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STANDING TO CHALLENGE FEDERAL ADMINISTRATIVE ACTIONS IN THE WAKE OF ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC. V. CAMP.

The Supreme Court recently decided two cases involving standing to challenge governmental actions; *Association of Data Processing Service Organizations, Inc. v. Camp*,¹ and *Barlow v. Collins*.²

The *Association of Data Processing Service Organizations, Inc.* case (*Data Processing*) is a competitor's suit seeking judicial review of an administrative rule promulgated by the Comptroller of the Currency. On October 15, 1966, the Comptroller authorized national banks, incident to their banking services, to make data processing services available to other banks and bank customers.³ Incident to this ruling the American National Bank and Trust Company began performing data processing services for two companies with whom Data Systems, Inc., a Minnesota corporation engaged in the data processing business, had negotiated as prospective customers.

Plaintiffs, Data Systems, Inc., and ADAPSO,⁴ filed a complaint in

1. U.S., 38 U.S.L.W. 4193 (U.S. Mar. 3, 1970).

2. U.S., 38 U.S.L.W. 4195 (U.S. Mar. 3, 1970). The question presented in *Barlow* was whether tenant farmers eligible for payments under the Upland Cotton Program, enacted as part of the Food and Agriculture Act of 1965, 79 Stat. 1194, 7 U.S.C. (Supp. IV) § 1444(d), had standing to challenge the validity of an amended regulation promulgated in 1966 by the Secretary of Agriculture. The Upland Cotton Program incorporates § 8(g) of the Soil Conservation and Domestic Allotment Act of 1938, as amended, 52 Stat. 35, 205, 16 U.S.C. § 590h(g), thereby permitting assignments of payments only "as security for cash or advances to finance making a crop." Prior to 1966, the regulation defined "making a crop" to exclude assignments to secure "the payment of . . . rent of a farm." 20 Fed. Reg. 6512 (1955). After the passage of the Food and Agriculture Act of 1965, the Secretary amended the regulation to define "making a crop" to include assignments to secure "the payment of cash rent for land used [for planting, cultivating or harvesting]." 31 Fed. Reg. 2815 (1966). Petitioners alleged that the amended regulation provided their landlord with the opportunity to require the assignment of their benefits under the Upland Cotton Program as a condition of obtaining a lease to work the land. As a result, they were being forced to obtain financing from their landlord for their other farm needs, and since the landlord charged such high prices and rates of interest, the tenants' crop profits are consumed each year in debt payments. The District Court for the Middle District of Alabama, in an unreported opinion, held that petitioners lacked standing because they did not suffer an invasion of any legally protected interest. The Court of Appeals for the Fifth Circuit affirmed, 398 F.2d 398 (1969). The Supreme Court granted certiorari, 395 U.S. 958 (1969).

3. The ruling stated: "Incident to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks or bank customers," COMPTROLLER'S MANUAL FOR NATIONAL BANKS ¶ 3500 (October 15, 1966 ed.).

4. An incorporated association of data service organizations domiciled in Pennsylvania whose members, including Data Systems, Inc., perform data processing services throughout the United States.

the United States District Court for the District of Minnesota on the theory that marketing of data processing to the public by a national bank is a violation of the National Bank Act.⁵ Named as defendants were William B. Camp, Comptroller of the Currency of the United States and American National Bank and Trust Co. The plaintiffs sought a declaratory judgment, an injunction and compensatory damages. The plaintiffs alleged that the Comptroller had authorized national banks to perform data processing services for bank customers in violation of the Act which gives national banks only "such incidental powers as shall be necessary to carry on the business of banking."⁶ As a result ADAPSO members were threatened with the loss of a substantial part of the data processing market. In particular, Data Systems had lost two prospective customers, whose data processing was now being done by American National Bank. Jurisdiction was asserted by reason of an alleged federal question arising under the National Bank Act. The plaintiffs asserted standing to challenge the action of the Comptroller by virtue of section 10 of the Administrative Procedure Act (APA).⁷

The district court held⁸ that the plaintiffs lacked standing because their only injury was loss due to competition and not due to the invasion of a legal right. The court stated that the APA was not designed to, and in fact did not, change the basic principle that one threatened with injury by governmental action does not have standing to challenge such action "—unless the right invaded is a legal right.—"⁹ The United States Court of Appeals for the Eighth Circuit affirmed¹⁰ stating that a plaintiff could challenge allegedly illegal competition only when it pursued: (1) a legal interest by reason of a public charter or contract; (2) a legal interest by reason of statutory protection; or (3) a "public interest" in which Congress had recognized the need for review of administrative action, and the plaintiff was sufficiently involved to have standing to represent the public.¹¹ The court found that the facts

5. 12 U.S.C. §§ 21 et seq. (1964).

6. 12 U.S.C. § 24 (1964).

7. 5 U.S.C. § 701 et seq (1964). The plaintiffs also alleged that § 4 of the Bank Service Corporation Act, 76 Stat. 1132 (1962), 12 U.S.C. § 1864 (1964), gave standing since if a legislative purpose can be found to protect a competitive interest, the injured competitor has standing to sue under the rationale of *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968). Brief for Petitioners at 20, *Association of Data Processing Service Organizations, Inc. v. Camp*, *supra* note 1. Section 4 of the Bank Service Corporation Act provides that: "No bank service corporation may engage in any activity other than the performance of bank services for banks."

8. 279 F. Supp. 675 (D. Minn. 1968).

9. *Id.* at 678.

10. 406 F.2d 837 (8th Cir. 1969).

11. *Id.* at 842.

clearly placed the plaintiffs outside the authority of those cases which recognized standing.¹² The Supreme Court granted certiorari.¹³ The Court reversed stating three requisites for standing. First, the plaintiff must allege that the challenged action has caused him "injury in fact."¹⁴ Second, the interest sought to be protected by the complaint must be arguably within the "zone of interests" to be protected or regulated by the statute or constitutional guarantee in question. Third, judicial review must not be precluded.

The decision in *Data Processing* is significant primarily because it marks the first interpretation of section 10(a) of the APA by the Supreme Court. A majority of the lower court cases interpreting it held that section 10(a) merely codified the common law of standing.¹⁵ Under that common law, in the absence of a specific authorization of judicial review, the complainant was required to show the invasion of a legal right.¹⁶ The Supreme Court in *Data Processing* interpreted section 10(a) much more broadly. Justice Douglas, writing for the Court, stated that the legal interest test had no place in the doctrine of standing, as it was a question which was essentially related to the merits of the case.¹⁷

The Traditional View of Standing

The standing requirement finds its origin in Article III, Section 2,

12. *Id.* at 843.

13. 395 U.S. 976 (1969).

14. *See* page 289, *infra*.

15. *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924, 932 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 884 (1955); *Atchison, Topeka and Santa Fe Ry. Co. v. United States*, 130 F. Supp. 76, 78 (E.D. Mo.), *aff'd*, 350 U.S. 892 (1955); *Harrison-Halsted Community Group v. Housing & Home Financing Agency*, 310 F.2d 99 (7th Cir. 1962); *Arnold Tours, Inc. v. Camp*, 286 F. Supp. 770, 772 (D. Mass. 1968), *aff'd*, 408 F.2d 1147 (1st Cir. 1969), *judgment vacated* 38 U.S.L.W. 3366 (U.S. Mar. 24, 1970); *See Comment, The Congressional Intent to Protect Test: A Judicial Lowering of the Standing Barrier*, 41 U. COLO. L. REV. 96, 99 (1969).

16. In *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938) the Supreme Court stated that:

... It is an ancient maxim, that a damage to one, without an injury in this sense, (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. . . . Want of right and want of remedy are justly said to be reciprocal. When therefore there has been a violation of a right, the person injured is entitled to an action. . . . The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained.

See Tennessee Power Co. v. TVA, 306 U.S. 118, 140 (1939); *See also JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 509 (1958)* [hereinafter cited as JAFFE].

17. *See* note 1, *supra* at 4194. After outlining the three tests discussed by the Court of Appeals, Justice Douglas stated that:

Those tests were based on prior decisions of this Court, such as *Tennessee Power Co. v. TVA*. . . . The "legal interest" test goes to the merits. The question of standing is different.

See Davis, Standing: Taxpayers and Others, 35 U. CHI. L. REV. 601, 620 (1968).

of the Constitution which provides for the judicial power of the federal courts to extend to all "cases" and "controversies." The Supreme Court has interpreted Article III, Section 2 to require that controversies be "—presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."¹⁸ A constitutional claim by a citizen against a government official is not a justiciable "controversy" unless the citizen shows that he has a personal stake in the outcome.¹⁹ The question of who possesses the required personal stake is customarily discussed in terms of "standing."²⁰ The Court in *Flast v. Cohen*²¹ enumerated the two objectives of the Article III standing requirement. The first is the creation of a judicial context in which:

[T]he questions will be framed with the necessary specificity, . . . the issues will be contested with the necessary adverseness and . . . the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution.²²

The second objective is the avoidance of the employment of—"a federal court as a forum in which to air . . . generalized grievances about the conduct of government. . . ."²³

The question of standing is not, however, simply a constitutional question. As the Court stated in *Flast*:

Additional uncertainty exists in the doctrine of justiciability because that doctrine has become a blend of constitutional requirements and policy considerations. And a policy limitation is 'not always clearly distinguished from the constitutional limitation.' *Barrow v. Jackson*, 346 U.S. 249, 255 (1953).²⁴

Indeed, the Court in *Data Processing*, also citing *Barrows*, stated that apart from the Article III limitations, the question of standing involved a "rule of self-restraint for its . . . [The Court's] own governance."²⁵ Justice Brennan, with whom Justice White joined, wrote a separate

18. *Flast v. Cohen*, 392 U.S. 83 (1968).

19. Professor Davis, *supra* note 17, at 616, states that: "I know of no federal case in which a plaintiff was held to have standing without asserting an interest of his own." See *Baker v. Carr*, 369 U.S. 186, 204 (1962).

20. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.01 (1959).

21. *Flast v. Cohen*, 392 U.S. 83 (1968).

22. *Id.* at 106.

23. *Id.* at 97.

24. *Id.*

25. See note 1, *supra* at 4194. In *Barrows* the Court allowed white property owners to assert the constitutional rights of Negroes as a defense to an action for damages for violating a restrictive covenant. In allowing the defendants to assert the rights of others the Court acknowledged that it was breaking from a past course of conduct, but indicated that it could properly do so, since the rule of self-restraint which would be violated was not constitutional in nature.

“concurring and dissenting” opinion in *Data Processing* in which he indicated that the constitutional barriers to standing were the only ones which the Court should recognize.²⁶ He stated that:

By requiring a second, nonconstitutional step, the Court comes very close to perpetuating the discredited requirement that conditioned standing on a showing by the plaintiff that the challenged governmental action invaded one of his legally protected interests.²⁷

Standing could traditionally be asserted in one of two ways. First, it could be asserted by reason of the invasion of an interest protected by law—the “legal interest” test.²⁸ The effect of the application of this test was that often one who was injured by illegal or unconstitutional administrative action was held to lack standing because there was no invasion of a “legal interest.”²⁹ In *Perkins v. Lukens Steel Co.*,³⁰ the Court stated that:

It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such.³¹

Congress has provided such “constitutional legislation”³² in the form

26. *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). Justice Brennan further indicated that these constitutional requirements were fulfilled by compliance with the “injury in fact” test. This position seems to be in accord with the views expressed by Justice Douglas in *Data Processing* and *Barlow*. In *Barlow*, Douglas said:

First, there is no doubt that in the context of this litigation the tenant farmers, petitioners here, have the personal stake and interest that impart the concrete adverseness required by Article III. 38 U.S.L.W., at 4197.

Justice Douglas then proceeded to examine the second and third requirements established in *Data Processing* to determine if the petitioner had fulfilled them, and would be granted standing.

27. *Id.* at 4198. Justice Brennan further argues that the majority’s approach will cause unnecessary confusion on the standing issue. Instead, he would restrict standing to the constitutional inquiry previously discussed, and then consider the related, but separate, question of reviewability. In practical effect there may be little difference between the results obtained under these two systems, since in determining reviewability, Justice Brennan would look to the same indicia which Justice Douglas analyzed in finding that the second and third requirements (the “zone of interests” and preclusion of reviewability tests) of the Court’s “standing” test was fulfilled.

28. See note 16, *supra*.; In *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938), the Court stated that the complainant was required to allege the violation of a legal right. In *Tennessee Power Co. v. TVA*, 306 U.S. 118 (1939), the Court outlined the “rights” that would be afforded protection:

The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government, which, but for statutory authority for its performance, would be a violation of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege. *Id.* at 137.

29. Professor Davis states the opinion that the law of standing is artificial to the extent that a person who is injured in fact by administrative action is held to lack standing to challenge the legality of that action. 3 DAVIS, *supra* note 20.

30. 310 U.S. 113 (1940).

31. *Id.* at 125.

32. The phrase “constitutional legislation” which was used by the Court in *Perkins*

of "person aggrieved" provisions of certain statutes.³³ The second way standing could traditionally be asserted, therefore, was by alleging statutory authorization for judicial review by "aggrieved" or "adversely affected" persons.

In *FCC v. Sanders Bros. Radio Station*,³⁴ the Court was called on to interpret the impact of a statute allowing attack on an administrative decision by an "aggrieved" person. The Court stated that the economic injury suffered by a rival station when the FCC granted a license to a new station was not, at least when considered alone, such an injury as would allow standing. The Court however, then stated:

Congress has some purpose in enacting §402(b)(2). It may have been of [the] opinion that one likely to be financially injured by the issue of a license would be the only person having sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license.³⁵

On this basis the Court found that standing existed. For standing to exist under such a statutory provision the complainant must have "[S]ome special and peculiar interest which may be directly and materially affected by alleged unlawful action. . . ."³⁶

seems to be a misnomer, for it is a fundamental principle of constitutional law that the Congress may not, by ordinary legislative means, expand the jurisdiction of the federal courts beyond the limits established by Article III, Section 2, of the Constitution. Thus, the legislation the Court discussed apparently had the effect of removing those barriers to standing which were non-constitutional in nature, but had been judicially superimposed over the "case" or "controversy" requirements of Article III, section 2.

33. The list of statutory provisions granting judicial review is a long one. The usual provision allows standing to one "adversely affected" or "aggrieved" by agency action; Communications Act of 1934, 47 U.S.C. § 402(b) (1964). The Securities Act allows standing to "any person aggrieved by an order of the Commission," 15 U.S.C. § 771(a) (1964). The same effect is achieved by allowing standing to "any person disclosing a substantial interest" in an order, Federal Aviation Act, 49 U.S.C. § 1486 (a) (1964) or to "any person in interest," Interstate Commerce Act, 49 U.S.C. § 1(20) (1964). A somewhat narrower provision allows standing to "any party to a proceeding . . . aggrieved by an order. . ." Federal Power Act, 16 U.S.C. § 8251(b) (1964) and the Federal Trade Commission Act allows standing only to those required to cease and desist by a Commission order, 15 U.S.C. § 45(c) (1964). See JAFFE, *supra* note 16, at 602; Davis, *supra* note 17, at 618; Note, *Competitors' Standing to Challenge Administrative Action Under the APA*, 104 U. PA. L. REV. 843, 844 (1956).

34. 309 U.S. 470 (1940).

35. *Id.* at 477.

36. *L. Singer & Sons v. Union Pacific R.R. Co.*, 311 U.S. 295, 304 (1940). The suit in *L. Singer* was brought under the Transportation Act of 1920 which in "Paragraph 20, § 402, provided that suit for injunction may be instituted by the United States . . . or any 'party in interest.' Such a suit cannot be instituted by an individual unless he 'possesses something more than a common concern for obedience to law.'" *Id.* at 303. Professor Jaffe has stated the contrary position. He contends that:

Judge Frank in the well known *Associated Industries* case believed, correctly in my opinion, that under *Sanders* as reinforced by *Scripps-Howard* it is not a necessary element of the constitutional requirement of case or controversy that the plaintiff have any interest. It is enough that the statutes authorize him to represent the public interest as a 'private Attorney General.'

JAFFE, *supra* note 16, at 517.

This opinion was reinforced by: Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

The scope of review the petitioner is entitled to receive under an "aggrieved person" provision is limited.³⁷ In *Scripps-Howard Radio v. FCC*,³⁸ the Court said:

The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By §402(b)(2) Congress gave the right of appeal to persons "aggrieved or whose interests are adversely affected" by Commission action. . . . But these private litigants have standing only as representatives of the public interest.³⁹

As a representative of the public interest, the complainant has standing only "to vindicate the public interest."⁴⁰

One other method by which standing was infrequently gained was by asserting the invasion of an interest implicitly intended by Congress to be protected absent a provision for review by "aggrieved" or "adversely affected" persons. In the *Chicago Junction Case*,⁴¹ the Interstate Commerce Commission authorized the New York Central railroad to take exclusive control of the terminal railroads in Chicago, in place of the common control that had existed. In a suit by New York Central's competitors, the Court stated that the Transportation Act of 1920 was intended to protect the competitors' interest. Mr. Justice Brandeis said:

By reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company.⁴²

Mr. Justice Harlan based his dissenting opinion in *Flast* on Jaffe's interpretation of the *Associated Industries* decision. Justice Harlan stated that:

It does not . . . follow that suits brought by non-Hohfeldian plaintiffs are excluded by the "case or controversy" clause of Article III of the Constitution. . . . This and other federal courts have repeatedly held that individual litigants, acting as private attorneys-general, may have standing as "representatives of the public interest." 392 U.S., at 120.

Professor Davis contends that Professor Jaffe's interpretation is incorrect. Professor Davis states that:

Even though the law of standing is so cluttered and confused that almost every proposition has some exception, the federal courts have consistently adhered to one major proposition, without exception: one who has no interest of his own at stake always lacks standing. Davis, *supra* note 17, at 617.

See also Singer, *Justiciability and Recent Supreme Court Cases*, 21 ALA. L. REV. 229, 280 (1969).

37. Professor Jaffe states that the question of standing is sometimes difficult to divorce from the question of what issues a standee may raise. JAFFE, *supra* note 16, at 513. See Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962). See generally 3 DAVIS, *supra* note 20, at §§ 22.06, 22.07.

38. 316 U.S. 4 (1942).

39. *Id.* at 14.

40. *Associated Industries v. Ickes*, 134 F.2d 694, 705 (2nd Cir.), *vacated as moot*, 320 U.S. 707 (1943).

41. 264 U.S. 258 (1924).

42. *Id.* at 267.

Although *Chicago Junction* indicates the Court's establishment of a statutory intent to protect test,⁴³ a significant step in the law of standing, later cases detracted from its importance as a stepping stone toward broader grants of standing.⁴⁴ The recent case of *Hardin v. Kentucky Utilities Co.*,⁴⁵ however, seems to have re-established the validity of this proposition.

The Impact of the APA

The decisions of the courts of appeal in *Data Processing*, and *Barlow*⁴⁶ indicate that those courts viewed section 10(a) of the APA as a mere codification of the two methods of asserting standing discussed above. Section 10(a) provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.⁴⁷

In order to determine why a majority of the courts interpreted Section 10(a) as a codification of the existing law of standing we must look to the legislative history.⁴⁸ The APA was derived from two earlier bills, the McCarran Bill⁴⁹ and the Sumners Bill,⁵⁰ both of which provided that: "Any person adversely affected by any agency action shall be entitled to judicial review thereof in accordance with this section." It can clearly be seen that at this stage a change in the existing law was anticipated. During the Senate Committee hearings on this section, however, it was rewritten to provide that: "Any person suffering legal wrong because of any agency action shall be entitled to judicial review."⁵¹ The section was then revised a third time,⁵² the result being the present text of section 10(a). The additional language in the final draft, "adversely affected or aggrieved . . . within the meaning of any relevant statute," appears to refer to the "aggrieved person" provisions in earlier statutes, and thus may be viewed as a completion of the codification begun in the second draft.⁵³ Uncertainty exists, however, because both

43. Professor Jaffe states that when the legislature recognizes an interest ". . . as on which must be heeded, it is such a 'legally protected interest' as warrants standing to complain of its disregard." JAFFE, *supra* note 16, at 508.

44. See note 41, *supra*; See Note, *The Congressional Intent to Protect Test: A Judicial Lowering of the Standing Barrier*, 41 U. COLO. L. REV. 96, 100-101 (1969).

45. 390 U.S. 1 (1968).

46. 406 F.2d 837, 843 (8th Cir. 1969); 398 F.2d 398, 400 (5th Cir. 1968).

47. 5 U.S.C. § 702 (Supp. II, 1967).

48. See note 15, *supra*.

49. S. 7, 79th Cong., 1st Sess. § 10 (1945).

50. H.R. 1203, 79th Cong., 1st Sess. § 10 (1945).

51. S. Doc. No. 248, 79th Cong., 2nd Sess. 11, 36 (1946); H.R. REP. NO. 1980, 79th Cong., 2nd Sess. 14 (1946).

52. *Id.*

53. Professor Davis, on the other hand, would view section 10(a) as merely pro-

committee reports on the final version stated that: "This subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute."⁵⁴ Senator McCarran, however, quoted the Attorney General's statement that: "This reflects existing law,"⁵⁵ as did a committee member.⁵⁶ Notwithstanding these comments, Professor Davis claims that:

When both committee reports are so clear in translating the statutory words 'adversely affected' to mean 'adversely affected in fact,' the reasons in favor of following that interpretation are rather powerful, except to the extent that other legislative history is inconsistent. In general, the rest of the legislative history clutters up the question more than it detracts from the committees' statements.⁵⁷

Professor Jaffe, on the other hand, contends that even though the Attorney General's statement is not so authoritative as to control, when it is taken into consideration "[I]t does throw into high relief the omission of the words 'in fact.'"⁵⁸ Therefore, Jaffe contends that Professor Davis' view is "—logically very difficult to support."⁵⁹

Perhaps because of the confused state of its legislative history, the judicial interpretations of section 10(a), at least prior to *Data Processing*, have done little to clarify its scope. In *American President Lines v. Federal Maritime Board*,⁶⁰ a district court analogized the phraseology "adversely affected or aggrieved" in section 10(a) to that language in the Federal Communications Act. The court then found that:

If a competitor who fears adverse economic effects, has a right to challenge the legality of official action under one of the Acts, the conclusion is inescapable that he may do so under the other Act.⁶¹

The court then went on to say that, "—[T]he Administrative Procedure Act is no mere codification of pre-existing law."⁶² Two years after the

viding a general statutory grant of standing applicable to all agencies where review is not precluded which is similar in nature to the various "person aggrieved" provisions which have been previously discussed. See note 33, *supra*. Professor Davis would still argue, however, that these statutes remove only non-constitutional barriers and may be applied only when the petitioner is adversely affected in fact so as to fulfill the "case" or "controversy" requirement. See note 64, *infra*. See also Note, *Competitor's Standing to Challenge Administrative Action Under the APA*, 104 U. PA. L. REV. 843, 858 (1956).

54. S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945); H.R. REP. No. 1980, 79th Cong., 2nd Sess. 42 (1946).

55. S. Doc. No. 248, 79th Cong., 2nd Sess. 212, 310 (1946).

56. 92 CONG. REC. 2984-85 (Rep. Hobbs).

57. 3 DAVIS, *supra* note 20, at 212.

58. JAFFE, *supra* note 16, at 529.

59. *Id.*

60. 112 F. Supp. 346 (D.D.C. 1953).

61. *Id.* at 349.

62. *Id.*

American President Lines decision it was overruled by the Circuit Court of Appeals for the District of Columbia in *Kansas City Power & Light Co. v. McKay*.⁶³ In that case the court held that section 10(a) did not alter prior law. The court, relying on the Attorney General's comment, expressly rejected the *American President Lines* interpretation.⁶⁴ This interpretation was also adopted by courts in three other circuits.⁶⁵

A well reasoned contrary interpretation can be found in *Norwalk CORE v. Norwalk Redevelopment Agency*,⁶⁶ where the Circuit Court of Appeals for the Second Circuit stated that they did not think that the language in section 10(a) should be construed to limit judicial review to situations where Congress has provided "person aggrieved" or "adversely affected" provisions in specific statutes. They stated that this interpretation would conflict with the Supreme Court's decision in *Abbott Laboratories v. Gardner*,⁶⁷ which indicated that the APA's "generous" review provisions should be given a "hospitable" interpretation. They then stated that in view of *Hardin v. Kentucky Utilities Co.*,⁶⁸ they would consider a person attempting to assert the invasion of a personal interest which a relevant statute was specifically intended to protect, as adversely affected or aggrieved within the meaning of that relevant statute.⁶⁹

Prior to the Supreme Court's decision in *Data Processing*, then, the circuit courts were split on the correct interpretation of section 10(a). Although some legislative history indicated that section 10(a) was a mere codification of existing law, other history indicated that the section

63. 225 F.2d 924 (D.C. Cir.), cert. denied, 350 U.S. 884 (1955).

64. *Id.* at 932.

65. *Atchison, Topeka and Santa Fe Ry. Co. v. United States*, 130 F. Supp. 76 (E.D. Mo. 1955), *aff'd*, 350 U.S. 892 (1955); *Harrison-Halsted Community Group v. Housing & Home Finance Agency*, 310 F.2d 99 (7th Cir. 1962); *Arnold Tours, Inc. v. Camp*, 408 F.2d 1147 (1st Cir. 1969), *judgment vacated*, — U.S. —, 38 U.S.L.W. 3366 (U.S. Mar. 24, 1970).

66. 395 F.2d 920 (2nd Cir. 1968).

67. 387 U.S. 136 (1967).

68. 390 U.S. 1 (1968). Though the court in *Norwalk* could probably reach its decision solely on the basis of *Hardin's* authority, the decision is noteworthy primarily for its interpretation of the APA's provisions. *Hardin* did not involve an interpretation of the APA.

69. See, note 66, *supra*, at 933 n.26. In *Abbott Laboratories*, the Court stated that the legislative history manifests a congressional intent that the APA cover a broad area of administrative actions. The Court then stated that: "... this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provision' must be given 'hospitable' interpretation." See note 67, *supra*, at 140. In *Hardin*, the Court adopted the "intent to protect" test when it stated:

... it has been the rule, at least since the *Chicago Junction Case* . . . that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. 390 U.S., at 6.

See Note, *The Congressional Intent to Protect Test: A Judicial Lowering of the Standing Barrier*, 41 U. COLO. L. REV. 96, 102 (1969).

was intended to establish a new right to review. This same confusion could be expected to permeate the judicial interpretation of the section, and we have seen ample evidence that it did. The Supreme Court in *Abbott Laboratories* and *Hardin* indicated that the right of judicial review should be more freely granted, but it was not until the decision in *Data Processing* that the doubts about the interpretation of Section 10(a) were resolved.

The Impact of Data Processing and Barlow

The extent to which the existing law of standing has been changed by the *Data Processing* and *Barlow* decisions can be highlighted by examining the First Circuit's decision in a similar case, *Arnold Tours, Inc. v. Camp*.⁷⁰ In that case the complainant asserted that the Comptroller of the Currency has authorized national banks to enter the travel agency business in violation of the National Bank Act. Petitioner's allegation of standing was based, as it was in *Data Processing*, upon section 10(a) of the APA. Plaintiffs argued that section 10(a) granted standing to any person claiming to be adversely affected in fact. In denying standing, the court expressly acknowledged that the plaintiff's argument was derived from Professor Davis' interpretation of section 10(a). The court then stated that they chose to side with Professor Jaffe and the majority of courts in holding that section 10(a) was a codification of the prior law of standing.⁷¹

The Supreme Court in *Data Processing*, on the other hand, adopted the position championed by Professor Davis and expanded the federal law of standing.⁷² Mr. Justice Douglas, writing for the Court, stated that: "The first question is whether the plaintiff alleges that the challenged action has caused him injury *in fact*, economic or otherwise."⁷³ Justice Douglas said that the question of standing is different from the inquiry into the existence of a "legal interest" in which the Court in

70: 408 F.2d 1147 (1st Cir. 1969), judgment vacated, — U.S. —, 38 U.S.L.W. 3366 (U.S. Mar. 24, 1970).

71. *Id.* at 1151.

72: Professor Davis has stated that:
Reform of federal law of standing should be easy, for all that is needed is application of the Administrative Procedure Act, 5 U.S.C. 702, which confers standing upon a person who is 'adversely affected or aggrieved by agency action within the meaning of a relevant statute.' . . . the federal courts should, in my opinion, recognize that standing of 'any person adversely affected in fact by agency action. K. DAVIS, DISCRETIONARY JUSTICE 159 (1969).

73. See note 1, *supra*, emphasis added. The decision in *Data Processing* does not appear to be limited to competitor suits. The Court stated that:
We mention these noneconomic values ['aesthetic, conservational, and recreational' and 'a spiritual stake in First Amendment values'] to emphasize that standing may stem from them as well as from the economic injury on which petitioner relies here. *Id.* at 4194.

Tennessee Power Co. v. TVA,⁷⁴ had engaged. Assuming the petitioner satisfies the prior constitutional requirement, in order to obtain standing he must then make a showing that the interest he sought to have protected is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."⁷⁵ Moreover, it indicated that these "zones of interest" may reflect "aesthetic, conservational, and recreational" values as well as economic ones.⁷⁶

Justice Douglas then pointed out that the trend is toward expanding the class of people who may challenge administrative action. He found this trend significant in discussing the Court's third criteria for standing: that judicial review has not been precluded. The Administrative Procedure Act provides that its review provisions apply "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."⁷⁷ Justice Douglas then stated that this provision should be construed narrowly because in *Shaughnessy v. Pedrino*,⁷⁸ they had referred to "the generous review provisions" of the APA, and in that and other cases had construed the APA "as serving a broadly remedial purpose."⁷⁹ The Court reinforced this opinion by stating that there is no presumption against judicial review unless that purpose is clearly discernible in the statutory scheme.⁸⁰

74. 306 U.S. 118 (1939). It appears that *Tennessee Power Co.* is overruled to the extent that it requires the assertion of the invasion of a "legal interest." Justice Douglas stated that: "The 'legal interest' test goes to the merits." 38 U.S.L.W., at 4194.

75. 38 U.S.L.W., at 4194. It has been contended that the Court too often confuses standing with the substantive issues of the case. Lewis, *Constitutional Rights and the Misuse of "Standing"*, 14 STAN. L. REV. 433 (1962).

76. 38 U.S.L.W., at 4194. Two cases were cited in support of this proposition; *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965) and *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). The court in *Scenic Hudson* was asked to review the Federal Power Commission's grant of a license to Consolidated Edison to construct a hydroelectric project on the Hudson River. The court held:

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under § 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests. 354 F.2d, at 616.

In *United Church of Christ* the court upheld the standing of representatives of the listening audience to contest the renewal of a broadcast license. Mr. Chief Justice Burger, writing for the Court of Appeals for the District of Columbia, stated that: "There is nothing unusual or novel in granting the consuming public standing to challenge administrative actions." 359 F.2d, at 1002.

77. 5 U.S.C. § 701 (Supp. II, 1967).

78. 349 U.S. 48, 51 (1955).

79. 38 U.S.L.W., at 4195. Even discretionary action may be reviewable for abuse of discretion. See Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965).

80. *Id.* In *Barlow*, Justice Douglas made the Court's position entirely clear:

As we said in *Data Processing Service*, preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. . . .

Conclusion

Data Processing appears to be a step toward the philosophy of the late Edmond Cahn, who said:

Some consumers need bread; others need Shakespeare; others need their rightful place in the national society—what they all need is processors of law who will consider the people's needs more significant than administrative convenience.⁸¹

Whether for the consumer, competitor or the citizen, the Court is moving to the preferred position of allowing standing to those who are "injured in fact." This will be particularly true if the Court construes liberally its requirement that the petitioner's interest be "arguably within the zone of interests to be protected or regulated by the statute. . . ." If the Court extends its "zone of interests" to cover those who logically might be, at least secondarily, considered in enacting the statute in question, it appears that most people who can fulfill the "case" or "controversy" requirement may be able to gain standing to challenge the actions of federal administrative agencies.

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Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated. 38 U.S.L.W., at 4197.

81. Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1, 13 (1963) cited by Mr. Chief Justice Burger in *United Church of Christ v. FCC*, 359 F.2d 994, 1005 (1966). Professor Cahn has another friend on the Court. Mr. Justice Burger said in his concurring opinion in *Flast v. Cohen*, 392 U.S. 83, 110 (1968), that:

The late Edmond Cahn stated my philosophy. He emphasized the importance of the role that the federal judiciary was designed to play in guarding basic rights against majoritarian control.