

ADMINISTRATIVE PROCEDURE IN THE REGULATION OF BANKING

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I

PERSPECTIVE

The banking agencies of the federal government have long maintained systems of secret evidence, secret law, and secret policy. The result has been a degree of unchecked and unstructured discretionary power that is far greater than it should be. Sound principle calls for openness, so that discretion may be checked and structured. To some extent the systems the agencies have been following violate existing legal requirements. The banking agencies can and should make procedural changes that will increase both efficiency and fairness.

I am pleased to say that since the presentation of an early draft of this article to the Chief Counsel to the Comptroller of the Currency, the Comptroller has made significant procedural changes in the direction that I have recommended. Furthermore, the General Counsel of the Federal Home Loan Bank Board, before I got to him, was making proposals for changes of the kind that I think desirable. The Federal Reserve Board and the Federal Deposit Insurance Corporation may well follow. My opinion is that a good many changes are needed in all four agencies.

This paper will be limited to chartering banks and authorizing branches, with particular focus on the Office of the Comptroller of the Currency. Even though these two functions often involve business interests of great magnitude, the banking agencies have been deciding cases (1) on the basis of secret evidence—evidence which is quite unnecessarily concealed from affected parties, (2) with no systematic statement of findings on issues of fact, (3) without furnishing parties reasoned opinions on issues of law or policy, (4) without building a body of case law that is open to public inspection and that can be used for confining and guiding discretion, and (5) without clarifying or even attempting to clarify the details of policy through rule making, policy statements, or opinions.

Although some of these five deficiencies are not susceptible to full correction, some are, and all can be mostly corrected. No substantial obstacles stand in the way of (1) disclosing evidence to parties except when a special reason requires concealment, (2) systematically stating findings of fact for the benefit of the parties except when a special reason requires confidentiality, (3) writing reasoned opinions on all significant issues of law and policy in all cases with no exceptions, (4) keeping the reasoned opinions open to public inspection as a body of case law to confine and to guide discretion and to inform affected parties, and (5) attempting to clarify details

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of policy through rules and policy statements, as well as through opinions, with additions from time to time as further clarification becomes feasible.

The background for the Comptroller's procedural system includes somewhat uncertain law as to whether a hearing is required on an application for a bank charter or branch, and hence uncertainty as to whether sections 5, 7, and 8 of the Administrative Procedure Act¹ apply. Some lawyers, including counsel for the Comptroller, reasonably believe that the *Smithfield* case,² a recent decision of the Court of Appeals for the Fourth Circuit, means that a hearing is not required, but that case seems to me both weak and temporary because (a) the dissenting opinion is persuasive; (b) by holding that the losing party was entitled to a trial *de novo* in the district court, the Fourth Circuit in effect held that a hearing *was* required; (c) to avoid *de novo* hearings in court the Comptroller is interpreting the case as if it required a hearing, and (d) the law will remain uncertain until the Supreme Court has spoken, or until a better opinion of a lower court gains general acceptance.³ Until the uncertainty is resolved, the procedural planning should be done in the light of the uncertainty. Excellence in such planning is sure to gain approval of discerning judges.

¹ 5 U.S.C.A. §§ 554, 556, 557 (Special Pamphlet 1966).

² *First Nat'l Bank of Smithfield v. Saxon*, 352 F.2d 267 (4th Cir. 1965), *reversing* *First Nat'l Bank of Smithfield v. First Nat'l Bank*, 232 F. Supp. 725 (E.D.N.C. 1964). The court reversed the holding of the district court that the competitor bank which was resisting the application was entitled to be heard, but it held that the competitor bank had standing to obtain judicial review and that the review should be *de novo*. The court's conception of the scope of the review is indicated by the following language:

"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."

352 F.2d at 272.

Very important to an understanding of the decision, in my opinion, is the Comptroller's denial to the competing bank of access to the application and the supporting data. If the Comptroller had allowed that right, along with an informal conference, and if findings and reasons had been stated, I think the court would have and should have limited the review by the substantial-evidence rule.

Even on the record as it was, the dissenting opinion of Judge Sobeloff, protesting against the *de novo* determination on review, seems to me persuasive. And I think Judge Sobeloff struck the key to good procedure: "If the Comptroller wishes to continue to use informal proceedings to deal with branch applications he must make sure that the proceedings are fair." By that he meant that the competitor bank "should be permitted reasonable access to relevant materials." 352 F.2d at 275 (dissenting opinion).

³ In *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966), the court held that the Comptroller in issuing a national bank charter was not required to "hold a formal adversary hearing upon the request of a competitor bank." 370 F.2d at 384. Two unsatisfactory features of the opinion seem to me to mean that the decision falls short of settling the law: (1) The opinion says that the objecting banks requested that they be furnished a copy of the application, but it does not say whether the copy was furnished. I think due process should require disclosure to the objecting banks of the application and the information submitted in support of it, except to the extent that confidentiality is for some reason essential. (2) The opinion quite properly holds that the APA does not require a hearing, but, instead of discussing the substantial problem of whether due process so requires, the court announces: "We do not have the prerogative of determining the advisability or the feasibility of a formal adversary hearing in the processing of a charter application for a national bank." 370 F.2d at 386.

I have long been and continue to be an admirer of the manner in which the banking agencies have effectively used sensible systems of supervision and have generally avoided the cumbersome procedure of formal adjudication. In my *Administrative Law Treatise* I have praised the banking agencies for their successful avoidance of trial procedure for chartering banks and for approving branches.⁴ A trial is surely a clumsy means of determining how many banks and which banks ought to serve a community, and I think the Federal Communications Commission and the Civil Aeronautics Board might well learn from the banking agencies how they can better handle their comparative application cases. The Comptroller properly, in my opinion, avoids proceedings in which each witness presents a mixture of evidence and argument in favor of his view about economic imponderables and each cross-examiner presents arguments on the other side in the guise of questions. Written presentations of economic data, coupled with conferences, seem to me preferable to trials, except on issues of specific fact.

In applauding the banking agencies for not falling into the ditch on the right side of the road by using trial methods when informal methods are better, I do not approve their tendency to fall into the ditch on the left side of the road by ignoring principles about fair dealing. When informal procedures are used, some cardinal ideas about fairness are still fully applicable. Too many of the courts that have quoted my approval of banking agencies' informal methods of regulation⁵ have overlooked my further statement: "Problems of fair procedure are just as important in the use of the supervisory power as they are in adjudication. Indeed, it is interesting that even some of the same problems arise."⁶ A party whose legal interests are at stake should not unnecessarily be denied an opportunity to know the materials that adversely affect him, whether or not he is entitled to a trial-type hearing. For instance, the competitor bank should normally be allowed to see the application and all materials supporting the application; such a procedural right was denied in the *Smithfield* case, and this is probably one motivation for the district court's holding that an administrative hearing was required and for the Fourth Circuit's holding that the competitor bank was entitled to *de novo* review of the facts.

Now, on this background, let me discuss each of the five deficiencies listed in my third paragraph above.

II

SPECIFIC DEFICIENCIES

I. *Secret Evidence*

Whether or not any reason for secrecy exists, the Comptroller until recently has been carefully keeping secret all evidence on which he decides whether or not

⁴ 1 *ADMINISTRATIVE LAW TREATISE* § 4.04 (1958) [hereinafter cited as *TREATISE*].

⁵ See citations in § 4.04 of the 1965 Supplement to my *TREATISE*; the cases include *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 330 (1963).

⁶ *TREATISE* § 4.04, at 251.

to grant applications for new banks or for branches. I have asked members of the Comptroller's staff why the evidence is concealed even in the absence of a reason for confidentiality, and I have never heard a satisfactory answer. The apparent reason is that someone during the 104 years since the office was established set up the system that way and no one in the present generation has critically examined it.

When the Comptroller receives an application, an examiner is directed to make an investigation. He is instructed to interview proponents and opponents, as well as local businessmen. One purpose is to dig up social, business, and economic facts, such as composition of the population, economic growth, banking needs, adequacy of the applicant's capital structure, and degree of public support. I see no reason why the examiner's report on facts of this kind should not be made known to affected parties, with opportunity to submit written comments. Both fairness and efficiency so require. Parties with substantial business interests at stake should have opportunity to correct mistakes and to argue for different interpretations of factual materials. Decisions are likely to be more soundly founded if the administrators take advantage of the parties' testing processes.

The Comptroller, however, until the first draft of this paper was submitted, has failed to distinguish between materials that called for confidentiality and those that did not, and has required, through a regulation illegally withheld from publication in the *Federal Register*, that the examiner should "summarize his findings" but that his report was "confidential."⁷ As of this writing, the examiner's report is no longer confidential, according to the Chief Counsel, but the regulation remains unchanged.

Some of the information the investigating examiner brings in may be of a highly personal character. The examiner is instructed to investigate "qualifications and integrity of the organizers, directors, officers, and other principals of the proposed bank or, in the case of a branch application, the condition and management of the applicant bank." The examiner must "evaluate" each such individual as to such factors as "sincerity of purpose" and "character and standing in the community." Although such mixtures of information and subjective opinion or emotion may properly be protected from public knowledge, I think the irreducible minimum of procedural fairness requires that no derogatory information or opinion should be used against

⁷ COMPTROLLER OF THE CURRENCY, GUIDELINES FOR NATIONAL BANK DIRECTORS 43-44 (1964). The Chief Counsel to the Comptroller says as of December 2, 1966, that this material "has never been published as a regulation and was never intended to have the force of regulations." But the "Guidelines" contain the only published statement concerning the examiner's report. Section 3 of the Administrative Procedure Act, 5 U.S.C.A. § 552 (Special Pamphlet 1966), requires every agency to publish in the *Federal Register* its rule of procedure. I do not see how an agency's only published statement of a portion of its procedural methods can be regarded as something other than a regulation. The "traditional" practice is shown in a brief filed in behalf of the Comptroller on February 1, 1965, and signed by three attorneys of the Department of Justice: "Smithfield requested an opportunity to examine Eastern's written application and any supporting data, an opportunity to examine the report and recommendation of the Comptroller's Regional Bank Examiner . . . and a copy of the Comptroller's decision Consistent with the traditional procedures and practices of the Comptroller's office, these requests were denied." Brief for the Comptroller of the Currency at 4-5, *First Nat'l Bank of Smithfield v. Saxon*, 352 F.2d 267 (4th Cir. 1965).

any individual whose rights are at stake without privately confronting him with it and its source and listening to what he has to say. And if a bank is denied a branch application because of a supposed weakness in its management, I think it should have the procedural right to respond informally and privately to the specific evidence against it.

2. Findings

The Comptroller should in every case furnish to parties a systematic statement of findings of fact. Findings are one of the best safeguards against hasty or careless action, and findings are desirable for many other reasons, including facilitation of judicial review. Even if findings were always made, the Comptroller's discretionary power would be enormous; the requirement of findings properly confines discretion and regularizes it. Findings are required by section 8 of the Administrative Procedure Act,⁸ which may or may not apply to the licensing of banks and of branches.⁹ But whether or not it applies is of little consequence because the requirement is only a codification of previously existing law, and the common-law requirement of findings, embodied in many Supreme Court decisions,¹⁰ clearly does apply.

Each of the two practices of acting on undisclosed evidence and making decisions unsupported by stated findings seems to me undesirable when considered alone, but the two practices in combination seem to multiply the undesirability. The two practices in combination mean absence of protection against the worst sort of administrative arbitrariness, even when the interests at stake are of great magnitude.

The almost invariable protest against my suggestion that findings ought to be systematically stated takes the form of a question: "What should we do when we think the key man may have been implicated in a shady transaction but we can't prove it? Can't you see that the public will suffer if we have to support our decisions with findings based upon evidence?" One answer to this question is that the public *will* sometimes suffer from a requirement of findings supported by evidence, just as the public may sometimes suffer from our refusal to imprison for crime unless we have the evidence of guilt. The public might be better protected against crime if the basis for imprisonment were the prosecutor's suspicion instead of a judgment based on a record of evidence. But possible harm to the public is not the only consideration; the need for justice to the individual must also be weighed. Although a determination of guilt without findings based on a record of evidence

⁸ 5 U.S.C.A. § 557 (Special Pamphlet 1966).

⁹ Section 8 applies only to adjudications required by statute or by due process to be determined on the record after opportunity for agency hearing, and I still regard the question whether such a hearing is required as an open one. See notes 2-3 *supra*.

¹⁰ See the various authorities discussed in TREATISE ch. 16. The first sentence of § 16.05 suggests the prevailing flavor: "The practical reasons for requiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, irrespective of a statutory requirement."

may be easier to justify in the context of an application for a bank charter than in the context of a criminal conviction, I think the present combination of secret evidence, failure to state findings, and determinations based on guesswork and suspicion is both unjust and unnecessary.

A second argument against stating findings is that appraisal of particular personalities is at the heart of most decisions about charters and branches and that a public statement reflecting adversely on a bank manager will scare away depositors. That this argument is powerfully supported by banking tradition is undeniable. But systematic findings can serve their purpose without damaging the reputations of bank managers. I do not expect a finding to announce that "X is stupid" or that "X is vulnerable to blackmail because of his affair with Mary Q. Jones" or even that "X is uninspired and unprogressive in his ideas about managing a bank." Honest and meaningful findings can be made with less bluntness. A finding that "Y is on the whole more likely to provide the service the community needs" will frighten depositors no more than an order which, without findings or reasons, grants Y the charter and denies it to X.

A third argument against stated findings is that clarifying the basis for decisions will give ammunition to those who want to fight further in a reviewing court. I agree that it will. Some useless litigation will result. And so will some correction of injustice.

Whether or not the Comptroller is now in process of adopting a system of findings seems somewhat uncertain. During late 1966 the Comptroller has moved to a system of stating written reasons, but in the first cases in which that has been done, findings have not been included.

3. *Reasoned Opinions*

The Comptroller and the other banking agencies have all been clearly violating section 6(d) of the Administrative Procedure Act¹¹ in the many cases in which they deny applications without stating reasons. I think opinions should be written on all significant issues of law and policy, whether applications are granted or denied. The strange fact is that the files of chartering and branching cases in the Comptroller's office often contain staff memoranda which are in the nature of reasoned opinions, but such opinions are normally withheld from the parties. Not much further effort would be required to turn the memoranda into opinions that could be furnished to parties.

A reasoned opinion, along with findings of fact, is a safeguard against arbitrariness. Findings and opinions do not always prevent arbitrariness, but they pull in that direction. An administrator who finds expedient an escape from the discipline of a reasoned opinion can delegate the opinion writing to a staff who can use boilerplate or who can substitute formal reasons for motivating reasons, but this in-

¹¹ 5 U.S.C.A. § 555(d) (Special Pamphlet 1966).

trinsic weakness in the requirement of opinions normally reaches only a small proportion of the cases, as much experience proves.

That findings and opinions are something less than a perfect protection against arbitrariness is not a good reason for losing such benefits as they provide. Almost all agencies of the government have long recognized the desirability of findings and opinions, as have the federal courts.

I am happy to add that as of late 1966 the Comptroller has adopted a system of systematically stating written reasons for decisions.

4. *Secret Law*

The opinions that are written should confine and guide discretion, and should inform affected parties. The opinions should be open to public inspection, as required by section 3(b) of the Administrative Procedure Act¹² in its present form, which clearly applies. The accumulation of opinions should mean the gradual development of a body of administrative case law, so that discretion will no longer be altogether at large, for discretion will and should be referable to the case law. With the preparation of opinions will naturally go a respect for precedents, subject, of course, to distinguishing and overruling.

The combination of findings, opinions, and precedents should mean a structuring of discretion. The program now involves a degree of unstructured discretion which is both unnecessary and unsound. Although I think the many voices that cry out against broad or unguided administrative discretion usually fail to understand the indispensability of that kind of discretion for many of the modern tasks of government, yet I think that *unnecessary* discretionary power should be cut back whenever it can be cut back without impairing substantive objectives. In this instance, the structuring of the discretionary power will not impair the program but should improve it.

5. *Rules and Policy Statements*

The Comptroller makes no effort to clarify his policies through publication of rules or policy statements. In the formal rules published in the *Code of Federal Regulations*, no amplification is provided for the statement that "The Comptroller of the Currency determines whether or not the national banking association is entitled to commence the business of banking," except that five "matters investigated" are listed.¹³ The rules should say what can feasibly be said about the policies that govern the granting and denying of charters. An Annual Report makes one general statement that has meaning: "It can never be in the public interest to protect banks against competitors who are either more efficient or more responsive to public de-

¹² 5 U.S.C. § 552 (Special Pamphlet 1966). The Public Information Act, 80 Stat. 250 (1966), 5 U.S.C.A. § 1002 (Supp. 1966) (effective July 4, 1967), may or may not apply; see note 17 *infra*.

¹³ 12 C.F.R. § 4.2 (Supp. 1966).

mands. There are, moreover, positive public benefits to be derived through the periodic introduction into the banking industry of new competitive forces with fresh ideas and fresh talents."¹⁴ Such a statement is all to the good as far as it goes, but it does not go nearly far enough; the statement should be elaborated, and other policies should be stated in as much detail as is feasible. Through opinions in adjudicated cases, the Comptroller should clarify his policies as issues arise, and rules or policy statements should be used to supplement the adjudicatory opinions. The Comptroller should learn from any of the government's most advanced agencies how to clarify law and policy through interacting adjudicatory opinions and rules; the Securities and Exchange Commission, for instance, writes reasoned opinions in all adjudications, thereby building a body of law through precedents, and it also constantly develops and refines its law through the use of the rule-making power.

III

AN INCIDENT ABOUT THE FDIC

In the *Washington Post* for September 2, 1966, is a long story under the headline, "Dispute Over Little Bank Ruffles FDIC's Façade."¹⁵ The FDIC, by a vote of two to one, granted insurance for a bank at Sherwood, Arkansas, although the applicant, who was described as "an affable and affluent wholesaler of Arkansas land and liquor," was reportedly disapproved by the examiners, and even though the Comptroller of the Currency had previously found that no bank was needed at Sherwood. As to the soundness of the decision I express no opinion. But as to the FDIC's failure to state findings or reasons I have an emphatic opinion: The refusal to make findings is contrary to the law of the federal courts, and the failure to write a reasoned opinion is bad policy. The sophisticated reporter for the *Washington Post* plays up the failure of the FDIC to state either facts or reasons on the public record: "The whole affair is 'classified' so far as FDIC is concerned. Chairman Randall won't even confirm that he voted to insure the bank. His position is that the internal workings of FDIC are 'confidential and privileged.'" The internal workings may properly be confidential, but the facts and the reasons should be open to the public in absence of special reason for confidentiality. Furthermore, if anything in the nature of an opinion was written, its concealment is specifically forbidden by section 3(b) of the Administrative Procedure Act unless it was "required for good cause to be held confidential." Oddly enough, however, the monstrously drafted Freedom of Information Act, which becomes effective July 4, 1967,¹⁶ may authorize the banking agencies to conceal adjudicatory opinions which the present Administrative Procedure Act requires them to open to public inspection.¹⁷

¹⁴ 102 COMPROLLER OF THE CURRENCY ANN. REP. 3 (1964).

¹⁵ Harwood, *Dispute Over Little Bank Ruffles FDIC's Façade*, *Washington Post*, Sept. 2, 1966, at A1, col. 6.

¹⁶ 5 U.S.C.A. § 1002 (Supp. 1966) (effective July 4, 1967).

¹⁷ No reasonable person could have intended any such result, but the sponsors of the Information

IV

CONCLUSIONS

Although I think trial-type hearings are usually inappropriate for deciding how many banks and which banks should serve a community, I can find no justification for the banking agencies' systems of secret evidence, secret law, and secret policy. Evidence should be disclosed except when confidentiality is essential. Findings of fact should be openly stated, as the federal courts have long required. Reasoned opinions should explain decisions on issues of law or policy. The resulting case law should be open to public inspection and should guide later determinations. Rules and policy statements should supplement the case law.

That able banking lawyers have so long tolerated such an intolerable system seems to me surprising. Perhaps the explanation lies in the prevailing assumption among practitioners that the choice for adjudication is between trial-type procedure and no procedural safeguards. The Administrative Procedure Act is based on the same unsound assumption that practitioners commonly fall into; for decisions without trials it fails to require disclosure of evidence, findings of fact, or reasoned opinions. I think lawyers both inside and outside the government should recognize the need for safeguards when trials are inappropriate.¹⁸

Two principles of broad applicability—important far beyond the banking agencies but still little recognized—seem to me to be brought out by this examination of the banking agencies' procedure: (1) Procedural safeguards may be vital for adjudications for which trials are inappropriate. (2) Unstructured and unchecked discretionary power of the kind the Comptroller has been exercising in these licensing cases (and of the kind that exists in many agencies throughout the govern-

Act did not allow themselves time for responsible draftsmanship. The act amends § 3 of the APA, and the new § 3 provides in clause (8) of subsection (e) for exemption from all of § 3 of "matters that are . . . contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions."

The new act opens a great deal that its sponsors would want to keep confidential, and it allows concealment of a great deal that its sponsors would want to open to public inspection. The courts which are called upon to enforce the act will no doubt often strain the literal language to try to produce sensible results. In addition, they probably will sometimes resort to the constitutional theory of executive privilege to override the act's provisions so as to protect information that clearly deserves confidentiality, but no constitutional doctrine is available for curing the harm done in closing information that ought to be open, such as the adjudicatory opinions of the banking agencies.

Despite the words of the Information Act, I think that responsible officers in the banking agencies should recognize that the literal statutory words produce a result that could not have been intended, and that the act should be interpreted to require opening all final opinions to public inspection.

¹⁸ The American Bar Association's bill for revising the Administrative Procedure Act, S. 2335, 88th Cong., 1st Sess. (1963), provides in § 1004(b) that a reviewing authority within an agency in "informal adjudication" shall "furnish to a party a statement of the reasons for its decision." The bill would not require for such informal adjudication either a disclosure of evidence or findings of fact or a system of open precedents; nor would it require reasons for initial determinations. Section 5(b) of S. 1336, 89th Cong., 2d Sess., passed by the Senate in June, 1966, requires for adjudications without trials that parties be informed of "the issues, facts and arguments involved"; this may be a requirement of disclosure of evidence, but no provision concerning adjudications without trials is made for findings, reasoned opinions, or a system of open precedents.

ment) should, whenever practicable, be structured and checked through disclosure of evidence, open findings, reasoned opinions, a system of open precedents, and clarification through interaction of administrative case law with rules and policy statements.

A word of commendation seems appropriate for the General Counsel of the Federal Home Loan Bank Board, who without any outside influence has initiated procedural changes in the right direction, and for the Chief Counsel to the Comptroller of the Currency, who during 1966 has been the key figure in the adoption of desirable procedural changes which move away from the system of secret facts, secret law, and secret policy.