

examiner's opportunity to observe witnesses he hears and sees and which the Board does not.<sup>59</sup>

*Universal Camera* does not alter the primary function of the Board in making fact determinations. The requirement for canvassing the whole record in order to ascertain substantiality is not intended to reduce the role of the Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of expertise which courts do not possess and therefore must respect.<sup>60</sup> Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views.<sup>61</sup> Therefore, as the *Northern Metal* dissent suggested, it would be permissible in satisfying the substantial evidence test for the trial examiner to reject only part of the employee's testimony without rejecting all of it.<sup>62</sup>

It is submitted that the *Northern Metal* holding that an individual employee is not engaged in protected concerted activity when he attempts, outside of the grievance machinery, to enforce rights under a collective bargaining agreement thwarts the purposes of the Act—the promotion of harmony in labor-management relations and the recognition of the individual's right to engage in activities for mutual protection and individual security. It is true that the overall policy of the Act may be better served if the employee processes his grievance through the union representative. However, as the facts of *Northern Metal* demonstrate, this avenue is not always available to the employee. In any case, where the employee is asserting a right which he has a reasonable basis to believe is provided by the collective bargaining contract, both Sections 7 and 9 of the Act give him the right to proceed alone.

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**Administrative Law—Due Process Implications in Agency Proceedings—*Sterling National Bank of Davie v. Camp*.**<sup>1</sup>—Appellant, a bank in Davie, Florida, brought suit to invalidate the granting of a national bank charter by the Comptroller of the Currency to a group of individuals wishing to establish a new national bank in Davie. Both proponents and opponents of the proposed bank were given the opportunity to present evidence at a hearing to consider the propriety of chartering the new bank. The complaint alleged that despite evidence in the administrative file supporting his action, award

<sup>59</sup> 340 U.S. at 495.

<sup>60</sup> *Id.* at 488.

<sup>61</sup> *Id.*

<sup>62</sup> 440 F.2d at 889.

<sup>1</sup> 431 F.2d 514 (5th Cir. 1970), cert. denied, 401 U.S. 925 (1971).

of the charter was unlawful, because the Comptroller had received *ex parte* information from the charter applicants and had not provided a written opinion stating the reasons for his decision.<sup>2</sup> The district court granted summary judgment<sup>3</sup> against the plaintiff, holding that the Comptroller's decision was within the statutory grant of authority contained in the National Bank Act.<sup>4</sup> On appeal, the circuit court affirmed and HELD: the Comptroller is empowered to exercise vast discretion in gathering information about prospective charter applicants, and judicial review is limited to determining whether or not the action of the Comptroller was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."<sup>5</sup>

The court was confronted with the threshold issue of determining the permissible range of decision-making by the Comptroller as authorized by Section 27 of the National Bank Act, which states:

If, upon a careful examination of the facts so reported, and of *any other facts* which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, *or otherwise*, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, *whenever he has reason to suppose* that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter.<sup>6</sup>

The court interpreted section 27 as conferring "vast discretion on the Comptroller to approve or disapprove a new charter application"<sup>7</sup> and broad authority to obtain his facts in a variety of ways. Consequently, appellant's criticism of the Comptroller's acceptance of privately submitted information, and of the lack of a written opinion, was treated as a demand for a formal adversary hearing which, the court concluded, is clearly not required by the National Bank Act. Since the Comptroller is authorized to receive information by special commission "or otherwise," the court emphasized that "it is obvious that the Comptroller is authorized to receive information sent to his

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<sup>2</sup> Id. at 516.

<sup>3</sup> Id.

<sup>4</sup> 12 U.S.C. § 27 (1970).

<sup>5</sup> 431 F.2d at 516.

<sup>6</sup> 12 U.S.C. § 27 (1970) (emphasis added).

<sup>7</sup> 431 F.2d at 516.

office by some of the applicants, even though this was done without the knowledge of those opposing the charter."<sup>8</sup> This decision illustrates the problem of whether the limited scope of judicial review of the Comptroller's actions adequately considers the rights of intervening parties at the agency level. Alternatively, the issue may be phrased in terms of whether the Comptroller's authority precludes court determination of a party's right to cross-examine witnesses and to offer rebuttal evidence at the agency hearing.

Persistent demands for rudimentary due process safeguards, such as those particularized in the Administrative Procedure Act<sup>9</sup> (APA), have been consistently rejected by courts<sup>10</sup> in cases such as *Sterling* in favor of the extremely flexible fact-gathering procedures authorized by the National Bank Act. In *Webster Groves Trust Company v. Saxon*,<sup>11</sup> the appellant-competitor bank sought a declaratory judgment and an injunction for the purpose of compelling the Comptroller to hold an adversary hearing before passing on the merits of the application. The appellant specifically sought the opportunity to interrogate and to cross-examine the applicant. The court's rationale, followed by *Sterling*,<sup>12</sup> concluded that whereas the National Bank Act contained no requirement for a formal hearing, and legislative history indicated no congressional intent to incorporate any such procedure, no right to a formal adversary hearing existed.<sup>13</sup>

The *Webster* court determined that the "very nature of the decision required by the Comptroller indicates that a formal adversary type hearing would be of little benefit to him in the exercise of his discretionary powers."<sup>14</sup> In this case appellant had admitted that, although the section of the APA dealing with adjudications applies only to "adjudication required by statute to be determined on the record"<sup>15</sup> and does not *expressly* apply to the grant of a national bank charter, applicability of the APA's judicial review provisions<sup>16</sup> nevertheless requires a hearing substantially equivalent to a formal hearing to insure adequate judicial review. The *Webster* court rejected the argument for reading implied hearing requirements into the National Bank Act,<sup>17</sup> and held that "if the Comptroller acts in excess or abuse of his legal authority, to this extent his actions are subject to judicial review, with the burden of proof resting on the

<sup>8</sup> *Id.* at 517.

<sup>9</sup> 5 U.S.C. §§ 500 et seq. (1970). 5 U.S.C. § 554 sets forth the requirements for a formal adjudication such as notice, identification of the matters at issue, and opportunities for interested parties to submit evidence and to participate in the agency hearing.

<sup>10</sup> *Warren Bank v. Camp*, 396 F.2d 52 (6th Cir. 1968); *Ramapo Bank v. Camp*, 425 F.2d 333 (3d Cir. 1970).

<sup>11</sup> 370 F.2d 381 (8th Cir. 1966).

<sup>12</sup> 431 F.2d at 517.

<sup>13</sup> 370 F.2d at 384.

<sup>14</sup> *Id.* at 385.

<sup>15</sup> 5 U.S.C. § 554(a) (1970).

<sup>16</sup> 5 U.S.C. § 706 (1970).

<sup>17</sup> 370 F.2d at 386.

party seeking the review."<sup>18</sup> Thus, courts have uniformly refused to extend the scope of judicial review to include examination of the procedural rights afforded a party appearing before the agency. Instead, they have preferred to rely on the explicit requirements of the enabling act, or to utilize the history of congressional intent to rationalize the absence of procedural fairness at the agency level.

In *First National Bank of Smithfield, North Carolina v. Saxon*,<sup>19</sup> cited by *Sterling*,<sup>20</sup> the court reviewed a decision of the Comptroller in which the latter had issued no formal statement of fact, conclusions of law, or opinion. Appellant charged that the Comptroller's procedure violated the APA and abridged the rights of Smithfield Bank without affording constitutional due process. The bank claimed that the Comptroller's ruling was an adjudication under the APA which could not be made without notice and a full-dress hearing.<sup>21</sup> The majority in *Smithfield* ruled that "[p]rocedural due process is not offended by the Comptroller's practice. The absence of a hearing provision in the Banking Act raises no Constitutional question, for the omission was within the power of Congress."<sup>22</sup>

It is submitted that if basic due process rights existing at the agency level can be demonstrated, then the requisite element of fairness in the agency proceeding cannot be negated by reference to congressional prerogative.<sup>23</sup> Nevertheless, the *Smithfield* court concluded that any apprehension about possible arbitrary or capricious agency action is dissipated by the APA's grant of judicial review<sup>24</sup> of the Comptroller's decision in district court.<sup>25</sup> The Act gives the court jurisdiction to "hold unlawful and set aside agency action . . . found to be—unwarranted by the facts to the extent that the facts are subject to trial de novo . . ."<sup>26</sup>

It is questionable whether the procedure of de novo review confronts the precise issue of "fairness" before the Comptroller has made

<sup>18</sup> Id. at 388. The Supreme Court has broadened the class of parties who may invoke judicial review to curb possible administrative abuse. In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), the Court stated that parties who face potential economic injury or litigate issues of public interest should be granted standing in district court. Accordingly, the Court construed the APA's grant of judicial review as serving a "broadly remedial purpose." One can easily understand the interest of an existent bank wishing to contest the grant of a new bank charter in its locale. However, it must be emphasized that it is not merely a party's fear of competition per se which should compel recognition of procedural rights for intervening parties. Rather, it is the judicial rationale that the interest of such parties will serve to insure that the particular agency action has strictly conformed with applicable standards.

<sup>19</sup> 352 F.2d 267 (4th Cir. 1965).

<sup>20</sup> 431 F.2d at 517.

<sup>21</sup> 352 F.2d at 270.

<sup>22</sup> Id. 12 C.F.R. § 4.2(b)(1970) provides in part that "the Comptroller . . . may conduct such investigations as he deems necessary or proper."

<sup>23</sup> See pp. 190-91 *infra*.

<sup>24</sup> 5 U.S.C. §§ 701-06 (1970).

<sup>25</sup> 352 F.2d at 270.

<sup>26</sup> 5 U.S.C. § 706(2)(F) (1970).

his decision. The reviewing court is put into the difficult position of finding facts for the first time, while having to refrain from substituting its judgment where the Comptroller has exercised expertise in examining the charter application in light of the goals of the National Bank Act. Arguably, judicial recognition of the broad discretion given the Comptroller in Section 27 of the National Bank Act, as evidenced by *Sterling* and *Webster Groves Trust*, results in virtually a perfunctory court review of the Comptroller's decision. In effect, the district court faces a dilemma. Either it blindly assumes that the Comptroller's discretion rests upon an adequate basis in fact, in which event the court review inevitably becomes a meaningless gesture; or, it acts in ignorance of the decision it is reviewing and proceeds upon the basis of facts it has found independently. In the latter case, the court's judgment may usurp the Comptroller's function.<sup>27</sup>

Judicial deference to the Comptroller's vast discretion invariably compels the courts to affirm his decision so long as the administrative record contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>28</sup> For example, in the principal case, the *Sterling* court agreed with the district court that "the administrative file is replete with evidence which would support either view."<sup>29</sup> Although the Comptroller had issued no written opinion delineating the reasons for his decision, the court determined that "it was obviously based on a composite of many factors and much data. To say that one fact was erroneous and that another fact was askew is not to infest the Comptroller's exercise of discretion with the scent of arbitrariness or capriciousness sufficient to set aside his decision."<sup>30</sup>

It is thus apparent that the party seeking judicial review assumes the burden of making out a prima facie case of abuse of discretion in order to obtain a trial de novo. Otherwise, as in *Sterling*, the court will generally find that the administrative file supports either view and thus will enter judgment for the Comptroller. Since every file of the Comptroller will contain favorable, if not self-serving, evidence of the applicant, the only situations where an opposing party could possibly succeed would be if either no evidence were accepted from the opposing party or no informal hearing were held.<sup>31</sup> However, in most situations, these two exceptions will have been avoided, and the Comptroller's decision arrives in court with virtually an irrefutable presumption of correctness.

It must be emphasized, therefore, that the existent limited scope of judicial review, effectively circumscribed by the Comptroller's ex-

<sup>27</sup> 352 F.2d at 274 (dissenting opinion).

<sup>28</sup> *Peoples Bank of Trenton v. Saxon*, 373 F.2d 185, 189 (6th Cir. 1967), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

<sup>29</sup> 431 F.2d at 516.

<sup>30</sup> *Id.* at 517.

<sup>31</sup> *Cf.* 373 F.2d at 188.

pansive grant of statutory authority, successfully negates the Comptroller's decision only in instances of extreme arbitrariness. Presently, parties such as Sterling National Bank, who submit evidence to the agency, and who subsequently learn that the Comptroller accepted *ex parte* information, have no way of ascertaining whether the Comptroller accorded any consideration to their views. Moreover, the courts, as earlier stated, have no basis upon which to determine the exact rationale of the Comptroller's decision.<sup>32</sup> The dissent in *Smithfield* emphasized the status of the Comptroller's decision on review:

The Comptroller's mind has been made up *ex parte* upon hearing from the proponent only, but not *effectively* from any opponents, for they have been kept in the dark as to the issues and the evidence. The operative scope of the court review being limited, it cannot easily repair any damage resulting from the inadequate practice followed by the Comptroller.<sup>33</sup>

It is suggested that the Comptroller's decision could be formulated more objectively if procedures were implemented which assure opposing parties the opportunity to rebut evidence presented by the applicant. Concomitantly, the reviewing courts would be presented with an administrative record demonstrating that substantial data on the points in issue supported the Comptroller's decision.

Although courts have rejected claims for a formal hearing on the ground that the APA applies only to agencies whose enabling statute expressly provides for one, it is arguable whether utilization of procedures affording minimum due process to parties appearing before the agency should be contingent upon applicability of the APA. Although the Comptroller has wide latitude in conducting an investigation of the charter applicant,<sup>34</sup> he acts according to statutory

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<sup>32</sup> Although courts have relied on the absence of explicit statutory language which would require the Comptroller to issue an opinion, recognition of due process rights would compel a statement of findings in spite of a literal reading of the APA provision. See *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). Moreover, an opinion affords the reviewing court the opportunity to fulfill the stated ideal—"the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately distinguished." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

The need for effective judicial review was illustrated in a recent Supreme Court decision in which citizen groups attempted to challenge a decision made by the Secretary of the Department of Transportation. In reversing in favor of the petitioners-conservationists, the Court noted that although the Secretary had not been required to issue formal findings, the judicial review provisions of the APA required, in this instance, that on remand to the district court for plenary review of the Secretary's decision, review was to be based on the entire administrative record to determine whether the decision was based on a consideration of relevant factors, and whether there had been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

<sup>33</sup> 352 F.2d at 274 (dissenting opinion) (emphasis added).

<sup>34</sup> It should be noted that the Comptroller's discretion is somewhat limited in those

guidelines when he considers public interest, need and necessity, and, subject to court review, when he exercises discretion in determining such public interest or need and necessity.<sup>35</sup> However, the important role played by an intervening party at the agency level, for example that of Sterling Bank, cannot be underestimated.

Competing parties arguably serve as catalysts to illuminate what might be the merits or deficiencies of an application. More importantly, a future competitor challenging an application may be viewed as a representative of the general public.<sup>36</sup> This situation arises from the fact that an application can be denied only in terms of the public need and interest, and not as a result of any adverse economic impact on the challenging party. Even though the party's motivation might be derived from predominately economic considerations rather than from a spirit of public service, the intervening bank fulfills the function of presenting the community's response as regards the issues, albeit in a subdued adversary context. Since the issuance of bank charters to conduct an activity totally responsible to governmental regulation directly affects the rights and choices of citizens in the local community, it is thus conceivable that a party representing the public interest and challenging the grant of a bank charter should be afforded basic due process rights which might indirectly deter an abuse of governmental discretion.

There is little doubt that an individual directly affected by an agency decision could successfully assert his constitutional rights. In *Goldberg v. Kelley*,<sup>37</sup> the Supreme Court had to determine the procedural due process rights of a welfare recipient whose benefits had been summarily terminated by the agency. Finding a violation of his constitutional rights, the Court reiterated the precept that "[t]he fundamental requisite of due process of law is the opportunity to be heard . . . at a meaningful time and in a meaningful manner."<sup>38</sup> Furthermore, the *Goldberg* Court, dealing with a uniquely governmental activity, acknowledged that "what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action."<sup>39</sup> A bank facing future competition concededly has a private interest in challenging a new bank charter. In appearing before the agency, however, the bank also assumes the status of a community representative to insure that the community is protected

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instances where the application is for a branch bank. The existence of relevant state statutes has a direct influence in those situations. See 12 U.S.C. § 36 (1970).

<sup>35</sup> 12 C.F.R. § 4.2(b)(3) (1970) provides that the Comptroller should consider "[t]he convenience and needs of the community to be served by the proposed bank."

<sup>36</sup> *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

<sup>37</sup> 397 U.S. 254 (1970).

<sup>38</sup> *Id.* at 267.

<sup>39</sup> *Id.* at 263, quoting *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

from a banking enterprise perhaps antithetical to the public interest. It is submitted that this status should generate some form of application of the constitutional rights discussed in *Goldberg*. The implementation of *Goldberg's* "meaningful" procedures would not, and should not, require a formal hearing. Instead, judicial review should focus on whether an interested party has had an opportunity to fairly present its view.

Present procedures utilized for judicial review of a decision by the Comptroller of the Currency, as illustrated by the *Sterling* decision, fail to adequately correct what might be termed rudimentary due process deficiencies at the agency level. Even if this is a case where there is no constitutional compulsion for a formal hearing because of the sensitive nature of the banking business,<sup>40</sup> one must note that an informal procedure is not the equivalent of no procedure, and that the fundamentals of procedural due process must be observed even in an informal conference.<sup>41</sup> It has been argued that even in a fact-gathering procedure, due regard should be given to a party in order that he may possess knowledge of and confront opposing evidence with an explanation of rebuttal evidence.<sup>42</sup> This would seem to be the minimum required by *Goldberg*, for only if the adversary party is familiar with the evidence of the applicant can a "meaningful" case be made. Without knowledge of the applicant's evidence, the informal proceeding, and the standing of the bank to intervene in the proceeding, become empty gestures fulfilling the form but not the substance of the right.

Whether the public interest was better served by the Comptroller's acceptance of ex parte information in the *Sterling* decision rather than by allowing the competitor bank to examine and possibly counter the information is questionable. Indeed, precisely because there is no way of determining on what grounds the Comptroller's decision was made, the courts should insure that agency discretion be maintained within the circumference of the National Bank Act by requiring procedural due process safeguards. Such an approach would eliminate the danger of administrative caprice. The self-interest of a competitor like Sterling Bank may advance the public interest by raising issues that may otherwise never be brought to the Comptroller's attention. Accessibility to the applicant's evidence would also conform to the *Goldberg* admonition that what is a "meaningful" set of procedures must be determined in relation "to the precise nature of the governmental function involved . . . ."<sup>43</sup> The Comptroller could promulgate rules allowing interested parties to obtain disclosure of pertinent issues and non-confidential information. Furthermore, the Comptroller has little to gain by denying the existing bank a chance to see the

<sup>40</sup> 431 F.2d at 517.

<sup>41</sup> 352 F.2d at 275.

<sup>42</sup> K. Davis, *Administrative Law Treatise* § 4.14 (Supp. 1965).

<sup>43</sup> 397 U.S. at 263.



application, the supporting data, or reports made by hearing examiners.<sup>44</sup>

The principle of fairness demands that each party be entitled to know the data presented to the Comptroller by the applicant, in order that objecting banks can perform the essential function of representing the vital interests of the community. The right of judicial review cannot be taken as fully realized, however, if intervening competitors are excluded from fully participating in the proceeding.<sup>45</sup> The reluctance of the courts to require due process in governmental decision-making reinforces and insulates the Comptroller's discretion from objective scrutiny. Due process and public policy require a broader recognition of the substantive rights of *all* parties appearing before a governmental agency.

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<sup>44</sup> 352 F.2d at 275.

<sup>45</sup> *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 736 (D.C. Cir 1970).