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**JOINT HEARING ON BANK OF AMERICA AND
MERRILL LYNCH: HOW DID A PRIVATE DEAL
TURN INTO A FEDERAL BAILOUT?**

Thursday, June 11, 2009

House of Representatives

Committee on Oversight and

Government Reform,

joint with the

Domestic Policy Subcommittee,

Washington, D.C.

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Committee Hearings

of the

U.S. HOUSE OF REPRESENTATIVES



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12 Washington, D.C.

13 The committees met, pursuant to call, at 10:00 a.m., in
14 Room 2154, Rayburn House Office Building, the Honorable
15 Edolphus Towns [chairman of the Committee on Oversight and
16 Government Reform] presiding.

17 Present: Representatives Towns, Kucinich, Issa, Jordan,
18 Kanjorski, Cummings, Clay, Watson, Lynch, Connolly, Quigley,
19 Kaptur, Van Hollen, Welch, Foster, Speier, McHenry, Bilbray,
20 Flake, and Chaffetz.

21 Staff Present: John Arlington, Majority Chief
22 Counsel-Investigations; Beverly Britton Fraser, Majority
23 Counsel; Kwane Drabo, Majority Investigator; Brian Eiler,
24 Majority Investigative Counsel; Aaron Ellias, Majority Staff
25 Assistant; Linda Good, Majority Deputy Chief Clerk; Jean
26 Gosa, Majority Clerk; Katherine Graham, Majority
27 Investigator; Adam Hodge, Majority Deputy Press Secretary;
28 Carla Hultberg, Majority Chief Clerk; Marc Johnson, Majority
29 Assistant Clerk; Mike McCarthy, Majority Deputy Staff
30 Director; Jesse McCollum, Majority Senior Advisor; Amy
31 Miller, Majority Special Assistant; Leah Perry, Majority
32 Senior Counsel; Jenny Rosenberg, Majority Director of
33 Communications; Joanne Royce, Majority Senior Investigative
34 Counsel; Leneal Scott, Majority Information Officer;
35 Christopher Staszak, Majority Senior Investigator Counsel;
36 Ron Stroman, Majority Staff Director; Jaron Bourke, Majority
37 Staff Director-Domestic Policy Subcommittee; Charisma
38 Williams, Majority Staff Assistant-Domestic Policy
39 Subcommittee; Cate Veith, Majority Legislative Assistant,
40 Office of Congressman Dennis J. Kucinich-Domestic Policy
41 Subcommittee; Lawrence Brady, Minority Staff Director; John
42 Cuaderes, Minority Deputy Staff Director; Jennifer Safavian,
43 Minority Chief Counsel for Oversight & Investigations;
44 Frederick Hill, Minority Director of Communications; Dan
45 Blankenburg, Minority Director of Outreach & Senior Advisor;

46 Adam Fromm, Minority Chief Clerk & Member Liaison; Kurt
47 Bardella, Minority Press Secretary; Benjamin Cole, Minority
48 Deputy Press Secretary; Christopher Hixon, Minority Senior
49 Counsel; Brien Beattie, Minority Professional Staff Member;
50 Molly Boyl, Minority Professional Staff Member.

51 Chairman TOWNS. Good morning. Thank you all for being
52 here today.

53 On September the 15th, 2008, when the financial crisis
54 was at its height, Bank of America announced that it was
55 purchasing Merrill Lynch, creating one of the nation's
56 largest financial institutions. At the time, Bank of
57 America's CEO, Mr. Lewis, called the merger a great
58 opportunity for Bank of America shareholders.

59 When it was announced on September the 15th, this merger
60 was a marriage negotiated between two willing parties. It
61 was designed for the exclusive benefit of private
62 shareholders, and it was to be paid for exclusively with
63 private money.

64 Four months later, on January the 16th, 2009, after the
65 merger was consummated and the quarterly earnings were
66 announced, the world woke up to a different kind of marriage.

67 The American people discovered that Merrill Lynch had
68 experienced a \$15 billion fourth quarter loss. Most
69 importantly, we found out that the merger had taken place
70 only after the Federal Government had committed to give Bank
71 of America billions in taxpayer money.

72 What happened in the interim?

73 When Bank of America urged its shareholders to approve
74 the acquisition of Merrill Lynch on December the 5th, 2008,
75 there was no public disclosure of any problems with the

76 transaction.

77 However, in a deposition taken by New York Attorney
78 General Cuomo, Mr. Lewis testified that just nine days after
79 the shareholder vote he discovered a \$12 billion loss at
80 Merrill Lynch. Mr. Lewis said he told then-Treasury
81 Secretary Hank Paulson that he was strongly considering
82 backing out of the deal. According to Mr. Lewis, Paulson
83 ultimately told him that if he didn't go through with the
84 acquisition, he and the Board would be fired.

85 However, internal emails we have obtained from the
86 Federal Government indicate officials there were very
87 skeptical about Mr. Lewis's motives in threatening to back
88 out of the Merrill deal. Federal Chairman Ben Bernanke
89 thought Lewis was using the Merrill losses as a bargaining
90 chip to obtain Federal funds.

91 Other emails reveal that Federal analysts found it
92 suspect that Mr. Lewis claimed to be surprised by the rapid
93 growth of Merrill losses given the clear signs in the data.
94 They noted that as a minimum it calls into question the due
95 diligence process Bank of America has been doing in
96 preparation for the takeover.

97 In short, the Treasury Department had provided \$20
98 billion for a shotgun wedding. But the question may be, Who
99 was holding the shotgun?

100 At today's hearing we hope to better understand what

101 happened in the four months between September the 15th, 2008,
102 when the merger was announced, and January the 16th, 2009,
103 when the public learned that Bank of America had received \$20
104 billion in taxpayer money.

105 We will be looking for answers to some puzzling
106 questions:

107 Why did a private business deal, announced in September,
108 and approved by shareholders in December, with no mention of
109 government assistance, end up costing taxpayers \$20 billion
110 in January?

111 Did Paulson and Bernanke abuse their authority by
112 ordering Mr. Lewis to go through with the Merrill
113 acquisition, or did Mr. Lewis threaten to back out in order
114 to squeeze more money out of the Federal Government?

115 Did the Federal Government tell Mr. Lewis to keep quiet
116 about the escalating Merrill Lynch losses and the
117 Government's commitment to provide billions in Federal
118 funding?

119 I am sure there will be other questions, as well.

120 To get to the bottom of these issues, we also intend to
121 invite Mr. Paulson and to invite Mr. Bernanke to testify at a
122 future date. The Committee's willingness to issue subpoenas
123 should clarify our expectation of full cooperation by
124 prospective witnesses.

125 I want to thank Mr. Lewis for being here and I look

126 forward to his testimony.

127 [Prepared statement of Chairman Towns follows:]

128 ***** COMMITTEE INSERT *****

129 Chairman TOWNS. At this time, I yield to the Ranking
130 Member of the Committee, Mr. Darrell Issa of California.

131 Mr. ISSA. Thank you, Mr. Chairman, and thank you for
132 holding this important bipartisan hearing today.

133 It is important that those who see this hearing today
134 recognize that we are not here to evaluate the value of Bank
135 of America or Merrill Lynch or their transaction, whether it
136 was a good deal then or a good deal today for either of the
137 parties. We are here because there has been a serious
138 allegation and a number of pieces of evidence have arisen
139 that make us believe that Government officials felt necessary
140 to use the power, influence and, in fact, potentially threats
141 in order to consummate this deal.

142 When Congress envisioned the TARP and other powers in
143 order to help in the post-September meltdown of the economic
144 market, we did so in a way that was intended to make dollars
145 available to help lessen the impact as we unwound credit
146 markets around the world. Nowhere in the legislation did it
147 suggest that Hank Paulson, Ben Bernanke, or anyone else
148 operating on behalf of the United States Government was given
149 the power to force shotgun weddings.

150 Today we will hear from Ken Lewis, CEO of Bank of
151 America, a man who has spent decades understanding the value
152 of financial institutions. We undoubtedly will hear that, in
153 fact, at the beginning of this transaction, the ratios

154 determined for a stock trade type merger were in fact
155 considered to be reasonable.

156 As the Chairman has said, rightfully so, the Federal
157 Government played a clear part in this. But the American
158 people should understand their dollars were not given to any
159 party in this transaction, but in fact loaned at an amount
160 substantially greater than the interest rate paid by the
161 Federal Reserve. As such, Ken Lewis and all the parties
162 involved had an obligation to recognize they were going to
163 have to pay this money back and that they had to receive
164 value in this transaction.

165 Allegations have been made throughout the press, and
166 will undoubtedly be reiterated here today, that the value
167 that was being questioned by Bank of America had something to
168 do with getting more money from the Federal Government. That
169 may be true. Having done acquisitions myself, more often it
170 is in fact the ratio being paid between the buying company
171 and the selling company that is more at stake.

172 Had Bank of America had to pay a greater amount in the
173 stock trade than it did, the value of Bank of America to the
174 existing stockholders would have been reduced. Had, on the
175 other hand, instead of a roughly 8 to 10 ratio, had it been a
176 5 to 10 ratio, the stockholders of Merrill Lynch would have
177 had a significantly lower value to their stock.

178 We are not here, though, today to deal with any of that.

179 We are clearly here today, as the Government Reform and
180 Oversight Committee, to deal with the question of whether or
181 not allegations made and evidence that has arisen lead us to
182 believe that those operating under the color of our
183 Government's seal used any unreasonable influence or threats
184 in order to consummate this or any other deal.

185 Mr. Chairman, I thank you for holding this hearing. I
186 appreciate the fact that this is clearly the first of two
187 hearings that will be necessary. Today we have part of the
188 story. When we have Mr. Bernanke and Mr. Paulson, then we
189 will have the other half of it. I look forward to this first
190 hearing and yield back.

191 [Prepared statement of Mr. Issa follows:]

192 ***** COMMITTEE INSERT *****

193 Chairman TOWNS. Thank you very much.

194 I now yield five minutes to Mr. Kucinich, who is the
195 Chair of the Subcommittee.

196 Mr. KUCINICH. Thank you very much, Mr. Chairman, members
197 of the Committee.

198 Bank of America became the largest commercial bank in
199 the Nation, the eleventh largest corporation in the United
200 States, and the 23rd largest company in the world through the
201 aggressive acquisition of other financial institutions,
202 including the purchase of Merrill Lynch last year. But
203 something went terribly wrong with the Merrill Lynch
204 acquisition, nearly enough to bring Bank of America down.

205 Taxpayers now own \$45 billion in preferred shares and
206 warrants in Bank of America. That money was committed by the
207 Treasury Department and the Federal Reserve, and Mr. Lewis is
208 here today, as the CEO of Bank of America, thanks to the
209 commitment of those funds through a series of events that
210 unfolded through the end of December 2008 and into early
211 January 2009.

212 Due to the secretive and unaccountable conduct of the
213 Fed throughout its interventions addressing the current
214 financial crisis, many questions about the Bank of
215 America-Merrill Lynch deal and bailout have, until today,
216 remained unanswered. Some of the key questions have been:

217 Were the Merrill Lynch losses that precipitated Bank of

218 America's distress call to the Treasury on December 17th the
219 first such accelerating losses Bank of America observed at
220 Merrill Lynch since agreeing to purchase the company? Did
221 the Government believe that Bank of America had a credible
222 case for abandoning the deal? Did the Federal Reserve compel
223 Bank of America to complete the deal against its will?

224 Or, Did Bank of America's mistakes and miscalculations,
225 more than any other single factor, cause the experienced
226 corporate deal-maker to be exposed to Merrill Lynch's
227 predictably large losses? Did the Government believe that
228 Bank of America knew or should have known about those losses
229 before its shareholders ratified the merger? Did the
230 Government have an opinion about whether Bank of America
231 could be liable for securities fraud for withholding from its
232 investors material information it possessed about a
233 significant deterioration in Merrill Lynch's balance sheet?
234 Did Bank of America in effect negotiate an extraordinary deal
235 for billions of additional dollars from taxpayers to continue
236 its growth as the Nation's largest commercial bank?

237 The hearing today will help to answer those questions.
238 This Committee's ongoing investigation and subsequent
239 hearings will answer the following questions, among others:

240 Did the Federal Reserve, in attempting to protect the
241 system, apply well-established remedies when it engineered
242 billions of dollars in subsidies to Bank of America to

243 complete its deal with Merrill Lynch?

244 Or, Did the Federal Reserve pursue an untested
245 experiment in banking regulation at variance with traditional
246 remedies in committing billions of dollars in taxpayer funds
247 to a corporate management that the Federal Reserve believed
248 had failed in major ways?

249 Mr. Chairman, members of the Committee, this Committee
250 has sifted through tens of thousands of pages of documents
251 produced by Bank of America, the Department of Treasury, and
252 the Federal Reserve. Our investigation will help set the
253 record straight about Bank of America and Merrill Lynch.
254 Furthermore, the story of Bank of America's merger with
255 Merrill Lynch and its huge taxpayer-provided subsidy helps to
256 answer broader questions about how the corporate management
257 of very large financial institutions operate with virtual
258 impunity for their mistakes. The documents we will reveal
259 today provide the public a rare look into the disconnection
260 between the Fed's ability to analyze financial problems, and
261 its ability to remedy them, when they involve very large
262 financial institutions.

263 Finally, Mr. Chairman, before Congress rushes to revise
264 the banking regulatory framework, we would do well to
265 incorporate the lessons of the Bank of America-Merrill Lynch
266 episode that this Committee's hearings over the coming weeks
267 will draw.

268 I yield back. Thank you.

269 [Prepared statement of Mr. Kucinich follows:]

270 ***** COMMITTEE INSERT *****

271 Chairman TOWNS. I thank the gentleman from Ohio.

272 Now I will yield to the Ranking Member, Jim Jordan, also
273 from Ohio.

274 Mr. JORDAN. Thank you, Mr. Chairman, for holding today's
275 hearing. I want to thank you and Ranking Member Issa, and
276 also the Chairman of the Subcommittee for his tireless
277 efforts to get to the truth about this issue. I believe
278 today's hearing is an important first step in learning about
279 the full extent of the Government's manipulation of the
280 banking industry.

281 This Committee's investigation of the Bank of
282 America-Merrill Lynch transaction has raised troubling
283 questions about potential abuses of Government power. As
284 both the Chair and the Ranking Member have indicated, we have
285 learned that, at a minimum, then-Secretary Hank Paulson
286 threatened to remove Mr. Lewis and Bank of America's board of
287 directors if Mr. Lewis exercised his legal option to attempt
288 to bank out of the deal to acquire Merrill Lynch. In
289 addition, we have learned that the Department of Treasury and
290 the Federal Reserve were involved in discussions about when
291 and how the financial condition of Merrill Lynch was to be
292 disclosed to the two companies' respective shareholders.

293 We have also learned that this transaction took place in
294 a climate of fear and intimidation by Government officials.
295 For example, we now know that, in October of 2008, Mr.

296 Paulson brought the CEOs of the largest private banks in
297 America to the Treasury Department and demanded that they
298 accept the partial nationalization of their banks in exchange
299 for an amount of money of the Government's choosing.

300 Mr. Chairman, I understand the significant challenges
301 that our economic system faced last fall, and I understand
302 Mr. Paulson's and Mr. Bernanke's intention to do what they
303 thought was in the best interest of the economic system as a
304 whole. But in our constitutional system of government, the
305 rule of law restricts the Government's ability to do whatever
306 it wants. We must understand the full story of what happened
307 in the process of the Government taking over much of the
308 banking industry so that, when the next crisis occurs, we can
309 understand the proper limits of Government action in a free
310 and civil society.

311 I am grateful for Mr. Lewis's willingness to appear
312 before the Committee today. In addition to important
313 questions regarding Bank of America's transaction with
314 Merrill Lynch, I also hope Mr. Lewis can shed light on his
315 personal interaction with Government officials, and I intend
316 to ask him about his participation in the initial capital
317 injections and to what extent they were forced upon Bank of
318 America. And as someone who comes from auto-making country,
319 I also would like to know the extent to which the Government
320 is currently involved in day-to-day operations of the

321 company.

322 A full and complete investigation underscores the facts
323 surrounding the Bank of America-Merrill Lynch transaction
324 requires the Government's decision-makers, in this case Mr.
325 Paulson and Mr. Bernanke, to appear before this Committee to
326 answer the tough questions that the American people demand to
327 be answered, and I know that the Chairman and the Ranking
328 Member talked about that. We look forward to that happening
329 in a bipartisan fashion in the near future.

330 Again, thank you, Mr. Chairman, for this opportunity to
331 make an opening statement. With that, I would yield my time,
332 if I could, to Mr. McHenry to introduce our witness.

333 [Prepared statement of Mr. Jordan follows:]

334 ***** COMMITTEE INSERT *****

335 Chairman TOWNS. Mr. McHenry.

336 Mr. MCHENRY. Thank you, Mr. Chairman.

337 Today, I have the privilege of introducing our witness,
338 whose company is headquartered in Charlotte, North Carolina,
339 which my district is just to the west of; and, as the only
340 member of the Committee from the Carolinas, I think it is my
341 duty and privilege to introduce our witness.

342 Kenneth D. Lewis is currently the Chief Executive
343 Officer of Bank of America. He is responsible for more than
344 55 million consumer and small business relationships and \$1.7
345 trillion in total client assets. With various business and
346 institutional clients in more than 150 countries and business
347 relationships with 98 percent of U.S. Fortune 500 companies,
348 Mr. Lewis oversees one of the largest financial services
349 corporations in the world and is one of the largest
350 institutions headquartered in North Carolina; in fact, is the
351 largest institution headquartered in North Carolina.

352 Born in 1947 in Meridian, Mississippi, Mr. Lewis earned
353 a Bachelor's Degree in finance from Georgia State University
354 and a graduate of the Executive Program at Stanford
355 University. Arriving at NC&B in 1969, which was Bank of
356 America's predecessor, he served more than 30 years within
357 the bank, and, in 2001, attained his current position as CEO
358 of Bank of America. Throughout his career with Bank of
359 America, he has secured millions of new customers and paved

360 the way for future expansion.

361 He was named, in 2007, as one of the 100 most
362 influential people in the world by Time Magazine, has been
363 twice named Banker of the Year by the American Bankers
364 Association. He has been the former Chairman of the National
365 Urban League and has been involved in every possible
366 community cause in Charlotte, large and small, and for that
367 we do thank you for your leadership for our community.

368 Bank of America's presence is certainly felt in western
369 North Carolina, in my district, and across North Carolina
370 generally. The 10th District has become particularly hard
371 hit in this economic recession, and Bank of America employs
372 about 17,000 North Carolinians, many of whom are my
373 constituents and are proud to work for a strong institution;
374 and we look forward to stronger days ahead.

375 Thank you for your testimony here today and thank you
376 for your presence.

377 Chairman TOWNS. Thank you very much, Mr. McHenry.

378 It is a longstanding tradition that we swear all of our
379 witnesses in, so, Mr. Lewis, would you please stand and raise
380 your right hand? Do you solemnly swear to tell the truth,
381 nothing but the truth? If so, answer in the affirmative.

382 [Witness answers in the affirmative.]

383 Chairman TOWNS. Let the record reflect that the witness
384 answered in the affirmative.

385 Let me just sort of explain as to the light situation
386 here. First of all, you have five minutes to summarize your
387 statement, and then the yellow light will come on. That
388 means you have one minute. Then, after the yellow light
389 comes on, then there is a red light; and, of course, that
390 means stop. Of course, after that, we will allow the members
391 an opportunity to raise questions with you. So you may
392 begin.

393 Turn your light on. Push that button.

394 STATEMENT OF KENNETH D. LEWIS, CHIEF EXECUTIVE OFFICER, BANK
395 OF AMERICA

396 Mr. LEWIS. Chairman Towns, Ranking Member Issa,
397 Subcommittee Chairman Kucinich, and Ranking Member Jordan, as
398 has been said, my name is Ken Lewis, and I am Chief Executive
399 Officer of Bank of America.

400 This Committee is reviewing important issues, and I hope
401 my remarks will be helpful to you.

402 Let me tell you a little bit about Bank of America. Our
403 business lines include deposits, wealth and investment
404 management, corporate investment banking, credit cards, and
405 mortgages. We have a deep commitment to serving all the
406 communities in which we operate. We have committed to land
407 and invest \$1.5 trillion in low and moderate income
408 communities over the next 10 years.

409 As everyone here is aware, the financial services
410 industry underwent considerable turmoil in 2008. Bank of
411 America was affected by that turmoil but, nonetheless, earned
412 a profit of \$4.2 billion for the year. We also made two
413 significant acquisitions, Countrywide and Merrill Lynch.

414 There does not appear to be any debate that these
415 acquisitions were in the best interest of the financial
416 system, the economy, and the Country. The failure of

417 Countrywide would have caused a massive loss to the deposit
418 insurance fund and could have destabilized an already
419 crippled mortgage market. The failure of Merrill Lynch,
420 particularly on the heels of Lehman's failure, could have
421 caused systemic havoc or necessitated an AIG-style Government
422 bailout.

423 These acquisitions, though, were also in the best
424 interest of Bank of America and its shareholders. Certainly,
425 the Merrill Lynch acquisition, in particular, came with risk,
426 some of which materialized in the fourth quarter of 2008,
427 when Merrill Lynch recognized significant losses. The
428 Merrill Lynch acquisition, however, also came with the
429 promise of significant long-term rewards, rewards Bank of
430 America and its shareholders are already beginning to reap.

431 Through the acquisition of Merrill Lynch, we have put
432 together what looks to be the preeminent investment bank and
433 brokerage firm in the world, an organization that is already
434 producing substantial profits, not losses, for our company.
435 Understanding that fact is absolutely critical to
436 understanding why we acquired Merrill Lynch.

437 When we bought Merrill Lynch, we really bought two
438 businesses. The first is the world's most productive
439 brokerage force, currently 14,000 Merrill Lynch financial
440 advisors. Merrill Lynch has more financial advisors listed
441 in Barron's Top 100, Top 1,000, and Top 100 Women financial

442 advisors than any other firm.

443 The second major business of Merrill Lynch was
444 investment banking and serving institutional investors.

445 The results here are nothing short of remarkable. As of
446 the first quarter of 2009, Bank of America Merrill Lynch was
447 first in U.S. equity-related underwriting, first in
448 underwriting high-yield debt, second in underwriting
449 investment-grade corporate debt, third in global equity and
450 equity-related underwriting, and fifth in global M&A and U.S.
451 M&A.

452 In the first quarter of 2009, Bank of America earned
453 \$4.2 billion. Merrill Lynch contributed \$3.7 billion, or 75
454 percent of that first quarter profit.

455 We continue to go about the business of lending. In the
456 first quarter of 2009, Bank of America issued \$85 billion in
457 first mortgages, extended \$3.9 billion in new credit to small
458 businesses, and provided \$31 million in community development
459 loans, bolstering the Country's most underserved people and
460 businesses. I also want to stress that we have paid \$1.1
461 billion in dividends to the Treasury on the TARP preferred.

462 While Bank of America earned \$4.2 billion in 2008, that
463 performance did not meet our expectations. As a result,
464 neither I nor my senior team received any bonus. For the
465 next level down, the bonus pool was cut by 80 percent from
466 the previous year, and the level below that by 70 to 75

467 percent.

468 Now let me briefly walk you through the decision to
469 purchase Merrill Lynch. We made that decision in September
470 2008. We did so because we saw the potential benefits I just
471 described, and we did so without any promise or expectation
472 of governmental support.

473 In mid-December, I was advised that Merrill Lynch had
474 significantly raised its forecast of its losses, and we
475 contacted officials of the Treasury and Federal Reserve to
476 inform them that we had concerns about closing the
477 transaction. At that time, we were considering declaring a
478 material adverse change, which, as a matter of contract law,
479 can, if upheld, allow an acquirer to avoid to consummate a
480 deal. Treasury and Federal Reserve representatives asked us
481 to delay any such action and expressed significant concerns
482 about both the systemic consequences and the risk to Bank of
483 America in pursuing this course.

484 We and the Government explored Government support as
485 would limit the risk of proceeding with the transaction. We
486 both were aware that the global financial system was in
487 fragile condition and that a collapse of Merrill Lynch could
488 hasten the crisis.

489 For its part, Bank of America concluded that there was
490 serious risk to declaring a material adverse change and that
491 proceeding with the transaction with governmental support was

492 the better course. This course made sense for Bank of
493 America and its shareholders and it made sense for stability
494 of the markets.

495 I believe that committed people of good intentions in
496 both the private sector and the Government worked desperately
497 hard in late 2008 to prevent a collapse of the global
498 financial system that would have resonated throughout the
499 whole global economy. Even six months later it is easy to
500 forget just how close to the brink our system came. I will
501 never forget, and I believe those efforts will be well
502 remembered long after any current controversy is forgotten.

503 With that, sir, I will conclude my remarks.

504 [Prepared statement of Mr. Lewis follows:]

505 ***** COMMITTEE INSERT *****

506 Chairman TOWNS. Thank you very, very much for your
507 statement.

508 Let me begin the questions.

509 Let me ask unanimous consent that we have 10 minutes on
510 each side initially, and then after that 5 minutes for each
511 member. And, of course, if we need a second or third round,
512 we will do that as well. Without objection, so moved.

513 One of the key questions is when you discovered the
514 massive losses at Merrill Lynch, Mr. Lewis, you have said
515 that you learned of them late and they came as a big
516 surprise. But the emails from the Feds tell a different
517 story. Tim Clark from the Fed said that your claim to be
518 surprised seemed somewhat suspect. The Federal Governor
519 Kevin Warsh wrote that this claim is not credible, and there
520 are more like this. It is clear that the Feds think you
521 either knew or you should have known about these losses
522 sooner.

523 I have to say everything that was happening in the
524 financial markets last fall, your claim that you had no idea
525 about Merrill's losses until December is remarkable. The
526 Feds seem to think that you are either not being forthcoming
527 about that or you were completely clueless about the merger
528 and the situation on Wall Street.

529 My question is when exactly did you know about these
530 losses and why didn't you know about them sooner?

531 Mr. LEWIS. Thank you for the question. The financial
532 markets in the fourth quarter of 2008 suffered a massive
533 credit meltdown, something that probably had not been seen
534 during our lifetimes, and we saw that happening in September
535 and in October, and we saw things that were evidenced in our
536 own book that suggested that things were bad and getting
537 worse. We also had heard rumors on the street that other
538 banks were suffering losses as well. So the losses at that
539 particular time were not concerning because they were
540 consistent with others in the marketplace and what we were
541 seeing as well.

542 But then, in mid-December, the forecast losses
543 accelerated dramatically. So it wasn't that we didn't know
544 about losses. The concern was the fact that these losses
545 accelerated, and that was what gave us the grave concern.

546 Chairman TOWNS. Let me put it this way. Did you move
547 forward with the Merrill deal because of pressure from
548 Government officials or because you thought it was in the
549 best interest of Bank of America and its shareholders?

550 Mr. LEWIS. There has been a lot of talk about the
551 pressure from the Federal Government. It is true that we
552 were told that if we went through or--I can't remember the
553 exact words, so please give me license with word for word,
554 but basically if we went through with calling the MAC, that
555 the Government could or would remove management and the

556 board. And I have said in the past that the threat was not
557 what gave me concern. What gave me concern that they would
558 make that threat to a bank in good standing. So it showed
559 the seriousness with which they thought that we should not
560 call a MAC, a material adverse change.

561 So as a result of that, that was a factor in our
562 decisions, because here your regulators and the Federal
563 Government was saying we don't think calling the MAC is the
564 best thing for you or the financial system.

565 But there were also other considerations. You weren't
566 assured you would win the MAC. If in fact you lost the MAC,
567 you were subject to severe lawsuits and severe amounts of
568 money that you would have to pay. So we thought that, given
569 the fact that the Government felt that strongly and the fact
570 that there was a risk that you would not win the MAC and
571 then, finally, that you might end up not getting Merrill
572 Lynch in any sense, even after paying the fines, we felt
573 like, because of all of those factors, that it was in our
574 best interest, that is, the Bank of America shareholders'
575 best interest, to go through with the merger.

576 Chairman TOWNS. So you were pressured.

577 Mr. LEWIS. It is hard to find the exact right word to
578 describe what I just described, so I have found, as I have
579 tried to have different words, that is is best just to
580 describe it and let people come to a conclusion.

581 Chairman TOWNS. I yield to the Ranking Member for the
582 rest of my minutes.

583 Mr. KUCINICH. Thank you very much, Mr. Chairman.

584 Mr. Lewis, in our review of the Fed's documents, it
585 reveals that, in contrast to your representations to us
586 today, Fed officials concluded that you must have known about
587 the accelerating losses at Merrill much earlier, as early as
588 mid-November, when your shareholders could have voted to
589 disapprove the merger.

590 Now, an email from a senior advisor sent to assistant to
591 Chairman Bernanke on December 13th, 2008; and it is up there
592 on the board for everyone to see. Writes of ''clear signs in
593 the data we have that the deterioration at Merrill Lynch has
594 been observably underway over the entire quarter, albeit
595 picking up significantly around mid-November. Ken Lewis's
596 claim that they were surprised by the rapid growth of the
597 losses seems somewhat suspect.''

598 Another memo, restricted Federal Reserve analysis of
599 Bank of America and Merrill Lynch merger, dated December
600 21st, 2008. ''BAC management's contention that the severity
601 of Merrill's losses only came to light in recent days is
602 problematic and implies substantial deficiencies in the due
603 diligence carried out in advance of and subsequent to the
604 acquisition. Talking about Merrill's losses were clearly
605 shown in Merrill Lynch's internal risk management reports

606 that Bank of America reviewed during their due diligence.''

607 And then there is an email from the Fed General Counsel
608 to Chairman Bernanke on December 23rd, 2008. ''Lewis should
609 have been aware of the problems at Merrill Lynch earlier,
610 perhaps as early as mid-November, and not caught by surprise.
611 That could cause other problems for him around the
612 disclosures Bank of America made for the shareholder vote.''

613 Now, Mr. Lewis, I am going to ask you a series of simple
614 questions, and if you are not forthcoming, I am not going to
615 have any choice but to interrupt you. I am asking for your
616 cooperation.

617 Isn't it true that Bank of America examined Merrill
618 Lynch's book of business before signing the merger agreement,
619 and then received detailed financial reports every week from
620 Merrill Lynch after signing the merger agreement on September
621 15th?

622 Mr. LEWIS. That is true.

623 Mr. KUCINICH. And isn't it true that the Merrill Losses
624 of mid-December, that you claim motivated you to go to the
625 Government, were not the largest week-to-week losses at
626 Merrill you observed since agreeing to purchase the company?
627 In fact, wasn't the week-to-week loss experienced in
628 mid-November larger than the one in mid-December?

629 Mr. LEWIS. The losses that were causing this forecast to
630 increase were partly based on losses in November. So I am

631 not saying that the losses in that time frame were what
632 caused the increase; it was the increased projections of the
633 losses based on some of those losses in November.

634 Mr. KUCINICH. Mr. Chairman, I move to insert into the
635 record a bar graph representing the week-to-week losses
636 reported by Merrill Lynch to Bank of America, which clearly
637 shows that the mid-November loss exceeded the one in
638 mid-December.

639 Chairman TOWNS. Without objection.

640 Mr. KUCINICH. I also move to insert an analysis by a
641 statistics expert finding that the mid-November loss should
642 have alerted Bank of America to an accelerating deterioration
643 in Merrill Lynch, and the loss evident in mid-December merely
644 confirms a trend apparent in mid-November.

645 [The information follows:]

646 ***** COMMITTEE INSERT *****

647 Mr. KUCINICH. Now, Mr. Lewis, isn't it true that you
648 understood the composition and performance of Merrill's
649 portfolio because it was similar to your own in that it was a
650 portfolio that contained complex structured derivative
651 products? Isn't that true?

652 Mr. LEWIS. It is true. The issue, though, is nobody
653 predicted a meltdown like occurred in the fourth quarter of
654 2008.

655 Mr. KUCINICH. But you were getting weekly reports, and
656 you certainly understood Merrill because of the similarities
657 in the composition and performance of their portfolio. Now,
658 our investigation found that the Fed believed you should have
659 understood the potential for losses at Merrill because your
660 own portfolio was similar to Merrill's.

661 I want you to look at the following from the Fed's
662 restricted analysis of Bank of America and the Merrill Lynch
663 merger, dated December 21st, 2008. ``The potential for
664 losses from other risk exposures cited by management,
665 including those coming from leverage loans and trading and
666 complex structured credit derivative products--what they also
667 call correlation trading--should also have been reasonably
668 well understood, particularly as Bank of America itself is
669 also active in these products.''

670 Now, Mr. Lewis, how do you explain the apparent
671 contradiction between your sworn testimony and the Fed's

672 findings that you knew about the acceleration and losses and
673 the potential for future losses as early as mid-November?

674 Mr. LEWIS. I can only tell you what I just said, that
675 part of the November losses were causing this projection that
676 we were getting in December, so they were a factor in the
677 increased projection.

678 Chairman TOWNS. My time has expired, so let me yield now
679 to the Ranking Member from California, Congressman Issa, for
680 his 10 minutes.

681 Mr. ISSA. Thank you, Mr. Chairman. Mr. Chairman, at
682 this time, I would like to ask unanimous consent that all
683 opening statements by all members be allowed to be inserted
684 into the record.

685 Chairman TOWNS. Without objection.

686 Mr. ISSA. Mr. Chairman, I would also ask unanimous
687 consent that the minority background memo, as well as
688 documents referred to in it, be included in the hearing
689 record.

690 Chairman TOWNS. Without objection.

691 Mr. ISSA. Thank you, Mr. Chairman.

692 [The information follows:]

693 ***** COMMITTEE INSERT *****

694 Mr. ISSA. Mr. Lewis, in your 35 years, how many
695 acquisitions, including stock trades, would you say you have
696 been involved in, roughly? Including boards you sat on or
697 were involved in in some tangential way.

698 Mr. LEWIS. Off the top of my head, ten.

699 Mr. ISSA. And probably hundreds that you have looked at
700 in your review of other people's, competitor's, transactions
701 and so on.

702 Isn't it true that it is fairly common to get down the
703 road, particularly in a stock transaction, and find that the
704 original anticipated ratio is changed, either favorably or
705 not favorably, and it is often written into the contracts
706 that there were certain break points based on a material
707 change in stock trading or other material facts, such as you
708 had in your MAC agreement, right?

709 Mr. LEWIS. Yes, that is not uncommon.

710 Mr. ISSA. Okay. So the Fed should not have been
711 surprised that that would be questioned as this very
712 turbulent market continued to have a number of changes in
713 what was going on at B of A and what was going on at Merrill
714 Lynch.

715 Mr. LEWIS. It is hard for me to speak, or I shouldn't
716 and can't speak--

717 Mr. ISSA. Well, let me just say this. Were you at all
718 surprised that there were day-to-day, week-to-week changes

719 | that you had to evaluate and forecast what they really meant
720 | over a much longer period during this turbulent time?

721 | Mr. LEWIS. No. And the way I would characterize it
722 | would be, not speaking for the Fed, but somebody on the
723 | outside who was familiar with mergers and acquisitions, had
724 | that person known that not strongly considered a material
725 | adverse change, they would have thought we were asleep at the
726 | switch.

727 | Mr. ISSA. And as a fiduciary to your corporation, now
728 | the combined, but at that time B of A, didn't you have a
729 | responsibility to weigh that and, in fact, when in doubt,
730 | assert the possibility? In other words, if you had to err,
731 | you had to err on the side that you had to look for the
732 | material adverse change, not assume it wasn't there. You had
733 | to assume that it could be there and you had to look for it.

734 | Mr. LEWIS. Well, particularly when we saw the
735 | acceleration, yes, sir.

736 | Mr. ISSA. Okay. I don't want to spend a lot of time on
737 | that part of it because I think it is beyond the purview of
738 | this Committee, but on December 17th, when you called
739 | Chairman Bernanke and Secretary Paulson to tell them you were
740 | thinking of exercising the MAC clause, which, again, you had
741 | an obligation to at least consider, were you motivated to do
742 | so because of your fiduciary obligation to your stockholders?

743 | Mr. LEWIS. I was, sir.

744 Mr. ISSA. I am going to ask a question that perhaps
745 shows too much of my background off the dais, but to the
746 extent that you were borrowing or potentially borrowing money
747 from taxpayer money, was that really--let me put it this
748 way--that was still borrowed money, it wasn't a gift. You
749 were not trying to renegotiate a gift from the Government or
750 even the amount of money coming from them. If you had cited
751 and they had said, yes, go ahead and exercise that clause,
752 would the more likely outcome change have been a difference
753 in the purchase price of Merrill Lynch relative to B of A?

754 Mr. LEWIS. That is one possibility, but I can't predict
755 the future, obviously.

756 Mr. ISSA. Okay. And when you looked at the material
757 adverse clause, and particularly the losses that were
758 building up, did you do so as an officer of a regulated
759 company who, if your capital dropped below a certain point,
760 could be in fact closed by the FDIC? In other words, were
761 you protecting B of A's position that you not take an anchor
762 that could lead to insolvency of your own company?

763 Mr. LEWIS. Yes, that was a factor.

764 Mr. ISSA. So we have a combination of what was Merrill
765 really worth relative to what they were getting in B of A
766 stock, and, as a regulated entity, the real risk if you did
767 not ensure that B of A's capital base was sufficient--we
768 recently had the stress test, obviously--sufficient for you

769 to be a going concern.

770 Mr. LEWIS. I want to at least make sure I give full
771 disclosure here. If we had done this deal, at least our tier
772 one ratio, which is the one that the regulators look at the
773 most, would have still been over well capitalized, but it
774 would have been well under our internal objective and would
775 have been a relatively low ratio in this environment.

776 Mr. ISSA. So today's hearing, at least from this
777 member's standpoint, is really about whether or not the
778 Government asserted either strong influence that would be
779 outside the ordinary influence one would expect from a
780 neutral party or/and whether or not you felt that there was
781 an implied threat, either to yourself, your board, or your
782 company, in any of the verbal or written correspondence you
783 had with Government officials, including Bernanke and
784 Paulson.

785 Mr. LEWIS. Well, there was the strong advice that I just
786 mentioned. I do want to put it--

787 Mr. ISSA. I realize that you don't want to characterize
788 it as a threat or any one word, but did you feel that you
789 were being pressured to go through with the deal at least as
790 strongly as that salesman trying to sell you the car and get
791 you to close, or the insurance salesman? You know the
792 pressure I am talking about. Were they advocating strongly
793 and using both positive and negative forces to do so in those

794 | conversations?

795 | Mr. LEWIS. Yes, sir, but I think it was in the context
796 | of them thinking that was in the best interest of Bank of
797 | America and the financial system.

798 | Mr. ISSA. I am going to call you to task a little bit.
799 | You said the best interest of Bank of America and the
800 | financial system. I am not going to quibble over their
801 | motives on the financial system, but why do you say Bank of
802 | America? Did you believe that they really believed this was
803 | a good deal for Bank of America, even though you were seeing
804 | a change which would have affected your arm's length
805 | negotiation of a price?

806 | Mr. LEWIS. Well, their concern, obviously, was from the
807 | top, and that is for the financial system. But we are so
808 | intertwined with the financial system, I think they thought
809 | that by all of this happening and the uncertainty coming back
810 | into the financial system, that in fact that would hurt the
811 | system and us.

812 | Mr. ISSA. Okay, so when you say and Bank of America, you
813 | really mean the financial system and, as a member of the
814 | financial system, you would be affected.

815 | Mr. LEWIS. Yes.

816 | Mr. ISSA. But if they went and sold it to somebody else
817 | or lowered the price and packaged it up, or if Merrill Lynch
818 | had gone through a bankruptcy and been offered to you free

819 and clear, all of those alternatives, strictly relative to
820 Bank of America, would have been either better or at least no
821 worse.

822 Mr. LEWIS. I can't speak to that, but those would be
823 options. But I can't speak to whether it would be better or
824 worse.

825 Mr. ISSA. My last question, then I am going to yield to
826 one of the other members, if you did not have the Government
827 at the table--and I know that is hypothetical, but if you did
828 not have the Government at the table, would you have, A,
829 asserted the clause and, B, either walked away or
830 substantially changed the deal?

831 Mr. LEWIS. It didn't happen that way, so it is hard for
832 me to project what I would have ultimately done, but,
833 obviously, we were strongly considering it.

834 Mr. ISSA. So it would be somewhere between possible and
835 likely.

836 Mr. LEWIS. I don't know how to characterize it. I will
837 just stick to how I described it, I think.

838 Mr. ISSA. Thank you. Your constituent, Mr. McHenry,
839 will control the balance of my time.

840 Mr. MCHENRY. Thank you, Ranking Member Issa.

841 Mr. Lewis, you have been with Bank of America and its
842 predecessor companies for how long?

843 Mr. LEWIS. September will be 40 years.

844 Mr. MCHENRY. Forty years. How many mergers or
845 acquisitions have you personally been involved with in your
846 career?

847 Mr. LEWIS. I would have to take a few moments and count
848 them up, but obviously probably more than one, less than ten.

849 Mr. MCHENRY. Okay. Would this be the largest merger or
850 acquisition that your company and the predecessor companies
851 have taken?

852 Mr. LEWIS. No. The Nations Bank-Bank of America
853 acquisition would have probably been--I would have to think
854 back to the market caps and things, but that would be the
855 biggest. This would be one of the biggest, however.

856 Mr. MCHENRY. Certainly. Now, in terms of how you
857 analyze these deals, do you have a process within your bank
858 to analyze appropriate growth measures and acquiring other
859 institutions or merging with other institutions?

860 Mr. LEWIS. We do.

861 Mr. MCHENRY. You do. And did you conduct that same
862 method with this Merrill acquisition?

863 Mr. LEWIS. Yes, we did. We used the same methodology.

864 Mr. MCHENRY. Okay. Thank you. My time has expired and
865 I have got other questions in that regard later. Thank you.

866 Chairman TOWNS. Thank you very much.

867 Let me now yield to the Chairman of the Subcommittee,
868 Mr. Kucinich, for five minutes.

869 Mr. KUCINICH. Mr. Chairman, members of the Committee,
870 our investigation, Mr. Lewis, also finds that Fed officials
871 believed that you were potentially liable for violating
872 security laws by withholding material information in your
873 possession from shareholders before the vote to approve the
874 merger with Merrill Lynch on December 5th, 2008.

875 Mr. Lewis, please look at the following email from the
876 Fed's General Counsel to Chairman Bernanke on December 23rd,
877 2008. ``A different question that doesn't seem to be the one
878 Lewis is focused on is related to disclosure. Management may
879 be exposed if it doesn't properly disclose information that
880 is material to investors. His potential liability here will
881 be whether he knew or reasonably should have known the
882 magnitude of Merrill Lynch losses when Bank of America made
883 its disclosure to get the shareholder vote on the Merrill
884 Lynch deal in early December.''

885 Mr. Lewis, did Bank of America supplement the proxy
886 solicitation it sent to shareholders with what the company
887 learned in mid-November about the rapidly mounting losses and
888 potential for future losses at Merrill Lynch before the
889 shareholder vote on December 5th?

890 Mr. LEWIS. Congressman, we take disclosure very, very
891 seriously. If any--

892 Mr. KUCINICH. Were there supplements? Can you say were
893 there supplements?

894 Mr. LEWIS. If anybody in our legal group had suggested
895 we do anything of that nature, we would have done it.

896 Mr. KUCINICH. There were no supplements, isn't that
897 right?

898 Mr. LEWIS. There was no suggestions to have a
899 supplement.

900 Mr. KUCINICH. There were no supplements. Okay. So, Mr.
901 Lewis, look at the following email that circulated among
902 officials at the Richmond Fed on December 23rd, 2008. ''I
903 think he's worried about stockholder suits. Knows they did
904 not know do a good job of due diligence, and the issues
905 facing the company are finally hitting home and he's worried
906 about his own job after cutting loose lots of very good
907 people.''

908 Now, Mr. Lewis, was your decision to tell the Government
909 you were considering invoking a MAC, which, of course, refers
910 to a clause in a merger agreement that allows the acquirer to
911 abandon the deal if a material adverse change is judged to
912 have occurred, was your threat to invoke a MAC in fact a
913 strategy you deployed to protect yourself from shareholder
914 lawsuits?

915 Mr. LEWIS. No, it was not.

916 Mr. KUCINICH. Isn't it true, Mr. Lewis, that during the
917 course of your conversations with Chairman Bernanke and
918 Secretary Paulson, you in fact requested a letter from the

919 Government saying that the Government ordered you to close
920 the deal to acquire Merrill?

921 Mr. LEWIS. No, that was not what I asked for. Our board
922 was concerned--

923 Mr. KUCINICH. Your answer is no? Are you sure that is
924 your answer?

925 Mr. LEWIS. Our board was concerned that we had verbal
926 assurances, but had nothing in writing, about getting some
927 assistance. So I called Chairman Bernanke and asked him--

928 Mr. KUCINICH. But you are referring to a different
929 letter. I am talking about a letter. You requested a letter
930 from the Government saying that the Government ordered you to
931 close the deal to acquire Merrill. Wasn't there such a
932 letter?

933 Mr. LEWIS. I don't recall such a letter.

934 Mr. KUCINICH. You are under oath but your answer is you
935 don't recall.

936 Mr. LEWIS. I do not recall.

937 Mr. KUCINICH. Isn't it true that your request of that
938 letter was motivated by your desire to protect yourself from
939 your shareholders?

940 Mr. LEWIS. Well, sir, if I can't recall it, I can't
941 answer the second question.

942 Mr. KUCINICH. Well, our investigation reveals that
943 Chairman Bernanke believed that your request for such a

944 letter was motivated by a desire to protect you from
945 shareholder lawsuits, as demonstrated in this email from
946 Chairman Bernanke to the Fed's General Counsel on December
947 23rd, 2008, ``He''--speaking of you, Mr. Lewis--``said he now
948 fears lawsuits from shareholders for not invoking the MAC,
949 given the deterioration at Merrill Lynch. He''--they are
950 speaking of you, Mr. Lewis--``still asked whether he could
951 use as a defense that the Government ordered him to proceed
952 for systemic reasons. I said no.'' This is from Chairman
953 Bernanke.

954 Mr. Lewis, is Chairman Bernanke's email describing his
955 call with you an accurate statement of your concerns and of
956 Bank of America's situation?

957 Mr. LEWIS. I can't recall the exact email, but we did
958 have concerns and we wanted some assurances that they would
959 support our position.

960 Mr. KUCINICH. I yield back, Mr. Chairman.

961 Chairman TOWNS. Thank you very much.

962 I now yield to the Ranking Member of Ohio, Mr. Jordan.

963 Mr. JORDAN. Thank you, Mr. Chairman.

964 Let me go back to this so-called threat concern here,
965 Mr. Lewis. I just want to be clear. On December 17th, when
966 you called Mr. Paulson and Mr. Bernanke, I just want to know
967 the nature of your call. Did you say we are going to
968 exercise the MAC clause or did you say we are thinking about

969 exercising the MAC clause?

970 Mr. LEWIS. Again, it seems like a long time ago. To the
971 best of my recollection, I said we are strongly considering a
972 MAC.

973 Mr. JORDAN. So, in other words, the response you then
974 got changed your decision. You were going to exercise the
975 clause; you felt that was in the best interest of your bank,
976 of your shareholders. You were going to do it and then,
977 based on what the Government told you, you took a different
978 course.

979 Mr. LEWIS. No, sir, it was a factor because they felt so
980 strongly. But it was not the only factor in making the
981 decision. We also thought, after a lot of consideration,
982 that there was downside risk in not winning the MAC.

983 Mr. JORDAN. Let me change direction, because we have
984 talked about this a lot. I want to get to just a big concern
985 I have with the unprecedented level of involvement the
986 Government now has in the private sector in way too many
987 industries, in my judgment; and let me provide a little
988 context.

989 I was on a conference call a week ago Sunday with
990 members of the Auto Task Force, talking about the GM
991 situation. I happen to come from car country, as I said in
992 my opening statement. We had a GM plant that was closed a
993 week ago Monday; 800 jobs, 800 families and a whole community

994 impacted, as you would expect. The night before that
995 announcement, we were on this conference call. Members of
996 the Task Force talked about what was going to happen and one
997 member of the Auto Task Force indicated, he said, we are not
998 going to run General Motors; we will only get involved if
999 there is a major event--major event was the language he
1000 used--and they explained the whole deal.

1001 When we got done, I asked a question. It was Mr.
1002 Spurling who made that statement. I said, Mr. Spurling,
1003 define major event. Define what is major. I said, because
1004 it is going to be pretty major tomorrow in our district when
1005 800 people find out they are not going to have a job. And he
1006 didn't have a definition. In fact, he said, we don't have a
1007 working definition; it would be something along the lines of
1008 a merger, a major change in corporate structure, which
1009 basically told me it could be any darned thing they wanted it
1010 to be.

1011 So my question to you is what day-to-day involvement
1012 does the Government have in decisions you are making relative
1013 to TARP funds, relative to any--if any, talk about that if
1014 you would, please.

1015 Mr. LEWIS. Well, sir, there is an oversight committee, a
1016 TARP committee that actually does look at our lending and see
1017 if we are using the TARP funds to lend money, so that is a
1018 report we just requested. There obviously is the involvement

1019 | of our regulators, as there normally would be.

1020 | Mr. JORDAN. I am talking over that, more than that.

1021 | Mr. LEWIS. The only involvement that would be explicit
1022 | would be after we were ordered to attain more capital as a
1023 | part of this stress test. They did suggest to all banks that
1024 | were raising that capital to re-look at their boards for
1025 | financial expertise and to look at their management and
1026 | succession as a part of this process; and we have been doing
1027 | that, but no day-to-day decisions made by regulators.

1028 | Mr. JORDAN. Okay, talk to me about TARP funds you have,
1029 | any kind of undue influence you felt there in relation to
1030 | when you initially accepted the TARP dollars.

1031 | Mr. LEWIS. No undue influence, no, sir.

1032 | Mr. JORDAN. Okay.

1033 | I would be happy to yield to the Ranking Member, Mr.
1034 | Chairman.

1035 | Mr. ISSA. Thank you. Just a couple of follow-ups.

1036 | Although the threat seems to have been stated, whether
1037 | or not it influenced you, to your understanding under U.S.
1038 | law--and I realize we are not asking a banker to be a lawyer,
1039 | but does the Federal Reserve Chairman have the right to fire
1040 | you or any member of your board?

1041 | Mr. LEWIS. I think there is something called a cease and
1042 | desist, which gives them power to do things like that. I
1043 | have been told that; I haven't read it myself.

1044 Mr. ISSA. Okay. And the U.S. Treasury Secretary, any
1045 similar power?

1046 Mr. LEWIS. No, sir, I don't think he would have the
1047 power.

1048 Mr. ISSA. Okay. But when acting in concert, you would
1049 perceive that threat to be real, that he could execute on
1050 that threat, of having you and/or your board relieved.

1051 Mr. LEWIS. My perception was that he was speaking on
1052 behalf of himself and the regulators. And my perception was,
1053 in concert, they would have that power.

1054 Mr. ISSA. Thank you.

1055 Chairman TOWNS. Thank you very much.

1056 I now yield to the gentleman from Pennsylvania who has
1057 been working on these issues for more than 20 years,
1058 Congressman Kanjorski.

1059 Mr. KANJORSKI. Thank you very much, Mr. Chairman.

1060 Mr. McHenry made a comment in his introduction of you
1061 that Bank of America has business relations with 98 percent
1062 of the Fortune 500 companies. What I want to know is what
1063 are the 10 companies that aren't doing business with you?

1064 [Laughter.]

1065 Mr. LEWIS. I don't know, but it is a very interesting
1066 question.

1067 Mr. KANJORSKI. Get home and check that.

1068 Mr. Lewis, in some regard we have important questions

1069 | that we are trying to resolve with reforming regulatory
1070 | authority in the United States, so to that extent these
1071 | hearings are helpful. But I don't hear anything thus far,
1072 | either by my colleagues or yourself in responding, that there
1073 | was some perceived threat or abuse of action on the part of
1074 | Federal regulators, so I am going to ask you directly. Do
1075 | you think Mr. Bernanke or anyone working under the Federal
1076 | Reserve Chairman took unauthorized, illegal, or improper
1077 | action toward you or the Bank of America during these trying
1078 | times?

1079 | Mr. LEWIS. I do not.

1080 | Mr. KANJORSKI. All right.

1081 | Mr. LEWIS. And I would say they strongly advised and
1082 | they spoke in strong terms, but I thought it was with good
1083 | intention.

1084 | Mr. KANJORSKI. If I had to characterize it, I was
1085 | thinking that if the Titanic were going down and some of us
1086 | were in the life rafts, it sounds like an argument between
1087 | the captain and some that are in the water and they are
1088 | refusing to get on board, and he is ordering them to get on
1089 | board. Is that not too dissimilar to what happened here on
1090 | this mid-September to December period of time, when all of
1091 | us, admittedly, had our hair on fire?

1092 | Mr. LEWIS. And I think they saw, probably with their
1093 | perspective, they saw rougher seas ahead that no one

1094 institution would be able to see.

1095 Mr. KANJORSKI. My Subcommittee on Financial Services is
1096 charged with looking at the reform of regulation. Is there
1097 anything that you could see that in, granted, extreme
1098 circumstances such as that weekend of September 15th and the
1099 failure of Lehman Brothers and what was happening in the
1100 implosion or the collapse of the financial system, is there
1101 anything that we could do in reforming the regulations to
1102 provide for faster disclosure?

1103 For instance, the 8-K requirements that were not carried
1104 out precisely in this case, and that disclosures by the
1105 company were not necessarily made within the four days. I
1106 know there is an argument as to whether or not they legally
1107 had to or were defined as required, but is there something we
1108 could do to assure shareholders, who do get at risk as a
1109 result of not force, but encouraged, acquisitions such as
1110 this, is there anything we in the Federal Government can do
1111 to clarify that problem and to make it clearer that would
1112 help the banking institutions in future events of this sort?

1113 Mr. LEWIS. Sir, are you speaking to the Lehman or to the
1114 Merrill Lynch?

1115 Mr. KANJORSKI. No, to the requirement of your filing for
1116 disclosure notice to your shareholders when all of this was
1117 pending. You didn't necessarily precisely follow what could
1118 be considered a notice requirement.

1119 Mr. LEWIS. I think clarity is always better. If it were
1120 left up to me, I would go to clarity first.

1121 Mr. KANJORSKI. So what would you recommend that we do,
1122 go into that area and declare more disclosure as to what is
1123 happening or how it is happening? Shall we put you on the
1124 net or what?

1125 Mr. LEWIS. I am not sure I am following you in terms of
1126 the disclosure that you are speaking to, so I am a little
1127 shaky on your question, frankly.

1128 Mr. KANJORSKI. Okay. Well, do you know of any
1129 disclosure, do you have any feelings of any disclosures that
1130 could be made at those highly charged, extreme circumstances
1131 that you were operating under? Is there anything that we
1132 could create in the reform of our regulatory requirements on
1133 acquisitions or mergers?

1134 Mr. LEWIS. It would be difficult because you don't have
1135 an event, many times, because you are still looking at
1136 alternatives and negotiating Lehman or the Merrill Lynch-Bank
1137 of America situation, and then it could be well into the
1138 morning before you actually get a signed deal, and then you
1139 do announce it the next day, for instance. So the ebb and
1140 flow of the circumstances would make it very difficult to
1141 describe it as an event, because it just may not happen that
1142 way.

1143 Mr. KANJORSKI. Now, I understood in your testimony you

1144 pointed out that the Merrill Lynch acquisition was
1145 responsible for 75 percent of your last quarter's profits.
1146 Are you aware of shareholders that are complaining about that
1147 acquisition as a result of that?

1148 Mr. LEWIS. No, sir, not now.

1149 Mr. KANJORSKI. Okay. Thank you very much.

1150 I yield back.

1151 Chairman TOWNS. Thank you very much.

1152 I now yield to Mr. Chaffetz, the gentleman from Utah,
1153 for five minutes.

1154 Mr. CHAFFETZ. Thank you, Mr. Lewis. I appreciate your
1155 being here. I am looking at some notes here dated December
1156 31st. These are your notes. Also looking at some notes
1157 taken by Joe Price, the CFO at Bank of America, that were
1158 taken on December 21st of 2008, about the attempt to use the
1159 MAC clause and get out of the Merrill Lynch transaction. In
1160 those notes it says fire board of directors if you do it,
1161 irresponsible for Country. TG agrees.

1162 TG, I would assume, would be Timothy Geithner?

1163 Mr. LEWIS. Those are Joe Price's notes?

1164 Mr. CHAFFETZ. Yes.

1165 Mr. LEWIS. I would have to assume with you, because they
1166 are his notes.

1167 Mr. CHAFFETZ. Based on your recollection of what was
1168 going on and based on the notes that we see from the CFO that

1169 was there, fire board of directors if you do it. Was that
1170 your understanding?

1171 Mr. LEWIS. That is probably a reference to the
1172 conversation I have mentioned that I had with Secretary
1173 Paulson. But again, those are his notes.

1174 Mr. CHAFFETZ. But based on your personal recollection,
1175 is that your understanding, that the board of directors would
1176 be let go if this MAC clause was invoked?

1177 Mr. LEWIS. You know, I mentioned that I need a license
1178 with whether he said could or would, but basically the
1179 premise was that management and the board would be removed if
1180 in fact we did call the MAC.

1181 Mr. CHAFFETZ. Including yourself.

1182 Mr. LEWIS. Correct.

1183 Mr. CHAFFETZ. So if the suggestion from the Federal
1184 Government was to have your job removed, as well as the board
1185 of directors, can it be looked at any other way other than a
1186 threat?

1187 Mr. LEWIS. Well, actually, we didn't actually have much
1188 of reaction to the comments themselves as it related to us
1189 being removed. Again, what impressed us was here was the
1190 Government telling a bank in good standing that they would do
1191 something like this. So it was the seriousness of it which
1192 caused us to believe that they really did believe that there
1193 was an issue here with the MAC and not calling it that did

1194 influence us. But it wasn't the threat to have us lose our
1195 jobs, it was the seriousness because they made it, not the
1196 threat it itself.

1197 Mr. CHAFFETZ. I am sorry, I didn't catch the last part
1198 of that.

1199 Mr. LEWIS. It was the seriousness with which they made
1200 it, not the threat itself.

1201 Mr. CHAFFETZ. Tell me about your discussion. You call,
1202 at one point, as I am looking at the time line here, Mr.
1203 Paulson is taking a bike ride, I guess, on December 21st.
1204 Tell me specifically what was going on in that conversation.

1205 Mr. LEWIS. Well, I called him to get an update and I
1206 think that was the Sunday. I am pretty sure that was the
1207 Sunday that I called him. As I recall the conversation, he
1208 said I want to give you some blunt language and I first want
1209 to start out by saying that we are very supportive of Bank of
1210 America, and then went one step further and said what I have
1211 already said. He said but we feel very strongly that you
1212 should not call the MAC, and if in fact you do, and, again, I
1213 think he said would, but it was would or could, as I recall,
1214 remove the board and management.

1215 Mr. CHAFFETZ. Well, that certainly sounds like a threat
1216 to me and an amazing use of power there. Tell me about your
1217 interactions with Timothy Geithner. How early in this
1218 process was he involved and engaged in this process?

1219 Mr. LEWIS. After the confirmation hearings or once he
1220 excused himself from the New York Fed, I had no contact with
1221 Mr. Geithner.

1222 Mr. CHAFFETZ. But he was involved before he was named
1223 and brought in as the Treasury Secretary, correct?

1224 Mr. LEWIS. Well, he had been involved in the original
1225 TARP money, yes.

1226 Mr. CHAFFETZ. Right. And tell me about Mr. Summers, the
1227 interaction and place of involvement that he had in this
1228 process.

1229 Mr. LEWIS. I personally had no involvement with Mr.
1230 Summers.

1231 Mr. CHAFFETZ. He was not engaged in any of these?

1232 Mr. Chairman, I would ask unanimous consent that Mr.
1233 Price's notes from December 21st, 2008 and Mr. Lewis's notes
1234 from the conversation with Ben Bernanke on December 31st,
1235 2008 also be entered into the record.

1236 Chairman TOWNS. Without objection, so ordered.

1237 Mr. CHAFFETZ. Thank you.

1238 [The information follows:]

1239 ***** COMMITTEE INSERT *****

1240 Mr. CHAFFETZ. Tell me about the interaction that you
1241 continue to have with Mr. Bernanke and Mr. Geithner at this
1242 point.

1243 Mr. LEWIS. Well, I have had very little conversation
1244 with--in fact, I can't recall a conversation that I have had
1245 with Mr. Bernanke in terms of being one-on-one. I am a
1246 member of a council called the Federal Reserve Advisory
1247 Council, and there are 12 of us, and we have a dialog with
1248 the Federal Reserve, including Mr. Bernanke, but that is in a
1249 group setting. So no--

1250 Mr. CHAFFETZ. Any interaction with the Administration--
1251 Chairman TOWNS. May I say to the gentleman from Utah,
1252 your time has expired.

1253 Mr. CHAFFETZ. My apologies, Mr. Chairman. Thank you.

1254 Chairman TOWNS. I now yield five minutes to the
1255 gentleman from Maryland, Mr. Cummings.

1256 Mr. CUMMINGS. Mr. Lewis, I have listened to your
1257 testimony very carefully and, you know, I understand and I
1258 have read a lot about you. You are a great man, but I think
1259 one of the things that you have tried to do today is to walk
1260 a very thin line. You just heard Republicans and Democrats
1261 say, to some degree, that whatever was said to you about
1262 losing your job and the board being dismissed, basically what
1263 we have said is we don't buy it.

1264 I assume the minutes are accurate from your board

1265 meetings. Are these things you vote on, the minutes from
1266 board meetings?

1267 Mr. LEWIS. Yes, sir, we do--

1268 Mr. CUMMINGS. Very well. I am talking about December
1269 22nd, 2008.

1270 Mr. LEWIS. Yes. Right.

1271 Mr. CUMMINGS. Let me read something you to. It says Mr.
1272 Lewis reported a series of calls, and you talk about a number
1273 of things, but this is one thing that I found very
1274 interesting, the second point. This is what you told your
1275 board. It says the Treasury and the Fed stated strongly that
1276 were the corporation to invoke the material adverse change,
1277 MAC, clause in the merger agreement with Merrill Lynch and
1278 fail to close the transaction, the Treasury and the Fed would
1279 remove the board and management of the corporation.

1280 If that isn't a threat, I don't know what is. If I say
1281 I am going to fire you if you don't do what I tell you to do,
1282 not only am I going to fire you, but I am going to fire your
1283 board. I mean, what you said--and I know that you are caught
1284 in a difficult situation. I know that after this merger was
1285 done your folks benefitted tremendously, and I know that Bank
1286 of America is doing fine now. But I am here to tell you that
1287 no matter how great Bank of America is doing today, the means
1288 does not justify the end. In other words, throughout these
1289 transactions we must have honesty, integrity, and

1290 transparency, period.

1291 So what I am saying to you is I know you are trying to
1292 be nice, but here we have got a situation where, apparently,
1293 Mr. Paulson has told you do it. Sort of like the Nike
1294 commercial, just do it. And then you come in here trying to
1295 tell us, oh, no, I was worried, the sky was falling, I was
1296 just so upset. And we don't buy it. So I am going to give
1297 you another chance. You didn't feel threatened?

1298 Mr. LEWIS. Well--

1299 Mr. CUMMINGS. I mean, don't get us to describe it. We
1300 are trying to figure out what you were feeling. And you know
1301 why we want to know? Because we want to straighten out this
1302 mess.

1303 Mr. LEWIS. I have been pretty consistent, as you have
1304 just described it as it happened.

1305 Mr. CUMMINGS. Yes, well, maybe you need to be
1306 inconsistent and tell us how you felt.

1307 Mr. LEWIS. Well, I did, as I think I have said at some
1308 point in time, maybe not today, it was a strong influence on
1309 my decision, but it wasn't the only influence.

1310 Mr. CUMMINGS. I understand. So apparently you are going
1311 to--okay. Now, let me ask you this. Did Mr. Bernanke have
1312 any influence with regard--I understand you just answered the
1313 question, but did he ever say that you should not disclose
1314 certain information, you should do this deal? I mean, did

1315 | that ever come to you in any kind of way from Bernanke?

1316 | Mr. LEWIS. No, sir. Well, he never said we should not
1317 | disclose anything that was disclosable; that would be our
1318 | decision. And I never heard from him on the issue of us not
1319 | disclosing something.

1320 | Mr. CUMMINGS. All right. Or anything else? You look
1321 | like you are trying to go somewhere. Go ahead.

1322 | Mr. LEWIS. Well, the second piece I thought that you
1323 | asked me, sir, was the issue of him not wanting us to call
1324 | the MAC, and he did express that to us.

1325 | Mr. CUMMINGS. And when did he do that?

1326 | Mr. LEWIS. He expressed it on more than one occasion. I
1327 | can't remember which dates, but several times.

1328 | Mr. CUMMINGS. And last but not least, you are an
1329 | experienced man. I understand you have great judgment.
1330 | Apparently, when you thought about this MAC thing, it was
1331 | based upon your own experiences, was it not?

1332 | Mr. LEWIS. Yes, sir.

1333 | Mr. CUMMINGS. You just don't say I think we may have a
1334 | MAC here out of the clear blue sky. What were you thinking?

1335 | Mr. LEWIS. I was thinking that the losses had
1336 | accelerated to a point that they were out of line with other
1337 | institutions and our institution.

1338 | Mr. CUMMINGS. Now, if you were to go back, you think it
1339 | was not a MAC situation?

1340 Mr. LEWIS. I wouldn't change my decision, but I can't
1341 say that there wasn't a MAC, because we never called it, so
1342 we just don't know.

1343 Mr. CUMMINGS. Very well. I see my time is up.

1344 Mr. ISSA. If the gentleman would yield for a moment.

1345 Mr. CUMMINGS. My time is up.

1346 Chairman TOWNS. The gentleman's time is expired.

1347 I now yield to Congressman Flake from Arizona.

1348 Congressman Flake for five minutes.

1349 Mr. FLAKE. Thank you, Mr. Chairman.

1350 I just want to share my colleague's skepticism here
1351 about whether or not this was a threat. It just seems
1352 completely incredulous that this wouldn't be considered a
1353 threat. If this wouldn't be considered a threat, if I might
1354 just ask you what would be considered a threat. I mean,
1355 kidnap the family dog, release your college GPA scores? What
1356 is a threat if this is not a threat, firing and the firing of
1357 your board?

1358 Mr. LEWIS. I am just trying to describe the circumstance
1359 and not put one word to it myself.

1360 Mr. FLAKE. Well, from this vantage point, it seems there
1361 is kind of a Stockholm Syndrome thing going here. I mean,
1362 you are still regulated by these entities and it seems that
1363 you have identified with your captors or your regulators in
1364 some way here. But we would like to have a candid answer

1365 | here, and I don't know if you can wiggle your pinky finger at
1366 | us or give some sign that nobody else will see. The big
1367 | grin, maybe that gives it away. But let me just tell you
1368 | from this vantage point it just seems very difficult to
1369 | accept that that would not seem threatening behavior.

1370 | Now, again, from the notes that I believe Mr. Price, the
1371 | CFO, took during one of these meetings, identified Hank P.,
1372 | Hank Paulson here, fire board if you do it, invoke the MAC;
1373 | irresponsible for the Country. Tim G. agrees. I mean, it
1374 | just seems like there is no other explanation here. And I
1375 | can understand, maybe from the smile and whatnot, that you
1376 | agree but can't say it here, but let me just say if you
1377 | learned later on that there was \$12 billion in losses that
1378 | you didn't know about, but you said they were compelling. It
1379 | wasn't so much what they said, but how they said it, the
1380 | seriousness of which they explained the need for you to move
1381 | forward with this merger. If not \$12 billion, where is the
1382 | threshold that you would have said can't do it? Can you
1383 | enlighten us there a bit?

1384 | Mr. LEWIS. I can't because I dealt with the
1385 | circumstances that existed, and I don't think there is a rule
1386 | of thumb or whatever to cause that to happen. But to your
1387 | point, whatever you want to call it, I wouldn't change how I
1388 | described it. So I will let you put the word to whether it
1389 | was a threat or whatever, but the circumstances that I

1390 described remain the same.

1391 Mr. FLAKE. Well, how compelling was the seriousness of
1392 that conversation? Would it have compelled you if the losses
1393 were twice as big, as you didn't understand that they were,
1394 \$24 billion instead of 12?

1395 Mr. LEWIS. Well, at some point you couldn't have made it
1396 a viable deal, so there is, at some point, a number that the
1397 hole would have been just too big.

1398 Mr. FLAKE. But if the taxpayers backfill, 24 is just as
1399 easy as 12.

1400 Mr. LEWIS. No, sir, because you would, all of a sudden,
1401 have--remember, this is 8 percent after tax dividends that
1402 you are paying, and at some point you just couldn't bear the
1403 burden of that kind of cash flow drain.

1404 Mr. FLAKE. But the \$12 billion was within the range.

1405 Mr. LEWIS. Within the range. It was painful and it
1406 caused us to have to push out our horizon in terms of
1407 accretion for the deal to work, but it was workable.

1408 Mr. ISSA. Mr. Flake?

1409 Mr. FLAKE. I would yield to the gentleman California.

1410 Mr. ISSA. I would like to associate myself both with
1411 your comments and the gentleman from Maryland when you are a
1412 little incredulous, when it has been previously stated under
1413 oath before the New York Attorney General, that in fact the
1414 gentleman was threatened. We are, oddly enough, arguing over

1415 whether, when you are threatened, you feel threatened, but we
1416 are not arguing over whether in fact there was a threat. I
1417 think we have made that pretty clear today and I appreciate
1418 your sticking to a position of not further indicting those
1419 who regulate you. But it is our job to get to the truth, and
1420 I think we have.

1421 Yield back.

1422 Chairman TOWNS. Thank you very much.

1423 I now yield to the gentleman from Massachusetts, Mr.
1424 Lynch.

1425 Mr. LYNCH. Thank you, Mr. Towns. I want to thank
1426 Chairman Kucinich as well, along with Ranking Member Issa and
1427 Ranking Member Jordan.

1428 Thank you, as well, Mr. Lewis, for coming before the
1429 Committee. Let me just go back to a point that Mr. Cummings
1430 and also Mr. Kucinich raised a little earlier. Mr. Kucinich
1431 seemed to be hung up on the fact of when there was a
1432 significant indicator that Merrill Lynch was in rapid
1433 decline, and rather than focus of November of 2008, we can go
1434 all the way back to fall of 2007 when they announced an
1435 almost \$8 billion loss and Mr. O'Neill was forced into
1436 retirement. There is a long history of decline here, albeit
1437 accelerated to some degree around the time of your purchase,
1438 but there was significant evidence that they had overloaded
1439 with collateral debt obligations and other complex

1440 derivatives and they were in pretty tough straits for a
1441 while, isn't that true?

1442 Mr. LEWIS. Yes, sir, it is true.

1443 Mr. LYNCH. Let me ask you. There are a couple of emails
1444 and, unfortunately, they are very, very small up there, but
1445 let me try to help you. One is from Chairman Bernanke to a
1446 selection of the Board of Reserve Governors, and this is
1447 December 21st, 2008, around the time that you were thinking
1448 about this material adverse change being existent or not.
1449 This is a quote from Chairman Bernanke: ``I think the threat
1450 to use the MAC''--which is the material adverse change--``is
1451 a bargaining chip and we do not see it as a very likely
1452 scenario at all. Nevertheless, we need some analyses of that
1453 scenario so that we can explain to Bank of America with some
1454 confidence why we think it would be a foolish move and why
1455 regulators will not condone it.''

1456 The other email sort of reinforces that, and that is
1457 from Jeffrey Lacker, who was a President, I believe, of the
1458 Federal Reserve Bank of Richmond at the time, and I think he
1459 is a member of the Federal Open Markets Committee now, a
1460 voting member. This email was also cc'd to the Chairman, I
1461 believe, and it says ``Just had a long talk with Ben.''. Ben
1462 Bernanke, I presume. ``Says they think the MAC threat is
1463 irrelevant because it is not credible. Also intends to make
1464 it even more clear that if they''--meaning Bank of

1465 | America--''play that card and then need assistance,
1466 | management is gone.'' Then, in parentheses, says ''Forgot to
1467 | tell him that K.L.'''--I believe that is you, Ken Lewis--''is
1468 | near retirement.''

1469 | So there is a different dynamic going on here. Remember
1470 | the context of all this is the sky is falling, as Mr.
1471 | Cummings said, and tremendous pressure on everyone. And they
1472 | think you are playing a game, they think you are throwing
1473 | this thing out as a red herring, and they think what you are
1474 | really trying to do, and what some people suggest you might
1475 | have been doing, is to leverage taxpayer support by falsely
1476 | putting this MAC out there, the fact that you are going to
1477 | let this deal crash, walk away, even asserting you don't have
1478 | to win the MAC, as you said before, you don't have to win it,
1479 | this deal just has to stop, and then I think the weight of
1480 | all the forces at play there, with Lehman and everything
1481 | else, you know, we are in some pretty deep trouble.

1482 | So what I am asking you is was that your strategy here?
1483 | Did you use this MAC as leverage to force Bernanke and
1484 | Paulson to come in with taxpayer support? I also want to
1485 | note that your own firm was in pretty tough shape at the
1486 | time. Everybody seems to think there was a perception that
1487 | you were the white knight here and you were the strong party,
1488 | but I think, as Mr. Kucinich has indicated, Bank of America
1489 | had its problems, too, at this time. But tell me what your

1490 strategy was in your negotiations there and what was the
1491 motivating force behind your decision to put forward this
1492 MAC.

1493 Mr. LEWIS. Thank you. And thank you for reminding us we
1494 were in the middle of a pretty bad financial crisis, and I do
1495 think we had people of good intentions, despite what they
1496 have said about me. We grew more and more convinced that
1497 there was a distinct possibility that we had a MAC as a
1498 result of these accelerated losses.

1499 Mr. LYNCH. You didn't disclose that to your
1500 shareholders, though.

1501 Mr. LEWIS. But the acceleration really took place about
1502 a week after. That is when you saw massive acceleration, not
1503 necessarily those days, but as result of the forecast
1504 increasing. So this was not some wild bluff. We thought we
1505 had the real possibility of a MAC.

1506 Mr. LYNCH. Okay.

1507 Mr. Chairman, I yield back.

1508 Mr. KUCINICH. [Presiding] The Chair recognizes Mr.
1509 McHenry.

1510 Mr. MCHENRY. Thank you, Mr. Chairman.

1511 Were there specific details that the Federal Reserve and
1512 Treasury told you not to disclosure to your shareholders?

1513 Mr. LEWIS. No, sir. Neither Secretary Paulson, nor the
1514 Chairman of the Federal Reserve, Mr. Bernanke, ever told me

1515 not to disclose something that we thought should be publicly
1516 disclosed.

1517 Mr. MCHENRY. Okay. Mr. Kucinich referenced some emails,
1518 and I just wanted to get on the record had you seen those
1519 emails before today?

1520 Mr. LEWIS. No.

1521 Mr. MCHENRY. Okay. I just wanted to make sure we got
1522 that on the record, Mr. Chairman, with all due respect to
1523 you.

1524 Mr. Lewis, as I asked earlier, you have been involved in
1525 a number of mergers and acquisitions. Your institution has
1526 been involved in dozens upon dozens over your career with the
1527 bank. To your knowledge, have there been material adverse
1528 change clauses included in previous deals of this sort?

1529 Mr. LEWIS. Virtually every acquisition would include
1530 some form of material adverse change clause, and it is not
1531 totally uncommon to have them invoked.

1532 Mr. MCHENRY. Has your institution invoked this clause
1533 before?

1534 Mr. LEWIS. Yes, sir. We invoked it on a deal that was
1535 with Sally Mae.

1536 Mr. MCHENRY. All right. And looking at the list of
1537 Federal Reserve regulators who were second-guessing your
1538 decision or your raising the issue of the material adverse
1539 change clause, it is probably fair to say that you have done

1540 more of these deals than they have in their careers as
1541 bureaucrats. Is that safe to say?

1542 Mr. LEWIS. I am sorry?

1543 Mr. MCHENRY. Is it safe to say you have done more deals
1544 that include MAC clauses than the bureaucrats that were
1545 second-guessing your decision?

1546 Mr. LEWIS. I don't know their backgrounds.

1547 Mr. MCHENRY. Okay. Well, I understand you are still a
1548 regulated institution, so no need to hit on the Federal
1549 Reserve and their staff there. To go to another subject
1550 matter, there have been reports about efforts of various
1551 banks to raise capital in the wake of stress test results.
1552 What is the status of your capital-raising efforts?

1553 Mr. LEWIS. We were required to raise \$33.9 billion, and
1554 I am pleased to say that we have raised that amount and we
1555 will raise more than that. That should be completed sometime
1556 toward the end of this month.

1557 Mr. MCHENRY. Okay. My constituents are concerned about
1558 access to credit. We have got a mortgage foreclosure issue
1559 that is widespread across this Country. Can you tell me
1560 about Bank of America's actions as it relates to foreclosure
1561 mitigation and helping those folks that are facing the loss
1562 of their homes?

1563 Mr. LEWIS. One of the issues with the loan modification
1564 issue was that, initially, the banks were just not staffed up

1565 to handle that kind that kind of volume and the different
1566 type things that were being asked. Since then, we now have
1567 7,200 associates that just focus on loan modifications. And
1568 since July of 2008, so less than a year, we actually already
1569 have modified 311,000 loans.

1570 Mr. MCHENRY. There's been a discussion about access to
1571 credit and whether or not institutions are lending. With the
1572 downturn in the economy, certainly, institutions have a more
1573 difficult time in a down economy to find creditworthy
1574 individuals and make loans. Can you discuss the loans that
1575 you have made over the last two or three quarters?

1576 Mr. LEWIS. Well, it is a great question and it is also
1577 the key to us getting this Country back on track, because, if
1578 the financial system doesn't make loans, then we have got an
1579 issue.

1580 First, I would say that I am very proud that Bank of
1581 America is the largest lender in the United States. I am
1582 very proud of that. Secondly, I can assure you that we are
1583 making every good loan that we can make. Simply put, banks
1584 take deposits and make loans; that is how we make money. So
1585 it is in our own self-interest to do that. If we don't, we
1586 don't optimize our profits.

1587 But I will say, to your point, that in a recession that
1588 is this deep and this prolonged, you do get an issue with
1589 demand. People start cutting back, they spend less, and

1590 companies expand less. So I can't assure you that these loan
1591 increases are going to continue because of loan demand. What
1592 I can assure you is we are going to make every good loan
1593 there is to be made.

1594 Mr. MCHENRY. Thank you, Mr. Chairman.

1595 Mr. KUCINICH. The gentleman's time has expired.

1596 The Chair recognizes Mr. Quigley.

1597 Mr. QUIGLEY. Thank you, Mr. Chairman.

1598 It is good morning, still. There has been discussion of
1599 a new stress test as it relates to our financial
1600 institutions. I guess the question comes was the current test
1601 good enough? Do we need a new one? And would either of these
1602 kinds of stress test have helped us to understand or prevent
1603 these issues when all these issues took place with your
1604 acquisition?

1605 Mr. LEWIS. I do think the stress test was a good one,
1606 and I think the fact that they probably used higher standards
1607 in terms of things getting worse than hopefully they will was
1608 helpful too, because those things can happen. So I know it
1609 has caused us to look forward with a greater sense of
1610 pessimism or greater sense of things could be worse than we
1611 actually think they are, so you should have higher buffers of
1612 capital; and that will show up in our internal objectives
1613 going forward. So I do think it was a very good thing.

1614 I don't see any evidence, particularly as we talk about

1615 | there being some signs that the economy may be improving
1616 | somewhat, to put another stress test on top of that. If you
1617 | think about the last two years, the industry has gone through
1618 | a significant stress test in actuality, and then we were
1619 | getting a stress test on top of that. So I think that is
1620 | enough.

1621 | Mr. QUIGLEY. But you know what the stress test was that
1622 | we just went through. If Merrill had gone through that
1623 | stress test and you had gotten the results prior to the
1624 | board's vote, would it have affected what your board did?

1625 | Mr. LEWIS. I don't know if--the stress test, of course,
1626 | came after the fact of all of this happening. What we didn't
1627 | project, and what nobody that I know projected, was the
1628 | severity of the credit crunch or the credit crisis that
1629 | occurred during that fourth quarter. It wasn't that we
1630 | hadn't identified the instruments; we just didn't see the
1631 | depth of the decline that happened during that quarter, and
1632 | most people didn't. So, to answer your question, if in fact
1633 | we had been able to predict that, no, we would not have done
1634 | the deal, because the hole would have been too big.

1635 | Mr. QUIGLEY. So you don't think that this stress test
1636 | would have indicated the problems that Merrill was going to
1637 | face because you couldn't have predicted the fourth quarter
1638 | collapse.

1639 | Mr. LEWIS. No, sir. I don't know of anybody that would

1640 have predicted that. Actually, you can see some evidence of
1641 that in the fact that virtually very major bank had an
1642 operating loss in the fourth quarter, and even the financial
1643 analysts were not predicting those losses prospectively.

1644 Mr. QUIGLEY. Sure.

1645 Switching ground here just for a second, you also
1646 acquired with that acquisition a significant ownership in
1647 BlackRock?

1648 Mr. LEWIS. Yes, sir, 49.9 percent.

1649 Mr. QUIGLEY. Okay. I am aware they do have contracts
1650 with the Federal Reserve and the Department of Treasury,
1651 BlackRock?

1652 Mr. LEWIS. Yes, they do. I think they do. We don't
1653 manage them, but--

1654 Mr. QUIGLEY. I am sorry?

1655 Mr. LEWIS. We don't manage the company, but I have heard
1656 they do have contracts, yes.

1657 Mr. QUIGLEY. So you may not know, then, were any of
1658 these contracts given to BlackRock in furtherance of
1659 financial support to Bank of America from the Government?

1660 Mr. LEWIS. No. There is a big distinction in the
1661 management of the two companies, and we in fact make it a
1662 point not to be part of the management team.

1663 Mr. QUIGLEY. But you could see the potential for a
1664 conflict of interest, then. You have to have some control

1665 over them.

1666 Mr. LEWIS. We actually don't, but I do see the cosmetics
1667 of the potential conflicts.

1668 Mr. QUIGLEY. And cosmetics are becoming important.

1669 Mr. LEWIS. They certainly are, yes, sir.

1670 Mr. QUIGLEY. So how do you avoid even the appearance of
1671 conflicts or impropriety in that vein?

1672 Mr. LEWIS. Well, you make it very clear, in terms of how
1673 the company is managed, that you have nothing to do with
1674 their management; and it is pretty clear in the bylaws of the
1675 company that we do not manage the company.

1676 Mr. QUIGLEY. Very good. Thank you.

1677 Chairman TOWNS. [Presiding] We now go to one of our
1678 senior members in Congress in terms of service, not age,
1679 Marcy Kaptur from Ohio.

1680 Ms. KAPTUR. Thank you, Mr. Chairman. You are a very
1681 diplomatic man.

1682 Mr. Lewis, thank you for appearing this morning. As you
1683 can tell, there are serious questions being raised about how
1684 much you actually knew about Merrill Lynch's condition and,
1685 indeed, the condition of Bank of America that you then did or
1686 didn't share with your shareholders; and I would like to cast
1687 a wider lens on a pattern of behavior of Bank of America, and
1688 perhaps other institutions in our Country that some have
1689 dubbed crony capitalism that has led our Nation to the

1690 precipice that it now faces.

1691 On August 20th, 2007, the Federal Reserve replied to a
1692 Bank of America request to waive banking regulation that
1693 limited the amount that federally-insured banks can lend to
1694 related brokerage companies to 10 percent of bank capital.
1695 Until that point, banking regulation was that banks with
1696 federally-insured deposits should not be put at risk by
1697 brokerage activities.

1698 Four months after that waiver was provided to Bank of
1699 America, Bank of America bought Countrywide, which has proven
1700 to be the worst subprime lender in our Nation, and I would
1701 like to place in the record a report by the Center for Public
1702 Integrity that documents that.

1703 [The information follows:]

1704 ***** COMMITTEE INSERT *****

1705 Ms. KAPTUR. The question that I have is who headed Bank
1706 of America at the time that the request was made of the Fed
1707 to waiver that, to allow Bank of America to enter into that
1708 brokerage activity?

1709 Mr. LEWIS. I was the Chairman and the CEO of the
1710 company.

1711 Ms. KAPTUR. You were Chairman and CEO. So you made the
1712 request.

1713 Mr. LEWIS. I don't know of this particular request.

1714 Ms. KAPTUR. But you are aware that Bank of America then
1715 bought Countrywide four months later.

1716 Mr. LEWIS. Yes, ma'am, I am very aware of that.

1717 Ms. KAPTUR. Okay. What kind of due diligence was done
1718 on their portfolio?

1719 Mr. LEWIS. We did a great deal of due diligence on the
1720 portfolio, and I am proud to tell you that we bought them, we
1721 changed all of their lending practices. They are now a prime
1722 lender. They are the ones that are doing these loan
1723 modifications. They are not doing Alt-As and subprimes.
1724 Bank of America had gotten out of subprime in 2001; we were
1725 not doing it at all. So we have turned that company around
1726 to a very reputable mortgage lender doing the right things.

1727 Ms. KAPTUR. But you had to absorb all their losses?

1728 Mr. LEWIS. No, ma'am. In the transaction, there is an
1729 accounting thing called purchase accounting, where you mark

1730 the assets down before you buy them.

1731 Ms. KAPTUR. That sort of leads me to my next question.

1732 It has been stated that the Bank of America, in 2008,
1733 conspired with Merrill Lynch in a sweetheart deal to give out
1734 exorbitant bonuses to Merrill executives totaling over \$4
1735 billion--that is with a B--in December 2008. Soon after,
1736 Bank of America got major infusions from taxpayer TARP money.
1737 But in 2008, on its Federal taxes, Bank of America, though it
1738 earned \$4.4 billion that year, apparently paid just \$120
1739 million in taxes and deferred \$5 billion in taxes for 2008.

1740 Some people are saying that Bank of America acquiesced
1741 to the Merrill bonuses because, otherwise, all of Bank of
1742 America's 2008 earnings would have been consumed with bonuses
1743 for Merrill. How do you respond to that?

1744 Mr. LEWIS. Well, the transaction with Merrill took place
1745 on January the 1st of this year, and until that time they had
1746 a separate board and a separate compensation committee. We
1747 had entered into agreement which allowed us to cap the
1748 bonuses and to have influence on the bonuses, but that the
1749 final decision would be made by their compensation committee
1750 and their board, because it was still a separate public
1751 company. So there was not a connectivity fully until after
1752 they became a subsidiary of Bank of America.

1753 Ms. KAPTUR. But it certainly looks like, I don't want to
1754 use the word hedge, but it certainly looks like financial

1755 people inside your company were anticipating what might
1756 occur, and the deferral of taxes in 2008 seems most curious.

1757 Mr. LEWIS. Well, I am no a tax attorney and I don't know
1758 exactly what the hedging was, but it was not--I don't see the
1759 connection to Merrill because Merrill was the next year.

1760 Ms. KAPTUR. Well, I would sure appreciate, Mr. Lewis, if
1761 you could provide for the record what net effective tax your
1762 company paid in 2008, because, to me, it looks like you paid
1763 one-fiftieth of what you should, and I would like to compare
1764 what tax rate was paid and the amount that was paid versus
1765 what the average middle-class family in our Country pays. I
1766 think the record will show you paid actually substantially
1767 less.

1768 Mr. LEWIS. I would be happy to do that.

1769 Ms. KAPTUR. I have a request, Mr. Chairman, if I could,
1770 for information for the record.

1771 Mr. Lewis, is it possible that in the spring of 2008, I
1772 have information that Bank of America bought a portfolio of
1773 subprime loans from the Federal Deposit Insurance Corporation
1774 that had been previously originated by Superior Bank of
1775 Illinois. Subsequently, Bank of America sold those same
1776 loans, valued at hundreds of billions of dollars, to
1777 investors who, as of last year, have now suffered major
1778 realized losses. Has Bank of America estimated the amount of
1779 those losses attributable to the acquisition of the Superior

1780 FDIC portfolio sold to Bank of America and can you provide
1781 that to the record?

1782 Mr. LEWIS. Yes, ma'am, I would be happy to do that.

1783 Chairman TOWNS. Thank you very much.

1784 Ms. KAPTUR. Thank you, Mr. Chairman.

1785 Chairman TOWNS. I now yield to Congressman Welch from
1786 Vermont.

1787 Mr. WELCH. Thank you, Mr. Chairman, and thank you, Mr.
1788 Lewis, for being here.

1789 A couple of questions. My understanding is that the
1790 original transaction started out as a private deal between
1791 Bank of America and Merrill Lynch, correct?

1792 Mr. LEWIS. Yes, sir.

1793 Mr. WELCH. And you did the due diligence financial
1794 review to make you come to the conclusion that it was in the
1795 best interest of the shareholders of Bank of America to
1796 proceed, correct?

1797 Mr. LEWIS. Yes, that is correct.

1798 Mr. WELCH. And then, sometime after you made this
1799 decision, you became aware of the \$12 billion additional hole
1800 in the balance sheet, is that correct?

1801 Mr. LEWIS. Yes, sir.

1802 Mr. WELCH. And that was on December 14th of 2008?

1803 Mr. LEWIS. That is when we saw the accelerating losses.

1804 Mr. WELCH. Well, accelerating as in \$12 billion

1805 additional.

1806 Mr. LEWIS. Correct.

1807 Mr. WELCH. Okay. Now, your shareholders had already
1808 voted to approve the merger based on information that you had
1809 provided up to that point, is that correct?

1810 Mr. LEWIS. Yes.

1811 Mr. WELCH. But the \$12 billion figure that you became
1812 aware of on December 14th was of such magnitude that it made
1813 you believe that, in your capacity as the CEO, you would have
1814 to consider invoking the MAC clause, is that correct?

1815 Mr. LEWIS. Yes, sir.

1816 Mr. WELCH. And is it fair to say that the MAC clause
1817 would be considered, in effect, the nuclear option?

1818 Mr. LEWIS. I don't know--

1819 Mr. WELCH. Well, here is what I mean. If you invoke the
1820 MAC clause to get out of a deal that you entered into, then
1821 there is obviously reputational consequences in litigation,
1822 correct?

1823 Mr. LEWIS. Yes, sir, that is a possibility.

1824 Mr. WELCH. And if you lose the litigation, there are
1825 financial consequences to your shareholders, correct?

1826 Mr. LEWIS. Yes, sir.

1827 Mr. WELCH. So you wouldn't even consider invoking the
1828 MAC clause unless there was something of enormous magnitude
1829 and consequence to the company and the shareholders, correct?

1830 Mr. LEWIS. That is correct.

1831 Mr. WELCH. Now, in order to invoke the MAC clause and
1832 avoid the consequences of perhaps losing, would it be
1833 prudent, in the ordinary course, to get financial advice from
1834 your financial advisors as to the impact of this \$12 billion
1835 hole on the business plan that justified the original
1836 decision to enter into the agreement?

1837 Mr. LEWIS. Well, we had finance people looking at all of
1838 that, so we were looking at that issue.

1839 Mr. WELCH. Well, obviously. This is my question: If
1840 you found out about a \$12 billion additional hole, whatever
1841 model you had about payback and value to the shareholders,
1842 now it was called into question, right?

1843 Mr. LEWIS. I tried to mention this before, but it
1844 extended the amount of time that you were going to get your
1845 payback, yes.

1846 Mr. WELCH. It affected shareholder value, correct?

1847 Mr. LEWIS. Correct.

1848 Mr. WELCH. All right, basically two questions. One, did
1849 you get a financial analysis that you reviewed before you
1850 made a decision to discuss with the Treasury officials the
1851 invocation of the MAC--

1852 Mr. LEWIS. There was financial analysis that I saw, yes.

1853 Mr. WELCH. Okay. These were made available to you?

1854 Mr. LEWIS. Yes.

1855 Mr. WELCH. And what was the conclusion of those
1856 financial analysis?

1857 Mr. LEWIS. The conclusion was that you pushed out your
1858 payback or your accretion because you had these preferred
1859 shares now that you were having to pay back.

1860 Mr. WELCH. That is obvious. I mean, the bottom line is
1861 was there a conclusion about the viability of this
1862 transaction was.

1863 Mr. LEWIS. Well, we still felt very strongly that all
1864 the strategic issues that were being addressed prior to
1865 Merrill Lynch were being addressed by the acquisition of
1866 Merrill Lynch.

1867 Mr. WELCH. Have you made these financial studies
1868 available to the Committee for its review?

1869 Mr. LEWIS. I don't know. I don't know what this
1870 Committee has.

1871 Mr. WELCH. All right.. So what you are saying is that
1872 you did review financial statements from your advisors.
1873 Those being whom, by the way?

1874 Mr. LEWIS. Our financial advisors are us.

1875 Mr. WELCH. So all internal. And on the basis of that
1876 you decided that, despite the knowledge of the \$12 billion
1877 hole, it was prudent to proceed, correct?

1878 Mr. LEWIS. Yes, sir.

1879 Mr. WELCH. So whatever threat or whatever word it is we

1880 are going to use for Mr. Bernanke and Mr. Paulson
1881 interactions, you had come to an independent conclusion on
1882 the basis of financial review by your people that it still
1883 made sense for your shareholders to proceed, correct?

1884 Mr. LEWIS. No. As I recall, they were done in the
1885 context of receiving the money.

1886 Mr. WELCH. Let's be clear. You are saying two things
1887 now. One, you did an independent financial analysis that
1888 said it will stretch out the payback time, but it still is
1889 prudent to proceed; but, on the other hand, you had Bernanke
1890 and Paulson breathing down your neck, so that was a factor.
1891 Are you saying those two things?

1892 Mr. LEWIS. No, I don't think I am. I am trying to say
1893 that we--

1894 Mr. WELCH. Okay, I am going to interrupt. I don't
1895 understand that, because I think you have said those two
1896 things.

1897 Another thing that is very important I think to
1898 shareholders, \$12 billion is of consequence to you, correct?

1899 Mr. LEWIS. Yes, it is.

1900 Mr. WELCH. Did you tell your shareholders that you had
1901 come upon this information that the deal they voted on is not
1902 the deal that was going through because it had a \$12 billion
1903 hole that was accelerated? Did you tell them that?

1904 Mr. LEWIS. The \$12 billion was what we discovered later.

1905 Mr. WELCH. And do you think after the fact information
1906 is not of interest to investors?

1907 Mr. LEWIS. What I do know is that when our lawyers tell
1908 us we have a disclosable event, we disclose it.

1909 Mr. WELCH. If you have--

1910 Chairman TOWNS. I must interrupt the gentleman.

1911 Mr. WELCH. If I can ask just one final question.

1912 If there is an event that you consider so significant
1913 that it may allow you to invoke the material adverse
1914 consequence contract clause, do you not think that same event
1915 is of interest to shareholders and requires you, in your
1916 fiduciary duty, to disclose it?

1917 Mr. LEWIS. I leave that decision to our security lawyers
1918 and our outside counsel.

1919 Mr. WELCH. You are not CEO?

1920 Mr. LEWIS. I am not a securities lawyer.

1921 Mr. WELCH. You are not the ultimate one responsible?

1922 Chairman TOWNS. I have to interrupt the gentleman. We
1923 have votes and we have other members who have not had an
1924 opportunity.

1925 Mr. WELCH. Okay. Thank you. Yield back.

1926 Chairman TOWNS. The gentleman from Virginia, Mr.
1927 Connolly.

1928 Mr. CONNOLLY. I thank the Chairman.

1929 Again, Mr. Lewis, thank you for being here this morning.

1930 Several questions. One is when did you decide that the
1931 financial losses being incurred by Merrill Lynch should be
1932 disclosed to your shareholders?

1933 Mr. LEWIS. Again, I don't decide on disclosures; we have
1934 securities lawyers, and many times they talk to external
1935 counsel to determine that.

1936 Mr. CONNOLLY. Well, presumably, you--I mean, I worked
1937 for a company. Presumably, you, as the CEO, are in those
1938 conversations.

1939 Mr. LEWIS. No. They come to me and they are done.

1940 Mr. CONNOLLY. Right. So when did that happen? When was
1941 the decision made and how was it made to disclose or not to
1942 disclose to the shareholders of your company?

1943 Mr. LEWIS. We disclosed the losses at Merrill Lynch
1944 consistent with disclosing the agreement we had with the
1945 Government and consistent with us announcing our earnings on
1946 January the 16th.

1947 Mr. CONNOLLY. January? Why such a long delay?

1948 Mr. LEWIS. Again, I am not a securities lawyer. That is
1949 when we announced according to schedules given to us by our
1950 lawyers.

1951 Mr. CONNOLLY. Were you ever encouraged or pressured by
1952 anyone at the U.S. Treasury or by the Federal Reserve not to
1953 disclose until January?

1954 Mr. LEWIS. No. We were working on a goal of getting

1955 everything done at once.

1956 Mr. CONNOLLY. I am sorry, I cannot hear you.

1957 Mr. LEWIS. We were working on a goal of getting
1958 everything done at once so that we didn't have an
1959 announcement of something that would cause more damage to the
1960 economy. But nobody ever told us that we should not disclose
1961 a disclosable event.

1962 Mr. CONNOLLY. So, for example, nobody at the Federal
1963 Reserve and no one at the United States Treasury urged you to
1964 manage the timing of the disclosure so that Merrill's
1965 earnings and the receipt of TARP money were all disclosed in
1966 January?

1967 Mr. LEWIS. The target was to do that so that we didn't
1968 damage the economy any more.

1969 Mr. CONNOLLY. So there were discussions about that with
1970 the U.S. Treasury and with the Federal Reserve.

1971 Mr. LEWIS. It was about announcing everything at once.

1972 Mr. CONNOLLY. I understand, but the timing is
1973 interesting; let's announce it in January, not in December.
1974 Was there something critical that had happened on Wall Street
1975 that made it better in January than December?

1976 Mr. LEWIS. Here was not an agreement in December.

1977 Mr. CONNOLLY. I am sorry?

1978 Mr. LEWIS. There was not an agreement in December.

1979 Mr. CONNOLLY. There was not an agreement among whom?

1980 Mr. LEWIS. Among us, us being the Federal Reserve or the
1981 Treasury.

1982 Mr. CONNOLLY. So there were discussions, but not an
1983 agreement, in December.

1984 Mr. LEWIS. There were discussions, but not an agreement,
1985 yes.

1986 Mr. CONNOLLY. Did those discussions involve the
1987 Secretary of Treasury himself and the Chairman of the Federal
1988 Reserve himself?

1989 Mr. LEWIS. Yes, they did.

1990 Mr. CONNOLLY. And yourself.

1991 Mr. LEWIS. Yes, they did.

1992 Mr. CONNOLLY. And the agreement was let's hold off until
1993 January because we are not in agreement yet about what to
1994 disclose and when to disclose it?

1995 Mr. LEWIS. We did not have an agreement and we had not
1996 agreed on all the details or the amounts.

1997 Mr. CONNOLLY. Were the reports that you were reluctant
1998 to accept TARP funds true?

1999 Mr. LEWIS. I am sorry? I couldn't hear you.

2000 Mr. CONNOLLY. There was a report that you did not want
2001 to accept TARP funding. Is that correct?

2002 Mr. LEWIS. It is true that we did not think we needed
2003 the TARP funds at the time we were asked to take them.

2004 Mr. CONNOLLY. And was there any connection between your

2005 reluctance in accepting them and the exhortation from
2006 Secretary Paulson at that time to accept them and the issue
2007 of don't disclose the \$12 billion worth of losses you had
2008 just discovered?

2009 Mr. LEWIS. No, absolutely not.

2010 Mr. CONNOLLY. It never came up?

2011 Mr. LEWIS. No.

2012 Mr. CONNOLLY. Why did you accept TARP funds if you
2013 didn't think you needed them?

2014 Mr. LEWIS. Because after hearing the various regulators,
2015 I felt like, given what they were saying about the potential
2016 of further deterioration in the economy, that we should have
2017 a healthy fear of the unknown.

2018 Mr. CONNOLLY. How much in TARP funds did you accept, Mr.
2019 Lewis?

2020 Mr. LEWIS. Fifteen billion.

2021 Mr. CONNOLLY. That is a lot of money for insurance
2022 against the unknown, especially if your initial reaction was
2023 we don't need them.

2024 Mr. LEWIS. Yes. But if you then see that credit
2025 meltdown of epic proportions that happened in the fourth
2026 quarter, it may not have been such a big insurance policy
2027 after all.

2028 Mr. CONNOLLY. My time is almost up. One final question.
2029 Greg Curl replaced Amy Brinkley at BoA's Chief Risk Officer.

2030 | Given the fact that Mr. Curl failed to notice \$12 billion of
2031 | Merrill Lynch's losses, is it wise to have Mr. Curl be your
2032 | Chief Risk Officer, and did you approve of that decision?

2033 | Mr. LEWIS. Mr. Curl didn't miss the instruments which
2034 | caused the loss. What happened is we did not anticipate the
2035 | meltdown of such significant proportions in the fourth
2036 | quarter. So he had identified everything properly; no one
2037 | thought things would get as bad as it did in the fourth
2038 | quarter. And I made that decision.

2039 | Mr. CONNOLLY. You made the decision that Mr. Curl should
2040 | go ahead to become the CRO.

2041 | Mr. LEWIS. To become the COO. I am sorry, the CRO.

2042 | Mr. CONNOLLY. Thank you. My time is up.

2043 | Chairman TOWNS. Let me thank you too. Let me announce
2044 | that we have two votes on the floor and that we will recess
2045 | until 12:30, and we will be returning at 12:30 and, of
2046 | course, continue the questions. So the Committee is in
2047 | recess until 12:30.

2048 | [Recess.]

2049 | Chairman TOWNS. The Committee will resume. May I remind
2050 | the witness that he is still under oath.

2051 | At this time, I yield five minutes to the gentlewoman
2052 | from California, Ms. Diane Watson.

2053 | Ms. WATSON. Thank you, Mr. Chairman, and thank you, Mr.
2054 | Lewis for enduring all of this time.

2055 In your testimony, you stated that nine days afer the
2056 shareholders' vote approving the merger, you became aware of
2057 significant accelerating losses, the MAC, at Merrill Lynch,
2058 raising concerns that the Bank of America might want to avoid
2059 finalizing the deal due to the revelation of MAC. However,
2060 it is difficult to understand how this came as a complete
2061 surprise, given reports by The New York Times that shortly
2062 after the deal was announced in September, B of A had quickly
2063 installed 200 people at Merrill Lynch to thoroughly review
2064 their books.

2065 Were any of the 200 Bank of America employees
2066 responsible for analyzing Merrill Lynch aware of the
2067 potential for the \$12 billion loss before you allegedly
2068 discovered it in mid-December?

2069 Mr. LEWIS. I apologize if I haven't been clear. We did
2070 have people there and we did know that there were losses;
2071 that was clear both at our company and theirs. We could see
2072 that that was happening and there were rumors on the street
2073 that that was happening across all financial institutions,
2074 and we saw evidence of that after the fourth quarter close
2075 because we saw most everybody had losses.

2076 The thing that caused us to be concerned was the
2077 acceleration that we saw when we got the numbers that we did
2078 on the 14th.

2079 Ms. WATSON. Did you feel that the reviews of Merrill

2080 Lynch's books were thoroughly adequate? Were they researched
2081 and analyzed adequately?

2082 Mr. LEWIS. Yes, ma'am. I thought the due diligence was
2083 done adequately. We identified the instruments that we
2084 thought might have issues if you have credit deterioration,
2085 but we did not expect the magnitude of the deterioration that
2086 occurred in the fourth quarter.

2087 Ms. WATSON. So you are saying that you really weren't
2088 aware of the substantial loss before the shareholders'
2089 meeting on December the 5th?

2090 Mr. LEWIS. No, ma'am. We saw losses, but they seemed
2091 consistent with what we were hearing about in the marketplace
2092 and consistent with what we were seeing at our company. It
2093 was only when we saw the acceleration, when we got the
2094 reports, when we did, that caused the alarm.

2095 Ms. WATSON. Well, do you think if you had that knowledge
2096 before, you would have proceeded with that merger
2097 differently?

2098 Mr. LEWIS. Well, I can't--it is hard to predict what I
2099 would have done other than what we did when we had them, so--

2100 Ms. WATSON. Well, the scenario that I just gave you. If
2101 you were aware, would you have proceeded differently?

2102 Mr. LEWIS. Well, I don't know because it didn't occur
2103 that way.

2104 Ms. WATSON. In testimony to the New York State Attorney

2105 General, Andrew Cuomo, you stated that you had been advised
2106 by representatives from the Treasury Department and the
2107 Federal Reserve not to disclose details of Merrill Lynch's
2108 difficult financial position. So why do you believe that
2109 representatives from the Federal Government would not want
2110 you to disclose knowledge you had of Merrill Lynch's
2111 increasingly dire economic position?

2112 Mr. LEWIS. During all of that time, there was never ever
2113 a time that the Federal Reserve or the Treasury Department
2114 told me that we should not disclose something that we thought
2115 would be a disclosable event.

2116 Ms. WATSON. So there was never a time that you were told
2117 to hold back on this information?

2118 Mr. LEWIS. Not as regards something that should be
2119 disclosed.

2120 Ms. WATSON. Okay, remember you are under oath.

2121 Okay, despite the fact that the plan for a merger was
2122 announced on September 15th, 2008, there was no mention of
2123 the \$20 billion capital injection from the Government until
2124 January 16th. At what point during the negotiations between
2125 the B of A, Merrill Lynch, and the Federal Government was it
2126 determined that this money would be necessary for the merger
2127 to be finalized?

2128 Mr. LEWIS. The discussions around the injection of the
2129 preferred stock took place after we went to the Federal

2130 Reserve and the Treasury on the 17th, so during that time we
2131 began to talk about various ways to inject capital and
2132 so-called filled the hole. We did not come to a conclusion
2133 about amounts and the nature of the structure until sometime
2134 well into that first few weeks of January of 2009.

2135 Ms. WATSON. Thank you. My time is up.

2136 Thank you, Mr. Chairman.

2137 Chairman TOWNS. Thank you very much, gentlewoman of
2138 California.

2139 Just before I move to the other members, let me just
2140 sort of ask a couple other questions.

2141 Mr. Lewis, did Merrill Lynch give you all the
2142 information that you needed to make a decision, an informed
2143 decision? Did you get all the material that you needed in
2144 order to be able to make an informed decision?

2145 Mr. LEWIS. Yes, sir, they did. We, in fact, not only
2146 were we looking at the data, but we had an outside firm that
2147 had looked at the data before, a company run by Chris
2148 Flowers, who was looking at the data alongside of us, and he
2149 had looked at their data some time ago, a few months before
2150 then, so they had a very good knowledge of the various
2151 instruments and securities. So we actually had two sets of
2152 eyes looking at that. Again, sir, it was not the fact that
2153 we didn't identify the securities, it was that we did not
2154 expect the credit to deteriorate like it did in the fourth

2155 | quarter.

2156 | Chairman TOWNS. So do you agree that the decision on
2157 | whether to proceed with the merger was ultimately yours? Was
2158 | it yours?

2159 | Mr. LEWIS. Well, it was my recommendation to the board
2160 | and it was mine and the board's decision to go forward, yes,
2161 | sir.

2162 | Chairman TOWNS. Thank you very much.

2163 | I understand that we got out of rotation here. I
2164 | understand it was Mr. Connolly next and then go back to Mr.
2165 | Jordan. Okay, Congressman Connolly.

2166 | No, no, no, Mr. Jordan has to--you yield to him?

2167 | Mr. CONNOLLY. I thank my colleague.

2168 | Chairman TOWNS. Briefly, he says.

2169 | Mr. CONNOLLY. I will be brief. I have to get back to
2170 | the floor. So I thank my colleagues and I thank the Chair.

2171 | Mr. Lewis, if you look at the minutes of the Bank of
2172 | America dated December 30th, 2008, it says special meeting.
2173 | Starting at the top of page 3, it reads, ''Mr. Lewis reported
2174 | that management has obtained detailed oral assurances from
2175 | the Federal regulators with regard to their commitment and
2176 | has documented those assurances with emails and detailed
2177 | notes of management's conversations with the Federal
2178 | regulators.'' It goes on to say that you discussed in detail
2179 | ''the commitment of the Federal regulators to deliver

2180 assistance in the form of capital and asset protection to the
2181 corporation.''

2182 In all, the word commitment in those minutes is used at
2183 least nine times. But just before the Committee recessed for
2184 this vote, in response to my question, you said there was no
2185 agreement in December. In fact, you said that it was for
2186 lack of agreement in December that you decided to make the
2187 announcement in January, and that all three
2188 parties--Treasury, Federal Reserve, and Bank of
2189 America--agreed to that. How do you reconcile your testimony
2190 today with what you told the board on December 30th?

2191 Mr. LEWIS. Well, we had an agreement that we would work
2192 toward a solution, but even from December 30th until the time
2193 that we signed the agreement, there was back and forth in
2194 terms of amounts, in terms of structure, and in terms of
2195 securities to be included in what was then called a wrap. So
2196 we had agreement for a solution, but we didn't have any kind
2197 of agreement as I would think of it as a business person.

2198 Mr. CONNOLLY. Well, what about commitment? What was
2199 your understanding of the commitment, that word used nine
2200 times in those minutes?

2201 Mr. LEWIS. Commitment to work toward a solution.

2202 Mr. CONNOLLY. Well, but it says that you received, as
2203 part of that commitment, detailed oral assurances from the
2204 Federal regulators with regard to their commitment.

2205 Mr. LEWIS. Yes, sir. And you can--

2206 Mr. CONNOLLY. That sounds like more than a commitment to
2207 find a solution. That sounds like it is pretty detailed and
2208 we have already worked out the solution, and I am verbally
2209 sharing with you at the special meeting the nature of that
2210 commitment.

2211 Mr. LEWIS. No. Different structures had been talked
2212 about, different amounts had been talked about, so there was
2213 a back and forth about different types of securities,
2214 different types of ways we could go about filling the hole.
2215 But there was never a specific agreement with specific
2216 numbers of that sort. So it took several more weeks before
2217 we could actually come to terms as to exactly what it would
2218 look like.

2219 Mr. CONNOLLY. And it is your testimony that it is that
2220 failure to come to a specific agreement in December, that is
2221 the reason the announcement was put off until January?

2222 Mr. LEWIS. That and the desire by the Federal Reserve
2223 and the Treasury to have an objective of having it all be
2224 able to be announced at one time, so that it would not spook
2225 the capital markets because they were so fragile.

2226 Mr. CONNOLLY. Final question, if I may, Mr. Chairman.
2227 Was there any intentional reason not to put the
2228 agreement in writing?

2229 Mr. LEWIS. No, sir, because there was not enough

2230 specifics to put into writing.

2231 Mr. CONNOLLY. But at some point there were.

2232 Mr. LEWIS. Yes, sir, and that was in the first few weeks
2233 of January of the following year.

2234 Mr. CONNOLLY. But I want to be very clear. Under oath,
2235 it is your testimony today there was no intentional evasion
2236 or reason to not put the agreement in writing. Nobody had a
2237 conversation with Treasury, the Federal Reserve, or at the
2238 Bank of America let's not put this in writing right now.

2239 Mr. LEWIS. I can only speak to what was happening at the
2240 time. I don't know what was said to everybody, but the two
2241 things that I would continue to say is, number one, the goal
2242 was to get this done comprehensively so it was one time and
2243 we would not shock the markets with something that was
2244 dangling that was needed; and, secondly, we had not come to a
2245 final conclusion and did not do so for several weeks.

2246 Mr. CONNOLLY. I yield back and I thank my colleagues for
2247 their indulgence.

2248 Chairman TOWNS. Thank you very much.

2249 I now yield to Mr. Jordan, gentleman from Ohio.

2250 Mr. JORDAN. Thank you, Mr. Chairman.

2251 Mr. Lewis, thank you. I know sitting there for three
2252 hours and answering questions is not the greatest thing in
2253 the world to be able to have to do.

2254 In my first round, I asked about whether you felt the

2255 Government, in connection with the TARP program, exercised
2256 any excessive influence in day-to-day operations, and your
2257 answer was no. But I want to go back to--and I am taking
2258 this from a May 13th Bloomberg News story, documents obtained
2259 by Judicial Watch relative to a meeting that you had with Mr.
2260 Paulson, Mr. Bernanke, Mr. Geithner, and Ms. Bear. Did you
2261 and eight other bank CEOs meet with those individuals here in
2262 Washington back in looks like October 13th?

2263 Mr. LEWIS. Yes, sir, we did.

2264 Mr. JORDAN. Okay. Tell us what happened at that
2265 meeting, because what the documents indicate is that we had a
2266 lot of conversation, discussion about the threat that has
2267 been talked about here by just about everyone relative to the
2268 MAC clause, but it looks like there was maybe threats here or
2269 at least strong suggestions that you initially participate in
2270 the TARP program. So can you tell me about what took place
2271 at that meeting and walk me through that October 13th
2272 meeting?

2273 Mr. LEWIS. The nine chief executives were called by Hank
2274 Paulson, or at least I was--

2275 Mr. JORDAN. Let me interject, if I could, real quick.
2276 You said earlier, I believe, too--and I forget to which
2277 member's questions--that you initially, your board and your
2278 bank and you felt your bank did not need any infusion of cash
2279 or TARP money from the Government. Is that right?

2280 Mr. LEWIS. Yes, sir, and it was--

2281 Mr. JORDAN. What was that date? When did you make that
2282 decision as a bank?

2283 Mr. LEWIS. Well, the first reaction that I had to the
2284 fact that we were being offered \$15 billion was that we
2285 didn't need it; the prior week we had raised \$10 billion in
2286 equity.

2287 Mr. JORDAN. Okay.

2288 Mr. LEWIS. And that it could have been--I am
2289 speculating, but it could have been that is why we were
2290 offered 15, and not 25, like some of the other big banks
2291 were.

2292 But, as you mentioned, the people that were there, they
2293 were on the other side of the table. There were nine of us,
2294 the nine bank CEOs, and each of those people spoke about the
2295 possibility of deterioration in the economy. Finally, and I
2296 think it is a little grey with me, but I think it was
2297 Secretary Paulson then began to tell each bank what amount
2298 they should take.

2299 Mr. JORDAN. Were you required to sign a form at that
2300 meeting?

2301 Mr. LEWIS. Yes.

2302 Mr. JORDAN. What did the form say?

2303 Mr. LEWIS. It basically was a very short form that
2304 talked about the interest rate of the preferred and the

2305 amount. In fact, we wrote in the amount. It was a blank and
2306 so each individual wrote in--

2307 Mr. JORDAN. You wrote in the amount, but it was
2308 suggested by the Treasury Secretary?

2309 Mr. LEWIS. We were told what to write in, so to speak.

2310 Mr. JORDAN. Okay. You did that at that meeting? You
2311 wrote in the amount at that meeting?

2312 Mr. LEWIS. Not until I had called my executive
2313 committee.

2314 Mr. JORDAN. Okay.

2315 Mr. LEWIS. So we talked about various things--

2316 Mr. JORDAN. So how long did this meeting last?

2317 Mr. LEWIS. I think it was less than an hour, but, again,
2318 it has been a while.

2319 Mr. JORDAN. In less than an hour, nine banks decided to
2320 take billions of dollars?

2321 Mr. LEWIS. Well, we ended up--

2322 Mr. JORDAN. Sign a form? Did you have to check with
2323 your board first before you signed the form?

2324 Mr. LEWIS. No, no. I ended up, at least, in a position,
2325 and I think most of my colleagues in the various banks ended
2326 up, thinking that if this group of people, with the knowledge
2327 they have of the economy, were saying that this may be
2328 necessary, you should take it, that we felt like it was
2329 probably the right thing to do to have a healthy fear of the

2330 unknown. So on that basis I called my executive committee
2331 and got permission to sign it.

2332 Mr. JORDAN. Okay. And did the events of that hour, on
2333 that day in October, did that weigh on your mind fast-forward
2334 a few months in December, when you were deciding or thinking
2335 about--I think your answer to me earlier was when you called
2336 Secretary Paulson and Mr. Bernanke and told them about the
2337 MAC clause, you said you were seriously considering. I think
2338 that was your answer to me earlier.

2339 Did the events of October, that meeting, that one hour
2340 meeting, where they put a form in front of you and said you
2341 need to sign this, you need to write in the amount, you are
2342 going to participate in this program whether you like it or
2343 not, did those events impact your decision in December, when
2344 they said we don't want you exercising this MAC clause?

2345 Mr. LEWIS. No, I didn't correlate them or connect them
2346 in any way. I was never thinking about that in relation to
2347 the circumstances.

2348 Mr. JORDAN. Did you know--if I could, Mr. Chairman.

2349 When you walked into that meeting in October, October--

2350 Mr. KUCINICH. Request unanimous consent to give the
2351 gentleman another two minutes.

2352 Chairman TOWNS. Without objection, so moved.

2353 Mr. JORDAN. I thank the Subcommittee Chairman and the
2354 Chairman.

2355 When you walked into that meeting on the 13th, did you
2356 know what it was about? Did you know it was going to be they
2357 are going to ask us all to take TARP dollars?

2358 Mr. LEWIS. No, sir, I did not.

2359 Mr. JORDAN. You had no idea? You thought it was about
2360 just the general concern of the economy?

2361 Mr. LEWIS. I didn't know, but--

2362 Mr. JORDAN. What were the rumors on the street? I think
2363 that is the term you used earlier about some other
2364 information you had gathered about Merrill Lynch. What were
2365 the rumors on the street amongst your colleagues in the other
2366 big lending institutions and banks around the Country?

2367 Mr. LEWIS. It was a weekend. I think Monday was a
2368 holiday or something, so I didn't hear a lot of things in
2369 that time period. So I don't know if it ever got out as to
2370 what was going to--but I did talk to at least one other
2371 person, and he did not know anything about it either.

2372 Mr. JORDAN. Did anyone in that meeting express any
2373 reservations about--and forgive me, I don't have the data in
2374 front of me. Did anyone not sign?

2375 Mr. LEWIS. Not to my knowledge. I think everyone
2376 signed.

2377 Mr. JORDAN. Did anyone express reservations about not
2378 signing?

2379 Mr. LEWIS. One person expressed reservations, yes.

2380 Mr. JORDAN. Was that you?

2381 Mr. LEWIS. No, it was not I.

2382 Mr. JORDAN. Okay.

2383 Mr. Chairman, thank you for the time. I have to run to
2384 a 1:00 o'clock meeting.

2385 And I want to thank the witness for his patience and his
2386 thoughtful answers.

2387 Chairman TOWNS. Thank you very much.

2388 I now yield to the gentleman from Ohio again, this time,
2389 Mr. Kucinich.

2390 Mr. KUCINICH. Thank you, Mr. Chairman.

2391 Mr. Lewis, we would hope that a CEO would have both a
2392 good memory and the integrity to take responsibility for his
2393 decisions. Mr. Lewis, you stated, in response to my previous
2394 question, that you did not recall asking for a letter from
2395 the Government stating that Bank of America was ordered to
2396 proceed with the purchase of Merrill Lynch. This is the
2397 lynchpin of clarifying whether you were threatened by the Fed
2398 or whether the Fed was tough with you because you were
2399 threatening to be irresponsible. I want to direct your
2400 attention to an email response from the Fed's General Counsel
2401 to Chairman Bernanke's email, which I previously disclosed.

2402 Mr. Chairman, it says, I don't think it is necessary or
2403 appropriate for us to give Lewis a letter along the lines he
2404 asked. First, we didn't order him to go forward; we simply

2405 explained our views and what the market reaction would be and
2406 left the decision to him. Second, making hard decisions is
2407 what he gets paid for, and only he has full information
2408 needed to make the decision, so we shouldn't take him off the
2409 hook by appearing to take the decision out of his hands.

2410 I am entering this into the record.

2411 Chairman TOWNS. Without objection.

2412 [The information follows:]

2413 ***** COMMITTEE INSERT *****

2414 Mr. KUCINICH. Now, Mr. Lewis, is it still your testimony
2415 that you don't recall asking for a letter to absolve you of
2416 your responsibility for acquiring Merrill Lynch's huge
2417 losses?

2418 Mr. LEWIS. Congressman, what I do remember is calling
2419 Chairman Bernanke and asking him if he could give us
2420 something in writing along the lines of what the solution
2421 would be.

2422 Mr. KUCINICH. We are now updating Mr. Lewis's previous
2423 testimony.

2424 Mr. LEWIS. Sir--

2425 Mr. KUCINICH. That may help you escape perjury, but it
2426 doesn't get away from the question of whether or not you were
2427 trying to absolve yourself of responsibility for acquiring
2428 Merrill Lynch's huge losses. I mean, we are talking about
2429 events that transpired only a few months ago, and the
2430 decision to withhold from Bank of America's shareholders
2431 material information about the deterioration of Merrill
2432 Lynch's finances was key here. This isn't about a threat,
2433 this is about your responsibility, and your failure to inform
2434 your shareholders could constitute a fundamental violation of
2435 security laws.

2436 I have just given you documentation, Mr. Chairman, that
2437 Mr. Lewis tried to deflect the matter to the Fed by asking
2438 for a letter that they made him do it.

2439 Now, I want to ask you, Mr. Lewis, our investigation
2440 finds that Mr. Bernanke believed that your threat to invoke a
2441 MAC was not credible. I want you to take a look at the
2442 following email from Chairman Bernanke dated December 21st,
2443 2008. ``I think the threat to use MAC is a bargaining chip,
2444 and we don't see it as a very likely scenario at all.''

2445 You did get a significant amount of financial assistance
2446 when you dropped the threat to back out of your deal, isn't
2447 that true?

2448 Mr. LEWIS. Yes, we did.

2449 Mr. KUCINICH. Tell the Committee what you received, how
2450 much money.

2451 Mr. LEWIS. Twenty billion dollars.

2452 Mr. KUCINICH. And you got the promise of \$118 billion,
2453 didn't you, in asset protection for a combination of Merrill
2454 and Bank of America toxic assets? Didn't you get that?

2455 Mr. LEWIS. We hadn't settled on an amount until some
2456 time, but the wrap was being considered, yes.

2457 Mr. KUCINICH. Now, that was in addition to the \$15
2458 billion in TARP monies you received directly in October, \$10
2459 billion in TARP monies you received upon acquiring Merrill,
2460 isn't that right?

2461 Mr. LEWIS. We did not ever sign the agreement on the
2462 wrap.

2463 Mr. KUCINICH. Now, our investigation also finds that,

2464 contrary to your representations to the Fed, that you were
2465 concerned primarily about the losses at Merrill Lynch.
2466 Merrill's losses were less than half of the problem you
2467 faced; losses originating at Bank of America itself were
2468 larger than the losses at Merrill.

2469 Mr. Lewis, please look at the following email dated
2470 December 18th, 2008, between officials at the New York Fed.
2471 One reports his findings saying that on the total of 30 basis
2472 points deterioration of the tangible common equity ratio of
2473 the combined Bank of America-Merrill Lynch entity, they go on
2474 to say that 16 basis points of deterioration is due to Bank
2475 of America, 14 basis points due to Merrill Lynch. The other
2476 official described this discovery as a smoking gun.

2477 Isn't it true that more than half of the decline in your
2478 all-important tangible common equity ratio evident in
2479 mid-December was not caused by Merrill Lynch?

2480 Mr. LEWIS. Your apples and oranges. The securities--

2481 Mr. KUCINICH. Well, maybe it is rotten apples and rotten
2482 apples, because isn't it true that you were told that if you
2483 went through with the MAC, and if you later needed financial
2484 assistance from the Government, you wouldn't get it? Isn't
2485 that true?

2486 Mr. LEWIS. I am sorry, repeat that, please.

2487 Mr. KUCINICH. That if you went through with the MAC, and
2488 if you later needed financial assistance from the Government,

2489 weren't you told you wouldn't get it?

2490 Mr. LEWIS. I think I have seen that in an email, but I
2491 don't--

2492 Mr. KUCINICH. Were you told that, yes or no?

2493 Mr. LEWIS. I do not recall being told that.

2494 Mr. KUCINICH. Isn't it true that given the precarious
2495 state of your balance sheet and especially your inadequate
2496 levels of tangible common equity, you believed at the time
2497 you reasonably could need financial assistance from the
2498 Government in the future?

2499 Mr. LEWIS. The preferred stock does nothing to help your
2500 tangible common equity ratio.

2501 Mr. KUCINICH. You wouldn't think about it? I mean, if
2502 you got \$15 billion in October and you are going to come back
2503 two months later and ask for another \$20 billion--you to 15
2504 and then, two months later, \$20 billion--doesn't it show that
2505 it really increased your Tier 1 capital ratio? Doesn't it
2506 show that?

2507 Mr. LEWIS. Not tangible.

2508 Mr. KUCINICH. Tier 1.

2509 Mr. LEWIS. Tier 1, yes.

2510 Mr. KUCINICH. Now, Mr. Lewis, the Government believed
2511 that you knew or should have known about the Merrill losses
2512 long before you said you did based on data that Bank of
2513 America possessed and had reasonably reviewed. The

2514 Government believed you could be in violation and breach of
2515 security laws.

2516 The Government didn't believe you that Merrill was the
2517 primary cause of your problems, but thought that Merrill
2518 losses were less significant than the losses that Bank of
2519 America was experiencing as a standalone entity. The
2520 Government even thought that you were making the threat to
2521 use MAC as a bargaining chip and that it was not credible.
2522 The Government had already given you \$25 billion before you
2523 approached it about Merrill Lynch.

2524 If the Government believed all of that about you and
2525 your management team, were you surprised that the Fed
2526 arranged for you to receive considerable additional financial
2527 support in January? Did that surprise you?

2528 Mr. LEWIS. We received \$15 billion, not \$25 billion,
2529 from the original TARP package. It did not surprise me they
2530 were willing to give us more because we had talked about
2531 coming to a solution to get the Merrill Lynch deal done.

2532 Mr. KUCINICH. Well, there was a financial crisis and
2533 they thought it was necessary for--

2534 Unanimous consent for two more minutes, and then I
2535 should wrap it up.

2536 Chairman TOWNS. Without objection.

2537 Mr. KUCINICH. There was a financial crisis and they
2538 thought it was necessary for the system for the deal to go

2539 through. If there is one thing about your record that is
2540 clear, it is that you have experience in negotiating deals.
2541 What do you believe your leverage with the Government was at
2542 the end of 2008?

2543 Mr. LEWIS. The only leverage I would say we had was that
2544 two honorable people trying to come to the right solution had
2545 given me their word that they would try their best to find a
2546 solution.

2547 Mr. KUCINICH. Isn't it true that it was because Bank of
2548 America is a big bank, and if you hadn't been the CEO of the
2549 largest bank in America, if you had been the top executive,
2550 let's say, at a mid-size or small regional bank and you had
2551 been acquiring another similarly sized bank during the fall
2552 of 2008, you think the Federal regulator would have behaved
2553 in the same way?

2554 Mr. LEWIS. Well, sir, I don't think I was such a
2555 favorite son from some of the emails that you have just read.

2556 Mr. KUCINICH. Well, wouldn't you have, if you were a
2557 smaller institution, been taken over and liquidated?

2558 Mr. LEWIS. I can't speculate on that, sir.

2559 Mr. KUCINICH. It is fair to say we have a large
2560 financial institution, Mr. Chairman, that doesn't face the
2561 same consequences for management of small ones, and the Fed
2562 had an opinion that there was considerable evidence of
2563 mismanagement. There has been a misconception here that the

2564 Government put a gun to the head of Bank of America, when it
2565 is quite possible that it was the Bank of America that put a
2566 gun to the head of the Fed by threatening to invoke the MAC,
2567 and I think that this whole idea, Mr. Chairman, about Mr.
2568 Lewis somehow being a victim here flies in the face of the
2569 fact that you were CEO of the largest bank and that you are
2570 pretending that you didn't ask for help from the Government
2571 to take the burden off your back, that you didn't ask for a
2572 letter.

2573 You are going to have to excuse me, but this is not
2574 credible. You are trying to change the scenario from you as
2575 a victim to you as a powerful CEO who made a decision that
2576 denied your stockholders, your shareholders material
2577 information that they needed prior to a vote on a merger, and
2578 I think that is the central point of this hearing, and I am
2579 sorry that you haven't been forthcoming enough about that
2580 central point.

2581 I yield back.

2582 Chairman TOWNS. Well, one thing for sure, there was a
2583 shotgun marriage, a shotgun wedding. There is no question
2584 about that.

2585 Let me just sort of raise this issue. On December the
2586 22nd, 2008, Mr. Lewis, you sent an email to your board, and
2587 let me just quote. It says, "I just talked with Hank
2588 Paulson. He said that there was no way the Federal Reserve

2589 and the Treasury could send us a letter of any substance
2590 without public disclosure, which, of course, we do not
2591 want.'' Do you remember that?

2592 Mr. LEWIS. Yes, sir. I do, yes, sir.

2593 Chairman TOWNS. And I was raising this because of the
2594 answer that you gave to my colleague from Virginia, Mr.
2595 Connolly. I didn't get that point that you actually sent
2596 that memo. I mean, it seemed to me, in his questioning, that
2597 didn't come out.

2598 Mr. LEWIS. No. May I give you the context?

2599 Chairman TOWNS. Sure.

2600 Mr. LEWIS. I had called Mr. Bernanke and said is there
2601 something you can give us in writing, because my board is
2602 concerned that everything is verbal and we have nothing
2603 concrete, and we are going in toward the end of the year and
2604 about to have to consummate this deal without anything in
2605 writing. And he said let me think about it, and the next
2606 call I got was from Hank Paulson, and he told me that, first
2607 of all, if they gave us any kind of agreement, it would be so
2608 watered down that the board would not find it satisfactory
2609 and, secondly, that they did not want disclosure. He was
2610 talking about the Government not wanting to create a
2611 disclosable event and have to disclose, not Bank of America.

2612 Chairman TOWNS. You sure didn't make that clear with my
2613 colleague from Virginia. But let me just move on.

2614 Mr. LEWIS. I apologize.

2615 Chairman TOWNS. Congresswoman Kaptur from Ohio.

2616 Ms. KAPTUR. Thank you, Mr. Chairman, very much.

2617 Mr. Lewis, I have been here since this morning and find
2618 your testimony a bit disquieting today for some of the
2619 following reasons:

2620 Bank of America owns 49.9 percent of BlackRock, but you
2621 seem not to know anything of its activities.

2622 Number two, you are the person who was in charge when
2623 Bank of America acquired Countrywide over a year ago, but you
2624 apparently weren't aware of its books and the losses inherent
2625 in that purchase.

2626 Number three, you are the CEO of the largest bank in the
2627 Country and you seem to present yourself as having a rather
2628 hands-off relationship with the Federal Reserve and the
2629 Treasury. I find that somewhat incredulous.

2630 So let me ask some follow-up questions. In terms of the
2631 purchase of BlackRock that was a part of your Merrill Lynch
2632 merger, it is my understanding that BlackRock now is valued
2633 at over \$1.3 trillion and that they just received five no-bid
2634 contracts from the Federal Reserve, among them managing
2635 troubled subprime mortgages in the Freddie Mac and Fannie Mae
2636 portfolios. The people of the United States, through the
2637 Fed, have propped up Fannie and Freddie now to the tune of
2638 over \$200 billion. For the record, can you provide the

2639 contract that BlackRock has with the Fed, particularly the
2640 one regarding the management of Fannie Mae and Freddie Mac's
2641 portfolios?

2642 Mr. LEWIS. I don't know if I can because, again, we
2643 don't run BlackRock. We have two or three seats on the
2644 board, but we don't have a CEO or Chairman, and he does not
2645 report to anybody in Bank of America-Merrill Lynch.

2646 Ms. KAPTUR. And yet you own 49.9 percent of it? Isn't
2647 that a rather strange relationship?

2648 Mr. LEWIS. Well, we don't own 51 percent. That would be
2649 the difference.

2650 Ms. KAPTUR. Do you know how much BlackRock will earn
2651 from that contract with the Federal Reserve to manage Fannie
2652 and Freddie paper?

2653 Mr. LEWIS. No. Possibly some of our board members
2654 would, but I don't.

2655 Ms. KAPTUR. Let me mention The New York Times wrote the
2656 following: Can a company that is being paid to price and
2657 sell troubled assets for the Government buy the same kinds of
2658 assets for private clients without showing preference? And
2659 should the Government seek counsel from a company whose
2660 clients stand to make or lose billions if those policies are
2661 enacted?

2662 Can you outline for us how the Bank of America will
2663 avoid conflict of interest in its mortgage portfolios and

2664 insider dealing charges as mortgage portfolios are resolved
2665 and Bank of America mortgages are involved when BlackRock is
2666 actually the designee to manage the Freddie and Fannie
2667 portfolios on behalf of the Federal Reserve?

2668 Mr. LEWIS. BlackRock would have to manage those and with
2669 the client would have to manage anything like that.

2670 Ms. KAPTUR. But obviously Bank of America, some of your
2671 mortgages are held by Fannie Mae and Freddie Mac. You were
2672 the acquirer of Countrywide, the largest subprime abuser in
2673 the Country, so you must have a pretty healthy portfolio
2674 there that is going to undergo scrutiny.

2675 Mr. LEWIS. And BlackRock would have to take that into
2676 account, yes.

2677 Ms. KAPTUR. Can you provide for the record the documents
2678 that you may have at Bank of America that contain or record
2679 the conflict of interest review undertaken by Bank of America
2680 to ensure proper ethics as these mortgages are resolved?

2681 Mr. LEWIS. The conflict would be with BlackRock and the
2682 client, which would be Freddie or Fannie Mae. And, by the
2683 way, Countrywide is doing quite well, and we have changed the
2684 policies dramatically to become one of the most responsible
2685 lenders in the Country.

2686 Ms. KAPTUR. Well, you know, I think there is a whole
2687 hearing that could be held just on Countrywide, and--

2688 Mr. LEWIS. It would be pre-Bank of America.

2689 Ms. KAPTUR. And are any of the former Countrywide staff
2690 on your staff now at Bank of America?

2691 Mr. LEWIS. There is some staff, but nobody in executive
2692 management.

2693 Ms. KAPTUR. I beg your pardon?

2694 Mr. LEWIS. Nobody in executive management. We sent our
2695 CEO to run the company, a woman named Barbara Desoer.

2696 Ms. KAPTUR. You know, Mr. Chairman, it wouldn't be bad
2697 to hold a hearing on the interrelationship between Bank of
2698 America, BlackRock, Countrywide, the Federal Reserve, Fannie
2699 Mae, and Freddie Mac, and explore these interlocking, rather
2700 shadow, relationships that you claim have no bearing on
2701 activities within your institution, but which sound very
2702 unusual as you state them before the Committee today.

2703 I wanted to just, in my second question here, relating
2704 to Superior Bank, which had the largest settlement in
2705 American history at the FDIC in 2001, over \$450 million as a
2706 result of their subprime activities in Chicago and beyond,
2707 including servicing by Merrill Lynch, which is how you would
2708 acquire the Superior troubled loans. Let me ask you, when
2709 Bank of America acquired those loans, did you audit them
2710 prior to reselling them to investors?

2711 Mr. LEWIS. I am no sure of that transaction, so I would
2712 have to get you somebody who was more familiar with the
2713 transaction.

2714 Ms. KAPTUR. Well, then explain to us, as head of this
2715 massive and important bank in our Country, what is your plan
2716 for dealing with bad loans such as the Superior loans that
2717 came to you through the FDIC Merrill acquisition?

2718 Mr. LEWIS. Well, to the extent that you have loans you
2719 can rehabilitate, you do. To the extent that you can sell
2720 loans for discounts, you do. To the extent that you can't do
2721 either, you hold them on your books and at some point write
2722 them off.

2723 Ms. KAPTUR. But if you sell them to knowing investors
2724 and they were bad loans, what happens?

2725 Mr. LEWIS. Well, you would take a massive discount. The
2726 bank selling them would take a massive discount.

2727 Ms. KAPTUR. Well, I would certainly like the paper
2728 trail, the audit trail on those Superior loans that your bank
2729 has been handling.

2730 I thank you, Mr. Chairman.

2731 Chairman TOWNS. Thank you very much. I thank the
2732 gentlewoman from Ohio.

2733 I now yield five minutes--

2734 Ms. KAPTUR. Mr. Chairman, may I ask the gentleman to
2735 yield just for a second? May I place in the record an
2736 article from The Atlantic Monthly, May 2009, on the financial
2737 crisis, please?

2738 Chairman TOWNS. Without objection.

2739 [The information follows:]

2740 ***** COMMITTEE INSERT *****

2741 Mr. KUCINICH. I ask unanimous consent to insert all the
2742 emails that I offered on the screen there for the record.

2743 Chairman TOWNS. Without objection.

2744 [The information follows:]

2745 ***** COMMITTEE INSERT *****

2746 Chairman TOWNS. The gentleman from Maryland.

2747 Mr. CUMMINGS. Thank you very much, Mr. Chairman.

2748 Mr. Lewis, I am confused. Just picking up on some of
2749 the things that the Chairman and Mr. Kucinich were just
2750 asking about, I can kind of understand your reaction to
2751 discovering that there was a \$12 billion loss suffered by
2752 Merrill Lynch, especially when it was coming after a
2753 shareholders' vote to purchase Merrill Lynch. I can
2754 understand you telling the Fed and Secretary Paulson and
2755 Treasury you were thinking of backing out of the deal. I can
2756 understand that. I think that was based upon your expertise
2757 and your experience.

2758 I cannot understand the agreement that you made with
2759 Treasury and the Fed, which they both deny, to disclose the
2760 \$12 billion loss. If the loss made this a horrible business
2761 deal to acquire Merrill Lynch, why did you still do it? And
2762 I know you have told us over and over again, but let's be
2763 frank. I mean, I am wondering how do you determine what it is
2764 you must disclose? I mean, we have shareholders here who are
2765 concerned.

2766 You are about to go into a deal with a company that is
2767 worse off than is made to believe, and it just seems to me
2768 that a person with your experience, there are a lot of people
2769 in this situation--and I don't care what Paulson may have
2770 said. I don't care what Bernanke may have said. They would

2771 have said to hell with you. They would have said I am going
2772 to stand on principle, and my principles tell me that there
2773 is a MAC here, and here is a real problem; and if I go down,
2774 I go down, but I am going down on principle.

2775 I just want to give you an opportunity to tell us,
2776 because I have got to tell you I am kind of concerned,
2777 because I think there are some serious credibility issues,
2778 and I think Mr. Kucinich has raised some things that, if I
2779 were your lawyers, I would be concerned about. So help me.

2780 Mr. LEWIS. You are referring to the fact that, despite
2781 the fact we thought we could have a MAC, we relied on the--

2782 Mr. CUMMINGS. Yes. And I am also going to the point
2783 that I believe that when you said to--you don't just go and
2784 tell the Feds and you don't tell Paulson that, look, I smell
2785 a rat here. Somebody of your stature. I can understand if
2786 you were some guy that just came off the street six months
2787 ago and the last thing you did was you were a bank teller--no
2788 offense to bank tellers, but that was all you did. You are a
2789 major player, and when you speak, people listen.

2790 So I am trying to figure out. I mean, you said there is
2791 a problem here, but then you let these folks--and all due
2792 respect to Bernanke, all due respect to the Feds, all respect
2793 to Paulson. You are the head of this bank, you are the head
2794 of Bank of America; they are not. They may be on high, but
2795 you have got to answer to the shareholders.

2796 And I am trying to figure out why--and this is stuff
2797 that, seems to me, if I had this kind of information, I
2798 wouldn't even want my shareholders to be voting on something
2799 and they did not have full disclosure, and I am trying to
2800 figure out where does the disclosure come in, why weren't
2801 things disclosed. I get the impression that there was
2802 insufficient due diligence. I know you were dealing with a
2803 crunch time. I know it was only a matter of hours that you
2804 were trying to turn all of this over. I got that. But a man
2805 of your stature, I refuse to believe that you set integrity,
2806 honesty, and transparency to the side for expediency. I just
2807 don't believe it. And I am trying to give you an opportunity
2808 to explain this to us. Now, if you don't want to, that is up
2809 to you, but I am asking you to.

2810 Mr. LEWIS. Yes, sir. Well, if you ask, I will do my
2811 best. I don't know what else I can say other than we were
2812 influenced by the strong nature of the wording from the
2813 Federal Reserve and the Treasury in the sense that they
2814 obviously felt very strongly that we did not have a MAC. I
2815 also still thought we had strategic reason to do Merrill
2816 Lynch, despite the fact it had a financial issue. And then,
2817 third, I thought the downside of calling the MAC and not
2818 winning was pretty severe. So all of those factors were
2819 factors in me making that decision. But if I had thought
2820 that it was a MAC and all these other things didn't matter, I

2821 would have called a MAC, or we would have called a MAC.

2822 Mr. CUMMINGS. I see my time is up, Mr. Chairman.

2823 Chairman TOWNS. Let me thank the gentleman from Maryland
2824 and let me say that, as we come to the conclusion of this
2825 hearing, it is important to remember that we have heard only
2826 one side of the story today. The Committee needs to hear
2827 from Mr. Paulson and Mr. Bernanke before we draw any hard and
2828 fast conclusions. I do believe in fairness.

2829 However, I do think it is fair to observe that a flawed
2830 financial regulatory process was at work in this case. We
2831 see closed door meetings, coded messages, motives, questions,
2832 and private emails. Basically, the regulators and financial
2833 institutions seemed to be making up the rules as they went
2834 along.

2835 As Congress considers financial regulatory reform, one
2836 of the lessons from this case is that we need much more
2837 transparency and accountability in the financial regulatory
2838 and oversight process. The American taxpayers and corporate
2839 shareholders deserve no less. They need to know what is
2840 going on.

2841 Let me again thank you, Mr. Lewis, for being here today.
2842 Before we adjourn, let me state that this Committee has and
2843 will continue to protect the American taxpayers, and will
2844 continue to make sure the taxpayers' dollars are spent in a
2845 transparent and wise manner.

2846 Without objection, I enter this binder into the
2847 Committee record and, without objection, the Committee stands
2848 adjourned.

2849 [The information follows:]

2850 ***** COMMITTEE INSERT *****

2851 [Whereupon, at 1:25 p.m., the committee was adjourned.]

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