



Summer 6-1-1973

De Novo Review of Informal Procedures of the Comptroller of the Currency

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Administrative Law Commons](#)

Recommended Citation

De Novo Review of Informal Procedures of the Comptroller of the Currency, 30 Wash. & Lee L. Rev. 261 (1973).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol30/iss2/5>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

DE NOVO REVIEW OF INFORMAL PROCEDURES OF THE COMPTROLLER OF THE CURRENCY

The discretionary and informal procedures employed by the Comptroller of the Currency in processing bank and branch bank charter applications¹ have received a considerable amount of praise.² What criticism there has been has centered primarily upon the uncontrolled nature of much of the Comptroller's discretion,³ and in recent years the Comptroller's office has moved decisively to remedy procedural inadequacies.⁴ These efforts have, for the most part, met with approval in commentaries⁵

¹See generally Bloom, *Hearing Procedures of the Office of the Comptroller of the Currency*, 31 LAW & CONTEMP. PROB. 723 (1966).

²Professor Davis has stated:

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 system may be one of the most successful, if not the most successful.

1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.04 (1958). This observation has been echoed by federal courts which have quoted Professor Davis. See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 330 (1963); *Bridgeport Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 307 F.2d 580, 581, 583 (3d Cir. 1962), cert. denied, 371 U.S. 950 (1963); *Northwest Bancorporation v. Bd. of Governors of Fed. Reserve Sys.*, 303 F.2d 832, 843 (8th Cir. 1962).

³Prior to 1965, but only occasionally since then, the Comptroller passed upon applications without the benefit of either public or private hearings. Decisions were based upon confidential evidence gathered by the field examiner which was kept secret from the interested parties. While parties could submit evidence to the field examiner, the confidentiality of the evidence prevented rebuttal. Applicants were merely advised of the Comptroller's decision without receiving a systematic statement of reasons or enlightenment as to findings of fact. During 1965-66, Professor Davis conducted a study of the Comptroller's procedural practices and criticized them as presenting possible due process violations. See Davis, *Administrative Procedure in the Regulation of Banking*, 31 LAW & CONTEMP. PROB. 713 (1966). See also K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.16 (Supp. 1970).

⁴Subsequent to Professor Davis' criticisms and the Fourth Circuit's decision in *First Nat'l Bank of Smithfield v. Saxon*, 352 F.2d 267 (1965), Comptroller Saxon instituted the first reforms in the Comptroller's office in its one hundred year history. The Comptroller now opens his evidentiary files for the inspection of the parties, conducts formal hearings at the request of an interested party in contested cases, issues written opinions in contested cases, and, where the application is denied, provides a brief statement of reasons for the denial. Bloom, *Hearing Procedures of the Office of the Comptroller of the Currency*, 31 LAW & CONTEMP. PROB. 723 (1966). Mr. Bloom, who was Chief Counsel for the Office of the Comptroller, stated that these reforms were partially in response to Professor Davis' findings. Professor Davis has suggested that the reforms might have been a response to the sweeping review imposed by the Fourth Circuit in *First Nat'l Bank of Smithfield v. Saxon*, 352 F.2d 267 (4th Cir. 1965). K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.16 (Supp. 1970).

⁵See Davis, *Banking Agencies' Secrecy: A Response to Mr. Bloom*, 31 LAW & CONTEMP. PROB. 731 (1966); K. DAVIS, ADMINISTRATIVE LAW TEXT § 4.04 (3d ed. 1972).

and court decisions.⁶

However, it has been primarily within the last ten years, while the Office of the Comptroller has been responding to the observations of its critics, that a large body of case law has developed around the Comptroller's informal procedures.⁷ In one of the early cases of this period, *First National Bank of Smithfield v. Saxon*,⁸ the Fourth Circuit Court of Appeals, expressing great concern that due process elements of fairness were not being extended to interested parties, formulated a new remedy for complainants.⁹ The *Smithfield* holding has been summarized as essentially providing that

[t]he Comptroller is not required to hold a hearing on an application, but unless he does hold an adversary hearing, a protestant is entitled to a determination de novo in court.¹⁰

⁶See, e.g., *Sterling Nat'l Bank v. Camp*, 431 F.2d 514 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971); *Ramapo Bank v. Camp*, 425 F.2d 333 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970); *Warren Bank v. Camp*, 396 F.2d 52 (6th Cir. 1968); *Citizens Bank v. Camp*, 387 F.2d 375 (5th Cir. 1967), *cert. denied*, 391 U.S. 904 (1968); *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966).

⁷See *Sterling Nat'l Bank v. Camp*, 431 F.2d 514 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971); *Ramapo Bank v. Camp*, 425 F.2d 333 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970); *First-Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086 (4th Cir. 1969); *Warren Bank v. Camp*, 396 F.2d 52 (6th Cir. 1968); *Citizens Bank v. Camp*, 387 F.2d 375 (5th Cir. 1967), *cert. denied*, 391 U.S. 904 (1968); *American Bank & Trust Co. v. Saxon*, 373 F.2d 283 (6th Cir. 1967); *Webster Groves Trust Co. v. Saxon*, 370 F.2d 281 (8th Cir. 1966); *First Hardin Nat'l Bank v. Fort Knox Nat'l Bank*, 361 F.2d 276 (6th Cir. 1966); *First Nat'l Bank of Smithfield v. Saxon*, 352 F.2d 267 (4th Cir. 1965); *Community Nat'l Bank v. Saxon*, 310 F.2d 224 (6th Cir. 1962); *Wood County Bank v. Camp*, 348 F. Supp. 1321 (D.D.C. 1972); *Citizens Nat'l Bank v. Camp*, 317 F. Supp. 1389 (D. Md. 1970); *Bank of Haw River v. Saxon*, 257 F. Supp. 74 (M.D.N.C. 1966); *Bank of Sussex County v. Saxon*, 251 F. Supp. 132 (D.N.J. 1966).

⁸352 F.2d 267 (4th Cir. 1965).

⁹*Id.* at 271, 273.

¹⁰*Citizens Nat'l Bank v. Camp*, 317 F. Supp. 1389, 1394 (D. Md. 1970). To date, this appears to be the clearest and most concise enunciation of the *Smithfield* remedy. In *Smithfield*, the Fourth Circuit stated:

Procedural due process is not offended by the Comptroller's practice. The absence of a hearing provision in the Banking Act raises no Constitutional question, for the omission was within the power of Congress. . . . However, all apprehension is dissipated by the APA's grant in § 1009 of a review of the Comptroller's decision in the District Court to any party in interest.

. . . .

For the court review no evidential record need first be developed before the Comptroller. No such prerequisite is exacted by the APA; plainly it envisions instances where the evidence initially is to be taken in a suit reexamining the agency action. To this end the Act gives the court jurisdiction to "hold unlawful and set aside agency action . . . found to

For seven years the Fourth Circuit had no occasion to reapply the *Smithfield* remedy, and since other circuits had refused to apply it,¹¹ the formulation was thought to be either moribund or of dubious validity.¹² However, in the recent decision of *Pitts v. Camp*,¹³ the vitality of the *Smithfield* formulation was re-established within the Fourth Circuit.

In *Pitts*, the plaintiffs had applied to the Comptroller of the Currency in August, 1967, for a charter for the organization of The First National Bank of Hartsville, South Carolina.¹⁴ The Comptroller's regional field examiner investigated the applicants, the community, and other interested parties and held several informal conferences with the applicants.¹⁵ A formal hearing was not requested by the applicants or any other party, and none was held. On April 15, 1968, the applicants' attorney was notified by letter and by telegram from the Comptroller that the charter request had been denied, but no explanation of the denial was given.¹⁶

be . . . unwarranted by the facts to the extent that the facts are subject to trial de novo. . . ." § 1009(e)(6). Nothing in the statute precludes the court from discovering the facts for the first time.

352 F.2d at 270-71. For other examples of attempts to summarize the *Smithfield* formulation, see *First-Citizens Bank and Trust Co. v. Camp*, 409 F.2d 1086, 1094 (4th Cir. 1969); *Bank of Haw River v. Saxon*, 257 F. Supp. 74, 79 (M.D.N.C. 1966); *Bank of Sussex County v. Saxon*, 251 F. Supp. 132, 142-43 (D.N.J. 1966).

¹¹ See *Ramapo Bank v. Camp*, 425 F.2d 333 (3d Cir.), cert. denied, 400 U.S. 828 (1970); *Warren Bank v. Camp*, 396 F.2d 52 (6th Cir. 1968); *Citizens Bank v. Camp*, 387 F.2d 375, 376 (5th Cir. 1967), cert. denied, 391 U.S. 904 (1968); *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966).

¹²In reference to *Smithfield*, Professor Davis notes:

The authoritative effect of the case today, if any, is weak, for three reasons: (1) The later decisions of the 5th, 6th, and 8th circuits are unanimous and clear in holding that de novo review is not required. (2) The dissenting opinion of Judge Sobeloff in the *Smithfield* case was especially powerful; the decision was two to one. (3) The comptroller's failure to disclose to the competing bank the application and supporting data may have influenced the decision.

K. DAVIS, DISCRETIONARY JUSTICE 122 n.36 (1969).

¹³463 F.2d 632 (4th Cir. 1972).

¹⁴Authority to charter national banking organizations has been delegated by Congress to the Comptroller of the Currency under the provisions of the National Bank Act §§ 21-27, 12 U.S.C. §§ 21-27 (1970).

¹⁵The Comptroller, or "a special commission appointed by him", is authorized to conduct such investigations "for the purpose of inquiring into the condition of such association." *Id.* at § 27.

¹⁶The applicants were informed as follows:

Dear Mr. Herring:

This will confirm our telegram of today's date regarding the application submitted by you and your associates to organize a National Bank at Hartsville, South Carolina.

On the basis of information developed by our Field Investigation,

Upon a request to the Comptroller for reconsideration, the field examiner undertook a new investigation; informal conferences with the applicants were held again, and the field examiner was supplied with additional data from the interested parties. Once again, on July 29, 1969, the application was rejected by the Comptroller. This time, however, the applicants were notified that the Comptroller was "unable to reach a favorable conclusion as to the need factor."¹⁷

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.

We regret to inform you that the application has been disapproved.
463 F.2d at 633.

¹⁷This notification provided:

We have carefully considered the various material developed in connection with the reconsideration of an application for a new National Bank at Hartsville, South Carolina, filed by you and your associates. This review included all of the material submitted by you at various times since the disapproval of the application in April of 1968, as well as the material developed during the course of the most recent field investigation by a National Bank Examiner.

You and the members of the group would be less than human not to feel strongly on this question which is of such importance to you. On each application we endeavor to develop the need and convenience factors in conjunction with all other banking factors and in this case we were unable to reach a favorable conclusion as to the need factor. The record reflects that this market area is now served by the Peoples Bank with deposits of \$7.2MM, The Bank of Hartsville with deposits of \$12.8MM, The First Federal Savings and Loan Association with deposits of \$5.4MM, The Mutual Savings and Loan Association with deposits of \$8.2MM and the Sonoco Employees Credit Union with deposits of \$6.5MM. The aforementioned are as of December 31, 1968.

It was a difficult case and you and your associates certainly presented your side of the case with fairness and diligence. We are unable to find any basis to change the decision as rendered. All we can say to you is that we did give this matter the most meticulous consideration and reached a conclusion contrary to what you had sought.

Id. at 633-34.

The imprecise terminology employed by the Comptroller in speaking of the "need factor" was a source of confusion to the Fourth Circuit on appeal. It seems to be well settled that the need of the community is a factor which the Comptroller may consider when processing bank charter applications. However, despite the Comptroller's recitation of the bank deposits of the community, the Fourth Circuit found considerable ambiguity in interpreting the meaning of the "need factor":

Questions immediately arising are, for example, whether the need is that of corporate or individual borrowers, local or non-resident depositors, mercantile or development capital, or the creation of desirable competition. Reasonably imaginable are other areas of pertinent consideration, untouched in the Comptroller's communications.

The plaintiffs appealed to the district court for a writ of mandamus.¹⁸ After admitting the administrative file on the application into the record, the Comptroller moved for summary judgment. The district court granted the motion, reasoning that the plaintiffs' right to a trial de novo under the *Smithfield* formulation had been waived by their failure to request a formal hearing before the field examiner.¹⁹ Basing its decision on the information contained in the administrative file and seeking solely to determine whether the Comptroller's denial was an abuse of his discretion, the court held that the need factor was within the peculiar competence of the Comptroller and that his rejection of the application "was neither capricious nor arbitrary."²⁰

A unanimous decision by the Fourth Circuit Court of Appeals vacated the judgment of the district court.²¹ The court discussed neither the separate assignments of error ascribed to the district court by the appellants nor the district court's finding that the appellants had waived their right to a trial de novo. Rather, the court held that it was impossible to determine if the Comptroller's decision was arbitrary, capricious, or an abuse of discretion, because his ruling did not sufficiently state the reasons for the denial. Noting that "the Comptroller has twice inadequately and inarticulately resolved the appellant's presentation",²² the court remanded the case to the district court, rather than to the Comptroller, for a trial de novo²³ to determine whether, by a preponderance of the evidence, the Comptroller's ruling was "capricious or an abuse of discretion."²⁴

In *Pitts*, the Fourth Circuit found itself presented with the same issues as in *Smithfield*, although the *Smithfield* decision was broader in scope.²⁵

Id. at 634. Thus, in view of the Fourth Circuit's observations it is possible to conclude that the "need factor" has no single definition, but takes its shape from whatever considerations the Comptroller deems significant in a particular set of facts.

¹⁸321 F. Supp. 407 (D.S.C. 1970). A motion for dismissal for lack of jurisdiction over the subject matter was denied, the court reasoning that it did have jurisdiction pursuant to § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 (1970). Section 10(a) provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

¹⁹329 F. Supp. 1302, 1304-05 (D.S.C. 1970).

²⁰*Id.* at 1307-08.

²¹463 F.2d at 632.

²²*Id.* at 634.

²³It is interesting to note that Judge Bryan wrote the opinions in both *Pitts* and *Smithfield*, the latter being the only authority cited in support of the remedy applied in the former.

²⁴463 F.2d at 634.

²⁵In *Smithfield*, the Fourth Circuit also addressed the questions of whether there was a requirement for the Comptroller to hold a formal hearing and whether there was a right to judicial review. The court concluded that the provisions of the National Bank Act were

The plaintiff in *Smithfield* was a North Carolina bank which was adversely affected by the decision of the Comptroller to award a license to a competitor bank for a branch office in the same village where plaintiff's main office was located. The approval of the application was unaccompanied by a statement of reasons. Although the plaintiff bank had been granted a conference with the Comptroller prior to the approval of the license, it was not permitted to inspect the application or the investigative file, or to cross-examine the applicants. Following an adverse ruling in the district court,²⁶ the complaining bank appealed to the Fourth Circuit,²⁷ requesting a remand to the Comptroller with instructions to conduct a formal hearing on the application. While denying the appellant's request for a formal hearing, the Fourth Circuit did agree that the bank was entitled to judicial review of the Comptroller's decision.²⁸ Basing its decision on section 10(e) of the Administrative Procedure Act,²⁹ the court remanded the case to the district court for a trial de novo in order to determine whether the Comptroller's approval was an abuse of discretion.³⁰

An analysis of the decision in *Pitts* is necessarily twofold. The application of the *Smithfield* remedy of de novo review must first be evaluated in terms of its present statutory foundation. If the remedy is statutorily permissible, it must then be considered in the broader context of its effectiveness and desirability.

sufficiently broad to allow the informal procedures employed, but that the courts had ample authority to review the Comptroller's actions under section 10(e) of the Administrative Procedure Act. 352 F.2d at 269-70.

²⁶232 F. Supp. 725 (E.D.N.C. 1964).

²⁷352 F.2d 267 (4th Cir. 1965).

²⁸*Id.* at 269.

²⁹Administrative Procedure Act § 10(e), ch. 324, § 10(e), 60 Stat. 243 (1946), as amended 5 U.S.C. § 706 (1970).

³⁰An important corollary to the ruling for a trial de novo prescribes a different standard of evidence in review of informal procedures than in judicial review of formal hearings. Noting that the burden upon the agency in review of its decisions is customarily to support the decision with substantial evidence, the Fourth Circuit held:

[A] necessary consequence of his unilateral procedure is that the facts on which the Comptroller presumably acted should not be given the preferred position accorded by the substantial-evidence rule. . . . Applied here, the plaintiff would be bound by evidence offered in a proceeding in which it was not heard. Hence, there is no place in the review for an opening-presumption of correctness of any fact which it may appear to the Court was adopted by the Comptroller for his decision.

352 F.2d at 272. Cf. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 (1958); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

Basis of Authority for De Novo Review

Judicial review of administrative action may range in scope from nonreviewability to complete substitution of judicial judgment on all questions.³¹ De novo review is a form of review close to the latter extreme.³² Originally courts would not undertake a de novo review without a specific independent statutory or constitutional basis, since article III of the Constitution was thought to prohibit the exercise of an administrative function by the judiciary.³³ The degree of review which could be exercised under the name of de novo review, therefore, was determined by the particular statutory or constitutional basis upon which the court relied. It would appear, however, that de novo review always contemplates a broader review of evidence than that employed under the frequently applied substantial evidence rule,³⁴ because the reviewing court itself hears the evidence and makes its own findings of fact.³⁵

There is not a specific, independent, statutory provision which provides for any form of judicial review of the actions of the Comptroller of the Currency.³⁶ However, section 10(e) of the Administrative Procedure Act provides for de novo review of some administrative actions across the broad range of administrative practice to which that act applies.³⁷ Relying upon this statutory grant of authority, the court in *Pitts* ordered a de novo review by the district court to include the submission of all relevant evidence from the appellants, the Comptroller, and any intervenors. Acting upon this evidence, the district court will make its own findings of fact and conclusions of law in deciding whether the appellants have shown by a preponderance of the evidence that the Comptroller's ruling was capricious or an abuse of discretion.³⁸

Section 10(e) of the Administrative Procedure Act grants reviewing courts limited authority to undertake review by trial de novo. That section provides in part:

³¹4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 (1958).

³²*Id.* at §§ 29.01, 29.07.

³³*Id.* § 29.10; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 620-23 (1965).

³⁴4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.07 (1958). *See also* note 30 *supra*.

³⁵4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.07 (1958).

³⁶Indeed, the Comptroller has customarily argued that his actions are immune from judicial review under § 10(a) of the Administrative Procedure Act which denies review under that act where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1970). This was the Comptroller's argument before the Fourth Circuit in *Pitts*. Brief for Appellee at 9-17, *Pitts v. Camp*, 463 F.2d 634 (4th Cir. 1972). It does not appear that this contention has ever been upheld.

³⁷*See* text accompanying note 39 *infra*.

³⁸463 F.2d at 634.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.³⁹

While this section might seem to apply only in conjunction with a specific statutory grant of authority for *de novo* review, the legislative history of the Administrative Procedure Act⁴⁰ indicates that the Congress envisioned this provision by itself as a direct source of authority for the application of *de novo* review:

The sixth category expresses the . . . situation in which Congress has not provided by statute for an administrative hearing and consequently any relevant facts must be presented *de novo* to original courts of review It should be noted that the sixth category, in accordance with the established rule, would permit trial *de novo* to establish the relevant facts as to the applicability . . . of adjudications where there is no statutory administrative hearing.⁴¹

Insofar as an administrative hearing is not required by statute,⁴² it would

³⁹5 U.S.C. § 706 (1970).

⁴⁰S. Doc. No. 248, 79th Cong., 2d Sess., (1946).

⁴¹*Id.* at 39-40.

⁴²National Bank Act § 27, 12 U.S.C. § 27 (1970), provides in part:

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate. . . . But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter.

No mention is made in the statute of an administrative hearing and the terminology would appear to encourage informal procedures. The courts have interpreted this section liberally as granting the Comptroller broad discretion in both the procedural and substantive aspects of decision-making. *See Sterling Nat'l Bank v. Camp*, 431 F.2d 514, 516 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971); *Ramapo Bank v. Camp*, 425 F.2d 333, 341 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970); *Warren Bank v. Camp*, 396 F.2d 52, 55-56 (6th Cir. 1968); *Citizens Bank v. Camp*, 387 F.2d 375, 376 (5th Cir. 1967), *cert. denied*, 391 U.S. 904 (1968); *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381, 384-85 (8th Cir. 1966); *First Nat'l Bank*

seem that the Comptroller's informal procedures fall directly within the scope of section 10(e)2(F). In addition, it should be noted that those courts which have refused to order de novo review, when requested to do so, never stated or implied that they lacked statutory authority.⁴³

A recent decision of the Supreme Court, however, has considerably restricted the range of cases in which de novo review may be imposed. In *Citizens to Preserve Overton Park, Inc. v. Volpe*,⁴⁴ the Court reasoned that section 10(e) of the Administrative Procedure Act⁴⁵ authorizes de novo review to determine whether administrative action was unwarranted by the facts in only two circumstances.⁴⁶ First, the Court would approve de novo review of administrative action when the action "is adjudicatory in nature and the agency factfinding procedures are inadequate."⁴⁷ Second, trial de novo would be appropriate for review of nonadjudicatory (legislative or rule-making) action "when issues that were not before the agency are raised in a proceeding to enforce . . . agency action."⁴⁸

In view of the *Overton Park* decision, de novo review of the Comptroller's informal hearing procedures would seem to be permitted only if the Comptroller's factfinding procedures were found to be inadequate, for it seems reasonably clear that the decision regarding bank charter applications is adjudicatory in nature.⁴⁹ It would appear that the restrictions imposed by *Overton Park* upon de novo review should be applicable in *Pitts*, although the Fourth Circuit seems to have justified the remedy solely on the basis of *Smithfield* without considering the possible effects that *Overton Park* may have had upon its earlier holding. Therefore, it becomes necessary to determine whether the Fourth Circuit's application of de novo review is consistent with the guidelines announced in *Overton Park*.

Although the court in *Pitts* did not speak to the sufficiency of the Comptroller's factfinding procedures, previous Fourth Circuit decisions in *Smithfield* and *First-Citizens Bank and Trust Co. v. Camp*⁵⁰ provide

of *Smithfield v. Saxon*, 352 F.2d 267, 270 (4th Cir. 1965). See also 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.04 (1958).

⁴³See, e.g., *Ramapo Bank v. Camp*, 425 F.2d 333 (3d Cir.), cert. denied, 400 U.S. 828 (1970); *Warren Bank v. Camp*, 396 F.2d 52 (6th Cir. 1968); *Citizens Bank v. Camp*, 387 F.2d 375 (5th Cir. 1967), cert. denied, 391 U.S. 904 (1968); *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966).

⁴⁴401 U.S. 402 (1971).

⁴⁵5 U.S.C. § 706 (1970).

⁴⁶401 U.S. at 415.

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*First Nat'l Bank of Smithfield v. Saxon*, 352 F.2d 267, 270 (4th Cir. 1965); *Wood County Bank v. Camp*, 348 F. Supp. 1321, 1325 (D.D.C. 1972); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 4.04, 4.11 (1958).

⁵⁰409 F.2d 1086 (1969).

some guidance. In both cases, the court held that the Comptroller was authorized to decide bank and branch bank charter applications upon the basis of informal procedures, but that the Comptroller's failure to provide for a confrontation of adverse parties and an opportunity for rebuttal might offend due process notions of fairness.⁵¹ While this may be a valid objection as to the fairness of the Comptroller's factfinding procedures, it would not seem to be an objection to the adequacy of those procedures. Indeed, it is difficult to understand how there could be any such objection in light of repeated judicial observations,⁵² including the *Smithfield*⁵³ and *First-Citizens*⁵⁴ decisions, that the Comptroller's informal decision-making process is, by nature, free of the rigors of factfinding in a formal hearing, and that the process is adequate. It has even been suggested that the Comptroller's informal procedures are more effective and better suited for the resolution of banking questions than formal hearings.⁵⁵

Thus, it would seem that the Fourth Circuit considers the Comptroller's factfinding procedures to be unfair to the interested parties when formal hearings are not held but recognizes the legal sufficiency of the procedures in any event. However, the *Overton Park* guidelines speak in terms of factfinding inadequacy, not due process unfairness. While *Overton Park* did not define inadequacy, the Court noted that "such de novo review is authorized where the action is adjudicatory in nature and the agency factfinding procedures are inadequate."⁵⁶ The context of the statement also indicates that "inadequacy" modifies "factfinding": the Court was generally speaking of de novo review of administrative actions which are "unwarranted by the facts", not of actions which violate due process notions of fairness.⁵⁷ Hence it would seem that due process unfair-

⁵¹*Id.* at 1090.

⁵²See note 42 *supra*.

⁵³352 F.2d at 270.

⁵⁴409 F.2d at 1089-90.

⁵⁵See note 2 *supra*; ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, MONOGRAPH ON FEDERAL CONTROL OF BANKING, S. DOC. NO. 186, 76th Cong., 3d Sess., Part 14 30 (1940). The Attorney General's Committee's report, which was relied upon by Congress in the drafting of the Administrative Procedure Act, (see S. REP. NO. 752, 79th Cong., 1st Sess., (1946)), was skeptical of the need for formal hearings:

Nor is it proposed that the Comptroller must, in passing upon applications to organize banks, go through the motions of a formal hearing. . . . [T]he investigative technique now in use is probably superior to the device of formal hearings as a method of obtaining necessary information, preliminary to decision. So long as opportunities for informal conference are freely given, and so long as machinery for securing reconsideration is provided, the restrictions of a formal hearing are not necessary to assure that applicants will be fairly heard.

⁵⁶401 U.S. at 415.

⁵⁷*Id.*

ness does not warrant de novo review where agency factfinding procedures are adequate, as the Comptroller's procedures would appear to be.

The Fourth Circuit is apparently guaranteeing interested parties a formal hearing, either by request at the administrative level or by trial de novo at the appellate level. The premise would seem to be that formal hearings are *more* adequate factfinding vehicles than the Comptroller's informal procedures, a premise in direct conflict with the observations of prominent authorities.⁵⁸

Since the other circuits have concluded that the Comptroller's informal procedures are adequate, a conclusion the Fourth Circuit has adopted in *Smithfield* and *First-Citizens*, the Fourth Circuit would seem to be imposing de novo review to provide what it considers to be fairer factfinding procedures, rather than to correct inadequate procedures. If such a policy for the imposition of de novo review does not exceed the authority of the courts as explained in the *Overton Park* decision, it seems to border upon the limits of that authority.

Even if the court in *Pitts* was acting within the limits of its authority in ordering a de novo review, the question of the desirability of such a review still remains. It is upon this consideration that the Fourth Circuit seems to depart from the decisions of other circuits which, in general, have refused to review the Comptroller's informal procedures by trials de novo.

The Desirability of De Novo Review

The decisions of the four other circuits which have ruled on the application of de novo review to decisions of the Comptroller indicate that it is simply regarded as an inappropriate form of relief for the review of the informal procedures. The first two circuits to consider the issue, the Eighth⁵⁹ and the Fifth,⁶⁰ treated the matter in cursory fashion.⁶¹ However, the more recent Sixth Circuit decision in *Warren Bank v. Camp*,⁶² which has been followed in the Third Circuit,⁶³ treats the question of de novo review in greater detail.

⁵⁸See notes 2 & 55 *supra*.

⁵⁹*Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966).

⁶⁰*Citizens Bank v. Camp*, 387 F.2d 375 (5th Cir. 1967), *cert. denied*, 391 U.S. 904 (1968).

⁶¹Following a discussion of the broad discretionary powers enjoyed by the Comptroller, the courts simply stated that the actions of the Comptroller were not subject to review by trial de novo. Although no explanation was provided, it appears that the courts may have felt that a de novo review would infringe upon the Comptroller's discretion. 370 F.2d at 387; 387 F.2d at 376.

⁶²396 F.2d 52 (6th Cir. 1968).

⁶³*Ramapo Bank v. Camp*, 425 F.2d 333 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970).

In *Warren Bank*, the court observed that although the Comptroller has considerable discretion which may not be reversed unless arbitrarily or capriciously applied, the district courts also have considerable discretion in determining the degree of scrutiny they may attach to a review of the administrative action, since judicial review of administrative action ranges from no review at all to a full-scale trial on the merits.⁶⁴ In *Warren Bank*, the court did not suggest that de novo review was beyond the court's discretion; it stated only that "[t]here appears . . . to be general agreement that a trial de novo is not required for every complaint where abuse of administrative discretion is pled."⁶⁵

The argument that de novo review is not necessarily the most appropriate form of review seems implicit in the opening clause of section 10(e) of the Administrative Procedure Act, which directs a reviewing court to undertake a review "[t]o the extent necessary to decision and when presented."⁶⁶ In limiting the scope of review to the extent necessary to decision, Congress seems to have envisioned instances in which a statutorily valid trial de novo would be far too vigorous in light of the objections raised to the administrative action. It would appear that the provision regarding de novo review⁶⁷ is not a matter of right, but a means of implementing the judicial review provisions of the Administrative Procedure Act⁶⁸ in situations where any degree of judicial review would otherwise be impossible.⁶⁹

The decisions of the Fourth Circuit providing for de novo review whenever the Comptroller fails to hold a formal hearing place the district court in a peculiar situation. Upon remand, the district court will be faced with the problem of determining whether a decision is arbitrary without a statement of reasons for that decision. The review ordered in *Pitts* contemplates that the district court will make its own findings of fact following the presentation of evidence by all parties.⁷⁰ In essence, this

⁶⁴See 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 (1958).

⁶⁵396 F.2d at 56.

⁶⁶5 U.S.C. § 706 (1970). The original wording before amendment in 1966 was: "So far as necessary to decision and where presented . . ." Administrative Procedure Act § 10(e), ch. 324, § 10(e), 60 Stat. 243 (1946). This was the language in effect at the time of the Fourth Circuit's decision in *Smithfield*.

⁶⁷Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1970).

⁶⁸Administrative Procedure Act § 10(a), 5 U.S.C. § 702 (1970).

⁶⁹For example, the reviewing court would be warranted in undertaking a de novo review where the factfinding procedures were inadequate and the decision of the administrative agency was, therefore, arbitrary and capricious. In such a case, the court would be unable to review the decision for lack of an adequate evidential record. The reviewing court would therefore be forced to make its own findings of fact in order to grant relief. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.07 (1958).

⁷⁰463 F.2d at 634.

procedure will force the reviewing court to analyze the result of the administrative action rather than the specific reasons upon which the agency relied. Thus, the district court may affirm the action on reasoning other than that followed by the Comptroller or it may reverse the action emphasizing different facts. In either case, the court will be substituting its own discretion for that of the Comptroller. The ramifications of this problem have been previously considered by the Supreme Court, although in a slightly different context.

In its two decisions in *SEC v. Chenery Corp.*,⁷¹ the Supreme Court stated what have become cardinal rules of judicial review of administrative agency decision-making.⁷² The primary rule states that the reviewing court cannot intrude upon the domain of the agency and substitute its discretion for that of the agency.⁷³ The courts may not reverse agency judgments simply because they might have made a different determination;⁷⁴ they may only affirm or reverse as to the legality of the agency decision, and if they affirm they may only affirm upon the rationale invoked by the agency.⁷⁵ This reasoning recognizes the concept of separation of powers and the view that the judiciary should not intrude upon the functions Congress has delegated to the administrative agency because of the agency's special expertise and experience.⁷⁶

The application of this rule, of course, requires that the rationale of the administrative agency be clearly stated. This is the corollary to the primary *Chenery* rule. In the second *Chenery* decision, the Court noted:

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; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."⁷⁷

The Fourth Circuit in *Pitts* cited this rule from *Chenery* as justification

⁷¹318 U.S. 80 (1943); 332 U.S. 194 (1947).

⁷²See K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.12 (Supp. 1970).

⁷³318 U.S. at 88. It must be remembered that the *Chenery* cases were decided in 1943 and 1947, respectively. The rules of those cases were "simple but fundamental rule[s] of administrative law" and, therefore, of general applicability. 332 U.S. at 196. It would appear that where specific statutory or Supreme Court pronouncements call for a broader or lesser degree of review, the *Chenery* rules would be held in abeyance.

⁷⁴318 U.S. at 94.

⁷⁵*Id.* at 88.

⁷⁶332 U.S. at 209.

⁷⁷*Id.* at 196-97 (citation omitted).

for refusing to review the district court's opinion. The court held that the limited reasoning contained in the Comptroller's two letters of rejection was insufficient to sustain the district court's review.⁷⁸

The vitality of the *Chenery* principles has been preserved through subsequent Supreme Court decisions,⁷⁹ and these two rules have been applied to review of the Comptroller of the Currency's informal adjudicatory procedures, although never with regard to bank applications.⁸⁰ Numerous circuit court statements to the effect that the Comptroller's decisions must be upheld unless arbitrary, capricious, or an abuse of discretion,⁸¹ reflect the impact of the *Chenery* rules. While the Fourth Circuit appears to agree that review must look to whether the administrative action was arbitrary or capricious, the decisions ordering de novo review would not seem to be in the spirit of the *Chenery* principles.

The imposition of de novo review in *Smithfield* and *Pitts* would seem to imply a broader review than should be judicially undertaken. In *Pitts*, the court described the de novo review in detail:

The charter aspirants will open the trial with proof of their application and compliance with the statutory inquiries, and proffer of any other relevant evidence. Testimony may then be adduced by the Comptroller or intervenors manifesting opposition, if any, to the new bank. Thereupon the District Judge will determine, upon a statement of his findings of fact and conclusions of law, whether the appellants have shown by a preponderance of evidence that the Comptroller's ruling is capricious or an abuse of discretion.⁸²

Although the corollary *Chenery* rule states that a court may not guess

⁷⁸463 F.2d at 633.

⁷⁹*See, e.g.*, *Port of Portland v. United States*, 408 U.S. 811, 842 (1972); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *Cincinnati, New Orleans & Texas Pac. Ry. v. United States*, 400 U.S. 932, 934 (1970) (White, J., dissenting); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962).

⁸⁰*See, e.g.*, *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971). The Supreme Court, relying upon *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962), which had relied upon *Chenery*, stated that judicial review of the Comptroller's action in granting authority to national banks to operate collective investment funds could not be based upon post hoc rationalizations by the Comptroller or his counsel. *Accord*, *Wood County Bank v. Camp*, 348 F. Supp. 1321, 1327 (D.D.C. 1972).

⁸¹*Sterling Nat'l Bank v. Camp*, 431 F.2d 514, 516 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971); *Ramapo Bank v. Camp*, 425 F.2d 333, 341 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970); *Warren Bank v. Camp*, 396 F.2d 52, 56 (6th Cir. 1968); *Citizens Bank v. Camp*, 387 F.2d 375, 376 (5th Cir. 1967), *cert. denied*, 391 U.S. 904 (1968); *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381, 384-85 (8th Cir. 1966); *First Nat'l Bank of Smithfield v. Saxon*, 352 F.2d 267, 272 (4th Cir. 1965).

⁸²463 F.2d at 634.

at the administrative rationale, the Fourth Circuit's instructions do not specifically call for a clarification of the Comptroller's decision, despite the court's awareness that the Comptroller's decision was too vague upon which to base a review.⁸³ The instructions provide only that "[t]estimony may then be adduced . . ."⁸⁴ Therefore, unless the district court requests some form of a preliminary clarification of the decision from the Comptroller, the de novo review can only proceed in ignorance of the rationale of the administrative action.

The court's instructions to the district court do not direct, or even seem to contemplate, a remand to the Comptroller for a further explanation. Thus, it may be impossible for the district court to determine whether the decision was arbitrary or capricious in terms of the Comptroller's original reasoning, because the district court may never understand the reasoning underlying that decision. The rationale of the *Chenery* principles seems to have been corrupted to the extent that the reviewing court must evaluate the Comptroller's decision without the benefit of a statement of reasons. The court may have to substitute its own interpretation of the Comptroller's reasons to review the agency decision. Such an interpretation by the court presents a problem because the determination of whether the administrative action was arbitrary or capricious can only be made in terms of the reasons relied upon by the Comptroller, not merely in terms of the correctness of the result. In other words, the *Chenery* decisions require a reason prior to the review, against which evidence will be measured. The Fourth Circuit, however, has ordered a de novo review in *Pitts* without any provision for ascertaining the Comptroller's reasons prior to the hearing.

Without a clarification of the administrative action by the Comptroller prior to trial, the Comptroller's reasons will not be fully presented to the district court unless he offers testimony. Rationalizations of the bank charter denial by others than the Comptroller will clearly not suffice because the Supreme Court has been emphatic and persistent in declaring that a court may not render a decision based upon the post hoc rationalizations of anyone other than the Comptroller.⁸⁵ While it seems probable that the Comptroller will seek to defend his action before the district court by adducing testimony, the Fourth Circuit's instructions do not seem to require that he do so. The instructions merely state that the

⁸³*Id.* at 633-34.

⁸⁴*Id.* at 634.

⁸⁵*See* *Port of Portland v. United States*, 408 U.S. 811, 842 (1972); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

Comptroller "may" adduce testimony.⁸⁶ Should such testimony be admitted, it will come at a point in the hearing subsequent to the presentation of the unsuccessful charter applicants' case.⁸⁷ This sequence of testimony will deny the applicants a focal point for their presentation of evidence since a *de novo* trial, without a prior statement of reasons from the Comptroller, will effectively prevent the applicants from challenging the specific rationale of the Comptroller's decision.

The district court's *de novo* review seems likely to develop into a trial on the merits because the court has been authorized to conduct a completely new factfinding investigation. It would seem that all that would be necessary to determine the capriciousness of the Comptroller's decision would be to focus upon the reasonableness of the Comptroller's evaluation of the vague "need factor". However, the district court is authorized to receive "any . . . relevant evidence"⁸⁸ from the appellants, opponents of the new bank, the Comptroller, or any intervenors.⁸⁹

Since the Comptroller's decision should be judged only upon the rationale of the admittedly vague "need factor", any opposition unrelated to that factor, as the Comptroller employed that term, would seem, as a matter of policy, to be beyond the competence of the court to judge.⁹⁰ Because the Comptroller claimed to have based his decision upon the need factor, evidence not relevant to that particular factor would seem to be irrelevant as grounds of support for his decision.

Nevertheless, the Fourth Circuit appears to have specifically provided for a review in which the district court will be allowed to consider any

⁸⁶463 F.2d at 634.

⁸⁷*Id.* The Fourth Circuit's instructions to the district court ordered that the trial open with the presentation of evidence by the charter aspirants to be followed by testimony from the Comptroller or intervenors. See text accompanying note 84 *supra*.

⁸⁸463 F.2d at 634.

⁸⁹*Id.*

⁹⁰These are the same concerns that led Judge Sobeloff to dissent in *Smithfield*. 352 F.2d 267, 273-77 (dissenting opinion). Judge Sobeloff perceived that unless the decision of the Comptroller was clarified, the appellants would have a difficult time presenting their case because the Comptroller's decision would almost certainly come before the district court "clothed with a presumption of correctness," despite the majority's claims to the contrary. *Id.* at 274. Judge Sobeloff explained:

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. We should not require or tolerate such a game of "blind man's bluff".

Id. at 274.

evidence in support of any reason to justify the result of the Comptroller's decision to deny the bank charter. Therefore, instead of evaluating the result of the Comptroller's decision in terms of a clearly articulated reason, as directed by the *Chenery* decisions, the district court will be evaluating the result, without a clearly articulated reason, in terms of the body of evidence advanced by the parties at the trial de novo.

That the de novo review may possibly evolve into a trial on the merits is disguised only by the fact that the district court is instructed to determine if the "Comptroller's ruling is capricious or an abuse of discretion."⁹¹ However, such a determination appears to be an illusion unless the district court conducts the type of pre-trial investigation of the Comptroller's rationale which the Fourth Circuit has not instructed it to undertake. The broad evidentiary record which will be assembled before the district court will increase the difficulty that the court will face in trying to evaluate the capriciousness of the decision in light of the administrative rationale.

In its attempt to ascertain the rationale of the Comptroller, the district court may reverse the Comptroller because of its misunderstanding of his rationale, or it may substitute its own judgment in affirming his decision because it improperly interpreted his rationale while agreeing with his holding. If either decision should be made, the court would be violating the primary *Chenery* principle⁹² since it would be substituting its discretion for that of the Comptroller. *Chenery* and its progeny demand that an administrative decision be upheld only if the decision is valid and can be supported by the specific reasoning upon which the administrative agency relied.⁹³

Even if the district court should correctly interpret the Comptroller's decision, unless specifically authorized, the application of de novo review would seem to violate the concept of separation of powers which underlies the *Chenery* principles: the judiciary should not infringe upon the domain of the administrative agency.⁹⁴ The de novo review in *Pitts* involves a complete rehearing of the original application with the court making its own findings of fact and conclusions of law and comparing them with the decision of the administrative agency.⁹⁵ Yet the district court will be making these findings of fact upon a broad range of evidence without the benefit of the experience and expertise which the Comptroller presumably possesses.⁹⁶

⁹¹463 F.2d at 634.

⁹²318 U.S. at 88.

⁹³2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.07 (1958, Supp. 1970).

⁹⁴332 U.S. at 195.

⁹⁵463 F.2d at 634. See text accompanying note 84 *supra*.

⁹⁶*E.g.*, Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 387-88 (8th Cir. 1966).

In light of the totality of evidence which will be gathered, the unrestricted direction of the proceedings, and the vague meaning of the Comptroller's decision, the trial de novo will closely resemble the formal hearing which the Comptroller, acting within the scope of his discretion, chose not to conduct. It would seem to violate the principles of separation of powers inherent in *Chenery*, section 10(e) of the Administrative Procedure Act, and the statutory grant of authority to the Comptroller,⁹⁷ for the Fourth Circuit to provide for a review far beyond the scope necessary to determine whether the decision was arbitrary and capricious. The criticisms expressed about the efficacy of formal hearings in bank application proceedings before the Comptroller⁹⁸ seem to cast further doubt upon the wisdom of such a proceeding when it is undertaken by the district court.

Thus, it seems reasonable to conclude that de novo review was not the most appropriate remedy for the Fourth Circuit to have applied in *Pitts*. However, as the Supreme Court observed in *Overton Park*, the fact that de novo review is unwarranted does not mean that the reviewing court may not engage in a "substantial inquiry".⁹⁹ Therefore, it becomes necessary to determine what alternative remedies the Fourth Circuit might have fashioned in *Pitts* in order to conduct a "substantial inquiry".

Alternatives to De Novo Review

It would appear that in both *Pitts* and *Smithfield* the Fourth Circuit should first have made some attempt to ascertain the rationale upon which the Comptroller rejected the appellants' charter applications. Such an inquiry would have provided an adequate basis upon which the district court might have undertaken a more limited review. There would seem to be several remedies alternative to de novo review by which a clarification of the Comptroller's reasoning might have been obtained.

A more appropriate remedy than the trial de novo in *Pitts* might have been a remand to the district court with instructions to remand to the Comptroller for further proceedings. The Comptroller might then have furnished the district court with a clarification of his decision. The district court would have been able to determine whether there existed a prima facie case of abuse of discretion before conducting a hearing. If no prima facie case could have been established, summary judgment would then have been granted for the Comptroller on the basis of the administrative file and the Comptroller's clarification,¹⁰⁰ and the difficulties of a de novo

⁹⁷National Bank Act §§ 21-27, 12 U.S.C. §§ 21-27 (1970).

⁹⁸See note 55 *supra*.

⁹⁹401 U.S. at 415.

¹⁰⁰*Warren Bank v. Camp*, 396 F.2d 52, 56 (6th Cir. 1968).

hearing would have been avoided. Should the appellants have been able to establish a *prima facie* case of abuse of discretion, the reviewing court could have proceeded to a less extensive and more restricted review of the specific rationale employed by the Comptroller.

Such a remand was the course advocated by Judge Sobeloff in his vigorous dissent in *Smithfield*.¹⁰¹ Remands to the administrative agency have been a common remedy in administrative law since the *Chenery* decisions.¹⁰² The Supreme Court in the first *Chenery* decision¹⁰³ ordered the case remanded to the S.E.C. for a revised opinion after finding that the written decision of the S.E.C. was incorrect in its reasoning although the result might have been supported upon other grounds.¹⁰⁴

Although the *Chenery* decisions referred to administrative actions where formal hearings and written opinions were required, the *Chenery* remedy is not inapplicable to review of the Comptroller's informal procedures. Although the Administrative Procedure Act and the National Bank Act do not require the issuance of written opinions in decisions based upon informal discretionary procedures, section 6(d) of the Administrative Procedure Act does require that the administrative officer include a brief statement of reasons when denying any written application.¹⁰⁵ Professor Davis points out that the Comptroller has apparently been violating the Administrative Procedure Act for a number of years by denying applications without stating reasons.¹⁰⁶ Although it has been the Comptroller's policy in recent years to issue written opinions in contested cases,¹⁰⁷ uncontested cases still fall within the ambit of the statute, and a statement of reasons would still be required upon rejection of an application.

The letters written by the Comptroller and sent to the appellants' lawyer in *Pitts* would seem to violate the statute.¹⁰⁸ The first letter,¹⁰⁹ which should have stated the reasons for the denial, contained no sugges-

¹⁰¹352 F.2d 267, 273-76 (dissenting opinion).

¹⁰²See, e.g., *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *FPC v. United Gas Pipe Line Co.*, 393 U.S. 71 (1968); *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962).

¹⁰³318 U.S. 80 (1943).

¹⁰⁴*Id.* at 95.

¹⁰⁵5 U.S.C. § 555(e) (1970) provides in part:

Prompt notice shall be given of the denial in whole or in part of a written application . . . made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

¹⁰⁶K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 4.04 (3d ed. 1972).

¹⁰⁷See note 5 *supra*.

¹⁰⁸The letters are reproduced in notes 16 and 17 *supra*.

¹⁰⁹See note 16 *supra*.

tion as to the reason for the rejection of the application. The second letter¹¹⁰ provided only a passing reference to the "need factor" together with some bank deposit amounts. This letter did not attempt to establish any causal relationship between the bank deposits and the size of the community, or its economy, or any other factor which the Comptroller might have considered to establish the "need factor".

Regardless of whether the Comptroller's failure to state his reasons clearly was a violation of section 6(d) of the Administrative Procedure Act, it should be apparent that the remedy imposed in the first *Chenery* decision might be applicable in cases like *Pitts* where there is a requirement of a statement of reasons, although not in the detail of a written opinion. Professor Davis would require written opinions on all application decisions as a matter of policy.¹¹¹ He notes that the inter-office memos used by the Office of the Comptroller so closely resemble written opinions that they could be reworked to fulfill that function with a minimum of bother to the Comptroller.¹¹² At the same time, the opinions would serve as a curb upon the uncontrolled discretion of the Comptroller and provide a more satisfactory basis for judicial review.¹¹³

Had the Fourth Circuit desired a more expeditious disposition of the case, it might have foregone a remand of the case to the Comptroller for a written statement of reasons and ordered a review in the district court with instructions to that court to obtain some further explanation from the Comptroller during the pre-trial stages. In *Overton Park*, after deciding that de novo review was not warranted but that the district court was authorized to conduct a "substantial inquiry",¹¹⁴ the Supreme Court remanded the case to the district court for review upon the administrative record. Noting that the Secretary of Transportation's rationale might not be disclosed in the administrative record, the Court stated that some further explanation might be in order:

The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. . . . And where there are administrative findings that were made at the same time as the decision . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there

¹¹⁰See note 17 *supra*.

¹¹¹K. DAVIS, ADMINISTRATIVE LAW TEXT § 4.04 (3d ed. 1972).

¹¹²Davis, *Administrative Procedure in the Regulation of Banking*, 31 LAW & CONTEMP. PROB. 713, 718 (1966).

¹¹³K. DAVIS, ADMINISTRATIVE LAW TEXT § 4.04 (3d ed. 1972).

¹¹⁴401 U.S. at 415.

are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.¹¹⁵

The Court also noted that the Secretary might be able to provide written formal findings which could explain the rationale.¹¹⁶ In any event the Court stated that the district court could use whatever method it thought "most expeditious so that full review [might] be had as soon as possible."¹¹⁷

The advantages of a remand to the Comptroller for a written opinion, or of a remand to the district court with instructions to obtain a further clarification of the decision before proceeding further are readily apparent. Either remedy would insure against judicial infringement upon the domain of the Office of the Comptroller. It would inform the court of the basis of the Comptroller's decision, which, in turn, would provide an adequate basis for judicial review of that decision.

By remanding the case to the district court for a trial de novo, the Fourth Circuit has revived what seems to be a questionable precedent. The remedy imposed in *Smithfield* has been the subject of significant criticism. It has been followed in only one district court decision outside the Fourth Circuit¹¹⁸ and was subsequently rejected by the court of appeals of that circuit.¹¹⁹ Every other circuit which has faced the issue has also rejected the Fourth Circuit's remedy.¹²⁰ Professor Davis has characterized the dissent of Judge Sobeloff in *Smithfield* as "powerful"¹²¹ and has labeled the authoritative effect of the case as weak or non-existent.¹²² As yet, the Supreme Court has refused to grant certiorari on the issue.¹²³ Until it does, the Fourth Circuit's decision in *Pitts* has insured that this conflict between the circuits will continue and that the questionable remedy of de novo review will be employed within the Fourth Circuit to review the Comptroller's informal proceedings.

ROY D. CARLTON

¹¹⁵*Id.* at 420.

¹¹⁶*Id.*

¹¹⁷*Id.* at 421.

¹¹⁸*Bank of Sussex County v. Saxon*, 251 F. Supp. 132 (D.N.J. 1966).

¹¹⁹*Ramapo Bank v. Camp*, 425 F.2d 333 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970).

¹²⁰*Warren Bank v. Camp*, 396 F.2d 52 (6th Cir. 1968); *Citizens Bank v. Camp*, 387 F.2d 375 (5th Cir. 1967), *cert. denied*, 391 U.S. 904 (1968); *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966).

¹²¹K. DAVIS, *DISCRETIONARY JUSTICE* 122 n.36 (1969).

¹²²*Id.*

¹²³The Supreme Court has denied certiorari three times where circuit courts have refused to order de novo review of the Comptroller's decisions on bank applications following informal investigations. *Sterling Nat'l Bank v. Camp*, 431 F.2d 514 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971); *Ramapo Bank v. Camp*, 425 F.2d 333 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970); *Citizens Bank v. Camp*, 387 F.2d 375 (5th Cir. 1967), *cert. denied*, 391 U.S. 904 (1968).