4 SEP 10 1962

4 MEMORANDUM

4 Re: Federally Supervised Lending Institutions and Racial Discrimination.

This memorandum reviews questions relating to the issuance of an executive order which will require, among other things, that federal agencies administering programs for the benefit of private lending institutions take affirmative measures to prevent the consideration of race as a factor in the making of real estate loans. This is to be accomplished by regulation or any other measure which will effectively condition enjoyment of federal benefits by such institutions upon their adherence to the federal policy against racial discrimination. The federal agencies involved are the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board. Two questions are discussed:

1. Do the above-mentioned agencies have statutory authority to issue regulations or otherwise to adopt and enforce a policy which denies the benefits of their programs to private lenders who consider race in evaluating real estate loans?

2. To the extent that the agencies have such statutory authority, does the President have the power to order them to take the necessary steps?

For the reasons set forth in detail below, we believe that the answers to these questions are:

1. Neither the FDIC, the Board of Governors of the Federal Reserve System nor the Comptroller of the Currency have the power to take the desired action with respect to institutions already admitted to their programs; a basis exists, however, for contending that these agencies could apply such a program prospectively.

2. The President has the power to direct the Federal Deposit Insurance Corporation, the Comptroller of the Currency, and the Federal Home Loan Bank Board to take the desired action to the extent that they possess the statutory authority to take such action. He has no similar directory authority over the Board of Governors of the Federal Reserve System.

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I.

A. Introduction.

The laws governing federal regulation of the nation's banking and savings and loan systems were not enacted with any consideration of their utilization as vehicles for the prevention of racial discrimination. Their use for this purpose can be justified, however, by the public policy against racial discrimination expressed in the Constitution as interpreted by the Supreme Court. This policy is broader and more pervasive than the economic policies which underlie the nation's banking laws.

The problem at hand, however, is not to justify a policy, but to find legal power to implement it. To do this, unused reservoirs of statutory capacity must be found in general grants of authority to the agencies involved. Experience under the Interstate Commerce Act has demonstrated the potentialities of this approach. See, e.g., Boynton v. Virginia, 364 U.S. 454.

In considering federal powers over private lenders, it is convenient to separate federal regulation of the banking system from federal regulation of savings and loan institutions. The chief difference between the two systems is that banks can create loanable deposits with limited cash reserves; they directly affect the money supply. Savings associations can loan only existing assets.

Federal bank supervision operates from three sources: The Board of Governors of the Federal Reserve System, who exercises visitorial (i.e., bank examinations), reserve, open market, discount and interest controls over national banks and

state-chartered banks which are members of the Federal Reserve System; the Comptroller of the Currency who charters and supervises national banks; and the Federal Deposit Insurance Corporation, which insures up to $10,000 per depositor the deposits of all members of the Federal Reserve System (i.e., all national banks and state member banks) and deposits of state-chartered banks which can meet the Corporation's requirements. Because the powers and operations of these three agencies are closely interrelated, they will be discussed together.

The Federal Home Loan Bank Board exercises regulatory powers of varying degrees of intensity over savings and loan institutions, according to the relationship the institution has to it. It charters and exercises visitorial powers over federal savings and loan associations; it examines and to some extent regulates the credit policy of federal and state-chartered institutions which are members of the Federal Home Loan Bank system; and it examines state-and-federal-chartered institutions which are insured by the Federal Savings and Loan Insurance Corporation. It will be discussed separately from the federal banking authorities.

B. The Federal Banking Authorities.

1. Federal Deposit Insurance Corporation.

The Federal Deposit Insurance Corporation provides the broadest source of federal regulatory power over banking institutions. According to the latest published report, 97% of the commercial banks in the United States are insured by the Corporation. FDIC Ann. Rept. 1961, p. 4. Its insurance completely blankets the other sources of federal regulatory authority, for all members of the Federal Reserve System are required to carry federal deposit insurance (12 U.S.C. § 1814(a)); 1/ every national bank is required to be a member

1/ Hereinafter, references to provisions of title 12 of the United States Code (1958 ed.) will be by section number only. Where sections appearing in the supplements are cited, it will be indicated thus: § 1234 (Supp. III).

of the System (§ 222); any state member bank whose insurance is terminated loses its membership in the Federal Reserve System (§ 1818(b)); and any national bank whose insurance is terminated must be placed in receivership by the Comptroller of the Currency, the FDIC to be named as Receiver (§ 1818(b)).

Obviously, if the FDIC can issue regulations denying insurance to institutions which discriminate on racial grounds, the banking field has been effectively covered. The Corporation itself does not believe that it has legal capacity to adopt and enforce such a policy. In a letter to the Civil Rights Commission dated May 8, 1961, Mr. Erle Cocke, Sr., Chairman of the Corporation's Board of Directors, wrote:

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> "Preliminary to answers to your questions we believe it necessary to state that, in its capacity as an insurer of bank deposits, the Corporation has no authority to issue regulations defining the types of loans which insured banks may make or to whom credit may be extended. The insured banks, both national and state chartered, are governed by statutes and by regulations issued by their respective chartering authorities; these authorities being the Comptroller of the Currency in the case of national banks and the State Supervisors in the case of state banks."

It is possible, however, to advance arguments which would support the Corporation's powers to issue the desired regulation.

(a). The broadest line of argument in support of FDIC's power rests upon the fundamental purposes underlying the Corporation's creation in the Banking Act of 1933. Section 8, 48 Stat. 168. At that time one of the primary objectives of proponents of federal deposit insurance was to restore the flow of funds from savers to borrowers. The 1933

legislative history is replete with statements in substance declaring that the purpose of deposit insurance was to get money out of the mattresses into the market place, that is, to restore public confidence in the banking system so that savings would be deposited and thereby made available for loan by the banks. See, e.g., 73 Cong. Rec. 3839, 3840, 3913, 4033. In the paralyzed economy of 1933, the public's lack of confidence in banks was dangerously restricting the use of demand deposits (checking accounts) as a circulatory medium, and was threatening destruction of private community banking. One of the objectives of federal deposit insurance was to remedy this situation. See Golembe, The Deposit Insurance Legislation of 1933, 75 Pol. Sc. Q. 181 (1960).

On the basis of this history, it has been suggested that FDIC may issue any regulations which will achieve the broadest purpose of the Act: to get savings into circulation and make credit available to all members of the community. Obviously, refusal of loans based upon the race of the applicant inhibits this objective. FDIC has power to issue regulations to carry out the provisions of the Act (§ 1819, Tenth) and, therefore, power to issue regulations necessary to carry out the broad objectives of the Act by policing the availability of credit, at least to the extent of denying insurance to institutions which discriminate against Negroes in their loan policies.

The most obvious weakness in the foregoing argument is that, whatever Congress' broad purposes may have been, the powers of the instrumentality created to achieve that purpose can be no greater than are necessary to give effect to the particular method that Congress selected. Federal deposit insurance was one method of restoring credit among many which Congress adopted. The powers of the corporation were not as broad as the powers of Congress to select remedies for meeting the depression. If they had been, their constitutionality would have been in serious doubt. Schecter Poultry Corp. v. United States, 295 U.S. 495. Moreover, there were many other objectives. Some, such as President Roosevelt and Secretary of the Treasury Woodin, saw in

deposit insurance a device for forcing all banks into the Federal Reserve System. Others were concerned about the safety of small deposits. Golembe, op. cit. supra. Out of this congeries of purposes emerged by 1935 the present structure of the Corporation. Title I, Banking Act of 1935, 49 Stat. 684. It was a carefully designed mechanism for implementing a system of deposit insurance, but that is all. The broad underlying purposes of Congress in passing the Act do not provide a substantial legal basis upon which to rest delegations of power.

(b). There is a further argument, however, which rests more directly upon the provisions of the Act, without implying a roving commission in the Corporation "to inquire into any evils and then, upon discovering them, to do anything [it] pleases." Schecter Poultry Corp. v. United States, 295 U.S. 495 (Cardozo, J., concurring). The argument is relatively simple, and, if valid, would meet the objections to the first argument. It is that the necessary regulatory power can be implied from the "convenience and needs of the community" factor in Section 2[6] of the Act, § 1816:

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> "The factors to be enumerated in the certificate required under section 1814 of this title and to be considered by the Board of Directors under section 1815 of this title shall be the following: The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this chapter. Sept. 21, 1950, c. 967, § 2[6], 64 Stat. 873."

Section 1816 lists factors which must be considered by the appropriate authority when insurance is granted to new banks, to merged banks (§ 1826(c) (Supp. III 1961)), and to newly authorized branch banks (§ 1828(d)). The Comptroller of the Currency must certify that the enumerated factors have been considered before any new national bank can be chartered; the Board of Governors of the Federal Reserve System must do so before any uninsured state bank can be authorized to do business as a member of the System, and the Corporation must make its own determination before any state nonmember bank can be insured. §§ 1814, 1815. A similar determination must be made by the appropriate federal authority before national banks or state member banks may merge or consolidate. § 1828 (c) (Supp. III, 1961). The Corporation must also consider

such factors before it consents to the establishment of branch banks by state nonmember insured banks. § 1828(d).

The argument based on § 1816 assumes that the listed factors do not cease to be applicable once a charter is granted; they become continuing obligations assumed by the insured bank. To carry out its mission, the Corporation has an express grant of power (§ 1819):

> "Seventh. To exercise by its Board of Directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this chapter, and such incidental powers as shall be necessary to carry out the powers so granted."
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> ". . . .
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> "Tenth. To prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this chapter. Sept. 21, 1950, c. 967, § 2[9], 64 Stat. 873."

It may therefore issue regulations necessary to enforce the obligation to serve "the convenience and needs of the community." This phrase refers to the whole community, without regard to race or religion.

Once issued, the regulations can be enforced under the Corporation's general power to terminate insurance for cause. If the Corporation's Board of Directors finds that any insured bank has continued unsafe or unsound practices in conducting the business of the bank, or has knowingly or negligently permitted any of its officials or employees to violate any provision of any law or regulation to which the insured bank is subject, the Board may terminate the bank's insurance after notice, hearing, and a finding of failure to correct

the unsound practices or the violations. § 1818. 2/ Before such a hearing can be held, the state or federal banking authority supervising the offending institution must be notified, and the bank allowed four months, or such lesser time as the regulating authority specifies, in which to correct the offending practices or violations. § 1818. These sanctions are obviously not aimed at particular offenses but at continued practices and policies. But a practice of continued racial discrimination, which obviously would prevent the banks from servicing the convenience and needs of the whole community, would, if uncorrected, furnish grounds for the termination of insurance.

Objections to the foregoing argument can be summarized under three headings. First, that the conditions governing the original grant of insurance are not continuing obligations; this attacks the fundamental assumption upon which the argument is based. Second, the requirement that the "convenience and needs of the community" be considered does not define an obligation of universal service, like a public utility's, but a simple business factor aimed at preventing improvidently chartered banks from weakening the insurance system. Third, that the Corporation was not empowered to undertake the regulatory functions of a chartering agency, but only to examine insured banks for the purpose of protecting its insurance fund from losses due to unsound and unlawful management.

(i) The structure and statutory history of the Act give substantial support to the view that the factors to be considered before insurance is granted are not continuing obligations, except to the extent, perhaps, that they be comprehended within the termination factors, i.e., "safe, sound and lawful practice." The statute itself requires

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2/ It may be noted that authority to impose sanctions for continued violation of any law or regulation is also available to all of the regulatory authorities discussed in this memorandum. This includes any state law or regulation. Consequently if a lending institution violates a state non-discrimination statute sanctions may be imposed by the federal agency having jurisdiction.

that the convenience and needs of the community be considered only when new applications for insurance are submitted, or when banks are undergoing a major change in their capital structure through merger or consolidation, or when the FDIC is called upon to consent to the establishment of a branch bank by an insured state member bank. Thus, the community factor comes into play only when banks are undergoing some major change in their financial or legal status or are making an initial application for insurance. In view of the fact that Congress expressly made the factor applicable in these limited circumstances, it can be contended that if it had been intended to make the meeting of community needs a continuing condition, Congress would have said so in so many words. Yet, it did not declare it to be the legal duty of insured banks to serve all members of the community; it said only that the community's convenience and needs were "to be considered" (§ 1816) by the appropriate authority when new insurance was sought or changes occurred in the capital structure of insured banks.

Further, if the conditions of the original grant of insurance were continuous, it might be expected that the provisions relating to the termination of insurance would have made some reference to them. 2/ Instead, § 1818

2/ A 1955 amendment to the Home Loan Bank Board Act (§ 1421-1449) indicates that conditions of eligibility are not automatically continuing obligations. The FHLBB can refuse membership in the Home Loan Bank system to any institution which it finds to be in unsafe financial condition or "the character of whose management or its home financing policy are inconsistent with sound and economical home financing or with the purposes of this [Act]." § 1424(a). Originally it could terminate membership only for failure to comply with the Act and regulations issued thereunder, or for insolvency. Section 7, 47 Stat. 730. In 1955, at the Board's request, the character and policy factor was added to the conditions for termination by Section 109a of the Housing Amendments of 1955, 69 Stat. 640, so as to put admission and expulsion on

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provides only that insurance may be terminated for unsafe, unsound, or unlawful operations. These concepts in themselves are not precise, but they were enacted in the light of the long-established standards of bank supervision recognized at the time. (Cf. Fahey v. Mallonee, 332 U.S. 245, 250-254, which sustained as constitutional general delegations of regulatory authority to the Federal Home Loan Bank Board "in the light of the history and customs of banking.") Neither in the past nor at the present time has the right of bank officials to refuse loans upon any ground ever been considered a matter within the purview of bank supervisory authorities. See letter from Wm. McC. Martin, Jr., Ch., Board of Governors, Federal Reserve System, to the Civil Rights Commission, May 23, 1961. If Congress intended to change the scope of supervision, or the scope of the bank's duty to the community, when it created the FDIC it gave no indication to this effect.

The Act's statutory history also seems to indicate that the needs and conveniences of the community are not continuing criteria governing bank operations. The federal deposit insurance program has undergone three statutory revisions. In 1933 when the Federal Deposit Insurance Corporation was created by adding a new § 12B to the Federal Reserve Act (§ 8 Banking Act of 1933, 48 Stat. 168), it was contemplated that insurance would be conditioned upon the holding of stock in the Corporation. National banks and state member banks of the Federal Reserve System qualified for stock upon the basis of a certification that the bank's assets were adequate to meet its liabilities to depositors and other creditors. Section 12B(e) & (1), Federal Reserve Act as amended by 48 Stat. 169. To qualify for insurance, nonmember banks had to meet the same requirements. Thus the Corporation had to insure banks if they were solvent, i.e., if their assets were equal

Foot note 3 Cont'd

~~3/ (cont'd)~~ the same basis. H.R. 1622, 84th Cong., 1st Sess., p. 26. Thus, when Congress wanted eligibility requirements to be a continuing obligation, it made them explicit by providing that the status to which they relate, once granted, could be terminated for failure to continually satisfy them.

to their deposit liabilities. Banking Act of 1935, Hearings before the Senate Committee on Banking and Currency, 74th Cong., 1st Sess., pp. 32, 48 (testimony of Leo T. Crowley, Ch., FDIC). But until the permanent plan of insurance was established, a temporary Federal Deposit Insurance Fund was created to which member banks and state nonmember banks certified to be in solvent condition were admitted. § 12B(y), Federal Reserve Act as amended, 48 Stat. 179. By 1934 86% of the nation's banks had joined the temporary fund under the sole requirement that they be solvent. See 1961 Ann. Rept., FDIC, p.2. In 1935, title I of the Banking Act of that year laid down the basic structure of federal deposit insurance as it exists today. 49 Stat. 684. It was a substantial revision of the 1933 plan. It was in the 1935 act that, for the first time, the community factor was prescribed for consideration when new insurance was granted. Section 12B(g), Federal Reserve Act as amended, 49 Stat. 688. But the Act did not apply the factor to banks which were already insured. It provided that the insurance of banks insured by the Temporary Deposit Insurance Fund should be continued "without application or approval." Section 12B(e) and (f), Federal Reserve Act as amended, 49 Stat. 687. These banks could lose their insured status only for failure to correct unlawful, unsafe, or unsound practices, as under present law. Section 12B(t), Federal Reserve Act as amended, 49 Stat. 684. To complete the process, the Temporary Fund was consolidated into the Permanent Fund. Section 12B(1), Federal Reserve Act as amended, 49 Stat. 694. The 1950 revision in effect continued the pattern of the 1935 Act by providing that all banks previously insured by the Corporation should continue to enjoy insured status without further application or approval. Section 4A, Federal Deposit Insurance Act of 1950, 64 Stat. 875.

The treatment in 1935 of banks which were already members of the Temporary Deposit Insurance Fund is significant. These banks had been admitted to insured status without being required to show that their operation

would serve the convenience and needs of the community. Nothing in the 1935 Act advised them (and they represented 86% of the banking community) that a new obligation of community service was being imposed upon the continued enjoyment of insurance. All that the Act provided was that their operations were subject to scrutiny for legality and soundness. It seems reasonable in the light of this history to conclude that the formula, "convenience and needs of the community", does not set forth a continuing obligation of service.

(ii) A substantial basis also exists for the argument that the community factor of § 1816 does not, in any event, define an obligation to serve the whole community, as in the case of public utilities. Rather, legislative history and longstanding banking practice show that the sole purpose of the community factor was to protect the insurance fund against improvidently chartered banks.

As already noted, the six factors "to be considered" when insurance was granted appeared for the first time in 1935. The entire plan of deposit insurance contemplated in the 1933 Act was revised along lines suggested by the Corporation itself in its report for 1934. 1934 FDIC Ann. Rept., pp. 34-35. Indeed, the bill which became title I of the 1935 Act was largely drawn by the Corporation's then Chairman of the Board of Directors and its General Counsel. Banking Act of 1935, Hearings, Committee on Banking and Currency, United States Senate, 74th Cong., 1st Sess., p. 24 (cited hereinafter as 1935 Hearings). Both in its 1934 Annual Report recommending new legislation and in the testimony of its representatives before the Senate Banking and Currency Committee, the Corporation emphasized that the factors to be considered in the issuance of new insurance were intended to give the Corporation "sufficient power to protect itself against incurring excessive risks." 1934 FDIC Ann. Rept., p. 34. In his testimony before the Senate Committee, Mr. Leo T. Crowley, first chairman of the Corporation, emphasized that the standards for admission, which included consideration of the convenience and needs of the community, were directed to preventing the growth

of excessive unviable banking facilities chartered by irresponsible authorities. 1935 Hearings, pp. 31-32, 49-50, 54-55, 56-57. But he clearly distinguished between banks which were already insured and new banks seeking insurance; the new standards were to apply to the latter. For protection from unsafe and unsound operation of banks already insured, the Corporation looked to the termination provisions of the Act. 1935 Hearings, pp. 56-57. Banks which were already insured but were uneconomic because the needs of the community had changed were to be eliminated by the process of merger and consolidation, not by cancellation of insurance. 1935 Hearings, p. 49.

The factors enumerated in the 1935 Act for the granting of new insurance were said to be similar to those utilized by the Comptroller of the Currency in authorizing national banks to commence business. 1935 Hearings, p. 57; S. Rept. 1005, 74th Cong., 1st Sess., p.3. The Comptroller first set forth requirements for charter in the Instructions of the Comptroller of the Currency Relative to the Organization and Powers of National Banks (1920). These in turn were derived from similar requirements which became widespread in state banking laws following the panic of 1907. Stokes, Public Convenience and Advantage in Applications for New Banks and Branches, 74 Banking L. J. 921 (1957). It has been said that the present "federal legislation followed the developing pattern of the state legislation with respect to public convenience and necessity." Stokes, op. cit. supra, p.926.

No federal cases have been found construing the phrase "convenience and needs of the community." The few state cases construing similar language have not attempted to define it, beyond emphasizing that its purpose is to insure the existence of a healthy banking system, not to preserve the existing facilities from competition. Stokes, op. cit. supra, p. 928. See Suburban Bank of Kansas City v. Jackson Co. St. Bank, 330 S.W. 2d 183 (Mo. App., 1959); Wall v. Fenner, 76 S.D. 252, 76 N.W. 2d 722, 1956.

In at least one case it has been said that if potential deposits and accompanying business of the bank appear substantial, then it will meet the convenience of the community and there is a need for it. Suburban Bank of Kansas City v. Jackson Co. St. Bank, supra, at p. 187. Thus, convenience and needs of the community has been interpreted in terms of business potential, not obligatory community service.

As administered by the federal banking authorities for the last twenty-seven years, it appears that the phrase, "convenience and needs of the community," has similarly been

interpreted to refer to the economic impact and potentialities of new banking facilities in the community. There is no evidence of any understanding that the phrase was intended to be interpreted to incorporate a public utility concept of service to all.

Nevertheless, the phrase, "the convenience and needs of the community to be served by the bank," is adequate to permit consideration of racial discrimination in lending policies, and the "plain meaning" of the language might be adequate to overcome the legislative history. Whether it would do so or not may depend upon the context in which the question is raised. The legislative history would probably be considered controlling if the question were first raised in connection with an attempt to make community service a continuing criterion. However, it seems unlikely that this history would control if the question were first raised in connection with a prospective application.

Even if the community factor is not a continuing criterion, it can have an effect in diminishing racial discrimination in bank lending. Every new applicant for insurance, every bank being merged or consolidated with another, and every state non-member bank seeking to open a branch must submit to a determination in which the community factor is a required consideration (see discussion, supra, pp. 7-8). As an element in testing the applying institution's ability to serve the convenience and needs of the community--the whole community--it would be appropriate for the supervisory authority to obtain assurances that the newly insured or merged bank, or its new branch, would not deny credit on the grounds of the race of the borrower.

(iii) The final objection to treating the community factor as a continuing criterion is that this would make the FDIC the ultimate law-giver to both the Federal Reserve System and the Comptroller of the Currency, as well as to state chartering authorities. Yet the structure of the Act indicates that Congress was determined to preserve fully the authority of the federal agencies, and to preserve as well the jurisdiction of any state regulatory authority where requirements were sufficient to assure adequate protection for the insurance fund. In the case of national banks and member banks applying for insurance, the certification required for insurance purposes is made by the Comptroller and the BGFRS, respectively. The

Corporation makes the determination only for state non-member banks. § 1814. If the Corporation finds continued violations of law or continued unsafe and unsound or unlawful practices, it must report them to the federal or state regulatory authorities; only if correction is not brought about thereafter is the Corporation permitted to act under its own procedures. 12 U.S.C. § 1818. Under the 1935 Act, the Corporation could examine any state non-member (of the FRS) bank, but it could examine national banks and state member banks only with the written consent, respectively of the Comptroller or the BGFRS, § 12B(k)(2), Federal Reserve Act as amended, 49 Stat. 684. In 1950, this power was modified so as to authorize the FDIC to make special examinations of state member banks or national and District (of Columbia) banks, but only when "in the judgment of the Board of Directors such special examination is necessary to determine the condition of any such bank for insurance purposes." 12 U.S.C. § 1820(b). The regulatory agencies' own view of the matter is reflected in a Joint Statement, 38 Fed. Res. Bul. 877 (1952). This statement in substance acknowledges that the several state and federal supervisory authorities have an obligation to minimize the insurance risks of the FDIC; but that the FDIC will normally attempt to protect itself by exerting influence through the state banking authorities, and by relying upon the Comptroller and the BGFRS to protect it from inadequate capitalization and unsound management on the part of banks under their jurisdiction.

Thus, neither Congress nor the banking agencies themselves have contemplated that FDIC will be anything more than an insurer of deposits. To date it has never been considered an arbiter of any aspect of loan policy, except as that policy affected its risk as an insurer.

10 7 2. The Board of Governors of the Federal Reserve System.

The Board of Governors of the Federal Reserve System is the top directorate of the central banking system which is composed of the Board itself, the twelve Federal Reserve Banks and their 21 branches, and the member banks. The Federal Reserve Banks (FRB) are incorporated private banks whose stock is owned by the member banks in their district, but which are controlled by boards of directors, six of which are elected

by the members and three of which are chosen by the Board. These Reserve Banks serve as depositories for their members' reserves, as sources of credit to members who wish to borrow, as purchasers of their members' eligible paper, and as buyers and sellers of government securities. They are bankers' banks. The member banks are required to hold stock and to maintain reserve deposits in their district FRB, to adhere to various directives of the Board of Governors respecting reserve requirements, interest rates, clearing house operations, and other monetary and credit controls. All national banks must become members of the System, state-chartered banks may become members, and all members of the System must be insured with the FDIC. The System as a whole is a mixture of private and public banking controlled from the top by a government board for the purpose of regulating the volume of money--particularly demand deposits--and credit in the national economy. See Haines, Money, Prices and Policy, pp. 163-200 (1961).

Only one in every five state banks is a member of the System, but its overall membership accounts for 85% of the Nation's commercial banking business. 48 Ann. Rept., BGFRS, 1961, p. 144.

The Board of Governors exercises certain powers over member banks. These powers are quite specific, however. While the Board has been given authority to issue regulations to enable it to perform the duties, functions and services specified in the Federal Reserve Act (§ 248 (i)), it does not have unlimited regulatory power over members of the System.

Without attempting a precise review of all the Board's powers, it may be said that there are only two statutory provisions which might support issuance of regulations prohibiting members from discriminating: the provisions governing admission of new members to the System and the Board's visitorial authority over member banks.

The Federal Reserve Act specifies standards for the admission of state banks as members, but not for national banks. When determining a state bank's application, the Board must consider its financial condition, the general character of its management and whether its corporate powers are consistent with the purposes of the Act. § 322. In addition, however,

it must also consider the factors, including the "convenience and needs of the community" enumerated in the Federal Deposit Insurance Corporation Act. § 1816. Thus, § 1816 defines factors for admission to the Federal Reserve System just as it does for FDIC, and regulatory authority might be inferred from it to the same extent as with FDIC. But all of the arguments against implying regulatory authority in the FDIC from § 1816 apply as well to the authority of the Board of Governors. There is nothing in the Banking Act of 1935, making the considerations contained in § 1816 applicable to new state bank applications for membership, which indicates that "convenience and needs of the community" constitutes a test of continued eligibility for members admitted under the original Federal Reserve Act of 1913, 38 Stat. 251.

Nor do the Board's visitorial powers offer much help. It may examine the general character and amount of the loans and investments of its member banks with a view to determining whether any bank is making undue use of credit for speculation. § 301. But this authority, by its very specificity, forecloses regulations aimed at discriminatory loan policies. And it may also examine any state member bank (§ 248(a), § 325); and, through the district FRB, provide for examinations to inform the FRB of the condition of its members and the lines of credit being extended by them. § 483.

It might be contended that authority to examine lines of credit might relate to the power to deal with discriminatory refusal to make loans. However, the regulatory limits of the general visitorial power conferred by § 483 are defined by the power of the Board to act upon the information disclosed. If, upon certification by the district Federal Reserve agent (who is by law chairman of the FRB's board of directors, § 305), the Board of Governors finds after notice and hearing that any director or officer of a state member bank has continued to violate any law relating to the bank or continued unsound or unsafe practices after having been warned by the agent, he may be removed from office. It is a felony for him to participate thereafter in the bank's affairs. Undoubtedly, the Board could issue regulations, consistent with banking custom, which define safe and sound operations. But its power appears to go no further.

Since the visitorial authority of § 483 extends to all member banks, it permits the Board of Governors to examine national banks as well as state member banks. But the Board has no removal power in such a case; that power is reserved to the Comptroller of the Currency. § 77. In the circumstances, "as a matter of practice, neither the Federal Reserve Banks nor the Board of Governors examine national banks because the Comptroller of the Currency is directly charged with that responsibility by law." 48th Ann. Rept. BGFRS 1961, p. 106.

The limited grounds upon which sanctions may be imposed leave no room for the implication of a power to regulate the grounds upon which loans may be denied. The Board's visitorial power is aimed only at safeguarding the financial soundness of its members and gathering information with respect to their operations. The latter is a wholly commercial concept which leaves no room for the achievement of larger social policy, however desirable.

10 3. The Comptroller of the Currency and the National Banking System.

The Comptroller of the Currency is an official in charge of a Bureau in the Department of the Treasury who charters and supervises federally incorporated commercial banks known as national banks. § 1. These institutions were originally created to provide a market for United States bonds; by depositing a certain quantity of bonds in the Treasury, they could receive for issue national bank notes to the value of 90% of the bonds deposited. Thus, the Comptroller's function was to be chief officer of a bureau to supervise "the issue and regulation of a national currency secured by United States bonds." § 1. Since 1935, however, no bonds eligible to serve as collateral for notes have been issued; therefore, the issue of national bank notes has ceased. 98th Ann. Rept. Comp. Currency 1961, p. 28. And in 1913, the national banks were excused from the requirement of furnishing bonds. The result is that except for minor functions related to the shipment and destruction of Federal Reserve notes, the Comptroller of the Currency's only duty is to supervise the national banks. As compulsory members of the Federal Reserve System, these banks are substantially similar to state member banks, except in the source of their charters and their bank examinations.

The regulatory powers of the Comptroller are not substantially broader than those possessed by the Board of Governors. As a chartering authority he inquires into the condition of an association seeking to do business as a national bank, examining its general condition, capital, adherence to the requirements of the Act, and "any other facts which may come to the knowledge of the Comptroller." (§§ 26, 27). Since 1935, he has also been required to consider the factors enumerated in the Federal Deposit Insurance Act (§ 1816), including the convenience and needs of the community. As a supervising authority, the Comptroller may examine any national bank (§ 481), and require reports on reserves, liabilities, and affiliates (§ 161 (Supp. III)). If the director of any national bank violates the national banking act, or permits the bank's officers or employees to do so, the charter is forfeited (§ 93), and the bank is placed in receivership (§ 191 (Supp. III)). A bank may also be placed in receivership if it fails to pay a judgment creditor within thirty days (§ 191). In addition, any director or officer of a national bank who continues to violate any law or continues unlawful, unsafe or unsound practices after having been duly warned may be removed (§ 77). The Comptroller may also put a bank in the hands of a conservator "whenever he shall deem it necessary in order to conserve the assets of any bank for the benefit of depositors and other creditors . . . ." § 203.

Without reviewing all of the specific powers of the Comptroller, it is clear that neither his chartering authority nor his visitorial power affords any greater basis for the issuance of regulations prohibiting racial discrimination by banks already chartered than in the case of the FDIC and BGFRS. The arguments derived from the "community factor" in § 1816, pro and con, are applicable to his chartering authority. His supervisory authority is so defined as to leave no substantial basis for argument in favor of the desired authority.

It might be noted here that national banks are expressly authorized to make real estate loans, but that the governing provision (§ 5371) simply states that the banks "may make real estate loans." It specifies in great detail the conditions of security and appraisal, and the preparation of appraised value which may be loaned against. There is no language, however, which offers a foothold for an argument against racially discriminatory denials of real estate loans.

C. The Federal Home Loan Bank Board and Savings and Loan Regulation.

The greater portion of the nation's savings and loan institutions are regulated to some degree by the Home Loan Bank Board. This three-man panel, which is now "an independent agency (including the Federal Savings and Loan Corporation) in the executive branch of the Government" (§ 1437(b)), has three principal functions: (1) to supervise and regulate the eleven Federal Home Loan Banks, (id.); to charter and supervise Federal Savings and Loan Associations (§ 1464(3)); and to direct and regulate the operations of the Federal Savings and Loan Insurance Corporation (§ 1725).

The Federal Home Loan Bank System was established in 1932 (Federal Home Loan Bank Act, 47 Stat. 725) for the purpose of providing "a permanent system of reserve credit banks for eligible thrift institutions . . . ." FHLBB Ann. Rept. 1961, p. 5. It consists of eleven Home Loan banks organized on principles similar to the Federal Reserve banks, plus the institutions admitted to membership in the System. The Home Loan Banks serve as a unified, nationwide credit source for member institutions. Federal Savings and Loan Associations are required to join the System (§ 1464(f)). State chartered institutions become members or nonmember borrowers, whether or not insured with the Federal Savings and Loan Corporation, provided they are duly organized under State law, are subject to State examination and regulation, or if not, will submit to Board examination and regulation; make long-term mortgage loans; are in satisfactory condition; and the character of their management and their home financing policy are consistent with sound and economical home financing and the purposes of the Home Loan Bank Act (§ 1424). The System presently includes all insured S & L institutions, both state and federally chartered, and more than 500 state-chartered uninsured associations. Its membership recently comprised 75% of all savings and loan associations in the country, and held 98% of the nation's total of savings and loan assets. FHLBB Ann. Rept. 1961, p. 1.

The Federal Savings and Loan System, created by § 5 of the Home Owner's Loan Act of 1933, 48 Stat. 132, consists of federally chartered mutual savings institutions directly examined and regulated by the Federal Home Loan Bank Board. Such institutions must be insured by the Federal Savings and Loan Insurance Corporation (§ 1726(a)) and be members of the Federal Home Loan Bank System (§ 1464(f)).

The Federal Savings and Loan Insurance Corporation, created by Title IV of the Housing Act of 1934, 48 Stat. 1255, insures the accounts of savings and loan type institutions up to $10,000 per depositor. To qualify for insurance the institution must have an unimpaired capital, safe management and financial policies, and there must be a need for an additional insured facility in the community (§ 1726(c)). Upon becoming a member, an insured institution agrees not to make loans beyond fifty miles from its principal office; not to issue securities except with the Corporation's approval; not to carry on sales plans, practices, or advertising in violation of the Corporation's regulations; and to carry adequate reserves before paying dividends (§ 1726(b)). The Corporation may conduct such examinations as are necessary to protect it and other insured institutions.

The greatest number of institutions and the greatest quantity of funds can be affected if all members of the Federal Home Loan Bank System can be forbidden by Board regulation to consider race as a factor in the making of loans. The Board's staff takes the position that (Memorandum to the Board from Clarence S. Smith, Assistant to the Board, dated June 7, 1961):

> "3. It is believed that the Board has the legal authority to issue such a regulation as to Federally chartered associations and members of the Federal Home Loan Bank System but there is a substantial legal question as to whether the Board has such authority with respect to insured associations operating under State charters.
>
> "It is not believed that the Board has authority to issue such a regulation solely on the basis that

the association is an insured institution under Title IV of the National Housing Act."

At the present time all institutions which are insured by the FSLIC are also members of the Home Loan Bank System. 1961 Ann. Rept. FHLBB, pp. 46-47. If the above-stated position as to the Board's powers over the Home Loan Bank System is correct, it does not matter that the insurance nexus alone is not sufficient to support regulations. [4] On the face of the statute and in the light of the history of the 1932 Act, the position appears to be sound.

The crucial language is to be found in the provisions of the Act governing the termination of membership. As in the case of the banking laws, the termination provisions mark the legal limits of the supervisory authority: everything beyond the termination authority is in the realm of moral suasion. Unlike the federal banking laws, however, the Home Loan Bank Act expresses the factors for termination in sweeping terms (12 U.S.C. 1426(i)):

> ". . . the board may, after hearing, remove any member from membership, or deprive any nonmember borrower of the privilege of obtaining further advances, if, in the opinion of the board, such member or nonmember borrower (i) has failed to comply with any provision of this chapter or regulation of the board made pursuant thereto; (ii) is insolvent: Provided, That any member of a bank which is a building and loan association, savings and loan association, cooperative bank, or homestead association shall be deemed insolvent if the assets of such member are less than its obligations to its creditors and others,

[4] As a practical matter the issuance of the desired regulations might force some withdrawals from the System, but, if there is no alternative source of large-scale credit for savings and loan associations, such withdrawals are unlikely to be widespread. It is possible, however, that a statewide or even a regional private credit banking system might be created to escape from federal regulation.

including the holders of its withdrawable accounts; or (iii) has a management or home-financing policy of a character inconsistent with sound and economical home financing or with the purposes of this chapter. * * *" (Emphasis supplied.)

The underscored language is the keystone of the argument. Although there is no preamble or findings to show the purposes of the Act, the legislative history makes clear that they were principally to provide encouragement to home ownership by making long-term mortgage money available to all Americans. A policy of racial discrimination obviously defeats this purpose, so that any institution pursuing such a policy is defeating the purpose of the Act. Since the FHLBB has express power to "adopt, amend, and require the observance of such rules, regulations, and orders as shall be necessary from time to time for carrying out the provisions of this [Act]" (§ 1437(a)), it may, in the exercise of its regulatory authority prohibit the denial of loans by member associations on the ground of race.

It was only in 1955 that the crucial language was added to the termination authority in § 1426(i), by § 109(a) of the Housing Amendments of 1955, 69 Stat. 640. Until that time, memberships could be terminated only for violation of the Act or regulations thereunder, or for insolvency. This, however, was inconsistent with the grounds upon which the FHLBB might reject an application for membership, for in passing on a membership application, it was expressly authorized to consider the consistency of management policy with the purposes of the Act. § 1424(a). The Act was amended to correct the discrepancy for the express reason that there was "no provision for removal of a member institution on these grounds once the institution becomes a member of the Federal Home Loan bank system." H. (Conf.) Rep. No. 1622, 84th Cong., 1st Sess., p. 26. Thus, unlike the provisions of the FDIC Act, the conditions for admission to the Home Loan Bank System are continuing obligations and as such furnish a basis for regulations aimed at their performance.

The legislative history of § 1424(a), governing admission to the System, demonstrates the "purposes of the Act." The general objectives of both President Hoover and the 74th Congress were to provide a permanent method for encouraging individual home ownership; to assist small owners in obtaining mortgage renewals, and to provide employment through revival of home construction. Presidential Message, Relief of Economic Situation, S. Doc. No. 32, 72d Cong., 1st Sess., p. 3; 77 Cong. Rec. 12586 (Remarks of Mr. Steagall). The precise method chosen was to create a reserve system supplying short-time and long-time funds to savings and loan institutions. H. Rept. No. 1418, 72d Cong., 1st Sess., p. 3. There are numerous statements to the effect that a primary purpose of the Act was to develop home ownership by making credit available to home loan institutions. See House report on the Act, H. Rept. 1418, 72d Cong., 1st Sess., pp. 8-9. This report was also submitted to the Senate as the Report of that body's Banking and Currency Committee. See, e.g., 77 Cong. Rec. 12604; 12606-12613.

It was clearly explained in both the House and Senate that the Board's right to refuse admission to institutions whose practices were inconsistent with the purposes of the Act was intended as a safeguard against unfair or even usurious loan practices (77 Cong. Rec. 12619):

> "Mr. LaGUARDIA. If the mortgage is down to the point described by the gentleman, then they force a foreclosure, and the family lose their home. If it is not, then they refuse to renew the loan and force him into the hands of another loan shark, who will refinance it and who, in turn, will get one of the other shark's victims.
>
> ". . . I hope before we go much farther the gentlemen from Wisconsin [Mr. REILLY] will point out the mechanics whereby these home owners may be protected."
>
> . . .
>
> "Mr. REILLY. Mr. Chairman, in answer to the gentleman from New York, I may say that the home-loan

board under this bill has authority to decide what institutions shall be eligible for membership.

"Let me read:

> "'No institution shall be eligible to become a member of, or a nonmember borrower of, a Federal home-loan bank if, in the judgment of the board, its financial condition is such that advances may not safely be made to such institution or the character of its management or its home-financing policy is inconsistent with sound and economical home financing, or with the purposes of this act.'

"This bill deals with existing institutions. If the resident in the district the gentleman speaks of happens to be a member of an organization eligible for membership in the mortgage bank, it is possible for the bank to get the money from this bank to enable them to extend the mortgage or rewrite it or extend the time of payment, and to forbear the collection."

"Mr. LaGUARDIA. In other words, it will not be possible for them to promulgate regulations preventing a bonus being exacted and provide the means for a complaint to be filed with the home-loan bank."

"Mr. REILLY. If there was any bonus exacted in such organization, they would not be permitted to become members."

See also 77 Cong. Rec. 12720-21, 14453-54.

It was even objected that the "purpose" language was defective because it left the Board to determine the purposes of the Act. But an amendment to specify the purposes of the Act was rejected. 77 Cong. Rec. 13099-13100.

From the foregoing it seems clear that both the language and history of the Act support the view that the Board can

compel members of the Home Loan Bank System to refrain from discrimination on grounds of race.

It seems unlikely that the insurance of accounts by the Federal Savings and Loan Insurance Corporation provides a basis for the regulations desired. The eligibility requirements include the provision for rejection of an application if "the character of the management of the applicant or its home financing policy is inconsistent with economical home financing or with the purposes of this [Title]." § 1726(c). But the termination provision rests upon entirely different grounds. Insurance may be terminated after notice and hearing if the Board finds that "any insured institution has violated its duty as such or has continued unsafe or unsound practices in conducting the business of such institution, or has knowingly or negligently permitted any of its officers or agents to violate any provision of any law or regulation to which the insured institution is subject. . . ." § 1730.

The difference in language indicates that the conditions of eligibility are not continuous conditions for insurance, for reasons similar to those outlined for the FDIC. Nor can the regulations be based upon the FHLBB's power to terminate for violations of the insured institution's duty, for the reference is to its duty as an insured institution, a duty which is spelled out specifically in that portion of the eligibility requirements which require the applicant to agree to adhere to certain specific business practices.

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II.

The Constitution declares that "[t]he executive Power shall be vested in a President of the United States of America." Art. II, Sec. 1. It further requires that "he shall take Care that the Laws be faithfully executed . . ." Art. II, Sec. 3. Congress is without power to place a purely executive officer beyond Presidential control. Myers v. United States, 272 U.S. 52. It can, however, in its discretion, place quasi-legislative and quasi-judicial agencies within or without the executive branch. Humphrey's Executor v. United States, 295 U.S. 602; Wiener v. United States, 357 U.S. 349. To test the President's power to issue directions to any agency, therefore, it must first be determined whether the agency performs purely executive functions or is fundamentally quasi-legislative or quasi-judicial in nature. If it is the latter, then it must be determined whether Congress intended to place the agency in the executive branch. These principles guide the discussion which follows.

A. The Federal Deposit Insurance Corporation.

When the FDIC was created in 1933 nobody was concerned with Presidential power over it. Because the federal government contributes nothing to its operations (it is financed from assessments against insured banks) and because its supervisory operations were concerned only with the security of deposits, there was no occasion for the issue of Presidential control to arise. Neither the original enactment of 1933 (§ 12B of the Federal Reserve Act, 48 Stat. 168), the revision of this statute in 1935 (49 Stat. 684) nor its readoption as a separate FDIC Act in 1950 (64 Stat. 873) throws any light upon the Corporation's status. Thus "[t]his is another instance in which the most appropriate legal significance must be drawn from congressional failure of explicitness. Necessarily this is a problem in probabilities." Wiener v. United States, supra, at p. 352.

As in the Wiener case, the most reliable factor for testing the President's power over the Corporation lies in its function. The Corporation is not a quasi-legislative body like the great regulatory commissions; nor is it a

grantor of licenses or adjudicator of disputes: it simply executes a law establishing a system of deposit security for the nation's banking system. None of the considerations are present which support the "line of cleavage between officials who [are] part of the Executive establishment . . ., and those who are members of a body 'to exercise its judgement without the leave or hinderance of any other official or any department of the government' . . . ." Wiener v. United States, supra, at p. 353; see Humphrey's Executor v. United States, supra, at pp. 625-626. The Corporation's functions are as purely executive as those of a postmaster administering his local office of the Postal Savings System. Cf. Myers v. United States, supra. In this respect the Corporation is closely similar to another establishment which, though independent of any department or bureau of the Government, is nevertheless an executive agency subject to Presidential control -- the Tennessee Valley Authority. In sustaining the President's power to remove the chairman of that agency, the Court of Appeals for the Sixth Circuit held (Morgan v. Tennessee Valley Authority, 115 F.2d 990, 993):

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". . . . It requires little to demonstrate that the Tennessee Valley Authority exercises predominantly an executive or administrative function. To it has been entrusted the carrying out of the dictates of the statute to construct dams, generate electricity, manage and develop government property. Many of these activities, prior to the setting up of the T.V.A., have rested with the several divisions of the executive branch of the government. True, it is, that in executing these administrative functions, the Board of Directors is obliged to enact by-laws, which is a legislative function, and to make decisions, which is an exercise of function judicial in character. In this respect its duties are, in no wise, different, except perhaps in degree, from the duties of any other administrative officers or agencies, or the duties of any other Board of Directors, either private or public. Whatever their character, they are but incidental to the carrying out of a great administrative project. The Board does not sit in judgment upon private controversies, or controversies between private citizens and the government,

and there is no judicial review of its decisions, except as it may sue or be sued as may other corporations. It is not to be aligned with the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies mainly exercising clearly quasi-legislative or quasi-judicial functions -- it is predominantly an administrative arm of the executive department. The rule of the Humphrey case does not apply."

The considerations thus relied upon in Morgan are clearly applicable to the Corporation.

That the corporation is subject to Presidential supervision has long been recognized. In performance of his duties as the constitutional repository of executive power and to "take Care that the Laws be faithfully executed" (U.S. Const. Art. II, Secs. 1, 3) the President required the Corporation to submit its operating budget to the Bureau of the Budget (Ex. O. 7126, August 9, 1935) even though no appropriated funds were involved. [5] And in a careful study of government corporations undertaken in 1937 FDIC was classified as being directly supervised by the President. Emmerich, Government Corporations and Independent Supervisory Agencies in Report of the President's Committee on Administrative Management (1937) pp. 295, 305.

It is true that the Corporation has been described, for purposes of financial control as a "mixed-ownership-corporation", i.e. partly Government-owned and partly private-owned. See H. Rep. 856, 78th Cong. 1st Sess., pp. 15, 65; Sen. Doc. No. 227, 78th Cong. 2d Sess. p. 19. Sec. 201, Government Corporations

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[5] The Corporation was excused from this requirement by the provisions of the Government Corporations Control Act of 1945, 59 Stat. 597, 31 U.S.C. 841, 856. See H. Rep. 856, 78th Cong., 1st Sess., pp. 64, 69. This became practicable after Congress had provided that the Corporation should undergo annual commercial-type audits by the Comptroller General. 31 U.S.C. 856.

Control Act, 31 U.S.C. 856. But it has never been controlled in any respect by any private person or group. On the contrary, its three directors are officers of the United States. One of the directors is an official of the Treasury Department, the Comptroller of the Currency; the other two directors are specially appointed. Both the ex officio director and the two appointive directors are appointed by the President with the advice and consent of the Senate. This is in sharp contrast to such institutions as the Federal Reserve Banks, a majority of whose directors are elected by the member-stockholders. § 304. Moreover it can no longer be said that the Corporation is of mixed ownership. Although its capital stock was held under the 1935 Act, by the Federal Reserve Banks and by the Treasury, all of it was retired by payments into the Treasury in 1947 and 1948. 61 Stat. 773; see FDIC Ann. Rep. 1961, p. 24. Thus not only control but ownership as well is wholly vested in the United States.

It would be anomalous indeed if a corporation wholly owned and controlled by the United States, with total assets of nearly 2 ½ billion dollars, could operate as a law unto itself. The necessity for Presidential supervision is indicated by the fact that the Board of Directors may borrow up to 3 billion dollars from the Treasury whenever such funds are required for insurance purposes. (Sec. 1824) The impact of this power upon Presidential responsibilities is obvious.

Thus, the Corporation's functions, ownership, control and history all demonstrate that it is subject to Presidential supervision. He may exercise this supervision by any means, including executive order, which is consistent with the Constitution and laws of the United States.

B. The Comptroller of The Currency.

There can be no doubt as to Presidential authority to issue directions to the Comptroller of the Currency. He is, by statute, an officer within the Department of Treasury who must "perform his duties under the general directions of the Secretary of the Treasury." (Sec. 1) And although he is appointed, for a term of five years, he may be "sooner removed by the President, upon reasons to be communicated by him to the Senate." (Sec. 2) What has been said of the executive

nature of the FDIC's functions applies with equal force to the Comptroller in his supervision of the national banks.

C. The Board of Governors of the Federal Reserve System.

It has long been the understanding of Congress and the public that members of the Board of Governors, although officials of the Government, are independent of Presidential control. The original Federal Reserve Act of 1913 included on the Board the Secretary of the Treasury and the Comptroller of the Currency. In 1935, however, the Board was reconstituted without them because experience had shown that the Secretary of the Treasury had tended to dominate the Board, thereby defeating the objective of having national monetary policy made by an independent group. 79 Cong. Rec. 11776 (Remarks of Senator, and former Secretary of the Treasury, Glass). A proposal to place the Board of Governors under direct Executive control was passed by the House of Representatives as part of Title II of what became the Banking Act of 1935, but the Senate rejected the provision and substituted the present law. See Kress, The Banking Act of 1935, 34 Mich. L. Rev. 154, 164-165 (1935).

A major dispute between the Department of the Treasury and the Board of Governors in 1951 made a national issue of the Board's independence. President Truman and Treasury Secretary Snyder wished to keep interest rates down in order to minimize the costs of the public debt, which were rising under the pressures of the Korean Crisis. The Board of Governors felt that higher interest rates were necessary to restrain the rising inflationary pressures in the economy. After a meeting with the Board the President announced that it had agreed to his views; the Board immediately issued a denial and a public furor began. Senator Paul Douglas threatened to introduce legislation to "reaffirm" the independence of the Board, but the dispute was settled when the Treasury and the Board signed an Accord in 1951. See Haines, Money, Prices and Policy, pp. 586-589. President Truman later stated that he had not attempted to dictate to the Board "which is not part of any department of the government." Truman, Years of Trial and Hope, pp. 44-45. Secretary Snyder later testified to a committee of Congress

that "Of course there is no one outside of the Federal Reserve Board that can force them to take any action. The Federal Reserve Board was set up by Congress and they make their final determination." Monetary Policy and the Management of the Public Debt, Hearings, Joint Committee on the Economic Report, 82nd Cong., 2d Sess. (1952) p. 39, 55-60.

Congress has expressly provided that the President may directly regulate member banks of the Federal Reserve System during such emergency period as the President by Proclamation shall prescribe. § 95. This statute, which was enacted in the Emergency Banking Act of 1933, Sec. 4, 48 Stat. 2, would probably be viewed as excluding any implied power in the President to regulate the member banks in other circumstances, even indirectly by orders to the Board. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579. In this connection it should be noted that the Proclamation of the Korean Emergency is still in effect. Proclamation No. 2914, Dec. 16, 1950, 64 Stat. A454. The emergency contemplated by § 95, however, is obviously directed at a collapsing banking system.

Strong evidence of the Board's independence of the President is contained in the statute defining their terms: members serve for 14 years. § 241. They may be removed by the President only for cause. § 242. Moreover, even a cursory review of the Board's functions demonstrates that it is, fundamentally, a quasi-legislative agency which initiates monetary and credit policies and implements them by direct regulations and indirect credit controls. These considerations, and the decision in Humphrey's Executor have the effect of placing the Board beyond the effective policy control of the President.

D. The Federal Home Loan Bank Board.

Congress itself has made clear that the FHLBB is subject to Presidential control. In 1955 the Board was a component of the Housing and Home Finance Agency, where it had been placed by Reorganization Plan No. 3 of 1947. By Sec. 109(b) of the Housing Amendments of 1955, this status was changed. But there was no intent on the part of Congress to make the Board independent of Presidential control. The Act provides (1437(b)):

10 The Home Loan Bank Board which was, pursuant to Reorganization Plan No. 3 of 1947, established and made a constituent agency of the Housing and Home Finance Agency, shall, from August 11, 1955, cease to be such a constituent agency and shall be an independent agency (including the Federal Savings and Loan Insurance Corporation) in the executive branch of the Government . . . .

The underscored language removes any basis for argument that, as a legal matter, the agency was intended to be independent of Presidential supervision.