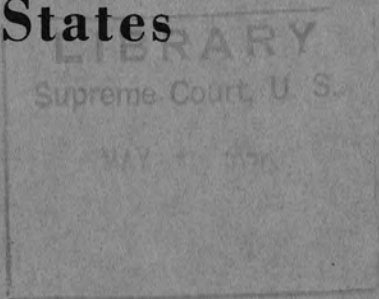


# Supreme Court of the United States

OCTOBER TERM, 1969



In the Matter of:

Docket No. 1093

UNITED STATES,

Appellant,

vs,

PHILLIPSBURG NATIONAL BANK AND TRUST  
COMPANY, et al.

Respondents.

RECEIVED  
SUPREME COURT, U.S.  
MARSHALLS OFFICE  
MAY 18 12 22 PM '70

Duplication or copying of this transcript  
by photographic, electrostatic or other  
facsimile means is prohibited under the  
order form agreement.

Place Washington, D. C.

Date April 28, 1970

**ALDERSON REPORTING COMPANY, INC.**

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

TABLE OF CONTENTS

	<u>ARGUMENTS OF:</u>	<u>P A G E</u>
1		
2	Daniel M. Freedman, Esq., on behalf of	
3	Appellant	2
4	Philip L. Roache, Jr., Esq., on behalf of the	
5	Office of the Comptroller	40
6	Robert B. Meyner, on behalf of Appellees,	
7	Phillipsburg National Bank and Trust Company	
8	and Second National Bank of Phillipsburg	67

	<u>REBUTTAL ARGUMENTS OF:</u>	<u>P A G E</u>
9	Daniel M. Friedman, on behalf of Appellant	82

\* \* \* \*

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

-----x  
 :  
 4 UNITED STATES, :  
 :  
 5 Appellant :  
 :  
 6 vs. : No. 1093  
 :  
 7 PHILLIPSBURG NATIONAL BANK AND TRUST :  
 COMPANY, et al, :  
 :  
 8 Respondents. :  
 :  
 9 -----x

Washington, D. C.  
April 28, 1970

The above-entitled matter came on for argument at  
10:48 a.m.

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

APPEARANCES:

DANIEL M. FRIEDMAN, Esq.  
 Department of Justice  
 Washington, D. C.

PHILIP L. ROACHE, JR., Esq.  
 Office of the Comptroller of the Currency  
 Washington, D. C.

ROBERT B. MEYNER, Esq.  
 Newark, New Jersey

P R O C E E D I N G

1 MR. CHIEF JUSTICE BURGER: We will hear arguments in  
2 No. 1093, United States against Phillipsburg National Bank and  
3 Trust Company.

4 Mr. Friedman, you may proceed whenever you are ready.

5 ARGUMENT OF DANIEL M. FRIEDMAN, ESQ., ON BEHALF OF APPELLANT

6 MR. FRIEDMAN: Mr. Chief Justice, and may it please  
7 the Court.

8 This is a direct appeal from the District Court to the  
9 District of New Jersey from a judgment of the District Court  
10 there which after trial dismissed a Government civil anti-trust  
11 suit challenging the merger of two banks in the town of Phillips-  
12 burg, New Jersey, as violating Section 7 of the Clayton Act.

13 The appeal presents a number of important questions as  
14 to the standards to be applied by the Courts in passing upon the  
15 application of Section 7 to small bank mergers and also to the  
16 correction of certain rulings made by the District Court in this  
17 case in upholding the community-and-convenience-needs defense  
18 that Congress wrote into the Bank Merger Act of 1966 as a per-issibl  
19 missible basis for justifying anticompetitive mergers.

20 Before discussin the facts and these legal issues,  
21 however, I would just briefly like to explain to the Court why  
22 the Government considers this an important case and why the  
23 Government has brought to this case a factual situation on its  
24 face does not seem to be of the greatest economic significance.

25 Ten, fifteen years ago, we had in this country a great

1 wave of tremendous bank mergers. Multi-billion dollar institu-  
2 tions combined, institutions involving hundreds of million dol-  
3 lars combined in the large metropolitan areas, New York City,  
4 Philadelphia, Chicago, Houston, and so on.

5 As a result of this Court's decision in 1963 in the  
6 Philadelphia bank merger case and a series of other decisions  
7 under Section 7 of the Clayton Act, the focus of the whole trend  
8 of bank mergers has shifted. Today we no longer have this  
9 pattern of large bank mergers in the big cities. Those seem to  
10 be a thing of the past, because under this Court's decisions  
11 these combinations and these very large, highly concentrated  
12 markets are illegal.

13 What we have instead is a developing trend of mergers  
14 among the smaller banks in the smaller areas. In the past four  
15 or five years, virtually all of the Justice Department's bank  
16 merger suits have been brought against this type of merger. The  
17 reason we have brought these cases is that we think, since in  
18 the smaller marketing areas, the very nature of banking tends  
19 to make it a concentrated market, a relatively small number of  
20 banks.

21 Since in the smaller communities, as I shall develop  
22 in the course of my argument, the people particularly affected  
23 are the small borrowers, most of the small banks tend to be pri-  
24 marily concerned with the small customers, we think it is parti-  
25 cularly important in these small markets to preserve for banking

1 customers the available alternatives of choice; that is, to make  
2 sure that in these markets that already tend to be concentrated  
3 there does not take place a large number of bank mergers which  
4 further reduce the available alternative.

5 That is why we think this particular type of situa-  
6 tion -- this is the first case that has come before this Court  
7 involving so-called small bank mergers -- that is why we have  
8 brought the case. We think it is an important case.

9 Q There have been quite a number of them in the  
10 courts of appeals, however, have there not?

11 A In the District Courts, Mr. Chief Justice.

12 Q That have gone to the courts of appeals ---

13 A No, Mr. Chief Justice. These cases -- we have  
14 lost, I have to admit unfortunately, several of these cases in  
15 the District Courts that we have not appealed, because these  
16 cases under the Expediting Act, all of these bank merger cases,  
17 come directly from the District Court to this Court.

18 There have been other cases, bank merger cases, involv-  
19 ing other issues in the Courts of appeals, but there have been  
20 none of the Government suit's challenging bank mergers in the  
21 courts of appeals.

22 Q How many of these have there been, Mr. Friedman,  
23 that you have decided not to bring here?

24 A Not to appeal, there have been, I think, three or  
25 four of them. But, those involved somewhat different situations.

1 Those, in contrast to this case which involves the combination  
2 of two banks in the same market, direct competitors, -- most  
3 of the cases that we have brought and decided not to appeal have  
4 been cases in which a large bank from outside of the immediate  
5 area has come in and acquired a bank in the market. The theory  
6 there being there was an elimination of a potential competition  
7 of a bank that came in and acquired ---

8 Q Well, have there been any situations comparable  
9 to this that you have decided not to appeal?

10 A I don't believe there have been any which have  
11 actually gone to trial. I think there are some that have been  
12 pending, and I think there have been a couple in which we brought  
13 and the merger terminated at that point.

14 Now, let me, with this background, come to the facts  
15 of this case. Phillipsburg, New Jersey, is an industrial com-  
16 munity with a population of about 18,000; including the surround-  
17 ing suburban area of the town, it has 28,000. It is directly  
18 across the Delaware River from the City of Easton, Pennsylvania,  
19 a larger city with a population of 32,000; and in the environs,  
20 approximately 60,000.

21 The two cities are very close together. They are  
22 connected by two bridges, one of which is free and the other  
23 of which there is a charge for commuters of 2-1/2 cents a cross-  
24 ing. There is a very close business and commercial relationship  
25 between the two towns. People go back and forth from the two

1 town to shop. People go back and forth from work. As a busi-  
2 ness man in Phillipsburg described it, he said that the Phillips-  
3 burg-Easton area is in effect really one town.

4 Like so many of the cities these days, the central  
5 area of both of these communities has not had much growth. It  
6 has become rather stagnant in recent years. Its population has  
7 remained quite stable. On the other hand, the surrounding areas  
8 have grown both in terms of population and industry.

9 The town of Phillipsburg has three banks. The town of  
10 Easton has four banks, one of which is a branch of a bank in  
11 the Easton suburbs, where the main office is located a few miles  
12 away in the town of Nazareth, Pennsylvania.

13 The acquiring bank in this case, the Phillipsburg  
14 National Bank, is the largest in Phillipsburg and the third largest  
15 in the Phillipsburg-Easton area. In 1967 -- and these are the  
16 latest data -- this the latest date for which data are in the  
17 record -- the assets were approximately \$24 million. It has its  
18 main office in the downtown part of town, and it has two branches  
19 in the suburban areas that it opened in 1964.

20 The acquired bank, the Second National Bank of Phillips-  
21 burg, is the second largest bank in that town and the fifth  
22 largest in the Phillipsburg-Easton area. It has assets of  
23 \$17 million, a little less than that of Phillipsburg National.  
24 Its main office in Phillipsburg is directly across the street  
25 from that of the Phillipsburg National Bank. It has one branch



1 in the suburbs, again, across the highway from one of the branches  
2 of Phillipsburg National.

3 It is thus apparent from the facts that these two  
4 banks are direct competitors.

5 Both of these banks in recent years have undergone  
6 substantial growth and both have been profitable. In the 10-  
7 year period from 1957 to 1967, Phillipsburg National doubled its  
8 assets and deposits and tripled its loans. In the same period,  
9 1957 to 1967, Second National increased its assets 82 percent,  
10 its deposits 86 percent, and, again, tripled its loans.

11 For the years 1962 to 1967 except for one year in which  
12 Phillipsburg National showed a deficit, because of various  
13 accounting changes it had employed, each year it had substantial  
14 profits. After taxes, they ranged from \$46,000 to \$123,000.  
15 Over that same five-year period, Phillipsburg National paid total  
16 dividends of \$192,000.

17 Similarly, the Second National Bank in this five-year  
18 period every year had substantial earnings ranging from \$35,000  
19 to \$73,000. It paid total dividends in that period of \$198,000.

20 Both of these banks provide a full range of the tra-  
21 ditional and usual banking services. They accept demand depos-  
22 its, savings and time deposits. They provide a checking ser-  
23 vice. They make various types of the usual loans, commercial  
24 and industrial loans, mortgage loans, installment loans, con-  
25 sumer loans. They have safe deposit boxes, etc.

Unlike the large-city bank, however, these banks, as

1 apparently is typical of most banks in the smaller communities  
2 have a much heavier percentage of their deposits in time and  
3 savings deposits and a much lower percentage of their deposits  
4 in the demand deposits, because of the fact that this community  
5 just doesn't have the same kind of heavy industry that we have  
6 in the large cities.

7 Similarly, in terms of their loans, a much greater per-  
8 centage of their loans are in real estate loans than the big-city  
9 banks and a much smaller percentage in commercial and industrial  
10 loans.

11 The banking market in the Phillipsburg-Easton area is  
12 a concentrated one. The two top bank, both in Easton, have  
13 approximately 50 percent of the assets, almost 40 percent of  
14 the loans and 55 percent of deposits and when we take the three  
15 leading banks, which includes the Phillipsburg National Bank, it  
16 comes to roughly 60 percent of assets, 65 percent of deposits  
17 and 65 percent of loans.

18 Now, as I have indicated, there is a substantial ex-  
19 tent of social and commercial intercourse between the two towns.  
20 In addition to that, there is a good bit of movement back and  
21 forth between the Phillipsburg-Easton area and the surrounding  
22 areas of the country. This was originally a rural farming  
23 country and as there has been increasing population growth and  
24 industry, a large number of smaller towns have developed. In  
25 fact, the evidence shows that people who live in Phillipsburg-

1 Easton frequently go outside of the area to work and people who  
2 live in the outside area come to Phillipsburg and that people  
3 from Phillipsburg-Easton go as far as Allentown and Bethlehem,  
4 Pennsylvania, 20 or 30 miles to shopping.

5 But -- and we think this is critical and I will develop  
6 it in more detail a little later -- the record shows that the  
7 two merging banks do the vast bulk of their business of all types  
8 in the Phillipsburg-Easton area.

9 Now, with this as a background, I would like to come  
10 to the decision of the District Court in this case.

11 Q Does the record show how much business the banks  
12 outside of Phillipsburg-Easton area get from Phillipsburg-  
13 Easton?

14 A There are various statistics in the record as to  
15 particular banks. The testimony generally is in most instances  
16 they get a very small part of their business. They get some,  
17 but in terms of percentages, for example, there are records  
18 showing that some banks get only a handful. One banker testi-  
19 fied they just had three or four loans in Phillipsburg.

20 Q As far away as Allentown and Bethlehem?

21 A A few of those, not many. I think, for example,  
22 in the trust business they get more of those, but basically,  
23 I think, the bankers themselves testified that -- Phillipsburg  
24 bankers testified -- the vast bulk of the business of the merg-  
25 ing banks comes from this area. We also had testimony of a

1 number of bankers from the outside area who generally indicated  
2 that the bulk of their business came from their area. They all  
3 said, "Yes, we have a few ---"

4 Q From their area or from their immediate location?

5 A From their immediate location, from their ---

6 Q The area is the Lehigh Valley, I suppose.

7 A The banks in this area tend to pretty much stick  
8 to their own little preserve four or five mile radius, or some-  
9 thing like that. That is what the evidence seems to seem to  
10 show in this case. They don't seem actively to go out into the  
11 areas 10 or 15 miles away. They do some soliciting. They have  
12 some newspaper ads, but by and large they stick to their own  
13 areas.

14 Q Trust departments? How about their trust depart-  
15 ments?

16 A The trust departments, the two merging banks have  
17 with all candor rather inadequate trust departments.

18 Q They hardly have a trust department.

19 A That is correct. On the other hand, the bank  
20 in Easton -- there is a bank in Easton that has one of the very  
21 finest trust departments. In addition, of course, there is another  
22 bank that does business in Easton that has a large trust depart-  
23 ment.

24 Q From Allentown or Bethlehem?

25 A Well, there is another bank, I think, one of the

1 banks that is outside of Easton, not in Allentown and Bethlehem,  
2 that does trust business in Easton -- has a branch in Easton.  
3 And then, of course, the banks in Allentown and Bethlehem, which  
4 are much larger than any of these banks, have extensive trust  
5 business. They do get -- there is evidence -- these outside  
6 banks do get trust business, of course. These tend to be by and  
7 large the larger accounts, of course.

8 Now, the District Court in this case basically, I think  
9 it is fair to say, made three or four rulings that are signifi-  
10 cant here. The Court in this case said that because a large  
11 number of other financial types of institutions are competing in  
12 the area with the banks that the relevant market for testing com-  
13 petitive effect in this case was not commercial banking as such.  
14 The district judge pointed to the fact that you had savings and  
15 loans associations, that you had finance companies, that you  
16 had mutual funds that were seeking to obtain the savings deposits  
17 of the customers, that you had finance organizations seeking  
18 loans.

19 The Court, therefore, concluded that the appropriate  
20 line of commerce for testing the effect of this merger was those  
21 particular service rendered by the bank as to which really there  
22 was no significant competition. The services the Court included  
23 in its line of commerce were checking accounts, savings accounts,  
24 certificates of deposit, personal loans, consumer and install-  
25 ment loans and commercial and industrial loans.

But then rather inconsistent with this theory, when

1 the Court came to evaluate the effect of the merger on competi-  
2 tion by examining the concentration ratios and the increases in  
3 concentration, the Court looked to the figures dealing with  
4 commercial banking not with the subcategories of commercial  
5 banking, which the Court believed was the relative market.

6 So, what it amounts to, it seems to us, it is really  
7 a kind of a dictum. The Court said it didn't think that com-  
8 mercial banking was the relevant market, and then it turned  
9 around and, in fact, tested this by commercial banking.

10 Q It didn't say that explicitly but that is the  
11 impression that one gets from the Court's opinion.

12 A It didn't say that explicitly but the Court in its  
13 opinion discussed all the figures relating to commercial bank-  
14 ing as a line of commerce.

15 On the geographic market, we have distributed to the  
16 Court this little three-colored map. Mr. Meyner, on behalf  
17 of the banks, has objected to the distribution of this map on  
18 the grounds that this map was offered in evidence at the trial  
19 court and rejected.

20 Q Well, that is not the only ground.

21 A And he also claims that it was rejected because he  
22 claims it distorts.

23 Q That it distorts the picture, and I must say when  
24 you indicate that there are no roads in between these cities.

25 A We did not intend to indicate that, Mr. Justice.

1 This was just attempting to show the geographical area. There  
2 is a patchwork of roads. There are extensive highways. There  
3 are a whole lot of little towns.

4 The reason we submitted this is because as the District  
5 Court defined the market, the District Court listed about 30 or  
6 40 communities and said, "I find that this is the market." And  
7 when you list communities unless one is familiar with this parti-  
8 cular section of the country, it is difficult to see precisely  
9 what is involved. We do not claim that this is exactly accurate.  
10 It is just a rough approximation.

11 But, I think, with the colors, it will indicate basi-  
12 cally what is the area of dispute here.

13 The Government proposed in the District Court that the  
14 relative market could be one of two areas. either the Phillips-  
15 burg area itself, which is the part we have colored pink, or  
16 the combination of Phillipsburg and Easton, which is colored blue.

17 The defendants and the Comptroller of the Currency  
18 suggested a much broader market. The District Court selected  
19 a market somewhere in between, which is the part colored green  
20 which appears to be roughly four times the size of our market.  
21 And, as is also shown by this map, the District Court included  
22 in its relevant market the City of Bethlehem over the extreme  
23 left and drew the line right between Bethlehem and Allentown,  
24 even though Allentown is contiguous to Bethlehem and in effect  
25 is almost a continuation of it.

1 Now, within this market, the Court concluded ---

2 Q What was the market urged by the Comptroller and  
3 the appellees?

4 A The Comptroller was the market which was basically  
5 most of the Lehigh valley. Most of this large section here.  
6 It is, again, I would say, another oblong thing around this  
7 market. In other words, it included part of Bucks County, part  
8 of Hunterdon County larger than we had proposed. And they also  
9 suggested that perhaps the entire Allentown-Bethlehem-Easton  
10 standard metropolitan statistical area, which isn't even ---

11 Q Reading is where, north of here?

12 A Reading, I believe, is north of there.

13 Q In any event, it is not in this picture.

14 A It is west, I am informed, Mr. Justice.

15 Now, within this broader area that the Court selected,  
16 it found that there was no substantial lessening of competition  
17 there was no trend toward present or future concentration, the  
18 merging banks had only 6-3/4 percent of all banking assets.  
19 After reaching that conclusion, the Court then said that that  
20 as far as it was concerned was the end of the case. But, since  
21 the convenience-and-needs point had been so fully canvassed it  
22 would also rule on that.

23 It then held that the banks had sustained the burden  
24 of proving this merger was justified by community convenience  
25 and need relying primarily on two factors; that the merger would



1 result in the new bank having a much larger lending limit than  
2 the old bank and that it would permit the bank for the first  
3 time to employ a full-time trust officer, which would enable  
4 it to build up a trust department for which it found there was  
5 need in the area.

6 In deciding the convenience-and-need point rather  
7 interestingly, and, we think, erroneously, although the Court  
8 had used the broad geographical market for determining competi-  
9 tive impact, it evaluated the needs of the community solely in  
10 terms of the needs of Phillipsburg, not Phillipsburg-Easton, but  
11 just Phillipsburg.

12 Now, I would like to turn now to the legal issues in  
13 the case. The first one is the so-called product market---

14 Q Where are the relative administrative agencies  
15 spread on this case?

16 A Yes. As is required under the Bank-Holding Company  
17 Act, the matter was submitted Federal Deposit Insurance Company,  
18 the Federal Reserve Board and the Justice Department all of whom  
19 advised the Comptroller in their view the merger would have ad-  
20 verse effects on competition.

21 Q Advised them what?

22 A That the merger would have an adverse effect upon  
23 competition.

24 Indeed, the two banking agencies in their recommenda-  
25 tion viewed Phillipsburg primarily as the relevant market. The

1 Comptroller held a hearing and after the hearing ruled that the  
2 merger did not have the anticompetitive effect primarily, again,  
3 because the Comptroller viewed the market much more broadly than  
4 the banking agencies.

5 The appellees argue at considerable length as to why  
6 commercial banking in this market is not the appropriate pro-  
7 duct, and that the District Court, therefore, correctly rejected  
8 that line of commerce. At page 61 of their brief, however, the  
9 bank says that the Government, in any event, hasn't been pre-  
10 judiced by any possible error in this thing. They admit that  
11 the issue is no longer really in the case because of the fact  
12 that in deciding the effect on competition, the District Court  
13 did look to commercial banking.

14 We have briefly discussed in our brief the reasons  
15 why we think that in this case as in all the other banking cases  
16 before this Court, commercial banking is an appropriate product  
17 market within which to test the thing. But in view of the fact,  
18 as I say, that issue seems to be a real live one in the case, I  
19 think I will leave the discussion to our brief on this point.

20 Now, coming to the first of the critical issues as  
21 far as the Government is concerned, because we have to win on  
22 to get a reversal here. I might just add in passing that all we  
23 are asking this Court to do in this case is to reverse and re-  
24 mand to the District Court to reconsider the community and con-  
25 venience-and-needs defense under what we think is the proper

1 determination, and that the merger had an anticompetitive effect  
2 in the relevant market.

3 This Court in the Pabst case recognized that just as  
4 with products so in the case of geographic areas, there may be  
5 more than one geographic area that is relevant. In Pabst, the  
6 Court recognized that there were three different markets, three  
7 large markets. The District Court here, however, said that it  
8 concluded that the relevant market -- that was the wording  
9 used, "the relevant market" -- was this area that it had select-  
10 ed.

11 There may be situations in which this larger market  
12 is an appropriate one for determining the effect of a bank  
13 merger. If, for example, we had a merger of a bank in Allentown  
14 with the merger of a bank in Phillipsburg, that would be the  
15 appropriate market. But, we think for the purposes of determin-  
16 ing the effect of this merger, these two banks in Phillipsburg,  
17 that Phillipsburg-Easton together is a relevant market within  
18 which to evaluate the effect.

19 In its Philadelphia bank decision, this Court stated  
20 that in determining the appropriate geographical market, the  
21 proper question is not where the parties to the merger do busi-  
22 ness or even where they compete but where within the area are  
23 competitive overlap the effect of the merger on competition  
24 will be direct and immediate. I will now proceed to show  
25 that this merger will have a direct and immediate effect upon

1 competition in the Phillipsburg-Easton area.

2 Q Do you rule out the possibility that the merged  
3 institutions could expand their business to the outer perimeter  
4 of the larger area by virtue of the merger?

5 A We don't rule that out, Mr. Justice, but I think  
6 again in the Philadelphia bank case this Court indicated the  
7 critical inquiry is where the immediate effect will be felt.  
8 Of course, we are dealing here with potential injury to compe-  
9 tition. It doesn't have to be an actual injury, all the statute  
10 requires is where the effect may be. And, we think that if,  
11 in fact, this has that effect in a relevant market, the merger  
12 cannot be saved because of the fact that the banks may be able  
13 to expand into the peripheral areas.

14 The figures we have at page 37, footnote 29 of our  
15 brief, is a table which breaks down as between the different  
16 types of business, the sources of the merging banks' business.  
17 The deposit and loan statistics therein contained show that the  
18 banks do roughly 85 percent of their business in Phillipsburg  
19 and Easton, as I had previously indicated in answer to a ques-  
20 tion of Mr. Justice Stewart, that there is very little in the  
21 way of solicitation outside the area and very comparatively  
22 little done outside and similarly banks outside of the area  
23 generally only solicit in the area on rare occasions.

24 Indeed, the business is even more localized than that.  
25 It seems to be pretty much localized within Phillipsburg and

1 within Easton. For example, each of the merging banks did only  
2 10 percent of its business -- I am sorry -- got only 10 per-  
3 cent of its savings and time deposits from Easton. Statistics  
4 indicate that almost every one of the 8,500 families in Phillips-  
5 burg deals with one of the three banks in that area. Numerous  
6 businessmen in Phillipsburg testified that they preferred to  
7 deal with a local bank in Phillipsburg than to go across the  
8 river to Easton.

9 It is not surprising that this business is thus local-  
10 ized, because the vast bulk of the customers of these two banks  
11 are small people. In terms of the number of deposits of these  
12 banks, just under three quarters of the total number of deposits  
13 are less \$1,000 and 96 percent of them are less than \$10,000.

14 Again, in terms of loans, the percentages are some-  
15 what smaller but nevertheless quite strong. Phillipsburg  
16 National had roughly three quarters of its loans for less than  
17 \$2,500. Second National has 58 percent. When you get to loans  
18 of up to \$10,000, 86 and 94 percent are less than \$10,000.

19 As this Court recognized in the Philadelphia bank  
20 case, these figures actually reflect the realities of banking.  
21 Banking is essentially local. It is locally oriented and parti-  
22 cularly so for the small customers in convenience. The con-  
23 venience of access to have your bank near you is the important  
24 thing.

25 The merging banks indeed themselves recognize this be-  
cause as the suburban communities developed four or five miles

1 outside of the center of Phillipsburg, they opened branches  
2 there. As the vice president of Phillipsburg National explained,  
3 he said, "That's where the customers are."

4 Furthermore, the vice president of Phillipsburg Na-  
5 tional pointed out in response to a question that a great many  
6 of the loans that they make in this small town are based pri-  
7 marily on the character of the borrower. He said that a man  
8 where you have a loan made on a character basis the people in  
9 Phillipsburg would find it very difficult to obtain a loan in  
10 any area outside where they weren't known.

11 Now, the banks themselves in thier business have  
12 recognized the integrated, localized character of the Phillips-  
13 burg-Easton market. Phillipsburg and Easton are in different  
14 Federal Reserves districts, which means that normally their  
15 checks would clear through different Federal Reserve clearing  
16 house banks and this would obviously cause a considerable pro-  
17 blem.

18 So, what they have done, they have established some-  
19 thing they call the Easton-Phillipsburg clearing house. Every  
20 three months or so one of the banks in this area takes its turn  
21 to act as a clearing house for all checks drawn on banks in the  
22 Phillipsburg-Easton area. The president of the largest bank in  
23 Easton, in discussing this arrangement said, at page 140 of the  
24 appendix, he said, "This arrangement seems to be another fact  
25 which indicates a closely knit community even though separated  
by the Delaware River."

1 Another indication of the integrated nature of this  
2 banking community is the fact that for many years banks in the  
3 surrounding area outside the Phillipsburg-Easton area were pay-  
4 ing four percent on savings. At the same time, the Easton banks  
5 were paying three percent, the Phillipsburg banks three and a  
6 half.

7 But in 1968, when one of the banks in Easton increased  
8 its savings rate to four percent, very quickly all the rest of  
9 them followed suit.

10 Now, the significance of all of these facts of locali-  
11 zation comes down to this that this indicates to us that this is  
12 the area where the effect of the merger will be primarily felt.  
13 These are the people, the people who deal with these banks, who  
14 give their business and from whom the banks derive a vast part  
15 of their business, these are the people to whom the elimination  
16 of an alternative source of banking will be hurt. These are the  
17 people who are going to feel it. And this is, in effect, in the  
18 language of the Philadelphia bank case where the merge would have  
19 a direct and immediate impact.

20 The basic error of the District Court, we think, was  
21 its refusal to recognize the significance of these considerations  
22 and instead its reliance on the fact that there is a great deal  
23 of business and work mobility within the broader area, that is  
24 people will drive 15 or 20 miles to go to work, people will drive  
25 as far as Allentown and Bethlehem to shop.

1           But this case, of course, is dealing with the effect  
2 of this merger on banking not on other businesses. The fact  
3 that a man is going to drive 20 or 25 miles to work, to buy a  
4 new suit of clothes, to buy a new sofa doesn't mean he is going  
5 to drive 20 or 25 miles to bank. Indeed, all the indications  
6 in this record is to the contrary.

7           Now, I would just briefly like to refer to one conten-  
8 tion that the appellees make here in their brief which is that in  
9 any event whatever else you may think about our market, Phillips-  
10 burg-Easton is not an economically significant area of the coun-  
11 try. I take it the argument is that it is too small and therefore  
12 cannot be a relevant section of the country within the meaning  
13 of the statute. They rely primarily on the fact that prior to  
14 1950 the Clayton Act spoke of an adverse effect on competition  
15 in any community or section and that in the 1950 amendments of  
16 the statute the word "community" was deleted. They rely on a  
17 colloquy before the Senate hearing at which Congressman Celler,  
18 one of the sponsors of the Act, engaged in a long discussion with  
19 Senator Donald, and they picked certain language which they sug-  
20 gest indicates that really Congress never intended to permit  
21 this small an area of the country to be a relevant section of  
22 the country.

23           Now, for whatever this kind of legislative history is  
24 worth, testimony given before a Senate committee by a member of  
25 the House who is one of the principal sponsors of the Bill, we



1 don't think it proves what the defendants believe it proves, be-  
2 cause at the end of this long colloquy what comes out of it is  
3 that Mr. Celler said he believed that the phrase "section of the  
4 country" means any trade area, that is what they were talking  
5 about. They wanted the statute to be able to reach a trade area.  
6 We think that this area, Phillipsburg-Easton, certainly is a  
7 significant trade area in terms of commercial banking.

8           Within the Phillipsburg-Easton area, we think that under  
9 this Court's standards that it has applied for determining compe-  
10 titive effect in horizontal mergers the effect of this merger may  
11 be substantially to lessen competition. As I have previously  
12 indicated, the market -- the banking in this area is concentrated.  
13 We have filed with the Court this zeroxed document which is a  
14 substitute for a chart we have at page 13 of our brief. Un-  
15 fortunately, in preparing the chart on page 13 we derived some  
16 of the figures from the wrong exhibit. The figures given in the  
17 narrative on the following page 15 are correct, but we have just  
18 reproduced this to give the correct figures.

19           The three largest banks in the area, as I have indi-  
20 cated, have approximately 60 percent of the total assets, 71 per-  
21 cent of the deposits, 65 percent of the loans.

22           The result of this merger would be to make the new  
23 bank, the Phillipsburg -- the combination of Phillipsburg Nation-  
24 al and the Second National the second largest bank in the area.  
25 It would have approximately 19.3 percent of all the banking assets  
in the area, \$41 million, 23.2 percent of the deposits, \$38 million

1 and 27 percent of the loans, which is almost \$25 million.

2           The total share of assets held by the three largest  
3 banks would increase as a result of this merger almost 12 per-  
4 cent to 68 percent; that is, from 60 percent to 68 percent, the  
5 deposits would increase to almost 80 percent. After this merger,  
6 the three largest banks would control three quarters of all the  
7 banking officer in the area, 12 out of 16.

8           Now, of course, that is the impact of this merger in  
9 Phillipsburg-Easton. The impact of the merger in Phillipsburg  
10 itself would be much, much greater. There what we would have is  
11 you would have one bank with 75 percent of all the business, three  
12 times larger than the other banks and this would eliminate for  
13 the people in Phillipsburg one of three banking alternatives.

14           I think the anti-competitive effect of this merger in  
15 the Phillipsburg community is rather dramatically illustrated by  
16 the fact, and I have to preface this by saying we did not make  
17 this argument in the District Court, by the fact that under this  
18 Court's decision in the Grennel case it would seem that a combina-  
19 tion which gives the combined firm 75 percent of the market vio-  
20 lates Section 2 of the Sherman Act, because you have got in one  
21 hand three quarters of the market. Certainly that is enough to  
22 control prices and exclude competitors.

23           Q       Throughout you are talking about the commercial  
24 banking business as a product, aren't you?

25           A       We are because we think -- we think correctly

1 the District Court treated it that way, and we think commercial  
2 banking is the appropriate line of commerce.

3 Q I don't know that you have even mentioned the ex-  
4 istence of the Bank Merger Act of 1966, have you?

5 A I will come to that in ---

6 Q You have told us about the Philadelphia case and  
7 what not which antedated that legislation and which indeed was  
8 the occasion for that legislation.

9 A Mr. Justice, I will come to that in a moment in  
10 ny discussion of the convenience and needs, but this Court has  
11 held that the 1966 Bank Merger Act did not change the standards  
12 for determining competitive impact. It introduced the conveni-  
13 ence-and-needs defense, but it is ---

14 Q And it also by removing what the reference to  
15 line of commerce -- it implicitly recognized that there might be  
16 other competition for banks beyond other banks, didn't it?

17 A With all due respect, Mr. Justice, we would have  
18 to disagree. This same argument was made in the Nashville case.  
19 In the Nashville case, the Court stated that it didn't believe  
20 that in the Bank Merger Act Congress intended any change in the  
21 traditional standards for determining competitive effect. These  
22 are considerations that may perhaps be appropriately taken into  
23 account in the convenience-and-needs defense, but in making the  
24 initial determination ---

25 Q Of competitive effect.

1           A     Under competitive effect, we think the standard  
2 is the same.

3           Now, I would add one other fact, which unfortunately  
4 we have not referred to in our brief but I think is significant,  
5 while we do not have in this market anything like the history  
6 of mergers that we had in the Philadelphia bank case and some of  
7 the other cases, we do know, and the record does show, that the  
8 largest bank in Easton is the result of a merger in 1959, at which  
9 point two banks with assets of \$25 million each were joined to  
10 form this bank which in that time since then has grown 50 percent  
11 to its present size of \$74 million.

12           I would like to read, the Court is thoroughly familiar  
13 but we think these facts I have demonstrated bring this case with-  
14 in the rule pronounced in the Philadelphia bank case where the  
15 Court said that a merger which produces a firm controlling an  
16 undue percentage share of the relevant market and results in a  
17 significant increase in the concentration of firms within that  
18 market is so inherently likely to lessen competition substantially  
19 that it must be enjoined in the absence of evidence clearly show-  
20 ing that the merger is not likely to have such anticompetitive  
21 effects.

22           If we are correct in our conclusion, that this merger  
23 is bad in terms of its anticompetitive effects under these  
24 standards, then it seems to me the decision of the District  
25 Court must be vacated and the case remanded to that court, because

1 the court's balancing tests that any anticompetitive effects  
2 were clearly outweighed by the community convenience and need it  
3 seems to us is vitiated when the court has incorrectly calculated  
4 one side of the scales.

5           As again in National Bank, the Court recognized, it  
6 said to weigh adequately one of these factors against the other  
7 requires the proper conclusion as to each, and we don't think  
8 that the Court's conclusion at the very end of its opinion where  
9 the Court said at page 699 that even if there were de minimis  
10 anticompetitive effect in the narrowly drawn market proposed by  
11 the Government, such effect is clearly outweighed by the conveni-  
12 ence and needs of the community to be served by the merged bank  
13 constitutes an adequate evaluation of this factor. It is not  
14 the kind of careful balancing Congress intended before an anti-  
15 competitive merger could be approved.

16           Therefore, we think the case has to go back to the Dis-  
17 trict Court as in Nashville Bank properly to perform the balanc-  
18 ing function. But since the District Court undertook to determine  
19 convenience and need and since on a remand the issue would again  
20 arise, we have fully discussed this issue and we think it is appro-  
21 priate for this Court to consider it.

22           We think the District Court committed two basic errors  
23 in applying the convenience-and-needs standard. First, we think  
24 it used the wrong market area. Secondly, it misapplied the con-  
25 venience-and-needs standard in several particulars.

1           The particular provision of the community convenience-  
2 and-need provision is set forth at the bottom of page 61 and the  
3 top of page 62 in our brief. What it says in effect is that where  
4 a merger has the effect -- may substantially lessen competition  
5 it cannot be improved unless the court finds that the anticompeti-  
6 tive effect of the proposed transaction are clearly outweighed  
7 in the public interest by the probably effect of the transaction  
8 in meeting the convenience and needs of the community to be  
9 served.

10           Q     What has happened during the interval between the  
11 time the Government filed its suit and the present time? Was  
12 the merger effectuated?

13           A     In this case? No, in this case -- because under  
14 the Bank Merger Act, Mr. Justice, the filing of the suit by the  
15 Government within 30 days acts as a stay and then the District  
16 Court further extended the stay pending the determination of this  
17 appeal.

18           Q     How long has the suit been pending?

19           A     The suit was filed in January, 1968, a little over  
20 two years.

21           The basic purpose, of course, of this convenience-and-  
22 needs defense is to permit bank mergers to go forward, which even  
23 though they are anticompetitive produce such significant benefits  
24 to the community that on balance it appears that the public  
25 interest would be best served by sanctioning such an anticompeti-  
tive merger.

1           It seemes, however, for us that for this comparison  
2 to be a meaningful one the community benefits resulting from the  
3 merger have to be assessed in the same area as the community detri-  
4 ments also resulting from the merger, because in both instances  
5 what you are considering are the banking needs of the community.  
6 On the one hand, you look to the banking needs to determine what  
7 the area is where the merger will have its effect and then you  
8 look and turn around on the other side and say what effect --  
9 favorable effect -- on the same banking needs will the merger  
10 have.

11           To be sure, there may be situations in which a merger  
12 will have an effect, a beneficial effect, upon a segment of the  
13 community, and that beneficial effect on the segment of the  
14 community rebounds to the benefit of the entire community.

15           It does seem to us that while that is permissible you  
16 cannot properly evaluate an sustain a community needs defense on  
17 the basis of benefits to a narrow segment of the community that  
18 do not benefit the entire community which is the relevant area  
19 for testing the impact of the merger upon competition.

20           That, we think, is just precisely the situation we have  
21 in this case in terms of what we think is the relevant market,  
22 the Phillipsburg, Easton market.

23           The Court, as I have indicated, relied upon two factors.  
24 primarily as the ground for sanctioning this merger. First, the  
25 higher lending limits that the larger bank would have. A bank's

1 lending limits turn upon its capital surplus, sometimes retain  
2 profits and so on. Of course, every time you combine two banks  
3 you get a larger lending limit. Each of these banks had a lend-  
4 ing limit of approximately \$100,000. When you combine them with  
5 various accounting adjustments, the new bank would have a lend-  
6 ing limit of \$250,000. There is testimony that people in -- a  
7 number of the business men in the Phillipsburg area would like a  
8 bank in Phillipsburg with a larger lending limit.

9 Q Was there some evidence in the record as to how  
10 often the Phillipsburg or Easton businessmen had to go outside  
11 the area for a loan?

12 A There is no statistical evidence on that. There  
13 are indications that some of them have had to go outside. In some  
14 instances the loans were satisfied through participation. There  
15 were some who testified that they didn't particular care to go  
16 outside, that they preferred to deal with the Phillipsburg bank.

17 Q But there is a substantial need in the Phillipsburg-  
18 Easton area for loans in excess of \$100,000.

19 A Not in the Phillipsburg-Easton area, Mr. Justice.  
20 This is the point I was coming to. In Easton, there are four  
21 banks whose lending limit is either equal to or substantially in  
22 excess of the \$250,000.

23 Q I didn't ask you that. Is there a substantial  
24 need in the Phillipsburg-Easton area for loans in excess of  
25 \$100,000?



1           A     I think there is a substantial need. But there  
2 is no indication that it is not -- that the need for the big  
3 loans is not being adequately met in this area. That is what I  
4 am suggesting, Mr. Justice, is first of all ---

5           Q     Yes, but let's assume that there is a recurring  
6 need for loans in excess of \$100,000 in the Phillipsburg-Easton  
7 area and one bank has a large lending limit and it can satisfy  
8 all that need. You would say that would be automatically an  
9 adequate answer to the community needs?

10          A     I wouldn't say that it would automatically be an  
11 answer, Mr. Justice, but I would say the need, the community need  
12 for an additional bank for the large loans under that hypothesis  
13 I think would be a relatively minor factor in assessing community  
14 needs.

15          Q     You wouldn't say there would be anything in the  
16 argument that it would help the community to provide some competi-  
17 tion in the large-loan area.

18          A     I think that would be a factor, but I think it  
19 would be a relatively minor factor. I suggest, Mr. Justice, that  
20 on the other side of the balance these loans that we are talking  
21 about involve a small number of people. The record shows that  
22 during the average year the Phillipsburg National Bank had a  
23 request for 25 loans in excess of its lending limit as against  
24 some-5,000 loans it had. The Second National Bank, I think,  
25 averaged something like 17 requests a year out of some-2,200  
loans that it had.

1 Q Well, that is fine, but people don't ask banks --  
2 they learn, they know where to go to get a large loan. How many  
3 loans did the large bank in Easton make in excess of \$100,000 in  
4 a year?

5 A I don't believe the record shows that, Mr. Justice.

6 Q You have no way of knowing? The record doesn't  
7 show what the need for large loans is in the Phillipsburg-Easton  
8 area?

9 A There are exhibits showing as to each bank, a  
10 series of exhibits beginning at page 725 which shows the per-  
11 centage of loans coming from all of the different types of custo-  
12 mers and the number of loans is broken down into size. For  
13 example, we have a group of loans of more than \$50,000, etc., etc.,  
14 etc. The percentages could be calculated. The number of these  
15 loans, for example, ---

16 Q Well, how can you assess this business of increas-  
17 ing the lending limit without some information like this?

18 A I think you can assess it, Mr. Justice, in two  
19 ways. First of all, the record shows that the number of people  
20 seeking these large loans is comparatively small. I think you  
21 have to compare that with ---

22 Q The number of people seeking them at these two  
23 banks is comparatively small, that is all you have said. There  
24 may be 10 times that many seeking and getting them at other banks.

25 A Their needs are being satisfied. If they are

1 seeking them and getting them at other banks, ---

2 Q I know, but then you come up to whether or not  
3 it is worthwhile at all for the community to provide some compe-  
4 tition in the large loan area.

5 A I think to the extent ---

6 Q I agree that those figures here are relevant if  
7 you can relegate this consideration to the sort of frivolous  
8 category.

9 A I am not suggesting it is frivolous, Mr. Justice,  
10 but I do think that we do know that there are four large banks  
11 in Easton. So, in the broader Phillipsburg-Easton area, there  
12 is no lack of competition. These are four large banks each one  
13 of whom would provide a loan limit equal to that of the merged  
14 banks and substantially greater.

15 Q Four banks in Easton?

16 A Yes, four banks in Easton whose lending limits  
17 range from \$224,000 to \$587,000.

18 Q The largest bank has a lending limit of what?

19 A \$587,000.

20 Q In Easton?

21 A In Easton

22 Q How many banks can lend more than \$1/4 million  
23 in Easton?

24 A Three, and one can lend \$224,000.

25 Q How many in Phillipsburg over \$1/4 million?

1           A     None. Of the three banks, the maximum limit is  
2 approximately, roughly \$100,000 in Phillipsburg. And, Mr. Justice,  
3 let me say one other thing in this connection. There may be other  
4 ways, of course, of increasing lending limits beside combining  
5 the two banks into a bank. We have discussed this at some length  
6 in our brief. The banks could sell stocks, some of the banks in  
7 this area have sold stock.

8           Q     But you are not suggesting the community needs  
9 factor must exclude the consideration of lending limits, are you?

10          A     No, I am not suggesting that, but I am suggesting  
11 that in considering the ---

12          Q     Let us assume for the moment there weren't any  
13 banks in the Easton and Phillipsburg area that had lending limits  
14 over \$100,000 and a lot of businessmen went outside for large  
15 loans. What would you say about the lending-limit argument  
16 then?

17          A     I think the lending-limit argument would be a  
18 strong one, but even then I am not sure that basically that con-  
19 venience and need goes so far as to permit the elimination of  
20 competition. I think it depends upon -- you'll have to balance  
21 on the one hand what the effect is on competition on the other  
22 hand balance what the benefits to the community are. And, in con-  
23 sidering benefits to the community, I think it is appropriate  
24 and necessary to consider other ways by which the banks would  
25 help solve these problems and know that there was no other way in

1 which they could increase their lending limits except through a  
2 merger. And if it further appeared that there are businessmen  
3 in this Phillipsburg-Easton area that were suffering because they  
4 couldn't get the money, it would seem to me that would be a very  
5 significant factor.

6 On the other hand, if it turns out -- and I might men-  
7 tion that some of the businessmen here in this record. For  
8 example, we had a witness who was an official of a gas company  
9 who was saying that he wanted the larger lending limit in the  
10 Phillipsburg area. Then he admitted, however, that since his  
11 lending demands were about \$2 million there was no bank in the  
12 area that could satisfy that.

13 Q Then I take it -- don't you have to concede that  
14 the very smallest market area here is Phillipsburg-Easton?

15 A I wouldn't say that, Mr. Justice, and let me  
16 explain why, because in the Phillipsburg ---

17 Q You mean you couldn't get rid of this argument  
18 by saying that the need for large loans is satisfied outside the  
19 relevant market?

20 A Well, this isn't why we think in Phillipsburg-Eas-  
21 ton. If, on the other hand, you are dealing in Phillipsburg in  
22 the other ---

23 Q You mean like the District Court?

24 A Now, the other side of the equation in Phillips-  
25 burg the anticompetitive effects of the merger are very drastic.

1 There you have a very drastic effect.

2 Q What is the population of Phillipsburg and what  
3 of Easton?

4 A Phillipsburg itself is 18,000, the broader area,  
5 the surrounding area is 28,000. Easton has a population of  
6 32,000 and the surrounding area 60,000. So, Phillipsburg and  
7 Easton together just under 100,000.

8 Q How far is Easton from Phillipsburg?

9 A Roughly 1/2 a mile. They are on opposites of  
10 the Delaware River.

11 Q Is there a bridge?

12 A Two bridges. One free bridge and one bridge where  
13 you buy tickets at a cost of 2-1/2 cents per ride, and there is  
14 extensive traffic back and forth.

15 I would also like to point out that the court's evalua-  
16 tion of the community convenience-and-needs defense was defective  
17 in another respect that it doesn't appear that either the banks  
18 or the court adequately explored the possibility of alternate  
19 methods of achieving these same benefits.

20 For example, at the time of this merger, New Jersey  
21 law permitted banks to merge within their own county. In Warren  
22 County where Phillipsburg is located, there were at that time six  
23 other banks which would have been available to these banks as a  
24 merger. In the City of Washington, about 12 miles away, there  
25 were two banks of roughly comparable size.

1 Q Washington is way over in western Pennsylvania.

2 A There is a Washington, New Jersey, Mr. Justice.

3 It is a small town in New Jersey.

4 Q All right.

5 A Two banks approximately 12, 13 miles away, both  
6 of the same size roughly as these merging banks yet the indication  
7 is, the record shows, the directors never considered the possi-  
8 bility of merging with those other banks.

9 In addition to that, we have one bank in Flemington,  
10 New Jersey, where the president testified that over the years his  
11 bank had followed a policy of not paying out cash dividends. He  
12 said we plowed back our dividends in order to meet the growing  
13 requirements of our community and despite this lack of payments  
14 of cash dividends, they recently made a substantial stock offer-  
15 ing that was 50 percent oversubscribed.

16 In addition, the third bank, the Phillipsburg Trust  
17 Company, for many years followed a practice of paying only stock  
18 dividends and not cash dividends in order to build up its capi-  
19 tal structure.

20 I think this should be contrasted with the statement  
21 of Mr. Varga, the vice-president of Phillipsburg National, when  
22 he said that the bank at the present time couldn't hire three  
23 specialists that they would like to have. He said it would be  
24 expensive, and it would be a burden in our profits and the divi-  
25 dents for our shareholders.

1 Q How far is Phillipsburg from the New Jersey line?

2 A Phillipsburg is right at the New Jersey line.

3 Q Right at the river?

4 A At the river. The river separates the two states.

5 Q What is the public interest involved in this suit?

6 This is something that I don't understand.

7 A In this type of case?

8 Q Yes, in this type of case.

9 A The public in this type of case, Mr. Justice, I  
10 think, is preserving for the large number of small banking custo-  
11 mers in the small areas the opportunity to preserve the availa-  
12 bility of competing sources of bank business; that is, to make  
13 sure that these people have the maximum choice.

14 Of course, banking by its very nature in these small  
15 towns does tend to be somewhat concentrated and you have the pro-  
16 blem in the bank situation it is very difficult to get in. You  
17 can't just open a bank the way you open a store. You have to get  
18 the approval of the various regulatory authorities, and once a  
19 bank is merged out, once it disappears, that is likely to be the  
20 end of it. And, the result is that if this merger goes ahead  
21 the competitive opportunities for the small people in this small  
22 market, we think, will be significantly diminished. And that is  
23 why we brought this case here and that is why we are urging this  
24 Court to reverse it.

25 Q Technically we don't need to get to the community



1 need thing at all.

2 A Technical, that is correct.

3 Q But you think that if we agree with you on this  
4 competitive standard, on the competitive effect, and if the Dis-  
5 trict Court made an error in applying the community needs, you  
6 suggest that we should tell them now.

7 A I would think so, since the case would have to  
8 go back, and that is the practise this Court in the past has  
9 followed where it said since the case ---

10 Q But before we could agree with you on the com-  
11 petitive effect we would in the long run have to get to the  
12 relevant market issue.

13 A Oh, yes, the Court would have to agree with us ---

14 Q Both geographic and product.

15 A Pardon?

16 Q Both geographic and product we would have to get  
17 to.

18 A Well, except that the District Court apparently  
19 was willing to decide the case on the basis of product market;  
20 that is, the District Court did decide the case on the basis that  
21 we think commercial banking was a relevant market. And, we think  
22 that was correct for the reasons we have given in our brief.

23 Q I know, but what if we thought that commercial  
24 banking wasn't the relevant market?

25 A If you thought -- of course, the other side hasn't

1 appealed from that ruling. And, if you thought commercial bank-  
2 ing was not the relevant market, I suppose it would then be  
3 appropriate to remand the case to the District Court to develop  
4 some more evidence as to what was the appropriate market.

4 Q I suppose this result would follow a fortiori,  
5 wouldn't it?

6 A Again, it would follow in his market but not  
7 necessarily in the Phillipsburg-Easton market, because even in  
8 the Phillipsburg-Easton market while this might result in diminish-  
9 ing somewhat the percentages, they still might be enough to prove  
10 a violation.

11 CHIEF JUSTICE BURGER: Thank you, Mr. Friedman. Mr.  
12 Roache?

13 ARGUMENT OF PHILIP L. ROACHE, JR., ESQ. ON BEHALF  
14 OF THE OFFICE OF THE COMPTROLLER

15 MR. ROACHE: Mr. Chief Justice, may it please the  
16 Court.

17 I would like to first primarily address myself to the  
18 needs and effects of the merger and the relevant geographic  
19 area, particularly as it applies to the new banking laws in New  
20 Jersey, to the appellant's contention that the District Court  
21 applied erroneous standards in assessing the convenience and  
22 needs and to the appellant's contention that the merging banks  
23 and the District Court failed to adequately consider the less  
24 anticompetitive alternatives to the merger.

25 Before I do that, if I may, I would like to make a  
comment or two on some of the answers to questions that Mr.

1 First, we disagree, and I disagree, that the District  
2 Court ruled that commercial banks was the line of commerce. I  
3 believe that the District Court recognized the fact that these  
4 banks perform various functions, that demand deposits alone per-  
5 haps was the only line of commerce, but in New Jersey savings  
6 banks also have a demand deposit function.

7 But the District Court, as I analyze its opinion, stated  
8 they hadn't proved their case and didn't really attempt to say  
9 this is it and this is it and this is it. First the burden was  
10 on the plaintiff to prove his case and to prove that commercial  
11 banking is the line of commerce, and the District Court felt  
12 that because of all of these other alternatives that were avail-  
13 able and the testimony adequately showed that they were in compe-  
14 tition with all of these other areas, specifically in the savings  
15 and loan and savings bank where these banks were so predominant  
16 in savings and in lending for residents, that these people did  
17 compete.

18 However, he didn't have to come out and made a determina-  
19 tion that this is in competition, this is in competition, this  
20 is in competition. As I interpret it, he said you haven't proved  
21 the case that commercial banking is the line of commerce and did  
22 state all of these other functions were in competition with  
23 commercial banking.

24 One other comment Mr. Friedman made was that the recent  
25 antitrust case in the banking field did not involve smaller banks,

1 that this is the first smaller bank, that large banks have no  
2 longer been merging. This isn't quite true.

3 The Crocker-Anglo case which was subsequent to the  
4 Nashville case and subsequent to the Philadelphia National Bank  
5 case involved a merger of a bank, the resulting bank had \$4 bil-  
6 lion in assets. So, that is a pretty substantial size bank.  
7 The First National Bank of Jackson involved approximately a  
8 \$350 million bank acquiring a bank with assets of about \$26 mil-  
9 lion.

10 Q Jackson of what State?

11 A Mississippi.

12 So, one of the banks was quite large. The First Nation-  
13 al Bank of Maryland also involved a large bank in Maryland with  
14 assets of approximately \$400 million acquiring a bank in Hartford  
15 County with assets of approximately \$30 million. Idaho First  
16 National Bank in Idaho, which was just decided last week, involved  
17 a bank with over \$300 million in assets acquiring a bank with  
18 approximately \$26 million in assets.

19 It isn't quite true that merges of the large banks have  
20 ended. All of these cases were dismissed by the District Court  
21 and decided in favor of the defendant banks. Most of these cases  
22 involved potential competition as opposed to what we are dealing  
23 with here as a horizontal type of merger. There was some hori-  
24 zontal type aspects to a couple of these cases.

25 The comment Mr. Friedman made with respect to the

1 reports of the various banking regulatory agencies -- I would  
2 like to comment that the Banker Merger Act provides that these  
3 agencies must report -- if it is a control of the currency in-  
4 volved in the merger -- must report to the Comptroller of Curren-  
5 cy only on the competitive effects not on the convenience and  
6 needs. They do not and are not to consider the convenience and  
7 needs.

8           So, all they get is a half of a picture when these  
9 regulatory agencies report to us or we report to them. The law  
10 says report on the competitive effects as you see them. So the  
11 whole picture is not in their competitive report.

12           Q     What did the Comptroller decide that there would  
13 be no anticompetitive effect?

14           A     That is correct, and that is our belief.

15           These banks, as Mr. Friedman has said, are Phillipsburg  
16 National with deposits of \$2.4 million and Second National with  
17 deposits of \$16 million as of 1967. They are small banks, they  
18 are truly small banks. They are located in a city with a popula-  
19 tion of 18,500. The population has remained static since 1960.  
20 Years ago, many years ago, this was a booming community, when the  
21 coal mines were operating in Pennsylvania and the surrounding  
22 areas, this was a terminal for the trains to bring the coal in  
23 and to hookup and go out. It was a very booming and a very pros-  
24 perous city at that time, but that is not the situation now. If  
25 you were to go there now, you would see rusty railroad tracks

1 and cars on siding rusting also. This give you an indication  
2 of the type of a community we are talking about. The so-called  
3 downtown area has no stores in it. There aren't any stores. You  
4 cannot buy a suit of clothes in Phillipsburg. This is the economi-  
5 cally significant area that Justice is talking about.

6 Q What did you say about the stores?

7 A There is no downtown area as we understand it --  
8 a downtown area. There are no stores. Maybe there are one or  
9 two restaurants or something of that nature. The only really  
10 institutions downtown are Phillipsburg National and Second  
11 National.

12 Phillipsburg Trust, the only other bank in the area,  
13 with assets of about \$12 million moved out of it several years  
14 ago recognizing that the area was -- needed so much renewal that  
15 it wasn't a good area for banks to be located.

16 Q By an area, you mean downtown?

17 A Downtown area.

18 Q No, downtown Phillipsburg, right?

19 Q How about Easton?

20 A Easton -- the population of Easton has decreased  
21 in the last few years. Easton has a population of approximately  
22 30,000 people. Easton has a downtown area of approximately three  
23 city blocks on either side with a square in the center or a circle.  
24 It has a department store, but not a department store as we know  
25 a department store, as we in this city know a department store or

1 in other large cities. It is a very small department store. You  
2 can buy suits of clothes in Easton. There about two or three  
3 small mens clothing stores but they don't have the selection that  
4 the average person today would like to have.

5 Most people today, and there is ample evidence in the  
6 record, go to Allentown or Philadelphia to buy their clothes.

7 Q Do they have shopping centers in the suburbs?

8 A They have a shopping center in Phillipsburg. A  
9 recent shopping center was developed two or three years ago and  
10 it has an Orr's Department Store which is in Allentown and Orr's  
11 is also in Easton, in the outskirts of Easton. But that shopping  
12 doesn't have the place to buy a suit of clothes.

13 Q You said the bank moved out of Phillipsburg. I

14 A It didn't move out. It moved out of the downtown  
15 area to -- more into the suburban area where industry is and where  
16 the people are moving. They are gradually moving out of the city  
17 in the suburban area.

18 Q That is happening in a great many places.

19 A That is correct, that is true.

20 Q Are you suggesting, then, that the downtown area  
21 of Easton is in effect the downtown area for both to the extent  
22 that you have one.

23 A That is correct. There is no doubt about it.  
24 The bridge that separates the two is about a city block long. No  
25 one has to drive across it. You walk across it. You wouldn't

1 know you were going from to the other unless you could see the  
2 signs at either end of the bridge.

3 As I said, these two banks are truly small banks in  
4 absolute terms. None of these banks, of course, have had any  
5 prior merger activity. They are located in a community that  
6 was formerly rural and now is turning to industry. They have in  
7 the past been serving the area by accepting deposits and lending  
8 money primarily to finance residences. In the past, farms were  
9 included in it, but as the area has been changing, the farms  
10 have disappeared.

11 The commercial and industrial business done by these  
12 banks is insignificant especially when you compare this with that  
13 done by large commercial banks. Their demand deposits are com-  
14 paratively small and savings represent the bulk of their deposits.  
15 When you compare these banks with the contested Section 7 cases,  
16 which we have had in the past such as the Hawaii case and the  
17 Nashville case, there is just no comparison. You are comparing  
18 this area with areas that were urban in nature and abounding with  
19 commercial business. Those banks' primary business was commercial  
20 and industrial lending. They had great amounts of demand deposits.  
21 In fact, their amount of demand deposits ranged from anywhere to  
22 2-1/2 to 5 times the amount of savings deposits. The reverse is  
23 true here.

24 Phillipsburg National's savings are 2-1/2 times its de-  
25 mand deposits -- quite a different type of business, a different



1 locality, a different community. Certainly Phillipsburg National  
2 and Second National cannot be judged in the same manner as those  
3 large, urban banks. And, I have made a comparison of those banks  
4 which is Intervenor Exhibit No. 1. It listed the various assets  
5 of these banks and how Phillipsburg's trust assets would be \$41  
6 million as compared to the smallest bank there was \$336 million,  
7 and that is some years ago.

8 Concentration and restraints of trade in large urban  
9 areas with such billion dollar and multi-billion dollar banks or  
10 at the minimum banks with approximately one half a billion must  
11 certainly be viewed differently than the situations these two  
12 banks are in.

13 Even though the county is growing commercially and  
14 industrially, due to the fact that local banks are small, busi-  
15 ness is compelled to go out of the county and out of this area  
16 for adequate financing, for trust facilities, business advice  
17 and other needed services.

18 Q The FDIC and the Federal reserve took a different  
19 view than you did.

20 A The Federal Reserve took a different view, and the  
21 Department of Justice also.

22 Q The Department of Justice obviously, but what about  
23 the FDIC?

24 A I don't think the FDIC were in on this particular  
25 one.

1 Q I thought they were.

2 CHIEF JUSTICE BURGER: We will suspend until after  
3 lunch.

4 MR. ROACHE: Thank you, Your Honor.

5 (Whereupon, at 12:00 Noon the argument in the above-  
6 entitled matter recessed, to reconvene at 1:00 p.m. the same  
7 day.)  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 (The argument in the above-entitled matter resumed at  
2 1:00 p.m.)

3 CHIEF JUSTICE BURGER: Mr. Roache, you may proceed.

4 FURTHER ARGUMENT OF PHILIP L. ROACHE, JR., ESQ.

5 MR. ROACHE: I would like to apologize, first, to the  
6 Court. I did make a mistake in answer to one question. The  
7 Federal Deposit Insurance Corporation did send us a competitive  
8 report and I had forgotten that they had. Oftentimes they don't  
9 and it just slipped my mind. So, all three agencies, the Depart-  
10 ment of Justice, the Federal Reserve and FDIC did send us reports  
11 and all were adverse.

12 This case, I believe, is quite different from the prior  
13 litigated bank merger cases. From the statements in the United  
14 States v. Philadelphia National Bank case, we can see the glaring  
15 differences in this case and the Philadelphia National Bank case.  
16 When this Court turned to the justifications advanced by the defen-  
17 dants, it said that the banks do not contend, that is Philadelphia  
18 and Girard, do not contend they are unable to compete without the  
19 merger. However, in this case Phillipsburg and Second National  
20 do so contend. The testimony in this case was to the effect that  
21 the only possible for these two banks to grow was by merger it  
22 could not be possible by internal expansion.

23 These banks must hire needed specialists to compete and  
24 they cannot do so as separate institutions. There is a plethora  
25 of evidence that they need a mortgage man, they need a trust man  
and they need a commercial and industrial loan specialists. These

1 men come high. These banks by themselves just could not possibly  
2 afford it. Without these people, without proper management, they  
3 can go nowhere.

4 Officials at Second National stated that growth at their  
5 bank had leveled off. There is other testimony to the effect that  
6 any growth by these two banks would be limited to the possible  
7 growth of the economy. The banks as separate have no future and  
8 would not be able to survive.

9 In the Philadelphia National Bank, this Court said that  
10 that was not a case where two small firms in a market proposed to  
11 merge in order to be able to compete successfully with larger  
12 corporations. However, Phillipsburg National and Second National  
13 do so contend in this particular case.

14 They are two small banks designed to merge to better  
15 compete in the market place. There was testimony at the trial  
16 from three experienced officials of larger banks to the effect  
17 that the merger would intensify competition between Phillipsburg  
18 and Easton banks and would eliminate the existing apathy in bank-  
19 ing competition in the area, and that the merger would be pro-  
20 competitive and benefit the community with better personnel and  
21 extended services.

22 There is an abundance of evidence to the effect that  
23 the merger would enable the resultant bank to hire the needed per-  
24 sonnel and to give the services that are needed to make them an  
25 aggressive competitor in the area.

It should be noted at this point that recent legislation

1 in New Jersey has amended the New Jersey banking laws.

2 Q Would you make this argument if the relevant mar-  
3 ket area was Phillipsburg and Easton?

4 A Yes, absolutely.

5 Q You mean the less business there is the more need  
6 there is for a bigger bank? I mean you have told us that there  
7 is so little business in this area that ---

8 A I didn't say there was little business. I said  
9 there is plenty of business. There is needed services in the area  
10 but there is no competition in the area. There is apathy in the  
11 area, that these banks are unable ---

12 Q So, that there is plenty of business, plenty of  
13 need for bank services in the Phillipsburg-Easton area?

14 A That is correct.

15 Q I understood you to say that it had leveled off.

16 A Their growth, Second National's growth had leveled  
17 off.

18 Q You mean it was losing money?

19 A It wasn't losing money, but its growth had leveled  
20 off. It had not increased its deposits at the same pace that it  
21 had in the past. That is what the president meant by his growth  
22 had leveled off.

23 However, I might point out when we talk about the  
24 banks in Easton being so large, Northampton National Bank with  
25 over \$300,000 as a lending limit is -- practically does nothing

1 in some of these lending areas. It does not hardly anything in  
2 the commercial and industrial lending. It has no installment  
3 lending loans whatsoever. With \$18,000,961,000 in deposits, it  
4 has only 34.5 percent of its deposits loaned out.

5 Q Does the record show how many \$200,000 loans there  
6 were available around Phillipsburg?

7 A It doesn't show that, no.

8 Q It does not?

9 A doesn't show.

10 Q I would think from what you said about it could  
11 not be so bad. They loan \$200,000.

12 A The record does show a number of witnesses who  
13 testify that they could use this kind of money, but it doesn't  
14 show how much was actually loaned out in that area.

15 Q Who were the witnesses who testified they could  
16 use it?

17 A That is correct.

18 Q Who were they?

19 A There was a man who wanted to open a motel in  
20 Phillipsburg who said he couldn't get the \$250,000. He needed  
21 \$250,000 and couldn't get it there. That is the first one that  
22 comes to my mind. There is testimony that Phillipsburg had a  
23 request of over 25 loans in excess of its lending limit and  
24 Second National had 17 requests, and I might add ---

25 Q 17 over how much?

1           A     Over its lending limit.

2           I might point out the reason you don't get too many  
3 requests is because business people generally know what your  
4 lending limit is. It is sort of useless to go to some place and  
5 ask them to lend you \$200,000 when they can only lend you \$100,000.

6           Q     I would think there would be very few places in  
7 the United States as you have described this that would be en-  
8 gaged very liberally in the \$200,000 loan business. That is  
9 a big-business loan.

10          A     \$200,000 today is not much of a loan. You can't  
11 build very many businesses today with less than that kind of  
12 money unless you are talking about a corner store or something  
13 like that.

14          Q     You don't suppose that they would want to supply  
15 all of it to open a business.

16          A     Sure, why not supply all of it?

17          Q     I mean to somebody that has no money at all and  
18 they are just going to lend him \$200,000.

19          A     Well, they have to have the credit, the capital  
20 and so forth. Much of this goes to expansion and to increasing  
21 business and so on. People starting in business sometimes will  
22 have the necessary capital and collateral to put up to start a  
23 new business. They don't start from zero and as a bank for a  
24 loan without anything.

25          Q     Does the record show how much -- how many \$200,000

1 loans Easton has made in the last year?

2 A No, it doesn't.

3 Q Does it show it made any?

4 A It doesn't, to my knowledge. I tried to get that  
5 information, but they wouldn't give it to me. This is pretty  
6 private and confidential information to these banks, and they  
7 hate to divulge it because they know that the competitors are  
8 going to see everything that you tell them. So, it is very  
9 difficult to get some of this type of information.

10 Q There is a third bank and only one other bank, as  
11 I understand it, in Phillipsburg, is that right?

12 A The Phillipsburg Trust Company.

13 Q Phillipsburg Trust. And what is the situation of  
14 that bank. Did witnesses from that bank appear in this?

15 A Mr. Leupo testified for that bank. Mr. Leupo testi-  
16 fied and I think they have assets of approximately \$12 million.

17 Q It is the smallest of the three?

18 A Yes, it is the smallest. It is the bank that  
19 moved from the downtown area.

20 Q To the suburban area of Phillipsburg.

21 A It has one branch and the Phillipsburg National  
22 has two and Second National has one branch in the area surround-  
23 ing Phillipsburg.

24 Q And I would suppose that the witness, the repre-  
25 sentative from that bank was opposed to this merger, was he?



1           A     He said it would be competitive. He was opposed,  
2 but not strongly so. However, the Court in analyzing his testi-  
3 mony interpreted it to be the testimony of a man who was satisfied  
4 with what he has and had no real desires to go beyond a certain  
5 particular area. In fact, the man said he wasn't even looking  
6 for trust business. And, the name of the bank is the Phillips-  
7 brug Trust Company.

8           This is the general condition throughout the area. This  
9 is why this merger is so good. This is a merger of two small  
10 banks who can't survive unless they can merge and get the adequate  
11 capital and the adequate personnel to compete. This merger with  
12 an aggressive management can put some competition into that area  
13 and get rid of this apathy in banking competition.

14           The president of Easton National Bank, which is the  
15 largest in this Easton-Phillipsburg area testified that they can  
16 confine themselves pretty much to the Easton area with a little  
17 bit of business in Phillipsburg and he was asked why he didn't  
18 go into Bethlehem and Allentown and he said, "Well, ---

19           Q     Did they say they couldn't survive without the  
20 merger?

21           A     That is the Comptroller's office opinion looking  
22 into the future. By survived I don't mean they are going to go  
23 into bankruptcy, I mean they are going to be adsorbed by the  
24 large Newark banks, that is what is going to happen in this  
25 case.

1 Q It is not a failing company, is it, then?

2 A No, sir, I am not alleging that. I am saying that  
3 in their present condition they have got to do something. The  
4 only thing left to them is to merge so that they can compete or  
5 else merge with some of the larger banks.

6 Q I thought they were still making money.

7 A They are still making money, but the ---

8 Q Do you suppose that you were a little quick on  
9 the trigger about failing?

10 A I didn't say they were failing. I said they can't  
11 be effective competitors in the area. They can't be effective  
12 competitors in the area. They are two small banks in this area  
13 just sitting there. One the large ---

14 Q Because you can't lend \$200,000?

15 A That is correct. Once these large Newark banks  
16 start moving in the area you will see a real change in the compe-  
17 tition, and it has already started, as a result of the change in  
18 the New Jersey banking laws.

19 A large Newark bank, Newark and Essex, has already  
20 acquired a bank in Washington. There is another merger pending  
21 between the Peoples National Bank, another large bank, there is  
22 a branch been granted to Morris Trust Company over in Morris  
23 County, I believe it is, who is coming into Warren County. But  
24 this is through the whole area. Ever since the passage of the  
25 New Jersey banking law, there has been a tremendous change. The  
applications have increased for bank mergers from 57 to over 300,

1 since this banking law changed for branches throughout the First  
2 Banking District. These banks are in the First Banking District  
3 which contains the largest banks in the State.

4 The answer to this if this merger doesn't go through,  
5 the larger banks are going to get larger, that is all.

6 Q Was that law the change in the New Jersey law  
7 after the decision in this case?

8 A The change in the law was prior to the decision  
9 but subsequent to the trial. The day the opinion was rendered  
10 a motion was made by the plaintiff to continue the stay until  
11 they determined whether they wanted to appeal it and also a mo-  
12 tion was made to reopen the record to accept supplemental evi-  
13 dence.

14 The Comptroller's office introduced evidence showing  
15 what had happened since the change in the New Jersey banking laws.  
16 The Court accepted this evidence and it is Intervenor's Exhibit  
17 No. 30. It shows what has happened since this law has changed  
18 and the court considered it, took time out and considered it and  
19 said it supported his opinion that this merger would not be anti-  
20 competitive.

21 Q What do you say to the Government's footnote on  
22 this? They say that the law doesn't really have much impact on  
23 the situation.

24 A They addressed themselves primarily to branching.

25 Q To branching, yes.

1           A     Because there are some limitations. However, the  
2 new census estimate that has come out has opened up several  
3 areas which is not in the record. However, they can merge through-  
4 out, and merging has been going on throughout the area.

5           Q     Is there still a geographical limit on branching?

6           A     In the three districts.

7           Q     That is there are now three banking districts.

8           A     Three banking districts.

9           Q     No longer county-wide limitations?

10          A     That is correct, no longer county lines. That is  
11 why these banks now ---

12          Q     But now to expand outside of the district what  
13 do you have to do, merge, is that it?

14          A     Become a bank holding company and you can do it.

15          Q     State-wide?

16          A     That is correct, yes.

17          Q     And you said already that one has been put up  
18 in Washington, has it?

19          A     That is correct, yes. Washington Trust Company  
20 has already been acquired by National Newark and Essex Company.  
21 These banks are just waiting to acquire, these large banks are  
22 just waiting to acquire ---

23          Q     What's the point that if this merger can't go  
24 through each of the banks will be gobbled up by some other large  
25 Jersey bank.

1 A That is our opinion, Your Honor.

2 Q Would that be so bad?

3 A Yes, it would be. The anti-trust laws are aimed  
4 at fostering competition not permitting the larger banks to get  
5 larger and creating the concentration which Mr. Friedman spoke  
6 so much about. We are talking about -- here are two banks that  
7 want to go out and compete. They want to do something about the  
8 situation, and they say no, stay where you are and be what you  
9 are.

10 Q Would the Comptroller be able to do anything about  
11 National Newark picking up one of these two Phillipsburg banks?

12 A The Comptroller approved that because he thought  
13 it was beneficial to the community.

14 Q Could do that?

15 A Yes, we could, yes.

16 Q But you haven't been, have you? The Comptroller  
17 hasn't been. These other cases that have been dismissed --  
18 there would be sort of an expansion into other markets.

19 A Most of them were potential competition cases and  
20 ---

21 A Where a large bank picks up another smaller bank  
22 in another market area?

23 A That is correct.

24 Q And the Comptroller has been approving those?

25 A Because of the needs of the community. We haven't

1 approved every single one. But because of the needs of the  
2 community, we have approved them.

3 Q Well, I wouldn't want to restrict the Comptroller,  
4 but what would the Comptroller do here in this case if one of  
5 these -- if this merger is not approved -- what would the Comp-  
6 troller do if the ---

7 A I don't know what the -- we always consider the  
8 facts. We send an investigator out and we spend a week or two  
9 examining these things before we do it. But, let me say this,  
10 that if we felt the area needed, if the analysis showed the area  
11 needed it, we probably would let them come in. I don't say that  
12 is the best thing to do.

13 Q Did the Comptroller approve the acquisition of  
14 the Washington Trust by National Newark?

15 A Yes, it did, because it felt it needed its in-  
16 creased lending limit. It needed the services, it needed the  
17 trust service and everything + there. But, I think  
18 the anti-trust laws are aimed at keeping competition in the area.  
19 If we can keep these two banks and they are willing to try to  
20 fight, I think it is pro-competitive. It is not anticompetitive  
21 in any respect.

22 Q I don't understand why you say they are willing  
23 to keep on trying to fight. I understand you to say they are  
24 not in any danger financially. How much did they make last year?

25 A I didn't say they were in danger financially. I  
said they ---

1 Q How much did they make last year on their divi-  
2 dends?

3 A I had the figures here. Mr. Friedman said they  
4 had profits ranging from, I believe a five-year period, 1962  
5 was \$46,000 to \$123,000. And that over a period of five years  
6 Phillipsburg National made \$192,000, that is over a period of  
7 five years and Second National \$198,000 over a period of five  
8 years. He is combining them. He is not giving them year by  
9 year.

10 Q Well, isn't that pretty good for a small bank in  
11 that kind of locality?

12 A I don't know that it is so great. Bank profits  
13 today are about 1 percent on their investment as opposed to other  
14 industries. This isn't any that ---

15 Q I imagine that is temporary during all of this  
16 high interest rates.

17 A But the point I am making about it -- I am not  
18 saying they are failing. I am saying that if we don't let them  
19 merge they are going to be absorbed by larger banks in the First  
20 District. And that is what the anti-trust laws are for.

21 Q Can they be absorbed without merging something?

22 A No, how else can ---

23 Q Well, they would have to go through this same  
24 process wouldn't they with the Department of Justice?

25 A Yes, they would. This is what evidently they  
are suggesting they do. There are other alternatives to merge

1 with someone else not in the city. What difference does it  
2 make if those two small banks are in the same city. I don't  
3 think that makes any difference.

4 Q What difference does it make if what?

5 A They are in the same city, these two small banks  
6 in the same city. That isn't what we are concerned about. We  
7 are concerned about the competition, not the competitors. I  
8 don't care what the geographic market is, what the relevant  
9 geographic market is.

10 Q This law had kind of the theory that you used to  
11 have on dominoes. If you put them up on their heads and stand  
12 them up right next to one another and you let one of them knock  
13 the other one down, they just keep on knocking them down until  
14 that is just one.

15 A Yes, but continuing on that theory, what about  
16 the large Newark Banks coming in and picking up all these other  
17 banks? You are progressing, you are jumping beyond it even.

18 Q You are arguing that in order to prevent them  
19 being gobbled up the thing to do is to is to let them merge  
20 themselves.

21 A So that they can effectively compete in the area,  
22 that is correct. I think that is what the anti-trust laws are  
23 for, that is what makes it pro-competitive.

24 Q Makes it more competitive for them to merge?

25 A That is correct, more competitive in the area.



1 That is our position, and we think it is an important issue in  
2 this case.

3 Q Is that the theory the law is written on?

4 A The law says that you are to foster competition  
5 and this fosters competition.

6 Q The fewer you have, the bigger the competition?

7 A If they merge, there will be more competition in  
8 the area. These are two local banks who want to expand and grow  
9 and give competition to an area, which there is testimony al-  
10 ready on the record that there is apathy in the area among the  
11 banks. For them not to merge would mean that the larger banks  
12 would come in and grow larger. Whereas, if you let these two  
13 merge, at least they will try to do something about the compe-  
14 titive situation and try to correct the apathy in the area and  
15 attempt to fight the larger banks. Instead of having them  
16 eliminated we would at least have another bank in there fighting.

17 Q That depends on the area, doesn't it? If you  
18 take the area the US Government suggests your argument falls  
19 flat, doesn't it?

20 A I don't care what area you take. You can take  
21 any geographic area. You can take either Phillipsburg or Easton.

22 Q If you take Easton and Phillipsburg and as of now  
23 you have got four banks and you will end up with how many banks?

24 A In Easton, they have listed seven banks -- six  
25 banks.

1 Q You will have less banks and more competition?

2 A Less banks but more competition.

3 Q In that area?

4 A That is correct.

5 Q Now, do I understand you correctly that the  
6 community if you keep going a little further on it is about to  
7 end up like Appalachia, that big banks want to come in there.  
8 This area is going to pot.

9 A That the big banks will come in?

10 Q Yes.

11 A Yes, they will come in.

12 Q For what reason?

13 A To grow larger and to get larger and to get more  
14 assets. The bigger they get, the more profit they make.

15 Q And yet you can't point to a single instance of  
16 any action by any outside bank in Easton and Phillipsburg?

17 A Outside of Easton and Phillipsburg?

18 Q Where any bank has made a move to take over any  
19 other bank in there.

20 A No, I can't. There is nothing in the record to  
21 show that.

22 Q So what we have is the possibility.

23 A We have more than a possibility, if you look at ---

24 Q Or probability? It can't get any better than  
25 probability, can it? Sir?

1           A     I think it is more than a probability, but if  
2 you look at Intervenor's Exhibit No. 30, you will see what has  
3 already happened in the area.

4           Q     I am talking about in Easton and Phillipsburg.

5           A     It hasn't happened in Easton or Phillipsburg.

6           Q     And you also agree that if an attempt is made it  
7 will have to run the gauntlet and you and the anti-trust division  
8 and everybody else. Am I right?

9           A     That is correct.

10          Q     And so for that reason you say these two banks  
11 should be permitted to merge?

12          A     I might point out that when you include Easton,  
13 then the Newark banks cannot come over into Easton because that  
14 is Pennsylvania. They are confined to the seven-county First Bank-  
15 ing District.

16          Q     Sure.

17          A     So you are only talking about the three banks  
18 in ---

19          Q     Has the Comptroller ever disapproved of a merger?

20          A     Yes, Your Honor.

21          Q     Do you remember the name of it?

22          A     The First National City going into Long Island.  
23 But the Comptroller doesn't -- this is the thing that the Depart-  
24 ment of Justice perhaps doesn't like about our method. We dis-  
25 courage the man before he files the application rather than go

1 through all of the expense and trouble of filing the application.  
2 They come and talk to us first. And after they talk to us, if  
3 we feel it looks quite obvious that this merger is not a good  
4 merger, we tell them not to bother filing.

5 Q I am interested in the question Justice Douglas  
6 asked. How many times has the present Comptroller refused to  
7 agree to a merger? In what cases?

8 A I am trying to think. I had the statistics on  
9 another case. I just can't quite remember them, but if I had to  
10 hazard a guess I would say around 30 or something like that.

11 Q Around what?

12 A Around 30 or 40, but I would have to hazard a  
13 guess on it.

14 Q That he has rejected?

15 A Yes, Your Honor.

16 Q Out of how many?

17 A Quite a number. I don't know the number of all  
18 of these applications.

19 Q Can you supply us with the names?

20 A I can give you the names later, I will.

21 Q What bank, number.

22 A All right. I will supply them.

23 Q The reason I asked the question, I was reading,  
24 oh, I guess, it must have been a couple of months ago. It was  
25 some article somewhere written not by a lawyer but by a bank or

1 a businessman who was making your argument -- he couldn't get  
2 a \$200,000 loan. But his wan't the \$200,000 loan. He coulun't  
3 make a loan of \$100 million to United Airlines. Therefore, his  
4 bank wasn't big enough. So, he wanted to join with others and  
5 have a merger. So, that is where you end up isn't it?

6 A You could end up, but you have to draw a line at  
7 some point. I do feel that people that borrow that kind of  
8 money can go to New York and ---

9 Q That is what he was complaining about, you all  
10 have to go to New York.

11 A Well, maybe we should do something about that.

12 Q He thought that all of the banks East of the  
13 Mississippi should be merged.

14 (Laughter)

15 A We don't agree with that.

16 Thank you, Your Honor.

17 CHIEF JUSTICE BURGER: Governor Meyner?

18 ARGUMENT OF ROBERT B. MEYNER, ESQ. ON BEHALF  
19 OF APPELLEES, PHILLIPSBURG NATIONAL BANK AND  
20 TRUST COMPANY AND SECOND NATIONAL BANK OF

21 PHILLIPSBURG

22 MR. MEYNER: Mr. Chief Justice and may it please the  
23 Court.

24 I shou dlike to point out that this is the culmination  
25 of a long series of episodes by which two banks endeavor to be

1 pro-competitive in an extensive area. Discussion to meet the  
2 problems that existed as between older management and younger  
3 management as to how we could serve the customers in the neigh-  
4 borhood, the people who were in need of loans to finance various  
5 enterprises, all of those problems were taken into consideration.  
6 It was felt that this was the only way that we could meet the  
7 problems.

8 So, we discussed merger and in 1967 signed an agree-  
9 ment and then filed an application with the Comptroller. The  
10 three agencies, not through their somber boards, but rather through  
11 bureaucratic employees, took the narrow, blind view that only  
12 Easton was a market, or that Phillipsburg and Easton was a mar-  
13 ket. They submitted adverse reports.

14 But, then there was a full and adequate hearing before  
15 the Comptroller. Justice chose not to appear on the scene. We  
16 produced witnesses and then a decision was arrived at that this  
17 was an area somewhat similar to the Standard Metropolitan Statis-  
18 tical Area which is set forth in white in this exhibit, Exhibit  
19 No. 13.

20 Then we found that after we were ready to go ahead with  
21 the merger Justice starts suit. Then we go to the District  
22 Court in New Jersey where we have 1,600 pages of testimony, where  
23 we have over 100 exhibits, where we are put to untold difficulty  
24 in getting out records as to duplicate depositors in each bank,  
25 furnishing infinite information. And, then, the judge became ill.

1 after the conclusion of the case and we waited a year for a  
2 decision, and now this suit is here before you.

3 I would like to address myself to three things. One,  
4 I believe that the record shows that this is pro-competitive.  
5 There isn't one witness, least of all Mr. Leupo, who says that this  
6 is anticompetitive. At most, he said, and I refer you to the  
7 appendix in page 35. In the record it is probably page 134. He  
8 was asked about the competition between his bank, that is the  
9 third largest bank, and the two existing banks in Phillipsburg.

10 He said, "I would say it was healthy competition.  
11 Healthy competition to the extent that we have grown, that we  
12 have recognized and we have progressed, I would say it was healthy  
13 competition."

14 The court, "When you define it as healthy competition,  
15 do I understand correctly that you consider this competition as  
16 a factor in your own growth?"

17 And I say to you, if you read the record, 1,600 pages,  
18 you cannot find one of the people who, as bankers, appeared on  
19 the scene who said that this was anticompetitive. Not one.

20 We will take Mr. Greenley of the second largest bank  
21 in New Jersey. He looked over the entire situation. He pointed  
22 out that there was no premium on any of the exchange of shares  
23 like there was in the Nashville case. He pointed out that there  
24 was a fair exchange and that there was nothing about it that  
25 would cause customers to have to pay the toll or pay anything

1 additional.

2 Q But Governor, you have to start with the propi-  
3 sition that competition between the two banks would be eliminated.

4 A But most of the ---

5 Q Well, I know, but you do start with that. That  
6 seems rather obvious.

7 A Well, I think the customer that we are talking,  
8 the customer that Mr. Friedman is so solicitous about, he will  
9 have five choices instead of two in one instance and three in ---

10 Q I understand, but you do start with the proposition  
11 that the competition between the two banks is going to be elimina-  
12 ted, but your point is that competition will be served in other  
13 ways and in ways that will overbalance any loss of competition.  
14 That is my point.

15 A Yes, indeed, and the customer will not be hurt.  
16 Because the charges are essentially the same for checking accounts  
17 and more and more since there is a better return on time deposits  
18 most of the money is going into the time deposit area. When  
19 you take William F. Jones of the Easton bank, he specifically  
20 pointed out that this would be pro-competitive.

21 Q Yes, but how is it pro-competitive. I understand  
22 how some could be eliminated between these two banks but speci-  
23 fically, how is competition going to be served by the merger?

24 A We had at least 10 witnesses who appeared, appli-  
25 ances dealers, automobile dealers, manufacturers, industry people



1 who pointed out that their needs were well in excess of \$200,000  
2 As a matter of fact, two borrowers from our bank are directors  
3 of the Phillipsburg Trust Company. They testified for us say-  
4 ing that they felt they would be better served if this bank were  
5 merged and they could have a larger borrowing limit. Mr. Riccardi  
6 and Mr. Falk. Mr. Falk who operates outside of Phillipsburg, a  
7 tremendous market, outside of Easton one, outside -- and two out-  
8 side of Allentown.

9 The testimony is replete. There isn't one, as there  
10 is in these previous cases, there isn't one person or one banker  
11 who came in and said this will effect the community, this will  
12 hurt the community. Most people were willing to testify. No one  
13 testified against it except Mr. Edwards, who was a young PhD, with  
14 a JD degree and the age of 31, and who, on the basis of casual  
15 empiricism, arrived at the conclusion by this doctoral thesis  
16 on the basis of standard metropolitan statistical areas -- he had  
17 examined some 49 of them and he examined them in terms of what  
18 happened in 1955 and 1957. He concluded that when you had a  
19 merger of this sort interest rates on savings deposits were re-  
20 uced and interest on loans were increased.

21 This was contradicted by all of our experts, contra-  
22 dicted by bankers.

23 Q But how is competition going to be served? Is  
24 competition going to be served, you say, by enabling another unit  
25 to service larger loans? That is one way. Is that all?

A Yes. As was pointed out in Nashville and

1 two banks will be better able to compete with other banks in any  
2 of these areas.

3 Now, let's take the Standard Metropolitan Statistical  
4 Area. You have the large banks in Allentown. You have the  
5 large banks in Bethlehem. You have a large bank south of us, and  
6 no one in Phillipsburg can get a loan in excess of \$100,000. He  
7 has to go to the other neighborhoods. He can get a larger loan,  
8 and I think it was recognized in the Nashville case that the  
9 Bank Merger Act of 1966 did remedy that situation.

10 That situation of a larger loan limit in the Philadelphia  
11 National bank case was sort of held out because it was felt that  
12 the Bank Merger Act prevented it, the Bank Merger Act of 1960.  
13 But the Bank Merger Act of 1966, I think, by the Nashville case  
14 indicated that that would be one of the factors. Another factor  
15 would be better management, a better opportunity to hire employees

16 The record here demonstrates that the president of the  
17 Second National is well over 80 and the next man is 71 or 72 and  
18 the man after that is 39 or probably 40, 41. The head of the  
19 Phillipsburg National Bank is now about 73 and the next man is  
20 about 61, 62, who wants to retire early. When you come down to  
21 the next level, it is about 40 and 39.

22 Now, Kinnamon, who represented the largest bank south  
23 of us, the Hunterdon County National Bank said it is too late to  
24 go out and try to do it alone. You have to have a merger. Greer  
25 of the Lafayette Trust Company, a former bank examiner, who was

1 pulled in as a young man and who has done a good job for  
2 Lafayette Trust, says that he wants to go to the \$50 million  
3 limit in Easton, and he says that he can't do it without a mer-  
4 ger.

5 Now, let's look at the geographic area. I think this  
6 Court recognized in the Philadelphia National case that they  
7 would take the four-county area. The four-county area where  
8 the banks were permitted to operate. The judge in this case,  
9 Judge Shaw, at the time of the hearing of this case, an 11-day  
10 trial, recognized that there was pending in the State legislature  
11 an amendment of the State banking law, which would allow and  
12 which subsequently was enacted. It allows in seven counties of  
13 New Jersey branching by merger or de novo with certain home of-  
14 fice protection.

15 Seven counties, the complete norther pier, the majority  
16 of the State, well over three million people, an area very much  
17 like that which was adopted in the Philadelphia National Bank case.  
18 This is the kind of competition we are likely to get. This applies  
19 just to branch banking, by branch banking or merging. But there  
20 is state-wide bank holding. So that you can have any bank picked  
21 up by the bank-holding process.

22 In addition to that, it includes savings banks as well.  
23 In addition to that, it includes savings and loans which can move  
24 into the area. So, you see how extensive the competition is. Al-  
25 ready Warren County has this situation. There were two independent

1 in Hackettstown. There were two independent banks in Washington  
2 one 12 miles away, the other about 22 miles away.

3 Q What about the finance company that Judge Shaw  
4 placed so much evidence on?

5 A Homer Kripke, one of the most outstanding experts  
6 who teaches at N.Y.U. Law School and who has been associated with  
7 finance companies, points out the tremendous competition that  
8 they have.

9 I think in Philadelphia National it was pointed out  
10 that the finance companies get most of their money from banks.  
11 He says this is untrue today. He says that they borrow it by  
12 notes on less than 270 days from the leading insurance and manu-  
13 facturing companies. For instance, U.S. Steel maybe 80 days  
14 from now will have to make a tax payment so they will buy some  
15 notes from one of the leading finance companies.

16 That is the way that they get a good deal of their  
17 money and Homer Kripke, who is an expert here and who has testi-  
18 fied, said that only about 10 percent of the finance companies  
19 get their money from the banks. There are two types of finance  
20 companies. There is the finance company that takes care of  
21 inventory, machinery and appliances, like GMAC and CIT and that  
22 type of outfit or the subsidiaries of General Electric and their  
23 appliances. That is one phase of it. The other is the small  
24 loan companies which are a very large outfit.

25 What I was going to say now about the Warren County

1 situation. We are part of this seven-county area. They are  
2 closing in on us and they are closing in on us this way.

3           Shortly after this suit was started, there was a merger  
4 between the Washington bank and the Hackettsstown bank. That was  
5 the Warren County National Bank. That has now been taken over by  
6 the largest bank in the State, the First National Bank, that is  
7 all in Intervenor's Exhibit No. 30. So, those two banks went  
8 into a merger. They are going to be taken over by a bank holding  
9 company, the biggest bank in the State of New Jersey.

10           Then there is the Washington Trust Company, which is  
11 12 miles away from Phillipsburg and which had a branch in Oxford  
12 and one in White Township, and that is being taken over by the  
13 National Newark and Essex Bank. This is a bank with about \$14  
14 million, \$15 million. National Newark and Essex is about the  
15 third bank in the State of New Jersey operating in Newark.

16           The other independent bank we now have in Hacketts-  
17 town, that is being taken over by the Peoples Trust Company, a  
18 Hackettstown bank, which is about number five bank in the State  
19 of New Jersey.

20           If you look at Intervenor's exhibits, you will see  
21 very clearly that they allow this sort of thing. Justice says  
22 it is vital, all right for the National Newark and Essex to come  
23 in and take the Washington bank. Under their method of approach,  
24 they would probably say it is all right to come in and take one  
25 of the three banks in Phillipsburg.

1           We, in order to compete with Easton, Bethlehem and  
2 Allentown, in order to compete with Hunterdon County National  
3 Bank, in order to compete in this First District, we must have  
4 better management than we have. The record is replete with  
5 instances of what we need. It has been shown that we tried to  
6 do it.

7           Q     Has your bank lost any money during any year?

8           A     No, I might say that these two banks, all three  
9 banks in Phillipsburg survived the depression without closing  
10 more than the normal time. We have served the community, that  
11 is our chief asset.

12          Q     I understand that but I was wondering if they had  
13 ever lost any money.

14          A     No they haven't lost any.

15          Q     Or are they still making money every year?

16          A     Well I am sure we lost some during the depression  
17 years, 1932, 1933 and 1934, and we had to write off things and  
18 we didn't pay dividends for a long while, that is true. But in  
19 recent years, there is hardly a bank in the country that has  
20 actually lost any money and the moment you lose too much you  
21 have FDIC looking over your shoulder and a receivership takes  
22 place and the depositors are paid off. We have strict super-  
23 vision.

24                 But we do have two banks that are designed primarily  
25 to take care of local people. Now we have had the testimony of

1 of William Greenley and we had had it of Furman Denton. They  
2 are high executives in the leading banks in Newark, some of  
3 the banks that are moving into this area. They were asked by  
4 Justice about participation and they said, "Well, you know,  
5 things get tight here and we withdraw or we don't want to be  
6 available, and we are not interested unless you have a skillful  
7 mortgage officer or a skillful C & I loan officer available to  
8 process the loan."

9           Consequently, there is this need, need by two directors  
10 of Phillipsburg Trust, need by an automobile dealer. Twenty-five  
11 requests according to Vargoe a vice-president, about 17 accord-  
12 ing to Dalbert, the Second National office. This is the need  
13 that we want to meet and we want to be a commercial bank. This  
14 is the area that we want to serve.

15           The record will show rather completely that we ---

16           Q     Have you ever thought about selling any stock  
17 and increasing the capital?

18           A     Oh, yes, and as a matter of fact, we are under-  
19 capitalized right now. We are undercapitalized. Our relationship  
20 of capital assets toward the total assets is only about 5 percent  
21 and it should be nearer 10 percent. Second National is about 7-1/2  
22 to 8 percent and it should be nearer 10 percent.

23           One of the purposes of the merger was to bring these  
24 two banks together and ---

25           Q     Not the mergers. I am talking about did you ever

1 think about doing it in a way that would it close up any banks.

2 You just sell stock to people in addition in addition to what  
3 you sold. You seem to be doing pretty well.

4 A No, Justice Black, we are not doing well in today's  
5 line of commerce. If you will but read Nadler or Wallick, the  
6 modern-day bankers, and you read this testimony, there is a great  
7 amount of change going on constantly. We realize that this change  
8 is going on.

9 I just want to give you a few illustrations of some  
10 of the changes.

11 Q You propose to help it by merging and reducing the  
12 number of banks instead of increasing them.

13 A We are not closing any offices. There will be  
14 the same number of offices. There will be better service to the  
15 customer in the sense that we can loan him more.

16 As a matter of fact, we have a real need for someone who  
17 understands mortgage loans, a real, definite need, because you have  
18 got multiple housing coming along. You can no longer take care  
19 of it by single family dwellings.

20 The US Savings Institution came up to our town just about  
21 the time of the trial and just gave a \$695,000 loan for a multiple  
22 dwelling. This is the sort of thing that we should be taking care  
23 of. The testimony of Likleiter shows that that was done and he  
24 testified. So that we really are in a position ---

25 Q Who made that loan?



1           A     That was by the US Savings Bank out of Newark.  
2     And this is the stuff we should be taking care of.

3           Q     Well, they would have lost that business if you  
4     had gotten it.

5           A     That is right and we would have been able to  
6     service the loan a good deal better than they would from Newark.

7           Q     Governor, when someone asks you for a loan beyond  
8     your lending limit, do you normally attempt to get participants?

9           A     Oh, yes, indeed. As a matter of fact, our policy  
10    is to go to the other two banks or go across the river or go to  
11    the Prudential Insurance Company or go to other banks.

12          Q     Do you have to turn customers away because you have  
13    to get a participation certificate?

14          A     Yes, Justice White, we have. And we have testi-  
15    mony here that some people who started business, an automobile  
16    dealer, Mr. Whitman, and another person who is in the chemical  
17    business, couldn't stay with us because they couldn't wait for  
18    the time it took for us to process the papers to get a participat-  
19    ing loan.

20          Q     Well, these two banks who want to merge, what  
21    could they do by merger in the way of a loan they couldn't do  
22    by participating in each others loan?

23          A     Well, they could keep the loan, because we have  
24    loads of evidence that -- the testimony is replete ---

25          Q     If somebody wants a \$250,000 loan today and asks  
   one of these two banks to make the loan, could that bank go to

1 the other one and if the other bank agreed, couldn't you make  
2 the loan?

3 A Yes, we could, but the testimony is such ---

4 Q You just don't operate that way.

5 A There is loads of ---

6 Q Because you are competing.

7 A No, not because we are competing. As a matter  
8 of fact, Lopatcong Pohatcong Alpha Borough and Phillipsburg  
9 have borrowed from Phillipsburg National because Phillipsburg  
10 National has got together with Second National and Phillipsburg  
11 Trust to service the community. They get a better loan and a  
12 better credit rating by that method than if they had to rely on  
13 a Newark or a Hackansck or a Passaic or a Patterson bank. This  
14 is the sort of thing we want to do. This isn't any manipulation.

15 Q No, I understand. I understand what you want to  
16 do. Do you have a larger correspondent bank you normally call  
17 on to participate with you?

18 A Yes, we correspond with two New York banks, Marine  
19 Midland and, I think, it is Manufacturers Hanover, Fidelity Union  
20 and National Newark and Essex.

21 Q If you want to originate the big loan the only  
22 thing is you end up on the tail end and they do the managing, don't  
23 they.

24 A Well, and they blow hot and cold, Justice White.  
25 When things are tightened up so that they can't take care of their

1 large accounts, they tighten up on us and they don't stay with  
2 us, and they don't stay with that customer, and the customer  
3 doesn't like it.

4 Q Their primary concern is with the customers in  
5 their community and not in your community.

6 A And with the larger customers, Your Honor.

7 Q If you merge these two banks, you can't but  
8 \$100,000 now, but once they are merged you can make a loan of  
9 \$200,000.

10 A Not only \$200,000, Justice Marshall, but maybe  
11 \$300,000 or \$400,000, because we must recapitalize and we have  
12 been delaying it as a result of this merger litigation.

13 Q So you can make a loan of \$400,000?

14 A That is correct, Mr. Justice.

15 Q And then you will come in five years later and  
16 say since you can't make a loan of \$600,000 you should be merged  
17 with one of the big banks you are now talking about. Wouldn't  
18 that be logical?

19 A Justice Marshall, this is what we are hoping to  
20 avoid.

21 Q But isn't the argument just as logical? That is  
22 my trouble.

23 A But, Your Honor, we have Justice at this moment say  
24 saying that if someone wants a loan of \$250,000, go on over to  
25 Easton or go on to Newark. They are anticompetitive in a sense.

1 They don't let us compete with the area across the river. They  
2 don't let us compete in this Standard Metropolitan Statistical  
3 Area, which was set up by the Budget Bureau, and this is the  
4 Standard Metropolitan Statistical Area. Our statistics demon-  
5 strate , statistics that are in Exhibits No. 6, 7 and 8, show  
6 that this area has not had anywhere near the concentration that  
7 existed in the Nashville case. It has the least concentration  
8 except one in some-49 cases.

9 Thank you, Your Honors.

10 CHIEF JUSTICE BURGER: Thank you, Governor Meyner.

11 You have one minute left, Mr. Friedman.

12 REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN

13 MR. FRIEDMAN: Mr. Chief Justice, and may it please  
14 the Court. In this minute, there are two points I would like  
15 to make. One is the legal argument and the other is to give  
16 some statist s that the Department has worked out as to the  
17 Comptroller's record in approving the merger.

18 The legal point I would like to make is just this.  
19 The problems faced by these two banks are basically the same  
20 problems faced by most banks in the smaller communities. The  
21 difficulty is that they don't have a large enough lending limit,  
22 they have difficulty hiring people and they would like to expand.  
23 We don't think the statute contemplates that the way to solve  
24 these problems is by combining two successful banks that are  
25 directly competing with each other. There are other ways

1 available to these banks.

2 For one thing, they can increase their capitalization.  
3 The record shows that in 19 ---

4 Q What happens if they get bought by a bigger bank  
5 outside?

6 A Well, if they get bought by a bigger bank, Mr.  
7 Justice, you are not eliminating the competition between them.

8 Q And the Department would prefer that?

9 A I think the Department would, Mr. Justice, if it  
10 is just a small bank because you ---

11 Q It would be better to have a Philadelphia bank,  
12 a big Philadelphia bank owning one of these banks or both of  
13 these banks for that matter, right?

14 A Well, I don't know, Mr. Justice. But it would  
15 seem to me to be a very different situation because even if a  
16 Newark -- it would have to be a Newark bank since it is in New  
17 Jersey -- but if a Newark bank purchased one of these banks a  
18 you would still have three competing banks in the area. Under  
19 this merger, you have only two competing banks in the Phillips-  
20 burg area. The purchase of one of these banks by a big bank from  
21 outside the area is not eliminating the available ---

22 Q But you will have five in this community.

23 A You will reduce the number in this community by  
24 this merger from seven to six. And in the Phillipsburg area, you  
25 will reduce it from four to two. That, it seems to us, is a

1 very different situation in continuing the number of banks at  
2 seven but allowing one of the banks to be operated and owned by  
3 a bank from outside.

4 Q That two to one would carry a lot more weight  
5 with me if you were saying that one of these was in Tulsa, Oklahoma  
6 and the other was in Oklahoma City. Here you have one metro-  
7 politan -- it doesn't rate metropolitan -- you have one community  
8 separated by a river, and you have got seven banks and you will  
9 be cut down to six.

10 A Yes, down to six, but we think with an already  
11 concentrated market and with the fact that while you have one  
12 community of seven the indication is that the major focus of  
13 banking is in each community. We think that the elimination of  
14 this number and the significant increase in concentration is  
15 enough.

16 Now, if I might, Mr. Chief Justice, because of the  
17 questions raised, could I permissibly just indicate some of  
18 the statistics the Department ---

19 Q Couldn't you submit those because your friends  
20 are going to submit some other things.

21 Q I would like just a summary, if we may.

22 A The summary of the statistics we have and we will  
23 submit them.

24 Q Will you submit them also?

25 A Yes, we will submit a letter, and we will have  
to check the statistics, but the preliminary information we have

1 is that in the years 1967 and 1968, in each of those years, the  
2 Comptroller approved approximately 88 mergers. These are our  
3 statistics and we think it is roughly approximate. In 1967, he  
4 disapproved one and approved 88. In 1968, he didn't disapprove  
5 any, and in 1969, we have figures roughly more than 100 as far  
6 as we can show there are no denials. This is our rough figures  
7 after we ---

8 Q But this doesn't reach the point of the mergers  
9 which might have been discouraged?

10 A No.

11 Q Actual filings?

12 A These are the ones that were presented to the  
13 Comptroller.

14 Q And there was a hearing?

15 A I don't know if there was a hearing.

16 Q Or at least there was a formal application filed  
17 and it was rejected.

18 A There was a formal application. And these do not  
19 cover mergers where the application was withdrawn after it had  
20 been filed. These are applications on which he acted. We will  
21 supplement this and try to obtain as accurate figures as we can.

22 Thank you.

23 CHIEF JUSTICE BURGER: Mr. Friedman, thank you, gentle-  
24 men, the case is submitted.

25 (Whereupon, at 1:54 p.m. the argument in the above-  
entitled matter was concluded.)