Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

Docket No. 61

INVESTMENT COMPANY INSTITUTE, ET AL.,

Petitioners,

vs.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

Respondents.

Place Washington, D. C.

Date December 15, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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INVESTMENT COMPANY INSTITUTE, ET AL., Petitioners, vs WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, ET AL., Respondents.	)	No. 61

The above-entitled matter came on for argument at 11:00 o'clock a.m. on Tuesday, December 15, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

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On behalf of

P R O C E E D I N G S

MR. JUSTICE BLACK: Number 61, Investment Company Institute, and others, against William B. Camp, Comptroller of the Currency, and others.

ORAL ARGUMENT BY G. DUANE VIETH, ESQ.

ON BEHALF OF PETITIONERS

MR. VIETH: Mr. Justice Black, and may it please the Court:

The issue in this case, the broad issue, is whether the Comptroller of the Currency has authority to permit national banks to operate comingled investment funds for managing agency accounts, such as the fund involved in Number 59 which has just been argued, notwithstanding the provisions of the 1933 Glass-Steagall legislation as amended.

However, since it appears to be conceded all around that the ordinary open-end mutual fund which I shall describe in just a moment, is prohibited by the Glass-Steagall legislation from engaging in the banking business, and conversely, the banks are prohibited from operating a garden variety of traditional open-end mutual funds.

The narrow issue before the Court, we submit, is whether, in sum and substance, a comingled investment account of the kind that has been discussed in the last case and which will be discussed in this case, whether such an account is, in sum and substance, an -- open end mutual fund.

The Petitioners in this case are the Investment Company Institute, which represents most of the mutualfunds or open ended investment companies in the United States, and a number of individual members of that institute.

The action was brought in the District Court against the Comptroller of the Currency, asserting that his regulation 9.18, which purported to permit this type of activity was unlawful because it violated the Glass-Steagall Act, and also because it permitted activity in excess of the trust powers which the Comptroller was authorized to grant national banks under Section 92-A of the National Banking Act.

The District Court found that the regulations were invalid under -- on both contentions. The matter was appealed to the Court of Appeals and the Court of Appeals reversed on both matters.

First I should like to briefly summarize the four sections of the Glass-Steagall Act of 1933 which we believe are applicable to this case. The Court will recall that the Glass-Steagall legislation was passed in 1933 and was prompted by the almost complete breakdown of this nation's major financial institutions during the late 1920's.

A number of reforms in the national banking legislation which today are accepted as commonplace, such as the insurance by the Federal Deposit Insurance Company, of national bank deposits and state bank deposits and other banking provisions were adopted in the Glass-Steagall legislation. However, the sense or purpose of Glass-Steagall, was to eliminate the inherent conflicts of interest which are present in the conduct by the same entity or closely affiliated entities of the business of commercial banking on the one hand, the business of receiving deposits subject to demand -- the activity of commercial banking on the one hand, and the securities business,the business of investment banking and the business of issuing, selling, distributing and underwriting securities on the other hand.

And then there are, as I say, four central provisions designed to accomplish this purpose. The keystone provision is Section 21 12 USC Sec. 378. Now, unlike the other sections that are involved in this case, some of which apply only to national banks, and some of which apply only to banks which are members of the Federal Reserve System and I might mention that all national banks are members of that Federal Reserve System most of the banks in the United States are state banks which are not members of the Federal Reserve System.

But, unlike these other sections, Section 21 applies to all banks, state or national, members or nonmembers of the Federal Reserve System. In the broadest possible language, Section 21 requires the complete divorce of the business of commercial banking from the business -- from the securities business. It prohibits the simultaneous engagement inthe business of receiving deposits subject to withdrawal by check or other means, which namely is the business of commercial banking and engaging at the same time in the business of issuing or underwriting or selling or distributing stocks, bonds, debentures, notes or other securities.

Section 15 of the National Banking Act is also relevant. It, however, applies only to national banks, and indeed, is the provision of the National Banking Act which sets forth the corporate powers of national banks. In doing so, it enacted two limitations, or I beg pardon, two exceptions to the broad provisions of the other provisions of the Glass-Steagall Act.

It did first permit an authorized national bank to underwrite and sell a strictly limited list of government bonds. And secondly, it expressly confirmed the right of all national banks, whether or not they exercised trust powers, to perform an accommodation service for customers by permitting banks to purchase and sell securities solely upon the order and for the account of customers and not for the acount of the bank. I refer to this as an accommodation service. The legislative history makes it clear and the contemporaneous publications of the Comptroller of the Currency of 1933 and '34 make it clear that this service was intended for the smallerbanks located in smaller communities where the ordinary services of the broker-dealer were not available. That situation may not prevail to a great extent today but certainly in 1933 there were many communities where the banker was theonly man who could buy or sell a security solely upon the order and for the account of the customer.

That was the second exception permitted by Section 16. However, in granting these two very limited exceptions, Congress made it clear that Section 16, once again, that the broad prohibition of -- broad repeal of the prohibitions of Section 21 was not intended because Section 16 specifically says that a bank may not underwrite any issue of securities or stock.

The third provision applicable here, Section 32, and also I should refer to Section 20. These two sections were intended to prevent the violationof the prohibitions of Section 21 indirectly through the use of the affiliations or interlocks. Section 32, which applies only to member banks, provides that no person affiliated with a company primarily engaged in the issue, flotation, underwriting, public sale or distribution of securities, may serve at the same time as an officer and director or employee of a member bank.

Section 20 prohibited certain defined affiliations between member banks on the one hand and corporations engaged principally in the issue, flotation, underwriting, and so forth, of stocks and bonds.

So, Sections 32 and 20 were intended to prohibit indirect violations of the broad prohibition of Section 21.

Now, as I have previously indicated, we believe that the narrow issue before the Court is whether a bank comingled investment fund of the type here under consideration, is, in sum and substance, a mutual fund. It has been repeatedly held by the Federal Reserve Board that a traditional mutual fund is subject to the Glass-Steagall Act; that the activity of a traditional mutual fund is the kind of activity contemplated by the Glass-Steagall Act.

Now, this fact seems to be conceded all around. It seems to be conceded that a bank, as I say, may not operate a traditional mutual fund, nor may a traditional mutual fund go into the banking business.

So then we come to the question: is there a significant difference between this fund and a traditional mutual fund or are they, are he contends, in sum and substance, the very same thing? I think in order to demonstrate this point with clarity, I should like to stress several of the characteristics of traditional mutual funds and demonstrate how the comingled investment fund typified by the Citibank Fund, are in sum and substance, the same thing as a matter of law.

A traditional mutual fund typically is corporate in form. However, there are many traditional mutual funds that are noncorporate entities, such as trusts, or other business associations. A traditional mutual fund is continually issuing participations or ownership interests in the funds. They are frequently called shares of common stock because a traditional mutual fund is typically or frequently a corporation. But, mutual fund shares of the garden variety type also have a varietv of other names(?) such as: beneficial interests, participating agreements and the like.

Now, in the case of the comingled investment fund of the National City Bank, their ownership interests or participations are called "Units of Participation," very similar to the participating agreement sthat are issued by some traditional mutual funds.

Also in the case of the Citibank's fund, it is not a corporate entity, but it is a separate entity and has been so recognized and it is registered under the Investment Company Act, as has been indicated in the prior case.

The ownership interests or participations in an ordinary open-end mutual fund, are merely issued subject to a sales charge or they may be issued on a so-called "literal" basis, where no sales charge is exacted.

The ownership interests in the bank comingled fund of the Citibank type, are sold on this literal basis.

An ordinary mutual fund typically invests and reinvests the proceeds from the sales of securities in the fund, and the portfolio of securities, in accordance with the investment policy stated for the fund.

The bank mutual fund of the kind that we have under consideration here, does exactly the same thing. It has adopted an investment policy that sells the securities in the fund and invests the proceeds of those securities in accordance with the stated investment policy.

The securities issued bythe ordinary mutual fund are not traded back and forth in the New York Stock Exchange or any stock exchange in the ordinary course, nor are they traded in the over-the-counter market. Rather, an investor in the ordinary mutual fund who desires to get his money, merely turns his certificate into the fund and it is redeemed in cash for its asset value. Indeed, that is the hallmark of an open end investment company, the right at any time to redeem their investment for cash.

The same privilege is available in exactly the same form to the investor, the purchaser of the security in the Citibank comingled investment fund.

Q Well, in the usual open-end fund, may the holder of a share or the holder of a participating certificate, sell his certificate to any person?

A He may do that. As the record in this case shows, it is virtually never done, Mr. Justice. There is literally no trading in the shares of participation in the ordinary mutual fund.

Q And to the extent that it happens it is permitted in this kind of a fund, too?

A In this kind of fund, as I understand it, under the -- it is not prohibited by the Comptroller's regulation, but the particular fund, Citibank fund, does not permit that kind of trading.

Now, in order to facilitate this right of redemption that I have referred to, an ordinary mutual fund avalues the assets of its portfolio regularly, usually twice daily and now it is required by the SEC regulations, to do so twice daily. And the same kind of valuation takes place with respect to this First National City Fund. It is valued -- the assets are valued as often as necessary so as to facilitate this right of redemption. And because of this right of redemption, the hallmark, as I say, of an open end fund, there is continual pressure upon the operator of any such fund to sell new securities, because regularly people are redeeming their investment and asking for their money back. And the assets of the fund would naturally shrink unless there are continual resales to provide new money for the purpose of handling these redemptions. And the same pressures are present with respect to this bank comingled fund.

I might mention that those pressures referred to by the Federal Reserve Board, in many hearings in which it has held that the ordinary mutual fund is primarily engaged in issuing and in selling securities. It must be primarily engaged, says the Federal Reserve Board, because it is under constant pressure -- to have redemptions.

Indeed, the record in this case contains an affidavit by the vice president of First National City Bank respecting the bank comingled fund, Citibank's funds, in which that official states that if new participations were not taken in from time to time in the Citibank fund, the comingled account, as it is called, would inevitably shrink in size, as a result of withdrawals.

Again, a point of direct similarity between that fund and the traditional mutual fund. The traditional mutual fund is typically controlled ultimately by a governing board such as a board of directors, or board of trustees.

As we have heard, the board of directors of the First National's fund is called the "committee," but it operates in exactly the same fashion as a board of directors or board of trustees.

Now, in an ordinary mutual fund, the day-to-day management, including advice as to the purchase and sale of the portfolio of securities, is typically provided by the investment advisor pursuant to an investment advisory contract of the same -- here. First National City Bank acts as advisor to that comingled account and it provides the day-to-day management services and the investment advice and it does so pursuant to investment advisory contract.

And a traditional mutual fund, typically, has a contract with a principal underwrite who handles the sale of the securities or participations in the mutual fund. Again, First National Citibank has executed a contract with its co-mingled account under which it agrees to act as principal underwriter and is responsible for the sale of the securities in that fund.

In both cases the funds are registered as an investment company under the Investment Company Act of 1940, as we have seen. In both cases the participations or shares in the funds, are registered with the Securities and Exchange Commission as securities under the Securities Act of 1933.

In both cases the pool fund itself is held out to the public as an investment medium and in both cases the essence is that the pool of securities, purchased with the money derived from the sale of participations, is used to buy and sell securities from the fund's portfolio.

Q Does the bank in this case, use its own selling organizations to sell the shares or do they have a contract with somebody to sell them?

A Yes, sir; it uses its own selling organization. It usesthe trust officers --

Q Isn't the usual -- an open end fund would haveonly an extensive selling organization.

A Yes, but -- the open end fund contracts with another entity which acts as principal underwriter. That underwriter may or may not have an extensive selling organization. Sometimes it does have door-to-door salesmen which -- in other cases the --

Q What about the fund; you say the bank does itself through its own employees and agents?

A Through its own employees, its many trust officers, throughout its many branches and it also sold this particular fund by a mailed flyer to the more than 2 million retail customers that First National City Bank has.

Q Do they have any officers around sales offices which are not in the -- in some -- bank?

A No, sir; its sales offices are only in its main office and its many branches throughout the New York metropolitan area.

Q And it doesn't use other banks to sell it?

A It does not use other banks.

Q Does it advertise publicly?

A It is, as we indicated in our reply brief, for First National City Bank, it typically advertises its trust department rather extensively. However, under the rules and regulations of the Securities and Exchange Commission, it may not advertise the availability of this fund except in a very limited way, and in a way that's limited to all mutual funds. No mutual fund may advertise the availability of participations except in the most conservative type of tombstone(?) advertisement. The SEC rules so require.

Q I notice in the appendix to your reply brief you have appended a couple of advertisements, but they are not of —

A They are not -- no, sir. Mr. Justice, the purpose of including those was to rebut the claim made by First National City that participations in this fund would only be offered in the context of the very conservative offering of the traditional fiduciary services, as if somehow or other that differentiated this fund from an ordinary mutual fund.

The fact of the matter is that an ordinary mutual fund is very strictly limited to the type of advertising it can do and as the appendix indicates, the appendix to our reply brief, a bank trust department is under no such limitations. We think it was very interesting and rather flamboyant advertising and for that reason, called it to the attention of the Court.

Q But, this is not an advertisement, of course, that we are talking about here. This is something else.

A It's an advertisement of the other trust services offered by the bank.

As I have indicated, in our view the points of similarity that I havelisted here, the characteristics of an ordinary mutual fund, are -- and the characteristics of a co-mingled investment fund of the Citibank type, indicate that in sum and substance, and for all practical and even purposes, they are identical. The significance of that, of course, is because of the fact, as I indicated previously, that it seems to be conceded all around that, if,in fact, it were an ordinary garden variety mutual fund, the banks under the Glass-Steagall Act, could not operate it. And vice versa, certainly a mutual fund could not go into the banking business.

The Federal Reserve Board has on many occasions, beginning in 1941, and we have listed all of them in our brief, but has, on many occasions, ruled that an ordinary mutual fund is engaged in the very activity that the Glass-Steagall Act refers to. It is said that the primary engagement of an ordinary mutual fund is the issuing and distributing of securities. It said the reason that is a primary engagement of an ordinary mutual fund, is because of its open end features. It must continue to issue securities so as to raise cash to take care of redemptions.

Now, it's true that the Federal Reserve Board rulings have been under Section 32 of the Act, one of the affiliation sections. And the language of Section 32 refers to a company primarily engaged in the issuance of securities. The Federal Reserve Board has ruled that that is what a mutual fund does.

We submit that a logical extension of such rulings to Section 21 is that kind of activity within the language of Section 21. The language of Section 21 refers to a company engaged in the business of issuing securities.

Now, Section 21 prohibits a bank from directly engaging in the business of issuing securities. Section 32 prohibits a member bank from having one or more directors who are affiliated with companies that are primarily engaged in the issue of securities. And if a mutual fund is primarily engaged in the issue of securities, it is also engaged in the business of issuing securities within the meaning of Section 21.

And we submit that this comingled account is primarily engaged in the issue of securities and is also engaged in the business of issuing securities, and thereby First National City Bank and the other national banks authorized to do this by the Comptroller, would be engaged in the business of issuing securities within the meaning of Section 21 an activity which is specifically prohibited to them by Section 21.

I should like to refer, if I may, to the common trust fund which has been a subject of some discussion in the prior case, and this was referred to in the briefs and by the Court below. It is true that banks for many years, national and state banks, had been operating common trust funds. It is also true that those funds, properly operated, are exempt from the 1940 Investment Company Act and it is also true and we do not contend to the contrary, that the Glass-Steagall Act does not prohibit a national bank or a state bank from operating an ordinary common trust fund.

The point is that there are fundamental differences between the operation of the common trust fund on the one hand, which does not violate the Glass-Steagall Act, and the operation of the comingled account, as is reflected in this record by the operation of First National City Bank account on the other hand. And those fundamental differences provide the facts upon which we contend a violation of Section 21 of the Glass-Steagall Act is to be found.

The common trust fund is a tool or device used by the trust department of a bank for the more efficient administration of funds which are entrusted to the bank in the overall course of its trust department business. The initial impetus for a common trust fund came from the need of a more economical administration of small trusts which came to the bank in the ordinary course of their business. It is my understanding that later the funds of larger trusts are also administered by comingling.

And under the manner of operationof the common trust fund, the _________ are delivered to the bank by the -- by virtue of the provisions of the trust or some other fiduciary relationship. After it has received the funds, the bank exercises discretion to determine whether all or any portion of those funds should be placed in one or more of the common trust funds operated by the bank.

Under no circumstances is the common trust fund, itself, held out to the public as a medium of investment. Under no circumstances may participations in the common trust fund, be offered or sold to the public for investment purposes. The common trust fund is merely a tool or an aid to the operation, the more efficient operation of the bank's trust department.

Q I still don't see why that isn't just as open to the public as any other form of investment. Of course it's -- it has to be a member of the public who has some money, but assuming someone who has $10,000 why isn't the common trust fund of the bank just as open to him as shares of just investors trust?

A Yes, it --

Q He executes the trust instrument and he turns it over and by the way of inter vivos trusts, to the bank as trustee, and that's the end of it.

A It is, if Your Honor please, available. However, the distinction is that the Federal Reserve Board and the American Banker's Association and all of the authorities involved in this have traditionally imposed limitations on the manner inwhich a common trust fund is operated so as not to make engaging in the offering of securities in a fund. It is true that if a bank customer takes the initiative and --

Q Take a previous customer: John Doe --

A John Doe, coming off the street --

Q -- he can say here's a deed of trust my lawyers prepared for me and it's all signed and please sign here and accept it and here is $10,000 and you are an inter vivos trustee.

A Yes, sir; that could be done.

I might say that the Federal Reserve Board through the years was always concerned about the use of common trust funds for inter vivos trusts and indeed, in 1960 promulgated a regulation which would have prohibited the use of revocable inter vivos trusts in common trust funds for this very reason, because that kind of use could be abused and could become the use of an investment medium.

That regulation was promulgated for comment; comments were issued and were submitted and a hearing was held, but the jurisdiction of the Federal Reserve Board was transferred to the Comptroller in 1962 before another action was taken on that.

However --

Q All that would indicate that what is suggested by my question was correct; wouldn't it?

A It would indicate that if an inter vivos trust would be used, but it would also indicate --

Q It would be very similar to an investment in open end investment company, particularly if it's revocable.

A Well --

Q Economically they are the same thing; aren't they?

A We contend, Mr. Justice Stewart, that thye are different because of the manner in which the bank handles the funds. It's true a person with funds could bring the funds into the bank and could create a trust relationship. The trust officer would then be faced with the initial decision: "Shall I invest these funds in a common trust fund that we operate, or shall I administer them separately?"

In the case of the comingled account, and this is the essence of the difference, in our judgment; in the case of the comingled account the customer is shown a prospectus and is sold a participation and there is no discretion. There is no discretion exercised, but instead the money is taken and automatically invested in the comingled account and in that respect it is identical to what is done with respect to a mutual fund.

We submit that that absence of a discretion is somewhat different here and does create the legal difference. I have not mentioned it earlier, but in fact, the record in this case shows that a sales flyer was sent by First National City Bank to its "valued customers," and the record also indicates that there are more than 2 million retail customers in this bank. And the sales flyer urged the customers to return a check in the amount of $10,000 or more and their name, address and Social Security number. That's all the information the bank would have with respect to its valued customers.

Upon receipt of that check a security in the co-mingled account would be issued in favor of that customer and his funds would be deposited in the comingled account. That is entirely different from the bona fide or fiduciary purposes which the Commission had been requiring with respect to the administration of common trust funds.

Those limitations on common trust funds imposed by the Banker's Association and by the Federal Reserve Board are set forth in pages 8, 9 and 10 or our reply brief, the yellow document and we submit that the -- that difference is significant. It is the difference between issuing and offering for sale securities on the one hand and the use of a common trust fund for the administration of the funds which come about in the normal course of the trust business and as to which a discretion is exercised as to whether the -- whether the funds should be placed in the common trust fund or whether they should be administered in some other fashion.

I should also mention that the Respondents in this case and the Court below, took the position that the units of participation issued by a comingled account are not securities within the meaning of Section 21 and the other sections of the Glass-Steagall Act. Indeed, the Comptroller's entire argument in this Court, based on the language of the statute, rests upon this one point, that somehow or other these units of participation are not securities within the meaning of the Glass-Steagall Act, even though a participating agreement or a share of an ordinary mutual fund is clearly a security within the meaning of the Glass-Steagall Act.

We submit that the very breadth of the reference in the similar and relevant sections of the Glass-Steagall Act to securities involved, requires rejection of any limited or technical claim as to the meaning of securities within the meaning of the act.

Section 21 refers to stocks, bonds, debentures, notes or other securities, in very broad and sweeping language, indicating the Congressional concern, in our judgment, to include all types of traditional securities. The units of participation that we are talking about here are ownership interests in an investment medium. A pool of securities managed and operated for speculative purposes. We submit that such an interest constitutes a security within any reasonable definition of that term.

I might point out that the Respondents haveoffered no contrary or substitute definition for the term "security," as it's used in the Glass-Steagall Act. But the fundamental point is that the Federal Reserve Board has ruled, and this fact is ignored by both Respondents; the Federal Reserve Board has ruled with respect to this very Citibank fund, that the units of participation issued by that fund are securities within the meaning of the Glass-Steagall Act.

The context of that rule is as follows: as I have indicated, Section 32 prohibits member banks from having one or more directors who are also affiliated with companies primarily engaged in the business of issuing securities.

The Federal Reserve Board was asked to rule on the question of whether this Citibank fund would violate Section 32 because a director of a member bank or an officer of a member bank, First National City, would also serve as a member of the committee.

The Board analyzed the facts as presented by First National City and first noted the contention of First National City that the units of participation were not securities within the meaning of the Glass-Steagall Act. The Board rejected that contention and specifically found that the units of participation were securities.

However, the Board next had to face the question: is there an interlock of the type prohibited? The Board ruled that a comingled account in the Board's view was merely an arm or department of First National City Bank and therefore, that there could be, technically no interlock of the kind prohibited by Section 32. If you didn't have two entities, within the view of the board, then you couldn't have a prohibited interlock.

The Board went on to note that, while Section 21, the Section upon which we principally rely, might have been involved it, traditionally, had not issued opinions with respect to Section 21 because that is a criminal statute.

We submit, however, that had the Board issued a ruling under Section 21 it would have been required by the logic of this finding, to have concluded that the bank, if, indeed, this is a single entity, that the bank would be engaged in the business of issuing and selling securities as referred to in Section 21.

The Board found that the units of participation were securities. The Board has repeatedly found that an ordinary mutual fund and the purpose of this is the same as an ordinary mutual fund, is primarily engaged in the issuance of securities because of the redemption feature and the need to raise cash to take care of redemptions.

We submit if the Board had not voluntarily withheld jurisdiction under Section 21 it would have concluded that Section 21 was violated.

I should like --

Q That one entity theory is, of course, at odds with the theory of the Securities and Exchange Commission; isn't it?

A Yes, sir; it seems to be. That has been a much mooted point, the Federal Reserve Board taking the position that it's a single entity; the Securities and Exchange Commission taking the position there are two entities. But, for our purposes --

Q Either way --

A Either way. If it is two entities, we submit that Section 32 is violated; if it is a single entity, we submit that Section 21 was violated.

I should like to briefly refer to one additional matter that was dealt with in the court below. The court below indicated that the essence and I'm referring to Judge Bazelon's concurring opinion which dealt with the merits, that the essence of his holding was that the securities dealings here involved, that is the portfolio dealings, were for the account of customers and not for the account of the bank, meaning that no funds of the bank were involved in the dealings. And therefore, in his view, the Glass-Steagall Act was not violated.

This reflected a judgment on the part of Judge Bazelon that the Glass-Steagall Act was intended to prohibit only that securities activity which, somehow or other endangered the assets of the bank and the depositors in the bank.

Now, there is no question that in any of the legislative history of t he Glass-Steagall Act shows that a principal concern of Congress was the fact that bank assets were depleted by the speculative activity of the banks in the 1920s. But also that there is no doubt from the reading of the legislative history, that Congress had many other concerns in mind, and a principal additional concern was the concern that a bank not have anything to offer in the line of securities; anything to offer for sale to bank customers; that a customer of the bank could rely upon the banker for disinterested advice with respect to the purchase of securities.

We submit that that Congressional concern was totally violated by an account of this kind. This bank's profit and any bank's profit under the comingled account, directly depends upon the selling of securities. The management fee owned under the investment advisory contract, goes directly in accordance with the number of participations that are sold and as the assets of the fund thereby increase.

And we submit that that concern of Congress, which was also a principal concern of the -- at the time of the Glass-Steagall Act, is violated by these provisions. It is not enough to say, as the court below said, that as long as the bank's -- are not involved; as long as this is for the account of customers and not for the account of the bank, that there is no violation.

Indeed, we submit that that is an incorrect reading of the language of Section 16, which I referred to before. The langauge reading that: "a bank may, solely upon the order and for the account of customers, and not for its own account, buy and sell securities for the customers. We submit that that language clearly indicates and the contemporaneous authorities underscore this, it clearly confers nothing more than a limited power to perform an accommodation service for individual customers on an individual basis. It has nothing to do with trust powers of banks. That kind of service can be performed by any bank, whether or not it has trust powers.

If I may, I should like to reserve the balance of my time for rebuttal.

Q Are you going to, in the balance of your time or in rebuttal argument, do you plan to deal with the question of standing?

A It has been our intention to rely on the statement and arguments made in our reply brief, but I would, of course, be happy to discuss any questions that the Court may wish to address to me.

Q Well, I just wondered if you thought you didn't have a -- that that wasn't a pretty important part of your case?

A In our view, Mr. Justice, this Court's decision recently in the Data Processing case and its subsequent per curiam order in the Arnold Tours case, disposes of standing as an issue in this proceeding.

As we analyze in our reply brief of November 20, 1970, we read Date Processing as eliminating the so-called "legal interest test," which has bedevlied courts and litigants for so many years, and substituting three tests on the question of standing.

The first test is whether there is injury, in fact, and indeed, several members of this Court would hold that injury in fact, is a must. I believe it's conceded all around that we have shown a sense of injury in fact, here.

The District Court found that the members of the Petitioner institute would be irreparably injured if the Comptroller's regulation and his specific authority were allowed to stand. The Comptroller himself has predicted that billions of dollars will soon be invested in banks' comingled accounts, bank mutual funds if his regulation is allowed to stand. I do not believe that there is any contention that we do not -- we have not shown injury, in fact.

A third criterion set up by the court in Data Processing is that the statute itself will not preclude judicial review. Here again, I don't think there can be any claim that the statutes here involved: the National Banking Act and the several sections, do preclude judicial review and I don't understand the Comptroller or anyone else in this case to make such a contention.

That returns us to the second test, which is: are the plaintiffs here arguably within the zone of interest to be protected or regulated by the statute in question. Well, quite clearly, the mutual funds who are members of the Petitioner institute, are within the zone of interest regulated by the statute in question. Indeed, the statute in question, namely: Section 32 has been applied repeatedly to ordinary mutual funds.

On a number of occasions ordinary mutual funds have petitioned Federal Reserve Board for the right to include among their unaffiliated directors, under the Investment Company Act, each mutual fund must have a certain percentage of unaffiliated directors; it has petitioned the Federal Reserve Board for the right to use prominent businessmen who are ultimately qualified, except for one thing: that they are also directors of member banks of the Federal Reserve System.

Q Well, isn't part of the record here that this isn't proper banking business?

A Yes, sir, but, as I have endeavored to point out even-handed justice would require continuance of that. The Federal Reserve Board has ruled that it is not. The Federal Reserve Board has ruled and under Section 32, that directors of member banks are unavailable for mutual funds, as directors of the mutual funds. It is repeatedly --

Q You are arguing here that this kind of investment account isn't proper banking business, in effect; aren't you?

A Yes, sir.

Q And isn't that really what is involved in the Data Processing --

A Yes, sir. What was involved in ata Processing and Arnold Tours were claims that under Section 16 data processing services in the one case, and travel agency services in the other, were not within the incidental powers of the banks.

Q Hadn't Congress pretty clearly expressed itself that banks shouldn't engage in nonbanking business?

A Much more clearly than in those two cases, in our judgment. In those two cases --

Q Well, you haven't on --

A Yes, sir. And we have, in our judgment, an a fortiori argument here. Congress has specifically spoken and said the banks may not engage in the securities business.

Q Well, how does that help you from the point of view of standing? On a standing argument that it's not a proper part of the banking business, but how does that get you down to --

A Well, I have attempted, Mr. Justice, to analyze the three standards set forth in the Data Processing case.

Q I understand your argument, but I really didn't understand my brother's question, I suppose.

A But, it seems to me that the per curiam order in Arnold Tours makes it pretty clear that if an arguable case can be made for a particular activity that is prohibited to banks, that where there is engaged in that activity, isn't going to present that arguable case to the courts for adjudication. He is obviously within the zone of interest.

Now, in my case, we're not just arguably within the zone of interest regulated by the statute; we are within the zone of interest regulated. We are barred by this statute from transacting business. We are specifically barred by Section 21 and in our judgment we have standing to challenge -- indeed, probably we are the only party that would challenge the attempt by the Comptroller to permit national banks to -- cross them off on the other side.

ORAL ARGUMENT BY DANIEL M. FRIEDMAN, OFFICE OF THE SOLICITOR GENERAL, ON BEHALF OF THE COMPTROLLER OF THE CURRENCY

MR. FRIEDMAN: Mr. Justice Black, and may it please the Court:

Although the Court was sharply divided last year in the Data Processing case on what is the appropriate basis for determining standing to challenge, the Court is unanimous in another proposition; and that is that assuming Plaintiff has standing, before Plaintiff can prevail on the merits, he must show that the conduct of which he complains has invaded a legal interest, a legal interest in the plaintiff.

I would justlike, if I may, to refer to both a statement in the majority opinion and in Mr. Justice Brennan's concurring and dissenting opinion in which Mr. Justice White joins. In the majority opinion at the very end of the opinion the Court says: "Whether anything in the Bank Service Corporation Act or the National Bank Act gives Petitioners a legal interest that protects them against violations of those acts, and whether the actions of Respondent did, in fact, violate either of those acts, are questions which go to the merits and are going to be decided below.

And the same thing was expressed in the concurring dissenting opinion which, saying that after you get past the standing question you have to inquire of one of the questions on the merits whether the specific legal interest claimed by the Plaintiff is protected by the statute. That's the first question before you decide you have to show, it seems to me, under the decisions of this Court, before you reach the question whether or not the conduct challenged violated the statute, you have to show that the plaintiff had a legal interest which the statute was designed to protect.

Now, we think that in this case the Petitioners have not shown that any legal interest of theirs, that the Glass-Steagall gives them any legal interest that was intended to be protected against violation.

The legal interest which they claim --

Q Does that mean you are taking your --

A Pardon?

Q Does that mean that you are taking your standing?

A Well, Mr. Justice, we think; we are, I guess, agreeing with the Petitioners that in the light of this Court's recent decision in the Arnold Tours case -- that case appears to hold that in the situation where a competitior of a bank is complaining of something the bank is doing, the bank has standing to challenge that in the light of the Bank Service Act. We have argued in our brief, however, which was argued before the Arnold Tours case, we argued that not only the question of standing, but also the question of legal interest, and indeed, the Petitioners have never attempted to answer us on the legal interest.

All they say about legal interest is they have a statement in the footnote saying legal interest goes to the merits. We agree it goes to the merits and we think they have not sustained their burden on that.

Q I don't quite understand your argument -- are you challenging in taking your standing to raise the questions?

A No, we're not challenging the standing, Mr. Justice; we're questioning, we're challenging their right to any relief because they have not shown that the statute which they claim has been misinterpreted by the Comptroller, invades any legal interest of theirs and we think that those are, as this Court has --

Q You are saying they don't have a right to recover?

A That's right, that's right.

Q You would say that -- was wholly wrong in letting the bank engage in this collective investment activity that these people have no legal interest to complain?

A That's correct. That's where --

Q Even though they have standing --

A Even though they can get to the plate, they don't get to first base.

Q And so Arnold -- in Arnold Tours it would be, end up the same way?

A It could well. The Arnold Tour case has not been decided on the merits.

Q Then we have been wasting our time in Data Processing and the --

A No, Mr. Justice, this Court has said that there is a public interest --

Q But they are only going to be met by your argument?

A Well, that's correct. We are arguing Arnold Tours, that there has been in the lower courts, there has been no invasion of any legal protected interest.

I'd like to just specifically refer the Court to the basis, the basis on which they claim that a legal interest of theirs has been violated. Paragraph 18 of the complaint on page 15 where they describe their injury in which they say that this action of the Comptroller would deprive the members of the institute of legitimate business; would dilute the volume of __________ a substantial proportion of the potential market for securities and mutual funds. And the same claim is made in behalf of the investment advisory members of the institute. They say there is going to be a loss of opportunities for profit in their trade and will dilute the __________, will withdraw substantial portions of the potential market for those services.

In other words, what they are saying is that the Glass-Steagall Act somehow guarantees to them that they will be free of competition of this new type of investment dealing.

Now, there is nothing --

Q Mr. Friedman, in the Data Processing Case, the conclusion of the majority was that under the Bank Service Corporation Act and the National Bank Act that Petitioners, of the Data Processing Company, as competitors of national banks which are engaging in data processing services are within that class of aggrieved persons who, under Section 702, are entitled to judicial review of agency action.

Now, you say yes, they are entitled to judicial review but that, so what?

A But they haven't -- that's it --

Q All they are asking for here is judicial review of the agency action.

A But, they are asking for judicial review and they are asking to have the agency action reversed. And we say they are entitled to have the --

Q Youdon't think this meant that they should get the judicial review but if the Court decided the agency was wrong, it could say, "Awfully sorry, but it won't do you any good."

A I would suggest, Mr. Justice, before the Court gets to consider whether the agency is wrong they have to satisfy what the Court says at the end of their opinion. They also have to show a legally protected interest. And it's our position there is nothing in either the Glass-Steagall Act or the Banking Act which suggests that these acts were intended to protect investors or competitors from this alleged type of injury.

The legislative history is quite clear on this. We have cited at page 28 a statement from Senator Bulkley, who is one of the managers of the bill in which he said on the Floor of the Senate, that the purpose of this bill does not extend the safeguarding purposes of securities as such. The object of the inhibitions which I am discussing here is not primarily to protect the investment public, although that is a worthy purpose. But, our thought is to protect the operations of the banking system itself and to protect the depositors and customers of the banks so that they shall have the service from national and state member banks which they are entitled to expect.

Q I suppose some would say, Mr. Friedman, that they are, in substance, private attorney generals who are indicating an interest broader than their own self-interest: policing the field of competition so that the field of competition remains open.

A Well, I think Mr. Justice, the doctrine of private attorneys general is developed in cases arising under statutes that Congress specifically permitted any person aggrieved or affected to seek judicial review. And we think those provisions reflect a Congressional determination, but in that type of situation, anyone who is aggrieved or injured, in fact, has standing to challenge.

Q I mention it here, because the prayer here is for equitable relief, in addition to the damages.

A But here they are not seeking damages; they are seeking to set aside the Comptroller's order. But again, it seems to me the Data Processing case is not a claim for damages. Again it was an attempt to set aside equitably the action of the Comptroller.

Q While some, most assuredly might say what my Brother Douglas has suggested, that these are private attorney generals trying to promote competition; others might, with equal logic, say these are people trying to preserve their monopolistic position.

A That depends on which way you approach the case. And if I may just --

Q And anyway it's your position that the only right is the right to lose?

A We think the only right they have, Mr. Justice, is to first, before they get to the merits they have to show that Congress, that this statute intended --

Q Is there any way for them to win?

A We don't think there is any way for them to win, Mr. Justice, on two counts --

Q So, they really take all this time to make a public objection to what the SEC says?

A We think they can't win for two reasons: one, they haven't shown that there is any intention in this statute to protect their monopoly position against competition; and secondly, which I would now like to get to, we think on the merits the Comptroller is correct in his decision.

And I'd like to turn to that, if I may, and I will discuss primarily the application of the Glass-Steagall Act, and Mr. Cox will continue with some discussion of the

Glass-Steagall Act and will also argue the proposition that what the banks have done here is -- constitutes an authorized fiduciary service within the meaning of Section 92(a) of the Banking Act.

Now, the Glass-Steagall Act was passed in 1933 because of the numerous things that had developed in the 1920s which had brought the country's banking system to such a deplorable pass. And the particular provisions that we're dealing with here were -- reflect the concern of Congress with the bank's speculation in that period in securities through so-called securities affiliates that the banks organized and the way Congress struck at this problem -- the way Congress tried to prevent a repetition of this problem, was to separate commercial and investment banking.

There are four different sections as Mr. Vieth has said -- and they all basically, I think, involve the same proposition. And I think we can fairly focus here on Section 21, which prohibits the banks from engaging in the business of issuing, underwriting, selling or distributing stocks, bonds, debentures and also other securities.

The question as we see it, is whether in the light of the Congressional purposes in Glass-Steagall, the banks' operation of this account is engaging in the business of issuing, underwriting, selling or distributing securities. It seems to us quite irrelevant that under the Securities and

Exchange Commission legislation the ____________ that are given as securities and that the fund may be viewed as the issue of securities.

As Judge Bazelon explained, the two sets of statutes perform different functions and they are not to be interpreted identically. Certainly Congress didn't intend the very broad definition of security automatically to be carried over to Glass-Steagall, because if that happened many of the bank's normal activities that it engages in every day might run afoul of this proposition.

We think that when Congress used these words, "engaging in the business of issuing, underwriting, distributing or selling securities," it used them to mean the kind of thing that the banks had been doing int he 1920s. That is, underwriting andselling securities through the affiliates for the bank's own profits so the bank could make a profit on buying and selling securities.

That is not this case. In this case the bank's sole compensation from this account comes from the usual fee that it receives as a fiduciary; a percentage of the account that it handles.

The --

Q You think the purpose was to prevent commercial banks engaging in the investment banking business?

A Precisely, Mr. Justice. The basic purpose of these provisions that we deal with -- other phrases of Glass-Steagall, we think that was precisely that purpose.

The Senate Committee Report that we have quoted, referred to these affiliates as having engaged in perilous underwriting operations, stock speculation and maintaining a market for the bank's own stock.

Now, in this situation the bank cannot make loans to the affiliates and the account buys the securities, not for the bank's account, but for the account of the customers. The customers, obviously, measure the performance of the bank account against those of other mutual funds and if the bank were to try to use this account for the kind of mischief that the banks engaged in the 20s, the very nature of the account would prevent the bank from doing it.

And the bank, basically, here, as it seems to us, is doing what it has done for many, many years; it's handling other people's money, investing it, giving advice. It's a traditional banking function which we think Congress in the Glass-Steagall Act did not intend to block.

For example, the old evils to which the Petitioners point in this case: the claims of possible misuse bythe bank of the bank's assets because of its control of the account, are identical where the bank handles $200,000 for a single customer whom it has undertaken to represent in managing its investments, or if it handles the same $200,000 for 20 customers each of whom contributes $10,000. The evil is identical in both of those cases. It's conceded and the bank for many years has had the authority to invest the $200,000. But now, we are told somehow that when the bank attempts to make available to the small investors the same kind of investment service it has hitherto provided for the large investments, Congress must have prevented this in the Glass-Steagall Act.

There has already been a reference to the fact --

Q There is surely a difference between a sole proprietorship in a publicly-owned corporation; isn't there? Even though both may be engaged in not the identical business.

A There is obviously a difference, Mr. Justice, but I'm addressing myself in terms of the evil to which Glass-Steagall is directed: the possibility of conflicting interests, the possibility of misuse by the bank of the capital that is received in a fiduciary capacity; the misuse it could make because of its investment facilities.

What I'm arguing is that that misuse is no less present in the case of a $200,000 fund than in the case of 20 at $10,000; or indeed, I might take it one step beyond this. The banks for at least 15 years have been permitted to comingle pension funds.

Q To do what?

A To comingle pension funds. They can take several pension trusts and put them into one quick pool of capital. The amount of money, I understand today in pension trusts and employee profit-sharing claims runs into the billions; much more than the amount that's even talked of as likely to result in these bank-investment accounts and again if the bank is likely to be optimistic, one would have thought this would have provided a fertile field. The letter that is quoted by Judge Bazelon and as Mr. Cox has set forth in his appendix, from Chairman Martin of the Federal Reserve Board, states that there experience has been that the banks have not done this kind of thing.

Then we have the other example, which has been discussed; the so-called "common trust funds." Once again, small trusts; it's not feasible for the bank to give the kind of management to provide the kind of service on that smaller basis. This bank has told us it can't provide individual investment service for less than $200,000, so they have been permitted now for many years to comingle the common trust funds into a pool which, for all intents and purposes, in terms of its effect and in terms of the possibilities for misdoing, is the same as this pool here.

Now, there is a further affirmative factor on this case, and that is that this type of thing, this may be available to the small investor, the type of investment service that has not hereto been available, makes available to these people a new opportunity to invest their money to get the kind of service for the small investor that heretofore has only been available for the large.

It is true, it is true that there are so-called "no load mutual funds," which a man does not have to pay to get in, but these are a minority. I think the briefs indicate that 95 percent of all investment companies of the so-called "load funds," where a man has to pay a commission of 7 or 8 percent to get into it. Now, there are many small investors who may feel that they prefer the stability or liabilities of conservatism that is traditionally associated with banks. And I would think they would welcome the opportunity to have this service made available.

And this is basically what the bank service is doing. It's making available to the small investor the kind of investment advice that he has not hitherto had. It's doing it under a fiduciary power and it seems to us there is a strong public interest in making this competing form of investment service available.

(Whereupon, at 12:00 o'clock p.m. the argument in the above-entitled matter was recessed to resume at 1:00 o'clock this day)

:1:00 o'clock p.m.

MR. JUSTICE BLACK: Mr. Cox.

ORAL ARGUMENT BY ARCHIBALD COX, ESQ.

ON BEHALF OF RESPONDENTS

MR. COX: Mr. Justice Black, and may it please the Court:

In this case, as in the one before it, we start with the unanimous conclusion of all the expert regulatory agencies that what the bank is doing is carrying on a somewhat new form of a traditional banking function which is not prohibited by existing law and which is in the public interest because it provides a traditional kind of service at lower cost and supplies competition for what would otherwise be the monopolistic position of the mutual funds.

So that here again, the general question involved is whether Petitioners have carried the very heavy burden of showing that the agency's conclusions are so unreasonable or ill considered that they must be set aside as beyond their authority or otherwise contrary to law. Andthat question, I think, breaks into two parts.

The first part, as we suggested shortly before the recess, is whether what the bank is doing in this instance is a lawful banking business or whether to put it in my exact terms: whether the bank, which admittedly acts in a fiduciary capacity when it invests the funds of an individual principal under the managing agent, which admittedly acts in a fiduciary capacity under Section 92(a) when it comingles the funds of several beneficiaries in a common trust fund, somewhere ceases to act in any fiduciary capacity in the language of this statute, when it comingles the funds of several principals into one account which the bank still continues to manage in a fiduciary capacity in the nonstatutory sense.

Now, certainly the word "comingled," does not, as a matter of law, destroy a fiduciary capacity. And that is clear in any number of cases; it's true as a matter of observations of trust laws on the questions.

Now, certainly I think it is equally plain that to me a registration of the fund under the Investment Company Act, does not mean that the bank ceases to act in a fiduciary ??? capacity. Nothing divides the world into two parts: one the monopoly of the mutual funds and the other a proper banking function. Indeed, the mutual funds are currently engaged in buying up corporate fiduciaries, doing the very sort of thing that banks do under 12 USC Sec.92(a). And surely nothing requires the ironic conclusions that something which is properly done under Section 92(a) suddenly becomes improper ifyou don't provide the additional protections that the SEC requests under the Investment Company Act.

The first question, I think, comes down to where the increased number of customers or principals, the use of the somewhat standardized form of managing agency agreement and the pooled investment. It means that the relationship, while perhaps fiduciary as a matter of law and legal concept, ceases tobe a fiduciary relation in fact or in function. Or, whether, to put it in the language of Section 92(a)(k), the bank is abusing its fiduciary power.

Now, we point out in that connection that Section ??? 92(a)(k) expressly gives the Comptroller, not with deference to this Court, the task of determining and issuing regulations; determining what restrictions are necessary to prevent abuse of the fiduciary power.

We think the conclusions of the Comptroller that this remains a fiduciary function and the observation of Chairman Martin of the Federal Reserve Board in writing to Congress that it's a traditional fiduciary function, are borne out by five considerations.

In the first place I emphasize again the individual fiduciary relationship which is created between the bank and each customer as explained in the Hogate(?) affidavit, which is the only evidence I could find in the record, which is created between them.

Second, the fiduciary duties in Regulation 9 and in the common law and in New York statutory law, continue to characterize this relationship. The bank is not permitted to have any interest in the account; it's not permitted to deal with the account; it's required to segregate the property in the account from its own property.

I may say in this connection that the New York statute very clearly prohibits a bank from selling assets to a trust, or to this agency, prohibits it. In addition to that, the Comptroller, interprets Section on page 25-A, Section 9 918(b)8(i), about the middle of 25-A.

Q 25-A of what?

A Of my brief; excuse me, Mr. Justice.

Interprets that provision as forbidding any such transactions, whether a loan or sale in terms of a collective fund. And he will not recognize any exculpatory clause put in a common trust fund. This is a matter of regular, as I understand it from the Comptroller's representatives here, it's a matter of his regular interpretation as borne out in his inspections of banks and --

Q Is that in the appellate ruling somewhere?

A I don't think this is a matter -- I do not believe thisis a matter of written ruling. I understand it is the practice and has been carried out for a long time. This is what the Comptroller's representatives informed me, as I understood them during the recess.

I may say in addition that there is, in the bank's prospectus, a perfectly clear statement that the fund will not borrow money. And, of course, in addition, as stated in any number of authorities on trusts, including Professor Scott's(?) book, a corporate trustee -- a corporation may not sell property to itself as fiduciary. So, I think this point has quite thoroughly been done.

The third point I would emphasize as sustaining the Comptroller's and the ________ conclusion, that this is a fiduciary relationship is the safeguards in Section -- in Regulation --

Q Mr. Cox, excuse me just one moment. I take it then it's the New York law and the Comptroller's ruling or -- prohibits a bank from buying from the fund any property?

A Or selling to the property.

Q Because --

A No corporate --

Q Section 82 says the bank may purchase for its own account, for its own account from a collective investment fund, any defaulted mortgage on certain conditions. This is the next section after the one you were reading. On 25-A, Roman Numeral IIii8ii(?) "the bank may purchase for its own account from a collective investment any defaulted mortgage held by the fund."

A Well --

Q I grant you there are several conditions there, but nevertheless, this is a --

A Of course, this fund wouldn't have defaulted mortgages.

Q You mean it --

A This is a common stock fund.

Q I thought --

A I don't think it would have any mortgages in --

Q I thought it could invest the funds in whatever kind of --

A Well, there are specific limitations on the plan that was submitted to the Comptroller and that he approved and there were specific limitations in the prospectus.

The question Your Honor raises might come up in connection with other kinds of --

Q The mortgage funds are already operating under Comptroller's rulings, as I understand it and the plan is under Section 9, is to have this sytem replace the mortgage funds.

A I don't think this plan has anything to do with mortgage, Mr. Justice.

Q Well, in page 27-A it expressly provides that mortgage funds, presently being operated pursuant to the provisions of Section 17(b) are going to be --

A There are many things in Regulation 9 which covers all fiduciary activities that are not applicable to the comingled investment account.

The third aspect of the comingled investment account which supports the conclusion that this is a true fiduciary function, is the safeguards that the Comptroller has imposed to assure that it is not corrupted by aggressive merchandising. There are no public distributions; a principal or customer may obtain participations, an opportunity to participate only through the bank itself. There is no, unlike a mutual fund, there is no distribution through the usual channels of securities distribution. Advertising is very rigidly limited by Regulation 9. And there are limits imposed on the bank's compensation.

In addition, Regulation 9 prevents any load for a commission to salesmen of managing agency account and this is the Federal Reserve Board notice. It is one of the things that will put a limitation on the extent to which a bank can secure this kind of business.

Fourth, I would emphasize the comingled investment account and any comingling under Regulation 9 is subject to continuing scrutiny by the Comptroller under his normal trust powers. He is required by law to investigate three times in every two years. I am told that in the case of the Citibank account his representatives have been there every year, and they conduct a very, very careful audit.

And finally, the Comptroller has the opportunity to take advantage of the years of experience with other forms of investment in common trust and to judge that the comingled investment did not, in fact, reduce the fiduciary nature of the arrangement.

So we come, I think, to the question of whether this traditional, lawful aspect of a banking function, or whether this new aspect of a traditional banking function is somehow prohibited by the Glass-Steagall Act. And we think for a number of reasons that the Glass-Steagall Act does not prohibit the activity.

First, I would emphasize that the words of the statute do not cover the managing of investments in a fiduciary capacity on behalf of others. Taking Section 21 which is probably the broadest prohibition --

Q What page is that on?

A That's on page 4-A of the appendix to our brief.

What it says that a commercial banker may not do, is engage in the business of issuing, underwriting, selling and distributing, at wholesale or retail, through syndicate participation, stocks, bonds or other securities.

Now, I submit that those words are plainly directed at a bank's purchasing and selling of securities as investments for its own account, and that a bank's acting as middleman, in handling securities, from the distribution of which it hopes to make a commission or profit, the normal business of investment banking.

And the word "issue" in here, seems to me to be used in the sense in which it was very commonly used during the 20s and early 30s and that is to say that a house of issue as bargained, might be the house of issue and not, in the more technical sense in which it has come to be used under the securities law.

And I would answer that the units of participation which the bank gives to its customers as receipts, really don't affect the matter. The units are simply the mechanisms by which the bank accounts to its customers for its performance of its fiduciary duties. The units aren't traded in security markets; the bank doesn't handle them as a house of issue, as a dealer or as any other middleman with the help of an issuer's or dealer's risks or their profits.

Second, we would emphasize that the temptation which the court below put on the Glass-Steagall Act, and which we urge here, the bank's engaging in this activity, is in no way contrary to the purposes of the Glass-Steagall Act. They are very well-known. They were first to prevent a bank from risking its own assets in securities, especially speculative securities and of course, the bank has no assets at risk here.

Second, they intended to prevent banks from exhausting securities and then endangering their solvency by making loans to bail out that investment. And since the bank has nothing at risk here, that temptation doesn't exist.

And third, the Glass-Steagall Act was intended to prevent banks from acquiring issues of securities and then putting pressure on its correspondents(?) and on its customers and their customers in order to sell the securities in which it invested without loss, so as to make its middleman's profit. And of course there is no such thing involved in the present case.

Third, I would point out that it is agreed on all hands that the Glass-Steagall Act does not apply in words or policy to the bank's managing investment securities on behalf of customers in any other fiduciary capacity and every reason that excludes those cases, whether a reason in terms of the word, or reason in terms of policy, applies equally to the Citbank plan.

Fourth, I submit that Petitioner's argument is wholly technical. It rests entirely upon form of the concepts adopted to comply with the Investment Company Act. Indeed, I think it's no exaggeration to say that the Petitioners do not cite a single substantive objection to the account that is not equally applicable to all the other fiduciary activities that are undertaken pursuant to Section 92a, and certainly are not affected by Glass-Steagall.

And finally, I would urge that there is no basis at all for the Petitioners' major premise here: the assumption that activities subject to the Investment Company Act must somehow be prohibited to banks by the Glass-Steagall Act. That doesn't follow. The two may, and indeed we urge, do overlap. As Judge Bazelon said, the acts have different policies; they deal with different subjects and nothing in either suggests the ironic conclusion that I mentioned before luncheon, that a bank-managed comingled investment account which doesn't violate Section 1621, if you don't give your fiduciares, your customers, the benefit of the Investment Company Act, somehow becomes unlawful if you do, which, as I say, is indeed ironic.

Now, the Petitioners' argument, as I understand it, reduces itself somewhat to a syllogism and in the sense, I think Mr. Vieth assumed a large part of the answer to the case, in his first statement during the argument this morning.

The syllogism is: the bank, everybody concedes that a mutual fund engages in the kinds of activities in which a bank cannot engage and with which it cannot be affiliated under the Glass-Steagall Act.

Minor premise: Citibank's account is engaged in the same activities as a mutual fund and then the conclusion is that we violate the Glass-Steagall Act.

Now, we deny both the major and the minor premises, and if we are right on either count, then we're right in our conclusions. In the first place we do not concede that a mutual fund, certainly a "no load" mutual fund, is engaged in activities of a kind with which a bank cannot be connected under the Glass-Steagall Act.

The Petitioners, until this case, were arguing just the opposite and I think the logic of a good many of the arguments in our brief is that they were right the first time. The Federal Reserve Board has ruled to the contrary in the case of the ordinary mutual fund, but that isn't the end of the matter and I respectfully submit that that isn't the reason to begin the decision of this case by assuming the correctness of the Federal Reserve Board conclusions instead of going back, as I have tried to do, to the words of the statute and to its basic policy.

Now, second: even if the ordinary mutual fund is engaged in the kind of activities with -- which is forbidden to the bank or with which it is forbidden to be connected, still we say that the Citibank's account is not in violation of the Glass-Steagall Act because we think it's a markedly different situation from the ordinary mutual.

In some respects, for the most part, for purposes of the Investment Company Act, we're the same, just as for many purposes, if I can be personal about it, I'm the same as any other teacher or professor, but for the purposes of appearing before a court, I am not and so here we say that for many purposes what we're doing may be the same as what a mutual fund is doing, but for the purposes of Glass-Steagall it's not.

And we would stress four important differences:

First, I have mentioned it several times, the direct fiduciary relationship between the bank and its customers, which does not exist in the case of the shareholders in a mutual fund and the managers of the fund.

Second, of course the bank --

Q Aren't some of the older mutual funds or at least in certain states, aren't they in the form of a trust?

A Some of them are in the form of a trust. Massachusetts Investors Trust --

Q Yes.

A Is in the form of a trust and in those cases there may be a direct fiduciary --

Q I wonder if there is a direct fiduciary --

A It's not -- it isn't quite the same individual relationship, I think, that there is here where the bank has the relationship of principal and agent. But I would go on and even if those cases -- and add certain others. Here, of course, everything the bank does is subject to Regulation 9 and the Comptroller's supervision. And that is not true, either with the Massachusetts Investors Trust or the other mutual funds.

Third, it must be remembered that 95 percent of the share in mutual funds are marketed as if they were ordinary securities through the ordinary channels of the securities business. They are advertised on television, whereas the bank's seeking of new accounts in this area is strictly limited.

And fourth, and I think perhaps --

Q A bank can advertise its ordinary banking and trust services, can't it, freely, , or is there some limitation or prohibition on that?

A It can advertise them and it can advertise in connection with the trust services, provided it also meets the requirements of the SEC, which makes it very difficult to advertise the trust services and the comingled fund together.

Q Well, let's take this one at a time. I'm not wrong in understanding that a bank can advertise its general purposes, quite apart from this kind of thing freely and jointly, can't it?

A Yes, I think so.

Q And once it inveigles customers byway of advertising then it can circularize those customers, advertising this --

A What it can do is on page 24-A in Reg. 9. "It may have a report; a full report should be furnished upon request to any person and the fact of the availability of such material may be given publicity solely in connection with the promotion of the fiduciary services of the bank. Except as herein provided the bank shall not advertise or publicize its collective investment funds." It's down toward the bottom of the page.

So, there are rather strict limitations, except for this initial mailing. About all the bank has done, as I understand it, is to have a slip that's available at the desks in the branch banks.

Q But my point is: originally --

A At the --

Q -- by ordinary conventional advertising and once it's got them then it can circularize them --

A Then it can mention in this form; that's true.

And then the fourth point is that from the standpoint of the Glass-Steagall Act, I submit, all the account's activities are the bank's activities. Now, this is important, as I see it, only in terms of the entity theory which the Federal Reserve Board said meant that there was no violation of Sections 21 and 32 -- I guess I have them mixed; 20 and 32. But, it also, I think, characterizes all the bank's activities, because what it means, in a nutshell, is that the bank, nor any officer of the bank, neither has any interest in the distribution of the securities of any other organization, or any interest in the ownership of the securities of any other organization.

And it those things that I submit, were really what the Glass-Stegall Act was directed against, and the bank doesn't have, nor does any officer have that kind of interest.

In conclusion I would simply call attention to the fact that the Federal Reserve Board explicitly advised the Congress that for the purposes of separating commercial banking from investment banking -- it was speaking of Glass-Steagall policy -- are not significantly relevant to the operations of the kind under discussion.

We submit, therefore, that Petitioners have failed to show that the agency's findings are so ill-considered or arbitrary or foolish that the Court should set them aside and consequently, the judgment below should be affirmed.

REBUTTAL ARGUMENT BY G. DUANE VIETH, ESQ.

ON BEHALF OF PETITIONERS

MR. VIETH: Mr. Justice Black, and may it please the Court:

I should like to dwell just briefly on the fiduciary point that has been emphasized so much in Mr. Cox'x argument. The fact of the matter is that this comingled investment fund, this bank mutual fund is operated by the trust department of the bank; in this case, Citibank's trust department and this, indeed, is the only such fund that has come into being.

But, beyond that point, the operation of this fund is no more or no less fiduciary than the operation of any ordinary mutual fund, whether that mutual fund takes the form of a Massachusetts Trust, as some of them do, or whether the fund is, as they more commonly are, a corporation.

The fact of the matter is that much of the argument seems to suggest the original Comptroller's contention with respect to Regulation 9, which intention was abandoned when the Comptroller approved Citibank's fund and said that he would amend Regulation 9 to permit all funds like Citibank's to be operated.

The Comptroller originally indicated in 1963, with respect to his first regulation, and his report is quoted on pages 2 and 3 of our reply brief that such a fund may not engage in the selling of interests in pooled funds. Accordingly there may be no agreement between the bank and the customer that the latter's funds will be invested in collective investment funds, nor may managing agency contracts be operated or held out as interests in a collective investment fund."

Now, one of the things mentioned by the Comptroller there is directly contrary to what is being done in connection with the Citibank funds.

Q What kind of an animal did the Comptroller originally have in mind?

A He had perhaps in mind the same sort of thing as a common trust fund, what the bank does in the normal course, obtain funds and then exercises a discretion as to whether the funds should be administered individually or whether perhaps it might be more economical or more efficient to invest them in a comingled fund. He had that in mind with respect to these.

But this Citibank fund fails in every one ofthose tests. Here the arrangement provides for the automatic investment of the participant's funds into the comingled fund. And the managing agency contract in the fund, is itself, held out as an investment trust. Indeed, it is those points mentioned by the Comptroller in 1963 which he abandoned during the course of permitting Citibank's fund to operate in accordance with his ruling in 1965. It is those very points that distinguish this kind of fund from the common trust fund that we discussed a bit --

Q Why may not a national bank have mutual directors with a typical open end investment fund?

A Section 32 prohibits such an affiliation between a member bank --

Q Well, I know but why? What is the purpose of that?

A Well, it's the interpretation of the Federal Reserve Board that Section 32 which prohibits such an affiliation with a company or a man affiliated with a company primarily engaged in the issuance of securities. And the Federal Reserve Board has held repeatedly that an ordinary open end mutual fund is primarily engaged in issuing securities within the meaning of Section 32.

Q Why wouldn't they want the same board of directors to be running one company as runs the other?

A Because of the inherent conflict of interest that Congress determined in the association between securities affiliates on the one hand and banks on the other hand, and that raises a point, Mr. Justice White, if I may comment upon it, with respect to the argument both by the Comptroller and Mr. Cox, that somehow or other the legislative history of the Glass-Steagall Act indicates that all Congress was concerned with was separating investment banking from commercial banking. Congress clearly was concerned with doing that; we don't deny that. But it had many other concerns, and one of the concerns was to eliminate any possibility of direct engagement or affiliation with companies that are primarily engaged in issuing and selling securities, whether as investment bankers or not.

Now, a mutual fund under no circumstances is even remotely akin to investment banking and yet the Federal Reserve Board has repeatedly held that a mutual fund is engaged in the kind of activity that Congress wanted to prohibit to banks directly, or through affiliates, in the Glass-Steagall Act.

Q Is there any indication that now that this kind of a fund is approved, is there any indication there that they might reconsider the --

A Well, Mr. Justice White, as I indicated in my earlier argument, the Federal Reserve Board looked at this particular fund and this particular relationship and in our judgment, in reading that decision, it would indicate that they would have held the relationship unlawful but for their holding that there were not the two entities, and therefore there could not be an interlock. That is the sole basis for their holding.

Now, with respect to this question that has repeatedly been urged here that this is a mere, modest extension of common trust fund activities and in particular with respect to a question asked by Mr. Justice Stewart this morning, with respect to setting up trusts, individual intervivos trusts specifically for investment in common trust funds.

The Federal Reserve Board through the years, and the bankers' manuals, have repeatedly urged against thatkind of a situation. Indeed, we cite in our reply brief a ruling on page 10 of our reply brief of the Federal Reserve Board which dealt with a very similar situation. In that case a corporation -- this rule appears in the September, 1947 Bulletin of the Federal Reserve Board -- in that case a corporation which wished to place certain funds to establish a trust so that it could place those funds in a bank's common trust fund. And the Board ruled, and I quote from the 1947 Bulletin:

Under the facts presented it appears that there is no reason for the creationof the trust other than the desire of the corporation to invest its funds in participations in the common trust fund. The trust merely is a mechanism designed to enable a corporation to acquire such participations in lieu of other investments. The analogy with the purchase of Investor Trust certificates is apparent and the use of the common trust fund for this purpose amounts, in substance, to the operation of the fund as an ordinary investment trust. Common trust funds were not permitted for that purpose, we submit, because the Glass-Steagall Act would be violated by such operation of a common trust fund and we similarly submit that this comingled fund violates Glass-Steagall.

Q There used to --this is out of date, isn't it, that ruling? Aren't they permitted now?

A No, sir; common trust fu is to this day are not permitted to be operated in that fashion.

Q But if you make an inter vivos trust with the bank as trustee, surely, if permitted by state law, that bank is permitted, as fiduciary, to invest in a comingled trust fund; is it not?

A Yes, sir, if you go to the bank and the bank makes no attempt to sell you a certificate in a common trust fund, takes your funds, makes the judgment as to whether your funds should --

Q -- and if state law provides it and there is no Federal inhibition on it; is there?

A No, sir.

(Whereupon, at 1:35 o'clock p.m. the argument in the above-entitled matter was concluded)