March 7, 1946

Re: No. 1, North American Co. v. SEC

Dear Frank:

You have written an excellent opinion and I am writing to indicate my agreement. I would like, however, to make the following suggestions for your consideration, some rather minor, others of some importance.

On page 2 in the 11th line of the first full paragraph, would it be accurate to insert between the words "aggregate" and "value" the word "capitalized"?

On page 3 I am wondering whether the second full sentence in the third full paragraph is quite consistent with later statements appearing in your opinion. That sentence says there is no evidence that North American ever actively managed the operation of any of the companies. On page 4 the first sentence of the first full paragraph states that North American in some respects has actually intervened in the activities of its subsidiaries. The paragraph then goes on to show how this has been done. I suppose that the difference you have in mind in the two statements is the difference between "operations" and controlling financial matters. I should think however that active intervention in financial matters, certainly in a broad sense, should be regarded as very close to active management of operations. Perhaps this question as to consistency of the statement is overly captious, but it may be worth calling to your attention nevertheless.

My more substantial questions relate to statements appearing on pages 12 and 13. I am a little afraid of the breadth of the last sentence on page 12. Read in conjunction with the preceding sentence it may be valid. Nevertheless it is very broad. I would prefer it to be watered down to some such statement as, "But so far as the commerce power alone is concerned, the authority of Congress is plenary."

On page 13 in the fourth line I would change "weapon" to "tool."

In the third full sentence on page 13, again your statement may be true in all its breadth. I am a little unwilling yet, however, to say, notwithstanding such cases as the Lottery case and Kentucky Whip & Collar Co., that Congress can "prohibit all activities, local or interstate, that occur in or concern more states than one, thereby substantially affecting interstate commerce." Maybe that will be the ultimate reach of the commerce power. I myself have strong reservations as to the wisdom of the decision in Kentucky Whip & Collar, which in practical effect for the purpose of protecting unions against prison labor imposed on prisoners through the country enforced idleness or a very large degree of that evil. Even though the power of Congress may go so far, I don't think we should yet say that Congress can forbid the shipment of apples because that would be beneficial to the peach or orange trade. We may be close to that line, but I'd rather

hold it until we have to decide it. Accordingly, I would like to see the third sentence on page 13 toned down and also the first two sentences in the second full paragraph on that page.

On page 14 in the last paragraph, and with reference particularly to the second full sentence, it seems to me that you might well point out, perhaps in a footnote, what I think is an inconsistency with reference to the management phase of North American's activities between its commerce clause and due process arguments. It looks as if the company is saying on the commerce clause angle, "We're not subject to federal regulation because we don't manage or control our subsidiaries"; whereas, on the due process argument they say they are protected against federal regulation because the effect of it is to deprive them of efficient common management.

On page 16 in the first full paragraph and with reference to the second sentence, I am not sure that an implication might not be found from the way the sentence is stated that the regulations imposed by other sections of the Act than § 11 (b) (1) do not apply to North American and other holding companies because § 11 (b) (1) does. I am sure this is not your meaning and it may be the possibility of implying such an inference is remote. Nevertheless, I think we should not indicate that, because a holding company may be subject to § 11 (b) (1), it is not also subject to the other applicable regulatory provisions of the Act.

In the last paragraph of the opinion on page 16, I do not like the form of statement "It also includes the power to regulate the good." This implies that North American is good. I don't think any compensation of this sort can be good, at any rate within the meaning of the policy against financial concentration which Congress has defined and put into law. I think it would be better to revamp this sentence into something like the following sentence: "It also includes the power to regulate with a view to preventing the occurrence of evil."

Although I think you have adequately treated the Northern Securities case as precedent and doctrine, I am inclined to think you might want to emphasize a little more strongly that basically the issue here presented on the commerce clause was settled in that case long ago.

Notwithstanding these questions, I think you have done an admirable job and the opinion will go down as an historic one.

Mr. Justice Murphy