliminate' and 'substantially.' . . . But when House section 8, which is Senate section 6, came to conference the House conferees insisted that the words 'eliminate' or 'substantially lessen competition' should be the standard. The Senate conferees insisted that the language of the Senate should be adopted, to wit, 'where the effect may be to lessen competition.' As always happens with men of ordinary sense, with men who want to carry out as best they can the instructions of their superiors, the conferees had to find some common ground upon which their minds could meet, and the result was a compromise, which is section 7 in the bill reported by the conferees. That compromise was the adoption of the words 'may be' instead of the word 'is,' so that instead of reading 'where the effect is' the bill now reads, 'where the effect may be'; that is, where it is possible for the effect to be, which was a decided victory for the Senate. We struck out 'eliminate,' which was another victory for the Senate. We left in the word 'substantially,' which was a victory for the House; but the House conferees insisted that that would change the section and would not accomplish the purpose intended by it; *that a corporation might acquire the stock of another corporation, and there would be no lessening of competition, but the tendency might be to create monopoly or to restrain trade or commerce,* and therefore there was added to the definition the following: 'Or to restrain such commerce in any section or community or tend to create a monopoly of any line of commerce.'" (Italics ours)

11/ 51 Cong. Rec. 16002 (1914)

And *recent* expressions of Congress are to the same effect. Thus, H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949), has this to say about Section 7:

> "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 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."* (Italics ours)

As pointed out in our earlier brief, the tests of illegality which the courts have applied in interpreting the same language as used in other sections of the Clayton Act are plainly set forth in the *Standard Oil* case. There the Supreme Court held that proof of substantially lessened competition *and* tendency to create a monopoly is made out whenever the record shows that a respondent made use of the practices prohibited by the Act and has attained a "dominant" position in the particular field in which it is engaged. A "dominant" position was held to be one showing that a respondent controlled two-fifths of available outlets in that field. It was also held that the same percentages held controlling for determining violations in a case involving a national market are applicable for determining violations involving a smaller geographical area.

A second test was also enunciated in *Standard Oil*. This test requires even less proof than the first. It was held that, absent a showing that respondent has achieved a "dominant" position in a particular field, violation of the Act is shown by proof of the prohibited practice coupled with a showing that the amount of competition foreclosed thereby is quantitatively "substantial". Control of only 16 per cent of all outlets in a seven-state area and annual sales of $57,000,000 was held to meet this test.

It now remains for us briefly to bring all of the above discussion into focus upon the facts of the present case. In the first place, we reiterate the position taken in our opening brief, namely, that the tests referred to above in *Standard Oil* are completely dispositive of the issues herein presented. That respondent has acquired the stocks of commercial banks is, of course, admitted. Largely as a result of its acquisitions, it now controls the same percentage of banking offices in the five-state area which the Supreme Court held in *Standard Oil* to constitute a "dominant" position. And even if respondent's position could not be called "dominant", certainly the acquisition by itself and its predecessors of almost 700 banking offices over a 40-year period is quantitatively so substantial as to meet the alternative test set out in *Standard Oil*. Judged from either viewpoint, therefore, the "effect" of respondent's acquisitions must be held, under the tests laid down in *Standard Oil*, to have resulted in both a substantial lessening of competition and a tendency to create a monopoly.

But let us look at this case as though *Standard Oil* had never been decided, and apply those considerations which emerge from the other discussion hereinabove appearing. Considering first the question whether the effect of respondent's acquisitions may be "substantially to lessen competition", the evidence is clear that both existing and potential competition has in fact already been eliminated to a very substantial degree.

First, as to the proof of elimination of *existing* competition. Board Exhibit 257 shows the acquisitionsby respondent and its predecessors in individual communities. Even respondent admits that local banks compete with other local banks for local business. In Board Exhibit 257 there appears community after community in which respondent has acquired more than one bank. In fact, it shows a great many instances where numerous acquisitions were made in the same community. Take the City of Oakland, for example. The record shows (BX 257, p. 200) that respondent now controls 25 out of the 37 banking offices in that city, 23 acquisitions having been made over the years. In Los Angeles (BX 257, pp. 155-158) it controls 91 out of 225 offices, 70 acquisitions having been made. In San Francisco (BX 10, pp. 61-65; BX 16, p. 37) it controls 48 out of 102 offices, 18 acquisitions having been made. In San Diego (BX 257, p. 257) it controls 11 out of 23 offices, 9 acquisitions having been made. Nor have its acquisitions of more than one office been limited only to the large cities. In 1924 there were four independent banks in Healdsburg, California, comprising two pairs of affiliated institutions, each of which jointly occupied a banking office. By 1929 all four of these banks had been acquired by respondent and its predecessors (BX 257, p. 118). In 1924 there were three independent banks in Winters, California, including two affiliated institutions which jointly occupied one office. By 1928 all of them had been acquired. Shortly thereafter, another bank was organized in Winters, and in 1941 this bank was also acquired by the Transamerica group (BX 257, p. 327). In 1924 there were three independent banks in Gardena, California, including two affiliated institutions which jointly occupied one office. By 1942 all of them had been acquired (BX 257, p. 104). These illustrations could be multiplied over and over again in communities of all sizes. Can anyone seriously argue that the cumulative effect of all of these acquisitions was not to substantially lessen *existing* competition?

Next, as to potential competition. In the first place, the very existence of the Transamerica banking empire is a deterrent to those who otherwise would be willing to enter the field, as was testified by Dr. Goldenweiser (R. 2758-2759, 11,962). There is, of course, no way to measure the extent of this influence, but it certainly cannot be ignored. In the second place, and more importantly, the acquisition of almost 700 separate banking offices over the years has not only eliminated *existing* competition, as stated above, but the dissolution of those banks by the branching of their assets into and the assumption of their liabilities by one or another of the Transamerica controlled banks forever put an end to all potential competition between those institutions. As stated in *Aluminum Co. of America* v. *Federal Trade Commission, supra,* the effect of these mergers was to destroy "potential competition in a way later to make actual competition impossible". Again, is there anyone who would seriously urge that if all of those separate institutions had remained in the field and the number of Transamerica controlled institutions diminished by a like amount, present competition would not be "substantially" increased?

Finally, as to the issue of tendency to monopoly. The record is replete with evidence of the kind referred to in *Temple Anthracite Coal Co.* v. *Federal Trade Commission* and *V. Vivaudou, Inc.* v. *Federal Trade Commission, supra.* That evidence shows respondent's steady and inexorable march toward monopoly. From 1920 to 1950 the percentage of controlled offices rose from 2 per cent to 40 per cent; deposits from 6 per cent to 39 per cent; and loans from 5 per cent to 50 per cent. In 1924 the Giannini group had offices in but little over half of the counties in California and none in any other state. Today it not only controls offices in all but 2[12/] of the 58 counties in California, but it also controls offices in 27 counties in Oregon, in 10 counties in Nevada, in 2 counties in Arizona, and 5 counties in Washington. It has 100 per cent of all banking offices in 28 of these counties. It has more than 60 per cent of all banking offices in 51 of these counties. In fact, in only 9 of

12/ There are no banking offices at all in these 2 counties.

them does it control less than 30 per cent of all banking offices. Surely, the cumulative effect of all of these acquisitions, to use the words of Congress itself, has been to "increase . . . the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive . . ." Who besides respondent would seriously urge that such a relentless process of acquisition, which has brought it control of 40 per cent of all commercial banking offices, 39 per cent of all commercial bank deposits, and 50 per cent of all commercial bank loans over a five-state area, is not a discernible movement in the direction of monopoly?

The final point made by respondent's brief as to the proper legal tests applicable in a Section 7 case is that the "rule of reason", a Sherman Act test, is also applicable here. Respondent's brief now speaks of this as the "public interest" test, but the nature of the inquiry which they suggest is required by this test is the same as that previously made by them when they openly called it the "rule of reason" test. Thus, they say the Board must inquire into the "motive" which led the Gianninis to buy all those banks; whether "increased efficiency" resulted; whether the previous owners of the banks were "willing sellers"; whether the strength of remaining competitors is sufficient to give adequate protection to the public; whether the industry itself shows "price rigidity, artificial scarcities"; and the like.

We disposed of this contention in our opening brief[13] by pointing out that, in *Standard Oil*, the Supreme Court flatly rejected the need, in a Clayton Act case, for making the kind of inquiry which the "rule of reason" test requires in Sherman Act cases. Admittedly, earlier cases under the Clayton Act, including those cited by respondent, had seemed to embrace the Sherman Act test. But in *Standard Oil* the Supreme Court traced in detail its own departure from this approach and emphasized the fact that the Clayton Act was designed to prevent, not remedy, monopolistic growth. It said (pp. 312-313):

> "*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." (Italics ours)

Congress, too, has emphatically stated that Sherman Act tests are not to be applied in Section 7 cases. Sen. Rep. No. 1775, 81st Cong., 2nd Sess. 4-5 (1950), 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

13/ Commencing at p. 21

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." (Italics ours)

H.R. Rep. No. 1191, 81st Cong., 2nd Sess. 8 (1950), reporting on the same bill, had this to say:

> "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)

These authorities make it clear that the "rule of reason" test is not applicable in this proceeding.

Next, respondent argues that, even if our contentions be right as to the proper legal tests to be applied in this case, our case is factually defective in numerous respects. Its first attack is upon the expression "Transamerica group" as used by counsel for the Board in presenting evidence and as used by Governor Evans in his recommended decision. This expression, it is alleged, was merely a "device", given articulation by "cleverly contrived statistics", designed to suggest that "one single concern operates 41 per cent of the banking offices and holds 39 per cent of the deposits and 50 per cent of the bank loans in the five-state area described in the complaint". Such a suggestion is wrong, says respondent, because it ignores the fact that Transamerica itself is not a bank and that there are almost 50 separate banking institutions within the "group"; that these institutions all operate independently of each other; and that all are available to supply banking services to the public. Our answer to these contentions will show (1) why the term "Transamerica group" was used and (2) why the banks whose offices, deposits and loans have been included in various tabulations reflecting the growth and present position of the "group" were properly so included.

First, as to why the term "Transamerica group" was used and what it means. We have repeatedly stressed herein that this case involves an appraisal of the cumulative effect of a great many acquisitions stretching back almost a half century. Those acquisitions were all made under a policy, originated and given continuing effect over the years by A. P. and L. M. Giannini, to build larger and larger branch banking organizations in each of the five states, principally by acquiring existing banks and then causing them to be branched or merged into one or another of the branch systems. The ultimate objective, as we have seen, is to establish one interstate branch banking organization when and if the law permits. Prior to 1928 these banking acquisitions were made by various officials of the Bank of Italy and by a number of companies formed by A. P. Giannini for that express purpose, among others. In 1928

Transamerica was formed by A. P. Giannini to take over "control" of the banks then under Giannini management, and thereafter approximately 237 additional banks and branches were acquired. It now holds the stocks of 48 banks, including Bank of America, all of the others having been swallowed up by one or another of those which it now controls.

Throughout the case, therefore, the expression "Transamerica group" has been used to identify the banks which at any particular time prior to 1928 were controlled by one or another of the Giannini managed companies or banks and, after 1928, the banks which have been controlled directly by respondent. Whether "cleverly contrived" or not, those are the simple facts and respondent's counsel was put on notice that such was the use being made of the expression when, on the first day of the trial, the first statistical exhibit was introduced to show how many banks have been acquired over all of these years. The "Transamerica group" now consists of every bank which Transamerica controls, and the only question remaining is to show why it was proper to "lump" them together in such fashion.

The measure of "market occupancy" which a holding company enjoys in a particular field depends, of course, upon the number of outlets which it controls in that field and the amount of business which those outlets command therein. Here the question is whether the banking offices identified in the Board's statistics and in Governor Evans' opinion as the "Transamerica group" are outlets "controlled" by respondent and, hence, in sum total accurately reflect the competitive position of respondent in the commercial banking field in the five-state area. On this question we think the record clearly supports the conclusion reached by Governor Evans.

Insofar as the Transamerica majority owned banks are concerned (they comprise all but one of the banks identified in the present "Transamerica group"), it is obvious that respondent has the legal power to control such institutions. This in itself is sufficient to justify their inclusion in the figures showing respondent's position, because the Clayton Act is aimed at preventing the rise of monopoly power, not at remedying the use of that power. Even Sherman Act cases (where the evidentiary tests are much more stringent than here) hold that majority stock control, without more, is sufficient to prove existence of such power. Thus, in the celebrated *Northern Securities* case[14/] the court, in answering the question "whether the ownership of all of the stock of two competing and parallel railroads vests the owner thereof with the power to suppress competition between such roads", stated that it had "no doubt that it does". Furthermore, said the court, "*we regard the suppression of competition, and to that extent a restraint of commerce, as the natural and inevitable result of such ownership.*" (Italics ours)

But the evidence here shows far more than mere ownership of bank stocks by respondent; it shows a consistent course of

14/ 120 Fed. 721, 726 (C.C.D. Minn. 1903), aff'd, 193 U.S. 197 (1904) "deliberate, calculated purchase for control".[15] Thus, as we have seen, respondent was organized specifically for the purpose of taking over "control" of existing Giannini managed institutions, including banks. It paid unusually high prices for bank stocks to enable it to obtain control; it paid bonuses and granted special inducements to officers of banks in order to assist it in obtaining control; its common practice was to select the directors of its banks, sell them qualifying shares, and take options to repurchase such shares, thus insuring continuing control of its banks; it formed an advisory committee headed by L. M. Giannini to "assist A. P. Giannini in directing the activities of all banks controlled" by it; this committee at the suggestion of L. M. Giannini gave consideration to questions of loan policies, investment policies, branch organization, personnel, operating policies, inter-bank relations, public relations, business development, pending legislation, and representation in bankers and clearing house associations for respondent's banks; it requires each majority owned bank to submit detailed reports of condition and earnings each month; it also requires quarterly reports showing all loans in excess of a stated amount, together with information about overdue loans, etc.; it receives copies of reports of examinations from the various supervisory authorities which examine its majority owned banks; it receives reports of examinations of these banks made by the inspection department of the Bank of America; it causes these reports to

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15/ *United States* v. *Reading Co.*, 253 U. S. 26, 57 (1920) be analyzed and any matters of importance are taken up with the banks by respondent's officials; since 1946 one of respondent's vice presidents, who has also been its principal bank buyer, has been used as "bank liaison man"; his duties are to visit respondent's banks, talk with the officers and directors on their operations and conditions and to advise and help them. These and many other instances which are multiplied in the record leave no doubt but that respondent effectively "controls" its majority owned banks.

As stated above, the only other bank which has been included in the "Transamerica group" is the Bank of America. This Bank, it will be recalled, was the first bank organized by A. P. Giannini and into it have been funneled virtually all of the banks that have been acquired in California. The principal purpose behind the formation of respondent in 1928 was to take over "control" of this institution, and respondent held all of its stock from that time until 1937. In that year it distributed to its stockholders about 58 per cent of the Bank stock and from time to time since 1937 it has further decreased its holdings. It now owns 7.6 per cent of that stock. From the beginning of the case counsel for the Board have conceded that, because respondent now owns less than a majority of Bank of America shares, it would be proper to include the figures respecting Bank of America as part of the "Transamerica group" only if respondent today still enjoys the power to control that institution. Accordingly, much evidence was introduced at the trial to establish this proposition and on the basis of such evidence Governor Evans has found that respondent does possess such power. This evidence has been fully discussed and the question has been fully argued in our opening brief. We therefore respectfully refer the Board to pages 47-68 thereof for that discussion.

But, argues respondent, even if we consider them as a "Transamerica group" of banks, there is no evidence that such banks all operate as a single unit. On the contrary, they contend, these banks all function through separately existing boards of directors and formulate their own policies. Hence, the public has a wide choice of banking institutions even within the "Transamerica group" at which to obtain competitive banking services.

But this argument misconceives the nature of the Board's case and, in any event, is no defense to the Board's charges. At no time have we contended that respondent dictates the day-to-day operating decisions at its various controlled banks. Obviously respondent's officials do not sit at one end of a telephone line and instruct controlled bank officials as to what loan to make and what loan to turn down. *They have the power to do that, however, and power alone is the evil against which the statute is aimed.* Therefore, the fact that we introduced no evidence of abuse of that power is no ground for deducing that abuse of power may not have taken place at respondent's direction. It means simply that we were of the opinion, as is Congress, that proof "that the acquiring firm had engaged in actions which are considered to be unethical or predatory" was unnecessary to prove a Section 7 case. Moreover, we can point out here what the court pointed out in the *Northern Securities* case, *supra,* as follows (p. 725):

"It will not do to say that, so long as each railroad company has its own board of directors, they operate independently, and are not controlled by the owner of the majority of their stock. It is the common experience of mankind that the acts of corporations are dictated and that their policy is controlled by those who own the majority of their stock."

Furthermore, it is clear that respondent maintains a firm grip on all *policy* questions in its controlled banks. This is to be found, *inter alia,* in the elaborate machinery which it has set up for policing them, as set out above. To this must be added the degree of uniformity which necessarily characterizes the actions of all of its banks resulting from the use of the "manual of operations" now employed in its banks; the use of trained Bank of America personnel, who invariably turn up as key officials and/or directors of a bank as soon as respondent acquires it; the "meetings" of the staffs of the various banks with officers from the larger Transamerica controlled banks within the area; and the like.

Even if there were no evidence of the kind referred to above, however, there is one fact which stands out in bold relief in this case which is sufficient in itself to sustain the case against respondent. It is this: Since its organization respondent has acquired approximately 237 independently operating banks and branches. All of them but 47 banks and approximately 11 branches which those banks had at the time of their acquisition, with respondent's consent, have been dissolved and converted into branches of or merged with one or another of its controlled banks, including Bank of America. And there are now pending before the Comptroller of the Currency applications to branch 37 of its remaining controlled banks into Bank of America and the First National Bank of Portland, respectively. To accomplish this objective respondent will have to do what it has always had to do in similar situations, namely, vote its stock in its controlled banks to sell all its assets and to dissolve the banks. From these facts, plus the fact that it is the long-range intention, when possible to do so, to combine all of respondent's banks into one interstate branch bank, it is more than obvious that the "use" by respondent of its stock in these banks "by the voting or granting of proxies or otherwise" has always been and now continues to be to substantially lessen competition and tend to create a monopoly.

Respondent next contends that the statistics used by Governor Evans to show the extent of "market occupancy" by the Transamerica group banks are inaccurate and misleading. The basic contention is that commercial banks perform a variety of services and functions and that most of these same services and functions are also performed by organizations other than commercial banks. Thus, it is argued, insurance companies and savings banks make real estate loans, post offices accept deposits for safekeeping, auto finance and personal loan companies make consumer loans, and so on. A wide variety of other organizations are also named as competitors of commercial banks, including federal farm credit agencies, savings and loan associations, production credit associations, banks for cooperatives, and various others of either a private or governmental nature. Hence, the argument runs, only by adding statistics respecting all of these organizations to those showing total offices, deposits and loans of commercial banks would a proper base be obtained against which to measure the "market occupancy" enjoyed by respondent's controlled banks.

The answer to this contention is very simple. If a monopoly of commercial banks, as such, would not be potentially hurtful to the economy of an area, then we are wasting our time in this case, for concededly the entire theory of the Board's case is squarely bottomed upon the contention that it would. In fact we have contended, and the evidence fully supports the contention, that a monopoly of commercial banks over any substantial geographical area would constitute the worst kind of a monopoly because it could adversely affect more people, businesses and communities than any other kind of monopoly yet attempted. So the answer to respondent's contention lies in showing that commercial banks, as such, perform important services and functions which are not performed by any of these outside organizations and that monopolistic control of those services and functions over any substantial area could do great harm to the economy of such an area. This is easily done.

Throughout the case evidence has been piling up which emphasizes the importance of three functions which are absolutely unique to commercial banks. These are the money payment function, the money creation function, and the function of supplying short-term business credit to the small, medium, and even the large sized businesses of the nation. These are the functions which set the commercial bank apart from all other business organizations of a private nature and which have established for commercial banks the unique and traditional place in the financial affairs of our economy which they enjoy. We do not believe it to be an overstatement to say that commercial banks, because of these primary functions, provide the greatest single protection to the continued maintenance of our private enterprise system, because without them resort by business to some form of governmental substitute would seem inevitable.

It will probably be "carrying coals to Newcastle" to explain the mechanics and argue the importance of these three important functions to an agency such as the Board, which is itself an authority in the commercial banking field. Nevertheless, we are required to dispose of respondent's contentions on the basis of what appears in this record and not on the basis of what we realize the Board already knows from its general experience in this field.

That commercial banks perform the money payment function is, of course, but another way of saying that commercial banks accept deposits subject to check. No other type of business organization in our country can do so. Before that function can be performed, those who would perform it must obtain a charter as a commercial bank. Out of this function has been fashioned a nationwide system of money payments which today accounts for virtually all money payments made throughout the entire country without the need for the physical transfer of currency or coin. That system has become so deeply entrenched in the economic and business life of the nation that all businesses and most individuals would be seriously handicapped if they were suddenly denied access to it. Even the economists called to the stand by respondent admitted that no substitute for this function is to be found anywhere.

By virtue of their privilege of accepting deposits subject to check commercial banks are thus enabled to obtain a large part of the money with which to make their loans and investments. This money is obtained without any cost to the bank beyond that of maintaining and staffing its banking offices. The net effect of this, as the record amply attests, is that commercial banks are enabled to reach the broadest base of the borrowing public at the least cost. Whatever the *kind* of loan, the borrower who can qualify as a good commercial bank risk can obtain his loan cheaper at a commercial bank than anywhere else.

Overshadowing even this consideration, however, is the *power* that goes with the control of so vital a service as the checking account service. All of the economists called by the Board, Messrs. Goldenweiser, Bopp and Wheeler, were unanimously agreed that control of this function would place it in the power of the commercial bank monopolist to discriminate between individuals and business concerns and, by denying the service to some, to place those discriminated against at such a disadvantage vis-a-vis their competitors as in some instances to spell the difference between success and failure. Moreover, as they also testified, control over the money payment function could be used by a monopolist as an effective lever for compelling all who need the checking account service to obtain all of their credit needs at the commercial banks controlled by the monopolist.16/

The second unique function of commercial banks is the money creation function. We will not restate the mechanics of the operation by which the commercial banking system is enabled, under our present system of fractional reserves, to create new deposit money by the simple process of bookkeeping entries. Governor Evans' findings set out this process in detail, and the Board is fully

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16/ The following colloquy occurred during the examination of Dr. Goldenweiser (R. 2734-2735):

"Q Let me ask you this, Doctor: Having in mind that the commercial banking system has the exclusive control over the check payment function, which you have heretofore described, and with particular reference to the control of that function in the commercial banking system, I will ask you whether you have an opinion as to whether or not the control of that function by a banking monopoly in any substantial geographical area would tend or not tend, as the case may be, to bring to the commercial banking monopoly a monopoly of all credit in the area.

* * *

"THE WITNESS: . . . I think that it would be a very big leverage in that direction that the monopoly could have, because it could deny the business community and those lenders other than banks access to the all-essential, important part of our mechanism, namely, the check clearing and check payment system.

"I believe that in determining matters of this sort, one can't be absolute. Business is frequently an extremely sensitive thing and the difference in cost and in convenience that might result in a fraction of one per cent of the gross turnover of the business may make the difference between success and failure and while it is unquestionably true that an institution and an organization can use the facilities somewhere else outside of the district, while they can use money orders or they can ship cash or they can use telegraphic transfers, they would not be barred from all means of making payments, but they would be barred or they could be barred-by the hypothesis of your question, they could be barred from making the most convenient, the most efficient and the most economical kinds of payments and by being barred from that, they could very easily find themselves at a sufficiently serious disadvantage so as not to be able to do profitable business."

conversant with it. What is important is the harm which a malevolent control of this function over a substantial area could perpetrate in such an area. We concede that in a relatively small area control of all commercial banks would not carry with it much of a threat from abuse of the money creation function. But as the monopoly expands in geographical proportion the more likely it is that the banks controlled by the monopolist will function as the banking system functions in creating money. This is because of the greater probability that a check drawn against a newly created loan deposit will be paid by the borrower to depositors of banks which are also members of the controlled group; hence the larger the area covered by such a group, the smaller would probably be the adverse clearing balances experienced by the group after initially creating deposit balances. Obviously, as the amount of such adverse clearing balances grows smaller, the opportunity of the group to relend the same deposit balances which it had originally created would increase proportionately.

Respondent is now moving in the direction of commercial banking monopoly in five large and important states. More than 10 per cent of the nation's population is located there (RX 293), and the extensive nature of its economy has been emphasized in numerous of respondent's exhibits. Thus, with full monopoly power in those states would come a realistic opportunity for the Transamerica group to operate as the banking system does throughout the balance of the nation, so far as the money creation function is concerned.

Thus, there would be emphasized the power of the Transamerica group banks, in the language of Governor Evans, "to expand credit by lending too freely and too much, and, on the other hand, . . . to so restrict credit as to hamper growth and development".

The third function unique to commercial banks is that of supplying virtually all short-term business credit to the small, medium and some large sized business concerns. The principal reason why commercial banks have been the only organizations to supply this type of credit is because through numerous or even daily contacts they obtain an intimate knowledge of the business affairs of their customers that no other company could possibly duplicate. This knowledge, and the special "know-how" of commercial banks of which it is a part, bring to commercial banks a strategic advantage in serving the credit needs of the business community not shared by any other type of organization. All of this enables the commercial bank, with a minimum outlay of energy and expense, successfully to appraise the needs of its customers and, after the loan is made, to service the loan through all of its phases until collection has been made. The testimony is clear that if for some reason a business concern was not able to get credit from its local commercial bank, it would suffer serious damage to its business.

From this brief discussion it is evident that commercial banks, as such, fulfill a role in our economy which is at once traditional and unique. It is a pure libel to minimize their importance to the point which respondent would do in order to escape liability under the Clayton Act. If competition in commercial banking should disappear in any substantial area, the result in our judgment would be inevitable. Sooner or later the Government would be forced to take over the commercial banks and this would be followed by the gradual, if not precipitate, disappearance of the private enterprise system.

The "market occupancy" figures used by Governor Evans are also challenged on a number of other grounds in respondent's brief. The next argument is that the base figures used by him are improperly limited to showing commercial banking offices, deposits and loans only for the five States of California, Oregon, Washington, Nevada and Arizona, because "the boundaries of the five-state area have no economic or competitive significance". The brief seems to proceed on the theory that only if the five-state area represents an economic unit or a "trade area" of the kind that prompted the division of the Federal Reserve System into twelve separate districts can figures limited to such an area have any significance here.

Here again the answer is simple. We have never made any contention that the five-state area represents any unit of "economic significance". It may represent such an area or it may not, but whether it does or not is unimportant here. The reason why the figures in the statistics are limited to those states is simply because only in those states has respondent acquired and does respondent now control commercial banks. Each of those states permits state-wide branch banking; in each of them respondent has already established or is in the process of building state-wide branch institutions out of the independent banks it has acquired. Thus far, at least, respondent has limited its commercial banking activities to those five states. It has not moved into other states -- yet. Consequently the "market occupancy" figures respecting the Transamerica group are limited to those states in which its acquisitions, in the aggregate, have brought it into violation of the Clayton Act.

Under these circumstances the only question is whether *within the five-state area* the "effect" of respondent's bank stock acquisitions "may be" to substantially lessen competition or tend to create a monopoly. As we have seen, the answer to this question is to be found by applying the standards laid down by the Supreme Court in the *Standard Oil* case. Banks, like gas stations, must do business at specific locations. The only difference between the two in this respect is that, to operate at its location, a bank must meet tests of the public interest which are a good deal more stringent than those applied to gas stations. Every deposit and every loan of a commercial bank must be received or made at its banking office, just like a sale of gasoline by a gas station must be made from pumps at its physical premises. Both the bank and the gas station serve people who are preponderantly located in the area of the physical location of their places of business, respectively. In the *Standard Oil* case the Supreme Court found that Standard Oil sold gasoline in the seven States of Arizona, California, Idaho, Nevada, Oregon, Utah and Washington; that it had entered into exclusive supply contracts with operators of 5,937, or approximately 16 per cent, of the gas stations in those seven states; and that it sold gas at a yearly rate of about $57,000,000 to the stations it had under such exclusive supply contracts. This evidence, *without more,* was held to justify the conclusion that the "effect" of Standard's exclusive supply contracts was to substantially lessen competition and to tend to create a monopoly. No inquiry was made to ascertain whether the seven states constituted a "trade area" or had any special "economic or competitive significance". No attempt was made to determine the precise boundaries of competition as between each gas station in the area, or even as between those under exclusive supply contracts. It was obvious on the face of the facts there, as it is here, that the companies taken over (there by exclusive supply contracts, here by buying their stocks) were retail outlets largely servicing particular local areas. It was no more a matter of judicial inquiry there than it should be here, as to whether a particular outlet obtained in San Diego, California, was in actual or potential competition with another obtained in Reno, Nevada, or Portland, Oregon. The crux of the matter, as the Court found, was that the use of the practice prohibited by the Clayton Act was directed toward obtaining "the maximum number of strategically located outlets". That this same objective has continually characterized respondent's stock acquisitions is patent from the record. In that respect this case and the *Standard Oil* case are exact parallels, only here the percentage of controlled outlets is much greater. It would be a strange anomaly indeed if it were to be concluded that a prohibited "effect" contained in identical language in two sections of a law having the same central purpose required one kind of a test when one section was being applied and an entirely different test when the other was being applied. Common sense as well as legal precedents require that identical language in the two sections be given identical interpretations.

Next, respondent attacks as "without probative value" Governor Evans' finding that it now controls 41 per cent of all commercial banking *offices* in the five-state area. This finding, it is argued, treats all commercial banking offices alike and fails to distinguish between small offices and large offices and overlooks the advantage which the public obtains by having convenient places at which to secure banking services. Here again, however, the rationale of *Standard Oil* is decisive. No doubt the gas stations involved in that case were of all sizes, so far as the number of pumps and personnel is concerned, and no doubt, too, some were more strategically or conveniently located than others for serving the public. But the Supreme Court did not stop to inquire into these refinements of outlet control; it found simply that there were only a certain number of outlets in the seven states and that the Standard Oil Company had brought 16 per cent of them under its effective control by doing what Section 3 of the Clayton Act forbids. So here. A banking office is a banking office; nothing in the license to conduct that office requires that it be a big office or a little office, that it employ at least but not more than a certain number of employees, that it receive only so many deposits or make only so many loans. Of all the available commercial banking outlets in the five states (and the statistical base is sufficiently broad to average out all kinds and sizes of offices, in and out of the Transamerica group) respondent has, largely by acquisition, brought 41 per cent of them under its effective control.

And these same considerations dispose of the remaining attacks upon Governor Evans' statistical findings, such as the claim that deposits and loans of all kinds are improperly "lumped" together in the figures showing the Transamerica percentage of commercial bank deposits and loans to all such deposits and loans in the five-state area. Each of these totals is premised upon the broadest kind of statistical base, which more than averages out the extremes of high and low breakdowns. Furthermore, they represent the historical method used in all statistics showing size of commercial banks in official as well as unofficial publications. Taken in conjunction with all of the other statistics which confirm the relative importance of the Transamerica group in the five-state area, such as the comparison of the number of personnel employed by the Transamerica group to total personnel of all commercial banks in the area, the comparison of the number of deposit accounts by size of account to all deposit accounts of such classification in the area, the comparison of dollar value of deposit accounts by various classifications to the dollar value of all accounts of such classifications in the area, etc., they expose the gigantic size of the Transamerica group in a perfectly accurate and proper manner.

PART II

Part II of respondent's brief is devoted to the charge that the hearings were conducted by Governor Evans in an arbitrary and discriminatory manner. The first part of this discussion consists of general, though personal, comments as to his conduct of the proceeding. The remainder consists of a discussion of alleged errors made by him in various rulings on evidentiary questions. The latter are supposed to demonstrate his unfairness and to show that, as a result, respondent was denied a fair hearing.

First, as to the general comments. These include such observations as "Lacking completely in judicial experience, [Governor Evans] was forced to conduct an extended and hotly contested hearing. In those circumstances it was all too easy to abdicate in favor of the theories expounded by the Solicitor in support of the complaint"; and, "To find the Hearing Officer's ruling on any evidentiary issue one needs only to look at the position urged by the Solicitor"; and, "Invariably, instinctively, and towards the conclusion of the hearing, mechanically, the Hearing Officer turned to the Solicitor for 'guidance' on every issue".

These remarks are but a continuation of the public and personal attacks made upon Governor Evans at various times while the hearings were in progress. The trial had hardly commenced before he was put on notice of the conflicting theories which counsel for the parties entertained as to the proper measure of proof in a Section 7 case. As we have seen, under our theory the issues are very narrow and a minimum amount of proof is necessary to support the Board's case. Under respondent's theory the issues are numerous and complex, and require a veritable mountain of proof to sustain. It was inevitable that, at an early point in the trial, Governor Evans had to come to grips with these conflicting contentions. His job was to decide which one was right and which one was wrong and then to admit or reject evidence accordingly. He did what any other judge or hearing officer does in a similar situation -- he satisfied himself as to the right theory and thereafter conducted the trial in accordance with that fundamental decision. Unwilling to credit Governor Evans with an honest decision -- even if believed to be erroneous -- officials of Transamerica and Bank of America promptly reviled him publicly in a most shameful way -- a way, in fact, which would have brought prompt punishment from a court, but which, unfortunately, administrative officers are powerless to do anything about. Thus, on April 28, 1949, A. P. Giannini released to the press a statement made by him at the Transamerica annual stockholders meeting which commented upon the Board's Clayton Act proceeding. Among other statements therein contained was the following:

> "The charges were rigged up, the Board's attorney is allowed the widest license of conduct, the rulings of the hearing officer (who is a member of the Board and shows a prejudice in favor of the Board) are virtually all in favor of the Board's attorney. The counsel for Transamerica is overruled, his rights denied and his every attempt to bring clarity to the issues is stopped.
>
> "During the earlier sessions in Washington the hearing officer stated that he would permit wide latitude to both sides

in the admission of testimony. The pious aim was to admit material for what it might be worth so that later it could be sifted for factual value. In practice, however, this privilege has been reserved almost exclusively to the Board's own side of the case."

This same statement was also sent by A. P. Giannini to the stockholders of the Citizens National Trust and Savings Bank of Los Angeles.

The 1949 Annual Stockholders Report of Transamerica (BX 3-v, p. 13) states, *inter alia,* as follows:

> "The Board's solicitor and presiding member have exhibited a determination to ignore all facts except statistics prepared under *their* supervision and in accordance with *their* preconceived ideas." (Italics ours)

Similarly, the 1949 Stockholders Report of Bank of America contains the following statement respecting the hearings:

> "As to disregard for fair play, consistency and judicial procedure: The Board's solicitor took a year and a half for advance preparation of his case, but once the hearing started both he and the presiding officer became curiously interested in haste, haste which could serve no other evident purpose than that of hampering the defense in its research, preparation and presentation of its case. More to be condemned, the Board's hearing officer has repeatedly ruled in favor of its solicitor, under the influence of his inconsistent and fallacious arguments, and has as repeatedly and without compunction sided with the Board's solicitor when he has reversed his own position and used equally false reasoning to gain exactly opposite rulings."

Of course these personal attacks on Governor Evans were not new Transamerica techniques in this proceeding. Some of the present Board members will recall that when the complaint was first issued respondent promptly moved to disqualify Governors Eccles and Clayton on the ground of personal bias and prejudice. It is clear from the evidence that the real purpose of the motion was to give widespread publicity to certain affidavits filed in the case in support of the motion. According to one of these affidavits, signed by L. M. Giannini, Governor Clayton allegedly was biased against Transamerica because he had failed to land a job with the Bank of America. At the time this affidavit was filed a Transamerica press release was sent to all branch managers of Bank of America for delivery "to the newspapers and radio stations for which you are responsible". Among other things, this press release contains the following statement:

> "L. M. Giannini, President of Bank of America, in his affidavit presented correspondence and information to support the contention that Clayton's animosity towards Transamerica developed as a result of the refusal of the Bank of America president to provide a job and compensation which met with Clayton's evaluation of his Washington 'experience and contacts that I could turn to good advantage.'
>
> "Giannini stated that one year after the Bank's refusal to employ Clayton 'A significant change took place in the attitude of the Board of Governors of the Federal Reserve System.' This attitude resulted in unprecedented and discriminatory acts leveled at Transamerica Corporation by the Board of Governors. The bank president's affidavit stated that 'it is significant that the change of attitude of the reserve board from one of fair administration under the law to one of violent opposition beyond its legal authority occurred very shortly after the conversations with Mr. Clayton in which I made it clear to him that it was not possible for Bank of America to give him the kind of employment to which he aspired.' Giannini presented correspondence which he claimed indicated 'Clayton's bitterness has remained in the forefront of his mind' following the job turndown." (BX 345)

Of course the Board refused to disqualify Governor Clayton on any such obviously contrived charges. (See Board opinion filed herein January 17, 1949.)

The press release referred to above also had this to say about Governor Eccles:

"Conclusions by Sam H. Husbands from facts in his affidavit are that -

"'while appearing to act in the public interest, Mr. Eccles for six years has misused his power as a member and former Chairman of the Board of Governors of the Federal Reserve System, to foster regulations and promote legislation favorable to his family holding company and discriminating against Transamerica, -- legislation which the Executive Council of the American Bankers Association at its meeting in April 1948 characterized as "Punitive Legislation"; that while carrying on such discriminatory activities, he and his family, through the Eccles Investment Company, have had substantial stock interests in the First Security Corporation of Utah; that this is a bank holding company controlling banks with 38 banking offices situated in Utah, Idaho and Wyoming, and as such is a competitor of Transamerica Corporation in the ownership of banks in the Twelfth Federal Reserve District.'"

And the same diatribe against Governor Eccles was later continued in a full page advertisement which Transamerica published in various New York, Washington and California newspapers at or about the time the trial herein was scheduled to commence. (See RX 52-c.)[17/]

17/ Governor Eccles was not always regarded by the Gianninis as their "persecutor". In 1938 the Gianninis sought his assistance in connection with a controversy then raging between the Bank of America and the Treasury Department. L. M. Giannini had several talks with Governor Eccles in which he sought to have the Board intervene in the controversy. The Board did so and Governor Eccles participated in subsequent negotiations which led to an amicable settlement of the matter. Thereafter, he received a letter (BX 34) from L. M. Giannini, dated April 1, 1940, which stated in part as follows:

"Despite the unpleasant circumstances under which the conferences in Washington were held, I enjoyed them because they renewed again my confidence in some of the persons responsible for administering our important governmental activities. As a result of the conferences I feel that I came to know you and John McKee better and to appreciate the breadth and soundness of your views and the fact that no personalities entered into the formation of your opinions and the rendering of your judgments."

This type of personal attack is not something which was invented by the Gianninis just for use in this case. It has been in use by them for a great many years. The record is clear that at various times throughout their banking careers, whenever any of their institutions became involved in a controversy with public officials, the cry of "persecution" was the first one raised by them, apparently on the theory that by publicly attacking the official they could divert attention from the real issues. Any official who disagreed with them has always been, as here, charged with acting in bad faith. Thus, as late as October 1950 while L. M. Giannini was on the stand in this case, he calmly charged two banking commissioners of California who served in the early 1920's with having resisted the expansion of the Giannini banking group at that time purely out of personal motives or as a result of "pressure" brought by other banks in the area. When, in 1938, the Treasury Department had its historic differences with the Gianninis over management and expansion policies of the Bank of America, Secretary Morgenthau was publicly branded as a "persecutor" of the Gianninis. In a public statement made at that time by L. M. Giannini he stated, among other things, that: "Being without power under the circumstances to impose on the Bank his personal opinions and wishes, because of their illegal character, Mr. Morgenthau fostered the proceedings of the Securities and Exchange Commission against Transamerica Corporation." (RX 255, p. 34) Even in this case the old charge against Secretary Morgenthau was renewed. Thus, when Governor Eccles was being cross examined in this case, respondent's counsel asked the following question (R. 774):

> "From your knowledge of events from 1938 to 1941, or 1940, anyway, would you say it was fair to say that Secretary Morgenthau was engaged in a continuous campaign of persecution against Transamerica Corporation, the Bank of America, and A. P. Giannini?

To which Governor Eccles replied:

> "I don't think he was engaged in a campaign of persecution. . .
>
> "I think the Federal Deposit Insurance Corporation and the Treasury and the Comptroller's Office were very much concerned about the expansion of Transamerica and prior to the getting of the new capital in the bank, I think they were very much concerned about the condition of the bank. . ."

We make reference to all of these episodes in order that the Board may clearly see that the present attack against Governor Evans was as deliberately planned as all of the other legal moves made on respondent's behalf throughout this case. What else could explain the production of witness after witness, usually persons whose appearance was likely to be the subject of press comment (such as the Mayor of San Francisco or the former Treasurer of the Democratic Party), when respondent's counsel knew, on the basis of repeated rulings already made in the case, that they would not be permitted to give the kind of testimony they were produced to supply?

Governor Evans' conduct of the trial needs no defense. And we would be presuming if we tried to defend his integrity before this Board. Anyone who knows Governor Evans would know instinctively that he is incapable of discharging any responsibility except in a way he believes to be right. We will, therefore, confine our remarks merely to saying that, whether his decisions were right or wrong, they were all honestly made and none of them reflects any "abdication" of responsibility on his part, or that he and counsel for the Board had joined in working out any "preconceived ideas" about evidence in the case.

A. We turn now to a consideration of those arguments in Part II of respondent's brief which challenge various rulings made by Governor Evans on evidentiary questions. The first of these contentions relates to evidence introduced in support of the Board's case. While not clearly delineated in the brief, this attack seems to be divided into two main allegations: (1) that the testimony of certain employees of the Board and of the Federal Reserve Bank of San Francisco relates to matters which are "confidential" and should not have been disclosed in this hearing; and (2) that the substance of their testimony is "untrustworthy".

First, as to the alleged "confidentiality" of their testimony. This argument is launched in respondent's brief by an extended discussion of alleged precedents, including the case of *Bank of America v. Douglas*, 105 F. 2d 100 (D.C. Cir. 1939), showing that examination reports of *banks* traditionally have been regarded as of a confidential nature and their use frowned upon as evidence in a public proceeding. By this maneuver respondent apparently attempts to suggest that examination reports of *banks* were introduced in evidence here. The short answer to such a contention is that it is not true; no bank examination reports were offered in evidence at any time in this case. Whether, if offered, they would be admissible in this or any other proceeding before the Board -- such as a Section 30 case[18] -- is, therefore, not even remotely involved here.

Three of the witnesses whose testimony is under attack did testify concerning facts they learned while engaged in various examinations of Transamerica Corporation. We assume that it is this testimony which respondent claims is "confidential" and should not have been revealed. If so, there are a number of answers to the contention.

In the first place, banks traditionally have been placed in a special class because of the nature of their activities. Their very existence depends upon the maintenance of public confidence. The spreading of rumors by the premature publication of criticisms of bank examiners contained in bank examination reports might very easily cause a run on the bank. Then, too, their relationships with their customers are of a highly confidential character. Revelation of comments about those relationships contained in bank examination reports would strike at the heart of the bank's ability to perform its functions. Consequently, bank examination reports, as such, have been treated as confidential so far as the public generally is concerned. However, and without arguing whether the doctrine of "confidentiality" would apply to such reports in a case brought by the government charging the bank itself with violating the law, it is obvious that Transamerica is not entitled to the benefit of any such privilege. It is not a bank and can lay no

18/ 48 Stat. 193 (1933), 12 U.S.C. § 77 (1940) legitimate claim for being treated as one. It is just like any other private business organization.

As stated, three Board witnesses testified as to facts learned by them while participating in examinations of Transamerica. Their testimony largely consisted in reading into the record transcripts of correspondence, documents and accounts contained in the official files and records of Transamerica and its non-banking subsidiaries. All of their work papers were made available to respondent's counsel, so that the specific dates and other identification respecting this material could all be checked at the offices of Transamerica. Every jot of that evidence was relevant to this proceeding. If the case had been brought by the United States Attorney in the District Court as provided in Section 15 of the Clayton Act, instead of before the Board in this administrative proceeding pursuant to Section 11 of the Act, all of this evidence could have been obtained by the simple process of subpoena. Even bank records would not be privileged against disclosure under those circumstances. Cf. *Bank of America v. Douglas, supra*. The Board lacks the subpoena power, presumably because Congress was satisfied that the Board possesses ample power to discharge its full responsibilities under the law through the examination function. Under such circumstances it is unrealistic to suggest that the Board can obtain the information necessary to enable it to decide whether the law is being violated, but cannot put that information into a formal record before itself simply because "examination" and not subpoena brought it to light. We submit that the claim of alleged "confidentiality" is completely without merit.

Even if the evidence gathered by Board examiners in the course of authorized examinations of a holding company were to be treated as having some "confidential" aspects, however, it must be obvious that it is not "confidential" as between the company and the Board. The very purpose of an examination is to ascertain facts for use by the Board in performing its statutory obligations. Therefore, so long as examiners report only to the Board facts found by them when making an examination, no one could seriously charge that the "confidentiality" of such an examination was being violated. *And that is all this hearing set out to do.* If the hearing had been conducted in private, as provided by the Board's Rules of Procedure and as was originally ordered, no one but the Board would have been told anything that the examiners learned. But respondent's counsel (who is also vice president and general counsel of Bank of America) insisted that the hearings be opened to the public. If any element of "confidentiality" of the kind now insisted upon ever did exist, any right to assert the claim was surely waived by respondent's motion. Certainly under these changed conditions, brought about at respondent's own request, the Board is not denied the right to hear the same evidence from its examiners that it could have received without question if the hearings had been conducted privately.

But even this is not the sum total of our answer to the "confidentiality" argument. At various times throughout the trial, when respondent's counsel objected on this ground to the testimony of Board examiners, counsel for the Board offered to close the trial to the public and put on such evidence as if in a private hearing. Of course this was never agreed to, because such a procedure would have denied counsel their present argument.

Now let us examine the claim that the evidence given by the employees of the Board and of the Federal Reserve Bank is "untrustworthy". This requires a brief analysis of the testimony of each, as well as of the facts which give probative force to their evidence. The first two to testify were Messrs. Horbett and Thompson of the Board's staff. Through them was introduced the basic statistics relative to bank acquisitions and showing the mounting percentage of respondent's domination of commercial banking in the five-state area. Thompson testified first. While he produced several exhibits which were admitted into evidence, Exhibits 8 and 9 are the only ones we need to consider now because all of the remainder were made by him from facts presented in Exhibits 8 and 9. Exhibit 8 is a volume of 680 pages. Each page is headed at the top by the name of a particular banking office acquired by Transamerica or its predecessors since the formation of Bank of Italy by A. P. Giannini in 1904. Only those companies and banks were regarded as "predecessors" of Transamerica which were identified as such by James A. Bacigalupi, a former president of Transamerica, in his testimony before the Banking and Currency Committee of the House of Representatives in 1930. Also included on each page of Exhibit 8 is a short statement showing every change which thereafter took place in connection with that office, such as its conversion into a branch of a Transamerica group bank, merger, closing, etc.

Exhibit 9 is a volume consisting of 230 pages. Each page identifies a branch established de novo by any of the Transamerica group banks since the formation of Bank of Italy in 1904. It also contains a short statement showing any subsequent changes of the kind mentioned above in connection with Exhibit 8.

The "trustworthiness" of these exhibits depends, of course, upon whether they were carefully prepared and whether the material used in their preparation was taken from reliable sources. To satisfy itself on these points the Board is respectfully referred to Board Exhibits 269, 270 and 272, which show exactly where verification of every fact contained in those exhibits can be found. Examination of those exhibits will show that almost without exception the data was obtained from official publications of bank supervisory authorities, such as the Comptroller of the Currency or Superintendents of Banking in the five-state area, or from official statistics maintained by the Federal Reserve Bank of San Francisco in the regular course of its duties, or from official publications or communications from the Transamerica companies and banks themselves. It would serve no useful purpose to analyze each of these sources again in this brief. They are all set out in the explanatory exhibits listed above and the Board can quickly determine the authoritative nature of these sources by reference to those exhibits.

Not only were Exhibits 8 and 9 carefully prepared from authoritative sources, but they were also subjected to as complete a checking as any evidence ever received in a trial. Thompson was cross examined on two occasions, once in Washington when he introduced the exhibits and again several months later in San Francisco after respondent's counsel had ample opportunity to check them against the records of Transamerica. On each occasion Thompson had at his side all of the source material referred to in his explanatory exhibits and was prepared, if necessary, to substantiate every line of the exhibits theretofore introduced by him. Not only did respondent's counsel fail to contradict any of the facts contained in Exhibits 8 and 9 but they have actually used material contained in them to prepare some exhibits of their own. (See, for example, Respondent's Exhibits 73, 74, 83, 99 and 301.) In the light of these and the other facts more fully contained in the record on this point we submit that the charge of "untrustworthiness" against the Thompson exhibits is clearly without substance.

Now let us examine the Horbett exhibits. He also introduced a number of statistical exhibits which are basic to the Board's case. The principal ones are Board Exhibits 13 through 20, and Exhibit 257. As was the case when we considered the Thompson exhibits, we need now refer to only three of these exhibits, namely, Exhibits 13, 16 and 257, because these exhibits contain the basic figures which were used in the preparation of the remainder of this group of exhibits. Exhibit 13 shows by selected years the total offices, loans and deposits of all banks by states in the five-state area; the total offices, loans and deposits of the Transamerica banking group in each of these states; and the percentage ratio of the Transamerica group bank offices, deposits and loans to all offices, deposits and loans in those states. Exhibit 16 shows similar figures by counties instead of by states, and Exhibit 257 shows similar information by individual communities, except that Exhibits 16 and 257 do not include loan data.

As to the "trustworthiness" of the Horbett exhibits. In the first place, for over twenty-five years Horbett has been in direct charge of that portion of the Board's work which consists in keeping accurate statistics of the banking structure of the entire United States. He took the names supplied by Thompson in Exhibits 8 and 9 as correctly representing the members of the Transamerica banking group and then compiled figures showing comparative percentages of the kind mentioned above. He, too, introduced in evidence the precise source of all of the material used by him in their preparation. For that information we respectfully refer the Board to Board Exhibits 45, 46, 254, 255 and 256. Examination of that material will disclose that every figure used by him in the preparation of these exhibits was taken from published official sources or other official statistical data kept in the regular course of the Board's duties. And all of this material is regularly used by Horbett and his subordinates in preparing the banking statistics which are published monthly in the Federal Reserve Bulletin or in other official Federal Reserve publications.

Furthermore, Horbett, like Thompson, was twice subjected to extensive cross examination. He, too, was prepared on each occasion to vindicate every figure contained in the exhibits prepared by him. In addition, an offer was made by counsel for the Board to permit respondent's representatives to check the information in the Horbett exhibits while the case was in recess. This offer was accepted and respondent's representatives did examine the source material in Horbett's office.

As occurred in connection with the Thompson exhibits, material contained in the Horbett exhibits was used by respondent's counsel in preparing some of their exhibits. (See Respondent's Exhibits 85, 99, 123, 124, 247, 248.) In addition, as the Board will recall, respondent requested and the Board authorized Horbett to prepare comparable exhibits in connection with a number of other banks located in the five-state area. And these, too, were later used by respondent's counsel as source material for the preparation of some of their exhibits. In the light of all of these facts it seems a little late in the day for respondent to challenge the validity of these exhibits.

Horbett also introduced Board Exhibits 275, 328, 329, 330, 331, 332-a, 332-b, 333 and 340. The sources of each of these exhibits are contained on the face of the exhibits except Exhibits 332-a, 332-b and 333, in which cases Horbett identified the sources in his testimony. Reference to these explanations will show that they are the same general sources used by him in the preparation of the exhibits referred to above. Their probative value is, therefore, beyond dispute.

The next employee witness to testify was James C. Smith of the Board's staff. Examination of his testimony will disclose that he testified principally on the following subjects: Particular bank acquisitions; the use of agents, inside and outside the Transamerica organization, to acquire banks; the methods of financing these agents in such acquisitions; the use in particular cases of Bank of America official personnel in perfecting arrangements to buy banks; the fact of payments by way of bonuses or other special inducements to secure controlling stock interests in particular cases; and the making of advances in particular cases to enable directors to purchase qualifying shares and the taking of options on directors' shares by Transamerica.

In giving testimony on these subjects Smith used working papers made by him during the 1943 examination of Transamerica, in which he participated. He read into the record the whole or part of various letters, ledger accounts, stock purchase agreements, option agreements, and other memoranda relevant to the subjects outlined above, which he had transcribed from the official records and accounts in respondent's offices at the time of the 1943 examination. Each one of these letters, accounts, agreements, etc., was specifically identified by him by name, date and place, and all his work papers were turned over to respondent's counsel for checking against the originals. No contradiction of any of this evidence was ever offered on respondent's behalf.

The next employee witness was Carl Reinholdt who is employed by the San Francisco Reserve Bank in its examination department.

Reinholdt was in direct charge of the 1943 and 1946 examinations of Transamerica. His testimony closely paralleled that of Smith. He gave evidence upon most of the same subjects as Smith, except that such evidence touched upon other bank acquisitions and other transactions relevant to this proceeding. In addition, he testified on other subjects, such as a conversation with one of respondent's officers in which the latter named A. P. Giannini as the one who made the determination respecting bank acquisitions by Transamerica; the consideration given and specific action taken by the Transamerica board of directors on matters directly relevant to this case; the intimate relationships existing between various non-banking subsidiaries of Transamerica and Bank of America; and others. As can be readily verified, Reinholdt, like Smith, read into the record all or portions of specific agreements, correspondence, ledger accounts, minutes and other memoranda which were transcribed by him, or other examiners acting under his direction, from the official books and records of Transamerica and its subsidiaries. Counsel for the Board offered to produce all of the examiners whose transcriptions were thus identified by Reinholdt as having been made under his direction. No request was ever made for permission to cross examine these men and no one testified on respondent's behalf that the records and other data identified by Reinholdt were not a part of the official files of Transamerica, or its non-banking subsidiaries.

The next employee witness named in respondent's brief was E. H. Galvin, now chief examiner of the San Francisco Reserve Bank.

Galvin's testimony was limited solely to showing an arrangement in effect between Bank of America and three Transamerica non-banking subsidiaries, Inter-America Corporation, Pacific National Fire Insurance Company, and Premier Insurance Company. This arrangement related to the insurance of automobiles, the purchases of which were financed by Bank of America, and under its terms Bank of America virtually guaranteed the insurance companies against loss on such coverage. In his testimony Galvin related a conversation had between himself and an official of Inter-America Corporation (which acted as insurance broker in the deals) who stated the terms of the payment formula in effect between the parties. He also read into the record certain payments made pursuant to the formula, the latter having been transcribed by him from the journal entries which he observed in the official records of Inter-America Corporation during the 1943 examination. He gave similar data for the period 1943 to 1946 but, inasmuch as he did not take part in the 1946 examination, these figures were taken from the work papers of another examiner who participated in that examination. However, counsel for the Board offered to produce the other examiner if respondent's counsel wished to cross examine him. No such request was made and neither the officer of Inter-America Corporation from whom Galvin obtained part of his information nor any other official of these companies appeared to refute any evidence given by him.

The final witness in this group was W. F. Volberg, at the time vice president in charge of examinations at the San Francisco Reserve Bank. Volberg was called principally for the purpose of identifying three letters written to him by officials of Transamerica, showing the acquisition by that corporation of three banks after these proceedings had been started, and to state for the record the approximate loans and deposits of those banks at the time of such acquisitions. Upon this evidence counsel for the Board secured an amendment to the complaint herein to include these additional banks. Volberg also produced and identified a report of examination of Bancitaly Corporation, a Transamerica predecessor, conducted in 1923 by a man long since retired from the Reserve Bank. Excerpts from this report were read into the record, but the material so used was designed only to be integrated with other matter theretofore introduced from the Board's official files showing the Board's concern even in those early years over the Giannini bank expansion program. Aside from our inability to produce the man who observed those records in the offices of Bancitaly Corporation in 1923, the guarantees of trustworthiness are the same as those referred to in the case of Messrs. Smith, Reinholdt and Galvin. As the legal successor to Bancitaly Corporation respondent presumably obtained all of its records. No one testified as to whether it did or did not, and no one controverted the facts recited in the report. However, if this part of Volberg's testimony is considered lacking in probative value, we have no objection to its being disregarded by the Board. It has no particular significance one way or the other so far as the basic issues here involved are concerned.

Finally, respondent's counsel attack as untrustworthy the so-called "reputation" testimony, that is, the testimony given by all of the independent bankers called in support of the Board's case, that Transamerica and Bank of America have the reputation among bankers of wanting to acquire every independent bank they can get. This testimony, while not vital to the Board's case, is nevertheless quite revealing and can be accorded its proper weight by an expert body such as the Board. Taken in conjunction with other evidence showing the methods pursued by respondent in acquiring banks, the very fact of this "reputation" among bankers shows, as no statistics can show, the fear which permeates the entire independent banking structure of the area that the day may not be far distant when all remaining independent banks there will have become but additional units in the Transamerica network of centrally controlled institutions. Furthermore, such a reputation is also a deterrent to the organization of new independent banks. We submit that the testimony on this point is helpful, but not necessary, in determining the issues on this record.

B. The next section of respondent's brief attacks rulings made by Governor Evans on the scope of cross examination of certain Board witnesses. The first witness mentioned in this connection is Reinholdt, the nature of whose direct testimony is referred to above. Like practically all of the balance of respondent's brief the arguments respecting alleged errors during the Reinholdt cross examination are in the most general terms. These seem to be that, during such cross examination, Governor Evans applied a test of "confidentiality" against respondent's counsel which he did not apply on direct examination against counsel for the Board. Of course such a charge is absolutely without foundation. The only completely satisfactory way for the Board to satisfy itself that such is the fact is to examine the Reinholdt testimony from beginning to end and to have before it all of the material which was before Governor Evans when the contested rulings were made by him. We assume that the Board will want to do just that. This will entail the necessity of the Board opening the record to have brought before it all of the papers hereinafter mentioned which were marked for identification by respondent, but which never became exhibits in the case. This material is all available and it is the understanding of counsel for the Board that respondent's counsel have photostatic copies thereof. Upon such an examination of the entire record the Board will find the truth to come out something like this:

On direct examination Reinholdt, with only a few unimportant exceptions, read into the record excerpts or transcripts of letters, minutes, agreements, etc., identified by him in the manner hereinbefore stated, all of which were directly relevant to one or another of the issues in the case. All of this material was transcribed from the originals; therefore none of it was copied from bank examination reports.

When cross examination commenced, respondent's counsel obtained from Reinholdt numerous papers which had been accumulated by him during the course of his various activities as examiner in charge of the Transamerica examination but which had not been used by him in giving direct testimony. After obtaining these papers from Reinholdt, respondent's counsel had them marked for identification, RX 17 to 33, inclusive. As is obvious from an examination of this material, some of it consists of excerpts made by Reinholdt from bank examination reports, ostensibly for use by him in preparing his own report of examination of Transamerica to the Board. As stated, however, none of this material had been put in evidence by him in any way on his direct testimony. Indeed, a good portion of these papers related to institutions about which Reinholdt had not even given any testimony on direct examination.

After keeping these papers in their possession for some time respondent's counsel renewed their cross examination of Reinholdt. In doing so they attempted to have him testify as to certain of the information contained in these papers which had been abstracted by him from confidential sections of bank examination reports. This was objected to on the ground that the questions had no relation whatever to any matters brought out on direct examination and that, in addition, the information being sought would require disclosure of information contained in confidential sections of bank examination reports. (Reinholdt had testified that he had no independent knowledge as to this information.) At this point we would respectfully request the Board to consider the arguments that took place between counsel at pages 3596 to 3609 of the record and the considered opinion of Governor Evans commencing on page 3610 thereof. This will fully inform the Board of the fundamental position of both counsel on this entire subject, and Governor Evans' ruling will demonstrate how completely without substance is respondent's contention that there was any "dual standard" of confidentiality applied by him in this case.

Another charge made in this section of respondent's brief is that Governor Evans unfairly limited respondent's counsel from developing the alleged bias and prejudice of certain Board witnesses. Of course the extent to which cross examination on such a matter may be appropriately carried is lodged in the sound discretion of the trial officer. When it comes to examine the entire record made in connection with the cross examination of the witnesses mentioned, the Board will find that Governor Evans leaned over backwards to allow the widest latitude in such cross examination. And it must be remembered, as stated earlier herein, that those in charge of Transamerica always pursue the course of attacking anyone who dares to disagree with them. Cross examination in this case was no exception to this habit.

The purely legal answer to respondent's contentions may be shortly stated. As to Governor Eccles. Respondent's counsel sought to establish his alleged bias and prejudice by cross examining him concerning the introduction in Congress of bank holding company legislation sponsored by the Board. The Board's official action, representing the combined official views of all the members thereof, can hardly be used as a basis for charging individual bias and prejudice.

As to Partridge. Counsel were permitted to develop that Partridge had been discharged by Bank of America. They were not permitted to develop the alleged reason for that discharge. As is apparent from the record, it was obvious that the only purpose of attempting to develop the latter information was to humiliate and embarrass the witness.

As to the banker witnesses. On cross examination respondent's counsel was permitted to develop that they were members of one or another of the independent bankers associations on the West Coast. Counsel was not permitted to ask questions as to the prerequisites of membership or purposes of those organizations. Such a line of inquiry is obviously irrelevant to the case and could not possibly establish any bias or prejudice on the part of the individual witnesses. Moreover, it was obviously aimed at focusing further public attention upon the charges made in the Transamerica paid advertisements to which reference has heretofore been made.

C. The next section of respondent's brief charges that Governor Evans discriminated against respondent by rulings which are alleged to have "prevented Transamerica's presentation of its defense". A number of rulings made while respondent was putting in its case are compared to earlier ones made while the Board's case was being presented and these are arranged in such a fashion in respondent's brief as to suggest "inconsistency". By this method counsel attempt to give substance to their charge that Governor Evans was applying one rule in favor of Board counsel and another when dealing with counsel for respondent. As we shall see, however, none of the rulings referred to in respondent's brief involved any legal inconsistencies whatsoever.

The first comparison is between a ruling made by Governor Evans while L. M. Giannini was on the stand and one made by him more than a year earlier when Roy Edwards, a banker witness for the Board, was testifying. First let us put these rulings in their proper perspective. On direct examination L. M. Giannini had stated that he and his father had over the years been offered some 17 banks having approximately 60 to 70 banking offices and aggregate deposits at the time of the alleged offers of seven or eight hundred million dollars, but that they had declined to acquire these banks because, as he said, "they did not fit into our picture" (R. 10,536-10,538). He supplied a list naming these banks. When cross examination was undertaken, counsel for the Board called to Mr. Giannini's attention the fact that a number of the principal officers of these banks had wired counsel for the Board that such banks had never been offered to the Gianninis, and we served notice that it was our intention to produce those officers at the appropriate time to so testify. On redirect examination counsel attempted to give some substance to the Giannini testimony by producing an affidavit of a former official of the Bank of America in San Diego stating that a Mr. Russell Jones had called upon him in 1933 and 1934 to offer for sale the shares of the Security Trust and Savings Bank of San Diego. Mr. Jones was not identified and nothing appears in the affidavit which would enable counsel for the Board to even find Mr. Jones to ascertain what connection, if any, he had with the subject institution and what right he had to offer the bank for sale, if he ever did do so. This affidavit and a letter from A. P. Giannini to the same Bank of America official referring to some unnamed institution were therefore excluded by Governor Evans as without probative value. Whether the Gianninis thought they had an opportunity to buy this bank is not, as contended by respondent's counsel, important to a decision in this case. The reason why counsel for the Board later produced evidence from the man qualified to give evidence as to the Security Trust and Savings Bank, as well as representatives from the other banks listed by Giannini, was to show that the Giannini testimony generally was lacking in credibility. By the time Governor Evans made the ruling complained of, L. M. Giannini, by his attitude and conduct on the witness stand, particularly during cross examination, had already cast serious doubts upon the reliability of much of his testimony given on direct examination. Under these circumstances Governor Evans' refusal to receive such self-serving and hearsay statements and as to which no possible safeguards of cross examination were present was entirely justified.

Now let us analyze the Edwards ruling. Edwards is the cashier and a stockholder of the First National Bank of Orange, California. His father is the president and principal stockholder of that bank. At the start of his direct examination Edwards was permitted to testify that his father had told him that the Gianninis had approached his father a number of times about buying the bank. This answer was permitted over objection by respondent's counsel on the express understanding that it would be connected up with testimony which would adequately safeguard the rights of cross examination. Edwards then testified that L. M. Giannini, accompanied by two officers of the Bank of America, had called upon his father and himself in 1943 and then and there confirmed the fact that the Gianninis wanted to buy the bank. In that meeting L. M. Giannini even offered Edwards a position with the Bank of America when and if the institution was taken over. Now that occurrence either took place or it did not. Respondent's counsel had a completely adequate basis for cross examination because all they had to do was ask L. M. Giannini whether it happened. The best proof of the credibility of Edwards' statement is that when L. M. Giannini took the stand and had the opportunity to deny it under oath he failed to do so.

The second comparison is between another ruling made while L. M. Giannini was on the stand and an earlier one when Herbert Ivey, president of the Citizens National Trust and Savings Bank of Los Angeles, was testifying. Again let us put the rulings in perspective. L. M. Giannini had made quite a point on direct examination that his father's and his own policy had always been to prevent "insiders", as he called them, from deriving any personal profits from the operations of the various companies or banks with which they were identified. On cross examination we developed facts that proved the contrary. We showed that, following the proxy battle in 1932 when the Gianninis were returned to control of Transamerica and its subsidiaries, a company was organized by Transamerica called

Associated American Distributors, the sole activity of which after 1933 was to pay commissions to brokers and salesmen all over the country to get people to buy Transamerica stock on the stock exchanges -- not new stock or stock which Associated had in its portfolio, but stock that was already owned by existing Transamerica shareholders. The likelihood that such operations, if extensively carried on, would tend to bring about an increase in the market price of Transamerica stock is, of course, obvious. Contemporaneously with these activities of Associated, all of the expenses of which were being paid by Transamerica, A. P. Giannini organized a pool to trade in Transamerica stock. The pool was composed of individual contributions from himself and others, including L. M. Giannini. It was during a portion of the cross examination of L. M. Giannini about the activities of Associated that the ruling complained about was made. He had previously, in general terms, stated that the reason Associated had been formed was that lists of stockholders of Transamerica had been obtained by unscrupulous persons during the proxy battle of 1932 and that these lists were being used by them in attempts to induce Transamerica stockholders to dispose of their shares and to invest in others. We asked him to be specific and to give evidence about which he had personal knowledge on this subject. He replied by starting to relate conversations with other persons which took place, as he said, "in later years". We interrupted to request the Hearing Officer to require Giannini to limit his answers to our question to matters within his personal knowledge. As the answer was thus clearly unresponsive to our question, it was ordered stricken.[19] However, as appears from his later testimony, all of this subject was gone into at length (R. 11,182-11,198).

Now compare this ruling with that made in connection with the Ivey testimony. Ivey was called to give evidence concerning the attempts made by Transamerica over the years to acquire his institution. This is the bank which Transamerica attempted to acquire over the objection of the management by publishing newspaper advertisements throughout the Los Angeles District requesting them to trade their Citizens stock for stock of the National City Bank of New York owned by Transamerica. He testified that the first "authentic" attempt to buy his bank came in the fall of 1942 when Francis Baer, an official of Bank of America, came to him to talk about acquiring the Citizens Bank. Purely as a preliminary question he was asked whether prior to that visit there had been any instances which had led him to believe that Transamerica was seeking to obtain the stock of the bank. In reply to this he stated, over objection, that (R. 1881):

> "In 1936, rumors were pretty rife that Transamerica was going to endeavor to take us over, and it was brought to the attention of the Board. The Board made an authorization for its officers to refute it and George W. Walker, the then Chairman of the Board, and myself addressed a letter to this man Byrne telling him that our bank was not for sale, had never been for sale, and requesting that he desist from calling on our stockholders and directors, trying to work up deals."

19/ Incidentally, this testimony had nothing whatever to do with the subject of "raids on Bank of Italy stock" or the "formation of Transamerica Corporation" as stated in respondent's brief.

Quite apart from the relative unimportance of this background information, it is obvious from all of the testimony subsequently given in connection with Transamerica's efforts to purchase the stock of the Citizens Bank that the rumors testified to by Ivey had a foundation in fact. This is also corroborated by the fact that L. M. Giannini identified a Mr. Byrnes as having been the "broker" in the acquisition of the Seaboard National Bank, Los Angeles, in 1936 (R. 11,396). Hence, like the situation in connection with the Edwards testimony above referred to, the hearsay statements were corroborated by subsequent events unchallenged in the record.

Next, respondent's brief compares a ruling made during the testimony of Carl Wente, an official of the Bank of America, to the testimony given by Ivey relating to the Transamerica attempts to acquire the Citizens Bank. On direct examination Wente started to tell about conversations and correspondence between himself and certain directors of the Citizens Bank to establish that they had offered him a job at Citizens before Transamerica obtained any stock of that institution. This evidence was properly excluded on the ground of hearsay. But even if it had not been hearsay, it still would not have been admissible because it was not relevant to any issue in the case. Transamerica insists that one of the reasons it tried to acquire Citizens is because certain directors of that institution, who are alleged to have been dissatisfied with its management, importuned it to do so. The Wente testimony was offered as indicative of the fact that the Citizens directors were dissatisfied with the Citizens management. The answer to this, of course, is that, even if there were dissatisfied directors and even if they did ask respondent to buy the bank, that fact would not excuse respondent for doing so in violation of the Clayton Act.

No specific ruling is referred to in citing the Ivey testimony. Counsel simply refer to the fact that "Ivey testified extensively as to conversations with total outsiders which purportedly bore upon Transamerica's purpose in acquiring stock in Citizens", citing the record reference as "Tr. 1882 *et seq*." In the first place, Ivey's testimony had nothing to do with the *purpose* of the Transamerica attempts to buy the Citizens Bank. His testimony related only to the *fact* of the Transamerica attempts to purchase the bank. Moreover, the conversations to which he testified were not with "total outsiders", but only with official representatives of Transamerica, which, of course, were not objectionable on any grounds.

The next comparison is between rulings made by Governor Evans in allowing counsel for the Board to introduce certain newspaper clippings into the record and his refusal to allow respondent's counsel to put in others. To begin with we must, of course, concede that all newspaper clippings offered by either side were subject to the technical objection of hearsay. We stated at the time that we did not expect to rely upon them as proof of any of the basic issues in the case. Nor have we done so. Hence, the entire subject is of little significance now. However, there is ample justification for Governor Evans' rulings. As the Board will find when it comes to examine the record, there is other competent corroborative evidence concerning the matters referred to in each of the six clippings put in by counsel for the Board and mentioned in respondent's exceptions. The very fact that it was common practice for Transamerica and Bank of America to issue press releases would support the conclusion, if necessary, that most of these newspaper articles were put out as official utterances of those institutions. This is in sharp contrast to the attempt by Mr. Stewart to introduce a collection of "approximately 100 editorials, and other stories, which were published at or about the time of Mr. A. P. Giannini's death" (R. 6304). Surely such an omnibus and random selection of newspaper clippings, written about A. P. Giannini at the time of his death, on the face of it could have no relevance to any of the issues in this case. We objected on the ground of their irrelevance and they were properly excluded on that ground.

Next, comparison is drawn between certain rulings made during the testimony of the economist witnesses for the Board and for respondent, respectively. Respondent's brief calls attention to the fact that when Dr. Goldenweiser was on the stand, Governor Evans permitted him to state that monopoly control of the check payment function in any substantial area would give to the monopolist a "very big leverage" in the control of all credit in the area, whereas when respondent's economists testified, they were not permitted to state that if a monopolist raised its charges for the checking account service, the public would resort to substitutes. Both rulings are easily justified. Dr. Goldenweiser was testifying as to the power which would come to a monopolist on the basis of conditions now known to exist. In other words, the checking account service is an indispensable element today in the business life of the nation and its availability from competitive sources is, therefore, essential. Control of it obviously would give great power to a monopolist. On the other hand, the opinions of respondent's economists, if expressed, would have been predicated upon conditions which do not exist today, namely, the possibility that some substitute could be found to take the place of the checking account service. The Clayton Act is designed to protect against the destruction of competition in commerce in its present form; it is not designed to force people to use substitutes. Furthermore, as all of respondent's economists testified, there is no satisfactory substitute for the checking account service rendered by the local commercial bank.

Next, respondent compares rulings by Governor Evans permitting Board economists to testify concerning the harm to the public which could result from monopolistic control of commercial banks in any substantial geographical area with those prohibiting customers of Bank of America and other Transamerica controlled institutions from testifying that they had not been victimized in any way by these institutions. Time and again in this brief we have called attention to the fact that proof of predatory action is not a necessary element of proof in a Section 7 case. As we have seen, only recently Congress itself has stated that it is not necessary "to prove that the acquiring firm had engaged in actions which are considered to be unethical or predatory". The theory of a Section 7 case is not that an acquiring firm has already attained monopoly power, but rather that it is tending in that direction. It is unrealistic to suppose that a company which has not yet attained monopoly power would attempt to use that power. It is important, however, to know that, as testified by Board economists, if such power is attained, it has the potentiality of great and destructive harm.

Next, respondent compares certain rulings respecting the proxy machinery of Bank of America. Counsel for the Board was allowed to show, as one of the elements of proof on the issue of control of Bank of America by Transamerica, various facts about the proxy machinery of Bank of America, such as how many shares were voted by proxy each year, who the members of the proxy committee were, and the like. While putting in their case respondent's counsel were not permitted to put in evidence the opinion of a partner of a New York company, which has conducted proxy campaigns in a great number of contests over control of the managements of corporations, to the effect that Transamerica's present stock ownership in the Bank would not necessarily be decisive if a proxy contest were to take place. The justification for both of these rulings should be apparent without argument. The question whether or not Transamerica now has the power to control Bank of America is a totally different one from whether, at some future time, it may lose such power. Our evidence demonstrated, and Governor Evans found, that Transamerica does possess the power to control Bank of America at the present time. The proxy machinery of the Bank has been, and is now being, effectively used in preserving that power, a conclusion amply supported by the cases. In addition, a whole host of other factors of present or past significance, all of which were also introduced in evidence and most of which are contained in Governor Evans' recommended decision, contribute to that conclusion. An opinion as to what might happen at some indeterminate time in the future, under circumstances which no one can now reasonably foresee, could contribute nothing to a determination of the question whether Transamerica now possesses the power to control Bank of America.

Next, it is contended that Governor Evans unfairly discriminated against respondent by allowing Dr. Goldenweiser to testify to a "legal conclusion" in answer to a hypothetical question put to him by counsel for the Board, while respondent's witnesses had been prevented from doing the same thing. It is true that Governor Evans did sustain a number of objections to the testimony of the economists called by respondent on the ground that they called for legal conclusions. But it is also true that he overruled the same objection on other occasions and permitted them to testify to such conclusions. Furthermore, virtually all of the evidence given by the economists called by respondent, such as the proper tests for determining whether a tendency to monopoly has been shown, the elements that make up "market occupancy", and the like, was designed to show that respondent is not tending to a monopoly which is, as counsel say of Dr. Goldenweiser's opinion, "the answer to the entire proceeding". And, as the record also shows, a great number of hypothetical questions, all calling for answers not describable otherwise than as legal conclusions, were put to and answered by respondent's witnesses. When the propriety of the single hypothetical question put to Dr. Goldenweiser was being argued, counsel for the Board pointed out that it was asked only to contradict all of the conclusions of the economists who testified for respondent. And we are willing now that it be so construed by the Board. Under the circumstances it is clear that the examples cited in respondent's brief do not support a contention of unfair treatment.

Next, respondent's brief compares the admission of testimony by banker witnesses called by the Board as to the reputation of Transamerica and Bank of America for acquiring all of the banks they can get, with the exclusion of evidence as to the reputation of Bank of America for competing with other banks. It is obvious that the justification for both rulings is simply that as to the former the evidence is relevant, but not necessary, while as to the latter, it is not even relevant.

Next, respondent contends that Governor Evans refused to consider rebuttal findings submitted by its counsel. This is not true. The following statement contained in Governor Evans' rulings upon the proposed findings submitted by both sides contains the following statement:

"Permission was granted counsel for each side to file a reply memorandum to the findings proposed by opposing counsel. It was not intended to grant leave, nor was leave granted, to file further proposed findings in addition to those originally filed on behalf of each party. *In ruling upon the findings proposed and arriving at the findings made, consideration has been given to the reply memorandum filed by counsel for the Board, and to the so-called 'Proposed Rebuttal Findings and Conclusions' submitted by counsel for respondent, the latter document having been considered as being the reply memorandum for which leave to file was granted."* (Italics ours)

D. This brings us to the final section of Part II of respondent's brief. In this section counsel refer to the rulings of Governor Evans which excluded testimony from a great number of persons, including officials and customers of the Transamerica controlled banks, other bankers, the Mayor of San Francisco, and others, to the effect that there is still active competition in the five-state area among commercial banks. We have always conceded such to be the fact. The reason we objected to its introduction, and the reason for its exclusion by Governor Evans, is that such evidence is simply not relevant to this case. Respondent argues that it is relevant, even decisive, citing Sherman Act cases to support its contention. But we have already shown that, under the Clayton Act, the language "substantially to lessen competition" does not require an analysis of the competition which remains after the challenged acquisitions have occurred, but rather refers to the competition which was eliminated as a result of the acquisitions. If the cumulative effect of all of the Transamerica acquisitions has been to eliminate actual or potential competition to a substantial degree, then Section 7 of the Clayton Act is violated no matter how much competition remains. So with the words "tend to create a monopoly". If the cumulative effect of all of the Transamerica acquisitions has been to bring Transamerica to a "dominant" place in the banking field in the five-state area, then that effect, under the decision in *Standard Oil* is to tend to create a monopoly. The testimony of the witnesses referred to is, therefore, clearly irrelevant.

PART III

Part III of respondent's brief purports to disclose alleged erroneous factual findings made by Governor Evans relating to respondent and its relations with its controlled banks, including Bank of America. When the Board comes to examine this section, it will find that a great deal of what is argued therein is merely repetitive of what was already argued in one or more other places in respondent's brief. Consequently, we shall not again recite our replies to those arguments but instead respectfully refer the Board to our earlier discussions which answer each and every one of them. We will, however, deal with such new points as are made in this part of respondent's brief.

A. There is very little in the first section which is new. The first part of this section again argues that there is no justification for referring to a "Transamerica group" of banks because, as it is alleged, respondent is merely an "investor" in banks and has no interest in them except as an "investor". This argument has been fully answered commencing at page 27, *supra*.[20] The only observation we shall now add is that, if respondent is only an "investor" in banks and, as it says, "relies upon dividends" for its earnings, then why does it always purchase all or nearly all of the stocks of the independent banks which it acquires? Why does it always make them branches of its larger controlled institutions and put them forever out of the competitive arena? Why, as to its majority owned banks in California, which pay to it *all* of their earnings declared as dividends, does respondent want to make them branches of Bank of America, which pays only 7.6 per cent of its dividends to respondent? These and the many other factors already fully discussed show without question that respondent is the instrument through which the Giannini bank expansion program, started almost fifty years ago, is still being carried out according to a formula which has not been changed in any particular in all of that time.

This section also contains a discussion about "intent". It proceeds on the theory that, in determining whether there is a violation of the Clayton Act, the Board must consider the intent of each acquisition, that is, whether respondent or its predecessors acquired a particular bank to eliminate it as a competitor, or for some "good" motive, such as to bring more banking service to the public than it was already receiving from the bank which it acquired.

20/ This argument is also dealt with extensively at pages 2 to 8 of our REPLY TO PROPOSED FINDINGS SUBMITTED ON BEHALF OF RESPONDENT, filed April 30, 1951.

It is obvious that, carried to its logical conclusion, that contention would enable respondent to acquire all commercial banks in the five states, so long as it could show a "good intent" in doing so. The short answer to this contention is that the element of intent is not an essential element of proof in a Section 7 case. We agree that it may be in a Sherman Act case, but the Clayton Act, as we have seen, was designed to arrest the growth of monopoly power before it can do any damage, regardless of how or why it got started. As already pointed out, Congress itself has declared that, in proving a Section 7 case, it is "unnecessary for the Government to speculate as to what is in the 'back of the minds' of those who promote a merger".

It is true, as pointed out in respondent's brief, that Board's counsel did put banker witnesses on the stand to show that respondent's attempts to acquire banks remain unabated. All of them testified that respondent's representatives were continuously calling upon their banks in an effort to acquire them. This testimony was offered to prove that the danger of more acquisitions was not over. As stated, however, the case against respondent would be fully made out even if there was no such testimony.

B. This section is devoted to the contention that Governor Evans should have made separate findings respecting Bank of America. The only reason suggested why this should have been done is that 85 per cent of the statistics showing offices, deposits and loans in the Transamerica group are made up of offices, deposits and loans of Bank of America. It is difficult to see why this fact requires separate treatment for Bank of America. That bank is not a respondent in the case, although we are willing to concede that it probably is entitled to that recognition in a different kind of antitrust case in some other forum. The important question is, was it proper for Governor Evans to regard Bank of America as within the Transamerica group? We have already shown why it was properly so included.

Furthermore, as we have seen, the original pattern of acquisition and absorption has been followed without deviation ever since the first acquisition in 1909. The only reason why the figures respecting Bank of America are so much larger than those of the branch banks controlled by respondent in other states is that more banking offices have been acquired in California than in such other states, hence Bank of America has swallowed up more acquisitions than have respondent's other large branch banks. But then it must be remembered that the Gianninis were acquiring banks in California over twenty years before they started to acquire them in other states. Considering this late start it cannot be said that respondent has been lacking in diligence in making acquisitions in these other states since it acquired its first bank in Oregon in 1930. As the record shows, it now controls 36 per cent of all banking offices in Oregon, 61 per cent in Nevada, 14 per cent in Arizona, and 4 per cent in Washington.

C. This section refers to an alleged "misuse" of statistics in the Board's exhibits and in Governor Evans' findings. Claim is made that some of these statistics have been "slanted" against respondent in such a way as to be "seriously prejudicial".

First, respondent objects to the inclusion in the "market occupancy" statistics of figures showing offices, deposits and loans of group bank offices which were originally established as "de novo" branches by respondent's controlled banks. In support of this contention respondent refers to the statement made in our opening brief that, if respondent's present dominant position in the banking field was attributable solely to the establishment of "de novo" branches, there could be no Section 7 case. We did make such a statement and we are glad to repeat it here. For in that event respondent's banks would have grown under a perfectly legal method of expansion rather than by the illegal one of buying out competitors. But that has nothing to do with the propriety of including figures of all Transamerica group banking offices, whether acquired or established "de novo", in measuring "market occupancy" of the group. Those totals are solely for the purpose of showing the extent of respondent's growing monopoly power and the fact that it has been steadily and relentlessly increasing over the years. To properly measure this power it was, of course, necessary to include all elements making up the sum total of such power, including that derived from the establishment and operation of "de novo" branches.

Next, respondent challenges the table contained on page 33 of Governor Evans' findings. This table consists of four columns. The first column purports to show that respondent acquired, and is now operating, the only banking office in each of 173 communities. Respondent points out that in 52 of those communities it established "de novo" branches and did not acquire banking offices already in existence. Column 2 of this tabulation shows that in each of 18 communities in California respondent acquired the only two banking offices and merged them into one office; column 3 shows that in each of 9 communities respondent acquired the only three banking offices and merged them into one office; and column 4 shows that in each of 2 communities respondent acquired the only four banking offices and merged them into one office. Respondent points out that, of the 71 acquisitions represented by these figures, 15 involved cases of "dual occupancy", that is, where two banks occupied joint offices.

We have no objection to the Board accepting the modifications suggested by respondent. The result would not alter the significance of the table in Governor Evans' findings because it would still show respondent's propensity for acquiring the only bank in a very large number of single bank towns. And the conclusion would still emerge that it has also been respondent's practice to acquire all competing banks in a number of smaller communities and to merge them into one office.

Another objection in this section relates to a finding made by Governor Evans that "despite the tremendous growth of population and wealth in this area, the expansion of Transamerica has been accompanied by a decrease in the number of banking offices independent of Transamerica . . ." The objection made to this statement is that it infers that the decrease in banking offices was due "entirely" to respondent's acquisitions and overlooks the fact that numerous banking offices closed during the depression. The answer to this contention is that we do not read into Governor Evans' statement any such inference as charged by respondent. We are willing to concede that part of the decrease in the number of banking offices "independent of Transamerica" in the area was due to bank closings brought about by economic conditions prevailing during the depression. But also there can be no doubt that a substantial part of the decrease is attributable to respondent's acquisitions. It is unimportant here to ascertain how many resulted from one cause or the other; the important fact is that respondent has been doing what the Clayton Act forbids and, largely as a result of doing so, now enjoys the exact percentages of "market occupancy" stated in Governor Evans' findings.

D. This section attacks Governor Evans' findings on the issue of control of Bank of America. It would serve no useful purpose to repeat here all of the facts found by him which demonstrate the correctness of his conclusion that "Transamerica has had and now has the power to control" that institution. They are set out in detail commencing at page 11 of his findings. And many more can be found in the forty pages of factual data on this issue in our requested findings (commencing at page 59). Nor will we repeat again the legal arguments which support Governor Evans' conclusion on this issue. They appear commencing at page 47 of our opening brief. We will simply say here that, when the Board comes to examine all of this material and compares it with the comments appearing in respondent's brief on the subject, it will confirm without difficulty the correctness of Governor Evans' ultimate finding on the subject. In doing so the Board will also learn why it is that practical people throughout the five-state area, such as competing bankers and newspaper men, have always taken it for granted that the Gianninis, father and son, have been the dominating influences in all of the closely integrated organizations composing the Transamerica controlled group. When it reads such items as the press release *issued by Transamerica* on November 30, 1948 (BX 345), saying that A. P. and L. M. Giannini had "regained . . . operating control of *their* bank [Bank of America] and investment company [Transamerica]" as a result of the proxy battle sixteen years earlier, the Board will readily understand why the names "Giannini", "Transamerica" and "Bank of America" are regarded as synonymous in the West. (Italics ours)

REPLY TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

As stated at the outset of this brief, respondent also has filed a brief in support of a motion to dismiss the proceedings for lack of jurisdiction. This motion is but a renewal of the motion filed by it on December 7, 1948, and denied by the Board on January 17, 1949. Since the present motion merely exhumes an issue that has already been fully considered by the Board on the earlier motion,[21] we do not deem it necessary to reargue the matter at this time. All of the points now made by respondent were urged, with slightly different emphasis, in support of their previous motion. Our position on these points is fully set out in our brief in opposition to the earlier motion, and we respectfully refer the Board thereto. We shall limit this part of our brief to calling the Board's attention to two recent authoritative pronouncements, one by Congress and one by the Ninth Circuit, which sustain the Board's previous ruling on the jurisdictional issue.

First, as to the Congressional pronouncement. For a number of years prior to the amendment of Section 7 approved December 29, 1950, the Federal Trade Commission had been asking Congress to plug the loophole in Section 7 created by the decision of the Supreme Court in *Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission,* 291 U. S. 587 (1934).[22] Numerous bills were offered and these were considered by various Congresses. In 1946 one of these earlier bills, which would have amended Section 7 along the lines of the recent amendment, was considered by the Committee on the Judiciary of the House of Representatives and favorably reported by it to the House. That the Committee entertained no doubt but that Section 7 applied to banks and that the Board was authorized under Section 11

21/ In overruling the previous motion the Board pointed out that while respondent's argument "has been pressed earnestly and at length, . . . it finds a complete answer in the language of the statute and cannot be sustained."

22/ See our discussion of this decision commencing at page 40 of our opening brief.

to enforce Section 7 as it relates to banks is clear from the following quotation from its report:[23]

> "Section 11 of the Clayton Act, *as it now stands*, vests jurisdiction to enforce the provisions of *Section 7* in the Interstate Commerce Commission where applicable to common carriers; in the Federal Communications Commission where applicable to common carriers engaged in wire and radio communication; in the Civil Aeronautics Authority where applicable to domestic and foreign air carriers; *in the Federal Reserve Board where applicable to banks and trust companies;* and in the Federal Trade Commission where applicable to all other character of commerce, and outlines the procedure to be followed.
>
> * * *
>
> "The proposed amendments affect only corporations subject to the jurisdiction of the Federal Trade Commission. The jurisdictions and regulatory powers of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Authority, *and the Federal Reserve Board* in their respective fields remain unchanged." (Italics ours)

And this same concept will be found, upon examination of the terms of the recent amendment, to have been entertained by the 81st Congress which enacted the amendatory law. Examination of Section 7, as now revised, shows that existing limitations upon *stock* acquisitions were retained as to all categories of companies, but that the new prohibition against acquisition of *assets* was carefully limited only to those corporations "subject to the jurisdiction of the Federal Trade Commission". This plainly indicates that Congress was of the opinion that the prohibition against *stock* acquisitions was applicable to other types of companies subject to the jurisdiction of other agencies of the Government, including the Board.

23/ H.R. Rep. No. 1480, 79th Cong., 2nd Sess. 2, 3 (1946)

As to the pronouncement by the Ninth Circuit. The Board will recall that last year it brought a suit in the Ninth Circuit to enjoin the proposed take-over by Bank of America of 22 California banks now majority owned by respondent. Such take-overs, if consummated, would have defeated the jurisdiction of the Board, upon appropriate findings in its Clayton Act proceeding, to enter an order effectively restoring these 22 banks to competitive status in California. In its action the Board called attention to the fact that it was powerless to protect either its own jurisdiction or that of the Ninth Circuit to review and enforce such an order if and when issued by the Board. Consequently the Board asked the Ninth Circuit to protect the jurisdiction of both the Board and the court by enjoining Transamerica and Bank of America from consummating the take-overs. The court issued the injunction and sustained the Board's right to a judgment, stating, *inter alia,* as follows:

> "It is therefore said that what the Respondents are about to accomplish here will serve to circumvent the possibility of the Board, in case it finds the same warranted, making an order of the kind upheld in the Western Meat Co. case, supra, and *thus defeat the jurisdiction of the Board,* and of this Court.
>
> "We think the position thus stated is well taken."[24/] (Italics ours)

Subsequent to the issuance of the injunction in that case the respondents and their respective presidents were convicted of civil contempt for having violated the court's order. At the trial in

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24/ *Board of Governors* v. *Transamerica Corp.,* 184 F. 2d 311, 316 (9th Cir. 1950), cert. den., 340 U. S. 883 (1950) the contempt proceedings the alleged lack of jurisdiction in the Board was again argued by counsel for the respondents. All of the points now being urged upon the Board in support of respondent's present motion were urged upon the court at that time. Thus, the "MEMORANDUM OF POINTS AND AUTHORITIES ON BEHALF OF ALL RESPONDENTS", filed in the contempt proceedings, states, *inter alia,* as follows:

> "(b) The Board has no jurisdiction to enforce section 7 of the Clayton Act and, therefore, this court has no reviewing jurisdiction.
>
> "Section 11 of the Clayton Act (15 U.S.C., § 21) does not specifically authorize the Board of Governors of the Federal Reserve System to enforce Section 7 of the Act.
>
> "The Congressional history of the Clayton Act demonstrates beyond doubt that Congress never intended that the Board should have power to enforce section 7.
>
> "At the time of the enactment of the Clayton Act, the investigation of the 'money trust' by the Pujo Committee had just been completed. As a result, what is now § 8 of the Clayton Act was put into the original bill (H. R. 15657, 63d Congress). Upon being reported out, § 8, relating to interlocking directors, was stricken out and the enforcement provision, which is now section 11, contained no reference to the Federal Reserve Board. (S. S. Report 698, 63d Congress, pages 12, 48). In conference, the sections relating to interlocking directorates were restored and the Federal Reserve Board was added to the enforcement section, section 11 (15 U.S.C. § 21). It is clear, therefore, that the Congress never intended the Federal Reserve Board to have any powers under the Clayton Act except with respect to interlocking directors.
>
> "This conclusion is further justified by the history of the administration of the Act. In the first place, the Board has never sought to enforce § 7 of the Clayton Act (12 U.S.C., § 18) prior to the present proceeding against Transamerica. It has issued regulations only with respect to interlocking directors. The Board does not and never has had any subpoena power. Finally § 7 of the Clayton [Act] could not in any way be applied to a bank because banks are not permitted to acquire stock in other banks (Banking Act of 1933, Section 5, Remington's Revised Statutes of Washington, Supplement 1940, § 3242; Oregon Compiled Laws Annotated §§ 40-810, 40-2510; Nevada Compiled Laws, §§ 662; Arizona Code Annotated 1939, § 51-207; California Banking Code, § 761).

"Transamerica, the respondent in the alleged Clayton Act proceeding, is not a bank and does not conduct a banking business. If it were a bank or did operate as a bank, it would have to do so in accordance with the banking laws. Finally, § 7 of the Clayton Act relates only to corporations engaged in commerce. Banking has never been held to be commerce and is not commerce.

"Despite all of these considerations, this court has assumed that the Board has been granted jurisdiction to enforce § 7 of the Clayton Act."

In its opinion finding the respondents guilty of civil contempt the court again reviewed the jurisdictional question and stated as follows:[25]

"We are also pressed by argument and brief for reconsideration of the question of our jurisdiction to issue the orders. It is our opinion that nothing contained in the showing now made requires or suggests a withdrawal or a modification of the injunction. . . . As for the jurisdictional argument, attention has been drawn to West India Fruit & Steamship Co. v. Seatrain Lines, (2 Cir.) 170 F. 2d 775, 779. That case affords strong support to the reasoning by which we have arrived at our jurisdictional conclusion."

To this statement the court appended the following footnote:

"Overruling an earlier case the court said: 'In any event, the rationale of the Long Island case lacks pertinence here; for there the majority rested its conclusion on a holding that the S.E.C. unmistakably lacked any possible jurisdiction; on the facts now before us, we are unable so to hold as to the Commission here.' The complaint of the Board of Governors in the Clayton Act proceeding pending before it, a copy of which is a part of the record here, indicates the existence of probable cause for that proceeding *and discloses a case within the jurisdiction of the Board*." (Italics ours)

We submit that, even if the Board had not already itself considered respondent's arguments and ruled against them, the decision of the Ninth Circuit just cited would be decisive of the present motion.

25/ *In re Transamerica Corp.*, 184 F. 2d 319, 325 (9th Cir. 1950), cert. den. 340 U. S. 883 (1950)

CONCLUSION

On the basis of all of the discussion hereinabove set forth counsel for the Board respectfully submit that respondent's motion to dismiss should be denied and that the findings of fact contained in Governor Evans' recommended decision should be adopted by the Board.

Respectfully submitted,

J. LEONARD TOWNSEND,
Solicitor,
Board of Governors of the
Federal Reserve System,
Washington, D. C.

G. HOWLAND CHASE,
Assistant Solicitor.

GREGORY O'KEEFE, JR.,
Of Counsel.

November 9, 1951.

MARTIN, PEPER AND MARTIN
ATTORNEYS AT LAW
407 NORTH EIGHTH STREET
ST. LOUIS,(1) MO.

WILLIAM McCHESNEY MARTIN
CHRISTIAN B. PEPER
MALCOLM W. MARTIN
JOHN C. BOYD

TELEPHONE CHESTNUT 9972

December 14, 1951

Mr. William McC. Martin, Jr.
2861 Woodland Drive, N.W.
Washington 8, D.C.

Dear Bill:

As I told you on the way to the station there were a couple of matters which I forgot and could not think of until the train pulled out. You probably noticed the memorandum on your desk at home about the provisions of the Administrative Procedure Act. As I read this, Mr. Townsend and his prosecuting staff must not consult with the Board in any respect about the decision, but Governor Evans is definitely entitled to participate in all deliberations as you will note the clause that states that the hearing is to be treated the same as if the Board itself had been hearing the proceedings from the beginning. In other words it was not an appeal but Mr. Evans holding the final hearing assisted by his colleagues on the Board.

Another minor point in connection with subpoenas. It was argued in the District Court in the original case to enjoin the Board from bringing the action that one reason the Board should not be allowed to proceed was its lack of subpoena power. Judge Morris, in his opinion, stated that if Respondent, Transamerica, were prejudiced in any manner by this lack of subpoena power, he was confident the Circuit Court of Appeals could rectify the situation by itself granting subpoenas for any witnesses it deemed essential for a proper consideration of the case. In a sense this was an invitation for Respondents to allow the Appellate Court to complete the record if it felt the Board hearing was inadequate. There is, therefore, a legal precedent for the opinion I expressed based on common sense, namely, that if the Board Hearing Officer erred in excluding evidence as to lessening competition, the proper place for this to be corrected would be the Appellate Court.

I may change my mind upon reading the two volume transcript of the oral argument, but at the moment, I am still of the opinion that the outline I gave you, were the decision left to me, should be followed. In other words I would over-rule Respondent's objections as to procedure, including Governor Evans' lack of subpoena power, and lack of jurisdiction. The commerce question is apparently admitted and there is ample evidence to support the point that even assuming the statistics are somewhat garbled there was a tendency toward monopoly. Mr. Townsend is supported by the Standard Oil case in his conclusion that this alone is sufficient to show a violation of the Clayton Act. As to the second point, Respondents have some basis for their argument that evidence should have been admitted as to the lessening of competition but it is based primarily on the dissents in the Standard Oil case and not on the majority opinion. Another argument for upholding Governor Evans' ruling and suggesting that Respondents take an appeal if they feel prejudiced by the exclusion of this evidence is their own argument as to subpoena power. In other words, if the Board remands the case for further hearings before the Hearing Officer, the problem of subpoenas is still there, whereas hearings before the Court of Appeals would cure this defect. In final analysis, it seems to me the case boils down to whether to meet the terms of the statute it is necessary to say that each individual acquisition results in specific lessening of competition or whether as Mr. Townsend argued the historical record of acquisition in a relatively limited area does not indicate a tendency towards monopoly which the Clayton Act was designed to stop in its incipiency.

I doubt if these remarks will prove of any value, but I will send them to you from time to time as they crystalize.

I was greatly pleased to find I won the Star-Times v. Buder case I told you about in the Missouri Supreme Court, so my worry about a motion for rehearing was unnecessary. The Court adopted our arguments completely and the decision was unanimous.

Everybody here is well. This will have to serve as a birthday letter also. I do not need to tell you how much you mean to me and how proud I am of you. Happy birthday on this 45th and many happy returns!

Please ask Cynthia to treat this as my thank you letter also. Obviously I enjoyed my stay immensely - I feel I really begin to know my niece and nephew. I have long known how fortunate you are in big Cynthia and I certainly enjoyed the visit with her. It is so nice to be always looking forward at life rather than backwards - the change for me is a tonic. I shall long remember the hearings with pleasure because of the excuse for the mid-season visit to my Washington family.

With love to all,

Mal

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 TRANS-AMERICA 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

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

- x
In the Matter of:
TRANSAMERICA CORPORATION
- x

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.)