

# The Burger Court Opinion Writing Database

## *BankAmerica Corp. v. United States*

462 U.S. 122 (1983)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



*CF*  
*I await the dissent*  
*JW*

To: Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **The Chief Justice**

Circulated: APR 8 1983

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-1487

**BANKAMERICA CORPORATION, ET AL., PETITIONERS v. UNITED STATES**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

[April —, 1983]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether Section 8 of the Clayton Act bars interlocking directorates between a bank and a competing insurance company.

I

In 1975, the United States brought these companion test cases (now consolidated) against ten corporations and five individuals. The corporations were three banks and their three respective holding companies, and four mutual life insurance companies. The five individuals each served on the board of directors of one of the banks or bank holding companies and one of the insurance companies. It was stipulated that the interlocked banks and insurance companies compete in the interstate market for mortgage and real estate loans.

The Government asserts that interlocking directorates between banks and insurance companies violate Section 8 of the Clayton Act, 15 U. S. C. § 19. The fourth paragraph of Section 8, on which the Government relies, provides:

“No person at the same time shall be a director in *any two or more corporations*, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce,

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

PERSONAL

April 26, 1983

Re: No. 1487, BankAmerica Corp. v. United States

Dear Harry:

You correctly assumed that I am waiting to see how the dissent treats the legislative history -- and other matters, before I decide whether to use what I have in mind.

Regards,



Justice Blackmun

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

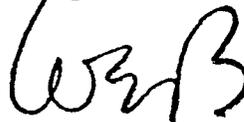
May 10, 1983

Re: No. 81-1487, Bankamerica Corp. v. United States

Dear Byron:

In due course I will be responding, albeit briefly,  
to your dissent in this case.

Regards,



Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

PERSONAL

May 19, 1983

Re: No. 81-1487, Bankamerica Corp. v. United States

Dear Harry:

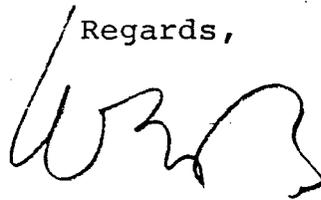
I have put together a treatment of legislative history which I am prepared to add, subject to two conditions:

- (1) that you join the opinion and judgment; and
- (2) that no one who previously joined objects.

In this case, Frankfurter's idea applies, i.e., if the language of a statute is clear -- as it is to four of us -- there is no need to look to history. Hence the introductory sentence at the top of new page 11 is qualified so as not to "shake" any of the four firm votes. (Lewis will probably join, since his tentative "pass" was made in an abundance of caution.)

I will not circulate this to others until I have your "join."

Regards,



Justice Blackmun

*Handwritten notes:*  
L.H. is favorable  
to our app. says it  
is a good idea  
to add it to the  
opinion  
4/20/83

*Chick*

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

PERSONAL

May 24, 1983

Re: No 81-1487, BankAmerica Corp. v. United States

Dear Harry:

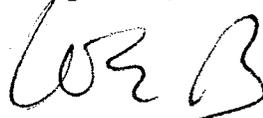
I have your note about the legislative history aspect of this case. I stretched myself beyond what I really wanted to go in trying to accommodate your view that the legislative history was relevant.

If all others wanted to go your route I would be content. I suppose I am unduly influenced by Frankfurter's view of the tendency to overreliance on legislative history. Beginning with the case I wrote back in about 1960 or 61, I began to receive occasional calls from Frankfurter's secretary with what at first seemed to be a curious message: "The next time the Judge is up this way, Justice Frankfurter would like to have him drop in." Very soon I realized that was simply a signal that he felt in the mood for a visit.

I am sure he conducted these seances with many people and I considered myself fortunate to be included in that circle. At least one of the "seances" focused on this business of legislative history and I suspect the old boy had just gone through some efforts to try to get his point of view across. He referred in uncomplimentary terms to those "who must lean on legislative history because they have difficulty in discerning simple English." Of course you knew him better by far than I did and you know that when he was worked up he was given to vigorous overstatement, but legislative history does have a tendency to become a "crutch" to lean on. Of course, it is not surprising that people reading particular language get different meanings from it. In this case Byron gets one message, I get one equally clear the other way and you find it uncertain and ambiguous. Each then, according to his reading; Byron flies North, I fly South and you join because the legislative history furnishes a certain "updraft." So be it!

I will let my few added pages stand if it doesn't cost me any votes but only with the "disclaimer" of reliance.

Regards,



Justice Blackmun

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 24, 1983

Re: 81-1487 - BankAmerica Corp. v. United States

MEMORANDUM TO THE CONFERENCE:

To accommodate views expressed by Harry, I have added pages 11-17 to cover legislative history to the extent it may be relevant.

This may not fully meet his concerns, but I am willing to go that far.

Regards,

*WEB*

C Pp. 10-17

To: Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **The Chief Justice**

Circulated: \_\_\_\_\_

Recirculated: 5/24/83

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-1487

**BANKAMERICA CORPORATION, ET AL., PETITIONERS v. UNITED STATES**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May —, 1983]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether Section 8 of the Clayton Act bars interlocking directorates between a bank and a competing insurance company.

I

In 1975, the United States brought these companion test cases (now consolidated) against ten corporations and five individuals. The corporations were three banks and their three respective holding companies, and four mutual life insurance companies. The five individuals each served on the board of directors of one of the banks or bank holding companies and one of the insurance companies. It was stipulated that the interlocked banks and insurance companies compete in the interstate market for mortgage and real estate loans.

The Government asserts that interlocking directorates between banks and insurance companies violate Section 8 of the Clayton Act, 15 U. S. C. § 19. The fourth paragraph of Section 8, on which the Government relies, provides:

“No person at the same time shall be a director in *any two or more corporations*, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce,

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 27, 1983

Re: 81-1487 - Bankamerica Corp. v. United States

Dear Harry:

I do not believe it is necessary to accede to your request on the legislative history. My version leaves it to each reader to decide how much the history is relevant, and I am not willing to change my draft. Congress will likely take a look at this issue anyway.

Regards,



Justice Blackmun

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 1, 1983

Re: No. 81-1487, BankAmerica Corp. v. United States

Dear Harry:

Possibly your problems on this case would be alleviated if I were to open the page 11 discussion as follows:

"If any doubt remained as to the meaning of the statute, that doubt is removed by the legislative history."

This would be a substitute for the present first sentence, page 11.

Regards,

Justice Blackmun

Pp. 11, 17

3rd Draft

To: Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun ✓  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: The Chief Justice

Circulated:

Recirculated: JUN 3 1983

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 81-1487

BANKAMERICA CORPORATION, ET AL., PETITIONERS v. UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 8, 1983]

CHIEF JUSTICE BURGER delivered the opinion of the Court:

The question presented is whether Section 8 of the Clayton Act bars interlocking directorates between a bank and a competing insurance company.

## I

In 1975, the United States brought these companion test cases (now consolidated) against ten corporations and five individuals. The corporations were three banks and their three respective holding companies, and four mutual life insurance companies. The five individuals each served on the board of directors of one of the banks or bank holding companies and one of the insurance companies. It was stipulated that the interlocked banks and insurance companies compete in the interstate market for mortgage and real estate loans.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

April 11, 1983

Re: No. 81-1487, Bankamerica,  
et al. v. United States

Dear Chief,

I'll await the dissent.

Sincerely,



The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 9, 1983

Re: No. 81-1487

Bankamerica Corporation, et al.  
v. United States

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Dear Byron,

Please join me in your dissent in  
the above.

Sincerely,

*Bul*

Justice White

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 8, 1983

Re: 81-1487 - Bankamerica Corp. v. U.S.

---

Dear Chief,

In due course, I shall circulate a  
dissent.

Sincerely,



The Chief Justice

Copies to the Conference

cpm

COMMUNICATIONS OF THE EXECUTIVE DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice  
Justice Brennan ✓  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

~~BRW~~  
*Please join me in  
your dissent*  
*(H)*

1st DRAFT

~~SUPREME COURT OF THE UNITED STATES~~

No. 81-1487

BANKAMERICA CORPORATION, ET AL., PETITIONERS v. UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May —, 1983]

JUSTICE WHITE, dissenting.

The primary issue in these cases is whether ¶4 of §8 of the Clayton Act (the "competing corporations provision"), 15 U. S. C. §19, prohibits interlocking directorates between banks and nonbanks. The Court holds that it does not, thereby exempting this entire species of interlocks from any regulation whatsoever, even though such interlocks undisputably may have serious anticompetitive consequences directly contrary to the policies of our antitrust laws. I am quite sure that Congress intended no such result, and I therefore dissent.

I

Subject to certain other exemptions not presently relevant, ¶4 of §8 prohibits interlocking directorates between two or more corporations engaged in whole or part in commerce, "other than banks, banking associations, trust companies, and common carriers. . . ." The question here is whether this "other than banks" exemption is applicable to interlocks where any single one of the interlocked corporations is a bank, as petitioners contend, or whether it applies only when all of the interlocked corporations are banks, as the Government asserts. Both sides argue, with straight faces, that the plain statutory language supports their re-

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To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

pp. 1, 2, 7, 8 and  
stylistic changes throughout

Circulated: \_\_\_\_\_  
Recirculated: JUN 2 1983

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 81-1487

BANKAMERICA CORPORATION, ET AL.,  
PETITIONERS v. UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[June —, 1983]

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The primary issue in these cases is whether ¶4 of §8 of the Clayton Act (the "competing corporations provision"), 15 U. S. C. §19, prohibits interlocking directorates between banks and nonbanks. The Court holds that it does not, thereby exempting this entire species of interlocks from any regulation whatsoever, even though such interlocks undisputably may have serious anticompetitive consequences directly contrary to the policies of our antitrust laws. I am quite sure that Congress intended no such result, and I therefore dissent.

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CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 11, 1983

Re: No. 81-1487 - Bankamerica Corp. v. U.S.

Dear Chief:

I await the dissent.

Sincerely,

*T.M.*  
T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 9, 1983

Re: No. 81-1487 - Bankamerica Corp. v. U.S.

Dear Byron:

Please join me in your dissent.

Sincerely,

*Jm*  
T.M.

5/27  
*Stet*

Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 21, 1983

Re: No. 81-1487 - Bankamerica Corp. v. United States

Dear Chief:

I am certainly with you as to the result in this case, and, ultimately, I may join your opinion.

Your conference notes will indicate that I feel rather strongly that the legislative history was adverse to the Government's position and that we should rely on it as well as attempt to parse the statute. I am not so firm about the statutory language as you and those who have joined you are.

It may be, of course, that you have reserved the legislative history feature of the case until you see what the dissent has to say. In the meantime, I shall preserve my final vote until the dissent is circulated.

Sincerely,

*H.A.B.*

The Chief Justice

cc: The Conference

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May 23, 1983

Re: No. 81-1487 - Bankamerica Corp. v. United States.

Dear Chief:

I feel that the addition of the six pages outlining the legislative history strengthens your opinion tremendously. But, of course, as I have told you, I am not as persuaded about the statutory language as the four of you are.

I could, and would, join your opinion as so supplemented provided that the first sentence of the supplementary material is changed to read "The legislative history provides little ...." I cannot join the first sentence as presently written because it carries an implication that the legislative history is not relevant.

I assume, also, that footnote 6 of the first draft will be deleted.

I am well aware of Felix' attitude toward plain language and legislative history. I sat at his feet for a solid year and heard him expound on this theme continuously. I came to know him fairly well later and heard more of the same expounding. The rule generally is a good one, but, as you know, we often honor it in the breach. You will remember Chemehuevi Tribe of Indians v. FTC, 420 U.S. 395 (1975), an opinion I always kidded Potter about. You joined him there as well as I.

I sense that you are uncomfortable with adding the legislative history material. If your discomfort is strong, we perhaps should go our separate ways. I then would write a concurrence and join the judgment. You point out that Lewis will probably join, so you should have a Court anyway. My conference notes, however, are to the effect that Lewis has decided to stay out of the case.

Sincerely,

HAB

The Chief Justice

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 27, 1983

Re: No. 81-1487 - Bankamerica Corp. v. United States

Dear Chief:

I do not wish to deprive you of a Court in this case if Lewis in fact is "out," as my notes indicate. I would withdraw this separate concurrence if you would change the first sentence on page 11 to read something like "The legislative history provides little ...." as I suggested in our private exchange of correspondence a few days ago. I still feel that, as written, your sentence carries an implication that the legislative history is not relevant. That implication is one I cannot join.

Sincerely,

*H.A.B.*

The Chief Justice

cc: The Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 31, 1983

Re: No. 81-1487 - Bankamerica Corp. v United States

Dear Chief:

In view of your note of May 27, I adhere to my special concurrence in the judgment and do not join your opinion.

Sincerely,

Handwritten signature of H.A.B. in cursive script.

The Chief Justice

cc: The Conference

HAI

June 1, 1983

Re: No. 81-1487 - Bankamerica Corp. v. United States

Dear Chief:

I appreciate your willingness to change the first sentence on page 11 of your opinion. It generally meets my concern. If the change is made, I shall join your opinion and withdraw my separate writing circulated May 27.

Sincerely,

HAB

The Chief Justice

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 3, 1983

Re: No. 81-1487 - Bankamerica Corp. v. United States

Dear Chief:

Please join me in your third draft circulated this afternoon. I am now withdrawing my separate concurrence.

Sincerely,

*H.A.B.*

The Chief Justice

cc: The Conference

January 6, 1983

81-1487 BankAmerica Corp. v. United States

Dear Chief:

This case, set for argument January 19, presents the question under the Clayton Act whether it is unlawful for a person to serve as a director of an insurance company and also of a bank when there is competition between them in the mortgage market.

I was a director of the bank I represented (UVB) for many years, and for a few years also was a director of an insurance company. I suppose they competed in the mortgage market, though the making of loans was a management function rarely involving the board.

I was aware of the Clayton Act, but it was understood (indeed, I knew of no dissenting view) that the Act did not proscribe service on the two types of boards. Petitioner's brief in this case states:

"In the 68 years since the Clayton Act was enacted, banks and insurance companies have continued to share directors. The practice is so commonplace that . . . as many as 50% of the directors of the nation's life insurance companies may also be directors of banks." (p. 6)

Of course the foregoing would not necessarily mean that the law was not being violated all of that time. As I have just begun to read the briefs, I have no firm opinion - although at the time of my service this was commonplace in Richmond where there are several insurance companies. Indeed, this was thought to be mutually beneficial.

This is a long explanation of why I write. I would like your opinion as to whether I should disqualify. I would be happy to ask the views of the Conference (as I often have) if you think this is desirable.

You might wait to respond until you have an opportunity to read the briefs. I have only commenced work on them.

Sincerely,

The Chief Justice

lfp/ss

May 30, 1983

81-1483 BankAmerica Corp. v. United States

Dear Chief:

Although Harry has not joined your opinion, his concurrence gives you a Court for the judgment.

This will mean a reversal of CA9's erroneous opinion. It also almost certainly will mean that the government will undertake no further suits unless and until §8 of the Clayton Act is clarified. In these circumstances, I would prefer to remain out of the case for the reasons we have discussed, and which I stated at Conference.

Before the vote on this case, I would have guessed that it would have been unanimous against the government. This is a suit that responsible officials never should have brought. It reflects on the judgment of the officials who instituted it.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 11, 1983

Re: No. 81-1487 Bankamerica Corp. v. United States

Dear Chief:

Please join me.

Sincerely,

*WHR*

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 11, 1983

Re: 81-1487 - Bankamerica Corp. v.  
United States

Dear Chief:

Please join me.

Respectfully,



The Chief Justice  
Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

April 8, 1983

No. 81-1487 Bankamerica Corporation v.  
United States

Dear Chief,

Please join me.

Sincerely,

*Sandra*

The Chief Justice

Copies to the Conference