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## Standing to Secure Judicial Review of Administrative Action - A New Direction

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## STANDING TO SECURE JUDICIAL REVIEW OF ADMINISTRATIVE ACTION—A NEW DIRECTION

The law of standing as developed by the [C]ourt has become an area of incredible complexity. . . . The [C]ourt has itself characterized its law of standing as a 'complicated specialty of federal jurisdiction.'

### INTRODUCTION

The federal law of standing to secure judicial review of administrative action, through its development, has manifested two doctrines, neither of which is distinct and neither of which has been able to provide clear and precise standards for those litigants who seek to appeal the actions of federal administrative agencies.

"The law of standing . . . has long been too complex; . . .<sup>2</sup> recent developments have increased the complexity instead of reducing it."<sup>3</sup> It is the task of this Note to examine the Supreme Court developments in the federal law of standing to secure judicial review of administrative action and to ascertain their effects on recent lower federal court decisions.

#### A. *The Legal Rights Doctrine*

The first of the two doctrines to emerge was the legal rights doctrine.<sup>4</sup> A legal right has been described as "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."<sup>5</sup> In addition, for a litigant to have standing under this doctrine, he must be able to show an injury or a threat to his particular legal rights; distinguished from the public's interest in the administration of the law.<sup>6</sup>

The result effectively denied judicial review to victims of possible arbitrary or capricious agency action in the event that they could not claim a "legal right," notwithstanding injuries they might suffer as a result of such agency action. Concomitantly, the litigants would suffer the same burdensome results where the denial indirectly affected them. An example of the indirect denial would be a representative of a large public

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<sup>1</sup> *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 61 (D.C. Cir. 1970).

<sup>2</sup> Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); [hereinafter referred to as Davis, *Liberalized Law of Standing*].

<sup>3</sup> *Id.*

<sup>4</sup> *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

<sup>5</sup> *Tennessee Elect. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939). *But see* Professor Jaffe, who suggests that "the clue to standing in these cases is to look . . . to the statutory purposes. If protection is one—it need not . . . be the *only*—purpose, then the plaintiff's stake is 'legally protected' and he has standing." Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 266 (1961).

<sup>6</sup> *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125-126 (1940).

group of aggrieved persons, who has not, himself, suffered an interference with a legal right, and who seeks to vindicate the position of his representative group and to avoid future possible injury to himself.

The demise of the legal rights doctrine came with *City of Chicago v. Atcheson T. & S. F. Ry.*<sup>7</sup> Several railroads discontinued a contract with Parmelee Transportation Company for transportation of passengers between terminals in Chicago and subsequently contracted with a company formed at the request of the railroads. After the change was announced, the Chicago City Council amended a city ordinance to require a determination that public convenience and necessity required additional transportation service before a license could issue, with the Council reserving final discretion in the determination. The Seventh Circuit held the ordinance invalid; Parmelee intervened, and the Supreme Court upheld its standing saying: "It is enough, for purposes of standing, that we have an actual controversy before us in which Parmelee has a direct and substantial personal interest in the outcome. Undoubtedly it is affected adversely by [its competitor's] operation."<sup>8</sup> In *City of Chicago*, Parmelee had standing to challenge the new company's competing business, because the established business was allegedly protected against unlawful competition by a valid statute. This statutory aid to standing became the basis for the enlargement and increased liberalization of the law of standing.

### B. Statutory Aid

The doctrine of statutory aid to standing has been present at least since the *Chicago Junction Case*,<sup>9</sup> when a railroad's standing to challenge Interstate Commerce Commission approval of a rival railroad's belt-line acquisitions was based on a finding of an implicit congressional intent to grant standing to carriers covered by the Interstate Commerce Act.<sup>10</sup> The decision is significant because, in addition to basing standing on a legal interest to be free from unequal treatment by the ICC, the Supreme Court determined that the legal interest had been denied the protection Congress intended to provide.<sup>11</sup> The Court's reliance on congressional intent, however, did not resolve the difficulties and inequities flowing from the use of the legal rights doctrine in the first instance.

In order to mitigate these problems, the Court began to allow litigants

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<sup>7</sup> *City of Chicago v. Atchison, T. & S.F. Ry.* 357 U.S. 77 (1958).

<sup>8</sup> *Id.* at 83, 84; see Note, *Competitor's Standing to Challenge Administrative Action—Recent Federal Developments*, 48 N.C.L. REV. 807, 813 (1970) [hereinafter referred to as *Competitors' Standing*].

<sup>9</sup> *Baltimore & O.R.R. v. United States*, 264 U.S. 258 (1924).

<sup>10</sup> *Competitor's Standing* at 815.

<sup>11</sup> *Id.*; see *Alexander Sprunt & Sons v. United States*, 281 U.S. 249 (1930); followed in: *L. Singer & Sons v. Union Pac. Ry.*, 311 U.S. 295 (1940); *Freeport Sulphur Co. v. United States*, 199 F. Supp. 913 (S.D.N.Y. 1961).

to assert public rather than private interest.<sup>12</sup> In *Associated Industries of New York v. Ickes*<sup>13</sup> the Court extended this concept to its logical extreme; holding that "there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy,"<sup>14</sup> even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals."<sup>15</sup> The Court stated further that "[i]f . . . one is a 'person aggrieved,' he has authority . . . to vindicate the public interest involved . . . even if he can show no past or threatened invasion of any private legally protected substantive interest of his own."<sup>16</sup>

Although the use of statutory aids and the emergence of the public interest exception vitiated some of the uncertainties in the early law of standing, the use of statutory aid in conjunction with the legal rights doctrine produced convoluted opinions, confusion, and inconsistency.

## II. INJURY IN FACT—A NEW DIRECTION

The first Supreme Court case indicating a new direction in the federal law of standing was *Hardin v. Kentucky Utilities Co.*<sup>17</sup> In *Hardin*, Kentucky Utilities filed suit against the Tennessee Valley Authority to enjoin TVA from supplying power to a new municipality served primarily by the plaintiff. The district court held that the new municipalities were within TVA's primary service area and dismissed the case. Affirming the court of appeals' reversal, and holding that Kentucky Utilities had standing, the Court noted that protection of private utilities from TVA competition was almost universally regarded as the primary objective of the statute in question.<sup>18</sup> The Court stated that "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

<sup>12</sup> *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942), see *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

<sup>13</sup> *Associated Indus., Inc. v. Ickes*, 134 F.2d 694 (2d Cir.), *dismissed as moot*, 320 U.S. 707 (1943).

<sup>14</sup> *Id.* The controversy referred to is a suit to prevent action by a government officer or agent in violation of his statutory powers.

<sup>15</sup> *Id.*, cited with approval in *National Coal Ass'n. v. FPC*, 191 F.2d 462, 464-65 (D.C. Cir. 1951). Speaking for the court, Judge Bazelon said that "the 'person aggrieved' review provision [is] a constitutionally valid statute authorizing a class of 'persons aggrieved' to bring suit in a Court of Appeals to prevent alleged unlawful official action in order to vindicate the public interest, although no personal substantive interest of such persons had been or would be invaded. . . ."

<sup>16</sup> *Associated Indus., Inc. v. Ickes*, 134 F.2d 694 (2d Cir.), *dismissed as moot*, 320 U.S. 707 (1943); but see *Stark v. Wickard*, 329 U.S. 288 (1944).

<sup>17</sup> *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968).

<sup>18</sup> *Id.* at 7.

with that provision."<sup>19</sup> The Court concluded that no specific statutory provision was necessary to confer standing.<sup>20</sup> Standing was granted even though the statute relied upon did not reveal an express intent to afford protection of the right that the plaintiff claimed had been infringed. Here, the mere suggestion of a legislative purpose was a sufficient basis for the Court's grant of standing.<sup>21</sup>

In *Flast v. Cohen*,<sup>22</sup> several taxpayers alleged a violation of the establishment of religion clause of the First Amendment by Congress' appropriation of funds to finance instruction in religious schools. The district court held that the plaintiffs' status as federal taxpayers did not give them standing to sue. On direct appeal, the Supreme Court reversed, and held that a federal taxpayer has standing to sue if he can show a "logical nexus" between the status asserted as a taxpayer and the claim sought to be adjudicated. Although the issue in *Flast* was a highly specialized one, the opinion significantly contributed to the liberalization of the law of standing.<sup>23</sup>

*Flast* is distinguishable from *Hardin*. In *Flast*, the plaintiff was "a public plaintiff," a citizen or taxpayer.<sup>24</sup> The plaintiff in *Hardin* was what might be characterized as a private plaintiff, one complaining of substantial direct economic injury. In *Flast*, the plaintiff taxpayers invoked the specific protection of the First Amendment. Since a constitutional right had been violated, and the plaintiff's status of a taxpayer was logically and directly related to the infringement, the plaintiff had standing. In *Hardin*, no specific statutory or constitutional right had been infringed, although injury to the plaintiff was substantial and direct. No express protection was afforded; instead, the Court determined that Congress had manifested a purpose to protect a competitive interest.

Although the import of *Hardin* and *Flast* is not identical, the cases form the basis for the new approach to the law of standing.

These cases sparked a series of lower court decisions not entirely consistent in their recognition of the new direction. In *Arnold Tours v. Camp*,<sup>25</sup> for example, the First Circuit rejected the argument that *Flast*

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<sup>19</sup> *Id.* at 6.

<sup>20</sup> *Id.* at 7.

<sup>21</sup> See Davis, *Liberalized Law of Standing* at 451, where Professor Davis has observed that "[t]he significance of the case does not lie in its holding. It lies in (1) the negative proposition that has later been read into the opinion that parties do not have standing unless they have interests protected by a statute—a proposition that the Court did not state—and (2) the language partially discrediting a leading case, [Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), cert. denied, 350 U.S. 884 (1955)] that had become the foundation for much law that a competitive interest alone cannot be enough for standing."

<sup>22</sup> *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>23</sup> Davis, *Liberalized Law of Standing* at 452.

<sup>24</sup> Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 638 (1971).

<sup>25</sup> *Arnold Tours, Inc. v. Camp*, 408 F.2d 1147 (1st Cir. 1969), rev'd 39 U.S.L.W. 3226 (U.S. Nov. 24, 1970) (No. 102), rev'g mem. 428 F.2d 359 (1st Cir. 1970).

indicated a "major shift in the judicial attitude toward the general doctrine of standing; and that while it is not directly in point, this decision [*Flast*] indicates that the relevant test for determining standing in this situation is whether the parties are sufficiently adverse to bring into focus the issues raised."<sup>26</sup> The court chose to limit *Flast* to its facts, emphasizing the distinction between the constitutional dimensions of that case and the purely administrative matter presented by the regulation of legitimate competition.

Although the District of Columbia Court of Appeals in *National Ass'n of Sec. Deal, Inc. v. SEC*<sup>27</sup> had reservations about the plaintiff's standing, those doubts were resolved in favor of reaching the merits of the case. In this puzzling case<sup>28</sup> the court, per Bazelon, C.J. concurring, found that "the basic justification for entertaining competitors' suits to challenge administrative action as statutory aggrieved parties . . . is to vindicate a public interest, and not a private right." The court found the absence of statutory aid adventitious, and granted standing to assert the public interest without it.<sup>29</sup> The grant of standing to the "public plaintiff" is almost imperative. In competitors' suits, the basic justification for standing is vindication of *public interest*. The opinion clearly rejects any lingering traces of the legal rights doctrine, and it expands the notion of the "public plaintiff" as espoused in *Flast* to a plaintiff who seeks to challenge "novel and prohibited—even criminal—business activity by administrative agencies."

In the *Security Dealers* case, standing was granted because the public had a vital interest in the regulation of a potentially illegal extension by the banking industry into an investment technique which portended a compromise of the vital protections afforded to investors and bank customers by the securities and banking laws. Thus, standing has been granted to a public plaintiff, lacking a private legal right, without statutory aid, for the vindication of a public interest.

Further illustrating the idea that an "injury in fact" suffered by either a public, or private plaintiff is a sufficient basis for standing, Judge Leventhal, in *Air Reduction Co. v. Hickel*,<sup>30</sup> granted private helium producers standing to challenge Department of the Interior regulations on the ground that the "regulations would interfere with appellees' existing

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<sup>26</sup> 408 F.2d, at 1152.

<sup>27</sup> *National Ass'n. of Sec'y. Dealers, Inc. v. SEC*, 420 F.2d 83 (D.C. Cir. 1969), vacated 401 U.S. 617 (1971).

<sup>28</sup> This case was heard by Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge and Burger, Circuit Judge. Judge Burger's opinion, in which Judge Miller concurred, was not published. The only reported opinion is Judge Bazelon, concurring.

<sup>29</sup> *National Ass'n. of Sec'y. Dealers, Inc. v. SEC*, 420 F.2d 83, 96 (D.C. Cir. 1969), vacated 401 U.S. 617 (1971).

<sup>30</sup> *Air Reduction Co. v. Hickel*, 420 F.2d 592 (D.C. Cir. 1969); see Davis, *Liberalized Law of Standing* at 451 n. 4.

beneficial business relations with government contractors, and are subject to challenge by appellees on the ground that they are invalid and hence an unlawful termination of a beneficial business relationship for supplying the needs of the government."<sup>31</sup>

The Fifth Circuit, to the contrary, has continued to follow a more restrictive approach. In *Troutman v. Shriver*,<sup>32</sup> the court found that the appellants failed to couple their claim of status as taxpayers, citizens and attorneys with an assertion of direct injury in violation of specific constitutional limitations required under the *Flast* "nexus" test. The court went further, holding that "[a]ppellants, however, have demonstrated no legal rights sought to be protected by Congress, there ordinarily being no right to be free from competition and the statute<sup>33</sup> having been passed for the benefit of the public at large."<sup>34</sup> Hence, appellants lacked standing.

Most circuits, notably the first,<sup>35</sup> fifth,<sup>36</sup> eighth<sup>37</sup> and the ninth,<sup>38</sup> have exhibited a marked reticence to advancement of the "injury in fact" test, as well as the increased allowance of standing to the "public plaintiff." In *Curran v. Laird*,<sup>39</sup> however, the court held that the National Maritime Union and its members had standing to complain of a violation of the Cargo Preference Act.<sup>40</sup> In reaching the decision the court stated that "[a]ggrievement in fact presents the kind of concrete, adversary interest underlying the recent decisions rejecting objections to standing, especially in the constitutional sphere."<sup>41</sup> The court stated further that the use of the aggrievement in fact test establishes "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult and far reaching questions."<sup>42</sup> The court also observed that "Section 10 of the Administrative Procedure Act makes cross-reference to the legislative trend of enactment statutes that provide standing to persons aggrieved in fact."<sup>43</sup> The *Curran* de-

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<sup>31</sup> *Id.*

<sup>32</sup> *Troutman v. Shriver*, 417 F.2d 171 (5th Cir. 1969).

<sup>33</sup> The Ichord Amendment, 42 U.S.C. §2809 (1970).

<sup>34</sup> *Troutman v. Shriver*, 417 F.2d 171, 176 (5th Cir. 1969).

<sup>35</sup> *Arnold Tours, Inc. v. Camp*, 408 F.2d 1147 (1st Cir. 1969), *rev'd* 39 U.S.L.W. 3226 (U.S. Nov. 24, 1970) (No. 102), *rev'g mem* 428 F.2d 359 (1st Cir. 1970).

<sup>36</sup> *Troutman v. Shriver*, 417 F.2d 171 (5th Cir. 1969).

<sup>37</sup> *Rasmussen v. United States*, 421 F.2d 776 (8th Cir. 1970).

<sup>38</sup> *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970).

<sup>39</sup> *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969).

<sup>40</sup> Cargo Preference Act, 10 U.S.C. §2631 (1964).

<sup>41</sup> *Curran v. Laird*, 420 F.2d 122, 124 (D.C. Cir. 1969); *see Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

cision stands in sharp contrast to *Troutman*. Such diversity of opinion amply displays the confusion and uncertainty prevalent in the law of standing.

In *Rasmussen v. United States*,<sup>44</sup> adhering to the more restrictive approach, the Eighth Circuit either did not recognize the trend toward the "injury in fact" test, or merely chose to resist it.<sup>45</sup> The court adhered to the legal rights doctrine, requiring the plaintiffs to establish the presence of a violation of a legal right, as opposed to infringement of a personal interest,<sup>46</sup> in addition to a showing of a personal stake in the outcome of the controversy.<sup>47</sup>

The conceptual and semantic difficulties manifest in the developing injury in fact test are delineated by Judge Tamm in *Scanwell Laboratories v. Shaffer*.<sup>48</sup> Citing *Curran*, the court stated that "[o]bviously no simple touchstone can be provided for determination of standing questions. . . . However, it is clear that a person aggrieved in fact may properly invoke not only the letter of the Administrative Procedure Act and its 'generous' review provisions, but a broad conception that Congress is 'hospitable' to the maintenance of complaints against officials charged with disregarding its substantive mandate."<sup>49</sup>

The court stated further that although the Supreme Court had not yet chosen to apply the APA to all situations in which a party "aggrieved in fact" seeks review, "regardless of a lack of legal right or specific statutory language, it is clearly the intent of that Act [APA] that this should be the case."<sup>50</sup> The court recognized that the grant of standing must be carefully controlled by the exercise of judicial discretion to avoid completely frivolous lawsuits. The court observed that "[t]he fundamental problem is that the early cases, in rhetoric always impressive but in understandability often determinedly so obscure as to deftly puncture the bubble of that very rhetoric, gave birth to an unruly concept."<sup>51</sup>

The cases indicate no appreciable difference between one who has an "interest," one "adversely affected," and one who is "aggrieved." Each becomes a receptacle for ideas about standing, but what is read into any one concept could just as readily be read into either of the others.<sup>52</sup>

It has been stated that a law of standing providing that "one who is in fact harmed by administrative action is held to lack standing to chal-

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<sup>44</sup> *Rasmussen v. United States*, 421 F.2d 776 (8th Cir. 1970).

<sup>45</sup> Davis, *Liberalized Law of Standing* at 451.

<sup>46</sup> *Rasmussen v. United States*, 421 F.2d 776, 778 (8th Cir. 1970).

<sup>47</sup> *Id.*

<sup>48</sup> *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

<sup>49</sup> *Id.* at 870.

<sup>50</sup> *Id.* at 872.

<sup>51</sup> *Id.*; see also Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 635 (1971).

<sup>52</sup> *Id.* at 873.



lunge the legality of the action . . . [has resulted] in a complexity that is so great that the Supreme Court often violates the principles that the Court has laid down for its own guidance."<sup>53</sup>

The preceding cases in this section, beginning with *Flast* and *Hardin*, reveal the introduction of new concepts into the law of standing. No longer can it safely be said that one who has been merely injured in fact by agency action lacks standing to complain of the legality of the action. *Flast* introduced the concept of the public plaintiff. *Hardin* allowed the maintenance of an action, notwithstanding the lack of express statutory protection, where the private plaintiff had been injured in fact.

*Hardin* and *Flast* served as a basis for a vigorous extension of the new concepts in the law of standing, particularly in the District of Columbia decisions, *Security Dealers*, *Curran* and *Scanwell*. At this point, however, the District of Columbia Circuit was the only circuit recognizing the merit of the new concepts.

### III.

#### ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS

#### INC. V. CAMP<sup>54</sup>

#### BARLOW V. COLLINS<sup>55</sup>

Data Processing Service Organizations, Inc. and Data Systems, Inc. sought to challenge a ruling by the Comptroller of Currency that national banks may make data processing services available to other banks and to bank customers as an incident to their banking services. The district court dismissed for lack of standing.<sup>56</sup> Affirming the district court dismissal, the Eighth Circuit applied a tripartite test for standing, requiring: "(1) a legal interest by reason of public charter or contract, . . . (2) a legal interest by reason of statutory protection, . . . or (3) a 'public interest' in which Congress has recognized the need for review of administrative action and plaintiff is significantly involved to have standing to represent the public. . . ."<sup>57</sup>

The legal interest requirements set out by the Eighth Circuit were summarily rejected by the Supreme Court. The Court stated that "[t]he 'legal interest' test goes to the merits."<sup>58</sup> Apart from the case or controversy test, the question of standing should concern whether the interest

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<sup>53</sup> 3 K. Davis, *ADMINISTRATIVE LAW TREATISE* 216 (1968).

<sup>54</sup> *Association of Data Processing Serv. Organ., Inc. v. Camp*, 397 U.S. 150 (1970) (hereinafter referred to as *Data*).

<sup>55</sup> *Barlow v. Collins*, 397 U.S. 159 (1970) [hereinafter referred to as *Barlow*].

<sup>56</sup> *Association of Data Processing Serv. Organ., Inc. v. Camp*, 279 F. Supp. 675 (D. Minn. 1968).

<sup>57</sup> *Association of Data Processing Serv. Organ., Inc. v. Camp*, 406 F.2d 837, 842-843 (8th Cir. 1969).

<sup>58</sup> *Data* at 152-153.

sought to be protected was “arguably within the zones of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>59</sup> Further, the interests need not necessarily be economic; they might be aesthetic, conservational or recreational.

The Court supplanted the “legal interest” test with two new tests. “The first, based on Article III, was injury in fact, economic or otherwise.” This test was satisfied by the injury from new competition. “The second test was whether the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>60</sup> The “zone of interests” test was satisfied by §4 of the Bank Service Corporation Act<sup>61</sup> and its legislative history. The Court found that the statute’s purpose was broader than mere regulation of service corporations. It was also a response to the fear that the bill would have enabled banks to engage in a nonbanking activity. The Court determined that Congress had provided sufficient statutory aid even though the competition may not be the precise kind legislated against. “We do not put the issue in those words, for they implicate the merits. We do think however, that §4 arguably brings a competitor within the zone of interests protected by it.”<sup>62</sup>

The *Data* decision is most significant because, in addition to firmly establishing the injury in fact test, it extended the liberal statutory aid test as originated in *Hardin* and manifested by its progeny.

Some members of the Court, however, felt that injury in fact should be the only test; that the statutory aid test, now the “arguably within the zone of interests test,” served merely to complicate the determination of standing. The separate opinion by Justices Brennan and White in *Barlow* relates the dissatisfaction with the second test.

The question in *Barlow* was whether tenant farmers, eligible for payments under the upland cotton program,<sup>63</sup> had standing to challenge the validity of an amended regulation by the Secretary of Agriculture which redefined “making a crop” to include assignments to secure rent for a farm. The tenant farmers alleged that the amended regulation provided their landlords with the opportunity to demand assignment of the program benefit in advance, as a condition to obtaining a lease and farm supplies. The tenant farmers further alleged that the landlords would, in turn, charge such high prices and interest rates that the tenant’s crop profits would be consumed each year by debt payments. The challenged

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 153.

<sup>61</sup> Bank Service Corporation Act, 12 U.S.C. §1864 (1964).

<sup>62</sup> *Data* at 155-156.

<sup>63</sup> Part of the Food and Agriculture Act, 7 U.S.C. §14444(d) (1970 Supp., Vol. 1).

regulation thus redefined, permitted the landlord to take advantage of the tenant farmers in a manner prohibited by the prior regulation.<sup>64</sup>

The district court, and the Fifth Circuit Court of Appeals relied on "traditional law" and denied standing because none of the tenant farmers' legally protected interests were violated,<sup>65</sup> and that the Food and Agriculture Act did not expressly or impliedly give the farmers standing to challenge the administrative regulation.<sup>66</sup> The Supreme Court reversed on two grounds: "First, . . . the tenant farmers . . . have the personal stake and interest that impart the concrete adverseness required by Article III [injury in fact]. Second, the tenant farmers are clearly within the zone of interests protected by the act."<sup>67</sup> The significance of the Court's treatment of the standing issue in *Barlow* lies in its treatment of the second test. Although the Court cited various legislative indicia of congressional intent that the Secretary protect the interest of tenant farmers,<sup>68</sup> it did not mention or consider whether the particular interest the tenant farmers were asserting should be a basis for standing, or whether that interest was within the zone of interests "to be protected" by the statute.<sup>69</sup>

The failure of the Court to adequately deal with the application of the second test in *Barlow* resulted in the Brennan-White separate opinion. Justice Brennan writing for both Justices stated, "[m]y view is that the inquiry in the Court's first step is the only one which need be made to determine standing."<sup>70</sup> The Brennan-White opinion emphasized that the "gist of standing is whether the party . . . has 'alleged such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness . . .',"<sup>71</sup> and urged that "[w]e may reasonably expect that a person . . . [suffering injury in fact, economic or otherwise] will, as best he can, frame the relevant questions with specificity, contest the issues with the necessary adverseness and pursue the litigation vigorously. Recognition of his standing to litigate is then consistent with the Constitution, and no further inquiry is pertinent to its existence."<sup>72</sup> By way of summation and conclusion, Justice Brennan stated:

The Constitution requires for standing only that the plaintiff allege that actual harm resulted to him from the agency action. Investigation to determine whether the constitutional requirement has been met has

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<sup>64</sup> Davis, *Liberalized Law of Standing*, at 454.

<sup>65</sup> Barlow at 163-164; Davis, *Liberalized Law of Standing* at 454-455.

<sup>66</sup> Barlow at 164.

<sup>67</sup> *Id.*

<sup>68</sup> Barlow at 164-165; see Davis, *Liberalized Law of Standing* at 455-56.

<sup>69</sup> Davis, *Liberalized Law of Standing* at 456.

<sup>70</sup> Barlow at 168.

<sup>71</sup> Barlow at 170, citing *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968).

<sup>72</sup> Barlow at 172-73; see *Barlow* at 172, nn. 4 & 5.

nothing in common with the inquiry into statutory language, legislative history and public policy which must be made to ascertain whether Congress has precluded or limited judicial review. More fundamentally, an approach which treats separately the distinct issues of standing reviewability, and the merits, and decides each on the basis of its own criteria, assures that these often complex questions will be squarely faced, thus contributing to better reasoned decisions and to greater confidence that justice has in fact been done.<sup>73</sup>

The impact of the *Data* and *Barlow* decisions was to drastically liberalize the law of standing. The new concepts advanced by District of Columbia Circuit were adopted and legitimized by the Supreme Court. The injury in fact test as expressed in *Flast* and *Hardin*, then later in *Security Dealers*, *Air Reduction*, *Curran* and *Scanwell*, became firmly ensconced in the law of standing.

The "zone of interests" test, however, was not so firmly entrenched. The Brennan-White opinion pointed out its infirmities. It should also be noted that in *Security Dealers* the court granted standing to assert the public interest in the total absence of statutory aid.<sup>74</sup> Again, in *Air Reduction* the court allowed standing without invoking the use of statutory aid. There the plaintiffs were allowed to challenge agency regulations on the ground that they were invalid, and therefore an unlawful termination of a beneficial business relationship.<sup>75</sup> *Curran* emphasized the legislative trend of enacting statutory provisions for standing where the plaintiffs were in fact injured.<sup>76</sup> In *Scanwell*, the court relied on the APA, and held that a party aggrieved in fact had standing regardless of a lack of specific statutory language.<sup>77</sup>

This cataloging of authority, combined with the Brennan-White opinion casts grave doubt upon the utility and viability of the "zone of interests" test.

#### IV.

##### THE AFTERMATH

The first case decided subsequent to *Data* and *Barlow* was *Crowther v. Seaborg*.<sup>78</sup> The court relied, in the main, on pre-*Data* precedent. Following the *Flast* analysis, the court required that the "plaintiffs first show a satisfactory interest entitled to legal protection and then show that this particular interest is in some way threatened with sufficient logical directness by the action of defendants to insure . . . a concrete

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<sup>73</sup> *Barlow* at 178.

<sup>74</sup> *National Ass'n of Sec'y. Dealers, Inc. v. SEC*, 420 F.2d 83 (D.C. Cir. 1969), *vacated*, 401 U.S. 617 (1971).

<sup>75</sup> *Air Reduction Co. v. Hickel*, 420 F.2d 592 (D.C. Cir. 1969).

<sup>76</sup> *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969).

<sup>77</sup> *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

<sup>78</sup> *Crowther v. Seaborg*, 312 F. Supp. 1205 (D. Colo. 1970).

controversy by adverse interests.”<sup>79</sup> The court stated that it need not cite authority for the proposition that the law protects personal interests such as health and safety.<sup>80</sup> The court also found a logical connection between the “status” of the plaintiffs and the threat to their health and safety thereby affording a sufficient basis for an actual controversy. The court’s reference to and reliance upon *Data* and *Barlow* is evidenced by the court’s conclusion that the parties also had standing under the APA and the Atomic Energy Act<sup>81</sup> to challenge the actions of the Atomic Energy Commission which allegedly disregarded a congressional directive to protect public health and safety. The court stated, citing *Data* and *Barlow* as in “accord”: “We would note that in fact it is immaterial in this particular case whether the plaintiffs . . . asserted standing in the general equitable jurisdiction of the [c]ourt or under the APA.”<sup>82</sup> Thus, the court apparently relied on the injury in fact test as manifested in *Flast*. The court emphasized the necessity that the interest entitled to legal protection must be threatened with logical directness by the agency action.<sup>83</sup> Although not cast in the terms of “injury in fact” as set out in *Flast*’s progeny,<sup>84</sup> the test applied by the court was “injury in fact.”

*Citizens Committee For Hudson Valley v. Volpe*<sup>85</sup> illustrates continuing uncertainty and confusion. Although the court cited neither *Data* nor *Barlow*, it stated that “[w]e think the concept of standing is sufficiently ‘practical and functional’ to permit . . . [the plaintiff] to take advantage of federal remedies to avoid the substantial impact of the consequences flowing from issuance by federal agencies of the disputed permit.”<sup>86</sup> The court, however, referred to the plaintiff’s interest as a “legally protected interest.”<sup>87</sup> The court relied on the public interest in environmental resources, which was an interest created by statutes affecting the issuance of the permit.<sup>88</sup> Here, then, it appears that the court followed the *Flast* “public plaintiff” concept in conjunction with the use of the statutory aid test. It is noted that the court repeatedly emphasized the practical and functional aspects of the concept of standing.

The first reported case substantially relying on *Data* is *State Ex Rel. Robson v. First Security Bank of Idaho*.<sup>89</sup> There the court applied the

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<sup>79</sup> *Id.* at 1212.

<sup>80</sup> *Id.*

<sup>81</sup> Atomic Energy Act, 42 U.S.C. §§2011 et. seq. (1970 Supp., Vol. 2).

<sup>82</sup> *Crowther v. Seaborg*, 312 F. Supp. 1205, 1217 (D. Colo. 1970).

<sup>83</sup> *Id.* at 1218.

<sup>84</sup> See *supra* nn. 74-77.

<sup>85</sup> *Citizens Comm. for Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970).

<sup>86</sup> *Id.* at 105-106.

<sup>87</sup> *Id.* at 105.

<sup>88</sup> *Id.*

<sup>89</sup> *State ex rel. Robson v. First Security Bank*, 315 F. Supp. 274 (D. Idaho 1970).

two part *Data* test and found that the plaintiffs failed to adequately allege that "the challenged action caused him injury in fact, economic or otherwise." With regard to the second part of the *Data* test, the court found that the plaintiff had an interest which the federal statute "'at least arguably' seeks to protect or regulate."<sup>90</sup>

The court in *Pennsylvania Environmental Council, Inc. v. Bartlett*<sup>91</sup> applied the *Data* test and found it easily satisfied. The plaintiffs alleged a right to not have natural resources wasted or damaged and a right to prevent irreparable damage to an irreplaceable natural and aesthetic resource, by preventing the expenditure of federal funds.

The plaintiffs would be injured in fact, notwithstanding such injury was not economic, but was damage to their interests as citizens, sportsmen, and environmentalists. The court found that the plaintiffs' interests were arguably within the zone of interests to be protected by the National Environmental Policy Act of 1969,<sup>92</sup> the Federal-Aid Highway Act<sup>93</sup> and the Department of Transportation Act.<sup>94</sup>

In *Bartlett* and *Robson* the *Data-Barlow* test was dealt with very easily. It should be noted, however, that in both cases, there were applicable statutes which satisfied the "arguably within the zone of interests" test. The "injury in fact" test was determinative. In *Robson* there was no allegation of "injury in fact"; standing was denied. In *Bartlett* the court found an injury in fact; standing was granted.

In a case<sup>95</sup> similar to *Bartlett* the District of Columbia court found that the "'zone of interest' sought to be protected by the statute includes not only the economic interest of the registrant<sup>96</sup> but also the interest of the public in safety."<sup>97</sup> The injury alleged was "the biological harm to man and to other living things resulting from the Secretary's failure to take action which would restrict the use of DDT in the environment."<sup>98</sup> Thus, the court found that the petitioners had standing under the requirements of the *Data* test.

The most well considered response to *Data* and *Barlow* appears in another District of Columbia Circuit, opinion, *National Welfare Rights*

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<sup>90</sup> *Id.* at 277.

<sup>91</sup> *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970).

<sup>92</sup> National Environmental Policy Act, 42 U.S.C. §§4321-4347 (1970 Supp., Vol. 2).

<sup>93</sup> Department of Transportation Act, 23 U.S.C. §138 (1970 Supp., Vol. 2).

<sup>94</sup> Department of Transportation Act, 49 U.S.C. §§1651(b)(2), 1653(f) (1970 Supp., Vol. 2).

<sup>95</sup> *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

<sup>96</sup> The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§135-135k (1970 Supp., Vol. 1), requires that pesticides and other "economic poisons" carried in interstate commerce must be registered.

<sup>97</sup> *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1096 (D.C. Cir. 1970).

<sup>98</sup> *Id.*

*Organization v. Finch*.<sup>99</sup> Recipients of welfare benefits<sup>100</sup> and their national and state organizations sought judicial review of the outcome of a conformity hearing. The court granted standing, noting that “[n]either the administrative nor the judicial concepts of standing have remained static. In both the trend has been away from the closed concept of legally protected interest as the basis of standing to criteria such as ‘economic injury’ of a competitor or ‘electrical interference’ or ‘representation of the public interest by persons aggrieved-in-fact.’”<sup>101</sup>

The court also took note of the Brennan-White position that standing should be determined only by an allegation of injury in fact.<sup>102</sup> With regard to the instant case, the court found that the recipients of benefits of welfare assistance programs had the requisite “personal stake in the outcome” of the suit, an economic stake. The court also found that the requirement that the plaintiffs be “within the zone of interest to be protected by the Act” was readily met.

Emphasis on the injury in fact test again suggests that the statutory aid test is merely an “additional” test; not determinative of the issue of standing, but included merely to lend some additional strength to a determination made on the basis of the injury in fact test.

This suggestion finds additional support in *Sierra Club v. Hickel*.<sup>103</sup> The Ninth Circuit held that the Sierra Club lacked standing because it failed to join any persons or organizations having a direct and obvious interest in the area affected by the administrative action.<sup>104</sup> In other words, the Club did not allege injury in fact.

Regarding the zone of interests test, the court stated that “[t]he significance of the language is not entirely clear. . . . We submit that it does not establish a test separate and apart from or in addition to the test which the Court first looked to in *Camp* [the injury in fact test]. . . .”<sup>105</sup> Also, the injury in fact test would reconcile most if not all of the decided cases and also fit the standards of the APA. “‘Standing to sue’, as the phrase indicates, refers to the posture of the plaintiff and not to the ‘legal interests’ to be unravelled.”<sup>106</sup>

The *Sierra Club v. Hickel* case appears to confirm the Brennan-White position, and recognizes the trend in the authorities cited above. Although the court cited no post *Data-Barlow* precedent, it bears out the

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<sup>99</sup> National Welfare Rights Organization v. Finch, 429 F.2d 725 (D.C. Cir. 1970).

<sup>100</sup> Social Security Act, 42 U.S.C. §§301-1394 (1970 Supp., Vol. 2).

<sup>101</sup> National Welfare Rights Organization v. Finch, 429 F.2d 725, 733 (D.C. Cir. 1970).

<sup>102</sup> *Id.*

<sup>103</sup> *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970).

<sup>104</sup> *Id.* at 31, 33.

<sup>105</sup> *Id.* at 31.

<sup>106</sup> *Id.*

recurring idea that injury in fact is the relevant, crucial and determinative test. The statutory aid test and its descendant, the "arguably within the zone of interests" test appears to have been cast aside.

The District of Columbia Circuit, in *Lodge 1858, American Federation of Government Employees v. Paine*,<sup>107</sup> however, granted civil service employees standing to contest the legality of NASA's implementation of its work force through service support contracts. The court relied on *Curran* and the *Data-Barlow* decisions. It is interesting to note, however, that the court invoked the "arguably within the zone of interest" test.<sup>108</sup> The only reliance on the injury in fact test was through analogy to *Curran* and, in a footnote,<sup>109</sup> a statement, citing *Flast*, that "it is clear that appellants have a personal stake in the outcome of the controversy. . . ." In an apparent turn about, the injury in fact test is relegated to a weak analogy and a footnote. Such an aberrational result is characteristic of the development of the law of standing.

## V.

### CONCLUSION

It has become obvious, notwithstanding the *Paine* case, that injury in fact is the best to be applied in resolving the question of standing to secure review of administrative action. The cases following *Data* and *Barlow* reflect the vagueness and uncertainty of the new two-part test and it has even been asserted that the court's test actually comes very close to the "legally protected interest" standard.<sup>110</sup>

The fact that the court has departed from the traditional tests for standing, at least according to its own language,<sup>111</sup> strongly suggests that judicial treatment of the requirements for standing should be given less formal and more relaxed and practical consideration. Use of the injury in fact test facilitates such consideration. The effect of application of the injury in fact test will be to relieve the federal law of standing of much of the formality and consequent circumlocution which has been required to achieve justice. Those who so vigorously asserted that the court's new standard is too vague for the courts to apply, mistake formality for clarity and specificity in language as an absolute prerequisite of expeditious and equitable administration of the law of standing. The law of standing is, by its very nature, somewhat vague.

The incidental and ancillary use of the zone of interests test does not

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<sup>107</sup> *Lodge 1858, Am. Fed. of Gov't. Employees v. Paine*, 436 F.2d 882 (D.C. Cir. 1970).

<sup>108</sup> *Id.* at 893.

<sup>109</sup> *Id.* at 892 n.62.

<sup>110</sup> *Barlow* at 168.

<sup>111</sup> *Data* at 153.



detract from the impact of the liberal injury in fact test, as established by *Data-Barlow* and their progeny. Professor Jaffe, in a recent comment in the *Harvard Law Review* proposed the thesis that:

[A] plaintiff without a "protected interest" does not have a *right* to judicial review, but a court may in its discretion take jurisdiction of a suit brought by such a plaintiff.<sup>112</sup>

Citing *Hardin*, *Chicago Junction* and the *Alexander Sprunt* case among others, Professor Jaffee elaborated: assertion of an interest protected by a statute in some degree is necessary for a plaintiff to be entitled to seek judicial review of agency action. He further asserts that a plaintiff, lacking statutory protection of his interest, is *not entitled to judicial review even though he has suffered economic or other injury*.<sup>113</sup>

Professor Jaffee's thesis flies in the face of the weight of the post *Data-Barlow* authority. These authorities, rather, suggest the exact reverse thesis. A plaintiff who has not suffered injury in fact, does not have a right to judicial review of agency action, but a court may, in its discretion and in the public interest, take jurisdiction of a suit brought by such a plaintiff.

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<sup>112</sup> Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 638 (1971).

<sup>113</sup> *Id.* at 633.