

In Quest of Reason:  
The Licensing Decisions of the  
Federal Banking Agencies\*

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In terms of both size and economic importance, the banking business plays a pre-eminent role in the United States. At the end of 1973, commercial banks, mutual savings banks and savings and loan associations held over a trillion dollars in total assets. There were almost 20,000 separate institutions, of which 6,699 were federally chartered; an additional 11,750 state chartered institutions had federal deposit insurance from the Federal Deposit Insurance Corporation (FDIC)<sup>1</sup> or Federal Savings and Loan Insurance Corporation (FSLIC).<sup>2</sup>

Along with the federal involvement and support goes an extensive structure of federal regulation. National banks are chartered and supervised by the Comptroller of the Currency, and automatically receive deposit insurance from the FDIC. State banks are chartered and supervised by the different state banking authorities; in addition, they may join the Federal Reserve System (and thus automatically receive FDIC insurance) or the FDIC itself, thereby incurring a secondary level of regulation and supervision.

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1. Originally created by Act of June 16, 1933, ch. 89, § 8, 48 Stat. 168.

2. Originally created by Act of June 27, 1934, ch. 847, tit. IV, § 402, 48 Stat. 1256.

Federal savings and loan associations are chartered and regulated by the Federal Home Loan Bank Board (hereafter FHLBB or Bank Board) and are automatically insured by the FSLIC. State savings and loans may also join the FSLIC to obtain insurance of accounts. Tables I and 2 provide a statistical picture of the jurisdiction of the various federal banking agencies.

Since its institution in the early 1930s, federal deposit insurance has gained widespread popularity and acceptance and is now regarded as a virtual necessity for any new bank or savings and loan; over ninety-seven percent of banking assets are held by insured institutions. Whether directly through control over chartering or indirectly through control over insurance of deposits, therefore, the federal banking agencies determine entry into the banking business. Moreover, through their approval powers over branches for existing banks and savings and loans, the federal banking agencies can to a large degree control entry into new markets and further influence the structure of banking competition.

These are not unimportant powers, but they have not been the focus of much public attention. This study inquires into the way these powers have been and now are exercised, and it suggests changes in regulatory procedures. The influence that the courts have exerted over these procedures will also be examined with some care.

We will begin with the area of primary supervision and direct licensing controls: approvals by the Comptroller of the Currency of charters and branches of national banks, and by the Federal Home Loan Bank Board of charters and branches for federal savings and loan associations. In the case of the Comptroller, it will be necessary to analyze a rather long and complicated sequence of cases in some detail—partly to convey a picture of past difficulties, and partly to understand the posture in which the agency now finds itself *vis-à-vis* the judiciary. Then we will turn to the area of secondary supervision: decisions to admit state chartered banks to membership in the Federal Reserve System (FRS) or in the Federal Deposit Insurance Corporation, or to approve their branches; and decisions to admit state savings and loans to membership in the Federal Savings and Loan Insurance Corporation. In both instances we will be concerned with how much discretion has been vested in the agency in question, and the grounds and manner of its exercise.

Thereafter we will look at these decisions in more statistical terms—in aggregate results for all four agencies over the period of the last five years, and in a sample study of decision files for the

Table 1  
Number and Total Assets (in billions of dollars)  
of Banks—December 31, 1973

|                  | Banks            |                  |          |         |                 |                 |                            |                 |                 |  |                                 |
|------------------|------------------|------------------|----------|---------|-----------------|-----------------|----------------------------|-----------------|-----------------|--|---------------------------------|
|                  | Commercial Banks |                  |          |         |                 |                 |                            |                 |                 |  | Mutual Savings Banks<br>(State) |
|                  | FDIC Insured     |                  |          |         |                 |                 |                            |                 |                 |  |                                 |
|                  | All<br>Banks     | FRS Member Banks |          |         |                 |                 | Nonmember Banks<br>(State) |                 |                 |  |                                 |
| Total            |                  | Total            | National | State   | FDIC<br>Insured | Non-<br>insured | Total                      | FDIC<br>Insured | Non-<br>insured |  |                                 |
| Number           | 14,653           | 13,964           | 4,659    | 1,076   | 8,229           | 207             | 482                        | 322             | 160             |  |                                 |
| percent of total | 100              | 95.3             | 31.8     | 7.3     | 56.1            | 1.4             | 3.3                        | 2.2             | 1.1             |  |                                 |
| Total assets     | \$942.4          | \$27.1           | \$56.3   | \$166.8 | \$170.8         | \$8.7           | \$106.6                    | \$93.0          | \$13.6          |  |                                 |
| percent of total | 100              | 87.8             | 69.6     | 17.7    | 18.1            | .9              | 11.3                       | 9.9             | 1.4             |  |                                 |

Sources: 60 FED. RES. BULL., Table A16 (July 1974); 1973 FDIC ANNUAL REPORT, Table 108.

Table 2  
Number and Total Assets (in billions  
of dollars) of Savings and Loan Associations—  
December 31, 1973

| Item             | Savings and Loan Associations |         |         |         |         |       |         |        |       |                  |                                                    |
|------------------|-------------------------------|---------|---------|---------|---------|-------|---------|--------|-------|------------------|----------------------------------------------------|
|                  | FHLB Member Associations      |         |         |         |         |       |         |        |       |                  | Nonmember<br>Nominating<br>Associations<br>(State) |
|                  | FSLIC Insured                 |         |         |         |         |       |         |        |       |                  |                                                    |
|                  | All<br>Associ-<br>ations      | Mutual  |         |         |         |       | State   |        |       |                  |                                                    |
| Total            |                               | Total   | Federal | Mutual  | State   | Total | Federal | Mutual | State | Stock<br>(State) |                                                    |
| Number           | 5,244                         | 4,311   | 4,163   | 3,571   | 2,040   | 1,531 | 592     | 148    | 933   |                  |                                                    |
| percent of total | 100                           | 82.2    | 79.4    | 68.1    | 38.9    | 29.2  | 11.3    | 2.8    | 17.8  |                  |                                                    |
| Total assets     | \$272.4                       | \$266.4 | \$264.8 | \$209.7 | \$152.2 | \$7.5 | \$55.1  | \$1.6  | \$5.9 |                  |                                                    |
| percent of total | 100                           | 97.8    | 97.2    | 77.0    | 55.9    | 21.1  | 20.2    | .6     | 2.2   |                  |                                                    |

Sources: U.S. SAVINGS AND LOAN LEAGUE, 1974 SAVINGS AND LOAN FACT BOOK, Tables 49, 50, 91, 92, 103; FSLIC Data.

Comptroller. Based on all these materials, some concluding observations and recommendations will be offered.

## I. PRIMARY APPROVALS

### A. The Statutory Foundation

The national banking system and the office of the Comptroller of the Currency as its administrator were established by the National Bank Act of 1864,<sup>3</sup> which superseded the National Currency Act of 1863.<sup>4</sup> The language of those acts of over a century ago is reflected today in sections 12 through 27 of the United States Code. "Associations for carrying on the business of banking" may be formed by five or more natural persons, who must enter into and sign articles of association, a copy of which is to be forwarded to the Comptroller.<sup>5</sup> The organizers must also execute and file with the Comptroller an organization certificate, giving among other things the bank's name, place of operation, and amount of capital stock.<sup>6</sup> The amount of capital required by law ranges from \$50,000 in localities with a population of no more than 6000 to \$200,000 in cities with a population of over 50,000.<sup>7</sup> Upon receiving this information, the Comptroller is to

examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; . . .<sup>8</sup>

If upon that examination "it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate . . . that such association is authorized to commence such business."<sup>9</sup> The Comptroller is authorized to withhold the certificate only when "he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter."<sup>10</sup>

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3. Act of June 3, 1864, ch. 106, 13 Stat. 99.

4. Act of Feb. 25, 1863, ch. 58, 12 Stat. 665.

5. 12 U.S.C. § 21 (1970).

6. *Id.* §§ 22-23.

7. *Id.* § 51.

8. *Id.* § 26.

9. *Id.* § 27.

10. *Id.*

On its face, the statute does not seem to grant the Comptroller broad discretion to determine whether a community should have a new bank.<sup>11</sup> This fact bothered the district court in *Pitts v. Camp*,<sup>12</sup> and yet that court declared itself "impressed with the long and continued practice of the Comptroller of considering the need of the community [and] with the fact that the weight of authority accepts the consideration by the Comptroller of the need factor without question."<sup>13</sup> The court then cited *Sterling National Bank of Davie v. Camp*,<sup>14</sup> which had asserted: "It has always been recognized that this legislation confers vast discretion on the Comptroller to approve or disapprove a new charter application."<sup>15</sup>

These decisions considerably overstate the matter. It has not "always been recognized" that the National Bank Act confers vast chartering discretion upon the Comptroller, and it has not been his "long and continued practice" to assert such discretion. The dominant views of the mid-nineteenth century favored "free banking," as part of the general trend towards "free incorporation"—the idea that charters to do various kinds of business should be readily available to anyone who complied with relatively simple and specific statutory requirements, rather than be grants of special privilege by the legislature to those who obtained (or bought) its favors. New York and Michigan passed free-bank laws in the 1830s, and by the time of the Civil War roughly half the states had adopted similar measures.<sup>16</sup> The National Currency Act and the National Bank Act were designed as free-bank laws, and with that origin in mind their language becomes perfectly comprehensible.<sup>17</sup>

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11. The Court has difficulty in seeing language in those sections giving the Comptroller discretion in granting the certificate if the specific requirements of the act are met. . . .

The statutory language, which the defendant contends makes the need of the new bank a proper consideration and commits the determination of that need to the Comptroller's discretion, does not impress the court.

*Pitts v. Camp*, 329 F. Supp. 1302, 1307 (D.S.C. 1971), *vacated*, 463 F.2d 632 (4th Cir. 1972), *vacated and remanded*, 411 U.S. 138 (1973).

12. *Id.*

13. *Id.* at 1307.

14. 431 F.2d 514 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971).

15. *Id.* at 516.

16. R. ROBERTSON, *THE COMPTROLLER AND BANK SUPERVISION* 22-23 (1968). This is an official history of the Office of the Comptroller.

17. See generally *id.* at 44-45. See also B. HAMMOND, *BANKS AND POLITICS IN AMERICA* 727 (1957); 2 F. REDLICH, *THE MOLDING OF AMERICAN BANKING* 99-105 (1968). In practice, the first Comptrollers tried on occasion to make their own judgments felt, but the legal footing for their efforts was minimal. "The law did not require the organizers to satisfy the Comptroller that they were qualified to engage in the banking business, that additional banking facilities were needed, or that the proposed bank had reasonable prospects of success." Wyatt, *Federal Banking Legislation*, in *BANKING STUDIES* 44 (F.R.B. 1941).

For a period of a decade following the Civil War, limitations on the amount of national bank-note circulation served indirectly to limit chartering of national banks, but when that condition ended in 1875 national bank charters were available for every qualifying group.<sup>18</sup> For the balance of the nineteenth century, Comptrollers not only recognized but proclaimed their lack of chartering discretion—for example, Comptroller Knox in 1881: “[T]he Comptroller has no discretionary power in the matter, but must necessarily sanction the organization . . . of such associations as shall have conformed in all respects to the legal requirements.”<sup>19</sup>

A shift in position did not begin until 1908, when a new Comptroller took office on the heels of the Panic of 1907,<sup>20</sup> and it did not become established policy until the 1920s.<sup>21</sup> This new approach did not acquire a respectable statutory foundation, however, until the Great Depression led to the creation of the Federal Deposit Insurance Corporation<sup>22</sup> and enactment of the Banking Act of 1935.<sup>23</sup> The latter enactment required the Comptroller, when he chartered a new national bank, which automatically would become an insured bank, to certify to the FDIC that he had “considered” the same six factors that the FDIC was supposed to consider in passing upon the application for insured status of a state nonmember bank:<sup>24</sup> “The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes” of the Federal Deposit Insurance Act.<sup>25</sup> In this somewhat backhanded fashion the law recognized—or, more accurately, created—the Comptroller’s chartering discretion. To the extent that there are standards governing that discretion, therefore, they are to be found in the Federal Deposit Insurance Act, not the National Bank Act.

Turning to the subject of branching, we find that it goes without mention in the National Bank Act of 1864.<sup>26</sup> This legislative omission was regarded by early Comptrollers as prohibiting branch

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18. R. ROBERTSON, *supra* note 16, at 57-61.

19. 1881 COMP. CURR. ANN. REP. 11.

20. R. ROBERTSON, *supra* note 16, at 66-69.

21. *Id.* at 95-96.

22. The FDIC was created by Act of June 16, 1933, ch. 89, § 8, 48 Stat. 168.

23. Act of Aug. 23, 1935, ch. 614, § 101, 49 Stat. 684, 688, *amending* 12 U.S.C. § 264.

24. 12 U.S.C. § 1814 (1970).

25. *Id.* § 1816.

26. Act of June 3, 1864, ch. 106, 13 Stat. 99.

banking by national banks,<sup>27</sup> a view that was confirmed by the Attorney General in 1911<sup>28</sup> and ultimately by the Supreme Court in 1924.<sup>29</sup> Meanwhile, branching by state banks had become extensive in a number of states, and considerable pressure built up for allowing national banks to do likewise. During the 1920s the Comptroller responded by approving "consolidations" as a device for obtaining branches and by authorizing "offices" that were almost branches.<sup>30</sup>

A more satisfactory answer was achieved with the passage of first the McFadden Act of 1927,<sup>31</sup> which permitted national banks to have "inside" branches (located in the same city as the head office), and then the Banking Act of 1933,<sup>32</sup> which authorized "outside" branches (located elsewhere in the state), in both cases only to the extent state law expressly authorized such branches for state banks and subject to certain additional capital requirements. Assuming the geographical and capital requirements were satisfied, a national bank could establish, operate or move a branch only with the "approval" of the Comptroller.<sup>33</sup> No standards were provided to govern the grant or denial of approval.

The statutory picture for the Federal Home Loan Bank Board is less complicated. Section 5 of the Home Owners' Loan Act of 1933<sup>34</sup> authorized the FHLBB, "giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States," to provide for the organization, chartering, and operation of federal savings and loan associations. Section 5(e) of the Act went on to provide the following standards:

No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.<sup>35</sup>

The Home Owners' Loan Act of 1933, like the National Bank Act of 1864, made no reference to the subject of branches. Never-

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27. R. ROBERTSON, *supra* note 16, at 81-85.

28. 29 OP. ATT'Y GEN. 81 (1911).

29. *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924).

30. R. ROBERTSON, *supra* note 16, at 100-04.

31. Act of Feb. 25, 1927, ch. 191, § 7, 44 Stat. 1228.

32. Act of June 16, 1933, ch. 89, § 23, 48 Stat. 189.

33. 12 U.S.C. §§ 36(c), (e) (1970).

34. Act of June 13, 1933, ch. 64, § 5, 48 Stat. 132.

35. 12 U.S.C. § 1464(e) (1970).

theless, the Bank Board from the outset took the position that it had the power to authorize branches, and was upheld when ultimately challenged in court.<sup>36</sup> The statute even today is silent on branching and obviously contains no standards to affect the FHLBB's discretion when passing upon branch applications by federal savings and loans.

So by different routes the two agencies emerge at about the same point. Both face a short list of general standards in the relevant statutes for charter approvals, and no standards whatever for branch approvals. Furthermore, the charter standards are either too narrow or too unspecified to serve as much of a guide for or restraint upon the exercise of discretion. Of the Comptroller's list of six factors, the first ("the financial history and condition of the bank") is inapplicable to new charters and the last (corporate powers "consistent with the purposes" of the Act) is a routine formality.<sup>37</sup> The second and third ("adequacy of its capital structure" and "future earnings prospects" for the Comptroller, "reasonable probability of its usefulness and success" for the Bank Board) do have content, but depend on a conjectural exercise in financial prediction. The fourth ("general character of its management" for the Comptroller, "persons of good character and responsibility" for the Bank Board) imposes a minimal constraint, occasionally in issue but capable of being met by millions of possible applicants and thousands of possible managing officers. It is therefore the fifth ("the convenience and needs of the community to be served" for the Comptroller, "a necessity . . . for such an institution in the community to be served" and establishment "without undue injury to properly conducted existing local thrift and home-financing institutions" for the Bank Board) that in most cases serves as the ground for decision. For convenience, this latter criterion will be referred to simply as the "need" factor.

Standards so judgmental and indefinite constitute in effect a delegation by the legislature to the administrative agency of the task of developing public policy in this area. We shall next examine the manner in which the two agencies have done so.

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36. *First Nat'l Bank of McKeesport v. First Fed. Sav. & Loan Ass'n of Homestead*, 225 F.2d 33 (D.C. Cir. 1955); *North Arlington Nat'l Bank v. Kearny Fed. Sav. & Loan Ass'n*, 187 F.2d 564 (3d Cir.), *cert. denied*, 342 U.S. 816 (1951). In its branch regulation, the FHLBB has simply repeated the statutory charter standards. See 12 C.F.R. § 545.14(c) (1974).

37. A simple prohibition of the exercise of inconsistent powers would suffice. *Cf.* 12 C.F.R. § 332.1 (1974).

## B. Decision Procedures and Judicial Review: Pre-1965

One way for an agency to develop law and policy is by undertaking comprehensive studies, followed by the issuance of detailed policy statements or regulations. Neither the Office of the Comptroller nor the FHLBB has availed itself of this approach. On occasion, general statements of "philosophy" appear in public speeches or annual reports,<sup>38</sup> but they have never been carried to the point of providing enlightenment as to how a particular application might fare.

Another way to develop policy is by the common law method of case-by-case adjudication. In the period since the Comptroller began regularly exercising approval discretion in the 1920s and the Bank Board started performing that function for federal savings and loans in the 1930s, the two agencies have passed upon thousands of applications for charters and branches, granting some and denying others. Their procedures, however, have been quite informal and customarily have not entailed providing written opinions or explanations of the decisions.

If one had consulted the Comptroller's regulations at the beginning of 1959 for information on how to obtain approval for a new bank or a branch, he would have found that the application was routed through various levels of the agency, with recommendations attached at each stage,<sup>39</sup> but without any form of public hearing. A field examiner would make an "investigation" of the application, gathering unspecified kinds of economic and market data and visiting existing banks in the locale to ask for their views. The applicant would not know what the investigator turned up, and objectors would not generally know even what was in the application, let alone the examiner's report. On request, an applicant or objector would usually be given a "conference" with the Regional Comptroller or another representative, without the presence of other parties, at which he could voice his opinions on matters that he thought might be relevant to the outcome. "Among other matters to be considered" in the case of a new bank charter, the regulations stated, were the six factors enumerated in section 1816 of title 12 of the United States Code.<sup>40</sup> For a branch application, the regulations listed additional factors:

[T]he number of branches now in operation and their location, the proposed location of the new branch and the distance

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38. See, e.g., 1964 COMP. CURR. ANN. REP. 2-4.

39. 12 C.F.R. §§ 4.1, 4.5 (1959).

40. *Id.* § 4.1(b). A modified version is now contained in 12 C.F.R. § 4.2(b) (1974).

from the head office, the nearest banking facilities, . . . the nature of the potential clientele and possible business available, including an estimate of contemplated volume within a reasonable period of time and the prospects of successful operation of the branch together with any other pertinent factors.<sup>41</sup>

The process of evaluation whereby these relevant "factors" were translated into a decision was not described in any published source available beforehand, and the applicant would know nothing more if ultimately he was turned down: "If the decision is unfavorable the applicants are so informed."<sup>42</sup> In its entire history, the Office of the Comptroller had never held a public hearing on an application nor published a written opinion.<sup>43</sup>

Over at the FHLBB, applicants and their opponents were faring better procedurally but not substantively. The Bank Board customarily released charter and branch applications to the public and scheduled public hearings<sup>44</sup> on either a "dispensable" or "non-dispensable" basis.<sup>45</sup> Information concerning the grounds for decision was about as hard to come by, however, as with the Comptroller. For charter applicants, the regulations merely required data "sufficiently detailed and comprehensive to enable the Board to pass" upon the four statutory criteria; in the case of branch applications, the regulations required an applicant to

state the need for such branch office; the functions to be performed; the personnel and office facilities to be provided; the estimated annual volume of business, income, and expenses of such branch office; and [submit] a proposed annual budget of such association.<sup>46</sup>

How such data eventuated in a grant or denial of the application was not vouchsafed to the applicant in any form of written opinion, however, leaving the actual policies of the Board as obscure as those of the Comptroller.

This state of affairs was not viewed critically by authorities in administrative law. In its 1941 report, the Attorney General's Committee on Administrative Procedure stated, in a passage cherished by the banking agencies:

41. *Id.* § 4.5(a)(1) (1959).

42. *Id.* § 4.1(d) (charters); *id.* § 4.5(a)(3) (branches).

43. Bloom, *Hearing Procedures of the Office of the Comptroller of the Currency*, 31 LAW & CONTEMP. PROB. 723 (1966).

44. 12 C.F.R. §§ 543.2(c), 545.14, 542.2 (1959).

45. See Breisacher, *Practice and Procedure Before the FHLBB*, 16 BUS. LAW. 146, 148 (1960).

46. 12 C.F.R. § 545.14 (1959).

The Committee recognizes, however, that . . . in determining whether individuals are suited to engage in a banking business, or whether the community needs the bank, or whether a bank should be insured and similar questions, a congeries of imponderables is involved, calling for almost intuitive special judgments so that hearings are not ordinarily useful . . . .<sup>47</sup>

The Attorney General's Committee therefore did not recommend that the banking agencies be covered by the formal hearing requirements of the proposed legislation, and ultimately they were not so covered by the Administrative Procedure Act of 1946.<sup>48</sup> Professor Kenneth C. Davis in his *Administrative Law Treatise* visited the same area in 1958 and found that all was well:

Probably the outstanding example in the federal government of regulation of an entire industry through methods of supervision, and almost entirely without formal adjudication, is the regulation of national banks. The regulation of banking may be more intensive than the regulation of any other industry, and it is the oldest system of economic regulation. The system may be one of the most successful, if not the most successful. The regulation extends to all major steps in the establishment and development of a national bank, including not only entry into the business, changes in status, consolidations, reorganizations, but also the most intensive supervision of operations through regular examination of banks.

. . . .  
The striking fact is that whereas the non-banking agencies administer their systems of requiring licenses and approvals by conducting formal adjudications in most cases involving controversies, the banking agencies use methods of informal supervision, almost always without formal adjudication, even for the determination of controversies. . . .

Even though important groups in the nation are applying pressures to try further to judicialize the administrative process, a close study of the methods of supervision used in the regulation of banking, as compared with the methods of determinations on a record of formal proceeding, might well

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47. ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 142-43 (1941).

48. Act of June 11, 1946, ch. 324, 60 Stat. 237. Technically this is because the requirements of section 5 only apply to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing," and as is evident the banking statutes do not so require for this class of decisions. See 5 U.S.C. § 554(a) (1970); cf. *United States v. Florida East Coast Ry.*, 410 U.S. 224, 241 (1973) (rulemaking); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-57 (1972) (same).

prove that the nonbanking agencies have a good deal to learn from the banking agencies. Banking regulation is obviously superior in its efficiency; if, as those who are regulated seem generally to believe, banking regulation fully measures up in qualities of overall fairness, then the only major question remaining is relative effectiveness from the standpoint of protection of the public interest.<sup>49</sup>

The same attitude prevailed in court when judicial review of a decision was sought. To begin with, there was no provision in the National Bank Act or in the Home Owners' Loan Act authorizing court review of charter and branch decisions. Thus, the only hope of obtaining review would be an original proceeding in a district court, probably in the form of an action for an injunction or declaratory judgment, and there was considerable doubt as to whether the Comptroller's decisions were reviewable at all.<sup>50</sup> So far as reported decisions show, no denied applicant or competing bank had ever even tried to take the Comptroller to court over a charter decision, and of course the nature of the applicable statutory standards made the prospects of success in such a proceeding rather uninviting. The branch law, on the other hand, by incorporating state law geographical restrictions,<sup>51</sup> posed the possibility of narrow and specific grounds of difference with the Comptroller's position, and so cases were undertaken. A denied applicant lost in *Michigan National Bank v. Gidney*,<sup>52</sup> but did succeed in obtaining declaratory judgment review. In 1958 the Comptroller was for the first time enjoined from authorizing a

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49. 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4.04 (1958). Professor Davis's position had become more critical by 1966. See Davis, *Administrative Procedure in the Regulation of Banking*, 31 *LAW & CONTEMP. PROB.* 713 (1966).

50. See Stokes, *Public Convenience and Advantage in Applications for New Banks and Branches*, 74 *BANK. L.J.* 921, 930 (1957): "Well informed opinion is that there is no right of appeal from a decision of the Comptroller of the Currency."

51. 12 U.S.C. § 36(c) (1970):

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

.....

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . .

52. 237 F.2d 762 (D.C. Cir.), cert. denied, 352 U.S. 847 (1956).

branch, in *National Bank of Detroit v. Wayne Oakland Bank*,<sup>53</sup> and in 1959 he was enjoined again in *Commercial State Bank of Roseville v. Gidney*.<sup>54</sup> All of those cases involved the question of violation of state law requirements as to location and did not challenge the Comptroller's judgment on approval or disapproval as such.

For the Bank Board, the picture was not much different. It had never been challenged on a charter decision, and the only branch challenges were to its authority to authorize branches at all<sup>55</sup> and not to its exercise of discretion in a particular case.

The story of the attempt to obtain review of branch and charter decisions really begins with *FHLBB v. Rowe*<sup>56</sup> in 1960, and the beginnings were not auspicious. As in most of the early cases, the grounds primarily relied on were procedural. The plaintiff in *Rowe*, a denied charter applicant, contended that he was entitled to a hearing conducted by the Board in accordance with Administrative Procedure Act (APA) specifications. The District of Columbia Circuit not only rejected that contention but went on to suggest that judicial review of a charter decision would be available, if at all, only under rather narrow circumstances, noting that Congress had "clearly reposed in the Board a wide discretion" and had "not in the Act provided for judicial review of the Board's order."<sup>57</sup>

In the context of branch applications, the APA-hearing-entitlement argument had already been tried without success,<sup>58</sup> so the plaintiff in *Bridgeport Federal Savings & Loan Association v. FHLBB*<sup>59</sup> instead attacked the form of Board hearing actually held. According to the complaint, the hearing was inadequate to satisfy procedural due process, since it involved restricted opportunity for cross-examination and denial of access to internal reports and information upon which the Board relied in approving a competitor's branch application. In upholding the Board, the Third Circuit saw the hearing as playing a limited and even minor role in the decision process:

The rulings of the Board are the result of its expert judgment, its policy, the reports, recommendations and analyses of its

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53. 252 F.2d 537 (6th Cir.), cert. denied, 358 U.S. 830 (1958).

54. 174 F. Supp. 770 (D.D.C. 1959), aff'd, 278 F.2d 871 (D.C. Cir. 1960).

55. See text and note at note 36 *supra*.

56. 284 F.2d 274 (D.C. Cir. 1960).

57. *Id.* at 275, 277.

58. First Nat'l Bank of McKeesport v. First Fed. Sav. & Loan Ass'n of Homestead, 225 F.2d 33, 36 (D.C. Cir. 1955).

59. 307 F.2d 580 (3rd Cir. 1962), cert. denied, 371 U.S. 950 (1963).

staff, plus any special evidence it might conclude necessary to obtain by way of hearing.<sup>60</sup>

The culmination of such judicial deference was expressed at about this same time in *Community National Bank v. Gidney*,<sup>61</sup> when a competing bank attempted to overturn a branch approval by the Comptroller on two grounds—not only violation of state law location requirements, but also lack of “necessity” for establishment of the branch. In order to show that the Comptroller had abused his discretion, plaintiff moved for discovery of documents in the Comptroller’s files relating to the examination and evaluation of the branch application. The court’s response was unequivocal:

In passing on branch applications, the Comptroller must necessarily utilize his great expert knowledge and consider questions of policy, as well as of fact, with respect to the interest of the public; coordination with other federal and state supervisory agencies; and banking conditions in general.

In view of the above cases and considerations, and especially in view of the failure of Congress to provide any standards by which this court could determine whether the exercise of discretion by the Comptroller was “reasonable” or whether it was “arbitrary”, this court is of the opinion that Congress intended that the Comptroller have an exclusive and unreviewable power of discretion in determining whether or not to approve the establishment of branch banks pursuant to 12 U.S.C.A. § 36(c). The Court, therefore, is further of the opinion that the discretion provided for in 12 U.S.C.A. § 36(c) comes within the second exception to Section 10 of the Administrative Procedure Act and that this court is without jurisdiction to review the action of the Comptroller in the present case.<sup>62</sup>

The full reach of that language implied that the Comptroller could not be reviewed and reversed by a court even for an unmistakable violation of the state law location requirements of section 36(c) of title 12 of the United States Code, and of course there was already ample precedent to the contrary on that point.<sup>63</sup> It is not surprising that the district judge later modified his position;<sup>64</sup> yet, if confined to the issue of how far to review a banking agency’s

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60. *Id.* at 584.

61. 192 F. Supp. 514 (E.D. Mich. 1961).

62. *Id.* at 518-19.

63. See text and notes at notes 53-54 *supra*.

64. See *Community Nat'l Bank v. Saxon*, 310 F.2d 224, 225 (6th Cir. 1962).

ultimate judgment in approving or disapproving a charter or branch, the passage shows an attitude that was pervasive at the time.

By the early 1960s, then, the licensing decisions of the Comptroller and the Bank Board were as impenetrable a mystery—or “congeries of imponderables”—as ever. Neither policy statements nor regulations provided a clear understanding of why decisions came out as they did, and no written opinions were issued at the end of the process to provide at least retrospective enlightenment. Competing banks were able to get a court to look at and at times overrule the Comptroller’s constructions of state law branch location requirements but otherwise he was having no difficulty defending his results in court.<sup>65</sup> This period proved to be the high-water mark of judicial deference to the Comptroller’s informal ways and unexplained actions, and the tide turned swiftly.

### C. The *Smithfield* Case and Its Aftermath

The landmark decision came in 1965: *First National Bank of Smithfield v. Saxon*.<sup>66</sup> It presented the familiar situation of a competing bank objecting to the Comptroller’s approval of a branch, but the Fourth Circuit came at the problem from an unfamiliar angle. The plaintiff had won in the district court on the ground that the APA required the Comptroller to conduct an adversary hearing.<sup>67</sup> The Fourth Circuit, as had others before it, rejected this argument, holding that neither the APA nor the requirements of procedural due process commanded that the Comptroller proceed by way of an adversary hearing.<sup>68</sup>

But then the court turned to the question of how, in the absence of a trial-type hearing and findings based on an evidentiary record, judicial review could be achieved. As the majority of the panel saw it, a “substantial evidence” scope of review was out of place in these circumstances; instead, it remanded the case to the district court for a trial *de novo*:

On the remand of this case, the plaintiff may adduce evidence demonstrating the impermissibility of the Comptroller’s

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65. See, e.g., *Continental Bank v. National City Bank*, 245 F. Supp. 684 (N.D. Ohio 1965); *Bank of Dearborn v. Saxon*, 244 F. Supp. 394 (E.D. Mich. 1965), *aff’d*, 377 F.2d 496 (6th Cir. 1967); *Peoples Bank of Trenton v. Saxon*, 244 F. Supp. 389 (E.D. Mich. 1965), *aff’d*, 373 F.2d 185 (6th Cir. 1967); *Commercial Sec. Bank v. Saxon*, 236 F. Supp. 457 (D.D.C. 1964).

66. 352 F.2d 267 (4th Cir. 1965).

67. *First Nat’l Bank of Smithfield v. First Nat’l Bank of E. North Carolina*, 232 F. Supp. 725 (E.D.N.C. 1964).

68. *First Nat’l Bank of Smithfield v. Saxon*, 352 F.2d 267 (4th Cir. 1965).

approval of a branch bank at Smithfield. Testimony to the contrary will be receivable from the Comptroller. The Court will then find the facts. Thereon, it will judge *de novo* the validity, in fact and in law, of the Comptroller's final action.

. . . If after the court has made its fact findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the Court, it concludes that the Comptroller has abused, exceeded, or arbitrarily applied his discretion.<sup>69</sup>

The problem seen by the majority in trying to "review" a totally unexplained decision was undeniably real, but the dilemma created by its solution was effectively pointed out by Judge Sobeloff in dissent:

How can the District Court conduct a proper examination if the Comptroller has not disclosed what issues he is resolving? The District Court is told to make its own *de novo* fact-findings, but it is still in no position to judge how far the Comptroller's decision rests upon fact-findings which the court deems erroneous and how far it is an exercise of discretionary judgment. . . .

The Comptroller has not divulged his mental processes, and his determinations of fact, rulings of law and exercises of discretion and judgment are inextricably intermingled. The District Court is thus placed in the unhappy position of choosing between two equally unacceptable alternatives. Either it must blindly assume that the Comptroller's discretion rests upon an adequate basis in fact, in which event the court review almost inevitably becomes a meaningless gesture; or the District Court, proceeding upon the basis of facts independently determined by it, must act in ignorance of the nature of the decision it is reviewing, in which case the court's judgment is liable to usurp the Comptroller's function.<sup>70</sup>

The course of judicial review since *Smithfield* can be seen in precisely the terms Judge Sobeloff predicted: a fluctuation between the unsatisfactory poles of futility and usurpation.

The latter outcome promptly became evident in *Bank of Haw River v. Saxon*.<sup>71</sup> Finding the Comptroller's hearing inadequate,

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69. *Id.* at 272.

70. *Id.* at 274.

71. 257 F. Supp. 74 (M.D.N.C. 1966).

the district court proceeded with review de novo, and in the process became Comptroller for a day. On the basis of the testimony in court, which went "far beyond that which was before the Comptroller,"<sup>72</sup> the judge defined the service or trading area of the branch and concluded that the area was "already considerably over-banked. Since the present ratio of existing banking offices to population is far in excess of both State and National averages, there can be no question but that the existing banks, with resources well in excess of two billion dollars, amply meet the capital needs of the Graham-Burlington area."<sup>73</sup> The judge also decided that, due to a slow rate of population growth in the locale, it would not be economically feasible to establish a new banking facility in the area. He concluded: "No public interest, need or necessity has been shown for the establishment of a branch of First National in Graham, North Carolina, and it is impermissible for the Comptroller to approve the establishment of such a branch."<sup>74</sup>

When the grounds for decision are made explicit, as in *Haw River*, it becomes possible to subject them to examination and critique, and the opinion in *Haw River* certainly shows the risks that such scrutiny entails for the decision maker. The ratio of banking offices to population in a somewhat arbitrarily defined service area, as compared with state and national averages, had become the measure of need—a measure that, in the very nature of an average, would lead to the conclusion that something like half of the country at any given time is "over-banked", and always will be, which might lead one to question either the suitability of the measure or its significance.

From the Comptroller's standpoint, however, the most important aspect of a decision like *Haw River* is that it demonstrated the potential of de novo review for taking over his functions—not necessarily performing them more poorly, but depriving him of one of the major sources of the power and prestige of his office.

Efforts were soon made to extend *Smithfield's* de novo review to a theretofore sacrosanct area: charter decisions. In *Webster Groves Trust Co. v. Saxon*,<sup>75</sup> the Comptroller was for the first time subjected to judicial review of a charter decision, in this instance at the behest of a competing bank objecting to a grant, but the Eighth Circuit refused to take the additional step of review by trial de novo.

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72. *Id.* at 79.

73. *Id.*

74. *Id.* at 80.

75. 370 F.2d 381 (8th Cir. 1966).

The Comptroller is free to exercise his discretion in the granting of charters, free from any review on the merits of his action. However, if the Comptroller acts in excess or abuse of his legal authority, to this extent his actions are subject to judicial review, with the burden of proof resting on the party seeking the review.<sup>76</sup>

Of course, if the Comptroller never disclosed the basis for his action, it would be rather difficult for the party seeking review to show an abuse of discretion. In effect, this was the other pole of Sobeloff's dilemma: the futility of judicial review.

When a charter case came before the Sixth Circuit in *Warren Bank v. Camp*,<sup>77</sup> it adopted a more qualified position on the scope of review, reading the branch and charter cases together as conferring on the district courts "a considerable discretion in determining the form of review required."<sup>78</sup> In this blurring of prior distinctions, a trial de novo would not be required for every complaint, but only where the plaintiff had made out "a prima facie case of abuse of discretion."<sup>79</sup> In an effort to do that, plaintiff moved to take the depositions of the Comptroller and several subordinates, but this was denied, absent a showing of "a prima facie case of misconduct."<sup>80</sup> "What appellant seems to us to seek is an opportunity to depose the Comptroller in order to probe his mind as to exactly why he saw fit to exercise his discretion as he did in relation to the grant of this charter. This appellant clearly was not entitled to do,"<sup>81</sup> noted the court, citing *Morgan IV*.<sup>82</sup> The result was to suggest that review de novo might be available even in the charter area, but to establish preconditions that seemed unlikely of fulfillment.

Even if the effects of *Smithfield* were to be largely confined to branch cases, however, that was still quite enough to have a major impact on the Comptroller's office. The *Smithfield* court had grounded the need for review by trial de novo on the Comptroller's "unilateral procedure," which, lacking any form of adversary hearing, deprived his fact findings of "the preferred position accorded by the substantial-evidence rule" and of any "opening-presumption of correctness."<sup>83</sup> To regain that preferred position, the

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76. *Id.* at 388.

77. 396 F.2d 52 (6th Cir. 1968).

78. *Id.* at 56.

79. *Id.*

80. *Id.*

81. *Id.*

82. *United States v. Morgan*, 313 U.S. 409, 421-22 (1941).

83. *First Nat'l Bank of Smithfield v. Saxon*, 352 F.2d 267, 272 (4th Cir. 1965).

Comptroller's office in 1966 set about redoing its procedures.<sup>84</sup> Most of the application and field examiner's report were made available to the parties, and "conferences" with a member of the Comptroller's staff were replaced by "hearings" with all parties present, of which a transcript was kept. The Comptroller even began preparing written opinions in some contested branch cases in which litigation was anticipated. The result was to put the Comptroller in a position similar to that already achieved by the Bank Board, so that he was able to offer the reviewing court a fairly thick record, replete with data and arguments, instead of a mere order defended by procedural breastworks of burden of proof and prima facie case.

Under his new procedures, it became the Comptroller's tactic when confronted with a complaint to submit the administrative file to the court and move for summary judgment. The administrative file usually had portions deleted as confidential or protected by executive privilege—for example, when they involved reports of examination of a bank, intra-agency memoranda, derogatory letters, or trade secrets. But a good deal of data and testimony could be found scattered through the record and, in some cases, brought together in an opinion to justify the agency's conclusion.

The new procedures came back before the Fourth Circuit in *First-Citizens Bank and Trust Co. v. Camp*<sup>85</sup> and had the desired effect. The court found that the Comptroller had provided the "adversary hearing" that was lacking in *Smithfield*, even if the panel conducting the hearing before the Regional Comptroller was no more than "an investigatory or fact-gathering organ, not having any fact-finding function."<sup>86</sup> Plaintiff was therefore not entitled to a hearing de novo in the district court; instead, "the scope of review should not be more rigorous than the substantial evidence rule."<sup>87</sup> With the aid of the Comptroller's opinion, the court concluded that the substantial evidence test was met, and the branch approval was upheld. If a sigh of relief issued from the Comptroller's office, however, it proved to be short lived.

#### D. The Search for Standards

Another significant decision in the banking field had occurred in 1966, with the Supreme Court's construction of section 36(c) of title 12 of the United States Code in *First National Bank of Logan v.*

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84. The following description is taken from Bloom, *supra* note 43, at 725-26.

85. 409 F.2d 1086 (4th Cir. 1969).

86. *Id.* at 1090.

87. *Id.* at 1095.

*Walker Bank & Trust Co.*<sup>88</sup> That statute authorized “inside” branches<sup>89</sup> for national banks “if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question.” Utah had a “home office protection” type of branching law, which forbade banks from opening branches in a municipality in which other banks were operating, except by buying out one of the existing banks and taking it over as the branch. The then Comptroller, James J. Saxon, believed in aggressively expanding the powers and activities of the national banking system to their fullest statutory potential; he argued that the Utah statute “expressly authorized” branching and that was enough for section 36(c). Since in his view the Utah takeover restriction was a mere specification of “method” not incorporated by section 36(c), the Comptroller proceeded to authorize de novo branches for two Utah national banks.

The Supreme Court, in a unanimous opinion, gave the Comptroller short shrift:

It is a strange argument that permits one to pick and choose what portion of the law binds him. Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States the laws of which permit it, and even there “only to the extent that the State laws permit branch banking.” Utah clearly permits it “only to the extent” that the proposed branch takes over an existing bank.

. . . As to the restriction being a “method,” we have concluded that since it is part and parcel of Utah’s policy, it was absorbed by the provisions of §§ 36(c)(1) and (2), regardless of the tag placed upon it.<sup>90</sup>

In itself, *Walker Bank* did not seem of great import, since it merely knocked down an attempt by the Comptroller to let national banks have de novo branches where state banks could not. But a number of lower courts started seeing more in it than that.

One of the problems in attempting to review decisions by the Comptroller under section 36(c) was that the statute contained no standards whatever for approving branches. Even under a limited scope of review like the substantial evidence test, it is necessary to ask: substantial evidence of *what*? It is possible to more or less duck the question when the court is deciding for itself, as in *Smithfield*’s review de novo, or is giving the form of review with little substance,

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88. 385 U.S. 252 (1966).

89. See text at notes 31-32 *supra*.

90. 385 U.S. at 261-62.

as in telling the plaintiff that he has failed to discharge the burden of showing an unexplained decision to be arbitrary, but it is harder for a court to duck while at the same time it is maintaining that the decision rests on substantial evidence.

In *First-Citizens*, the Fourth Circuit filled the void by using *Walker Bank* to incorporate in section 36(c) all the standards and findings required by North Carolina law and not just its restrictions on the "extent" of branching allowed state banks. North Carolina is a statewide branching state that does not restrict the "extent" of branching at all, but it does set certain standards for the exercise of the state bank commissioner's approval authority:

Such approval shall not be given until he shall [find] (i) that the establishment of such branch or teller's window will meet the needs and promote the convenience of the community to be served by the bank, and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or teller's window and of the existing bank or banks in said community.<sup>91</sup>

Although the Comptroller, with reason, argued that *Walker Bank* did not face and decide the question of whether such broad criteria, unrelated to either the geographical location of branches or the "manner" of obtaining them (by acquisition or de novo establishment), were intended to be imposed on the Comptroller by section 36(c), the general language in the opinion about not picking and choosing what portion of the law would bind him was apparently enough to cost him the day; the court held that he was bound by North Carolina's "need and convenience" and "solvency of the branch" criteria. The Fourth Circuit conceded that these were "nebulous concepts,"<sup>92</sup> resulting in a "lack of definitive direction,"<sup>93</sup> but at least they were better than the National Bank Act and provided the court with some basis for purporting to give substantial evidence review.

The Comptroller, consistently with his view of *Walker Bank*, had not expressly made even these vague findings in *First-Citizens*, but the court was willing to infer them from the general matters discussed in his opinion and the fact of his ultimate conclusion of approval. Although a number of other courts, both before and

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91. N.C. GEN. STAT. § 53-62(b) (1965), quoted in *First-Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086, 1090 n.5 (4th Cir. 1969).

92. 409 F.2d at 1091.

93. *Id.* at 1094.

after *First-Citizens*, agreed with the proposition that section 36(c) incorporated all state law standards and findings, the Comptroller did not readily acquiesce and continued in many cases to omit express findings in the terms required by state statutes.<sup>94</sup> Furthermore, after 1971, the Comptroller cut back on the practice, begun in 1966, of writing opinions in contested branch cases.<sup>95</sup>

Since the reviewing courts were agreed that *Walker Bank* made any required state law findings binding upon the Comptroller,<sup>96</sup> they were in an awkward position. Some courts were willing to continue to find the necessary state law determinations "implicit" in the Comptroller's approval and review on that basis.<sup>97</sup> On occasion, the Comptroller wrote an opinion after the case went to court, and made the state law findings expressly.<sup>98</sup> But in other cases, where there were no opinions and no state law findings, the court was unwilling to indulge in implications and simply reversed the Comptroller outright and remanded to him for reconsideration.<sup>99</sup>

The matter came to a head in *First National Bank of Catawba County v. Wachovia Bank and Trust Co.*<sup>100</sup> In a one page per curiam opinion, the Fourth Circuit affirmed an injunction against the Comptroller's issuing a branch certificate: "[W]hen the Comptroller expressly declined to make the findings required by § 53-62(b), although he made numerous other findings, he acted arbitrarily and capriciously in approving Wachovia's application to establish a branch. . . ."<sup>101</sup> Faced with what amounted to a rule of automatic reversal, the Comptroller gave up and thereafter conceded, at

94. See, e.g., *American Bank & Trust Co. v. Saxon*, 373 F.2d 283, 291 (6th Cir. 1967); *Citizens Nat'l Bank of S. Md. v. Camp*, 317 F. Supp. 1389, 1392 (D. Md. 1970); *Industrial State Bank v. Camp*, 284 F. Supp. 900, 902-03 (W.D. Mich. 1968), *vacated as moot*, 421 F.2d 1361 (6th Cir. 1969).

95. Cf. *Clermont Nat'l Bank v. Citizensbank*, 329 F. Supp. 1331, 1336 (S.D. Ohio 1971). The practice had in any event been largely devoted to North Carolina cases.

96. This conclusion was somewhat strengthened by the citation of *Walker Bank* in *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 130 (1969), for the proposition that state law controls "when, where, and how" branches may be authorized for national banks. See also *id.* at 139 (Douglas, J., dissenting but agreeing with proposition stated).

97. See, e.g., *Clermont Nat'l Bank v. Citizensbank*, 329 F. Supp. 1331, 1344-45 (S.D. Ohio 1971); *First Nat'l Bank of Fairbanks v. Camp*, 326 F. Supp. 541, 545 (D.D.C. 1971), *aff'd*, 465 F.2d 586, 597 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1124 (1973). Cf. *Farmers Nat'l Bank v. Camp*, 345 F. Supp. 622, 629 (D. Md. 1971).

98. See, e.g., *Citizens Nat'l Bank in Gastonia v. Wachovia Bank & Trust Co.*, 329 F. Supp. 585 (M.D.N.C. 1971).

99. See, e.g., *Citizens Nat'l Bank of S. Md. v. Camp*, 317 F. Supp. 1389 (D. Md. 1970).

100. 448 F.2d 637 (4th Cir. 1971).

101. *Id.* at 638.

least in the Fourth Circuit, that he was bound by state law findings requirements.<sup>102</sup>

What had been gained, or lost, in this running battle? The Comptroller apparently feared that his approval discretion would be hobbled by a tangle of state statutory findings and fought tenaciously to avoid it. Most state statutes, however, where they contained any standards at all, were as "nebulous" and lacking in "definitive direction" as the Fourth Circuit found North Carolina's to be,<sup>103</sup> or as the Comptroller's own earlier list of "pertinent factors."<sup>104</sup> By the same token, reviewing courts actually gained little in the way of standards or findings by which to examine a record for substantial supporting evidence. In any but a superficial sense, the Comptroller was about as free and the courts as much at sea as before. Looking ahead, it was possible that the state standards would gradually undergo a process of judicial construction and administrative interpretation that would give them real meaning, and perhaps it was this kind of development that the Comptroller sought to avoid.<sup>105</sup> For the moment, however, it made little real difference if the Comptroller was forced to express his conclusion in terms of boilerplate findings like "needs and convenience" and "public advantage" taken from state statutes.

#### E. Probing the Comptroller's Mind and Files

Although the Comptroller has under duress provided some form of opinion or findings at times in branch cases, charter decisions are another story. The Comptroller has never written an opinion in a charter case, and the courts have tended to regard his discretion in charter decisions as especially unfettered and their scope of review as correspondingly more narrow. For over a century the Comptroller was never taken to court over a charter decision, so far as the records show. The first party to do so was a competing bank complaining of a charter approval, in *Webster Groves*

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102. *Bank of New Bern v. Wachovia Bank & Trust Co.*, 353 F. Supp. 643, 646 (E.D.N.C. 1972). In other circuits, the Comptroller has continued to resist. *See, e.g.*, *First Bank & Trust Co. v. Smith*, 509 F.2d 663 (1st Cir. 1975).

103. *See* text and note at note 92 *supra*.

104. 12 C.F.R. § 4.5(a)(1) (1959); *see* text and note at note 41 *supra*. This regulation was revoked on Feb. 14, 1963 (28 Fed. Reg. 1584), and has not been subsequently replaced by any list of a similar nature.

105. However, state interpretations of state standards have not thus far been accorded much of a role under section 36(c). *See, e.g.*, *First Bank & Trust Co. v. Smith*, 509 F.2d 663, 666 n.2 (1st Cir. 1975); *First Nat'l Bank of Fairbanks v. Camp*, 465 F.2d 586, 593-97 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1124 (1973); *Howell v. Citizens First Nat'l Bank of Ridgewood*, 385 F.2d 528, 530 (3d Cir. 1967).

*Trust Co. v. Saxon*.<sup>106</sup> The Comptroller contended his action was not subject to judicial review and plaintiff had no standing, contentions that run through many of these cases with a uniform lack of success.<sup>107</sup> But if his decision was in principle reviewable, the absence of any opinion or explanation made review undeniably difficult. The court handled the case before it by putting on the plaintiff the burden of showing that the Comptroller had abused his authority, and then holding that burden unmet.<sup>108</sup>

Under the circumstances, how could the burden be met? Obviously, the plaintiff would have to find out the reasoning that had led the Comptroller to his conclusion before he could demonstrate something wrong with it. In *Warren Bank v. Camp*,<sup>109</sup> the plaintiff was denied the right to seek that information directly by taking the depositions of the Comptroller and several subordinates.<sup>110</sup> The only other possibility was careful examination of the administrative file, in the hope that internal memoranda and recommendations would disclose the basis upon which the final decision was made, and a number of cases tried to pursue such an examination.

It was an approach with inherent limitations—what would you learn about the reasoning behind the Comptroller's approval of a charter if, for example, what the file contained was staff memoranda recommending denial? That was the situation in *Sterling National Bank of Davie v. Camp*,<sup>111</sup> but there was a thick file "replete with evidence which would support either view,"<sup>112</sup> and the court was untroubled:

Although we cannot chart the subjectives of his discretionary decision, it was obviously based on a composite of many factors and much data. To say that one fact was erroneous and that another fact was askew is not to infest the Comptroller's exercise of discretion with the scent of arbitrariness or capriciousness sufficient to set aside his decision.<sup>113</sup>

In other words, the Comptroller might have some of his facts wrong, but since you couldn't tell what his reasoning process was,

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106. 370 F.2d 381 (8th Cir. 1966).

107. They were finally laid to rest by *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970), and *Camp v. Pitts*, 411 U.S. 138 (1973).

108. See text and notes at notes 75-76 *supra*.

109. 396 F.2d 52, 56 (6th Cir. 1968).

110. See text and notes at notes 77-82 *supra*.

111. 431 F.2d 514 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971).

112. *Id.* at 516.

113. *Id.* at 517.

there was no way to be sure it made a difference, and the plaintiff loses again.

In *Olsen v. Camp*,<sup>114</sup> the plaintiff was for the first time a charter applicant seeking judicial review of a denial, a category of case in which going to court is even more unrewarding because of the limited remedy available.<sup>115</sup> The plaintiff sought discovery of the administrative file, but the Comptroller claimed executive privilege for a substantial portion relating to the applicant group's background and connection to certain other banks with which the banking agencies were having supervisory differences. Since it seemed likely this was the primary ground of the decision in the case, the court was unwilling to simply uphold the claim; it ordered some of the documents produced and the rest submitted to it in camera for review, partial excision, and release.

Similarly, in *Klanke v. Camp*<sup>116</sup> the court ordered the Comptroller to release to the plaintiffs "all Government records pertaining to the denial of plaintiffs' charter application,"<sup>117</sup> though it later allowed part to be withheld. But the court itself characterized obtaining judicial review based on the administrative file as "a hollow victory," since the Comptroller would be "insulated from judicial interference merely upon evidencing a minimal basis in reason for his denial."<sup>118</sup> The accuracy of that characterization was subsequently borne out, when the Comptroller obtained summary judgment because the plaintiffs had not discharged the "onerous burden" of showing that the Comptroller's decision was "totally devoid of any rational foundation."<sup>119</sup>

There were also attempts in some of the branch cases to open up the administrative file more fully, in an effort to ascertain the basis for decisions. Thus, the protestant in *Citizens National Bank of Southern Maryland v. Camp*<sup>120</sup> wanted to know the full content of

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114. 328 F. Supp. 728 (E.D. Mich. 1970).

115. If a competing bank prevails in a challenge to a branch or charter approval, it gets an injunction and thereby blocks or delays the additional competition. But if an applicant were to successfully challenge a denial, it would not get an order to the Comptroller to issue the desired approval, for that would in effect be mandamus relief which is not available in so judgmental and discretionary an area. See, e.g., Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 332 (1967). Instead, it would get a remand to the Comptroller with instructions to correct his errors and reconsider, a prize of dubious value if the Comptroller remains unfavorably inclined.

116. 320 F. Supp. 1185 (S.D. Tex. 1970).

117. *Id.* at 1188.

118. *Id.*

119. *Klanke v. Camp*, 327 F. Supp. 592, 593-94 (S.D. Tex. 1971).

120. 317 F. Supp. 1389 (D. Md. 1970).

the application and administrative file, parts of which had been withheld as confidential. He obtained a judicial order that, after remand, any undisclosed material should be submitted to the court in a sealed record for in camera inspection.

Over the course of the decade, therefore, the Comptroller had been forced to reveal most of the administrative file on branch and charter decisions, though he was still keeping a portion of it confidential, at least from litigants. Once revealed, however, it proved only moderately enlightening. For a court concerned only lest the Comptroller be doing something totally absurd or unfair, the contents of the file were generally sufficient to support an affirmance. But for anyone seeking to understand the Comptroller's values and policies and reasoning process, a file filled with varied and conflicting views of subordinates provided disappointingly little help.

#### F. The Renewed Assault

To sum up "progress" by 1971, then, the Comptroller had been led, or coerced, into adopting a more formalized hearing procedure. As revised anew in 1971,<sup>121</sup> the Comptroller's regulations required notice by publication of applications for branches or charters, and the Regional Administrator of the Comptroller's office was required to notify local banks.<sup>122</sup> On request, a hearing would be held, primarily as an opportunity for protestants to voice their objections. The application and field examiner's report and any filed objections were part of the public file, except to the extent parts were excluded as confidential.<sup>123</sup> At the hearing, the applicant would usually introduce his application and rest, leaving it to the protestants to call witnesses (whose attendance was voluntary and testimony unsworn) and submit evidence. Though all parties were in the dark as to the Comptroller's precise standards, if any, there was a customary pattern—the protestant would try to show that the described service area was too large, that when properly drawn it was overbanked already, and that the local economy was stagnant, while the applicant would try

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121. 36 Fed. Reg. 6888 (1971).

122. 12 C.F.R. § 5.2 (1974).

123. *Id.* at § 5.3. Most of the exclusions are based on claims that the information consists of either business trade secrets or derogatory comments on the applicant or protestants. Reliance on the latter raises problems familiar from the days of the employee loyalty/security programs. *Cf.* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 866 (1961); Greene v. McElroy, 360 U.S. 474 (1959). But in very few cases do such considerations seem to be of actual importance in the outcome. *See* text at note 214 *infra*.

to show the opposite. A transcript would be kept, at the protestant's expense, which if counsel were adept would be "replete with evidence which would support either view" and contain "many factors and much data."<sup>124</sup> Some time thereafter, the Comptroller would announce that he had approved or disapproved the application.

If it was a charter case, the Comptroller never wrote an explanatory opinion, though when he was taken to court in *Klanke v. Camp*<sup>125</sup> he did submit an affidavit which "explained" his denial on all available grounds.<sup>126</sup> By restricting its scope of review and putting all the burden on plaintiff, the court was able to find such a purely conclusory "explanation", or none at all, sufficient.

For a while, the Comptroller wrote opinions in some branch cases, but then he decided to cut back. Under the new practice, apparently the Comptroller would wait to see if suit was filed, and then supply some explanation if necessary by requesting a remand for that purpose<sup>127</sup> or by simply mailing out a belated opinion.<sup>128</sup> The courts insisted that the Comptroller's opinion or administrative file in some way support the findings required by state law, but those too were "nebulous" and unhelpful.

In short, half a dozen years of litigation through numerous cases had accomplished remarkably little in understanding just why the Comptroller decided as he did.<sup>129</sup> Once again, judicial patience wore thin, and a series of reversals for the Comptroller followed.

The district court in *Bank of New Bern v. Wachovia Bank & Trust Co.*<sup>130</sup> contemplated North Carolina's nebulous standards for branches and felt "constrained to establish its own guidelines," coming up with a list of seven factors.<sup>131</sup> The court then applied

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124. See text and notes at notes 111-13 *supra*.

125. 320 F. Supp. 1185 (S.D. Tex. 1970).

126. The Comptroller informed the court that he was convinced, among other reasons, that there was no adequate need for a banking facility at the proposed location; that the ability and experience of the proposed organizers was insufficient; that the requested new bank would not be successful under its proposed leadership; that the objects contemplated by the National Bank Act would not be served; and that the granting of the charter application would be detrimental to the public interest.

*Id.*

127. See, e.g., *Farmers Nat'l Bank v. Camp*, 345 F. Supp. 622, 624 (D. Md. 1971).

128. See *Citizens Nat'l Bank in Gastonia v. Wachovia Bank & Trust Co.*, 329 F. Supp. 585, 586 (M.D.N.C. 1971).

129. In 1969 Professor Davis thought he could discern a significant trend in the Comptroller's office toward reasoned opinions and controlled discretion, but the trend unfortunately died a-borning. See K. DAVIS, *DISCRETIONARY JUSTICE* 120-26 (1969).

130. 353 F. Supp. 643 (E.D.N.C. 1972).

131. *Id.* at 647-48.

these factors to the record evidence and Comptroller's opinion, attached its own weights, concluded that there would not be substantial evidence to support an approval, and accordingly granted the plaintiff summary judgment against the Comptroller. *New Bern* is not far removed from *Haw River*<sup>132</sup> in its willingness to take over the Comptroller's function, though it employed the language of substantial evidence review rather than review de novo.

In *Pitts v. Camp*,<sup>133</sup> the Fourth Circuit encountered its first case of charter review. Apparently there were no serious protestants, for no hearing on the application was requested or held. The Comptroller disapproved the application and as usual wrote no opinion, simply informing the applicant by letter that:

On the basis of information developed by our Field Investigation, together with all other pertinent data relating to the proposal, we have concluded that the factors in support of the establishment of a new National Bank in this area are not favorable.<sup>134</sup>

Upon requesting and receiving reconsideration and submitting additional data, the applicant group got a letter of renewed denial and a glimmer of further explanation: "[W]e were unable to reach a favorable conclusion as to the need factor. The record reflects that this market area is now served. . . ."<sup>135</sup> The letter then listed one bank, two savings and loans and one credit union servicing the market area, which in no way distinguished the locale from a great many others in which the outcome had been favorable.

Instead of manipulating procedural rules and a narrow scope of review to sustain the Comptroller's ruling, the Fourth Circuit pronounced it "unacceptable." "It does not comply with the bare, fundamental principle of agency decision: that its basis must be stated."<sup>136</sup> The court cited *FTC v. Sperry & Hutchinson Co.*<sup>137</sup> and *Chenery I*<sup>138</sup> for the proposition that the "orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed . . . ."<sup>139</sup> The court

132. See text and notes at notes 71-74 *supra*.

133. 463 F.2d 632 (4th Cir. 1972), *vacated*, 411 U.S. 138 (1973), *remanded*, 477 F.2d 593 (4th Cir. 1973).

134. *Id.* at 633. This is the standard letter of denial.

135. *Id.*

136. *Id.*

137. 405 U.S. 233 (1972).

138. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

139. 463 F.2d at 633.

remanded the case to the district court for a trial de novo, since the Comptroller had twice "inadequately and inarticulately resolved the appellants' presentation."<sup>140</sup> In essence, seven years after *Smithfield*, the court was back about where it started and again had recourse to review de novo as a means of putting pressure on the Comptroller to change his practices.

The United States District Court for the District of Columbia took a different tack in *Wood County Bank v. Camp*,<sup>141</sup> in form a protestant's appeal from a charter approval.<sup>142</sup> The district court found what none before it had been able to find—a fifth amendment procedural due process requirement for findings and reasons by the Comptroller to support his decision, which the court characterized as adjudicatory in nature.<sup>143</sup> Although the court could muster little precedent for that requirement, it offered a number of "practical reasons" that it found compelling:

The foremost of these is the facilitation of judicial review.

. . . .

. . . The Court is confronted here with an Administrative Record of over a thousand pages of testimony, complex technical data, and recommendations of the investigating National Bank Examiner and various members of the Comptroller's staff. For the Court to properly review such a record in as complex an area as the banking field and without the benefit of the Comptroller's underlying reasoning cannot expeditiously be done. As Mr. Justice Cardozo said . . . "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." . . .

A second important reason for requiring findings is to prevent a reviewing Court from usurping the administrative fact-finding function. For a Court to refrain from such encroachment of administrative function, a Court must know what facts were found. . . .

. . . .

A third practical reason for administrative findings is to protect against careless or arbitrary action.<sup>144</sup>

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140. *Id.* at 634.

141. 348 F. Supp. 1321 (D.D.C. 1972), *vacated*, 489 F.2d 1273 (D.C. Cir. 1973).

142. The substance was closer to a branch approval: the applicant was an existing bank, applying for a new charter as a branch-substitute in a unit banking state.

143. 348 F. Supp. at 1325.

144. *Id.* at 1326-27 (footnotes omitted).

The court therefore ordered the case remanded to the Comptroller to supply findings and conclusions "sufficient for the Court to grant Plaintiff the judicial review to which it is entitled."<sup>145</sup>

In increasing trouble once more, the Comptroller appealed *Wood County Bank* to the District of Columbia Circuit and took *Pitts* to the Supreme Court on a petition for certiorari.

### G. *Pitts* and its Interpretation

The Comptroller in *Camp v. Pitts*<sup>146</sup> did not challenge before the Supreme Court the Fourth Circuit's holding that his letters of explanation were inadequate for judicial review,<sup>147</sup> but he did attack the procedure of remand to the district court for trial de novo. The Supreme Court agreed:

It is quite plain from our decision in *Citizens to Preserve Overton Park v. Volpe* . . . that de novo review is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding . . . . [T]he only deficiency suggested in agency action or proceedings is that the Comptroller inadequately explained his decision. As *Overton Park* demonstrates, however, that failure, if it occurred in this case, is not a deficiency in factfinding procedures such as to warrant the de novo hearing ordered in this case.<sup>148</sup>

Instead, said the Court, the proper remedy for an inadequate explanation is to get more, by way of either affidavits or testimony, to add to the administrative record. Since the Comptroller had already indicated the "determinative reason" for his denial,<sup>149</sup> that was the ground that had to be supportable on the record with the aid of the additional explanation.<sup>150</sup> If it was not, then the proper

145. *Id.* at 1329.

146. 411 U.S. 138 (1973).

147. 463 F.2d at 633-34.

148. 411 U.S. at 141-42. De novo findings of fact and determination of the ultimate result should be distinguished from de novo review on questions of law; courts routinely review questions of law de novo in appeals from administrative decisions. See *Seattle Trust & Sav. Bank v. Bank of Cal.*, 492 F.2d 48 (9th Cir. 1974).

149. In the Court's rendition, this reason was "the finding that a new bank was an un-economic venture in light of the banking needs and the banking services already available in the surrounding community." 411 U.S. at 143.

150. The appropriate standard of review for this purpose, the Court also held, was that of section 10(e)(2)(A) of the APA: "whether the Comptroller's adjudication was 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.'" *Id.* at 142, quoting from 5 U.S.C. § 706(2)(A) (1970). The "substantial evidence" test was deemed appropriate for reviewing findings based on a hearing record, which the statutes in question here do not require. 411 U.S. at 141. Presumably, the former standard is a less demanding one af-

course was to vacate the Comptroller's decision and remand to him for further consideration.

The Supreme Court therefore seemed to take away the only club the Fourth Circuit had found effective in trying to change the Comptroller's ways—*de novo* review. That method had always involved a more or less open intrusion upon the functions assigned to the Comptroller by Congress, and was therefore inappropriate, as the Court declared. What was regrettable was the Court's apparent unawareness of the eight years of running struggle between the Comptroller and the lower courts, in which effective judicial review had been frustrated determinedly and continuously.

On the other hand, the Court certainly left the door open for the lower courts to force explanations that they could find comprehensible. Indeed, as *Pitts* made clear, *Overton Park* had limited the rule of *Morgan IV*, about not probing into the mental processes of decision makers by deposition or examination as witnesses, to situations in which the decision maker had made formal findings on a record.<sup>151</sup> That overruled *Warren v. Camp*<sup>152</sup> and other cases holding that the Comptroller could not be examined or deposed, and if litigants pursued the opportunity it would become a new club of some force. If the Comptroller's inevitable objections about the burden on his office were not received sympathetically, he would almost surely move to forestall the embarrassments of cross-examination by providing fuller explanations—if not in contemporaneous opinions then through litigation affidavits. And if he did not, the court was free to remand.

But if the door to more intelligible explanation was still open, the general tenor of the opinion in *Pitts* was not very encouraging. This can best be shown by examining how lower courts have subsequently used or construed *Pitts*. The District of Columbia Circuit vacated *Wood County Bank* and remanded it to the district court for reconsideration in light of *Pitts*, and the district court felt constrained to grant the Comptroller's motion for summary judg-

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fording narrower review, but the distinctions involved have never been very clear. For example, would a finding not supported by evidence that was at least substantial not also be an abuse of discretion? Courts now know which language to use, but it is not evident that they will go about their job much differently; a district court subsequently considered the question in *Grenada Bank v. Watson*, 361 F. Supp. 728, 733 (N.D. Miss. 1973), *aff'd*, 488 F.2d 1056 (5th Cir. 1974), and found "no substantial difference" between the two standards. More recent and authoritative, if not more enlightening, discussion may be found in *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 95 S. Ct. 438, 441-42 (1974).

151. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).

152. 396 F.2d 52 (6th Cir. 1968). See text and notes at notes 77-82 *supra*.

ment, though not without considerable protest.<sup>153</sup> The court concluded with a plaint that in cases like *Pitts* judicial review was impossible and with a plea to Congress to put the Comptroller under the hearings and findings requirements of the APA.

In *First National Bank of Homestead v. Watson*,<sup>154</sup> a competitor challenge to a charter approval, the court cited *Pitts* for the proposition that, absent a showing that his action was arbitrary or capricious, the Comptroller was under no obligation to explain his decision.<sup>155</sup> In *Grenada Bank v. Watson*,<sup>156</sup> the Comptroller had without opinion approved a branch on the basis of the usual thick hearing record plus brief and conflicting recommendations from subordinates; the court went back to implying state law findings and noting that the record contained evidence that might, on some theory, support them. *Pitts* was cited to the effect that the Comptroller's decision must be upheld unless the record indicates that it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law . . . ."<sup>157</sup>

The plaintiff in *Bank of Commerce of Laredo v. City National Bank of Laredo*<sup>158</sup> requested remand to the district court to obtain from the Comptroller some explanation of his charter approval as a branch substitute for the defendant, but was turned down flatly by the Fifth Circuit in a remarkably obtuse opinion. The court cited *Morgan IV* and the pre-*Overton Park* banking cases for the proposition that the plaintiff was barred by the "preponderant weight of judicial precedent" from deposing the Comptroller or requiring him to answer interrogatories.<sup>159</sup> *Overton Park* itself was ignored, and *Pitts* was cited as a recent affirmation of this policy, though the opinion had said the exact opposite.<sup>160</sup> The real point

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153. [1]n the case at Bar the Comptroller attempted to explain in three short sentences his analysis of 1000 pages of economic data contained in the administrative record. . . . The Comptroller explained his determinative reasons for the action taken by stating summarily that the new bank would serve the convenience and needs of the relevant market and have no serious effect on the existing institutions now serving the general area. Under present requirements of procedural due process governing the Comptroller's decisions . . . the Court is constrained to deem the Comptroller's explanation sufficient.

Wood County Bank v. Camp, Civil No. 1277-72 (D.D.C., May 24, 1973), *aff'd*, 498 F.2d 1063 (D.C. Cir. 1974). See WASH. FIN. REP., at T-2 (June 4, 1973).

154. 363 F. Supp. 466 (D.D.C. 1973).

155. *Id.* at 468.

156. 361 F. Supp. 728 (N.D. Miss. 1973), *aff'd*, 488 F.2d 1056 (5th Cir. 1974).

157. *Id.* at 735.

158. 484 F.2d 284 (5th Cir. 1973), *cert. denied*, 416 U.S. 905 (1974).

159. *Id.* at 287.

160. "If, as the Court of Appeals held and as the Comptroller does not now contest, there was such failure to explain administrative action as to frustrate effective judicial re-

in *Laredo* was that the Fifth Circuit did not in that case feel any need for additional explanation to undertake judicial review,<sup>161</sup> and that in turn rested upon a willingness to hold the Comptroller to a generous and undemanding standard—the court was willing to glean from the staff recommendations and a “voluminous record” what “surely” was the determinative reason for the approval.<sup>162</sup>

In *Merchants & Planters Bank v. Smith*<sup>163</sup> the district court applied the limited scope of review of *Pitts* to a branch approval, suggesting it was sufficient if the Comptroller’s determination had “a rational basis in fact.”<sup>164</sup> Untroubled by the lack of any findings, conclusions, or opinion, the court pieced together conflicting file memoranda and constructed what it felt “the agency thinking” must have been. Needless to say, the Comptroller was sustained.

The only contrary note was *First National Bank of Fayetteville v. Smith*,<sup>165</sup> reversing the Comptroller’s approval of a charter in a manner reminiscent of *Haw River*.<sup>166</sup> The recommendations of subordinates having gone four to one against approval, the court concluded that the Comptroller must have accepted and relied upon the grounds given in the one favorable recommendation, and that advice became in effect the Comptroller’s findings to be tested against the record.<sup>167</sup> After noting that the standard for review was whether the Comptroller’s action was arbitrary or capricious, or had no rational basis in the record, the court then waded through the record—considering how much capital would be adequate, choosing one expert over another on the bank’s earnings prospects, judging whether the “need” would be better met by branches, and weighing the qualifications of the applicant group and proposed managing officer. Subsequently, however, the Eighth Circuit reversed this decision on the ground that the district judge, though stating the correct standard of review, had actually exercised an independent judgment in place of that of the Comptrol-

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view, the remedy was not to hold a de novo hearing but, as contemplated by *Overton Park*, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.” *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973).

161. 484 F.2d at 288.

162. *Id.*

163. 380 F. Supp. 354 (E.D. Ark. 1974).

164. *Id.* at 356.

165. 365 F. Supp. 898 (W.D. Ark. 1973).

166. See text and notes at notes 71-74 *supra*.

167. 365 F. Supp. at 904.

ler;<sup>168</sup> the failure of the Comptroller to provide even a hint as to how his own judgment had been arrived at occasioned no adverse comment at all.

So judicial review of the Comptroller's decisions that is both limited and intelligent seems to be a goal that is as far away as ever. Even without trial de novo, there still seems to be only the unattractive choice between pro forma endorsement and taking over the policy judgments that were supposed to be the duty of the Comptroller. An intermediate role for the courts is simply not feasible unless the Comptroller can and will provide a clear and consistent explanation of what he is doing, and that has not been forthcoming.

#### H. The FHLBB Revisited

Meanwhile, during what for the Comptroller was a most turbulent decade, the Federal Home Loan Bank Board has sailed along with remarkably little disturbance. It is true that the Bank Board had no state law limitations on branches<sup>169</sup> to raise issues of interpretation and lead to litigation, and also that the Board was from the outset willing to hold hearings and build up a record for court inspection. The Board's position was therefore much less vulnerable than the Comptroller's; there were fewer obvious points of attack. And certainly early decisions like *Rowe*<sup>170</sup> and *Bridgeport Federal*<sup>171</sup> would be discouraging to any would-be litigant.<sup>172</sup>

But as the Comptroller's judicial battles created new doctrines, some of them had a clear potential for application to the Board as well. And in 1970 the Board amended its rules for charter and branch applications,<sup>173</sup> reducing the trial-type hearing that it had

168. *First Nat'l Bank of Fayetteville v. Smith*, 508 F.2d 1371 (8th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3439 (U.S. Feb. 4, 1975) (No. 963).

169. Except to the extent the Board has imposed them on itself by regulation. *See Lyons Sav. & Loan Ass'n. v. FHLBB*, 377 F. Supp. 11 (N.D. Ill. 1974); 12 C.F.R. § 556.5(b)(1) (1974).

170. *FHLBB v. Rowe*, 284 F.2d 274 (D.C. Cir. 1960). *See* text and notes at notes 56-57 *supra*.

171. *Bridgeport Fed. Sav. & Loan Ass'n. v. FHLBB*, 307 F.2d 580 (3d Cir. 1962). *See* text and notes at notes 59-60 *supra*.

172. These decisions were reinforced by some of the observations about the Board's "exclusive discretion" in *Central Sav. & Loan Ass'n of Chariton v. FHLBB*, 293 F. Supp. 617, 623-24 (S.D. Iowa 1968), *aff'd*, 422 F.2d 504, 507 (8th Cir. 1970), which upheld the Board's authority to permit federal savings and loans to operate "mobile facilities," a sort of traveling branch.

173. *See* 35 Fed. Reg. 2509, 2510-12 (1970).

been holding for many years to a procedure involving the submission of written protests and an opportunity for brief oral argument thereon.<sup>174</sup>

New attacks by competing associations were, nevertheless, as unsuccessful as before. In *Guaranty Savings & Loan Association v. FHLBB*<sup>175</sup> the court upheld this truncated "oral argument" procedure, and seemed to suggest that the Board's discretion over branching was so wide as to constrict judicial review almost to the point of nonexistence. And in *Benton Savings & Loan Association v. FHLBB*<sup>176</sup> the Board's resolution of branch approval in conclusory boilerplate was likewise sustained, the court noting that *Pitts* had been construed "to relieve the Comptroller and, by analogy, the Home Loan Bank Board of any obligation to state with specificity the reasons for their decision."<sup>177</sup>

In 1974 the Board carried this truncation process yet another step, amending the branch regulation to make oral argument available to a competitor only if it had filed a "substantial" protest.<sup>178</sup> In theory, this ever-widening divergence from the model of decisions based upon evidentiary hearings is going to increase the risk that a court will hold the agency's factfinding procedures inadequate; the Supreme Court in *Overton Park* listed that conclusion as one of the two grounds that would justify de novo review.<sup>179</sup> Yet so far the courts have not developed the same disenchantment with the Board's decision making that the Comptroller has managed to evoke, and the evident possibility seems but a distant cloud.<sup>180</sup>

## II. SECONDARY APPROVALS

Next we turn, more briefly, to the role of federal banking agencies with respect to state-chartered institutions. A state agency is the primary supervisor for such institutions, making decisions

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174. 12 C.F.R. §§ 543.2(e), (f) and 545.14(g), (h) (1971).

175. 330 F. Supp. 470 (D.D.C. 1971).

176. 365 F. Supp. 1103 (E.D. Ark. 1973).

177. *Id.* at 1104. The Board has, however, written opinions in letter form since 1968 in some cases where litigation was anticipated, and has said that its present policy is to issue explanatory opinions whenever requested.

178. 39 Fed. Reg. 789 (1974). This is in line with the Bank Board's current "general policy . . . to encourage expansion through branching;" see 12 C.F.R. § 556.5(b)(5) (1974), which also contains the wonderfully elusive warning that protests "will have to be increasingly persuasive" to have any effect.

179. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

180. The most recent tranquil acceptances of the Board's branch procedures are to be found in *Lyons Sav. & Loan Ass'n v. FHLBB*, 377 F. Supp. 11 (N.D. Ill. 1974) and *Elm Grove Sav. & Loan Ass'n v. FHLBB*, Civil No. 72-C-305 (E.D. Wis., Mar. 3, 1975).

on charter and branch approvals and otherwise regulating their investments and activities. But access to federal deposit insurance is controlled by federal agencies and is for practical purposes as necessary to commencement of operations as a charter.<sup>181</sup> In admitting state institutions to membership and thereby to deposit insurance, therefore, the Federal Reserve Board (FRB), Federal Deposit Insurance Corporation, and Federal Savings and Loan Insurance Corporation perform a sort of secondary charter approval function. Likewise, when a bank gets approval for a branch from its state supervisor, it also has to obtain approval from the FRB or, if not a member of the Federal Reserve System, from the FDIC. There is, however, no counterpart requirement for insured savings and loans to get branch approval from the FSLIC.

In performing these secondary approval functions, particularly for branches, one would expect the federal agencies to play a narrower and more limited role than the primary supervisor making the initial determination; but the process is not wholly an automatic endorsement of what the state has approved. Although the court cases are few, the general picture is not dissimilar to the one we have traced for primary approvals: a dearth of standards, a lack of hearings, and the absence of opinions.

#### A. Federal Reserve Board

A state bank desiring membership in the Federal Reserve System makes application to the system's Board of Governors "under such rules and regulations as it may prescribe";<sup>182</sup> by way of standards the statute merely states that the Board "shall consider the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes" of the Federal Reserve Act.<sup>183</sup> The "financial condition" factor is amplified somewhat by the requirement that a bank may not be admitted to membership "unless it possesses capital stock and surplus which, in the judgment of the Board . . . are adequate in relation to the character and condition of its assets and to its existing and prospective deposit liabilities and other corporate responsibilities."<sup>184</sup> In addition, for a newly organized state bank that is not already insured, the

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181. See Tables 1 & 2, p. 237 *supra*.

182. 12 U.S.C. § 321 (1970).

183. *Id.* § 322.

184. *Id.* § 329.

Board must certify to the FDIC that it has "considered" the list of six factors contained in section 6 of the Federal Deposit Insurance Act.<sup>185</sup> The rules and regulations prescribed by the Board for membership applications are to be found in Regulation H,<sup>186</sup> which consists primarily of an assemblage of the pertinent statutory provisions and is thus not informative about additional bases of decision.

For the establishment of branches by a state member bank, the approval of the FRB must be obtained.<sup>187</sup> The statute says nothing whatever about approval standards, and the regulation merely notes that the request for approval "should be accompanied by advice as to the scope of the functions and the character of the business which . . . will be performed by the branch and detailed information regarding the policy . . . proposed to be followed with reference to supervision of the branch by the head office. . . ."<sup>188</sup>

There are no reported cases challenging either approvals or denials of membership or branch applications. In *Apfel v. Mellon*,<sup>189</sup> the petitioner sought mandamus to force the FRB to approve an application to form an Edge Act corporation,<sup>190</sup> another vehicle for engaging in foreign banking; the argument was over whether the statutory reference to approval by the FRB imported the exercise of judgment and discretion, and the court held that it did. And in *Old Kent Bank & Trust Co. v. Martin*<sup>191</sup> there is one judge's comment that, as to branches, "[s]ince 12 U.S.C.A. § 321 incorporates the policy of Section 36, the Board's discretion over state member banks must be construed as broadly as that of the Comptroller of the Currency."<sup>192</sup>

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185. *Id.* § 1814. See text and note at note 25 *supra*.

186. 12 C.F.R. § 208 (1974). See also 12 C.F.R. § 265.2(f)(26) (1974).

187. 12 U.S.C. § 321 (1970). This has been construed to apply only to de novo establishment and not to acquisition of branches by merger. *Old Kent Bank & Trust Co. v. Martin*, 281 F.2d 61 (D.C. Cir. 1960). The distinction is now moot since the Board's approval must be obtained anyway for a merger in which a state member bank is the surviving party, 12 U.S.C. § 1828(c)(2)(B) (1970).

188. 12 C.F.R. § 208(c) (1973). The FRB has delegated its authority to approve domestic branches to the regional Federal Reserve Banks and to the Director of the Division of Supervision and Regulation, in a manner that contains additional standards. 12 C.F.R. § 265.2(f)(1), (c)(10) (1974). For foreign branches, the Board exercises approval authority over national banks as well. 12 U.S.C. § 601 (1970); 12 C.F.R. § 213.3(a) (1974). If a branch is denied, the Board will provide a "simple statement" of the grounds. 12 C.F.R. § 262.3(e) (1974).

189. 33 F.2d 805 (D.C. Cir. 1929).

190. See 12 U.S.C. §§ 611 *et seq.* (1970).

191. 281 F.2d 61 (D.C. Cir. 1960).

192. *Id.* at 68 (dissenting opinion).

## B. FDIC

When a state bank that is not a member of the Federal Reserve System applies for deposit insurance, the FDIC is supposed to "consider" the six factors which we have already noted<sup>193</sup> and also to "determine, upon the basis of a thorough examination of such bank, that its assets in excess of its capital requirements are adequate to enable it to meet all of its liabilities to depositors and other creditors as shown by the books of the bank,"<sup>194</sup> a requirement designed for operating banks rather than newly formed ones. The same six factors are to be considered by the FDIC in deciding whether to approve new branches for insured state banks that are not FRS members.<sup>195</sup> The regulations add nothing except some information about application forms and where to file them.<sup>196</sup>

There are no reported cases involving judicial review of FDIC decisions on membership and branch applications.<sup>197</sup>

## C. FSLIC

The provisions governing applications for insurance of accounts by state chartered savings and loans<sup>198</sup> are to be found in section 1726(c) of title 12 of the United States Code:

The Corporation shall reject the application of any applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe; and the Corporation may reject the application of any applicant if it finds that the character of the management of the applicant or its home financing policy is inconsistent with economical home financing or with the purposes of this subchapter. . . . In considering applications for such insurance the Corporation shall give full consideration to all factors in connection with the fi-

193. 12 U.S.C. § 1816 (1970). See text at note 25 *supra*.

194. 12 U.S.C. § 1815 (1970).

195. *Id.* § 1828(d).

196. See 12 C.F.R. §§ 303.1, 303.2, 303.10, 304.3 (1973). Authority to approve branches, if certain conditions are met, has been delegated to the Director of the Division of Bank Supervision. 12 C.F.R. §§ 303.11(a)(7), 303.12(c) (1974).

197. The nearest approach is *Magelsen v. FDIC*, 341 F. Supp. 1031 (D. Mont. 1972), a tort action for money damages against the FDIC which was dismissed for failure to follow the procedures required by the Federal Tort Claims Act; it contains some general references to the FDIC's discretion in passing on insurance applications.

198. It is the "duty" of the FSLIC to insure the accounts of federal savings and loans. The FSLIC is run by the three-man Federal Home Loan Bank Board, which charters federal savings and loans; for federal associations, therefore, the insurance decision is essentially part of the chartering decision.

financial condition of applicants and insured institutions, and shall have power to make such adjustments in their financial statements as the Corporation finds to be necessary.<sup>199</sup>

In these applications, since a newly organized savings and loan will not have impaired capital and normally will assert that its financial and home financing "policies" will be whatever is necessary for approval, the pivotal statutory criteria become "the character of the management" and "all factors" in connection with financial condition. The regulations do not expand upon these rudimentary criteria, but do contain a description of internal processing<sup>200</sup> and a procedure for public notice of applications and opportunity for oral argument.<sup>201</sup> As we have previously noted, the FSLIC does not have any approval authority over the establishment of branches by state-chartered members.

There are no reported cases challenging FSLIC decisions to grant or deny insured status to an applying institution.

### III. THE ADMINISTRATIVE DECISION PROCESS

Court cases and judicial opinions do not provide a comprehensive picture of agency decision making, since they are concerned with but a small and probably atypical fraction of all applications. We turn, therefore, to an overall statistical summary of the licensing decisions of the federal banking agencies, and then to a more detailed examination based upon a sample of actual decision files.

#### A. The Statistical Picture

The following tables show the licensing decisions of the four agencies over the five year period from 1969 to 1973, inclusive. These statistics must be interpreted with caution, however, for the policies followed by an agency, to the extent they are known and predictable, shape the applications it receives. A low percentage of denials, for example, would not necessarily mean an agency was following a course of automatic approval; it might mean only that applicants had a clear understanding of when to expect disapproval, and in those situations did not waste time applying. Nonetheless, there are some striking patterns revealed by the figures, and they correspond to the distinction between primary and secondary supervision already noted.

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199. 12 U.S.C. § 1726(c) (1970).

200. 12 C.F.R. § 571.6 (1974).

201. *Id.* §§ 562.4, 562.5.

Table 3  
Comptroller of the Currency Decisions  
1969-1973

|                           | 1973 | 1972 | 1971 | 1970 | 1969 | Total No.<br>(Percent) |
|---------------------------|------|------|------|------|------|------------------------|
| 1. Charter applications   | 224  | 172  | 128  | 110  | 77   | 711 (100)              |
| a. Approved               | 149  | 99   | 65   | 52   | 46   | 411 (58)               |
| 1) New                    | 134  | 84   | 55   | 42   | 33   | 351 (49)               |
| 2) Conversion             | 15   | 15   | 10   | 10   | 13   | 63 (9)                 |
| b. Denied                 | 70   | 63   | 57   | 48   | 25   | 263 (37)               |
| 1) New                    | 69   | 60   | 54   | 46   | 24   | 253 (35)               |
| 2) Conversion             | 1    | 3    | 3    | 2    | 1    | 10 (2)                 |
| c. Withdrawn or abandoned | 5    | 10   | 6    | 10   | 6    | 37(5)                  |
| 1) New                    | 4    | 10   | 5    | 9    | 2    | 30 (4)                 |
| 2) Conversion             | 1    | 0    | 1    | 1    | 4    | 7 (1)                  |
| 2. Branch applications*   | 1257 | 1070 | 917  | 987  | 1125 | 5356 (100)             |
| a. Approved               | 1092 | 925  | 786  | 782  | 831  | 4416 (82)              |
| b. Denied                 | 119  | 116  | 104  | 152  | 200  | 691 (13)               |
| c. Withdrawn or abandoned | 46   | 29   | 27   | 53   | 94   | 249 (5)                |

\* Excluding mergers.

Source: COMP. CURR. ANN. REFS. 1968-1973, Tables 4, 6, 8.

The Comptroller, with respect to applications for national bank charters and domestic branches, and the FHLBB, with respect to applications for federal savings and loan association charters and branches, act as primary supervisors, making the initial (and indeed the only) decision as to approval or rejection. Tables 3 and 4 present the data on their decisions. The rejection rates are high enough to be quite meaningful; over this most recent five year period, the Comptroller denied 13 percent of all branch applications and the Bank Board denied 18 percent. Putting aside conversions of existing state institutions to federally chartered institutions, the Comptroller denied 40 percent (253 out of 634) of the applications for new national banks and the FHLBB denied 61 percent (79 out of 129) of the applications for new federal savings and loans.

By way of contrast, the FRB, FDIC and FSLIC are in the position of secondary supervisors when they deal with institutions already chartered and regulated by state authorities. In performing their statutory approval function over branches for state banks, therefore, the FRB and FDIC are passing on issues previously dealt with by state banking departments. Although the question

Table 4  
FHLBB Decisions  
1969-1973

|                          | 1973          | 1972 | 1971 | 1970 | 1969 | Total No.<br>(Percent) |
|--------------------------|---------------|------|------|------|------|------------------------|
| 1. Charter applications  | 46            | 31   | 37   | 31   | 56   | 201 (100)              |
| a. Approved              | 24            | 23   | 26   | 23   | 24   | 120 (60)               |
| 1) New                   | 15            | 17   | 14   | 1    | 3    | 50 (25)                |
| 2) Conversion            | 9             | 6    | 12   | 22   | 21   | 70 (35)                |
| b. Denied                | 22            | 8    | 10   | 8    | 32   | 80 (40)                |
| 1) New                   | 22            | 8    | 9    | 8    | 32   | 79 (39)                |
| 2) Conversion            | 0             | 0    | 1    | 0    | 0    | 1 *                    |
| c. Withdrawn             | 0             | 0    | 1    | 0    | 0    | 1 *                    |
| 1) New                   | 0             | 0    | 0    | 0    | 0    | 0                      |
| 2) Conversion            | 0             | 0    | 1    | 0    | 0    | 1 *                    |
| 2. Branch applications** | 1143<br>(465) | 654  | 487  | 249  | 255  | 2788 (100)             |
| a. Approved              | 1002<br>(391) | 534  | 377  | 208  | 154  | 2275 (82)              |
| b. Denied                | 140<br>(74)   | 119  | 102  | 41   | 101  | 503 (18)               |
| c. Withdrawn             | 1<br>(0)      | 1    | 8    | 0    | 0    | 10 *                   |

\* Less than ½%

\*\* Excluding mergers. (For 1973, limited service facilities are in parentheses.)

Source: FHLBB data.

of admission of a new applicant to system membership and deposit insurance is more of an initial decision, the factors that the FRB, FDIC and FSLIC consider under the relevant statutes are quite similar to those that state authorities were supposed to consider in their chartering decision, which precedes the membership application. The outcome is reflected in Tables 5, 6, and 7. The approval rate on branch applications was 99 percent for the FDIC and almost 100 percent for the FRB. On membership applications, the approval rate was 98 percent for both the FRB and the FDIC; only the FSLIC had a significant rejection rate of 30 percent. With this latter exception, it is apparent that the main area in which discretion is exercised, at least in a manner that applicants do not fully comprehend and anticipate, is in the decisions of those agencies that act as primary supervisors: the Comptroller of the Currency and the Federal Home Loan Bank Board.

#### B. A Closer Look—The Comptroller

In order to understand better the agency decision-making process, a study was made of a number of Comptroller's office de-

Table 5  
FRB Decisions  
1969-1973

|                                  | 1973 | 1972 | 1971 | 1970 | 1969 | Total No.<br>(Percent) |
|----------------------------------|------|------|------|------|------|------------------------|
| 1. Membership applications       | 30   | 19   | 14   | 8    | 10   | 81 (100)               |
| a. Approved                      | 29   | 19   | 13   | 8    | 10   | 79 (98)                |
| 1) Operating                     | 3    | 6    | 4    | 0    | 3    | 16 (20)                |
| 2) New                           | 26   | 13   | 9    | 8    | 7    | 63 (78)                |
| b. Denied                        | 0    | 0    | 0    | 0    | 0    | 0                      |
| 1) Operating                     | 0    | 0    | 0    | 0    | 0    | 0                      |
| 2) New                           | 0    | 0    | 0    | 0    | 0    | 0                      |
| c. Withdrawn                     | 1    | 0    | 1    | 0    | 0    | 2 (2)                  |
| 1) Operating                     | 0    | 0    | 0    | 0    | 0    | 0                      |
| 2) New                           | 1    | 0    | 1    | 0    | 0    | 2 (2)                  |
| 2. Domestic branch applications* | 250  | 262  | 212  | 211  | 194  | 1129                   |
| a. Approved                      | 250  | 262  | 212  | 210  | 193  | 1127                   |
| b. Denied                        | 0    | 0    | 0    | 1    | 1    | 2                      |
| c. Withdrawn                     | 0    | 0    | 0    | 0    | 0    | 0                      |

\* Excluding mergers. The FRB also during this period approved 416 applications for foreign branches of national and state member banks; one was denied and one withdrawn.

Source: FRB data.

Table 6  
FDIC Decisions  
1969-1973

|                           | 1973         | 1972         | 1971 | 1970 | 1969 | Total No.<br>(Percent) |
|---------------------------|--------------|--------------|------|------|------|------------------------|
| 1. Insurance applications | 266          | 188          | 167  | 149  | 161  | 931 (100)              |
| a. Approved               | 261          | 185          | 163  | 147  | 157  | 913 (98)               |
| 1) Operating              | 6            | 6            | 4    | 8    | 17   | 41 (4)                 |
| 2) Proposed               | 255          | 179          | 159  | 139  | 140  | 872 (94)               |
| b. Denied                 | 5            | 3            | 4    | 2    | 4    | 18 (2)                 |
| 1) Operating              | 0            | 0            | 0    | 0    | 0    | 0                      |
| 2) Proposed               | 5            | 3            | 4    | 2    | 4    | 18 (2)                 |
| c. Withdrawn              | 0            | 0            | 0    | 0    | 0    | 0                      |
| 2. Branch applications*   | 968          | 862          | 787  | 530  | 563  | 3710 (100)             |
| a. Approved               | 961<br>(165) | 848<br>(132) | 773  | 527  | 556  | 3665 (99)              |
| b. Denied                 | 7            | 14           | 14   | 3    | 7    | 45 (1)                 |
| c. Withdrawn              | 0            | 0            | 0    | 0    | 0    | 0                      |

\* Excluding mergers. (For 1972-73, limited service facilities are in parentheses.)

Source: FDIC data.

Table 7  
FSLIC Decisions  
1969-1973

|                        | 1973 | 1972 | 1971 | 1970 | 1969 | Total No.<br>(Percent) |
|------------------------|------|------|------|------|------|------------------------|
| Insurance applications | 49   | 20   | 19   | 19   | 18   | 125 (100)              |
| a. Approved            | 39   | 12   | 11   | 11   | 11   | 84 (67)                |
| b. Denied              | 9    | 8    | 7    | 8    | 5    | 37 (30)                |
| c. Withdrawn           | 1    | 0    | 1    | 0    | 2    | 4 (3)                  |

Source: FSLIC data. No breakdown between operating associations and proposed new associations was available.

cision files. That agency was chosen since it has figured in most of the significant judicial review litigation of the last decade and is the most important of the primary approval agencies in terms of the size of the industry segment it regulates.<sup>202</sup> A random sample was taken from charter decisions, branch approvals and branch denials over the 1969-1973 period; with the usual vicissitudes of files that were checked out or missing, the study group consisted of twenty-seven charter files (fifteen approved and twelve rejected), twenty-nine branch approvals, and thirty branch denials. These are fairly small samples, and the analysis based on them is intended to be suggestive, not conclusive. Nevertheless, it seemed desirable to look at the decision process from the inside, since no similar study had ever been undertaken.

1. *Charter Decisions.* The process formally begins when an "Application to Organize a National Bank"<sup>203</sup> is filed with the Regional Comptroller. This is a short form containing little more than the proposed name, locations, and initial capital of the new bank, together with rather long and detailed biographical and financial statements by each of the organizers.<sup>204</sup> The applicant is separately required to submit additional information, primarily on the issue of profitability: the location chosen, the population and economic character of the area the bank will serve, competing financial institutions in that area, and projections of deposit and loan growth and of income and expenses.<sup>205</sup> This information is frequently

202. See Tables 1 & 2 *supra*.

203. Form CC 7022-16.

204. Form CC 6021-05 and 7021-04. The Comptroller customarily also requires these forms from each director, officer and substantial stockholder (holding five percent or more of the stock) of the new bank.

205. See Form CC 7022-18, set forth in the Appendix, pp. 297-98 *infra*.

provided in the form of a "market survey" prepared by a consulting firm.

The application is then assigned to a national bank examiner for a field investigation. His comments and findings are rendered<sup>206</sup> in two parts, the "Examiner's Report of an Investigation," which is available to the public, and the "Confidential Memorandum" to the Comptroller, which is not. The Examiner's Report summarizes some of the application information and gives a brief economic description of the service area and community, but contains little in the way of evaluation. That is provided in the Confidential Memorandum, on a number of topics. The examiner gives his views on how much initial capital the bank should have; he checks on the biographical and financial data furnished by the principal figures in the proposed bank and offers his conclusions about whether they are acceptable persons; and he answers questions such as these:

4. Is there a public need for the proposed bank or is the area reasonably well served by existing banks and branches? . . .

5. Is it reasonable to expect that the available banking business will be adequate to support the proposed bank, if established, together with existing competitive banks and branches, or will an overbanked situation be created? Indicate whether a healthy or unhealthy degree of competition will accrue.

He concludes by recommending either approval or denial of the application. Neither the form nor any standard instructions provide criteria by which these judgments and conclusions are to be reached; consequently, they rest largely on the personal attitudes of the examiner to whom the application was assigned.

The applicant has to publish notice of the filing of the charter application, and it is permissible, though uncommon, for objectors to request a hearing.<sup>207</sup> Otherwise, the application simply proceeds along a recommendation chain. The Regional Comptroller adds his comments and recommendation to those of the local examiner, and then the application goes to Washington, where three more recommendations are added—in turn, those of the Director of the Bank Organization Division, an Economist, and a Deputy Comptroller. These latter three recommendations are

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206. See Form CC-1956-OX.

207. 12 C.F.R. §§ 5.2, 5.4 (1974).

usually explained in a few sentences; the basis given for the other two recommendations is summarized in a paragraph or two. When the form arrives at the Comptroller's desk for final decision, he has five recommendations set forth on two pages. The Comptroller signifies his decision by signing on the approval or rejection line, without any statement of reasons.

Although this decision procedure defies close analysis, as a number of courts have found out, it is possible to make some simple breakdowns, based on the sample of twenty-seven charter files. Table 8 shows the frequency with which the Comptroller agreed

Table 8  
Staff Recommendations and Comptroller's Charter Decisions  
(1969-1973 Sample)

| Comptroller's Decision  | Approved (15) |           | Percentage of Disagreement | Rejected (12) |           |
|-------------------------|---------------|-----------|----------------------------|---------------|-----------|
|                         | Approval      | Rejection |                            | Approval      | Rejection |
| 1. Examiner             | 10            | 5         | 44%                        | 7             | 5         |
| 2. Regional Comptroller | 9             | 6         | 30                         | 2             | 10        |
| 3. Director, B.O.D.     | 10            | 5         | 33                         | 4             | 8         |
| 4. Economist            | 11            | 4         | 27                         | 3             | 8         |
| 5. Deputy Comptroller   | 13            | 2         | 11                         | 1             | 11        |

Source: Comptroller's charter files.

with the recommendations of his various subordinates. The Comptroller disagreed with his field examiner's view in almost half the cases, and with his more senior staff in about a quarter of the cases, on the average. The disagreements were mostly over implicit standards and values, for the examiner was the only one to undertake a significant factual investigation and there were few disputes along the recommendation chain over what could be called a matter of historical fact.

Table 9 provides a picture of the extent to which these disagreements were clustered. It indicates the number of staff recommendations contrary to the Comptroller's decision in each case. In forty-one percent of the cases, the Comptroller and his staff were in complete agreement, but twenty-six percent of the time the Comptroller's decision was the opposite of the recommendation of a majority of his staff.

It is more difficult to get at the basis of these disagreements, since the Comptroller makes no statement of his reasons and the statements of the last three staff members in the recommendation chain are usually very brief and conclusory. In each case, however,

Table 9  
Comptroller's Charter Decisions and Contrary Recommendations  
(1969-1973 Sample)

| No. of Contrary Staff Recommendations | Comptroller Approvals | Comptroller Rejections | Combined |              |
|---------------------------------------|-----------------------|------------------------|----------|--------------|
|                                       |                       |                        | No.      | (Percentage) |
| 0                                     | 7                     | 4                      | 11       | 41           |
| 1                                     | 3                     | 2                      | 5        | 19           |
| 2                                     | 1                     | 3                      | 4        | 15           |
| 3                                     | 0                     | 3                      | 3        | 11           |
| 4                                     | 3                     | 0                      | 3        | 11           |
| 5                                     | 1                     | 0                      | 1        | 4            |
| TOTAL                                 | 15                    | 12                     | 27       | 100          |

Source: Comptroller's charter files.

a list was made of the factors cited by each staff member in support of his conclusion, and the factors were grouped into four broad categories: (1) factors related to predicting the bank's profitability, such as past or projected future economic growth of the community, the business available to a new bank, the accessibility of its location, and projections of loan and deposit growth and of income and expense; (2) characteristics of the application and applicant group, such as the reputation, financial strength and experience of the organizers, the distribution of stock ownership and its "local" character, and the adequacy of the proposed initial capitalization; (3) competitive aspects, such as the need for additional competition in the locale, the prospect for injury to other banks, and the operation of state laws limiting entry to certain markets; and (4) factors seen as bearing on the convenience and needs of the community, such as the absence or paucity of existing banking offices in the locale, or the existence of adequate service at the present time.

Attention was then focused on the thirteen cases in which the Deputy Comptroller agreed with the Comptroller and disagreed with one or more of his colleagues. In these cases disputes centered overwhelmingly on the matter of the "need" for a new bank. In twelve of the thirteen cases, the opponents of charter issuance viewed the locale as already adequately served and saw no indications of public need for a new bank. Those supporting charter issuance, on the other hand, most often cited rapid past or future growth of the area (nine cases), adequate capitalization of the proposed bank (eight cases), need for a new bank or added competition (eight cases), and the absence of any particular injury to existing banks (eight cases). The use and implications of these factors will be further discussed below.

2. *Branch decisions.* The procedure on branch applications is generally similar to that for charters. The application form<sup>208</sup> is a single page, but here too there is a requirement to submit additional information on competing institutions in the area to be served and the population and economic character of the locale.<sup>209</sup> A national bank examiner then makes his field investigation, which is again written up<sup>210</sup> in two parts—a publicly available Report and a Confidential Memorandum. The Report covers the same ground as the application, summarizing it and adding to it in a few respects. The Confidential Memorandum contains the examiner's comments on whether the bank has any problems "which may be considered as factors against branch expansion" and on whether any protests from other banks have "merit"; he lists what he believes to be the favorable and unfavorable factors and gives his opinion and recommendation. The Regional Administrator then adds his comments and recommendation.

At the Washington office, the recommendation chain differs slightly from the charter process. First comes the Director of the Bank Organization Division, as before. Then views are added either by one of the several Deputy Comptrollers with supervisory responsibility for different regions, or by the Chief National Bank Examiner. Next comes another Deputy Comptroller, and then the application goes to the Comptroller for his final decision. The recommendations of the Comptroller's subordinates are contained on two pages of the form, and the Comptroller's own decision is not accompanied by any indication of its basis.

Table 10 shows the frequency with which the Comptroller's branch decisions were in agreement with various subordinates' recommendations. As compared with Table 8 on charter decisions, the greater degree of agreement is striking. The same tendency is evident in Table 11; in no case was a majority of the staff recommendations contrary to the Comptroller's branch decision, and in seventy-eight percent of the cases there was unanimity.

The reasons for this greater consistency are not apparent. Where conflict did occur, it usually (fourteen out of eighteen times) took the form of a staff recommendation of approval for a branch application that the Comptroller denied; indeed, there was unanimity on only two-thirds of the denials, as compared to

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208. Form CC 7024-01.

209. Form CC 7024-06, which in many respects is identical to the charter form in the Appendix.

210. See Form CC-1930-OX.

Table 10  
Staff Recommendations and Comptroller's Branch Decisions  
(1969-1973 Sample)

| Comptroller's Decision      | Approved (29) |        | Percentage of Disagreement | Denied (30) |        |
|-----------------------------|---------------|--------|----------------------------|-------------|--------|
|                             | Approval      | Denial |                            | Approval    | Denial |
| Recommendations of*         |               |        |                            |             |        |
| 1. Examiner                 | 25            | 2      | 15%                        | 6           | 22     |
| 2. Regional Administrator   | 28            | 1      | 5                          | 2           | 28     |
| 3. Director, B.O.D.         | 28            | 1      | 5                          | 2           | 28     |
| 4. Chief Nat. Bank Examiner | 5             | 0      | } 5 {                      | 2           | 3      |
| or<br>Deputy Comptroller    | 23            | 0      |                            | 1           | 22     |
| 5. Deputy Comptroller       | 28            | 0      | 2                          | 1           | 28     |

\* In some instances, a recommendation was omitted.

Source: Comptroller's branch files.

Table 11  
Comptroller's Branch Decisions and Contrary Recommendations  
(1969-1973 Sample)

| No. of Contrary Staff Recommendations | Comptroller Approvals | Comptroller Denials | Combined |              |
|---------------------------------------|-----------------------|---------------------|----------|--------------|
|                                       |                       |                     | No.      | (Percentage) |
| 0                                     | 26                    | 20                  | 46       | 78           |
| 1                                     | 2                     | 6                   | 8        | 14           |
| 2                                     | 1                     | 4                   | 5        | 8            |
| 3                                     | 0                     | 0                   | 0        | 0            |
| 4                                     | 0                     | 0                   | 0        | 0            |
| 5                                     | 0                     | 0                   | 0        | 0            |
| TOTAL                                 | 29                    | 30                  | 59       | 100          |

Source: Comptroller's branch files.

ninety percent of the approvals. (Overall, it may be recalled, the Comptroller approved eighty-two percent and denied thirteen percent of all branch applications.<sup>211</sup>)

When attention is centered on the cases involving disagreement, as before, the key issue seems to be whether the branch would be profitable. There was dispute over this in nine of the twelve cases; proponents cited rapid growth in the area and argued that other banks were doing well, while opponents contended that the area was adequately served, that profitability of the new branch was doubtful, and that the application was premature.

211. See Table 3, p. 274 *supra*.

3. *Decision grounds.* What can be said about the Comptroller's decision process and grounds for decision, as set forth in the application files? First of all, it is worth noting what factors do *not* seem significant in most cases. Consider the factors enumerated in section 1816 of title 12 of the United States Code, which constitutes the statutory framework for the Comptroller's exercise of chartering discretion: "[1] The financial history and condition of the bank, [2] the adequacy of its capital structure, [3] its future earnings prospects, [4] the general character of its management, [5] the convenience and needs of the community to be served by the bank, and [6] whether or not its corporate powers are consistent with the purposes of [the statute]." <sup>212</sup>

The first and second factors amount, in the case of a newly chartered bank, to its initial capitalization. In none of the sample cases was inadequate capitalization mentioned as an adverse factor or reason for denial, and for a rather simple reason: the applicants will generally either conform their application to the amount of initial capital which the agency indicates it deems desirable, or abandon the application as not feasible under the circumstances. For an operating bank seeking a branch, these factors have more content. But if there is serious supervisory concern over its management or capital adequacy or operating policies, a bank is made aware that there is no point in its applying for a branch at any location. <sup>213</sup> In effect, in both cases this issue is disposed of at an early stage and is not reflected in the final figures.

The fourth factor, the general character of management, was mentioned in some cases, but in fact was rarely determinative. A lot of the charter application routine bears on this factor—the long biographical and financial questionnaires required of the organizers and principal stockholders and proposed managing officers, and the investigation reports made on them by the field examiner. It is generally understood, however, that if the agency objects to any of these persons, he will be replaced or dropped from the applicant group, so this factor too does not often determine the final outcome. <sup>214</sup>

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212. 12 U.S.C. § 1816 (1970). *See also* 12 C.F.R. § 4.2(b) (1974).

213. This is made quite explicit in the FHLBB's treatment of "supervisory clearance"; *see* 12 C.F.R. § 556.5(a)(7) (1974). The withholding of branches is also used as a form of supervisory pressure on an institution to conform to what the agency regards as desirable operating policies and practices.

214. The Comptroller insists that this part of the memorandum section of the examiner's report be kept confidential, to protect the anonymity of sources. The Comptroller's policy carries with it the distinct possibility of personal unfairness, since disqualification may

The sixth factor, corporate powers consistent with the purposes of the act, to the extent it has any meaning at all, is satisfied by the use of a prescribed form of articles of incorporation. It was never referred to in any way in any sample case.

That leaves factors three and five, future earnings prospects and the convenience and needs of the community; as already noted, these were the central points of disagreement in the recommendation chain. For branches, the debate was usually over whether the branch would be profitable, while for charters the issue was more often cast in terms of whether there was a "need" for a new bank. Analytical distinctions between the two factors were not clearly made, however. The discussion of community need sometimes, though not often, involved an assertion that the new entry would cause injury to existing banks or branches, but that argument shaded into the argument that there was not enough business for the new bank or branch to be profitable in the near future.

Most of the Comptroller's decisions, therefore, seem to turn on assessments of "need" and "profitability," and it is these two factors that warrant closer scrutiny. As it stands, each participant in the recommendation chain forms his own judgment as to profitability and reflects his own concept of need; there is no discussion of, or explicit agreement on, the underlying premises. Unless that consideration is systematically undertaken and articulated, the Comptroller's decision process will never be comprehensible, either internally or externally.

To afford an illustration of what would be entailed, let us explore these concepts somewhat further, from a critic's standpoint. What does it mean to inquire whether the community "needs" a new bank or branch? How is the public need for any new facility or service determined, whether it be a bank or a department store or supermarket? The answer for most products and services is whether the public is willing to patronize it enough and pay enough for it to be supplied at a profit—in other words, profitability is a measure of the extent of "need." It ensures that the social value of what is being provided, as measured by the public itself and what it is willing to pay, exceeds the social costs of supplying it. It is not apparent why this is not the standard of need to apply to banking offices as well. In the Comptroller's files there

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be founded on erroneous or distorted information that is not subject to correction or rebuttal.

are numerous examples of the use of much cruder standards—for instance, whether there are other banking offices that customers can go to without incurring what is, in the examiner's opinion, too much inconvenience, or whether a casual interview process with local businessmen turned up statements that they wanted a new bank. It is not at all clear that the "need" criterion does not resolve itself into the other key issue of profitability.

But why should the Comptroller be concerned with profitability? That factor is usually the worry of those who are financing a new venture; they have the most at stake and every reason to go into the matter as carefully as they can. It is hard to see why either superior sources of information or superior thoroughness of analysis would characterize the Comptroller's office as it grinds through hundreds of applications each year. It is as if a Washington agency had to approve each decision of a grocery chain concerning location of new outlets. A presumed agency expertise must find some rational foundation in its actual capacities, or it is an empty shibboleth.

But suppose we put aside the question of whether the agency or the applicant is in the better position to make judgments about the profitability of a particular location, and assume that applicants will make more mistakes than the agency will—how is the public interest thereby threatened? A bank simply closes down a branch that does not become profitable; rather than attempting to second-guess the bank's profitability estimate, the Comptroller could merely ascertain whether the bank could afford the cost of an error. Similarly, in the case of a new charter, the Comptroller could merely require that the amount of initial capital be sufficient to cover several years of operating losses.

A familiar rejoinder would be that we are concerned about the effects of a mistaken judgment, not merely or even primarily on the applicant, but on other institutions. In the jargon of the business, the concern is that new entry would lead to an "overbanked" condition. In more general terminology, the argument is that errors of entry judgment (which by assumption are made more often by applicants than by the agency) will at times produce excess capacity. Although long run excess capacity in an industry is normally corrected by elimination of the industry's less efficient facilities or firms, the argument continues, banking is a special case because the contraction may involve bank failure. At this point the argument tends to become either emotional or obscure. To some, the very words conjure up the collapse of the 1930s and the thought is unacceptable, though the fact is that several hundred

banks have failed since the 1930s.<sup>215</sup> To others, apparently, a policy of preventing bank failures is viewed as having major benefits but no costs.<sup>216</sup>

A less extreme position would be that, while entry controls and a policy of failure prevention do have costs, they are outweighed by the benefits. But that position too is open to criticism on both theoretical and empirical grounds. For example, to what extent do entry controls actually prevent bank failure? At best (or worst), entry controls can confer a protected monopoly position on certain firms; that may be reflected in the present market value of the firm, but it does not constrain the future operations and policies of risk-acceptance by the firm. Nor is it easy to see the large metropolitan centers and national banking markets, in which the big banks operate, as protected monopolies; there are too many substantial competing firms. To the extent entry controls have successfully created monopoly positions (or "prevented overbanking," in the preferred phrase), it is probably in local markets and smaller towns. Is the purpose of entry controls mainly to prevent the failure of small banks? Why, and for whose benefit? Presumably, it is not to protect the stockholders; that is the very risk they undertake to bear. Perhaps to protect the depositors? But most of them are covered by deposit insurance; the smaller the bank, the higher tends to be the percentage of its deposits that are insured.<sup>217</sup> Deposit insurance merely transfers the loss to the FDIC, so perhaps the need is to protect the insurance fund? But the failure of small banks is the kind of event that the FDIC and FSLIC insurance funds can most easily handle, and there is little reason to doubt their adequacy for this purpose.<sup>218</sup>

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215. See 1973 FDIC ANN. REP. 227 (Table 121).

216. For a quite contrary view, see Tussing, *The Case for Bank Failure*, 10 J. LAW & ECON. 129 (1967). Some of the costs to bank customers are reflected in the monopoly franchise value that attaches to new charters upon approval, a phenomenon that troubles the banking agencies. Their response has been to block immediate resales of controlling stock, to limit attorneys' fees charged successful applicants, and in general to try to suppress the visible signs of the franchise value. See, e.g., FHLBB, OUTLINE OF INFORMATION EX. G NO. 20 (1967, rev. 1969); FDIC, *Statement of Policy on Legal Fees*, 37 Fed. Reg. 17778 (1972).

217. As of June 29, 1968, 75 percent of total deposits in banks with under \$5 million in deposits were in accounts below the insurance ceiling (which was then \$15,000), while in banks with over \$100 million in deposits, the figure was 34 percent. See FDIC, SUMMARY OF ACCOUNTS AND DEPOSITS IN ALL COMMERCIAL BANKS 5 (1969). The insurance ceiling has now been increased to \$40,000 by Pub. L. 93-495. And a family can have a number of insured accounts in the same institution. See Scott, *Some Answers to Account Insurance Problems*, 23 BUS. LAW. 493 (1968).

218. There would be even less reason if the insurance corporations were not required to charge all firms a single rate regardless of individual risk. For a more comprehensive dis-

In short, the reasons for the Comptroller's concern with entry controls, and with overriding applicants' estimates of need and profitability, are by no means self-evident or self-validating. If it is to protect banks and their stockholders from losing money on poor site selections, it seems unwarranted. On this score, it also seems unsound, for it is hard to give credence to the proposition that on the whole the Comptroller's staff in Washington or in the field can judge the business potential of different locations across the entire United States better than the applicants can. If it is to protect depositors, or really the deposit insurance funds, from losses due to failures caused by "unhealthy" competition, it seems unnecessary on the one hand and largely impossible on the other. Among other things, there are too many sources of competitive pressure quite outside the Comptroller's control—not only state banks, and savings and loan associations, but also, increasingly in recent years, other investment media (such as mutual funds and direct investment in the capital markets) and other sources of loans (such as insurance companies, or direct access to the capital markets through commercial paper or variable-rate notes). It is not surprising, therefore, to find that economists have become dubious about the justification and effects of entry controls in banking.<sup>219</sup>

The foregoing discussion is not intended to reach a conclusion or be definitive, but merely to open up the kind of issues that the Comptroller should be facing in his administration of entry controls for national banks. What are the justifications and objectives of entry controls that the Comptroller believes have current validity? What determinations, concerning need or profitability or unhealthy competition or whatever, is he thereby required to make? On what sort of findings of fact are those determinations to be based?

The answers to those questions will not be obtained by opening up the "confidential" part of the Comptroller's files, as some of the cases<sup>220</sup> sought to do, for they cannot be found there either. So far as an examination of over a hundred branch and charter

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cussion, see Scott & Mayer, *Risk and Regulation in Banking: Some Proposals for Federal Deposit Insurance Reform*, 23 *STAN. L. REV.* 857 (1971).

219. See generally Alhadeff, *A Reconsideration of Restrictions on Bank Entry*, 76 *Q.J. ECON.* 246 (1962); Meltzer, *Major Issues in the Regulation of Financial Institutions*, 75 *J. POL. ECON.* 482 (1967); Peltzman, *Bank Entry Regulation: Its Impact and Purpose*, 3 *NAT. BANK. REV.* 163 (1965).

220. See text and notes at notes 111-20 *supra*.

files reveals, the problem is one of developing explicit answers and standards; they simply do not now exist.

Although this discussion has centered on the Comptroller, its applicability is not confined to him. In its essential characteristics, the branch and charter decision process of the FHLBB has the same shortcomings, though the Bank Board has much less often been taken to court. The purpose has been not to single out the Comptroller, but to use his procedures as a way of developing in some depth the problems presented by all the federal banking agencies in their licensing decisions.

#### IV. CONCLUSIONS AND RECOMMENDATIONS

The judicial cases recounted in the first part of this paper demonstrated the determined resistance of the Comptroller and other agencies to providing applicants (and courts) with intelligible explanations of licensing decisions. The study of application files strongly suggests that at least one reason for that resistance is that there is no systematic and intellectually respectable basis for branch and charter decisions. Instead, there is a process of ad hoc recommendations and conflicting pressures, leaving fertile soil for a suspicion that the outcome can turn on political favoritism or outright corruption.<sup>221</sup> In essence, the banking agencies have failed to develop and announce public policy on these questions, although Congress, by enacting vague and general statutory standards, has in effect delegated to them a responsibility to do so.<sup>222</sup> This failure cannot be justified or excused on the basis of insufficient time for study or reflection or the accumulation of experience; the Comptroller's office has been in existence, and making

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221. The latest examples, involving charges of favoritism for Nixon supporters, have concerned the Comptroller's approval of a national bank charter for a group that included Dwayne O. Andreas, *see* N.Y. Times, Aug. 29, 1972, at 21, col. 6, and *id.*, Sept. 29, 1972, at 30, col. 1; the Comptroller's denial of a charter for a bank that would have competed with Charles Rebozo's Key Biscayne Bank & Trust Co., *see id.*, Oct. 17, 1973, at 27, col. 2; and the FHLBB's approval of account insurance for a new state savings and loan in Key Biscayne formed by Rebozo associates, *see id.*, Oct. 23, 1973, at 37, col. 4. *See also* 119 CONG. REC. H 9236-37 (daily ed. Oct. 17, 1973); *id.* at E 6658-60 (daily ed. Oct. 18, 1973); *Hearings on Financial Structure and Regulation Before the Subcomm. on Financial Institutions of the Senate Banking, Housing, and Urban Affairs Committee*, 93d Cong., 1st Sess. 378-80 (1973).

222. *Cf. Morion v. Ruiz*, 415 U.S. 199, 231-32 (1974): "The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. . . . No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis by the dispenser of the funds."

such decisions, for over a century, and even the relative newcomers have had four decades.

Why has this state of affairs been so long invulnerable to assault in the courts? Much of the explanation probably lies in the traditional view that an applicant for a bank charter or branch has no "right" to engage in the banking business at the desired location; he is merely a petitioner for a "privilege" bestowed by the government, a suppliant for an act of largesse. Thus, the argument runs, he has no recognized "property" interest calling for due process protection. This attitude is reflected in the almost unanimous holding that the Comptroller and other agencies are not constitutionally required to reach decisions by way of trial-type hearings.<sup>223</sup>

The right-privilege dichotomy, as a touchstone for due process analysis, has undergone a decline in recent years.<sup>224</sup> Welfare benefits were the classic case of governmental gratuities, to be dispensed in whatever manner the legislature might choose, but the Supreme Court in *Goldberg v. Kelly*<sup>225</sup> imposed the requirement of a fair evidentiary hearing before they could be terminated.<sup>226</sup> The category of property interests protected by procedural due process was enlarged to include government benefits to which a person claims he is entitled.<sup>227</sup> A "legitimate claim of entitlement"<sup>228</sup> may be based upon a statute whereby the government awards valuable benefits or privileges, just as much as upon contract or historically familiar forms of private property.

Although these cases show which way the wind is blowing, it is doubtful that the Comptroller's house has yet been toppled by them. They involve the termination of a preexisting (and thus relied upon) benefit or status, rather than an initial decision on an application, and that consideration is usually viewed as strengthening the claim that due process necessitates an evidentiary hearing.<sup>229</sup>

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223. See text and notes at notes 58-68, 141-44 *supra*.

224. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

225. 397 U.S. 254. (1970).

226. The pre-termination fair hearing requirement was subsequently extended to driver's license suspensions, *Bell v. Burson*, 402 U.S. 535 (1971), to parole revocations, *Morrissey v. Brewer*, 408 U.S. 471 (1972), and to probation revocations, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), but not to discharge from government employment, *Arnett v. Kennedy*, 416 U.S. 134 (1974).

227. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

228. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

229. See, e.g., Reich, *The New Property*, 73 YALE L.J. 733, 744 (1964). The distinction has

Furthermore, they involve situations where either the statute or the agency has spelled out eligibility requirements for the benefit with some precision or the plaintiff is already its possessor, so the claim of "entitlement" is not difficult for a court to pass upon. By contrast, where both statute and agency have left the bases for conferring the benefit utterly vague, the threshold showing of entitlement would seem impossible to make.<sup>230</sup> Ironically, therefore, the poorer the job an agency does in developing policy standards, the more minimal will be the procedural requirements it must satisfy.

But even more basic is the fact that the recent due process cases have been concerned with the need for a full evidentiary hearing. Although that is admittedly lacking in the banking decision process, it is not as yet the factor whose absence seems critical and whose presence is much to be desired. Judicialization of agency decision making is a remedy often prescribed, but its costs in terms of delay and expense frequently exceed by a wide margin its contribution towards improving the quality of decisions.<sup>231</sup>

At this stage, at any rate, the pressing need is for the articulation of policy rather than for trial-type hearings. The immediate problem is not one of resolving disputes about historical facts, but of specifying the purpose and bases of the exercise of controls over entry into banking markets. In terms of legal form, that can be achieved in one of two ways: by the adoption of policy statements and the exercise of the rulemaking power, or by a process of case-by-case adjudication and reasoned opinions. The route of policy

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not appealed to all courts. Compare *Sumpter v. White Plains Housing Auth.*, 29 N.Y.2d 420, 328 N.Y.S.2d 649, 278 N.E.2d 892 (1972), with *Davis v. Toledo Metro. Housing Auth.*, 311 F. Supp. 795 (N.D. Ohio 1970).

230. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

*Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

231. Possibly the small group of cases where an applicant or organizer is rejected or excluded on personal grounds constitutes an exception. The present procedure of disqualification on the basis of secret evidence might not withstand legal challenge; it can be argued that the person being branded as unacceptable is both stigmatized (at least within the agency and among the applicant group, and, given interchange of information among the banking agencies, on occasion with other agencies as well) and to some extent denied the liberty to enter a recognized occupation. At the same time, the reasons for secrecy do not involve lofty goals like protecting national security; in most of the sample cases, the adverse reports concerned a poor credit rating or financial position, and the source was treated as confidential simply to avoid embarrassment. Under these circumstances, due process probably entitles the barred applicant to an evidentiary hearing. Cf. *Board of Regents v. Roth*, 408 U.S. 564, 573-74 (1972); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Norlander v. Schleck*, 345 F. Supp. 595 (D. Minn. 1972). Of course, as long as the final decision remains so totally discretionary, most such persons will be dissuaded by their colleagues from pursuing the matter and alienating the agency.

statements and rulemaking seems preferable, because it tends to force the decision maker to confront the more fundamental questions and think through and justify comprehensive answers;<sup>232</sup> that may explain its relative neglect. Alternatively, at least in theory, an agency can develop a consistent policy in piecemeal fashion, by separate adjudications—but the world will never know it unless opinions are written and published.

There is little that courts can do to force an agency to use its rulemaking authority,<sup>233</sup> but they are in a better position to require written explanations of decisions that are subject to judicial review, even in areas in which neither due process nor the Administrative Procedure Act<sup>234</sup> requires trial-type hearings. The very concept of limited review requires that the decision maker provide a reasoned justification for his action. As the Supreme Court said in *Chenery II*:

If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action. . . . In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'<sup>235</sup>

With a general decline in the level of automatic judicial deference to agency expertise has come a corresponding recent increase in the demand that agencies give reasoned explanations for their decisions, even when that is not required by the statute under which they are acting.<sup>236</sup> Most of these cases involve statutory review (where the statute under which the agency is acting has an explicit provision for court review) and that means that Congress intended for the agency to have to explain and defend its decisions in court.

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232. Cf. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 526 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 937-40 (1965).

233. Compare *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764-65 (1969), with *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974).

234. See 5 U.S.C. §§ 554, 556-57 (1970).

235. *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947). See also *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-69 (1962); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941).

236. See, e.g., *Natural Resources Defense Council v. EPA*, 478 F.2d 875 (1st Cir. 1973); *Air Line Pilots Ass'n v. CAB*, 475 F.2d 900 (D.C. Cir. 1973); *Wellford v. Ruckelshaus*, 439 F.2d 598 (D.C. Cir. 1971); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

In cases of nonstatutory review (where the statute lacks an express judicial review provision and the plaintiff relies on the general jurisdiction of the federal courts in seeking an injunction or declaratory judgment), the courts have been more hesitant to intrude upon agency discretion, even by merely asking for explanation in any but a pro forma sense. But the same tendency is visible here,<sup>237</sup> and for the same reasons. Without explanation by the agency, as the banking cases previously discussed make clear, the court in affording judicial review is reduced to an unhappy choice between usurpation and futility.

There is no longer much room for dispute that charter and branch decisions are subject to judicial review, at the behest of either applicants or competitors.<sup>238</sup> Though an applicant may have no right to a charter or a branch, he has a right to have his application decided according to law by the agency, and the right to judicial review of that decision carries with it the necessity for explanation of its grounds.

The real issue is how little explanation will suffice. As satisfaction with the performance of administrative agencies has lessened, the level of understanding being required has risen, and remands for a more intelligible explanation have become a commonplace.<sup>239</sup> In nonstatutory review (which includes the bank licensing cases), however, the courts have been less assertive, or at least less explicit. *Overton Park*<sup>240</sup> demanded simply "an adequate explanation" by the Secretary of Transportation for his action, leaving it largely to the district court to decide whether the administrative record already provided one or had to be supplemented through formal, if belated, findings or actual testimony and cross examination. *Pitts*<sup>241</sup> did not change this position, though it did intimate that a "curt" explanation might be good enough.<sup>242</sup>

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237. See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Citizens Ass'n v. Zoning Comm'n*, 477 F.2d 402, 408-10 (D.C. Cir. 1973); *District of Col. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972).

238. See *Camp v. Pitts*, 411 U.S. 138 (1973).

239. See, e.g., *Atchison T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-09 (1973); *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1321-26 (D.C. Cir. 1972); *USV Pharmaceutical Corp. v. Secretary of HEW*, 466 F.2d 455, 461-62 (D.C. Cir. 1972); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

240. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

241. *Camp v. Pitts*, 411 U.S. 138 (1973).

242. The authority of that intimation is undermined by the fact that the case was decided on the certiorari papers without either full briefing or oral argument. The Court was in all likelihood unacquainted with the history of difficulties that had been encountered in reviewing the Comptroller's customarily "curt" explanations of decisions.

But however full or inadequate the explanation that the courts are prepared to demand, the requirements of good administration are an independent matter. Banking plays too central a role in our economic system, and the issues at stake in the administration of entry controls are too important, for a continuation of the present regime of unexamined and unexplained exercises of discretion. Whether they are ultimately forced to it by the courts or not, the banking agencies should articulate their policies and their reasons<sup>243</sup>—and not in the curt and superficial manner of *Pitts*.

The usual response to such a recommendation is that writing opinions in all cases would be a substantial burden on overworked staffs, and generally of little value since decisions depend on particular fact settings. There are answers on a number of levels. First and most fundamental, opinion writing is not the only or even the preferable way of establishing a clear policy; the route of policy statements and rulemaking, in terms of objective standards, would be more comprehensive and satisfactory.<sup>244</sup> It also makes more evident the gaps and inconsistencies in underlying premises and is therefore less likely to be adopted. On the charitable assumption that still more time and experience is necessary to work the problems through, perhaps a practice of case-by-case adjudication can still be rationalized. Second, the overworked staff objection is generally available against doing anything not already being done, but it has less application to the banking agencies than to most others. These agencies do not depend on Congressional appropriations for their funds, nor (with the exception of the FHLBB) on Congressional authorizations for their budgetary expenditures. If the job is worth doing, the staff can be increased. Third, the point about the limited value of most decisions does have merit. It has the most merit when policies are inchoate and standards are undefined, so that opinions consist of a list of the "relevant" factors in a particular case and a conclusion, with the connecting links left to the reader's imagination or the court's "opening-presumption of correctness." Still, if that is all the decision process has to offer, written opinions at least expose the vacuity to the view of courts and critics, instead of hiding it behind a protective veil of obscurity and trust in expertise.

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243. The suggestion is not exactly a new one. See H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* (1962).

244. The validity of substantive informal rulemaking of this sort was recently considered at length and sustained, for the FTC, in *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974). See also Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

Another line of objection to explanatory opinions is based on the fact that applications are sometimes, though not often, rejected on grounds that the agency believes would be substantially injurious to a bank or individual if made public. The existence of this possibility in a few cases is not an excuse for a general policy of non-explanation, and it ought not to be automatically invoked to shield all negative information. However, instances may remain where the agency believes it should not disclose certain information, in order to preserve (unwarranted) public confidence. If the information pertains to the applicant bank or group, the applicant could be afforded the option of withdrawing its request; if it pertains to an objecting bank, the ground could be expressly stated but in general terms, such as "to prevent an adverse impact on other institutions."<sup>245</sup>

It is submitted, therefore, that opinions in at least part of the cases should be regularly forthcoming. The following recommendations are designed to meet the need for a fuller explanation of the licensing decisions of the federal banking agencies, while taking into account distinctions between the various types of decisions and attempting to minimize the call on agency resources.

Recommendation 1. *General.* The federal banking agencies should undertake to provide a full statement of their objectives in approving or denying charter or membership applications and branches, and should define in concrete terms the standards to be applied. This can be done best by the adoption of policy statements and rules of general applicability, which should be as specific as possible. To provide additional clarity and understanding, reasoned opinions should be issued in certain situations as set forth below.

It should be noted that as policy statements and definitions of standards become more specific, it becomes less burdensome to decide and explain individual cases.

Recommendation 2. *Primary supervisor decisions: Comptroller and the Federal Home Loan Bank Board.* In the case of branch applications, the numbers are large and many approvals seem a matter of routine. Probably only a small minority of approvals, but a much larger fraction of denials, would occasion a desire or need for explanation. For branches, therefore, the Comptroller and the

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245. If judicial review is sought, the court can, to the extent deemed warranted, afford *in camera* or protective order treatment to the supporting evidence.

FHLBB should furnish written opinions only when so requested by the applicant or by objectors, or when the agency believes the case presents issues of general importance. It would be appropriate to charge the requesting party an amount commensurate with the time cost of opinion preparation.<sup>246</sup>

Charter decisions are considerably fewer in number and, at present, more obscure in their grounds—in the Comptroller's case, even to his own staff, let alone applicants or protestants. An opinion should be furnished as a matter of course in all charter denials, since this is the most critical entry barrier, and in approvals when requested.

Recommendation 3. *Secondary supervisor decisions: Federal Reserve Board, Federal Deposit Insurance Corporation and Federal Savings and Loan Insurance Corporation.* Branch approvals by the FRB and FDIC seem well-nigh automatic, no doubt because of reliance on the primary approval of other authorities, and an opinion requirement in all cases would seem excessive. Rejections are something of an extraordinary event, however, and should always be accompanied by a full explanatory opinion.

Membership applications may not wholly fall into the same category, though only the FSLIC has a significant rejection ratio. It would probably be worthwhile to furnish written opinions on request, which would presumably be forthcoming mainly in the event of denial.

Recommendation 4. *Publication.* All four agencies should systematically collect and publish their licensing decisions and opinions in some convenient form. Depending on frequency and length, those of general importance might be included as part of monthly publications such as the *Federal Reserve Bulletin* or *Federal Home Loan Bank Board Journal*, or as an appendix to annual reports; others might be published as a separate series and made available in public files at the agency's Washington and field offices.<sup>247</sup>

As a concluding caveat, it must be recognized that opinions may be a necessary ingredient in the development and application of a coherent and well-defined policy of administration of entry con-

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246. See 31 U.S.C. § 483a (1970); *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974).

247. Cf. 5 U.S.C. § 552(a)(2) (1970), as amended by Pub. L. No. 93-502, 88 Stat. 1561.

trols, but they do not ensure such a policy. The opinions will be largely worthless if they consist of no more than a list of factors or a recital of facts, followed by a leap to the conclusion boilerplate without articulation of the connecting theories and standards and tradeoffs.<sup>248</sup> The decade of judicial decisions previously reviewed shows a growing disinclination on the part of courts to approve what they cannot follow, so long as they can view it as well intended and not corrupt. That tendency toward greater judicial rigor is to be applauded, but it is even more important that the agencies themselves move at last to discharge the policy making responsibilities inherent in the broad discretion conferred upon them by the Congress.

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248. Judge Jerome Frank paid his respects to such "woosh-woosh" opinions in *Old Colony Bondholders v. New York, N.H. & H.R.R.*, 161 F.2d 413, 449-52 (2d Cir. 1947) (dissenting opinion).

APPENDIX



COMPTROLLER OF THE CURRENCY  
THE ADMINISTRATOR OF NATIONAL BANKS

SUMMARY OF INFORMATION TO BE SUBMITTED TO THE REGIONAL  
ADMINISTRATOR OF NATIONAL BANKS WITHIN 30 DAYS AFTER THE  
FILING OF AN APPLICATION TO ORGANIZE A NATIONAL BANK

- (1) Population of city, town, county, village or municipality in which the proposed bank is to be located as of the last decennial census and a present estimate.
- (2) (a) Estimated population of the service area, for last decennial census and a present estimate from which the proposed bank is expected to generate 75% or more of its loans and deposits.
- (b) This area extends from the proposed bank location approximately \_\_\_\_\_ miles north; \_\_\_\_\_ miles east; \_\_\_\_\_ miles south; \_\_\_\_\_ miles west.  
(Area must be outlined on the maps and aerial photographs submitted)
- (3) Provide the following information with respect to each competitive bank and branches thereof located within the service area of the proposed bank (if complete branch figures are not available use consolidated figures). In nonpar, so indicate.

|                                                           |                                                                      |                                                                              |                                                    |
|-----------------------------------------------------------|----------------------------------------------------------------------|------------------------------------------------------------------------------|----------------------------------------------------|
| * Location marker number, names and addresses             | Date established if within three years                               | Deposits                                                                     | Loans                                              |
| Distance by road mileage and direction from proposed bank | Interest rates paid on savings deposits and certificates of deposits | Interest rates normally received on short-term business and instalment loans | Rate of return on capital for previous three years |
| Hours of business                                         | Estimate of commercial bank share of mortgage loan business          | Loan-deposit ratio                                                           |                                                    |

- (4) Provide handy-sized duplicate maps (with a scale of miles and compass points) of the city or area appropriately labeled to show the location of the proposed bank and the names and locations of all banks and branches, including applications pending and those approved but not opened. Aerial photographs of reasonable coverage, including expected service area are helpful, and if available, one so labeled should be submitted. The expected service area of the proposed bank should be clearly outlined on the maps and on aerial photographs.
- (5) Provide the following information with respect to Savings and Loan, Building and Loan, and Mutual Savings Banks located within the proposed service area.

|                     |                                        |                |       |                                                           |
|---------------------|----------------------------------------|----------------|-------|-----------------------------------------------------------|
| Names and Addresses | Date established if within three years | Share Accounts | Loans | Distance by road mileage and direction from proposed bank |
|---------------------|----------------------------------------|----------------|-------|-----------------------------------------------------------|

- (6) Indicate the number of the following institutions within the proposed service area three years ago and the number of each at the present: Credit Unions, Finance companies, Insurance companies granting loans, and other institutions granting loans.

\*Include applications pending and those approved but not opened.

- (7) Indicate degree of intensity of competition in service area by Savings and Loan, Mutual Savings Banks, Credit Banks, etc.
- (8) Provide a copy of any survey made preliminary to filing the application for the proposed bank and also the cost for any such survey.
- (9) Comment on the economic character of the area to be served.
  - A. If area is largely residential, state whether homes are generally owner-occupied, the extent of housing development, type, quality, price level, average age, number of unsold new homes, and prospect for continued development.
  - B. If primarily industrial or business, state the number and general types of business, and in the cases of principal employers, give the name of each company or firm, number of employees, and payroll, and comment on the consistency of employment and special skills required.
  - C. Shopping center locations should be fully described. State the number of units, size as to total land and building area, number of individual parking spaces, accessibility to surrounding communities, the extent to which signed leases have been obtained, the names of principal lessees, and provide information as to their financial responsibility, if not national concerns.
  - D. Provide information regarding population growth potential; new businesses recently established or planned, etc. Discuss the traffic pattern, the street and road facilities, and their adequacy. Describe geographical barriers, if any.
- (10) If no bank in community, where is banking business conducted by residents?
- (11) Past banking history of community.
- (12) Proposed ownership of stock, is it to be widely distributed or closely held. Amounts to be taken by organizers, proposed directors, officers and their families.
- (13) Financial position of city, town, village, school districts and county. Discuss tax collections, showing total levy, percentage collected and arrear, etc.
- (14) List the major types of loaning demands proposed bank expects to serve.
- (15) Give estimates of the volume of total deposits, showing the amount of public funds included in total and total loans expected at the end of the first year of operations, second and third year.
- (16) A detailed projection of earnings and expenses must be submitted showing the breakdown of income and expenses for each of the first three years of operations.
- (17) Give the following information regarding banking house and equipment as it applies:
  - (a) If to be purchased, the separate costs of land, building, furniture and fixtures, and vault.
  - (b) If to be leased, give terms in brief and describe the quarters.
  - (c) If property is to be purchased or leased from a director, officer, or large shareholder, state name and other pertinent data.
  - (d) Give expiration date of any option to purchase or lease.
  - (e) If new construction, furnish anticipated completion date.
  - (f) If a temporary location is planned, furnish exact address, distance and direction from permanent location, and period it will be occupied.
  - (g) State the approximate period of time that will be required to place bank in operation in temporary and/or permanent site.
- (18) What plans have been made to obtain fidelity insurance covering all individuals authorized to collect, receive or deposit funds from stock subscriptions?