

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: NATIONSBANK OF NORTH CAROLINA, N.A., ET AL.,  
Petitioners v. VARIABLE ANNUITY LIFE INSURANCE  
COMPANY, ET AL. and EUGENE A. LUDWIG,  
COMPTROLLER OF THE CURRENCY, ET AL.,  
Petitioners v. VARIABLE ANNUITY LIFE INSURANCE  
COMPANY, ET AL.

CASE NO: No. 93-1612 and No. 93-1613

PLACE: Washington, D.C.

DATE: Wednesday, December 7, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - X  
3 NATIONSBANK OF NORTH CAROLINA, :  
4 N.A., ET AL., :  
5 Petitioners :  
6 v. : No. 93-1612  
7 VARIABLE ANNUITY LIFE INSURANCE :  
8 COMPANY, ET AL. :  
9 and :  
10 EUGENE A. LUDWIG, COMPTROLLER :  
11 OF THE CURRENCY, ET AL., :  
12 Petitioners :  
13 v. : No. 93-1613  
14 VARIABLE ANNUITY LIFE INSURANCE :  
15 COMPANY, ET AL. :  
16 - - - - - X

17  
18 Washington, D.C.

19 Wednesday, December 7, 1994

20 The above-entitled matter came on for oral  
21 argument before the Supreme Court of the United States at  
22 10:02 a.m.  
23  
24  
25

1 APPEARANCES:

2 EDWARD C. DuMONT, ESQ., Assistant to the Solicitor

3 General, Department of Justice, Washington, D.C.; on

4 behalf of the Petitioners Ludwig, et al.

5 STEVEN S. ROSENTHAL, ESQ., Washington, D.C.; on behalf of

6 the Petitioners NationsBank, et al.

7 DAVID O. STEWART, ESQ., Washington, D.C.; on behalf of the

8 Respondents.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 93-1612, NationsBank of North Carolina v.  
5 Variable Annuity Life Insurance Company and a consolidated  
6 case.

7 Mr. DuMont.

8 ORAL ARGUMENT OF EDWARD C. DuMONT

9 ON BEHALF OF THE PETITIONERS LUDWIG, ET AL.

10 MR. DuMONT: Thank you, Mr. Chief Justice, and  
11 may it please the Court:

12 This case presents the question whether Federal  
13 banking law permits national banks to act as agents in the  
14 sale of annuities.

15 The Comptroller of the Currency, who has  
16 supervisory authority over the national banking system,  
17 based his conclusion that it does on three determinations,  
18 each grounded in his technical and policy expertise:  
19 first, that banks are authorized to broker financial  
20 investments on behalf of their customers, second, that  
21 modern annuity contracts are essentially investment  
22 products, and third, that nothing in 12 U.S. Code section  
23 92, which authorizes banks operating in small towns to  
24 operate general insurance agencies, prohibits sales of  
25 annuities by banks located elsewhere. The court of

1 appeals erred by failing to defer to the Comptroller on  
2 each of these judgements.

3 The general banking power statute, 12 U.S. Code  
4 section 24 Seventh, provides at the outset that national  
5 banks may exercise "all such incidental powers as shall be  
6 necessary to carry on the business of banking." Defining  
7 what is part of the business of banking at any given time  
8 requires an intimate understanding of a highly dynamic  
9 field. It is therefore a task uniquely within the  
10 competence of the Comptroller.

11 QUESTION: Well, Mr. DuMont, you rely on the  
12 language in the seventh section there of the business of  
13 banking.

14 MR. DuMONT: That's correct.

15 QUESTION: And that phrase is followed by a  
16 listing of six specific things that banks can do, and it's  
17 been my understanding that most courts have defined the  
18 business of banking in terms of those specifically  
19 enumerated powers rather than something more broad.  
20 Should we not look to the six specific things and see if  
21 something is closely related to those?

22 MR. DuMONT: I think the courts are certainly  
23 well advised to look at those things as exemplary of what  
24 is encompassed within the business of banking, the core  
25 business of banking.

1 QUESTION: But you think any investment  
2 instrument of financial investment interest is within the  
3 business of banking even though it's not mentioned in any  
4 of the six listed things?

5 MR. DuMONT: We think that the language of the  
6 first phrase there, 24 Seventh, is broad enough to go  
7 beyond just the listed powers, and the courts have so held  
8 in a variety of cases, including --

9 QUESTION: Including the selling of insurance  
10 policies of any kind.

11 MR. DuMONT: Well, I think if you wanted to  
12 operate a general insurance agency you would be in the  
13 province of section 92, but let me point out that the  
14 second sentence of section 24 Seventh I think is very  
15 important here, if I may, and the second sentence, which  
16 was added in the 1930's, says the business of dealing in  
17 securities and stock by the association shall be limited  
18 to purchasing and selling, and so on.

19 It goes on to -- it recognizes the existence of  
20 the business of dealing in securities and stock, and this  
21 Court has twice before recognized in --

22 QUESTION: You mean the Glass-Steagall --

23 MR. DuMONT: That's the Glass-Steagall  
24 provision.

25 QUESTION: And they wouldn't have had to add it

1 unless the sale of securities and stock had been covered,  
2 is your point.

3 MR. DuMONT: Well, my point is that the way that  
4 that sentence is phrased indicates that it is not granting  
5 a new power but recognizing and limiting one that was  
6 already granted. In fact, this Court has specifically  
7 recognized that fact in both Clarke v. Securities Industry  
8 Association and SIA Board of Governors.

9 QUESTION: Well, could a bank have power to deal  
10 in expensive art for investment purposes? Some people use  
11 art as an investment.

12 MR. DuMONT: I think that that would --

13 QUESTION: Is that within their powers, too?

14 MR. DuMONT: Well, that sort of question would  
15 be one for the Comptroller in the first instance and, of  
16 course, is not involved here. I think --

17 QUESTION: Well, do you think the language would  
18 stretch that far? Would that be a reasonable  
19 interpretation by the Comptroller to which we should  
20 defer?

21 MR. DuMONT: I think that if there were a  
22 practice, as there is in this case over a long period of  
23 years, of banks dealing in that kind of thing as agent for  
24 their customers without substantial equity risk, and that  
25 that had been recognized by the courts over time, I think

1 it would be reasonable for the Comptroller -- and, by the  
2 way, I think I should add, if other banks and savings  
3 institutions regulated by other entities, such as State  
4 banks or Federal thrifts, were engaging in the same  
5 activity, I think it would be reasonable --

6 QUESTION: And do you say that the sale of  
7 annuities is something that has been carried out over a  
8 long period of time by national banks?

9 MR. DuMONT: I say that the sale of investment  
10 products, the brokering of investment products is  
11 something that has been carried --

12 QUESTION: Annuities.

13 MR. DuMONT: Well, they are different questions.  
14 The sale of investment products has been carried out over  
15 a long period of time by banks, and that's --

16 QUESTION: How about annuities?

17 MR. DuMONT: Annuities have been sold by banks  
18 other than those regulated by the Comptroller in the last  
19 several years. In fact, banks are quite a substantial  
20 part of that business, other banks, and that's really part  
21 of the Comptroller's point here, is that there are lots of  
22 banking institutions that are conducting exactly this kind  
23 of agency sale, and there's no reason why national banks  
24 should not be allowed to encompass that within their  
25 business of banking.

1 But we're perfectly willing to address the  
2 question of why annuities are like -- modern annuities are  
3 like investment products of the kind that banks have  
4 traditionally brokered.

5 QUESTION: Where does the term, investment  
6 products come from? Is that some part of the statute?

7 MR. DuMONT: It is not a statutory term.

8 QUESTION: Then why do you use it?

9 MR. DuMONT: Well, I think that the -- the  
10 statutory term is, the business of banking. The question  
11 is, what is fairly encompassed within the business of  
12 banking and powers incidental thereto?

13 The Comptroller has determined that the  
14 brokerage sale of investment products of a variety of  
15 different kinds, whether or not they are securities and  
16 stock specifically recognized by the statute --

17 QUESTION: Did he -- in his ruling did he use  
18 the term, investment products?

19 MR. DuMONT: I believe, financial investment  
20 products, yes, or financial investment instruments.

21 QUESTION: Did he define it?

22 MR. DuMONT: Well, the discussion goes on to  
23 talk about exactly why they are investment instruments in  
24 the modern context, why annuities are, and I can turn to  
25 that.

1 I think that if you look at the modern market,  
2 and this is something the Comptroller did, that the  
3 essential feature of the modern annuity contract is really  
4 a tax deferral feature. In the accumulation of --

5 QUESTION: Mr. DuMont, before you go on with  
6 that, would you just tell us the expression, business of  
7 banking, you said that the six specifics are exemplary,  
8 not exclusive. Where would one look to find the limits of  
9 the term, business of banking, or are there no limits  
10 that -- that emerge from the text, one must see what banks  
11 are doing at a particular point in time?

12 MR. DuMONT: Well, I think it's perfectly fair  
13 to look at the text as a good starting point for what is  
14 the business of banking, but I think it would be erroneous  
15 to take a statute like this, that is really an organic law  
16 to govern the development -- to govern the existence of  
17 the banking industry and to try to freeze at any one time  
18 exactly what banks are doing, and say, well, they were  
19 doing that in 1864, and unless Congress acts specifically,  
20 they can do no other thing from now on.

21 And I would point out that this Court has had to  
22 address a variety of issues, such as borrowing money,  
23 which are not specifically referred to in section 24  
24 Seventh, and yet the Court has not had a lot of trouble  
25 saying, well, look, we look at a particular case with

1 particular facts, and this is a power which is necessary  
2 to carry on the business of banking, and I think that's  
3 exactly the kind of analysis we look to here.

4 Now, there are a variety of -- the text is the  
5 best starting point, but also, I do think that as the  
6 business develops, and banks in a variety of jurisdictions  
7 start dealing with particular kinds of products that one  
8 can fairly look to that development, as the Court really  
9 did, or as the State and lower Federal courts did, in the  
10 case of securities and stock, which may or may not have  
11 been part of the business of banking in the 1860's, but  
12 certainly by the time of the 1930's, when Glass-Steagall  
13 was passed, this Court has properly recognized that that  
14 was a recognized part of what banks were doing. They were  
15 brokering securities and stock for their customers.

16 QUESTION: Mr. DuMont, may I ask you a related  
17 question? Just assume -- I know you don't assume this,  
18 but just assume for the sake of argument that the  
19 annuities in question could be classified either as  
20 securities or as insurance. Just take that as a given.

21 In deciding which way to classify them, I would  
22 like to know, if we do know, what the object of section 92  
23 was. I have assumed that the object of section 92 was --  
24 beyond its desire to help out the little banks by giving  
25 them an extra source of cash, that its object also

1 reflected an intent to protect independent insurance  
2 brokers. Am I right?

3 And if I am right, is that a reason for  
4 construing the -- for saying that, other things being  
5 equal, we ought to recognize that objective, and we ought  
6 to construe these annuities as being insurance rather than  
7 securities in order to realize the protective object of  
8 92?

9 MR. DuMONT: Well, to answer the first question,  
10 I don't think it would be particularly appropriate to  
11 consider that a central purpose of 92, to protect  
12 insurance agents. There is concern expressed in the  
13 primary legislative history, the Comptroller's letter on  
14 the subject in 1916, that banks should not become  
15 department stores and --

16 QUESTION: And didn't that letter also -- I  
17 forget the exact words, but didn't that letter make some  
18 such remark as, you know, it's not going to hurt the  
19 others too much? They said, well, you know, the little  
20 banks will be able to make a little money on this, but  
21 it's not going to hurt the others, by which I assume they  
22 meant the insurance brokers?

23 MR. DuMONT: I think there was certainly  
24 recognition of that, but again, I think you need to look  
25 at that in the context of what 92 was doing, which was

1 authorizing a national bank operating in a small town to  
2 carry on an entire general agency.

3 QUESTION: Oh, I realize it was doing that, but  
4 that's where it stopped, and why would it have stopped  
5 unless it wanted to protect insurance brokers?

6 MR. DuMONT: Well, we really think that section  
7 92 was limited to granting an additional power.

8 QUESTION: Well, I know, but what about the  
9 answer to my question? Assuming that we recognize that  
10 there's a limitation there, isn't the only likely object  
11 of the limitation to protect insurance brokers?

12 MR. DuMONT: No. Even if we grant that there's  
13 some preemptive scope to 92, and that therefore there's a  
14 question to be decided about what was the purpose of 92  
15 and what might be the sort of insurance product that falls  
16 within it, there's no indication that that was meant to  
17 sweep away any product that might ever be sold by an  
18 insurance company, or anything that might for some  
19 purposes be denominated insurance.

20 And in this context, we'd be perfectly willing  
21 to concede, as you say, that annuities might for some  
22 purposes be classified as insurance and for other purposes  
23 not. As long as they're in that middle ground, it is --  
24 it was perfectly within the Comptroller's province to  
25 decide --

1 QUESTION: I grant you that, but I think you're  
2 getting a little bit away from my question. My question  
3 is, why did they put the limitation? Why did they limit  
4 it to the small banks, and was there any reason they did  
5 so, except to protect insurance brokers?

6 MR. DuMONT: Well, certainly. I mean, they --  
7 first of all, the presumption was that a bank in a large  
8 city had plenty of banking business and didn't need the  
9 additional revenue.

10 That's the primary reason, and that's reflected  
11 in the Comptroller's letter, and also that a bank in a  
12 large town that had lots of banking business should be  
13 concentrating its attention primarily on its banking  
14 business as opposed to running a general insurance agency,  
15 whereas none of those things applied in the small town.

16 Incidentally, he did mention that they also  
17 wouldn't be taking business away from insurance brokers in  
18 small towns because they might not be an insurance broker  
19 in such a town.

20 All of that is fine, but I don't think it gets  
21 away from the central purpose of 92 being to confer  
22 additional power on banks and small towns to allow them to  
23 raise extra revenue by operating a general insurance  
24 agency, and really none of those purposes was engaged  
25 here.

1 QUESTION: Is it a plausible argument to say  
2 that an annuity can be both insurance and a security, or  
3 are these mutually exclusive categories?

4 MR. DuMONT: Well, to begin with, it's  
5 importance to distinguish -- for instance, the Court's  
6 prior cases like Bailey, for one, and United Benefit Life,  
7 looked in the securities law context at whether something  
8 was a security, on one hand, or an annuity contract or  
9 insurance on the other, and that made sense in that  
10 statutory context because the specific statutory exception  
11 was from securities law for annuity contracts or insurance  
12 contracts.

13 We have a very different context here, which is  
14 a statute which simply confers some authority to deal in a  
15 broad range of insurance products on banks and small  
16 towns.

17 There isn't anything to set against insurance  
18 like securities. There's no other product that you're  
19 really deciding, is it one or the other. In this case, it  
20 can perfectly well be both. The question is, does it fall  
21 within the scope of insurance as that is intended in  
22 section 92?

23 And our answer to that is, the Comptroller was  
24 perfectly within the grounds of reason to conclude that  
25 no, because these products in the modern marketplace were

1 sufficiently like modern, other modern investment  
2 products, and sufficiently unlike the broad range of  
3 general insurance products, that he could determine that  
4 they are part of the business of banking and --

5 QUESTION: How unlike are they --

6 MR. DuMONT: -- not go under section 92.

7 QUESTION: How unlike are they to life insurance  
8 contracts? Why -- couldn't you make the same argument  
9 about regular life insurance, that it's -- that it's a  
10 form of investment?

11 MR. DuMONT: Well, I think it depends on what  
12 kind of life insurance we're talking about. Pure term  
13 insurance, no, I don't think you can make the same --

14 QUESTION: No. Well, no --

15 MR. DuMONT: there are a variety of insurance  
16 products --

17 QUESTION: Whole life, right.

18 MR. DuMONT: The insurance industry has shown  
19 itself to be very inventive in operating in that medium  
20 ground between pure investment and pure insurance.

21 QUESTION: It's always been considered -- whole  
22 life insurance, anyway, has always been considered a  
23 medium of saving and investment as well as a medium of  
24 life insurance, hasn't it?

25 MR. DuMONT: I think it has, to the extent that

1 it has always existed, which --

2 QUESTION: So your argument would lead to the  
3 conclusion that at least insofar as straight life  
4 insurance -- not term insurance, but investment life  
5 insurance is concerned, bank could have been life  
6 insurance agents.

7 MR. DuMONT: The Comptroller has made no  
8 determination on that, but our argument would be that the  
9 Comptroller could look at a particular set of insurance  
10 products, including whole universal life products, and  
11 decide that if they have predominantly -- predominantly  
12 investment characteristics they are within the scope of  
13 the banking powers and outside the scope of section 92.

14 QUESTION: And you think that's faithful to what  
15 was sought to be achieved by this amendment regarding  
16 insurance. You think it was contemplated that banks  
17 generally could engage in the sale of whole life  
18 insurance. I find that very difficult to credit. I  
19 just -- it doesn't seem to me very likely.

20 MR. DuMONT: Well, I don't -- I don't know what  
21 Congress or the Comptroller thought about life insurance  
22 and banks in 1916, and I'm not sure that it's really  
23 completely relevant.

24 Assuming that they thought -- that they would  
25 have been completely surprised at the notion that a bank

1 anywhere could have sold -- without 92 to could have sold  
2 an insurance policy or an annuity that doesn't give any  
3 scope for the development of the business of banking and  
4 the development of the products.

5 I mean, I think if you really looked at 1916  
6 life insurance products and annuity products, then and  
7 now, you'd find that they are very different, the market  
8 is very different, the country is very different, and the  
9 business of banking is very different. There's no reason  
10 why one should freeze the business of banking or the  
11 concept of insurance for purposes of section 92.

12 QUESTION: Who does the business of banking  
13 besides -- besides the banks that are restricted by this  
14 very provision? Where does one get the concept of the  
15 business of banking, if not from the banks that are  
16 governed by this restriction, which restricts them to the  
17 business of banking?

18 MR. DuMONT: Well, banking, of course, started  
19 out as a State-regulated activity, and still very many  
20 banks, including many very important banks, are State-  
21 regulated, for instance in New York, and as you know, the  
22 New York Court of Appeals has recently said on a case  
23 identical to this that New York banks are entitled to --

24 QUESTION: What banks are selling annuities now?  
25 To what extent are banks selling annuities? What percent

1 of the market, and as between national banks and State  
2 banks?

3 MR. DuMONT: The latter part, I don't know, the  
4 breakdown between State banks and national banks. I don't  
5 have them at the tip of my finger. There are figures in  
6 our brief about the percentage. It's a considerable  
7 percentage, on the order of 20 percent of the modern  
8 annuities market, which is a bank market, I believe.

9 QUESTION: On the order of 20 percent. Now,  
10 suppose we do not accept your argument about the  
11 Comptroller could cover lots of insurance if he chose to  
12 do so, do you lose, or can you treat annuities discretely?  
13 In answer to Justice Scalia's question, can you say, even  
14 if the banks can't touch life insurance, still they can  
15 allow banks to engage in the sale of annuities?

16 MR. DuMONT: I think you can certainly say that.  
17 Annuities are, and always have been, and are treated under  
18 State insurance laws, for that matter, as separate  
19 products from other kinds of insur -- from insurance at  
20 all, and --

21 QUESTION: Can you also draw an intelligible  
22 line between fixed and variable?

23 MR. DuMONT: Well, variable annuities I should  
24 say have been held by this Court in the securities context  
25 to be securities, and therefore they're clearly covered by

1 the second sentence of 24 Seventh, and there really  
2 shouldn't be any issue --

3 QUESTION: Well, they are if the two terms are  
4 interchangeable as between the two statutes, but if we  
5 assume they're not necessarily interchangeable, I take it  
6 the insurance character, the significance of the actuarial  
7 element is much greater in the case of a fixed annuity.

8 MR. DuMONT: The fixed annuities are a more  
9 difficult case, there's no question about that.

10 QUESTION: I thought you had told me that the  
11 distinction between securities on the one hand and  
12 insurance on the other is not very helpful to this case,  
13 yet I see you're relying on that in your answer to Justice  
14 Souter.

15 MR. DuMONT: No, no, all I'm saying is that in  
16 the securities context -- and we agree that they're not  
17 the same context.

18 They're not necessarily the same context, but  
19 both the Comptroller and the SEC and this Court have, in a  
20 variety of contexts, both securities and banking,  
21 recognized that variable annuities are essentially mutual  
22 fund products.

23 They are investment products, and they are  
24 securities. They are regulated like securities, and they  
25 are sold like securities, so in that sense they're clearly

1 covered by the second sentence of section 24 Seventh.

2 QUESTION: In the statute it says, incidental  
3 powers, right? The word is "incidental."

4 MR. DuMONT: Correct.

5 QUESTION: Okay. What I'd like to know -- and I  
6 take it there are then some semicolons and a number of  
7 things listed, and nowhere is listed the word, securities,  
8 yet somebody at some point must have thought that  
9 "incidental" includes securities, which isn't listed,  
10 otherwise they wouldn't have written the second sentence.

11 MR. DuMONT: That's correct.

12 QUESTION: All right. So now, what is -- and if  
13 you can say it in a sentence or so, what is the  
14 Comptroller's basic theory of how you define that word,  
15 "incidental"?

16 MR. DuMONT: I don't know that the Comptroller  
17 has a taken a particular position on --

18 QUESTION: Well, can he put anything in under  
19 the sun?

20 I mean, he must have some theory as to how you  
21 get this word "incidental," which couldn't be limited just  
22 to the next six clauses, but can't include everything in  
23 the world, so what is the basic theory of it?

24 MR. DuMONT: The basic theory is really two  
25 things: one is, you look to the kinds of things that are

1 listed, and to things that might be either convenient or  
2 useful to carrying out those listed powers, or a  
3 reasonable extrapolation from them, and the second is that  
4 you look at banking practices as they have grown up in  
5 other banks that are not necessarily regulated by the  
6 Comptroller, or even among banks that are in the modern  
7 marketplace, and you look to that kind of contemporary  
8 practice.

9 QUESTION: Is that the proper interpretation to  
10 ask under that statute, whether this is an incidental  
11 power? That's not how I read it.

12 I would think the question is whether it is the  
13 business of banking.

14 MR. DuMONT: We think the --

15 QUESTION: Because it doesn't say, colon, to  
16 discount and negotiate promissory notes, to loan money, et  
17 cetera, which would be an enumeration of the incidental  
18 powers. It rather says, to conduct the business of  
19 banking by, rather than to.

20 MR. DuMONT: The preferable reading is that this  
21 is all part of the business of banking and powers are  
22 incidental thereto, but we don't think it makes a lot of  
23 difference.

24 QUESTION: Thank you, Mr. DuMont.

25 Mr. Rosenthal.

1 ORAL ARGUMENT OF STEVEN S. ROSENTHAL  
2 ON BEHALF OF THE PETITIONERS NATIONSBANK, ET AL.

3 MR. ROSENTHAL: Mr. Chief Justice, and may it  
4 please the Court:

5 Let me begin by noting what this case does not  
6 involve. This case does not involve a bank underwriting  
7 annuities. This does not involve a bank seeking to become  
8 a general insurance agent.

9 What it does involve is NationsBank's attempt to  
10 sell a specific financial investment product which is  
11 currently being sold by federally insured thrift  
12 institutions, Federal credit unions, and by respondent's  
13 admission at least a third, and we believe two-thirds of  
14 all State banks, including the State banks that  
15 NationsBank competes with, which are --

16 QUESTION: Does it include all types of  
17 annuities, fixed, variable, and those in between?

18 MR. ROSENTHAL: Our application, Justice  
19 O'Connor, included a request to sell every modern form of  
20 annuities, and we are --

21 QUESTION: Including fixed?

22 MR. ROSENTHAL: Well, our application included  
23 fixed and variable, every possible combination that's  
24 available in the marketplace, and indeed, we do represent  
25 several different insurers and have sold virtually every

1 combination known, so you're talking about the whole  
2 panoply here.

3 QUESTION: Are the statistics you recited just  
4 before your answer to that question, are they applicable  
5 to fixed annuities as well as variable?

6 MR. ROSENTHAL: Yes, Your Honor.

7 QUESTION: That is, two-thirds of all State  
8 banks sell fixed annuities?

9 MR. ROSENTHAL: I haven't looked as carefully as  
10 I should have on that issue.

11 My understanding is that the banks which sell  
12 annuities where States permit it, permit the sale of the  
13 full panoply, and indeed, let me expand on that, according  
14 to the latest available statistics banks, depository  
15 institutions in 1993 sold on the order of \$13-1/2 billion  
16 worth of annuities, representing 19.3 percent of all  
17 individual annuity sales. Those are depository  
18 institutions.

19 It's a huge amount of volume, and it's our  
20 belief that the Comptroller is permitted, under the  
21 National Bank Act, to at least include that as one of his  
22 factors in determining what constitutes the business of  
23 banking. It's not --

24 QUESTION: What exactly will NationsBank do if  
25 its application is granted? Will it, in its own name,

1 sell annuities to people?

2 MR. ROSENTHAL: No. We are not -- we are simply  
3 an agent. We are a broker. The policy is issued by  
4 Hartford Life Insurance, or some company --

5 QUESTION: So I walk into a NationsBank office,  
6 what do I do if I want to buy -- buy one of those  
7 policies?

8 MR. ROSENTHAL: You will go to an account  
9 executive at the branch, you will indicate that you are  
10 interested in purchasing annuities, the account executive  
11 will provide you with material on a wide variety of  
12 different policies, you will look at that material and you  
13 will decide which of the various features you would like,  
14 and then you will write out a check, not to NationsBank,  
15 but to the issuer for the amount of the policy, and we  
16 will handle the application and arrange for the sale.

17 QUESTION: You get a commission, then, from  
18 the --

19 MR. ROSENTHAL: Yes, we do. We do.

20 The position respondents have -- has taken in  
21 its brief is really that the business of banking is a  
22 concept which was frozen as of 1863. I mean, it's frozen,  
23 I say in my brief, like some Matthew Brady daguerreotype.

24 We don't believe that the business of banking  
25 was frozen by banking powers that existed at that time and

1 by the same token we don't believe it's infinitely  
2 elastic.

3 What we're asking this Court to do is to grant  
4 the Comptroller reasoned discretion, as it does under a  
5 variety of other statutes which include similar language.  
6 This Court has had no problem --

7 QUESTION: Well, isn't there some negative  
8 implication from section 92 that large banks can't sell  
9 insurance?

10 MR. ROSENTHAL: I think -- I think this would be  
11 a tougher case, Justice O'Connor, if the Comptroller had  
12 approved our right to be a general insurance agent, to  
13 sell auto insurance, life insurance --

14 QUESTION: Well, my question is this: is there  
15 some negative implication, from the language of  
16 section 92, that suggests that large banks may not sell  
17 insurance?

18 MR. ROSENTHAL: I do not believe, Your Honor,  
19 that section 92 prohibited large banks from selling any  
20 insurance product.

21 QUESTION: You see no negative implications?

22 MR. ROSENTHAL: From selling, Justice O'Connor,  
23 any insurance policy, any insurance product, any product  
24 of an insurance company, we do see some negative  
25 implication in the sense that if we were here trying to

1 sell all insurance products, all products of insurance  
2 companies, we think that that would be a tougher case, but  
3 we note, Your Honor, that at the beginning of Section 92,  
4 Congress express -- Congress expressly preserved existing  
5 banking powers.

6 QUESTION: Why would it be necessary to grant  
7 the authority to sell in places of 5,000 if there were  
8 already a general authority to do that?

9 MR. ROSENTHAL: But there -- I don't think there  
10 is, Justice -- Chief Justice. The fact is that there  
11 wasn't a general power to sell all policies. I mean, all  
12 insurance. All there was under 24(7) is the right to  
13 engage in those activities incidental to the business of  
14 banking.

15 Even in 1994, all that the banking industry has  
16 contended is that 24(7) allows the sale of credit life  
17 insurance, certain policies which are related to lending  
18 and annuities, but not --

19 QUESTION: Get back to Justice O'Connor's  
20 question about the negative implication. You say there's  
21 no negative implication from that grant in section 92?

22 MR. ROSENTHAL: No, I'm -- I thought what I had  
23 answered was that I think there is a negative implication  
24 to the extent that, if we were here in a case in which we  
25 were seeking -- a large bank, NationsBank were seeking to

1 sell auto insurance, life insurance, the full panoply of  
2 insurance, then I think the argument about negative  
3 implication has more weight, but we're not seeking that  
4 here. We're talking about very specialized and particular  
5 products.

6 If I may turn it around, what was the purpose of  
7 Congress adding the language at the beginning of 24(7) if  
8 it was not to preserve the right to sell some products  
9 under other banking powers, and that's all we're talking  
10 about here, and there are two banking powers we're talking  
11 about, 24(7) and the power to deal in stocks and  
12 securities, the second sentence of 24(7).

13 And I would note that we are here urging both  
14 powers, because -- and this is a point which may get lost  
15 in the briefs. There are really two lawsuits here.  
16 There's a lawsuit against the Comptroller with respect to  
17 the 1990 approval. There's also a lawsuit against  
18 NationsBank to enjoin us from selling either fixed or  
19 variable annuities.

20 When we appeared in the district court, we  
21 defended the right to sell under -- under the general  
22 business of banking, but we also defended on the grounds  
23 that under previous rulings which were adopted in 1990 we  
24 had the right to sell variable annuities under the second  
25 sentence of 24(7).

1 QUESTION: But isn't the sale of a fixed annuity  
2 very much like the sale of a life insurance policy?

3 MR. ROSENTHAL: I think that the Comptroller had  
4 the discretion --

5 QUESTION: Well, isn't it?

6 MR. ROSENTHAL: I --

7 QUESTION: Don't -- try to focus on my question.

8 MR. ROSENTHAL: I think, Justice O'Connor, there  
9 is a critical difference, and the critical difference is  
10 that an insurance policy, a life insurance policy dealt -  
11 deals with an insurable risk, the risk that someone will  
12 die prematurely.

13 QUESTION: Well, a fixed annuity does exactly  
14 the same thing.

15 MR. ROSENTHAL: No, it doesn't. It deals  
16 with -- it deals with -- it has a mortality calculation.  
17 I concede that all of them have mortality calculations,  
18 but there area lot of instruments and a lot of entities  
19 which have mortality calculations which are not insurance.

20 The key is, and I think the Court has said this,  
21 sharing of insurance risk, and I believe that the  
22 authorities which we've cited, and there are voluminous  
23 academic authorities, say that annuities are not insurance  
24 because they do not involve an insurance risk. Only the  
25 insurance companies would argue that living to a ripe old

1 age constitutes a risk.

2 QUESTION: Mr. Rosenthal, what about the cases  
3 that this Court had, the Manhart case involving -- those  
4 involved annuities, the TIA Craft cases, where there  
5 were -- there was a pooling male and female, and the  
6 question was whether that was lawful under title VII, but  
7 that was -- it was certainly pooling a risk.

8 MR. ROSENTHAL: I think pooling -- the word  
9 pooling occurs, but the question is, was there a pooling  
10 of insurance risk, and I think what the Comptroller said  
11 in his opinion and what I think he was reasonable in  
12 concluding was that annuities do not involve a pooling of  
13 insurance risk, and we've cited in our briefs, and I think  
14 it's hard to disagree that there are lots of authorities  
15 out there, lots of academicians, lots of court cases which  
16 have held that annuities, fixed annuities do not involve a  
17 pooling of insurance risk.

18 They do involve mortality calculations. We  
19 concede that, but we don't think this that that's the  
20 hallmark.

21 QUESTION: They do involve a pooling, so you're  
22 focusing on the word whether there's a risk or not.

23 MR. ROSENTHAL: Risk, and that's the word that  
24 has been focused on in numerous decisions of this Court,  
25 the word risk, and really what they mean is insurance risk

1 in those cases.

2 QUESTION: Thank you, Mr. Rosenthal.

3 MR. ROSENTHAL: Thank you, sir.

4 QUESTION: Mr. Stewart, we'll hear from you.

5 ORAL ARGUMENT OF DAVID O. STEWART

6 ON BEHALF OF THE RESPONDENTS

7 MR. STEWART: Mr. Chief Justice, and may it  
8 please the Court:

9 I'd like to start by talking about the pooling  
10 question that was just being discussed here by  
11 Mr. Rosenthal, because it seems to us very critical here  
12 to understand the nature of insurance, because the  
13 Comptroller misstated in his definition of insurance. He  
14 said that insurance is indemnification against risk of  
15 loss, and that is not the case. That is a description of  
16 casualty insurance. Life insurance and annuities are  
17 insurance, but they do not involve indemnification against  
18 risk of loss.

19 The elements of insurance are, in fact, pooling  
20 and sharing of risk, which Mr. Rosenthal said. That's  
21 what this Court has said in the McCarran-Ferguson cases in  
22 trying to construe the term, the business of insurance.  
23 If you take a life insurance situation, the people who buy  
24 the life insurance are insuring against the loss of income  
25 due to death for the benefit of their dependents, and the

1 people who die -- let's make sure I get this correct. The  
2 people who die early are subsidized by the premiums paid  
3 by the people who die late.

4 In annuities, you are -- the annuity purchaser  
5 is insuring against the loss of income for the annuity  
6 purchaser, because loss of income ordinarily accompanies  
7 age and retirement, and the people who die late end up  
8 subsi -- boy, I'm afraid I'm going to get it wrong.

9 (Laughter.)

10 MR. STEWART: There is a pooling of risk, and  
11 the people who -- between the people who die early and the  
12 people who die late.

13 (Laughter.)

14 QUESTION: The people who die late are  
15 subsidized by those who die early.

16 MR. STEWART: I'm very grateful.

17 (Laughter.)

18 QUESTION: Yes, but that -- but isn't that the  
19 crucial point, really, which makes us not like insurance?  
20 I mean, I would have thought that insurance in its  
21 heartland concept is a group of people in this room get  
22 together and they think something bad might happen to  
23 them, and they say, if something bad's going to happen to  
24 us, at least we'll get some money, and so what they're  
25 doing is, they're worried about a risk of bad things that

1 are going to happen. They're called risk-averse. So they  
2 put up some money now, a little bit, and then if something  
3 bad happens they get a lot more. That helps them feel  
4 better, all right, or other things.

5 This isn't that at all from the insurance  
6 company's point of view. Maybe you measure it and decide  
7 what the price is going to be, because you take life into  
8 account. That's a decision as to what you're going to  
9 charge.

10 But what the person's buying is not some  
11 protection against some bad thing happening to them. He's  
12 buying an income stream that happens to be measured by his  
13 life, just as if he bought a coupon, a bond, or some other  
14 thing, or a black acre for his life, or a condominium in  
15 Florida for his life. I mean, it seems to me that's a  
16 rather heartland difference, even though I absolutely  
17 concede that insurance companies sell this kind of thing.

18 MR. STEWART: Your Honor, I think you've  
19 crystallized, in fact, the problem, because your  
20 description also would apply to life insurance --

21 QUESTION: Yes, yes, life insurance --

22 MR. STEWART: -- delineated as insurance.

23 QUESTION: -- that's correct. You sell a lot of  
24 things under the name, insurance, that other people also  
25 sell. I'm not denying that insurance companies sell this

1 kind of thing. All I'm saying is -- and it's a  
2 question -- isn't this somewhat removed from the heartland  
3 of what we think of as normal insurance, and doesn't that  
4 fact, or why doesn't it, even though insurance companies  
5 certainly sell this, doesn't that make a difference, or  
6 does it?

7 MR. STEWART: Your Honor, I think --

8 QUESTION: You're going to say it doesn't make a  
9 difference, or you're going to say it isn't different, but  
10 I'm interested in your answer.

11 MR. STEWART: I think it does not make a  
12 difference, because when you're dealing with the risk of  
13 life and death, it is not that the risk may not happen.  
14 That's what you have with an indemnity policy. You have a  
15 risk that may not occur. You may not suffer a loss, and  
16 that's where the Comptroller got off the tracks by going  
17 off on indemnification against risk of loss.

18 For annuities and insurance, you're dealing with  
19 the risk of mortality. That risk will happen. We will  
20 die. The only question is when --

21 QUESTION: Yes.

22 MR. STEWART: -- and the timing of your death,  
23 the stream of income that is generated by your life is  
24 what you will insure.

25 QUESTION: Yes, and when life insurance is

1 bought, normally people say, when a bad thing happens to  
2 me, I don't know when, I'll at least have some money for  
3 my children.

4 Now, people buy it for other reasons, like  
5 investment, and so it isn't necessarily 100 percent that  
6 way. I'm drawing a difference, and what I'm driving  
7 towards is this: why isn't this more like banking than  
8 stocks and bonds?

9 People put money in a bank account, and the bank  
10 pays interest, so instead of the bank paying interest, the  
11 bank one day says, I'll tell you what we'll do, we'll save  
12 all this money for you, and then we'll pay it back to you  
13 with some interest later on when you retire, in equal  
14 monthly payments.

15 Now, people do put money in banks all the time,  
16 and they do want to get back this money. Why isn't this  
17 more like banking than taking your money and buying a  
18 stock and bond?

19 MR. STEWART: Well, Your Honor, I think this is  
20 an elegant theoretical construct, but I don't think it's  
21 the way that the pooling of risk has been viewed in  
22 insurance and in fact what Congress had in mind when you  
23 look at section 92, for example, which talks specifically  
24 only in extending insurance powers for representation of a  
25 life insurance company as well as others.

1           So Congress clearly was thinking of a life  
2 insurance company as selling insurance. That's right in  
3 the text of the statute, that the national bank in a small  
4 town is permitted to sell insurance as agent for a fire,  
5 life, or other insurance company, so although this may be  
6 a theoretical possibility, I don't think it's in the  
7 context of this case available as an outcome.

8           QUESTION: So you mean if insurance companies --  
9 this is -- they're not selling life insurance, they're  
10 selling something called an annuity, and I agree that  
11 insurance companies also sell annuities.

12           You're saying that 92 means that if insurance  
13 companies decide to sell off their real estate -- they  
14 have a lot of bad real estate investments -- or if they --  
15 is it whatever insurance companies do that they can't do?  
16 What is the interpretation of that, 92? I mean, whatever  
17 insurance companies used to sell, that means banks, or if  
18 insurance companies sold a lot of it -- is -- how does  
19 that work?

20           MR. STEWART: Of course not, because annuity  
21 product does involve the pooling of risk, the risk of  
22 outliving your income, the risk of a penniless old age.  
23 It does involve an investment component like the other  
24 elements of whole life insurance. We always recognized  
25 that.

1 QUESTION: All right.

2 MR. STEWART: But it also has an insurance  
3 component.

4 QUESTION: Insurance -- mutual funds also  
5 involve the pooling of risk. Bond funds also involve the  
6 pooling of risk. Lots of things involve the pooling of  
7 risk.

8 MR. STEWART: You do not have one purchaser  
9 subsidizing the loss or gain of another purchaser, that's  
10 the difference, and what -- in the life insurance and in  
11 annuities, the difference is, what you get depends upon  
12 when you die --

13 QUESTION: So if, in fact --

14 MR. STEWART: -- and that is uniquely  
15 different --

16 QUESTION: Yes, all right --

17 MR. STEWART: -- from mutual funds or any other  
18 type of --

19 QUESTION: So if real estate companies pool  
20 condominiums, and sell condominiums for people's life,  
21 that also is in the -- the banks couldn't do that, either?

22 MR. STEWART: I didn't understand the --

23 QUESTION: Well, I mean, you could have -- pool  
24 condominiums. People sell condominiums, a life estate in  
25 a condominium. I don't know if that's a comparable thing

1 or not, but you can use 2 weeks in Florida in this house  
2 for the rest of your life. Big insurance companies might  
3 sell those things. Would that also -- is anything that's  
4 measured, that's a pool and it's measured by a person's  
5 life, is that the definition?

6 MR. STEWART: I think if you're protecting  
7 against a risk of loss and it involves the pooling and  
8 sharing, you do, in fact, have insurance.

9 QUESTION: Aren't there two other problems with  
10 your analogy? You say that what is being insured here is  
11 loss of in -- insurance against lost income from living  
12 too long, but as I understand it, characteristically the  
13 income stream begins regardless of whether you live too  
14 long or not, and it begins regardless of whether you have  
15 other income or not, and so in both of those respects  
16 there's a clear distinction from kind of the paradigm case  
17 of casualty insurance.

18 MR. STEWART: Well, I'm not sure that's true,  
19 Your Honor, because the annuity begins to pay at the  
20 maturity date. It can begin immediately, but it's more  
21 customary at a maturity date which is often coincident  
22 with the retirement date, and it is designed to ensure  
23 that there will be --

24 QUESTION: Well, I mean, most people don't  
25 assume that they're going to go broke on their retirement

1 date. I mean --

2 MR. STEWART: I think most people assume their  
3 income will go down.

4 QUESTION: It's an income supplement really,  
5 isn't it? I mean, it's not a benefit that accrues only if  
6 one's income drops below a certain level. If the person  
7 retires and his rich uncle leaves him millions the next  
8 day, he's still going to get his benefit, so it doesn't  
9 seem to have that feature of the income casualty that sets  
10 it going. Rather, it has a feature of income planning.

11 MR. STEWART: Well, it is a contractual  
12 relationship. It goes on regardless of the individual  
13 circumstances of the annuity purchaser, but the fact  
14 remains, from the company's standpoint and from the  
15 purchaser's standpoint, they are pooling their risk with  
16 the other purchasers of that annuity product.

17 QUESTION: Well, I grant you that there is a  
18 pooling going on, and I grant you that there is an  
19 actuarial feature in deciding what you're going to charge  
20 for what you do, but I don't think there's such a neat  
21 analogy as suggested by the notion that what is being  
22 insured against is loss of income from living too long,  
23 because the triggering events are simply different from  
24 what they are in a casualty circumstance, and I just -- I  
25 guess that's why I think the analogy is weak rather than

1 strong.

2 MR. STEWART: Your Honor, I can only refer you  
3 to the many insurance treatises which deal with exactly  
4 this issue, and agree that that is what people are doing,  
5 and if you look, people are buying life contingency  
6 annuities. They want to have that -- they are preserving  
7 income for their lives. That is, it seems to me is direct  
8 support for what we are trying to say here.

9 QUESTION: Mr. Stewart, why isn't it appropriate  
10 to look at this, as Justice Breyer I think suggested, from  
11 the point of view of the bank's customer, the notion that  
12 the customer has savings, wants to invest the savings for  
13 a return that will be there for a rainy day, for later  
14 years, and that an annuity is today a substitute for that,  
15 more attractive, but it serves the same customer who has  
16 savings and wants to invest the savings for a return.

17 So the bank is serving that very same need that  
18 was once served in a very simple way and now there are  
19 more ways to serve it. Why isn't that -- if you look at  
20 the bank serving its customer, the depositor, why aren't  
21 those two very much alike?

22 MR. STEWART: They -- the difference is, I  
23 think, that what you get depends on how long you live. It  
24 is a different type of arrangement both from the issuer's  
25 standpoint and the purchaser.

1           If the purchaser really wanted simply to save,  
2     the purchaser could buy a term certain annuity. This is a  
3     very small part of the annuity market. That is just an  
4     annuity for 10 years. It doesn't matter whether you live  
5     or die. Your heirs or beneficiaries will get that annuity  
6     payment if you die before the end of it. That is a very  
7     small part of the market, and the --

8           QUESTION: And that you could sell, you say.

9           MR. STEWART: We think -- the pooling of risk is  
10    not present there, yes, that's true. It is not clear that  
11    NationsBank has asked to do that, or the Comptroller has  
12    raised the issue. I don't think it's before the Court.  
13    But we do recognize the pooling of risk is not present  
14    there. Those annuities are regulated as insurance.

15          QUESTION: In the brief for the Federal  
16    petitioners at pages 34 -- 33 and 34, there's a footnote  
17    that seems to indicate that, while small, it's not that  
18    small, the kind of annuity that doesn't depend on the  
19    length of one's life.

20          MR. STEWART: Well, it is a small part of the  
21    market, and my point was simply that the purchaser's  
22    annuities are not taking the pure tax-deferred benefit  
23    which is being posited by the Court here, but rather,  
24    they're choosing the product which provides also this  
25    insurance characteristic, the life definition of their

1       benefits.

2               QUESTION:   Mr. Stewart, would a purchase by an  
3       elderly person of a life estate in a retirement home be  
4       insurance within your definition?

5               MR. STEWART:   I think not, Your Honor.

6               QUESTION:   Why not?

7               MR. STEWART:   Because that is an individualized  
8       transaction.

9               QUESTION:   I know, but it's the same subsidy.  
10       The people who live a short period of time subsidize those  
11       who live longer.   It's exactly the same thing.

12              MR. STEWART:   Your Honor, I think --

13              QUESTION:   And it's the same risk, the same -- I  
14       don't understand the difference.

15              MR. STEWART:   I think that we also do have to  
16       look at the traditions of regulation of insurance in this  
17       country at some point, and at that point --

18              QUESTION:   Yes, but if you do that to much --

19              MR. STEWART:   I don't want to be --

20              QUESTION:   If you do that, don't you fall into  
21       your opponent's argument that business changes over the  
22       times, and what might not have been insurance 50 years ago  
23       can be considered insurance today?

24              MR. STEWART:   If annuities had changed in any  
25       material way, that would be possibly true, but we think

1 annuities in their core really are exactly the same as  
2 they were 100 years ago or 50 years ago or 80 years ago.

3 QUESTION: Were variable annuities sold at the  
4 time these laws were passed?

5 MR. STEWART: Variable annuities are the single  
6 innovation, you're exactly right.

7 QUESTION: They were not sold then. It tended  
8 to be --

9 MR. STEWART: They were not sold then. They  
10 came on the scene in the fifties. About 75 to 85 percent  
11 of the market, according to the petitioner's source, is  
12 currently fixed annuities, not variables. The variable  
13 annuities have been held by this Court to include a  
14 securities element, but there's also an insurance element  
15 that is retained in the variable annuities.

16 QUESTION: So as to the variables, do you think  
17 that falls within the enumerated powers of banking under  
18 the seventh section, to the extent they're securities?

19 MR. STEWART: No, Your Honor. The enumerated  
20 powers of banking have been crystallized, really, as  
21 three: taking of deposits, the extending of credit, and  
22 the exchanging of credits. It has nothing to do -- the  
23 sale of a variable annuity has nothing to do with any of  
24 those.

25 Now, a question has been -- and it's been

1     unclear, I think, in the argument from petitioners as to  
2     whether the second sentence of this provision, section  
3     24(7), is really at issue here, the business of dealing in  
4     stocks and securities. The Comptroller expressly excluded  
5     reliance upon that provision. The court of appeals did  
6     not rely on it, either, so we think that question is not  
7     before the Court.

8             QUESTION: Well, I'm curious, though, inasmuch  
9     as this Court has said those instruments are securities,  
10    whether it wouldn't fall squarely within that provision.

11            MR. STEWART: We think not, because they're a  
12    different kind of security, and here it's necessary to  
13    harmonize the provision there with the provision of  
14    section 92, which we do think has a powerful negative  
15    implication, because variable annuities have both security  
16    and insurance characteristics. I think Justice Kennedy's  
17    question was on point on that. They do have both  
18    characteristics.

19            Banks have been allowed to sell securities, but  
20    the assumption in that has been, these are tradable  
21    securities. Annuities are not like that. They're not  
22    that kind of security, and in order to harmonize that,  
23    because they're also insurance, harmonize it with  
24    section 92, it's necessary that they not be an instrument  
25    that can be handled by national banks.

1           QUESTION: Mr. Stewart, you may already have  
2 alluded to this, but let me ask you, with respect to your  
3 argument that in fact the enumerated powers are  
4 essentially exclusive, do you agree that the final  
5 sentence of the seventh section makes no sense, except on  
6 the congressional assumption that the enumeration was not  
7 exclusive, because there's nothing in the enumeration that  
8 would be taken to refer to stocks and securities, so  
9 Congress must have assumed that in fact the so-called  
10 powers incident to banking were broader. How do you deal  
11 with that?

12           MR. STEWART: Well, I think there's some  
13 confusion here, because the initial stock and security  
14 trading power for national banks was created by the  
15 McFadden Act in 1927, and that was an affirmative grant of  
16 power. In the 1930's, the Glass-Steagall Act amendment  
17 that and basically rendered it in the current form to  
18 prevent national banks from selling other types of  
19 products. What this Court has said is, that was the first  
20 time national banks were authorized to sell them.

21           The Comptroller, in a technique somewhat akin to  
22 what has happened -- he's done here did, prior to that,  
23 tell national banks that they could, in fact, start to  
24 sell debt securities, and there was some development in  
25 that area which became very controversial during the

1 depression.

2 QUESTION: So that this was essentially just a  
3 kind of -- perhaps a misleading and untidy way to deal  
4 with what Congress took as a fait accompli?

5 MR. STEWART: I think that's right.

6 QUESTION: Why shouldn't Congress -- why  
7 shouldn't we deal with a fait accompli in this case? The  
8 banks are selling all of this stuff.

9 MR. STEWART: Well, I think if, in fact, that  
10 issue, the bank's ability to sell securities, had come to  
11 this Court in 1925, the decision of this Court would have  
12 had to be that they lacked the power to do so.

13 QUESTION: Okay, but now we're in the situation  
14 in which the 1925 analogue doesn't work with respect to  
15 annuities, either.

16 MR. STEWART: Well, I think it does.

17 QUESTION: In other words, if it was  
18 appropriate -- I guess my question is, if it was  
19 appropriate for Congress to write the final sentence on  
20 the assumption that -- and I think it makes no logical  
21 sense otherwise -- on the assumption that the bank's  
22 incidental powers could include the power to sell stocks  
23 and securities, and Congress did that because the -- you  
24 know, the cat was out of the bag, then why isn't it  
25 equally appropriate for us to construe the first sentence

1 on that same set of assumptions, which I gather would put  
2 us in the same interpretive position that the State of New  
3 York is in with respect to its statute, which was taken as  
4 the model for this?

5 MR. STEWART: Your Honor, I think we're getting  
6 this turned upside down, because in fact Congress had to  
7 grant that power because the banks didn't have the power,  
8 just as, if banks are really to have the power to sell  
9 annuities, Congress is going to have --

10 QUESTION: But if that's all Congress was doing,  
11 Congress -- all Congress had to say is, they can sell  
12 stocks -- they can broker stocks and securities, and that  
13 isn't what it said. It wrote a sentence which -- the  
14 logical form of which implies that the power is there.

15 MR. STEWART: Your Honor, I don't read it that  
16 way. I think the form of that statute has to be  
17 understood in the sequence between the McFadden Act and  
18 the Glass-Steagall Act, which cut back on a preexisting  
19 power which had been created only 6 or 7 years earlier,  
20 and that accounts for the form of it.

21 There was a preexisting power, but it was  
22 unauthorized, and we think that by Congress authorizing  
23 it, going to that step --

24 QUESTION: I don't understand. What's an  
25 unauthorized preexisting power?

1 MR. STEWART: By which I mean it had been  
2 approved by the Comptroller but was not legal, and that if  
3 it had been tested in the courts it would have been found  
4 illegal.

5 QUESTION: Right, and if all Congress meant to  
6 do was to legalize what the Comptroller had been doing,  
7 the sensible way to do that would have been to say, it is  
8 lawful for banks to sell stocks and securities, but it  
9 didn't do that. It wrote a sentence which seems to imply  
10 that they had a general power to do that.

11 MR. STEWART: Your Honor, I think if you look  
12 back, and this issue has not been briefed in this case,  
13 and it has not been developed by the Comptroller, and it  
14 has not been developed in the court of appeals, so this  
15 Court is coming to it in the first instance, but if you go  
16 back and look at the McFadden Act and the way that was  
17 written, then that will explain why the Glass-Steagall  
18 Act, that sentence now is written in such a way --

19 QUESTION: Are you saying that in the McFadden  
20 Act, the text of which is not incorporated here, there was  
21 an affirmative grant of authority to sell stocks and  
22 bonds?

23 MR. STEWART: I think that's what this Court  
24 found in Clarke v. Securities Industries Association, yes.

25 QUESTION: When did this sentence that we're

1 talking about, the second sentence, the business of  
2 dealing in securities, when was that sentence enacted by  
3 Congress?

4 MR. STEWART: Well, it's first form was enacted  
5 in 1927 in the McFadden Act, and then it was amended in  
6 the Glass-Steagall Act.

7 QUESTION: The McFadden Act was '27, the Glass-  
8 Steagall Act was '33, or --

9 MR. STEWART: '33 or '34.

10 QUESTION: I'm sorry, I don't quite understand,  
11 because I have in front of me two sentences from section  
12 24(7). We know what those two sentences are, right?

13 All right. Now, are you saying that in the  
14 statute books there's some other sentence some place that  
15 affirmatively gives to banks the authority to sell  
16 securities?

17 MR. STEWART: No. I'm saying the --

18 QUESTION: No.

19 MR. STEWART: -- second sentence was rewritten.

20 QUESTION: So the answer's no. All right. So  
21 the only sentences -- I'm just looking at the words. I  
22 just want to look at the words.

23 QUESTION: You're appealing to the legislative  
24 history, I think, aren't you?

25 QUESTION: No, I --

1 MR. STEWART: Well --

2 QUESTION: I'm just not looking at the  
3 legislative history. I'm just looking at the words.

4 (Laughter.)

5 MR. STEWART: I don't think that was a  
6 helpful --

7 QUESTION: He wants to --

8 (Laughter.)

9 MR. STEWART: I'm referring to the development  
10 of the statute.

11 QUESTION: So you're -- I misunderstood you,  
12 too. You're saying that the predecessor sentence of the  
13 sentence which now is the final one in section 7 extended  
14 that authority. That's what you're saying.

15 MR. STEWART: Authorized those activities, yes.

16 QUESTION: Yes. I understand you.

17 MR. STEWART: I did want to talk just a second  
18 about the sequence of the statutes here, because it seems  
19 to us very important. Section 24(7) was adopted in 1863.  
20 It included an -- the incidental powers clause without  
21 change for the last 130 years.

22 In 1915 and 1916, almost 50 years -- more than  
23 50 years later, the Federal Reserve Board and the  
24 Comptroller concluded -- and now it's -- the national  
25 banks had no insurance powers. In fact, the Comptroller

1 said insurance was an outside business naturally belonging  
2 to others.

3 Now, he then asked for a statute to be enacted  
4 to allow the banks and small towns, national banks and  
5 small towns to exercise these powers, and specifically he  
6 specified that it would be unwise and undesirable to give  
7 it to the banks in larger towns.

8 This sequence, it seems to us, is very powerful,  
9 because the Comptroller is saying that in 1990 he's all of  
10 a sudden discovered that back in 1863 that statute  
11 actually authorized insurance sales and annuity  
12 insurance -- sales of annuities all along, and I think  
13 that renders the entire sequence in 1915 and 1916  
14 really --

15 QUESTION: I don't think the argument was all  
16 along. I think it was, the business of banking changes  
17 over time, and I think as Mr. Rosenthal put it, this  
18 statute is like some other statutes that are meant to  
19 govern a business. The phrase, "restraint of trade" may  
20 mean something different today than it meant when it was  
21 originally put in the Sherman Act.

22 MR. STEWART: Well, but this Court in construing  
23 section 24(7) has been very careful to tie any extension  
24 to those powers to the express powers enumerated in  
25 section 24(7). As Justice Sutherland wrote in the First

1 National Bank of St. Louis v. Missouri, you can only carry  
2 into effect those powers which are granted. Incidental  
3 powers can only be used in that regard.

4 QUESTION: It's not very helpful to limit  
5 somebody to the business of banking if the business of  
6 banking means anything that banks want to do.

7 MR. STEWART: Yes.

8 (Laughter.)

9 QUESTION: And do in sufficient numbers.

10 MR. STEWART: Yes, and of course, that's a very  
11 fair point, which is, the statute does not say the  
12 business of banks. It says, the business of banking,  
13 which must mean something more, and indeed --

14 QUESTION: Do you take the position -- I just  
15 want to be sure. Do you take the position that the  
16 concept of banking was frozen as of the date of the  
17 enactment of the statute?

18 MR. STEWART: Absolutely not.

19 QUESTION: Well then, you disagree with Justice  
20 Scalia's question, I gather.

21 MR. STEWART: Well -- I don't think that was the  
22 import.

23 QUESTION: I think it was the --

24 MR. STEWART: Perhaps I misread it.

25 QUESTION: Well, maybe I didn't understand it,

1     then.

2             MR. STEWART:  The -- we think that the express  
3     powers given to banks, the way those are carried into  
4     effect will change over time.  For example, how you  
5     receive deposits, will become safety deposit boxes --  
6     those have been approved by this Court.  You can go to ATM  
7     machines.  These are all developments, but it relates to  
8     the express powers of the banks.

9             The banks -- the business of banking will  
10    change.

11            QUESTION:  Well, for example, there's a power,  
12    loaning on personal security.  Does that mean that the  
13    note -- the person who gets the note must be personally  
14    liable on every note that the bank makes?

15            For example, lending money on -- mortgaging real  
16    property, or chattel mortgages, all that -- how do you  
17    justify all that?

18            MR. STEWART:  I think it is all part of the  
19    extension of credit, which is authorized.

20            QUESTION:  Any extension of credit is  
21    authorized?

22            MR. STEWART:  Yes.

23            QUESTION:  I don't see that.  Where is extension  
24    of credit authorized?

25            MR. STEWART:  I think that has been the

1 construction of the statute.

2 QUESTION: Which of the five powers?

3 MR. STEWART: Your Honor, I don't have it before  
4 me.

5 QUESTION: Well, the only loaning is by loaning  
6 money on personal security.

7 MR. STEWART: That has been read to involve the  
8 extension of credit, because personal security wouldn't  
9 apply to corporations as well.

10 QUESTION: It wouldn't -- or -- and nobody  
11 guarantees the note. It's just secured by a piece of real  
12 estate. I don't know how that fits in this.

13 MR. STEWART: It has been read to --

14 QUESTION: Yes.

15 MR. STEWART: Extension of credit generally, and  
16 we think that is fair. That is contemplated.

17 QUESTION: Even though it doesn't say so?

18 MR. STEWART: I think it does say so, Your  
19 Honor. What it does not say is that there's any power to  
20 sell insurance, and I think if you look at section 92 and  
21 what Congress was doing in response to what the  
22 Comptroller said, Congress was, in fact, responding to  
23 this need only to grant a small amount of insurance, and  
24 as this Court has held, powers not conferred by Congress  
25 are denied in that sort of setting.

1 QUESTION: If you can generalize with respect to  
2 the extension of credit, why can't you generalize with  
3 respect to the investment power, which happens to be  
4 receiving deposits? People today, instead of just making  
5 deposits, want other ways of making investments. If  
6 generalization is good with respect to credit, why isn't  
7 generalization good with respect to investment?

8 MR. STEWART: Because the bank itself is not  
9 receiving deposit here. It is acting as an agent for an  
10 insurance company --

11 QUESTION: Well, that's --

12 MR. STEWART: -- in a context where --

13 QUESTION: -- that is to say we won't  
14 generalize, but my question is, why don't you generalize?

15 MR. STEWART: Well, I think in this instance,  
16 section 92 indicates that Congress addressed this and  
17 specifically indicated that it did not want banks to  
18 participate in this kind of activity.

19 Thank you, Your Honor.

20 CHIEF JUSTICE REHNQUIST: Thank you,  
21 Mr. Stewart. The case is submitted.

22 (Whereupon, at 10:59 a.m., the case in the  
23 above-entitled matter was submitted.)  
24  
25

## CERTIFICATION

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

*NATIONSBANK OF NORTH CAROLINA, N.A., ET AL., Petitioners v. VARIABLE ANNUITY LIFE INSURANCE COMPANY, ET AL. and EUGENE A. LUDWIG, COMPTROLLER OF THE CURRENCY, ET AL., Petitioners v. VARIABLE ANNUITY LIFE INSURANCE COMPANY, ET AL.*

*CASE NO.:93-1612 and No. 93-1613*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Am Mani Federico*

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