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Administrative Law—Judicial Review of Decisions of the Comptroller of the Currency

In *First Nat'l Bank of Smithfield v. First Nat'l Bank of Eastern North Carolina,*¹ the United States District Court for the Eastern District of North Carolina was faced with the issue of the availability of judicial review of decisions of the Comptroller of the Currency in passing on applications for the establishment of branch banks under the provisions of the National Banking Act.² Acting under this statute, the Comptroller decided to approve the application of defendant Bank of Eastern North Carolina for permission to establish a branch bank in Smithfield, North Carolina, in which city Bank of Smithfield was then engaged in banking operations. Plaintiff Bank of Smithfield asked the court to enjoin the Comptroller from issuing a certificate of approval and to enjoin the defendant bank from establishing and operating such branch, claiming that the Comptroller had made the decision to approve the application of Bank of Eastern North Carolina without providing Bank of Smithfield with a hearing as it had requested.³ Bank of Smithfield contended that this action of the Comptroller was within the purview of the judicial review provisions of section 10 of the Administrative Procedure Act⁴ and that denial of a hearing in this action was violative of procedural due process and hence subject

² REV. STAT. § 5155 (1875), as amended, 12 U.S.C. § 36(c) (1958), which provides in part:
A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.
³ 232 F. Supp. at 727.
⁴ 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958), which provides:
(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. . . . (c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.
to judicial correction under that act.\(^5\) The court reviewed the decision as requested and held that the Comptroller must, in passing on applications for permission to open branch banks, afford a hearing to all interested parties.\(^6\)

Under the opening sentence of section 10 of the act, judicial review does not lie where "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." Since the section of the National Banking Act under which the Comptroller had acted in \textit{Bank of Smithfield} is silent as to judicial review,\(^7\) the court was concerned only with the second exception to section 10—i.e., with agency discretion. The precise questions presented to the court were: (1) Whether the actions of the Comptroller under the establishment of branch banks section of the National Banking Act are committed by law to the discretion of the Comptroller? (2) Whether, if they are so committed, the actions of the Comptroller can be reviewed under section 10 at least to the extent of assuring procedural due process? (3) Was the denial of a hearing by the Comptroller violative of procedural due process?

\(^6\) Administrative Procedure Act § 10(e), 60 Stat. 243 (1946), 5 U.S.C § 1009(e) (1958), provides in part:

[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions . . . . It shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; . . . [or] (4) without observance of procedure required by law . . . .

\(^7\) 232 F. Supp. at 730-31.

\(^8\) National Banking Act, \textit{Rev. Stat.} § 5155 (1875), as amended, 12 U.S.C. 36(c) (1958), which says only that branch banks may be opened with the "approval" of the Comptroller of the Currency.
In the past, courts have been asked to review decisions of the Comptroller for three general reasons: misinterpretation of law; misinterpretation of the facts of the particular case; and for abuse of discretion, arbitrariness, or capriciousness in the finding of fact.

Although not always relying on the Administrative Procedure Act for authority, courts have usually reviewed the Comptroller's conclusions of law in proceedings under the establishment of branch banks section of the National Banking Act. In *Michigan Nat'l Bank v. Gidney*, the court was asked to review a decision of the Comptroller interpreting an ambiguity in the Michigan Financial Institutions Act. Without referring to the "conclusiveness" of the Comptroller's decision, the court sustained his decision, saying: "We think . . . [the Comptroller's] action was based upon a proper construction of applicable law." Although the court did not raise any question as to its jurisdiction to review the interpretation of law made by the Comptroller, it is evident that the court reached the merits of the issue in determining that the Comptroller had correctly interpreted the law.

The Comptroller's interpretation of the Michigan Financial Institutions Act as incorporated into the National Banking Act and the Comptroller's interpretation of the language of the National Banking Act itself were reviewed in *National Bank v. Wayne Oakland Bank*. In this case, the sixth circuit upheld a district court's

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10 Community Nat'l Bank v. Saxon, 310 F.2d 224 (6th Cir. 1962).
11 Ibid.
13 Mich. Stat. Ann. ch. 17, § 23.762 (1957), which provides: "[A]ny bank may . . . establish and operate a branch or branches within the limits of the city . . . in which said bank is located." *Michigan Nat'l Bank* arose from the Comptroller's denying plaintiff bank's application for permission to open a branch in a city in which plaintiff bank operated a branch but which was not the city in which plaintiff maintained its main office. The Comptroller ruled that the statute contemplated the city in which the bank maintained its main office. Plaintiff asked the court to review this ruling.
14 237 F.2d at 763.
15 Mich. Stat. Ann. ch. 17, § 23.762 (1957), which provides: "Any bank having a capital of at least $50,000.00 may . . . [establish] branch banks provided that] no such branch bank shall be established in a city or village in which a state or national bank or branch thereof is then in operation . . . ."
16 252 F.2d 537 (6th Cir.), cert. denied, 358 U.S. 830 (1958). In *Wayne Oakland Bank*, the Comptroller notified a national bank of his approval of their application to open a certain branch. Fourteen days later a state bank opened a branch in the same town. The Comptroller and the national bank contended that the national bank could still open its branch on the grounds.
declaratory judgment that it would be unlawful for defendant national bank to open a certain branch, and upheld the district court's restraining order directing the Comptroller not to issue a certificate of approval to the defendant bank for the opening of the branch. The court held that the "approval" contemplated by the National Banking Act was a formal certificate and that, contrary to the Comptroller's contention, a letter from the Office of the Comptroller to the defendant national bank stating that its application had been approved was insufficient "approval" as contemplated by the statute. The court went on to say: "Whether the rights of a party are infringed by unlawful action of an individual or by exercise of unauthorized federal administrative power, it is entitled to have such controversy adjudicated." This statement clearly indicates that the courts will review an interpretation of law made by the Comptroller under the establishment of branch banks section of the National Banking Act.

A district court, in *Suburban Trust Co. v. National Bank*, reviewed the Comptroller's interpretation of a New Jersey banking statute as incorporated by reference into the National Banking Act by saying: "We agree with defendant that the courts may not review discretionary action of the Comptroller. . . . However, it is not true that he may act contrary to the law as the complaints in the

that approval by letter is sufficient "approval" as contemplated by the National Banking Act, and hence the national bank was "established" as contemplated by the Michigan statute before the state branch was in "operation." The state bank asked the court to prevent the issuance of the certificate of "approval" and the opening of the branch.

17 Id. at 543.
18 Id. at 544.
20 N.J. STAT. ANN. § 17:19A-19 (1963), which provides:

B. No bank or savings bank shall establish or maintain a branch office which is located outside the municipality in which it maintains its principal office; except that a bank or savings bank may establish and maintain a branch office or offices anywhere in the same county as that in which it maintains its principal office. . . . (3) when each proposed branch will be established in a municipality in which no banking institution has its principal office or a branch office.

In *Suburban Trust Co.*, the Comptroller approved the application of a national bank for permission to open a branch in Mountainside, N.J., and the national bank had opened its branch pursuant to the approval. A state bank which had an earlier approval for a branch in Mountainside but which had not then opened the branch, asked the court to review the Comptroller's interpretation of the statutory phrase, "has its principal office or branch office."
The foregoing discussion illustrates that the courts will review conclusions of law made by the Comptroller acting under the establishment of branch banks section of the National Banking Act. Faced with a request to review a question of mixed law and fact, the district court in Community Nat'l Bank v. Gidney held that it was without jurisdiction to order the Comptroller to produce documents on which his decision was based. When requested by plaintiff, the Comptroller had refused to produce these documents. The district court based its holding on the view that action by the Comptroller under the establishment of branch banks section of the National Banking Act was "by law committed to agency discretion" and therefore within the second exception to the judicial review section of the Administrative Procedure Act, which, in the opinion of this court, precludes review even for abuse of discretion. On appeal, the sixth circuit, which had decided Wayne Oakland Bank, affirmed the decision of the district court, but found that the district court had modified its holding to the extent of ruling that decisions of the Comptroller under the establishment of branch banks section were reviewable as to whether the Comptroller's decision "'was arbitrary or capricious.'" This modification, said the court of appeals, was made by the district court in ruling on motions other than that ruled on in the reported opinion. The court of app-

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21 211 F. Supp. at 699.
23 Defendant national bank's application for permission to establish a branch bank in an unincorporated but populous area was approved by the Comptroller on the basis of his determination that the area was a "village" as contemplated by MICH. STAT. ANN. ch. 17, § 23.762 (1957), which provides in part: "Any bank . . . may . . . establish and operate a branch or branches within a village or city other than that in which it was originally chartered . . . ." Plaintiff national bank asked the court to review the Comptroller's determination that the area was a "village."
25 Id. at 519.
26 Ibid.
27 Community Nat'l Bank v. Saxon, 310 F.2d 224 (6th Cir. 1962).
28 Id. at 225.
29 Ibid.
30 The modification was not in the opinion as reported in Community Nat'l Bank v. Gidney, 192 F.Supp. 514 (E.D. Mich. 1961).
peals then held that the issue in controversy was essentially a question of fact and that the Comptroller's findings of fact "are conclusive if reasonably supported by substantial evidence." The court of appeals went on to confirm the district court's modified opinion that, even under the Administrative Procedure Act, the courts can review determinations of fact made by the Comptroller under the establishment of branch banks section of the National Banking Act only to the extent of determining if the decisions are arbitrary, capricious, or an abuse of discretion.

A comparison of the district court opinion in Community Nat'l Bank with the opinion of the court of appeals raises another and perhaps the most important question involving the availability of review under the Administrative Procedure Act: to what extent will the courts limit the discretion of the Comptroller in order to assure due process? There is an inconsistency between the decisions of the district and circuit courts in Community Nat'l Bank in that the circuit court seemed unaware of the full implication of the district court's denial of plaintiff's motion for production of documents. This denial rested only on the district court's initial view that a decision of the Comptroller under the establishment of branch banks section was unreviewable even for abuse of discretion. The district court, however, stated that if review had been available, "it would be anomalous to permit a plaintiff to attack the discretionary act of the Comptroller because of alleged abuse of discretion and arbitrariness and at the same time prevent such plaintiff from discovering the basis for the Comptroller's action." Although the circuit court stated that the district court's initial view to the effect that review of the Comptroller's decision was unavailable even for abuse of discretion was later modified by the district court, and although the circuit court itself held that acts of the Comptroller alleged to be arbitrary, capricious, or an abuse of discretion were reviewable,

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\[\text{supra}\]
it did not discuss the production of documents. Apparently the motion to produce was not reconsidered, causing the very thing the district court had said would be anomalous—i.e., allowing review for alleged abuse of discretion in the making of a decision and at the same time preventing the plaintiff from seeing the documents on which the decision was based. Apparently, the circuit court in *Community Nat'l Bank* held that the Comptroller's decision was not arbitrary, capricious, or an abuse of discretion, but did not concern itself with the procedure through which the decision was reached.

Prior to the decision in *Bank of Smithfield*, courts had held that interpretations of law made by the Comptroller under authority of the establishment of branch banks section were reviewable and that the Comptroller's findings of fact were reviewable if alleged to be arbitrary, capricious, or an abuse of discretion. However, until the decision in *Bank of Smithfield*, the courts had not reviewed the procedures used by the Comptroller in reaching his decisions. Thus, the extension made by *Bank of Smithfield* was not of the availability of review to be afforded parties adversely affected by decisions of the Comptroller, but rather was an extension of the scope of this review to the extent that the Comptroller must "preserve the fundamental fairness characteristic of our system" in the procedure followed by him in reaching his decisions. In *Bank of Smithfield*, the court held that even if the Comptroller's decision was not arbitrary, capricious, or an abuse of discretion, the court would enjoin the issuance of a certificate of "approval" and enjoin the opening of the branch until the "approval" was based on a deliberative process in which all parties would be afforded procedural due process of law. In the words of the court:

> [A]dministrative procedure . . . must conform to the requirements of procedural due process of law which requires at least a hearing after notice and that the findings are supported by substantial evidence and that the decision is not arbitrary, capricious, or illegal.

With this statement in mind, the court declared:

> Any provisions of the National Banking Act that would deny procedural due process would raise a serious constitutional question. . . . Since an act should be construed as to preserve its

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58 232 F.Supp. at 730.
59 Id. at 729.
40 Id. at 730.
constitutionality, it becomes imperative... to hold that the Administrative Procedure Act is applicable to the Comptroller of the Currency in proceedings under § 36 of the National Banking Act.  

As the court expressed it, the Administrative Procedure Act "is sufficiently elastic to provide procedural due process in the administration of the National Banking Act."  

By this ruling, the court in Bank of Smithfield adopted the doctrine that the Administrative Procedure Act has remedial purposes which "greatly expanded the availability of judicial review," and implicitly rejected the view suggested by Professor Davis and judicially expressed in Luckenbach S.S. Co. v. United States that the Administrative Procedure Act made no change in the availability of judicial review of administrative decisions. In answer to the Comptroller's contention that the requirement of a hearing in proceedings under the establishment of branch banks section "'would place an impossible administrative burden on the Comptroller's office as it is now constituted,'" the court said that any administrative burden incident to due process cannot be deemed sufficient grounds to deprive parties of constitutional rights. The Administrative Procedure Act provides a solution. Section 11 of the Act authorizes the appointment of as many examiners as may be necessary for proceedings incident to the hearings and initial decisions.  

The decision in Bank of Smithfield reduces the importance of the question of whether action by the Comptroller is "by law committed to agency discretion" in that the court said: "If the use of the word 'approval' is deemed to commit agency action to agency discretion within the meaning of the second exception to § 10, nevertheless it must be a sound discretion exercised in a manner that is not violative of procedural due process." With these words, the court has said that it will not only review decisions reached by Comptroller under the branch banks section of the National Bank-
ing Act to assure that the decisions are not illegal, arbitrary, capricious, or an abuse of discretion, but has gone further to say that it will assure that the process through which these decisions are formulated affords all parties procedural due process of law.

The extension of the scope of review made by Bank of Smithfield seems desirable in that conformance to procedural due process, including notice, hearing, and an opportunity for all parties to introduce and examine evidence, is necessary to formulate a complete record of the Comptroller's deliberations; and a complete record is the only adequate basis on which a court can subsequently review the decisions for arbitrariness, capriciousness, or abuse of discretion. By using the Administrative Procedure Act as authority for granting this new remedy to those deprived of procedural due process in proceedings of the Comptroller, the court seems to be applying the act in the spirit in which the United States Supreme Court has said it should be applied.40

RALPH JACOBS


Tateo was brought to trial before a jury in a federal court on four counts of bank robbery and one of kidnaping. On the fourth day of the trial, the judge informed Tateo's counsel that if Tateo insisted on continuing with the trial through the jury verdict and was convicted, sentencing would be arranged so that Tateo would be imprisoned for the rest of his life.1 Tateo was notified of these statements and warned by his counsel that the probability of conviction was high. Accordingly, he changed his plea to guilty. The plea was accepted, and the jury dismissed. The judge then sentenced Tateo to twenty-two years and six months in prison.2


1 Tateo's attorney later testified, unchallenged by the Government, that the trial judge had stated: "I think I ought to tell you this. If you finish the trial and your clients are found guilty, I'm going to start off by imposing a life sentence on the kidnaping charge and then I'm going to add consecutive maximum sentences on the other counts on which they are found guilty." United States v. Tateo, 214 F. Supp. 560, 563 (S.D.N.Y. 1963). At this later hearing, Tateo testified that he was unaware that the judge was unable to impose consecutive sentences. Ibid.

2 At the time the sentence was imposed the prosecution agreed to defendant's motion of dismissal of the kidnaping count. Id. at 562.