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Barely two years after enactment of the Bank Merger Act of 1966, the Supreme Court clarified the meaning of that law's substantive provisions for the first time. On March 4, 1968, the Court demonstrated once again an antimerger stance which has been much in evidence since *Brown Shoe*.[1] Misgivings such as those expressed in 1966 by Representative Charles Weltner of Georgia that this was "legislation diluting the antitrust laws to a substantial degree"[2] have not been confirmed, at least not by the decision in *United States v. Third National Bank*.[3]

I. The Nashville Banking Market

A. Concentration: Local and Comparative

As measured by regional standards, banking in Tennessee's capital for years centered around three very large institutions and one of middle size. The latter, Nashville Bank and Trust Company (hereinafter Nashville Bank), merged into Third National Bank (the second largest bank in the area) in August, 1964, after the Justice Department failed to secure a preliminary injunction blocking the merger.[4] This left Davidson County (the county in which Nashville is located) with seven banks, four of which were quite small. Nashville Bank was less than one-fourth the size of third-ranking Commerce Union Bank, but almost seven times as large as the fifth-ranking bank. As the second largest state-regulated bank in Tennessee, Nashville Bank was an institution of substantial size. The two largest banks in Davidson County in the decade preceding the litigated merger had over 70 per cent of both the resources and demand deposits owned by individuals, partnerships and corporations, while the top three banks had over 90 per cent of the assets and demand

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1. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).
2. H.R. Rep. No. 1221, 89th Cong., 2d Sess. 28 (1966).
3. 390 U.S. 171 (1968), *rev'g* 260 F. Supp. 869 (M.D. Tenn. 1966).
4. 260 F. Supp. at 871.

deposits of the Davidson County market.

According to the Justice Department's complaint in the case, banking in the Nashville area was heavily concentrated; but defendants countered that concentration was not high when compared to other cities. The district court, looking at comparable southeastern markets competitive with Nashville, agreed with defendants; and figures for these metropolitan areas in November, 1964, soon after the merger, supported this position.[5] When the two largest banks in pre-merger Nashville as of mid-1962 are compared with other metropolitan areas, Nashville again is similar to the entire Southeast.[6]

However, Nashville was markedly above the concentration ratio of similar metropolitan areas throughout the United States in 1962. Likewise, post-merger Nashville's 95.7 per cent share of demand deposits in the top three banks surpasses the United States average of 76 per cent for all 60 limited branching metropolitan areas with a similar total population, placing Nashville clearly among the most concentrated commercial banking markets.[7] Indeed, in November, 1964, its three largest banks, with their combined 95.8 per cent share

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5. *Id.* at 882. The average concentration of demand deposits for all 60 Standard Metropolitan Statistical Areas (SMSA) in Nashville's population bracket in limited branch bank states was 80.5% of all deposits in the largest three banks on November 18, 1964, while Nashville had a concentration of 95.7% in its three largest banks. J. GUTTENTAG & E. HERMAN, BANKING STRUCTURE AND PERFORMANCE 48 (1967). For comparative figures of demand deposit concentration between Nashville and other southeastern cities, see FDIC, ACCOUNTS AND DEPOSITS OF INSURED COMMERCIAL BANKS AS OF NOVEMBER 18, 1964; Smith, *Measures of Banking Structure and Competition*, 51 FED. RES. BULL. 1217-18 (1965).

6. For a comparison of the Nashville area with other SMSA's as to concentration of deposits in the largest and two largest banks, see Shull & Horvitz, *Branch Banking and the Structure of Competition*, in STUDIES IN BANKING COMPETITION AND THE BANKING STRUCTURE 130-33 (1966); 49 FED. RES. BULL. 1321 (1963). For the seven comparable southeastern SMSA's, the mean deposit concentration for the two largest banks in mid-1962 was 85.3%, well above the Nahville concentration. Board of Governors, Banking Market Unit, *Concentration of Commercial Bank Deposits in Largest Banks or Bank Groups in Standard Metropolitan Statistical Areas*, (June 30, 1962). Similarly, after the merger, on November 18, 1964, Nashville's 75.1% of demand deposits in the two largest banks compares with an average of 82.9% for all seven SMSA's. FDIC, ACCOUNTS AND DEPOSITS OF INSURED COMMERCIAL BANKS (1964).

7. If concentration in all metropolitan areas with limited branch banking is taken, the median of 78% contrasts with Nashville's 89.4% (mid-1960) and 92.6% (mid-1964) in the three largest banks. Before the merger, only five areas had a higher ratio than Nashville. Mechanical addition of Nashville Bank's share brought Nashville's ratio to 97.9%, a greater concentration than in any of the 64 other principal metropolitan areas in the nation. Plaintiff's exhibit No. 575, United States v. Third Nat'l Bank, 260 F. Supp. 869 (M.D. Tenn. 1966) [hereinafter cited as Plaintiff's Exhibit]. *See* 1962 FDIC ANN. REP. 55, 56.

of total deposits, had the third highest concentration ratio of all 62 largest metropolitan areas in states permitting branching; only Birmingham and Bridgeport exceeded Nashville's ratio.[8]

The district court found there was no trend toward concentration in the Nashville market.[9] In mid-1955 the share of the three largest banks was 94.6 per cent of total assets; nine years later, just before Nashville Bank disappeared, it was 93.1 per cent. Just after the merger, on October 1, 1964, the asset share was 97.8 per cent. Over a span of a quarter of a century, from 1939 to 1964, the asset share of the two largest Nashville banks increased from 68.8 per cent to 77.5 per cent, and the three largest went from 90.8 per cent to 98.0 per cent.[10] This growth essentially resulted from successful internal expansion; Davidson County had few mergers.[11]

B. Geographic Market

The Justice Department's complaint defined the relevant geographic market as being Metropolitan Nashville, which was then co-extensive with Davidson County, and also made reference to the seven surrounding counties. Third National included the eight counties in the community to be served, in which the three largest Nashville banks had more than 82 per cent of total deposits at the end of 1963, compared with 93 per cent of deposits in Davidson County.[12] The decision of Comptroller of the Currency Saxon approving the merger used the eight counties and, alternatively, a region with a 250-mile radius where banks doing correspondent business with Third National were located, as well as a wholesale trade area extending over middle

8. *See* FDIC, *supra* note 6.

9. 260 F. Supp. at 883.

10. POLKS BANKERS ENCYCLOPEDIA 1835-37 (March, 1940); Transcript of Record, vol. 4, at 1352, United States v. Third Nat'l Bank, 390 U.S. 171 (1968) [hereinafter cited as Transcript]. Between 1939 and 1959, asset concentration in 25 of 46 metropolitan areas which contain Federal Reserve Bank cities declined substantially. Carson & Cootner, *Structure of Competition in Commercial Banking in the United States*, in PRIVATE FINANCIAL INSTITUTIONS 80 (1963).

11. The district court's finding that Davidson County had no history of mergers was only slightly inaccurate. 260 F. Supp. at 883. Broadway National Bank was consolidated with Commerce Union in mid-1962. This was a change in form rather than substance, as both banks had been under common ownership and management for almost three decades. In 1952, First American acquired the out-of-town Madison Bank and Trust Company. Also, Nashville Bank absorbed a department of First American in 1933, in a step related to the exigencies of the Great Depression.

12. Transcript, vol. 1, at 3.

Tennessee, southern Kentucky, northern Mississippi and northern Alabama.[13]

Rejecting the broader areas, the district court considered Davidson County exclusively as the relevant geographic market. The Supreme Court agreed, stating that the 1966 Act had not altered the traditional antitrust concept of relevant geographic market.[14] Since Tennessee law confines branching to a single county,[15] the Nashville banks were limited to opening new offices only in Davidson County. An examination of the location of depositors confirms the district court's judgment. Thus 72 per cent of Third National's and 90 per cent of Nashville Bank's demand deposits (IPC) by value came from the county; in the case of savings accounts, the respective percentages were 83 and 90.[16]

C. *Product Market*

Also at issue in the case was the nature of the product market. Comptroller Saxon's opinion singled out savings and loan associations as particularly strong competitors in the area. By including these in the product market—as well as loan companies, sales finance companies, and insurance companies—the Office of the Comptroller argued that the merger increased Third National's market share by only two per cent.[17] However, the line of commerce was defined in *United States v. Philadelphia National Bank* as "the cluster of products . . . and services" offered by commercial banks.[18] This definition was followed by the district court[19] and affirmed on appeal.[20]

D. *Competitive Impact of the Merger*

In the historic *Philadelphia* situation, the merger would have produced "a firm controlling an undue percentage of the relevant market," at least 30 per cent of commercial banking in a four-county area, and would have resulted "in a significant increase [one-third] in

13. 102 COMPTROLLER OF THE CURRENCY ANN. REP. 129-30 (1964) [hereinafter cited as COMPTROLLER'S DECISION].
14. 390 U.S. at 182 n.15.
15. TENN. CODE ANN. § 45-211 (1964).
16. Transcript, vol. I, at 79.
17. *See* COMPTROLLER'S DECISION, *supra* note 13, at 131.
18. 374 U.S. 321, 356 (1963).
19. 260 F. Supp. at 878.
20. 390 U.S. at 182 n.15.

the concentration of [the top two] firms in that market . . . ." The Supreme Court pronounced such a merger "inherently likely to lessen competition substantially . . . ."[21] In addition, there was "a trend toward concentration" related to "a strong trend toward mergers." During the 1950's the seven largest banks increased their share of total assets in the Philadelphia area from 61 to 90 per cent.[22]

By contrast in Nashville, as the district court pointed out, the increase in concentration in the top two banks was about seven per cent following the merger, and Davidson County had no significant merger history. In the framework of the *Philadelphia* criteria, the only unfavorable factor was Third National's share of almost 40 per cent of the Nashville banking business. However, by the end of 1965 Third National had fallen back to second place, whereas Philadelphia National would have been by far the largest bank in its trade area.[23]

In *Brown Shoe*, the Supreme Court had warned that "remaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly."[24] Even before the merger, the Nashville banking industry was oligopolistic; indeed it had never been anything else. A trend toward concentration, "whatever its causes," was "a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be," the Supreme Court stated in *Pabst*.[25] No such trend was discernible in Davidson County; rather, even prior to the merger, the market was one of heavy concentration.

The Government argued before the Supreme Court that the Nashville merger eliminated the most probable source of some possibility of deconcentration. Although preservation of the possibility of eventual deconcentration in a market setting of already great concentration was first mentioned in the *Philadelphia* decision,[26] the district court viewed the 1966 Act as calling for the approval of a bank merger under certain circumstances despite this consideration.[27] Not dealing explicitly with this issue, the Supreme Court found that the tendency of the merger to lessen competition substantially was apparent. The Supreme Court noted that "the share of the three largest banks went from 93 to 98 per cent with Third National having

21. 374 U.S. at 363-64.
22. *Id.* at 331.
23. 260 F. Supp. at 879.
24. 370 U.S. at 333.
25. United States v. Pabst Brewing Co., 384 U.S. 546 (1966).
26. 374 U.S. at 365 n.42.
27. 260 F. Supp. at 875.

almost a 40 per cent share." Nashville Bank was deemed to have been "an important competitive element in certain . . . facets of Nashville banking;" its business had increased steadily, in absolute amount, since 1956.[28] Since *Philadelphia* provided that a merger "inherently likely to lessen competition substantially . . . must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects,"[29] an examination of market behavior in Nashville, as revealed in the proceedings, is therefore appropriate.

II. BANKING COMPETITION IN NASHVILLE

The market shares of the merging banks are often considered to be the most reliable indicator of a merger's probable competitive impact.[30] Unquestionably, however, as the district court stated, "no reliable extrapolation as to future prospects may safely be predicated upon concentration or market share figures alone." To the district court, the record refuted predictions of "actual or probable future oligopolistic behavior." Instead, Judge Miller, the district court judge, found Davidson County banking to be "highly competitive at all levels;" indeed, "one of the most highly competitive in the nation."[31]

A. Evidence of Competition

The only objective evidence submitted on the issue of competition dealt with service charges for checking accounts and trust fees. For example, in the spring of 1966 the three largest Nashville banks had the lowest average service charges on business demand deposits, with an average balance of 2,025 dollars, of 49 sizeable banks in 21 southern cities (one half the charge in Richmond, and less than two-thirds the charge in Atlanta and New Orleans). On both small (225 dollar average balance) and medium-size (625 dollar average balance) personal checking accounts, only 5 of the 21 cities were lower than

28. 390 U.S. at 183.

29. 374 U.S. at 363.

30. *See* B. BOCK, MERGERS AND MARKETS 27 (6th ed. 1968).

31. 260 F. Supp. at 882. Competition in Nashville was "keen" hut without "unusual friction," an FDIC examiner reported in late 1963. Transcript, vol. 4, at 1332. The "competitive atmosphere" was "intense," according to the Office of the Comptroller of the Currency, Customers described Nashville as "the most competitive banking town they have ever seen," a Third National vice-president in charge of business development testified. Transcript, vol. 2, at 762. The district court agreed that business rivalry "has already been exceptionally keen." Transcript, vol. 1, at 124.

Nashville. Third National, in turn, charged less than the Nashville average. Before the merger, Nashville Bank had the lowest personal checking account charges of any of the four largest banks. Since the merger, charges had not been increased by the remaining banks.[32]

B. Trust Activities

Chartered in 1889 as a trust company, Nashville Bank and Trust Company added "Bank" to its title in 1956. Earning about one-quarter of the total trust department revenues of all Davidson County banks in the 1958-1963 period, it was more important in the trust business than Third National.[33] Its trust department contributed 11.5 per cent of the bank's total income, compared to 2.5 per cent for Third National.[34]

The Board of Governors of the Federal Reserve considered Nashville Bank to be "a signficant alternative source of trust services." Its trust department was "an aggressive competitor," according to the FDIC's Division of Examination, which viewed the merger of "two important competitors in the trust field" as eliminating "significant competition."[35] Nevertheless, the district court estimated competition for trust business in Davidson County to be "minimal." Judge Miller, contrary to the view generally accepted by bankers, did not consider trust departments to be an important lever in obtaining commercial business.[36]

C. Nashville Bank's Local Correspondents

As a state chartered bank which did not belong to the Federal Reserve System, Nashville Bank was required to keep legal reserves in its own vaults or with depository banks. At the beginning of 1964, for example, it had balances of 2.5 million dollars with First American, 1.0 to 1.5 million dollars with Third National and about .33 million dollars with Commerce Union. The district court considered these balances to be "a deterrent to competition by these banks."[37]

Although banks usually do not compete with their correspondents, the presidents of both Commerce Union and First

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32. Transcript, vol. 3, at 1180; Post-trial Brief of the Intervenor at 35.
33. *Id.* at 959.
34. *Id.* at 1161.
35. *Id.* at 965.
36. 260 F. Supp. at 879 n.6. *But see* Ballam, *The Trust Department*, in THE BANKER'S HANDBOOK 867, 882 (W. Baughn & C. Walker eds. 1966); Shelton, *What a Good Trust Department Means to the Bank as a Whole*, 24 TRUST BULL. 10 (Oct. 1944).
37. Transcript, vol. 1, at 137.

American testified that they were actively competing with Nashville Bank.[38] On the other hand, the president of Third National, as well as the Comptroller of the Currency, insisted that the competition between the merging banks was neither significant nor substantial.[39]

D. *Equalization as a Merger Benefit*

Third National pointed out that the merger would bring it closer in size to First American, which was one-sixth larger before the merger, but roughly equal to Third National following it. The increased equality, the defendants argued, would present a countervailing power which would intensify competition. Such an argument was set forth in the *Manufacturer's Hanover Trust Co.* case, decided by a district court, which reasoned that by narrowing the previously existing gap between the third and fourth largest New York City banks, the merger "improved the balance of the competitive structure and intensified competition for the three leaders."[40]

Sharp asymmetry among leading firms is thought by certain students of industry to make for a higher degree of monopoly and greater probability of collusion than if the leaders are co-equals.[41] In Nashville, the top two banks were not very far apart in size by 1964. Moreover, during the period from 1955 to mid-1964 there had been a trend toward greater equality. Against the background of Nashville's highly concentrated market and Third National's already great size, the argument that merger would strengthen Third National in its competition with First American should be received skepitcally.[42] As the FDIC's Division of Examination stated "there is no evidence that such equalization would outweigh the unfavorable factor of elimination of substantial competition."[43]

E. *Post-Merger Trends*

Between the end of 1963 and the middle of 1968, assets in Davidson County rose over 40 per cent and deposits increased 37 per

38. Transcript, vol. 2, at 240, 350.
39. Transcript, vol. 1, at 148-49; Transcript, vol. 2, at 438.
40. United States v. Manufacturers Hanover Trust, 240 F. Supp. 867, 933 (S.D.N.Y. 1965).
41. E. SINGER, ANTITRUST ECONOMICS: SELECTED LEGAL CASES AND ECONOMIC MODELS 125 (1968); Shepherd, *On Appraising Evidence About Market Power*, 12 ANTITRUST BULL. 68 (1967).
42. *See generally* J. BAIN, INDUSTRIAL ORGANIZATION 575 (2d ed. 1968).
43. Transcript, vol. 3, at 957.

cent. The two largest banks lost some of their market share despite the merger, while the third bank gained. For the top three, asset concentration remained steady at 98.1 per cent, while deposit concentration declined slightly to 97.3 per cent.[44] According to the district court, competition subsequent to the merger "has been extremely active and is greater than it was prior to the merger;"[45] nevertheless, there was no significant alteration in the asset concentration pattern. At the same time, there was no basis for the Government's argument that the four smaller banks in Nashville had been at an increasing disadvantage.[46] Unlike the situation in *United States v. First National Bank and Trust Co.*,[47] not one of the Davidson County banks testified that the merger would impair its ability to compete. In fact, the president of the newest bank explained, "we don't consider Third National Bank to be a direct competitor of ours."[48]

F. Entry Conditions

Capital City Bank, which opened for business in Nashville in March, 1960, had deposits of almost 7.5 million dollars by mid-1964. Citing this experience, which was also noted by the district court, Comptroller Saxon commented that "[t]here is hardly a monopoly when a new bank can enter the market and prosper so remarkably in such a short time."[49] Nonetheless, this was the first new bank to open in Davidson County since 1927, when Third National was chartered. As the Supreme Court pointed out, the newcomer's share was only .9 per cent of the county's bank assets, and Capital City was but one-fourth the size of Nashville Bank.[50] Significantly, Nashville was not among the areas closed for new national bank applications in the immediate future by a 1965 order of Comptroller Saxon, who was anxious "to prevent overinvestment in banking in particular trade areas." In June, 1966, he testified that the fact that no applicants had appeared for a new charter to replace Nashville Bank indicated that

44. Transcript, vol. I, at 140, 155.

45. *Id.*

46. Plaintiff's Exhibit No. 496; letter from the Justice Department to the Comptroller of the Currency, May 25, 1964.

47. 376 U.S. 665 (1964).

48. 260 F. Supp. at 81. *See also* Klebaner, *The Lexington Merger Decision and its Significance for Commercial Banking*, 11 ANTITRUST BULL. 911 (1966).

49. COMPTROLLER'S DECISION, *supra* note 13, at 131.

50. 390 U.S. at 191 n.24.

the community felt that there was no need for another bank.[51]

In another aspect of the entry situation, Nashville Bank argued in its application for merger that "since practically all areas of the county are already well-served with branches, and attractive locations are almost prohibitively high in price, it would be very difficult to enter into a branching program at this date."[52] The Antitrust Division seized upon this argument as further evidence of oligopolistic power: all but 2 of the 44 branches in the county in April, 1964, belonged to the three largest banks. Later, inconsistently, the Justice Department pointed to Capital City's two branches.[53] Since the merger, Capital City has added two more, and the other Nashville banks, seven.[54] In December, 1968, the president of Third National was quoted as saying that good branch locations were still available.[55]

III. NASHVILLE BANK'S POSITION IN NASHVILLE

A. *Conflicting Official Evaluations*

The Tennessee Superintendent of Banking, who had jurisdiction over Nashville Bank, agreed that it held "a minor position in the field insofar as competition is concerned."[56] Comptroller Saxon likewise testified that it "was not a major or effective competitor in Nashville."[57] Even more pointed was a statement of his successor, William B. Camp, that Nashville Bank "could not, would not and did not compete."[58] In contrast, the FDIC's Division of Examination considered the four largest banks, which included Nashville Bank, highly competitive, and reasoned that the merger would eliminate "substantial competition."[59] Similarly, the Federal Reserve Board of Governors cited the elimination of direct competition between the merging banks in its opinion on the competitive factors in the merger.[60]

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51. Transcript, vol. 2, at 835; *see* 103 COMPTROLLER OF THE CURRENCY ANN. REP. 5 (1965-66).

52. Nashville Bank & Trust Application to Merge at 89.

53. Brief for United States at 29, United States v. Third Nat'l Bank, 390 U.S. 171 (1968) [hereinafter cited as Brief for United States].

54. POLK'S WORLD BANK DIRECTORY (Sept. 1968).

55. The American Banker, Dec. 16, 1968, at 15.

56. Transcript, vol. 4, at 1195.

57. *Id.*, Vol. 2 at 822.

58. *See* Appellee's Motion to Affirm at 11, United States v. Third Nat'l Bank, 390 U.S. 171 (1968).

59. Transcript, vol. 3, at 957.

60. *Id.* at 965.

According to the district court, Nashville Bank at the time of merger was a "floundering bank, though not a failing one . . . more attuned to the Victorian age which gave it birth than to the competitive realities of 20th Century commercial banking."[61] Judge Miller pointed to the slippage in its share of the banking business from 5.7 per cent in mid-1960 to 4.8 per cent in mid-1964. While total demand deposits in Davidson County rose almost 16 per cent, Nashville Bank had the dubious distinction of being the only bank to suffer a decline in the absolute dollar amount of demand deposits from 19.98 to 18.95 million dollars.[62] Likewise, it was the only bank in the market to show a decline in the percentage growth rate of assets, loans and deposits in the four years after mid-1960 when compared to the preceding four years.[63] Moreover, in the brief period before the crystallization of the merger agreement in March, 1964, deposits in Nashville Bank declined by several million.[64]

Although the Supreme Court noted that Nashville Bank was not dynamic and its rate of growth was slower than other banks in the county after 1960, the Court emphasized that "the absolute size of its business increased steadily" up to the time of the merger; Nashville Bank was "an important element in certain . . . facets of Nashville banking," offering "somewhat different services, at somewhat different rates, from those offered by the other banks. . . ."[65]

B. Competition Between Third National and Nashville Bank

In the opinion of Comptroller Saxon, as well as that of the district court, competition between the acquiring and acquired banks was minimal, because of the difference in their size and diversity of market interests.[66] Yet a review of banking services offered by the two institutions shows a preponderance of common activities. For example, Nashville Bank offered nine of the fifteen deposit operations found at Third National. As depositories, both were involved in the same six distinct areas. 31 of 42 kinds of loans available from Third National were available also at Nashville Bank. The smaller bank performed only two of Third National's four safe deposit functions

61. 260 F. Supp. at 884.
62. Transcript, vol. 1, at 132.
63. *Id.* at 146.
64. *Id.* at 30-31. According to Comptroller Saxon, deposit shrinkage ($5.8 million specified) was a factor prompting the merger. COMPTROLLER'S DECISION, *supra* note 13, at 130.
65. 390 U.S. at 183.
66. COMPTROLLER'S DECISION, *supra* note 13, at 130; Transcript, vol. 1, at 137.

and three of four investment services offered by the larger bank. Of 32 various other services at Third National, Nashville Bank listed 19. Real estate sales and rentals were available at Nashville Bank, but not from the larger bank.[67] The size of customers' balances is another significant measure of competitive overlap. At the end of 1963, 58 per cent of the dollar volume of demand deposits at Third National and 70 per cent of Nashville Bank's deposits were in accounts of over 50,000 dollars; the respective shares in time and savings accounts in the two banks were 19 and 21 per cent.[68]

C. Correspondent Banking

A striking difference in the activities of the merging institutions is found in the area of correspondent banking. Almost one-fifth of Third National's deposits belonged to some 365 mid-southern correspondent banks, while Nashville Bank, with only twelve inactive accounts at the end of 1963, could hardly be said to be in this field.[69] Third National, which stood in 108th place among all United States banks with respect to total deposits and 58th in correspondent balances, was clearly a substantial competitive factor in this area.[70]

Offering no explanation for its position, the district court stated that "a bank has the responsibility, if it has the assets and personnel, to engage in correspondent banking."[71] Existing competitors may have adequately served the field, and it was not shown that Nashville Bank's prospects here were more attractive than in other segments of banking. While Judge Miller pointed out that Nashville Bank "could have engaged in correspondent banking had it been truly competitive," Comptroller Saxon testified that most banks the size of Nashville Bank would not assume this activity.[72]

D. Loan Policies and Loan Quality

The ratio of loans to deposits for Nashville Bank was well below the Davidson County and United States averages from 1955 to 1964, with the exception of 1958. During these years, Third National was

67. Transcript, vol. 3, at 987-91. Among important services not available from Nashville Bank were: lock-box, night transit, payroll preparation, credit-by-check, term loan, statistical information, and bank wire services. Transcript, vol. 1, at 128-29.

68. Transcript, vol. 3 at 993.

69. COMPTROLLER'S DECISION, *supra* note 13, at 130.

70. 260 F. Supp. at 882.

71. Transcript, vol. 1, at 127.

72. Transcript, vol. 2, at 833.

above the average and generally outstripped First American as well as Commerce Union in this respect.[73] Commercial and industrial loans averaged 26.7 per cent of Nashville Bank's total loan portfolio during the period from 1961 through 1963, while Third National's average was 40.8 per cent.[74] However, if real estate loans for nonfarm, nonresidential purposes are added to loans already classified as commercial, Nashville Bank's ratio of loans for business purposes becomes about one-third of its gross loans outstanding in these years.[75]

Both banks had similar proportions in loans to individuals for personal expenditures. Nashville Bank advertised five per cent direct new automobile loans and made none through dealers. The large banks emphasized indirect car loans in their advertising, but they made direct loans as well; indeed, Third National had twice as many direct car loans as Nashville Bank at the time of the merger.[76] The proportion of real estate loans to total loans at Nashville Bank was twice the state-wide average, while less than 1 1/4 per cent of Third National's loans were in this form.[77]

The merger removed the only major alternative loan source available to local businesses and individuals who could not or chose not to deal with the three largest banks. At the end of 1963, 62 per cent of the dollar volume of Nashville Bank's loans were in amounts under 50,000 dollars, while Third National had only 52 per cent of its loans under this amount.[78] Clearly, the presence of sizeable lesser banks in a market has a favorable effect on smaller borrowers.[79]

The record of the merging banks in respect to the quality of loans made was significantly different as reported by bank examiners who evaluate questionable loans as being either substandard, doubtful, or loss. A declining trend in the quality of loans had set in for Nashville Bank in the early 1960's, as the district court noted. In November, 1963, the dollar volume of its classified loans—those rated substandard, doubtful, or loss—exceeded those so rated for Third

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73. Nashville Bank's ratio was below average for all United States banks by at least 10% in every year except 1957 and 1958. Board of Governors of Federal Reserve System, Loan-Deposit Ratios (unpublished, available at Federal Reserve of New York).

74. Transcript, vol. 4, at 1256.

75. Plaintiff's Exhibit No. 45-61, Schedule A.

76. Transcript, vol. 1, at 150.

77. COMPTROLLER'S DECISION, *supra* note 13, at 130.

78. Transcript, vol. 3, at 994.

79. J. GUTTENTAG & E. HERMAN, *supra* note 5, at 32; Carson & Cootner, *supra* note 10, at 83.

National, although the larger bank had an eightfold greater loan volume.[80] As early as 1960, the FDIC examiner cautioned Nashville Bank that its classified loans were sufficiently high to warrant attention by officers and the board of directors. A disproportionate amount of classified loans was noted the following year, though overall the FDIC did not consider them unduly large.

As late as 1961, the agency continued to rate Nashville Bank's management as satisfactory.[81] The FDIC lowered this rating to "fair" in 1962; a rather large volume of loans was criticized, and the need for closer screening of applications and a more aggressive servicing and collection program were cited. Because of the large volume of criticized loans, even though the number of such loans had decreased, the "fair" rating was continued by the FDIC at the time of its late 1963 examination. Classified loans, 6.9 per cent of the total, were below 1962's record 7.3 per cent, but sharply above the 3.6 per cent for 1960 and 3.7 per cent for 1961.[82] By the time of the 1963 examination, loss loans were cut to half of those of 1962, and overdue paper had been reduced by one-fourth from the 1962 level of 1.2 million dollars.[83] Net loan chargeoffs (.3 per cent in 1961, .4 per cent in 1962, and .2 per cent in 1963) were not considered abnormally high.[84] After the merger, Third National lost 121,000 dollars on the 23.6 million dollar loan portfolio acquired from Nashville Bank.[85] Altogether, the evidence would seem to indicate that 1962's loan performance was particularly poor, while 1963's was somewhat more encouraging.

E. Other Weaknesses

The FDIC rated the trust department of Nashville Bank only "fair" during the years 1960 through 1963. Its 1960 report noted that "the overall operations of the department leave much to be desired," and the 1963 report mentioned "lack of improvement in the long

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80. Transcript, vol. 1, at 152-53. The ratio of classified assets to total capital also measures a bank condition. A third measure showed classified loans as 145.4% of Nashville Bank's bad debt reserves, while Third National had only 17.2% at the end of 1963. Transcript, vol. 1, at 153.

81. Transcript, vol. 4, at 1264, 1295, 1299.

82. *Id.* at 1310, 1315, 1331, 1357.

83. Transcript, vol. 2, at 781, 785; Transcript, vol. 4, at 1357.

84. Transcript, vol. 2, at 786-87. Third National's ratio during these years was .24%, .24%, and .23%. Transcript, vol. 3, at 1156.

85. Transcript, vol. 1, at 154; Transcript, vol. 3, at 933.

standing criticisms."[86] The bank's equipment—similar to that acquired 37 years earlier by Third National—was another example of backwardness. In 1964 Nashville Bank was among fourteen medium-sized Tennessee banks (most of the rest in very small communities) which did not have any form of automated or computerized equipment.[87] Failure to set up and to develop branch banks was another weakness. At the time of the merger only 1 of the 44 Davidson County branches belonged to Nashville Bank.[88] Neglect of this "hallmark of modern banking," in Comptroller Saxon's apt phrase, certainly did not speak well of its policies.[89]

In short, the district court correctly described management policies as "unaggressive, ultra-conservative, negative and unprogressive."[90] The Supreme Court recognized that "managerial deficiencies" existed, but insisted on asking whether alternative solutions were available.[91] Before ruling on an anticompetitive bank merger, the Supreme Court requires not only an examination of the condition of the acquired bank but also an evaluation of the practicality of alternative remedial measures.

IV. Possible Solutions for Nashville Bank's Problems

A. Merger Negotiations

At the time negotiations were under way for the purchase of Nashville Bank's controlling stock interest (held by the H. G. Hill Company), Nashville Bank's President Hackworth did not tell the Weaver group that it would be necessary for the bank to merge. Weaver testified that he and his associates did not plan to sell or merge Nashville Bank when they bought it. Serious discussions began in November, 1963, and on January 13, 1964, the Weaver group signed a contract to buy the H. G. Hill Company's stock in the Nashville Bank. The purchase was consummated on March 11, 1964. Six days earlier, after a series of discussions which had begun in mid-February, Third National made a formal offer to buy the Weaver group's controlling stock. Exactly one day elapsed between the time

86. Transcript, vol. 1, at 134-37.

87. Transcript, vol. 2, at 684.

88. 260 F. Supp. at 881 erroneously refers to 52 branches in the county.

89. Comptroller's Decision, *supra* note 13, at 131, *quoted in* 260 F. Supp. at 881.

90. 260 F. Supp. at 879, 881.

91. 390 U.S. at 190. The Supreme Court criticized the district court for not "sufficiently or reliably" establishing this point. The minority disagreed. 390 U.S. at 194.

that the Weaver group delivered the cash for the Hill Company and Hackworth stock, and the approval of the merger agreement by the board of directors of both banks.[92]

Weaver was senior vice-president of the National Life and Accident Insurance Company of Nashville and son-in-law of the chairman of the board. His group viewed the stock purchase as an investment and was unwilling or unable to participate in the active management of the bank. They claimed not to have understood the full magnitude of Nashville Bank's difficulties until after they had entered into the agreement to buy it.[93] However, the "many inquiries by Weaver and his associates and attempts to find improved management or otherwise solve these problems" referred to by the appellees, and Weaver's testimony that they gave "a lot of thought and consideration to the problem of management" appear to have been appropriately characterized as perfunctory by the Justice Department.[94]

The district court concurred in the argument that the merger was a business necessity for the smaller bank.[95] Negotiating another sale would have been a "formidable task," while solving the bank's many problems directly would have been an "even more formidable task." Further, the district court stated that unless Nashville Bank merged, it "faced an almost insoluble problem," which would require drastic expenditures.[96] To put us in a position to evaluate properly the rationale of the Supreme Court decision, possible remedial measures must now be reviewed.

B. Management Difficulties

Nashville Bank's serious management problems—its inadequate personnel and management policies and the "wholly inadequate" salary scale—impressed the district court. For example, four of the department heads were 65 or older and the other two were 59. Sixty was the average age of the fifteen officers outside the trust department. Of the three officers under 40, only one was a college graduate. President Hackworth, 68, was ill and interested in retiring, but no one at the bank was qualified to replace him. Judge Miller concluded that "it

92. Transcript, vol. 1, at 129-31; Transcript, vol. 2, at 487-88, 492, 527, 528, 536.

93. Transcript, vol. 2, at 492; Transcript, vol. 1, at 145.

94. Brief for Appellee, Third Nat'l Bank, at 15, United States v. Third Nat'l Bank, 390 U.S. 171 (1968).

95. *Id.*

96. 260 F. Supp. at 881, 883.

would have been practically impossible within any reasonable period of time to obtain adequate managerial replacements either from within the bank or from the outside."[97] Nevertheless, a government witness, Professor McNichols, chairman of the Business Administration Department of the Graduate School of Business at Northwestern University, testified that the management "could compare very favorably with other banks throughout the country."[98] Also, the head of a Chicago bank personnel recruiting firm testified that there would be no major problems in obtaining adequate new management.[99] Furthermore, both the number of officers and their compensation were rated "satisfactory" on the FDIC examination of November, 1963.[100]

Although the Supreme Court's statement that the "merger with Third National would very probably end" Nashville Bank's managerial problems appears unduly cautious, the Court correctly asked whether "reasonable efforts to solve the management dilemma of Nashville Bank short of merger with a major competitor" had been tried but failed, or whether "any such efforts would have been unlikely to succeed."[101] The weight of evidence appears to support the Government's position that the Weaver group made no serious efforts to resolve the management succession problem. The Supreme Court took notice of the lower court's finding that the recruitment of new management would be extremely difficult, considering the salaries paid by Nashville Bank. To attract competent personnel, it is very likely that salaries would have had to be raised. But if this were done, a bank the size of Nashville Bank and located in a thriving, desirable community would have difficulty demonstrating that it could not recruit officer replacements. The problem then becomes one of deciding whether realistic salary payments would have wiped out prospective profits.

C. *Would Revamping Nashville Bank Have Been Profitable?*

Relying on figures supplied by Third National President Fleming, the district court found that had Nashville Bank "made the expenditures which needed to be made for the proper maintenance of

97. *Id.* at 880-81.
98. Transcript, vol. 2, at 880-81.
99. *Id.* at 912.
100. *Id.* at 792-93. *Contra*, Transcript, vol. 1, at 133.
101. 390 U.S. at 188-89.

the bank, its apparently good earnings record in the years immediately preceding the merger would have been substantially diminished."[102] The Antitrust Division exaggerated the bank's profitability. Although the bank did have the highest increase in net profits after taxes of any Davidson County bank in the period 1955 through 1963 (272 per cent), earnings were strikingly low in the initial years of the comparison. Before 1960, the bank averaged 4.2 per cent, which was less than half the return of all Sixth District member banks, and well below the 7.8 per cent for all banks of comparable size. Beginning in 1960, reported earnings compared favorably; while the 1963 FDIC examination report found the Nashville Bank's earnings to be satisfactory,[103] at least some of the "profit" of the later years reflected deferral of outlays for necessary improvements which could not be postponed indefinitely.

According to Professor McNichols, the outlays for salary, fringe benefits and remodeling would not have been imminent had the bank remained independent. It is difficult to accept this viewpoint at least as far as salaries are concerned. More to the point was his observation that modernization outlays could be expected to enhance the bank's profitability.[104] In the opinion of the FDIC, Nashville Bank's growth in the period after 1960 (36.6 per cent in deposits) "reflects neither stagnation nor lack of a considerable public acceptance for an institution having but one branch in a city where multiple branching by other major banks exists."[105]

D. Alternatives to Merger

According to the legislative history, the Bank Merger Act of 1966 had as one of its purposes the provision of more definite guidelines for the floundering-bank problem in medium to small communities.[106] The problem arises when there is a small number of banks and one or more is stagnant due to its inability to attract top management personnel because of its size, unrealistic and conservative policies, or other reasons. At the time of the merger, both the defendant banks and the district court considered the Nashville Bank a "floundering bank."[107] The Supreme Court disagreed, finding none

102. Transcript, vol. 1, at 139.
103. Transcript, vol. 4, at 1331.
104. Transcript, vol. 2, at 901-03.
105. Transcript, vol. 3, at 957.
106. H.R. REP. No. 1221, 89th Cong., 2d Sess. 3 (1966).
107. 260 F. Supp. at 884.

of the elements set forth by the House Committee on Banking and Currency and noting the success of the much smaller Capital City Bank, founded only a few years prior to the merger. The Court found nothing to indicate that a 50 million dollar bank was too small to attract top management; nor was there evidence that the new owners were insisting on "unreasonably conservative managerial policies."[108] Nashville Bank's rating with the FDIC had been downgraded to "fair" in 1962, but the lower court did not draw any "conclusion about the extent of the danger these conditions posed" for the bank's future. Its 1963 net profit after taxes of 368,000 dollars and its subsequent steady profitability impressed the Supreme Court. Apparently the high court classified floundering banks as those in danger of collapse or in a financially unstable condition; the district court's findings had not documented "the possibility of eventual failure of Nashville Bank."[109]

The Justice Department had previously posed the question to the Supreme Court "whether a bank can be deemed to be floundering, . . . so as to justify an anticompetitive merger, when the bank's problems can evidently be resolved simply by an infusion of new management or a limited amount of new capital."[110] In oral argument before the Supreme Court, the Government explained that unless corrective measures were taken soon Nashville Bank would "tend to go downhill and ultimately might even turn into a failing bank." Nevertheless, the Government argued that the bank could not be said to be floundering merely because it was "not operating efficiently and using the most modern methods."[111]

The Justice Department took the position that a substantially anticompetitive merger should not be permitted in a floundering bank situation unless defendants had shown "that they made reasonable efforts to determine whether less anticompetitive solutions were available." The Bank Merger Act was said to require exploration of "all practicable alternatives to a highly anticompetitive merger." Before Nashville Bank could merge with "a dominant and substantial competitor," it should be required to show clearly "first, that it has attempted to cure its problems without resort to merger, and second, that it could not find a buyer with whom it did not directly compete, or one of lesser size than the contemplated buyer."

108. 390 U.S. at 191-92 & n.24.

109. *Id.* at 187 & n.21.

110. Jurisdictional Statement, at 22, United States v. Third Nat'l Bank, 390 U.S. 171 (1968).

111. Appellant's Oral Argument before the United States Supreme Court at 79, 81.

If curing the problems without merger was feasible, "then resolution of these problems at an unnecessarily high cost in terms of competitive injury does not 'clearly outweigh' the merger's anticompetitive effects."[112]

The Office of the Comptroller of the Currency had another interpretation of the 1966 Act; regardless of the anticompetitive effect, a merger clearly dictated by convenience and by needs of the community should be approved. In such a view the possibility that a less anticompetitive merger could have been arranged is irrelevant.[113] Along similar lines, Third National's attorneys reasoned that even assuming that merger with the third-ranking bank would have been less anticompetitive than merger with the second-ranking bank, the former would not be the preferable alternative if the latter could be shown to be more promotive of community needs.[114]

The Justice Department argued that if merger were the sole solution, then a sale to Commerce Union, the third-ranking bank, represented the lesser evil. Several times, starting in 1961, Commerce Union's interest in acquiring Nashville Bank had been conveyed informally to Hill and Hackworth. Subsequently, Commerce Union offered the Weaver group about 360 dollars a share, but the Weaver group wanted about 468 dollars.[115] The Justice Department argued that the fact that a smaller profit would have accrued to the shareholders from merger with Commerce Union was irrelevant. The Officer of the Comptroller of the Currency objected to this approach, saying that Commerce Union "was not interested in making a fair price."[116]

Neither court analyzed the possibility of a merger with Commerce Union. Judge Miller was convinced that acquisition by Third National satisfied the Merger Act's requirements. The Supreme Court sought a preliminary demonstration that "alternative means . . . without a merger would present unusually severe difficulties."[117] The Court noted that such an alternative would have been an offer by another businessman "to buy out the Weaver interest at an acceptable price."[118]

112. Brief for United States at 27 & 30.

113. Brief for Appellee, William B. Camp, at 24, 39.

114. Brief for Appellee, Third Nat'l Bank, at 55-56, United States v. Third Nat'l Bank, 390 U.S. 171 (1968).

115. Transcript, vol. 2, at 250-52.

116. Brief for United States at 30 & 31 n.18. Brief for Appellee, William B. Camp, at 36, United States v. Third Nat'l Bank, 390 U.S. 171 (1968).

117. 390 U.S. at 192.

118. 390 U.S. at 189.

V. The "Nashville" Doctrine

The Bank Merger Act of 1966 precludes a merger which would violate the Clayton Act "unless . . . the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."[119] In *United States v. First City National Bank of Houston,* the Supreme Court italicized "clearly."[120] Then, in *Nashville*, it interpreted the statutory language as requiring proof that the "merger was essential to secure this net gain to the public interest."[121] Therefore, the defendant banks must establish the unavailability of alternative solutions, because the Court will declare the merger illegal if reasonably able businessmen could have taken other remedial measures.[122] Thus in *Nashville*, one issue was whether "more lively and efficient management" which would continue to operate Nashville Bank as an independent entity could have been secured.[123] Here the Court refused to sanction an anticompetitive merger unless there has been "a showing . . . that the gain expected from the merger cannot reasonably be expected through other means."[124] Since there was no showing that lively and efficient management could not be found by other means, the Supreme Court held that the district court misapplied the "convenience and needs" provision of the 1966 law. Thus, the Court will approve a merger "if the gains in better service outweighed the anticompetitive detriment and the merger was essential to secure this net gain to the public interest."[125] While the Court was prepared to give suitable weight to benefits of a merger, it remanded the case for consideration of alternative solutions.

VI. Convenience and Needs Aspect of the Merger

A. Benefits of the Merger

In the lower court, Judge Miller found that the merger contributed importantly to the area's needs and convenience by

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119. 12 U.S.C. § 1828(c)(5)(B) (Supp. III, 1968).
120. 386 U.S. 361, 370 (1967).
121. 390 U.S. at 189.
122. *Id.* at 189-90.
123. *Id.* at 192.
124. *Id.* at 190.
125. *Id.* at 189.

providing a greater loan limit, by solving Nashville Bank's problems, and by providing better pay and fringe benefits for its former employees. He also enumerated a great many benefits accruing to customers formerly attached to Nashville Bank as a result of their new connection with Third National. Every one of these advantages, of course, had been available previously to those who did business with any of the three largest banks. Third National, which described itself as "a full service" bank, did not propose a single new service in its merger application.[126]

B. More and Larger Business Loans

The Office of the Comptroller of the Currency considered Third National's utilization of Nashville Bank's funds for commercial lending to be the merger's most important benefit. The Supreme Court agreed that the merger would "secure the better use of its [Nashville Bank's] assets in the public interest."[127] The acquiring bank, as we have seen, placed a greater emphasis on short-term commercial lending. Moreover, because the capital base of the combined institution generally exceeds that of the acquiring bank, a merger ordinarily as in this case, increases the permissible maximum size of loans.

In 1963, the Supreme Court rejected the defense that the Philadelphia National Bank would be in a position to make much larger loans, thereby allowing it to compete with New York banks. This consideration was said to be irrelevant under the 1960 Bank Merger Act: "If anticompetitive effects in one market could be justified by procompetitive consequences in another . . . every firm . . . could, without violating section 7, embark on a series of mergers that would make it in the end as large as the industry leader."[128] In *Philadelphia* the Court found that the lack of adequate banking facilities caused no hardship to either individuals or businesses because firms too large to be accomodated locally could obtain bank credit elsewhere. In *Nashville,* however, the Supreme Court recognized that one of the aims of the 1966 Merger Act was to give lending capacity, a "factor, not previously relevant in appraising bank mergers, suitable weight in judging their validity."[129]

126. Intervenor's Exhibit No. 1 at 75, United States v. Third Nat'l Bank, 260 F. Supp. 869 (M.D. Tenn. 1966).

127. 390 U.S. at 188-89.

128. 374 U.S. at 370.

129. 390 U.S. at 186.

The district court found that the higher loan limit and Third National's higher loan-to-deposits ratio enhanced the combined institution's lending capacity. Since the district court did not spell out the beneficial consequences of the enhanced lending capacity for the Nashville community and did not define the value of these additions, as compared with the less desirable results of the merger, the Supreme Court felt that the increased lending capacity weighed very little in the balancing test under the Merger Act. By this pronouncement, the Supreme Court was presumably underscoring once again the principle that alternatives to anticompetitive mergers must be sought first. As for "beneficial consequences" the lower court pointed to the dependence of small Nashville firms on local funds and reasoned that a bank could best assist the growth of a developing area through commercial loans. Further the court noted that Third National disposed of some 8.4 million dollars of the Nashville Bank's real estate mortgages and made the funds available for commercial lending in Nashville and the central South.[130] For the district court to have said any more on this subject would have been to labor the obvious.

Less clear-cut than the benefits of an increase in the funds for shorter-term business lending are the advantages of a larger maximum limit. Nashville's economic development created capital demands which local and regional institutions could not satisfy. For example, no bank in the Sixth Federal Reserve District was large enough to meet the credit needs of any of the 14 giant corporations (among the nation's 100 largest) with facilities in the District.[131] However, these corporations, headquartered mostly in or near one of the largest cities, do have ready access to major lenders anywhere in the United States and their growth is not impeded by their having to look to distant centers for their funds. Some of Third National's lines of credit, moreover, were extended to such firms as General Motors, General Motors Acceptance Corporation, Sears Roebuck, and Ralston-Purina.[132] Only 1 of the 500 largest industrial firms in the nation,

130. Transcript, vol. 1, at 155. Funds totaling $11.2 million became available from the sale of mortgages and Third National's higher loan-deposit policy. *Id.* The merger added altogether $12.7 million in commercial lending power. Brief for Appellee, William B. Camp, at 91.

131. Transcript, vol. 1, at 143; *cf.* 390 U.S. at 186.

132. Transcript, vol. 3, at 1067-69. Altogether, Third National made 21 loans in excess of $700,000 between January, 1963, and August 17, 1964, to out-of-state borrowers. *Id.* at 1074-78. The combined lending limit of all banks in the nation with deposits of over $100 million is under $2.2 billion. GMAC borrows about $3 billion at short term from banks and the commercial paper market. Federal Reserve Bank of Chicago, *Business Conditions* at 5 (Dec. 1968).

Genesco, makes its headquarters in Nashville.[133] Surely it did not face difficulties in securing whatever financing it sought outside the Sixth District.

Actually, a very large local firm (for example, Capitol Airways, or Murray-Ohio Manufacturing) could have secured a larger total credit before the merger, if both banks involved had participated in the loan. Nashville Bank had an unconditional limit of 654,000 dollars and a conditional limit of 1,090,000 dollars. The smaller amount was almost one-fourth more than the increase gained by Third National as a result of the merger.[134] Loan participations are common when a bank is unable or unwilling to assume the full responsibility of accommodating a large customer. For example, Nashville Bank had participated to the extent of 1 million dollars in a 19.6 million dollar credit to Genesco. Third National also had a large interest in this loan arrangement, which was handled by First American.[135]

Undoubtedly, as Comptroller Saxon stated, merger would enable Third National "better . . . to meet the credit needs of its larger customers throughout the Nashville wholesale trade area."[136] Yet the Comptroller testified after the merger that Nashville did "not yet possess an institution of sufficient size to meet even the existing capital requirements of the larger business institutions, and indeed has to rely excessively on outside institutions." He also believed that Nashville was a capital deficit area which needed a reasonable concentration of banking resources to provide for its growing needs.[137] Again in 1966 he referred to Nashville's need "to reduce . . . an excessive reliance on outside institutions."[138] Just how larger banks can eliminate the deficit is nowhere made clear. A capital deficit area will inevitably import capital, but to speak of the resulting drain of earnings with negative overtones is to overlook the benefit to the area, whose growth is made possible in part by financing from sources outside the region. As for accomodating the large customers, there is no reason for additional entrants to make this borrower market more competitive than it already is.[139]

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133. 70 FORTUNE, July 1964, at 179.
134. Transcript, vol. 1, at 129.
135. Transcript, vol. 3, at 1070; *cf.* Transcript, vol. 2, at 187.
136. COMPTROLLER'S DECISION, *supra* note 13, at 131.
137. Transcript, vol. 2, at 820, 835.
138. *Id.*
139. Alhadeff, *Bank Mergers*, 29 So. ECON. J. 218, 220 (1963).

A recent study of mergers in the Sixth Federal Reserve District suggested that service benefits to the public, such as larger loan limits and increased or new services, "probably outweighed, in most cases, the presumed inconvenience . . . to the public of reductions in numbers of alternative sources of banking services."[140] Realistically, the Antitrust Division cannot afford to ignore the advantages to a community which a larger institution, made possible only by merger, would bring about. But before an anticompetitive merger is condoned, it is not unreasonable on the Division's part to insist on a more persuasive showing of convenience and needs than was made in the *Nashville* case.

VII. Bank Merger Policy After *Nashville*

A. Convenience and Needs, and Floundering Banks

As the Supreme Court recognized, the 1966 law provided merging banks with a new defense or justification: "an anticompetitive bank merger would be in the public interest because of the benefits it would bring to the convenience and needs of the community to be served."[141] However, the banks have the burden of demonstrating the unavailability of alternative means of securing these benefits. "Otherwise," the Supreme Court pointed out, "the benefits of competition, acknowledged by Congress, would be sacrificed needlessly."[142] The unnecessary elimination of a competitor can hardly be said to contribute to the community's convenience and needs.

Unless the authorities administering the 1966 Act apply a rigid standard for outweighing anticompetitive effects, they are in danger of sanctioning merger proposals which injure competition needlessly. After all, if merger is a readily available solution, the incentive to pursue more difficult alternatives which preserve or enhance competition is greatly weakened.[143] Nashville Bank, according to

140. Crum, *Evaluation of Some Concentration Influences in the Postwar Banking Structure of the Southeastern Region Comprising the Sixth Federal Reserve District*, 1 So. J. Bus. 249 (1966).

141. 390 U.S. at 192.

142. 390 U.S. at 189; *see Hearings on S. 1698 Before the Subcomm. on Amendment to the Bank Merger Act of the Senate Comm. on Banking & Currency*, 89th Cong., 2d Sess., pt.1, at 378 (1965) (Federal Reserve Governor Mitchell) [hereinafter cited as 1698 hearings].

143. Via, *Antitrust and the Amended Bank Merger and Holding Company Acts*, 53 Va. L. Rev. 1115, 1131 (1967). *See also* Alhadeff, *supra* note 139, at 228; Edwards, *Bank Mergers and the Public Interest: A Legal and Economic Analysis of the 1966 Bank Merger Act*, 85 Banking L.J. 753, 790-91 (1968).

Comptroller Saxon, was "not disposed to compete."[144] But the profit awaiting the Weaver group from sale of their stock interest to Third National could hardly strengthen their disposition. What if merger were ruled out?

The evaluation of a convenience and needs defense is not a simple matter. Federal Reserve Governor Mitchell has suggested that surveys of community views, informed judgments of bank examiners, and a review of the bank's participation in financing its community show the area's demands for various banking services, as distinct from the services that the existing and proposed banks intend to supply.[145] Though difficult to gauge, the benefits which a merger may bring to a community are rightly a matter which the applicant banks may now argue with the authorities.

B. Problem Situations

Management problems, especially those revolving around succession, are perhaps the most common argument offered for mergers. This is not a recent devclopment. State and federal supervisors over a dozen years ago cited successor management as "the biggest problem and most glaring weakness of bank management."[146]

In "determining whether the merging bank is capable of obtaining its own improved management," the Supreme Court does not "demand the impossible or the unreasonable."[147] The Supreme Court's search for feasible alternatives to merger also rcflects the thinking of the House Committee on Banking and Currency on the earlier Bank Merger Act. In 1960, the Committee enumerated a number of situations where merger would be in the public interest (and lawful), despite the fact that competition might be lessened substantially:

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144. 260 F. Supp. at 881. A bank which finds merger blocked, however, is more likely to develop or discover a disposition to compete.

145. Gustus, *Mergers, Branches, and Convenience and Needs*, FED. RES. BANK OF PHILA. BUS. REV. at 16 (Nov. 1968); *cf.* 1698 Hearings, *supra* note 142, at 377.

146. Bowers, *Management Succession in Bank Mergers*, FED. RES. BANK OF PHILA. BUS. REV. at 18, 22 (Nov. 1968); H. LIVINGSTON, MANAGEMENT POLICIES IN AMERICAN BANKS 100 (1956); Alhadeff concluded that "management problems . . . were not a major initiating factor" in mergers. Alhadeff, *Recent Bank Mergers*, 69 QUAR J. ECON. 506 (1955). A 1964 investigation suggested that more commonly the succession problem was brought about by a desire to merge rather than the reverse. AN EVALUATION OF THE MANAGEMENT SUCCESSION PROBLEM IN THE COMMERCIAL BANKING INDUSTRY, SUBCOMM. ON DOMESTIC FINANCE OF THE HOUSE COMM. ON BANKING AND CURRENCY, 88th Cong., 2d Sess. 5 (1964).

147. 390 U.S. at 190. *See also* Edwards, *supra* note 143, at 794-95.

(1) ultimate failure is a "reasonable probability;"

(2) management problems can be corrected "only by a merger with the resulting bank;"

(3) "a problem bank with inadequate capital or unsound assets and the merger is the only practicable means of solving the problem;"

(4) overbanking in a small town results in "resort to unsound competitive practices, which may eventually have an adverse effect on the condition of such banks, and the merger would correct this situation."[148]

Thus, the attitude reflected in this report permeates the Supreme Court's reading of the 1966 Act in the *Nashville* case. Although the language of the 1966 statute differs from the 1960 law, it certainly cannot be argued that the later measure was intended to downgrade the element of competition as a criterion.

The Antitrust Division's "restrictive interpretation of the 1966 Amendment" was the subject of adverse comment by the district court.[149] When the convenience and needs provision was under consideration by the Congress, the Attorney-General criticized it as an unnecessary, inappropriate "substantive change in existing law." Despite opposition, it was enacted. The report of the House Committee on Banking and Currency explained that although section 7 of the Clayton Act applies to banks, the 1966 amendment "permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served . . . that it would be in the public interest to permit it."[150]

There can be no doubt that Congress intended that the convenience and need exception should apply to the "floundering bank" problem. Other situations to which the exception applies are less obvious from the record. The Government argued in both *Houston* and *Nashville* that the amendment would apply where "new and important banking services" would be brought to the community. It then contended that the Nashville Bank merger failed to provide such service.[151]

The scope of convenience and needs should be left undefined. Certainly the *Nashville* case has not established any restrictions on the kinds of benefits which might appropriately be embraced under the exception. Rather, as the Supreme Court perceived:

148. H.R. REP. No. 1416, 86th Cong., 2d Sess. 10 (1960).

149. 260 F. Supp. at 875.

150. H.R. REP. No. 1221, 89th Cong., 2d Sess. 3-4, 7 (1966).

151. Brief for United States at 31-32.

> The necessity of choosing is most clearly posed where the proposed merger would create an institution with capabilities for serving the public interest not possessed by either of the two merging institutions alone and where the potential could be realized only through merger.[152]

The banks are only required to show the importance of the benefits and their inherent connection with the merger in question; to insist in addition that the benefits be new or different would be gratuitously restrictive. As the then Economist to the Comptroller of the Currency wrote in 1963: "[I]t is in the public interest to be discriminating enough to allow concentration where it is beneficial and to forbid it where it is harmful."[153]

C. *Concentration Ratios and Bank Mergers*

Convinced that "the test is fully consonant with economic theory," the Supreme Court in *Philadelphia* saw in the market concentration data an approach which "lightens the burden of proving illegality . . . with respect to mergers whose size makes them inherently suspect in light of Congress' design in section 7 to prevent undue concentration."[154] Economists commenting on the *Philadelphia* decision pointed out that at issue was the complex question, yet unresolved by their profession, "of the competitive impact of a change in concentration in a market already characterized by a substantial degree of concentration."[155] Economic theory has little to offer in the form of well-grounded analysis of the consequences for competition when an already oligopolistic market setting, such as is common in banking, loses a firm.[156] The reduction in the number of firms does

152. 390 U.S. at 185-86. A thoughtful decision, handed down a few weeks before *Nashville*, interpreted convenience and needs as "a narrow and restricted exception." The condition to which it would apply in the case of an anticompetitive merger is described as "compelling" in two different places. United States v. Provident Nat'l Bank, 280 F. Supp. 1, 23-25 (E.D. Pa. 1968).

153. Abramson, *Private Competition and Public Regulation*, in STUDIES IN BANKING COMPETITION AND THE BANKING STRUCTURE 18 (1966) [hereinafter cited as STUDIES]. For economic arguments in favor of the Supreme Court's approach, see Edwards, *supra* note 143 at 794-95. His statement, that "neither the convenience and the needs defenses nor the floundering bank defense prove to be supportable in cases where the merger violates the competitive standards of Section 7," appears premature to say the least. *Id.* at 795.

154. 374 U.S. at 363.

155. Motter, *Bank Mergers and Public Policy*, in STUDIES, *supra* note 153, at 10; *see* G. FISCHER, AMERICAN BANKING STRUCTURE 363-64 (1968). Even a supporter of *Philadelphia*, like Edward Herman, makes this point. Herman, *The Philadelphia Bank Merger Decision and Its Critics*, in STUDIES, *supra* note 153, at 51-52 (1966).

156. E. SINGER, *supra* note 41, at 131-32; *see* G. FISCHER, *supra* note 155, at 368;

not necessarily lessen the intensity of competition.[157] The idea "that market power or the plane of competition can be inferred directly and exclusively from data relating to the structure of the market" is a "main misconception" according to Professor Edward Mason, an outstanding authority, who has warned that "a study of structure is not enough."[158] Scholars have rejected the notion that concentration ratios by themselves can tell us what kind of behavior will be found in a banking market.[159] Most economists would agree with Carl Kaysen that "market share statistics can do no more than raise the question" of monopoly. Determination of the degree of competition in a locality calls for an appraisal of the banks involved.[160] In *Nashville*, Justice Harlan agreed and reiterated his criticism of his colleagues who adopted "the 'numbers game' test for determining Clayton Act violations." He found the market concentration test particularly inappropriate for banking.[161]

In 1966 Congress once again refused to adopt a Clayton Act test *simpliciter* for bank mergers. At least for acquisitions in the banking industry, a narrow structural approach is inappropriate. The application to banking of the guidelines announced several months after *Nashville* by the Justice Department would block most mergers. In unregulated industries, a merger attempt by two companies, each holding four per cent of the market in an industry where the top four had 75 per cent or more, would be challenged.[162] Under the 1966 Act, however, high concentration in a banking market does not automatically preclude merger, nor should it. Nevertheless the Supreme Court agreed with the Justice Department's argument that the 1966 Act had not altered the test for the threshold determination

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Markham, *Current Decisions in Antitrust*, NAT'L INDUS. CONFERENCE BD. 6TH CONFERENCE ON ANTITRUST 4, 7 (1967).

157. E. SINGER, *supra* note 41, at 131.

158. Mason, *Preface* to C. KAYSEN & D. TURNER, ANTITRUST POLICY xviii (1959). Structure includes not only concentration, but also such factors as conditions of entry of new firms and product differentiation.

159. Alhadeff, *supra* note 139, at 218, 219; Carson & Cootner, *supra* note 10, at 84; Carson & Horvitz, *Concentration Ratios and Competition*, in STUDIES, *supra* note 153, at 19-20, 24.

160. Kaysen, *The Present War on Bigness*, NAT'L INDUS. CONFERENCE BD. 4TH CONFERENCE ON ANTITRUST 31, 34 (1965); *see* Smith, *Measures of Banking Structure and Competition*, 51 FED. RES. BULL. 1212, 1221 (1965); *cf.* Handler, *Some Misadventure in Antitrust Policy Making*, 76 YALE L.J. 92, 103 (1966).

161. 390 U.S. at 193.

162. MERGER GUIDELINES, DEPARTMENT OF JUSTICE RELEASE, at 9 (May 30, 1968); American Banker, May 31, 1968, at 1.

of whether the challenged merger is substantially anticompetitive. The *Philadelphia* approach, with its stress on market percentages as normally the most important index to a merger's competitive effects, will therefore continue to be used.

D. Line of Commerce Considerations

The Supreme Court has rightly pointed out that although other institutions compete with commercial banks, at least with respect to checking accounts they are unique, and for other than large firms, banks have little effective competition in the area of short-term loans.[163] The Justice Department has emphasized this view.[164] In passing on mergers, however, the Office of the Comptroller of the Currency has considered "the presence and behavior of other financial institutions."[165] Likewise, under the Bank Holding Company Act of 1956, the FDIC has considered competition from non-bank sources, as has the Board of Governors.[166]

There is some basis for the argument that Congress intended that non-bank competition should be considered in a merger situation.[167] The 1966 Bank Merger Act, unlike the 1960 Act, used section 7 Clayton Act language but omitted "in any line of commerce." In *Houston*, the Justice Department argued that this omission was "inadvertent" and "of no particular consequence," and it reiterated this viewpoint in the *Nashville* proceeding.[168] On the other side of the question, the Office of the Comptroller of the Currency reasoned that the omission was deliberate and that the amendment provided for a broader product market than allowed in the *Philadelphia* decision.[169]

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163. 374 U.S. at 327, 356 n.33. For a critique of the Justice Department's position, see *1698 Hearings*, pt. 2, *supra* note 142, at 785. For a critique of the line of commerce argument, see Note, *The 1966 Amendment to the Bank Merger Act*, 66 COLUM. L. REV. 764, 781, 785 (1966).

164. *1698 Hearings*, pt. 2, *supra* note 142, at 725 (testimony of Governor Mitchell & Comptroller Saxon).

165. *Id.* at 785 (testimony of the Comptroller of the Currency). For an economic argument by the staff of the Comptroller, see STUDIES, *supra* note 153, at 22-23.

166. *1698 Hearings*, pt. 2, *supra* note 142, at 804; *Hearings on S. 2353, S. 2418 and H.R. 7371 Before the Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess., pt. 2, at 701 (1966). The Board of Governor's position represents a shift from an earlier stand. Klebaner, *Federal Control of Commercial Bank Mergers*, 37 IND. L.J. 287, 304 (1962).

167. 106 CONG. REC. 9713 (1960).

168. Brief for the United States at 20 n.12.

169. Brief for Appellee, William B. Camp, at 52, United States v. Third Nat'l Bank, 390 U.S. 171 (1968); Pronouncements by Senator Robertson (D-Va.) supported this reading. 112 CONG. REC. 2655 (1966).

The 1966 statute refers to "the business of banking" in prohibiting bank mergers which would violate section 2 of the Sherman Act, but the very next section, which uses phrases from section 7 of the Clayton Act, does not so specify.[170] On the other hand, justification for a restrictive (*Philadelphia*) interpretation of line of commerce can be found in a comparison of the Ashley Report, issued by a "rump" House Banking Committee,[171] and the final Patman Report of the full committee.[172] The later report had many sections taken verbatim from the Ashley Report, but omitted precisé languagc reflecting the expectation that the authorities would take into consideration the fact that commercial banks face intensive competition from other financial institutions.

Rejecting defendant banks' argument, the district court in *Nashville* confined the line of commerce to commercial banking. This was not at issue in the appeal, but the Supreme Court found that the 1966 Amendment was not intended "to alter the traditional methods of defining relevant markets in which to appraise the anticompetitive effect of a merger. . . ."[173]

Whatever one's interpretation of the complex issue of congressional intent, the fact remains that in most of their activities commercial banks compete with other financial institutions. Of course such competition does not eliminate the necessity for inter-bank rivalry.[174] Small demand depositors are effectively confined to a narrow geographic area, and small business borrowers are essentially restricted to local commercial banks for low-cost loans. For these groups, a bank merger is likely to have the greatest adverse impact, thus making the narrow line of commerce most appropriate.

Nevertheless, there are situations where a reasonable evaluation of the impact of a merger on competition can be made only if the line of commerce includes other financial institutions besides commercial banks.[175] If meaningless market share statistics are to be avoided, the product market cannot arbitrarily be confined to commercial banking in every case.

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170. 12 U.S.C. § 18(c)(5) (1964).

171. H.R. REP. No. 1179, 89th Cong., 1st Sess. 5 (1965).

172. H.R. REP. No. 1221, 89th Cong., 2d Sess. 3-4 (1966).

173. 390 U.S. at 182 n.15; Brief for United States at 20-21.

174. P. Smith, Banks and Other Financial Institutions in Pennsylvania, May 25, 1965, at x, 61 (unpublished study prepared for use by the Pennsylvania Banking Law Commission); *1698 Hearings*, pt. 1, *supra* note 142, at 378-79 (testimony of Governor Mitchell).

175. G. FISCHER, *supra* note 155 at 345; Shull, *Commercial Banking as a "Line of Commerce,"* in STUDIES, *supra* note 153, at 94, 95 (1966); *cf.* Edwards, *supra* note 143, at 770.

E. *Insistence of Alternatives*

The Supreme Court suggested in *Houston* that the convenience and needs of the community approach, referred to in the 1966 Act, and the failing-company doctrine were related, though perhaps remotely.[176] The failing-company doctrine, with its long standing in antitrust law, calls not only for evidence of the acquired firm's debilitated condition, but probably also for the seeking out of less anticompetitive alternatives. Thus the recent Justice Department "Merger Guidelines" insist that good faith efforts to find a partner be consistent with the purposes of section 7 of the Clayton Act.[177] A fortiori, where at the time of merger the firm to be acquired is a more substantial competitor than would be a failing company, sound public policy requires that realistic alternative solutions be explored.

In this respect, *Nashville* may have simplified the application of the standards of the Bank Merger Act.[178] If there is a practicable alternative to an anticompetitive merger which keeps the bank alive, there will be no occasion for weighing imponderables. If merger is the only plausible solution, then weighing may enter the picture as various possible combinations are explored.

It should be noted that the more restrictive a state's branching laws, the more difficult it is to avoid an anticompetitive merger. Had merger proven to be the only way out for Nashville Bank, then the authorities would have had to decide between Third National and Commerce Union. Consideration would have had to be given to the adverse effects on competition, versus the prospective advantages to the community which each prospective partner would be in a position to offer as an enlarged institution. Statewide merger possibilities offer greater chances of minimizing competitive injury.

F. *The Antitrust Division's Role*

Under the Bank Merger Act, the agency whose approval is needed must request an opinion on competitive factors from the other two federal banking agencies, as well as from the Attorney General. In connection with the proposed acquisition of Nashville Bank, the

176. 386 U.S. at 369.

177. 11 ABA ANTITRUST SECTION 76 (1968).

178. The difficulty of applying the standards of the 1960 Bank Merger Act was once suggested by Federal Reserve Governor Robertson: "Suppose it is concluded that the merger would lessen competition, 'but it is hard to say how much'—then go on and weigh this imponderable against the benefits you guess may flow from the merger—to both the public and the banks." *1698 Hearings*, pt. 4, *supra* note 142, at 2005.

Comptroller of the Currency received adverse reports from all three sources. Both the Board of Governors and the FDIC found that the merger would adversely affect competition[179] while the Justice Department filed suit to oppose it.[180]

The purpose of the advisory opinions on competitive factors is to foster uniform standards. In the period from the beginning of 1966 through July, 1968, the Board of Governors found a serious anticompetitive effect in 94 cases before the other two agencies, while the Comptroller and the FDIC issued denials in only three. Thus each agency appears to handle a case in a significantly different manner. This situation persists after eight years of experience and is likely to continue as long as responsibility for bank supervision is divided among three federal agencies.

The *Nashville* doctrine suggests the need for bank supervisory agencies and the Justice Department to think about structural possibilities in a banking market which extend beyond the rearrangement proposed by the merger application. Any effort to improve the banking structure in specific markets in the long run faces major obstacles. New banks can obtain either a state or a federal charter, while merger and branching decisions are made by three federal agencies acting separately. The pattern of divided jurisdiction plus the fact that initiative for change rests with the banks, all but rule out any coordination of structural plans. Whatever fundamental unity of purpose is ultimately achieved under existing arrangments must rest on the Justice Department's power to file anti-merger suits; in 1968, 10 of its 24 merger challenges involved banks.[181]

Once a complaint is filed, the merger is ordinarily delayed until the banks win their case. *Houston* made it clear that injunction would be the rule under the 1966 law: "[A]bsent a frivolous complaint by the United States, which we presume will be infrequent, a stay is essential until the judicial remedies have been exhausted."[182]

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179. 390 U.S. at 179; letter from FDIC to James J. Saxon, May 28, 1964, Transcript, vol. 3, at 957 (FDIC Division of Examination).

180. COMPTROLLER'S DECISION, *supra* note 13, at 132.

181. Department of Justice Release (Jan. 9, 1969). Three of the ten bank mergers were cancelled.

182. 386 U.S. at 370. For a criticism of the injunction as "an instrument of oppression," see interview with Eugene J. Metzger, formerly with the office of the Comptroller of the Currency and earlier with the Department of Justice. 60 BANKING 46 (April, 1968).

G. The Consent Decree

Rather than continue the litigation, Third National, busy with plans to combine with National Life and Accident Insurance Company in a one-bank holding company, entered into a consent decree in October, 1968.[183] Under its terms, a new FDIC-insured state bank, The Nashville Bank and Trust Company, with total capital of 4.18 million dollars, opened for business on December 16, 1968, in the building (remodelled by Third National) which had served as headquarters for the old Nashville Bank. The new bank started out with two branches: one had belonged to the old Nashville Bank; the other had always been part of Third National. Some 33 million dollars in deposits at the three locations were transferred to the new bank, whose capital can support a considerably larger total.

President Howell, of the spun-off bank, had been a credit officer for most of his 36 years at Third National. Of the staff of eight officers, several had been with the old Nashville Bank and stayed on with Third National after the merger.[184] Under the consent decree, Third National was allowed to retain all of the trust business acquired from the old Nashville Bank. Though only 114th in total deposits nationally, Third National stood 98th in trust income, and 103rd in trust assets in 1967.[185]

The Bank Merger Act of 1966 forgave all bank mergers previously unchallenged by the Justice Department, as well as two prosecuted combinations—Manufacturers Hanover Bank in New York and First Security National Bank in Lexington, Kentucky. This left three contested post-*Philadelphia* mergers for the courts to decide. Crocker-Citizens in California won in the district court, and the Government did not appeal.[186] Mercantile Trust of St. Louis, after the Supreme Court remanded in accordance with *Houston*, agreed to establish a new bank on the downtown site of the old Security Trust headquarters.[187] The settlement of the last of this series of actions restored "an important banking alternative" to Nashville.[188]

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183. American Banker, Dec. 2, 1968, at 1. The Weaver group is connected with this insurance company.

184. FDIC Press Release No. 65-68; American Banker, Dec. 16, 1968, at 1. On the eve of the merger in August 1964, the old Nashville Bank had \$42.5 million in deposits and \$4.7 million in capital. Transcript, vol. 3, at 933.

185. American Banker, June 18, 1968, at 9; *Id.*, July 12, 1968, at 22.

186. United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133 (N.D. Cal. 1967).

187. United States v. Mercantile Trust Co., 263 F. Supp. 340 (E.D. Mo. 1966), *rev'd & remanded*, 389 U.S. 27 (1967) (per curiam).

188. American Banker, Mar. 5, 1968, at 1; Plaintiff's Trial Brief at 75.

From *Houston* and *Nashville*, the Antitrust Division emerged with important powers to affect the banking structure of the United States. How wisely this authority under the 1966 Act will be used by the Justice Department is a matter of concern to the Congress and the public.