ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1487

TITLE BANKAMERICA CORPORATION, ET AL., Petitioners
v.
UNITED STATES

PLACE Washington, D. C.

DATE January 19, 1983

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ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

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BANKAMERICA CORPORATION, ET AL., :

Petitioners :

v. : No. 81-1487

UNITED STATES :

- x

Washington, D.C.

Wednesday, January 19, 1983

The above-entitled matter came on for oral agrument before the Supreme Court of the United States at 10:48 a.m.

APPEARANCES:

WILLIAM SIMON, ESQ., Washington, D.C.;
on behalf of the Petitioners.

EDWIN S. KNEEDLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.;
on behalf of Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: I think you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM SIMON, ESQ.,
ON BEHALF OF BANKAMERICA CORPORATION, INC., ET. AL.,
PETITIONERS

MR. SIMON: Mr. Chief Justice, may it please the Court:

The issue here is whether Section 8 of the 1914 Clayton Act, which bars corporate director interlocks between two or more corporations other than banks, applies to one bank and one non-bank; namely, one bank and an insurance company.

The appellants here are four insurance companies, three banks, three bank holding companies, and three individuals who were directors at the same time of both a bank and an insurance company.

Both the District and the Circuit Courts found that 40 percent of all insurance directors in America were also directors of banks, and that this situation had prevailed for a long time, and yet until the filing of this case, 61 years after the enactment of the statute, the government had never attacked the bank-insurance interlock.

Indeed, the amicus brief of the American

Council of Life Insurance states that 79 percent of their insurance company members have one or more bank directors on their board.

This case was tried in the District Court in San Fransicso before Chief Judge Peckham on a fully stipulated record. He found that the statute did not apply to an insurance-bank interlock. On an appeal to the Ninth Circuit in an opinion by Chief Judge Browning, joined in by Senior District Judge Christianson, the Court found that the statute did bar the interlock but Circuit Judge Kennedy dissented.

Thus, one District Judge and one Circuit Judge has held the act inapplicable to this interlock, each holding that the statutory language was clear and unequivocal and on the other hand one Circuit Judge and one District Judge has held that the act is applicable conceding, however, and I quote, "The meaning remains equivocal" and, I quote again, "the language may be read with equal plausibility," as it was read by the District Court.

Judge Browning's opinion issued 34 months after the oral argument. We urge affirmance of the District Court judgment on the grounds, first, of the face of the statute; secondly, if Your Honors get that far, the clear legislative history; and finally, 60

years of uninterpreted administrative construction of the statute by the Department of Justice, the Federal Trade Commission, and the Congress.

QUESTION: Do you mean uninterpreted or uninterrupted?

MR. SIMON: Both, Mr. Justice Rehnquist.

The language of the statute, I submit, is clear, and it appears in several places in the brief, but one page is page 2 of our brief, which is the blue brief. And the statute provides as follows: No person at the same time shall be a director, one, in any two or more corporations; two, any one of which has capital in surplus of a million dollars -- and I point out where the Congress meant any one of them; it said any one of them has capital of a million dollars; three, engaged in whole or in part in commerce, which I submit means two or more corporations engaged in whole or in part in commerce; and four, other than banks, banking associations, trust companies, and common carriers subject to the Interstate Commerce Commission Act.

In his opinion in the District Court Judge Peckham said of that language, and I quote from his opinion, "An examination of this language reveals four criteria which must be met before this statute may be applied: First, a person must simultaneously serve as a

director of two or more competing corporations; second, at least one of the corporations must have capital surplus and undivided profits of greater than a million dollars; third, both or all of the corporations must be engaged in interstate commerce; and fourth, the corporations must be other than banks, banking associations, trust companies, or common carriers.

We submit that two corporations other than banks and common carriers excludes two corporations, one of which is a bank or a common carrier. There are three different provisions relating to three different classes of corporations in this statute as showing that Congress did not have in mind a uniform legislative purpose.

The second and third unnumbered paragraphs of the House bill relate to banks. And as presently amended, they apply only where one of the banks is a member of the Federal Reserve System and no more than a third of the banks in the country are members of the Federal Reserve System. And it includes not only directors but officers and employees as to which interlocks are also prohibited.

The fourth -- excuse me, the first unnumbered paragraph of the House bill, which is now Section 10 of the Clayton Act, relates to common carriers. It in no way prohibits interlocking directorates between

competing common carriers. It provides only that when there is an interlocking directorate between a borrower and a lender or a supplier and a purchaser, that the transactions must be on public bids.

And then the fourth unnumbered paragraph of Section 8 is the one which we have here which throughout the legislative history was referred to as the Industrial Corporations Act. And we strongly urge that one bank and one non-bank doesn't make two bank -- two corporations other than banks.

This case does not involve an exemption from the antitrust laws with the accompanying narrow rules of construction. This is not a case like the Norris-LaGuardia Act, which exempted labor unions from antitrust laws, or the Capra-Volstead Act,which exempted farm co-ops from antitrust laws, or the Securities Act, which exempted the Stock Exchange from the antitrust laws. This case involves a requirement of the statute which is not met in the case before this Court.

Now, I think that that is the end of the lawsuit, but I do think if the Court goes beyond the face of the statute, the legislative history is compelling, and I would like to speak to it briefly.

Mister -- later Justice -- Brandeis was an adviser to President Wilson in 1914, and he testified

before the House Judiciary Committee on this legislation, having previously written a long series of articles on the subject matter which were published in Harpers.

The Pujo Committee of the Senate had conducted hearings on this subject, and its General Counsel, Samuel Untermyer testified before the House Judiciary Committee on this bill. Both Mr. Brandeis and Mr. Untermyer urged upon the House Judiciary Committee that the bill should cover insurance-bank interlocks. And they said it doesn't do it and you should amend the bill to make it cover it. The House took no heed of their admonition.

As the bill passed the House, the second and third unnumbered paragraphs related to banks, the fourth unnumbered paragraph read as I read it to you earlier except that the "other than" clause read merely "other than common carriers." It did not have the banks in it. And at that time, the first paragraph related to common carriers but, as I noted, only borrowers and suppliers.

In the Senate the Senate struck all banking provisions from the bill so that as it passed the Senate the banking provisions of the House bill were eliminated. When it got to conference, the House

conferees insisted on putting back the House provisions on the banking provisions, and the Senate conferees ultimately said, okay, we'll put the House -- we'll put those things back, but we want to put in between "other than common carriers" the words "banks, banking associations, and trust companies. And so the Conference Committee Report was changed to read "other than banks and common carriers."

I think most conclusive on the legislative history is the fact that when the Conference Committee Report got back to the House, Congressman Mann made a point of order that the conferees had exceeded their jurisdiction in inserting the words "banks" between "other than" and "common carriers." He opposed, he took the position that the Department of Justice takes before you today, and he said that the conferees had gone beyond their authority.

Congressman Shirley and Congressman Webb, who were both members of the Conference Committee, agreed with him that the bill did just what he said it did, but they argued that it did not go beyond the authority of the Conference Committee because they merely put into the statute in explicit terms what was previously implicit. The Speaker, who was then Champ Clark, overruled the point of order, and the bill passed in

that manner.

Because we think the debate on this point of order is so important to the legislative history, we have copied it in its totality in an appendix to our reply brief. And I would like to read two sentences of Congressman Mann, from A-2 of the yellow brief. Just before the quotation in the middle of the sentence, he says, what the conferees have done is to eliminate from this section all banking corporations.

And then skipping to the last five lines of the page, he says, and the conferees by their report undertake to eliminate from this prohibition of interlocking directorates not only the railroads subject to the act to regulate commerce but also banks, banking institutions, and trust companies. And we indeed agree with that he -- with what he said.

Now, on page 14 Congressman Shirley, who supported the Conference Report, said in a sentence beginning about two inches down from the top of the page, the conferees having redrafted the matter have gotten away from the language of Section 9 of the House and Section 7 of the Senate -- and what is now Section 8 was 9 in the House and 7 in the Senate -- in many particulars, concluded that it would leave no matter of argument touching the language of Section 7 and

therefore the conferees inserted in the exclusion proviso what would have been held as excluded in the bill agreed to in the conference even if not put there, to wit, banks, banking associations, and trust companies, thus making it plain by the very expression itself that they -- and I believe "they" refers back to the banks -- that they along with the common carriers were not within the group outlined as industrial corporations.

And yet, in spite of both sides agreeing that that's what the Conference Report did, although they disagreed on the propriety of doing so, the Court of Appeals, in its opinion reversing the District Court, said, and I am quoting at the top of page 24-A of the Appendix to our petition for certiorari, in the first full sentence, the Court of Appeals said, but the references in the exclusionary clause to banks and common carriers do not have a common origin. There is no basis for the assumption that they are to be read in the same way.

And the Court of Appeals went on to hold that the phrase "other than banks" was to be read "other than to banks," but the phrase "other than common carriers" was to be read "other than one common carrier." And that's exactly opposite to what both sides agreed in the

debate on the point of order to the Conference Report.

QUESTION: Mr. Simon, was this debate argument that you are now presenting also presented at the Court of Appeals?

MR. SIMON: Yes, indeed. I made the argument to the Court of Appeals, Justice Rehnquist, and I said exactly to them what I have said to you.

QUESTION: You didn't lose faith in it because you lost there.

(Laughter.)

MR. SIMON: Since 1914 the Congress has repeatedly modified Section 8. The banking provisions, for example, were changed five times: 1916, 1920, '28, '29, and '35. But it has repeatedly rejected suggestions made to it that it amend unnumbered paragraph 4 to cover bank-insurance interlocks.

QUESTION: In this exchange, Mr. Simon, did any member advance or advocate the position now asserted by the government in this colloquy that was going on in these exchanges?

MR. SIMON: No, Your Honor. The colloquy was primarily with Congressman Mann, who made the point of order, and Congressman Webb and Shirley, who opposed it. And they both agreed on what the point -- what the language would do. Their difference was that

Congressman Mann thought it was a bad thing. And what he expressly said in his argument, that if you let this go through, it will permit a bank and United States Steel Corporation or a bank and the Sugar Trust Company or a bank and a hat company to have common directors, and I am against that.

And Congressmen Shirley and Webb didn't disagree with him on what it did, but said that that was within the scope of the conferees' authority, and the Speaker agreed with him.

QUESTION: In other words, Mr. Mann wanted to alter it to provide what the government now contends for?

MR. SIMON: Yes, sir. But he agreed that if the conferees' language stayed, it would not achieve that result. And that was the purpose of his point of order.

In 1965, '67, '69, '71, '74, and '75 bills were introduced into Congress that would have prohibited these interlocks, and yet not one of those bills passed. In 1978 Congress had before it comprehensive legislation to deal with interlocks in finanicial institutions. And the bill that finally emerged is the Depository Institution Interlock Act of 1978.

That debate took place shortly after Judge Peckham's decision in the District Court. And

Congressman St Germain took the floor of the House and castigated Judge Peckham for his decision in this case, said it was a totally wrong decision and it ought to be reversed. And he offered an amendment which would have reversed Judge Peckham's decision.

The amendment was stricken, and to be sure, it was stricken on a technicality, but a technicality which could haved been cured and no member of the Congress, in spite of Congressman St Germain's criticism of this case, no member of the Congress offered a proper amendment which would have overruled the decision.

I submit that this Court's decision in 1980 in Merrill Lynch versus Curran and in -- I am sorry, that was in 1982 -- and in 1980 in Seatrain versus Shell, hold that while the views of subsequent Congresses cannot overrule the unmistakable intent of the enacting Congress, they are entitled to great weight where there is any doubt of the intent of the enacting Congress.

Now, although the government now claims that the statute prohibits these interlocks, they concede that they made no effort for over 60 years to enforce it, notwithstanding the fact that 40 percent of all insurance company directors in America were bank directors. And the answer they give you in their brief is that they were spending their time on voluntary

enforcement and they were trying to achieve the results voluntarily.

Now, I have the greatest respect for the Department of Justice, and I think if they were really were trying to get voluntary enforcement of the statute, there would not have been 40 percent of all insurance company directors on bank boards at the time this case was filed.

I suggest that they do not cite a single instance where they persuaded an insurance or bank director to voluntarily give up one of his directorships. And we know of none.

I also suggest that a more likely answer to that situation is the holding of this Court in 1949 in the Panhandle case where it held that the failure to use such an important power for so long a time indicates a belief that the power did not exist.

QUESTION: Mr. Simon, what liability does an interlocking director subject himself to by remaining on a board if the government is correct in its --

MR. SIMON: None whatever, Justice Rehnquist. No liability at all. I might add, in addition, that even if we are -- if we are correct and we are sustained by this Court, they also have no immunity from violating the antitrust laws. If a bank director and an insurance

company director sitting on a board conspire to do something in violation of the Sherman Act, they are just as subject to being indicted as anybody else.

QUESTION: Well, doesn't that detract from your argument of 50 years of no prosecution or no construction by the government? If the government really can't do anything anyway except voluntary, try to get voluntary compliance, it seems to me it negates all but the administrative interpretation argument.

MR. SIMON: Oh, Justice Rehnquist, there are a number of cases where both the Justice Department and the Federal Trade Commission have sued to force somebody off a board. When I say a number of cases, I don't mean thousands, but there are a great many cases.

QUESTION: What is it, a declaratory judgment, is it, or --

MR. SIMON: No, sir, it's just a suit for an injunction to enjoin --

QUESTION: Injunction --

MR. SIMON: -- the man from serving on both boards. And as a matter of fact, it is the law at least in the Seventh Circuit in an opinion by Justice Stevens that either of the corporations can sue to get off their board a man who is not legally sitting on -- who is illegally sitting on two boards in violation of Section

8. Now, that case didn't involve banking interlock, but you sue for an injunction to enjoin the man from sitting on the board.

Fifteen months before this case was filed, the assistant attorney general in charge of the Antitrust Division of the Department of Justice, who filed this case, made a public statement in which he said, and I quote, "The Clayton Act section dealing with interlocks may not be directly applicable to financial institutions and insurance companies." And he added, "It may be more of a legislative problem than an enforcement problem."

In 1950 a report of the Federal Trade Commission said flatly that this statute did not bar bank-insurance company interlocks. And 25 years later, in 1974, the chairman of the Federal Trade Commission testified before Congress that the deficiencies pointed out in their 1950 report still prevail.

In 1965 a staff report of the House Judiciary Committee, and in 1968 a staff report of the House Banking Committee both alluded to the fact that these interlocks were not covered. And I think that's particularly significant in light of the bills that I referred to earlier in this time frame where Congress refused to enact legislation that would have barred these interlocks.

One final minor point. The complaint is brought against both the banks and their holding companies. The case was tried on a stipulation of facts. The stipulation has in paragraph 9 two sentences, one of which we rely on and one on which the government relies on.

The sentence the government relies on provides that the holding companies admit control of the bank through ownership of the stock and the election of directors. And the government and the Court of Appeals said that makes the holding company responsible for the acts of the bank and therefore, if the bank is guilty, the holding company is guilty.

But the second sentence of that very same paragraph says that the directors of the bank, and I quote, "manage the bank and select the officers and control its operations and activities."

Now, the Court of Appeals recognized, and I think it's hornbook law that a parent is not liable for the acts of its subsidiaries unless it actually operates the subsidiary company. And while recognizing that law, the Court of Appeals ignored it by holding the holding companies liable here.

I would like to conclude by saying that we believe the unambiguous language of the statute, the

concession by both the government and the Court of Appeals that they cannot prevail without giving the words "other than banks" a different meaning than the words "other than common carriers," the Conference Report debates to which I have alluded at some length, and the government's failure for over 60 years to bring a case in this area, although it had knowledge that 40 percent of insurance company directors were bank directors.

Thank you, Your Honors.

CHIEF JUSTICE BURGER: Very well, Mr. Simon.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,
ON BEHALF OF THE UNITED STATES OF AMERICA, RESPONDENT

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

This Court is familiar with the background of the enactment of the Clayton Act. That statute was passed in 1914 to supplement the Sherman Act and to correct perceived deficiencies in the Sherman Act. It was intended to arrest in their incipiency conspiracies and monopolies and trusts that would be anticompetitive and to arrest them before their consummation.

Section 8 of the Clayton Act, which is at issue in this case, is part of that overall statutory

scheme. Its prohibition against interlocking directorates between competing corporations is likewise intended to arrest anticompetitive conduct in its incipiency.

Congress was aroused by the fact that concentration of control by a few individuals over the great corporations of the -- of the country may have led to anticompetitive situations among corporations that should have been in unrestrained and active competition. Congress feared that the interlocking directorates would lead to uniform policies among those corporations that should have been competing and that they may have led to joint action against third parties.

Congress was also specifically concerned about the concentration of control over capital. Section 8, therefore, was designed to nip in the bud the possible antitrust violations that could arise in this setting.

Now, as the Committee Reports on the bill explain, Congress emphatically rejected the suggestion that there were not enough men in the country qualified to serve on the boards of directors of the great corporations and that these interlocking directors should be permitted to continue for that reason.

To the contrary, Congress concluded following on the views of the President, that the implementation

of Section 8 would in fact bring new people into the boards and would bring new initiatives and new ideas. And Congress concluded that the notion that there are not enough people to go around on the boards of directors was contrary to our institutions.

QUESTION: I take it, Mr. Kneedler, there is no disagreement with anything you have said so far?

MR. KNEEDLER: That's -- that's correct, Mr. Justice Blackmun.

QUESTION: All right.

MR. KNEEDLER: In this case, the petitioners, as Counsel has indicated, stipulated that the banks and insurance companies involved in this case are corporations engaged in commerce and that they are competitors, principally, in the extension of real estate and mortgage loans.

The Court of Appeals pointed out that the substantiality of the potential competition perhaps affected by this case is indicated by stipulations that in 1975 the three banks had outstanding real estate loans of about $6 billion and the insurance companies involved had outstanding real estate loans of about $32 billion.

Indeed, petitioners have stipulated in this case that the competition between the banks and

insurance companies is not insubstantial and that they have in effect admitted for purposes of this litigation that an agreement between them to eliminate -- to eliminate that competition would violate the antitrust laws, as that principle is used in Section 8.

Now, those -- although these prerequisites for the application of paragraph 4 of Section 8 are satisfied in this case, petitioners nevertheless contend that they -- that the interlocks between banks and insurance companies are exempt from the coverage of paragraph 4. They rely on the phrase in that paragraph "other than banks, banking associations, and trust companies."

The question presented here is whether this phrase, which makes no mention of the insurance companies that petitioners claim are exempt by virtue of their interlock with the banks, whether this phrase should be construed to be limited to the banking institutions that are expressly mentioned in that phrase or whether it should be construed more broadly to exempt from coverage interlocks between a bank and insurance company.

Now, the statutory presumptions governing the recognition of exemptions from the antitrust laws are well established under this Court' decisions. We think

that there are three principles that are especially pertinent here. First is the -- is the basic one, that the antitrust laws are to be liberally construed and correspondingly that exemptions from those laws are to be narrowly construed.

QUESTION: Well, how much weight does that really bear in a closed case, Mr. Kneedler? I mean if you applied that generally, I suppose you'd say anytime there is an arguable point to be made for the government, the courts ought to decide in favor of the government.

I -- I don't see that carries a lot of weight in a case like this.

MR. KNEEDLER: Well, I think, Mr. Justice Rehnquist, that this Court has treated it as a starting point of analysis, and that's the -- that's the point that I am making here. And also that the Court has viewed those principles as applying equally where there is an express exemption as we have here as well as where there is an implied exemption.

QUESTION: Well, it seems to me Justice Rehnquist's point is especially significant when, what is it, 60 years has gone by with one position on the part of the government in this area and now the government changes its position.

MR. KNEEDLER: Well, I would like to address that point, Mr. Chief Justice. In fact, petitioners point to no statement by the Justice Department which has dual enforcement authority with the -- with the Federal Trade Commission during this -- during this period, expressing the view that bank-non-bank interlocks are not covered by the fourth paragraph of --

QUESTION: Well, I wasn't referring to affirmative statements, I was talking about passivity, nonaction.

MR. KNEEDLER: Well, as this Court noted in the W.T. Grant case, which is the previous case it's had before it under Section 8, the government in the -- in the decades immediately following the Clayton Act did not pursue enforcement, unfortunately, perhaps, in any area of Section 8. So these -- failure of the Justice Department to focus specifically on this type of interlock, when read in that context of general absence of enforcement, we think doesn't really -- doesn't really prove very much. In fact --

QUESTION: In the situation you are talking about, you are dealing with a new and what was then regarded as a revolutionary concept of law. And there's nothing new or revolutionary about the antitrust laws now, is there?

MR. KNEEDLER: No, that's -- that -- that's correct. And the --

QUESTION: We've all had 60 years to think about it.

MR. KNEEDLER: Well, as I say --

QUESTION: 60 years in this context.

MR. KNEEDLER: Well, the -- as I say, the -- there was not enforcement action under -- under most circumstances under the Clayton Act. In fact, the 1965 staff report that is cited in the briefs has statistics on the enforcement both by the Federal Trade Commission and by the Justice Department, at page 227, in which that indicates that there was no systematic enforcement program by the Justice Department at all until after World War II.

And in fact, the first suit that eventually went to a judgment in one of these cases was not even filed until 1952.

QUESTION: Is there a standing committee of either house or of both houses on focusing directly on antitrust matters, or a subcommittee of --

MR. KNEEDLER: The respective Judiciary Committees would --

QUESTION: It would be a subcommittee of the Judiciary, would it not?

MR. KNEEDLER: Right. Ordinarily, the antitrust --

QUESTION: At least I recall 20 or 30 years ago Senator O'Mahoney was chairman of that subcommittee and was very active in surveillance of problems of this kind. Was that not so?

MR. KNEEDLER: I don't know specifically on this. There --

QUESTION: I mean generally oversight of the --

MR. KNEEDLER: Yes, I -- yes, I think the Antitrust --

QUESTION: -- antitrust laws.

MR. KNEEDLER: -- Committees do. But I think again, even as -- even as to that, these -- the '65 staff Committee Print that's referred to in the briefs makes the point that the -- that the department and the Federal Trade Commission had generally not enforced the statutes. So that any dissatisfaction that Congress may have felt, and it's unclear to what extent Congress was dissatisfied, seems to have been more generally focused on the general nonenforcement of Section 8 than perhaps on this particular -- particular point.

QUESTION: Mr. Kneedler, do you know when the Antitrust Division of the department was created?

MR. KNEEDLER: I am sorry, I do not, Justice

Rehnquist.

I would point out too that the situation we have here is not unlike that before the Court in the duPont case, which involved the question of whether vertical acquisitions are covered by Section 7. In that case the Court pointed out that there likewise had been a period of 35 years of nonenforcement against vertical mergers.

And also the Federal Trade Commission in fact had gone on record as saying that the vertical acquisitions were not covered, and yet the Court construed the Section 7 as applicable in that circumstance.

And likewise in the Philadelphia National Bank case, the Court noted that the Justice Department had -- itself had expressed doubt after the -- even after the passage of the 1950 amendments that the particular form of acquisition or merger in that case was not covered. And yet that did not deter the Court.

So in the absence of some more affirmative showing of a contemporaneous judgment that these, interlocks such as this, were not intended to be reached by Congress, we think that the absence of that is not controlling.

And I think that I would also like to

underscore the point that Justice Rehnquist made. This is not a situation in which the government is coming in in a situation that would expose the individual directors to criminal liability. Criminal penalties for stopped -- were deleted from the bill. It's not a situation that would require a disruption of the ongoing operations of a company. This isn't a case where the remedy is one of divestiture or something of that sort.

This is not a case that -- a situation in which the interlocking directorate would pose any realistic possibility of treble damages, because the interlocking directorate provision was really prophylactic in nature, and absent some additional abuse, the -- an individual challenging it would probably not be able to demonstrate injury.

I would also point out again that what that --

QUESTION: Well, what, just by hypothesis, if a treble damage plaintiff alleged that the defendant took an action and that there were 10 out of the 30 directors were interlocking directors that were barred by the thing and if they hadn't voted in favor of the resolution, it wouldn't be carried, and this resolution was what led to the policy that is injured. Don't you think that would have some possibility of saving a claim in antitrust violation?

MR. KNEEDLER: Well, conceivably, although -- although we were -- it's our view that in almost every such situation there would be -- it -- there would be -- or it would be necessary to prove an independent violation. In other words, a conspiracy with another -- with another corporation or --

QUESTION: You say that by itself couldn't constitute the antitrust violation?

MR. KNEEDLER: I don't want to rule it out entirely, but it seems to me that it would not, because the interlock itself does -- is not an active sort of thing that injures someone else. It's when the interlock is abused in the way that Congress was concerned about, and that Congress thought the abuses were already covered but it was necessary to -- to have the prophylactic measure in order to prevent any temptation or opportunity for it to happen.

QUESTION: Well, Mr. Kneedler, apart from the antitrust laws, is there any risk that if it were decided that all these directors had been acting unlawfully in serving as directors, that some of their corporate acts might be subject to challenge?

MR. KNEEDLER: I would think not. I would think that the principle of de facto --

QUESTION: And that would be a question of

state law, I suppose.

MR. KNEEDLER: I -- I should think so. But I would think in this setting --

QUESTION: You -- you're sure they're perfectly safe?

MR. KNEEDLER: I --

(Laughter.)

MR. KNEEDLER: I don't want to warrant it, but I --

(Laughter.)

MR. KNEEDLER: -- I would assume so.

I -- one other point just to finish up on this analysis, and that is that the -- the remedy here, to the extent that an insurance company or bank may feel that if there are several insurance company-bank directors on the board, that this might be unsettling for the board, an appropriate remedy could be fashioned to make sure that the respective boards did not have to rid themselves of the directors immediately upon the entry of --

QUESTION: Does it provide for all deliberate speed?

(Laughter.)

MR. KNEEDLER: Something along those lines, as the -- as the Court -- as the Court's decision last term

in Romero Barcello, the Federal Water Pollution Control Act case, that indicated that the -- an appropriate solution could be an injunction ordering the -- the parties to come into compliance. And we would think that, as there, a reasonable compliance period would be appropriate. And that remedy in fact would be simply a turnover of the board, which is something that happens in the normal course anyway through elections or resignations.

So just in order to put this in perspective, I think it's necessary to focus on what the remedy would be. And even though Counsel cites statistics regarding the number of bank directors on boards of insurance companies, it should be pointed out as well that that does not indicate how many of those interlocks would be barred by this statute. This statute again applies only where the corporations are competing in the sense that an agreement to eliminate competition between them would violate the antitrust laws. An insurance company is free to have a bank director on the board as long as that director is not selected from a bank that poses those concerns.

QUESTION: Well, your position, or to put it this way, does your position assume that, going back to, let's say, 50 years ago when Senator Robinson of, I

think, Arkansas and Wright Patman of Texas, and O'Mahoney and Norris of Nebraska were all very active in this surveillance of antitrust laws. And there were many others too. But did all this escape their notice?

MR. KNEEDLER: I --

QUESTION: Did these interlocking directorates escaped their notice all that time?

MR. KNEEDLER: Mr. Chief Justice, I think -- well, even if the -- even if these interlocking directorates came to their attention, again I would make the point that just because they exist does not mean that they violate the statute. One would have to analyze on a case-by-case basis to know whether the interlocked corporations are competitors.

QUESTION: Yes, but they must have been all pretty well aware of Congressman Mann's position.

MR. KNEEDLER: Well, we -- we don't have any -- we don't have any indication of congressional reaction in the -- in the ensuing years. The only thing petitioners have pointed to is Congress' enactment in 1933 of Section 8(a) of the Clayton Act, which was subsequently repealed in 1935, which barred interlocks in essentially a vertical relationship as part of the Glass-Stiegell prohibitions against involving banks and speculation by -- in securities speculation. And that

-- petitioners have attempted to argue that the repeal of that somehow suggests that Congress was -- was content with these relationships. But in fact, that position had nothing to do with horizontal or competing relationships, it had to do with a quite separate problem of involving banks in -- in securities measures.

So other than that, we just have -- I believe we would be reduced to speculation that that -- that Congress as a body was aware of these arrangements and thought them consistent with the --

QUESTION: Well, is it possible that, to take the more recent one, Senator O'Mahoney's subcommittee on antimonopolies and some other -- and the broad range, that those men who were acutely familiar with these fields were not conscious that there were thousands of interlocking directorates of banks and other companies?

MR. KNEEDLER: Well, I -- there -- there have been these staff reports that have called it to the attention of Congress. But there -- but what we have there are simply staff reports, they are not expressions of -- of understanding by Congress or expressions of an intent by Congress not to regulate in the area. The bills that Counsel has referred to died. They were not -- the -- and the failure to enact the bill to overturn a state of affairs has always been viewed by this Court

as being, and especially the basis for overturning a statutory interpretation especially -- about which the Court should be especially cautious.

And particularly, the efforts that Counsel focuses on from 1965 on, a period that is 50 years after the passage of the Clayton Act, Congress' failure to act one way or another in that period, in fact, even in the decades prior to that, comes so long after the Clayton Act that it's difficult to attribute Congress' actions so much later to the intent of the enacting Congress.

If I could return for a moment to the presumptions governing the recognition of exemptions from antitrust laws, I have already mentioned the obvious one concerning the liberal interpretation of the statutes and the narrowness of the exemptions, but there are two other --

QUESTION: Before you get to that, do you think -- do you think there is any merit to Mr. Simon's argument that this really isn't an exemption, it's a question of how you define the offense, because if you said all corporations except banks in the first clause, that wouldn't be an exemption, would it?

MR. KNEEDLER: Well, I -- I -- I regard that as essentially a semantic difference. It quite -- under their view, the -- the -- the statute, which is

otherwise written to apply to all corporations engaged in commerce, assuming the million dollars' capital assets are satisfied, we have what amounts to a clause upon which they rely for an exclusion from that provision. So I -- I --

QUESTION: But it's quite different from a separate statutory enactment, like an exemption from the -- for labor or an exemption for the insurance industry, the McCarran Act or something of that kind, isn't it?

MR. KNEEDLER: Well, it's -- it's -- it's different in the sense that they were enacted at different times, but I think that it's -- the analysis is the same in the sense that the -- that the exemption for which the petitioners are arguing cuts against the grain of the -- of the principal prohibition, which based on the legislative history and the broad political support that gave rise to it was -- was -- reflected a congressional intent broadly to attack these interlocking directorates.

And piecing the bank paragraphs and paragraph 4 together, they together reflect a comprehensive approach to the problem. And if one reads the "other than banks" language as simply referring back to the separate regulation of banks and no broader, then you have a comprehensive package which both gives effect to

the purpose of not having inconsistent treatment of banks and also gives effect to the broad congressional purpose to recognize -- to prohibit these interlocks.

On the other hand, if you give the interpretation which petitioners urge, you have an exemption for banks and insurance companies based on a clause that doesn't even mention insurance companies, situations that are concededly within the policy of what Congress was focusing on in terms of competing corporations and, therefore, cutting against the grain. So I think in that respect, the analysis is largely the same.

This -- this brings me to the second of the points dealing with the presumption. Ordinarily, when Congress has provided for an exemption from the antitrust laws for an entity within a particular business, this Court has been reluctant to extend that immunity or exemption to arrangements between the corporations and the industry and other entities outside.

Well, here we have another situation in that -- in that category where the -- the clause in question is said to provide immunity not only for the banking institutions mentioned but also for insurance companies.

And thirdly, that this Court has generally recognized that where there is an antitrust immunity,

that's ordinarily predicated on the existence of some regulatory authority elsewhere to protect the public interest against the sort of abuses that the antitrust laws would otherwise bar.

And in this situation, if the -- if the clause upon which petitioners rely is limited to banks, then -- then that pattern is sustained here because interlocks between banking institutions are in fact separately regulated. They are separately regulated by the initial paragraphs of -- of Section 8 itself, and now more recently in 1978 they are separately regulated by the Depository Institution Interlocks Act.

So on the -- on the other hand, the interlocks between banks and insurance companies that we have involved in this case are not separately regulated by the initial paragraphs or by the Bank Interlocks Act, although there was an amendment offered in 1978 to -- to extend the coverage to include bank-insurance company interlocks after the District Court's decision in this case, that was rejected not on the merits but because it was not -- it was not germane to the bill and would have been under the Judiciary -- Judiciary Committee's jurisdiction.

And along the same lines with the analysis on an exemption from the antiturst laws, we think that the

analysis that -- that we urge the Court to adopt is supported by looking at the structure of the act. As passed, the initial paragraphs of Section 8 cover interlocks between banking institutions with certain carefully crafted exceptions showing that where Congress wants to accept intelocks even in that category, it has done so.

The succeeding paragraph contains the general prohibition against interlocks between competing corporations generally, limited only by the phrase we have here and the common -- other than common carriers.

Now, it's significant that the substantive standards in the initial paragraphs of Section 8 are different from those in the -- in the fourth paragraph. As initially enacted, for example, the banking paragraphs barred interlocks only where one of the institutions had capital or paid-in surplus exceeding $5 million, which is a figure considerably higher than the -- than the $1 million figure necessary to trigger paragraph 4.

And there was also a prohibition against interlocks in cities of 200,000 or more without regard to the amount of capital. Under paragraph 4, in contrast, the -- the standards were somewhat different. The initial paragraphs covered more than simply

directors, they covered interlocks between other officials. Paragraph 4 just covered directors.

And even though, as Counsel for petitioners points out, the act was amended, the initial banking paragraphs of the act were amended over the years. Even now they contain different standards prohibiting the interlocks than those now in paragraph 4.

So we -- we submit that the natural reading of the phrase upon which petitioners rely here is that it serves to ensure that the bank -- bank interlocks that are governed by initial paragraphs are not also subject by the somewhat inconsistent standards in paragraph 4.

And those same, as I mentioned before, the structure of the act also suggests that Congress legislated in paragraph 4 generally with respect to interlocks and in addition legislated with respect to banks because of a concern over the concentration of capital.

If you put those together, the structure does not suggest an intent nevertheless to exempt interlocks that somehow fall between the cracks of the two. And yet, that's essentially what petitioners urge here, because they do not, as the Court of Appeals and the Federal Trade Commission in its parallel Perpetual case found, there is no indication that Congress carefully

considered the situation of interlocks between banks and competing non-banks and decided that they should be exempt from the -- affirmatively decided that they should be exempt from the antitrust laws for some reason that justified an exception to the general policy.

Now, it may be that in 1914, when Congress was enacting the Clayton Act, that many of the members did not believe that banks were engaged in commerce or that insurance companies were engaged in commerce. This Court had so held in Nathan versus Louisiana and in Paul Burke versus Virginia with respect to banking and insurance.

And so therefore, the Congress that enacted this statute may not have been thinking of paragraph 4 as reaching those sorts of interlocks between banks and insurance companies or one or the other.

But this Court made clear in Southeastern Underwriters that the -- even -- even though the enacting Congress may not have anticipated that this Court would subsequently rule that in that case insurance is part of commerce, that that did not mean that the language in the statute Congress enacted should be limited in that fashion.

And that same principle was applied to banks and specifically to the Clayton Act in the Philadelphia

National Bank case, where the Court noted in a footnote that the banks there didn't even challenge the proposition that they were engaged in commerce, citing the Court of Appeals decision in Transamerica where the Court had engaged in the same analysis under the Clayton Act, that even though the -- the Congress that passed the Clayton Act may not have anticipated that banks were part of commerce, that as that language was expanded or the interpretation of that language was expanded then too the application of the act should.

And in fact, the Section 7 of the Clayton Act refers to corporations engaged in commerce in language that is directly parallel to paragraph 4 of Section 8.

I would like to address then, just in conclusion, the discussion of the debate on the Conference Report. We think in a situation like this, particularly reading the statute against its -- its purposes and the structure of the act, that -- that it would be particularly unwise to rely on scattered pieces of discussion in the legislative history --

QUESTION: Well, why would you say that particularly in the light of the language and the structure of the act? I mean don't you think that the actual interpretation of the written enacted language here is a very close call?

MR. KNEEDLER: No, I -- I would concede that that reasonable persons can differ as the -- as the two -- as the two courts below have indicated, the Federal Trade Commission --

QUESTION: Well, then why wouldn't you put some reliance on this sort of a discussion?

MR. KNEEDLER: Well, I am not --

QUESTION: What it says --

MR. KNEEDLER: -- I am not saying -- I am not saying that it should be ignored, but what -- what should be -- I think what the Court's task in a case such as this is through -- to reconcile the competing -- the competing policies and to -- and to --

QUESTION: Well, Congress has reconciled those, I take it?

MR. KNEEDLER: That's -- well --

QUESTION: You want to rely on a bunch of general presumptions and not address what congressmen thought about this particular clause.

MR. KNEEDLER: Well, the -- but the presumptions that I am speaking of are not judge-made rules, they are guides to the interpretation of the body of antitrust -- of antitrust statutes that --

QUESTION: Is there -- is there a provision in the antitrust acts that says they shall be liberally

construed?

MR. KNEEDLER: No, but that -- that is thought to reflect the intent of the Congress that enacts those statutes by --

QUESTION: Well, where -- I -- you say the presumption of liberal construction is not a judge-made rule?

MR. KNEEDLER: Well, I -- I mispoke. What I am -- what I am saying is that the Court has used it as a -- as a guide to defining the intent of Congress where Congress has enacted a broad statute as the Sherman Act or as paragraph 4 here is, that -- that the general prohibition should be liberally construed to effectuate Congress' purpose as -- as remedial statutes generally are. And the question before the Court then is whether these particular -- with respect to the legislative history is whether these particular references are sufficient to overcome the -- the purposes of the -- of the Clayton Act as -- as this Court observed just last term in -- in Rose versus Lundy and in the previous term in Pennhurst. It's necessary to focus where -- where statutory terms are ambiguous, not just on the particular phrase but to look at the statute as a whole and the purposes and the policies.

And we think that in these situations, the

Conference Report references are not -- do not overcome those points.

QUESTION: Very well. Thank you, Mr. Kneedler.

Do you have anything further, Mr. Simon?

ORAL ARGUMENT OF WILLIAM SIMON, ESQ.,

ON BEHALF OF BANKAMERICA CORPORATION, ET AL.,

PETITIONERS -- REBUTTAL

MR. SIMON: I have just one comment, Mr. Chief Justice. And that is that our primary argument is that the statutory words "two or more corporations other than banks" does not include one bank and one non-bank.

Thank you.

CHIEF JUSTICE BURGER: Thank you gentlemen.

The case is submitted.

(Whereupon, at 11:16 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

Bankamerica Corporation, et al., Petitioners
v. United States #81-1487

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BY _____
(REPORTER)