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Standing To Intervene in Administrative Agency Proceedings

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IV. CONCLUSION

A 1929 Texas case, *Davis v. State*, distilled the exception to the general rule into a single statement. "The right of arrest carries with it a contemporaneous search of the person, and, under some circumstances, of the place where the arrest occurs."⁴⁵ Forty years later, the United States Supreme Court revised this general rule: A lawful arrest carries with it the right to search the person of the arrestee and also the area under his immediate control. Strangely enough, the subsequent holding in *Thornton v. State* more closely resembles the 1929 holding.

The Texas court's attempt to distinguish *Thornton* from *Chimel* on the basis of the arresting officer's motivation for the search in each case is unsuccessful. Such a distinction does not diminish the controlling effect of *Chimel*. Though the cases may differ in terms of the thing sought, Justice Stewart's majority opinion in *Chimel* turns upon no such distinction. "The only reasoned distinction is between a search of the person arrested and the area within his reach on one hand, and more extensive searches on the other."⁴⁶ Since it makes no difference what an officer seeks to discover as a result of his right to search incident to a lawful arrest, to attempt to distinguish the cases on this ground is to rely upon an essentially meaningless distinction. A decision based upon this distinction would no doubt be reversed. Whether a valid distinction could be drawn on the other grounds discussed remains to be seen.

R. Dennis Anderson

Standing To Intervene in Administrative Agency Proceedings

In 1968, Congress passed several amendments¹ to the Social Security Act of 1935² which established certain federal standards for state welfare programs funded under the Aid to Families with Dependent Children

search could then be used to lighten the onerous burden of the warrant requirement. 395 U.S. at 765.

Furthermore, the search incident to arrest could be broader in scope than the search supported by a warrant. Since a warrant requires the setting out of the specific place to be searched and the specific things to be seized, a warrantless search in the case of a legal arrest was to be preferred. M. BASSIOUNI, CRIMINAL LAW AND ITS PROCESSES 384 (1969).

⁴⁵ 113 Crim. Rep. 421, 21 S.W.2d 509 (1929) (emphasis added).

⁴⁶ 395 U.S. at 766.

¹ E.g., 42 U.S.C. § 602(a)(19) (Supp. V, 1969), which calls for "prompt referral to the Secretary or his representative [of appropriate individuals] for participation under a work incentive program . . ."; *Id.* § 602(a)(8), provides, *inter alia*, that "the State agency [when determining need] shall with respect to any month disregard all of the earned income of each dependent child receiving aid to families with dependent children who is . . . a fulltime student or part-time student who is not a full-time employee attending a school, college, or university"; *id.* §§ 602(a)(14), (15), which require that the state "provide for the development and application of a program for such family services . . . as may be necessary in the light of the particular home conditions . . ." as well as develop programs "assuring that [a person] referred to the Secretary of Labor . . . is furnished child-care services and that in all appropriate cases family planning services are offered them . . ."

² 42 U.S.C. §§ 301-1394 (1964), *as amended*, 42 U.S.C. §§ 302-1396 (Supp. V, 1969).

Program.³ In order to participate in the AFDC program, states were required to submit modified plans to the Secretary of Health, Education and Welfare. The Secretary was then to determine whether the state plans were within the new federal standards.⁴ Pursuant to administrative procedure,⁵ the Secretary initiated informal negotiations with representatives of the states of Nevada and Connecticut. When, at the close of these discussions, the states failed to present amended plans, the Secretary gave notice that hearings would be held to determine whether Nevada and Connecticut might continue to receive federal aid for their welfare programs. At this time state affiliates of the National Welfare Rights Organization⁶ sought intervention as parties in the hearings. When their requests were denied, a writ of mandamus was sought to compel the Secretary to grant the Organization the status of "party."⁷ The federal district court denied the Organization's requests for preliminary injunctions *pendente lite*, and the Organization appealed. *Held, reversed and remanded*: Persons or organizations which are able to show that as a result of an administrative agency determination, they are "injured in fact," that they are persons within the "zone of interests to be protected" by a relevant statute, and that judicial review of such agency action is neither expressly nor impliedly precluded by Congress, not only have the right to judicial review of the determination, but also have standing to intervene in any hearings on which such action is based. *National Welfare Rights Org'n v. Finch*, 429 F.2d 725 (D.C. Cir. 1970).

I. THE LAW OF STANDING

The article III⁸ jurisdictional requirement of "cases" or "controversies"

³ 42 U.S.C. §§ 601-10 (Supp. V, 1969).

⁴ See 42 U.S.C. § 302(b) (1964): "The Secretary shall approve any plan which fulfills the conditions specified in subsection (a)"

⁵ 45 C.F.R. § 201.5(c) (1970):

Informal discussions. Hearings with respect to matters under paragraph (a) . . . of this section are generally not called, however, until after reasonable effort has been made by regional and central office representatives to resolve the questions involved by conferences and discussions with State officials. Formal notification of the date and place of hearing does not foreclose further negotiations with State officials.

⁶ "Plaintiff National Welfare Rights Organization is described as a group with more than 70,000 members in 46 states which assists its members in seeking redress of their legal grievances under the welfare laws, informs and educates its members of their legal rights, and generally acts as the public voice for welfare recipients." *National Welfare Rights Org'n v. Finch*, 429 F.2d 725, 727 n.1 (D.C. Cir. 1970).

⁷ Such status, as sought by appellants, would include:

- (1) The right to present evidence on all matters raised at these hearings;
- (2) The right to cross-examine witnesses whether presented by the Department, Nevada or any other party;
- (3) The right to propose findings on which the Administrator shall rule in the decision following the hearing;
- (4) The right to call witnesses, including employees of the Department, Nevada, and any other party;
- (5) The right to full discovery of pertinent documents and information in the possession of either HEW or Nevada;
- (6) The right to timely notice of all future proceedings in this matter;
- (7) The right to participate in any pre-determination conferences and;
- (8) Any further rights as shall be necessary to enable NWRO to fully and adequately represent the interest of welfare recipients in this hearing.

Id. at 730-31 n.18.

⁸ U.S. CONST. art. III, § 2. "[T]he exercise of the judicial power is limited to 'cases' and

and the judicial policy of self-restraint⁹ have combined to make the law of standing in federal courts a most "complicated specialty."¹⁰ Conceptually, the requirement of standing concerns the parties to a lawsuit rather than the issues contained therein.¹¹ The general rule was that a plaintiff must be able to show an injury to a legally protected interest in order to have standing.¹² In applying the "legal interest" test, courts were inclined to confuse standing requirements with court-made rules designed to exclude cases "confessedly within [their] jurisdiction,"¹³ but in which, for one reason or another, judicial propriety dictated a discretionary avoidance.¹⁴ In *Flast v. Cohen*,¹⁵ which, for the first time, allowed taxpayers standing to challenge exercises of the congressional taxing and spending power, the United States Supreme Court stated that the article III requirement of "cases" or "controversies" functioned only to guarantee that suits are presented in an adversary context, "that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought capable of judicial resolution."¹⁶ Thus, the Court distinguished the requirements of standing, which relate exclusively to the litigants, from considerations relating to the merits, e.g., justiciability.¹⁷

'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred." *Muskrat v. United States*, 219 U.S. 346, 356 (1911).

⁹ "The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (concurring opinion).

¹⁰ See *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953).

¹¹ *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

¹² See *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1937), wherein the Court stated:

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 the statutory authority for its performance, would be a violation of his legal rights, may challenge the validity 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 137-38. See also *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-79 (1937). This approach is obviously circular, since if a party is given standing, his interest is legally protected; if standing is not conferred, the party's interest is not legally protected. C. WRIGHT, *LAW OF FEDERAL COURTS* 43 (2d ed. 1970).

¹³ *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (concurring opinion). "The books are full of opinions which dismiss a plaintiff for lack of 'standing' when dismissal, if proper at all, actually rested either upon the plaintiff's failure to prove on the merits the existence of the legally protected interest which he claimed, or on his failure to prove that the challenged agency action was reviewable at his instance." *Association of Data Processing Serv. Org's v. Camp*, 397 U.S. 150 (1970) (concurring opinion). See also the court of appeals opinion in *Data* wherein it was said: "Much of the confusion on standing seems to arise from the emphasis upon the issues to be adjudicated or upon the possible merits of the substantive claim rather than upon an examination of the status of the complaining plaintiff." *Association of Data Processing Serv. Org's v. Camp*, 406 F.2d 837, 839 (8th Cir. 1969).

¹⁴ E.g., cases involving "political questions." See *Baker v. Carr*, 369 U.S. 186, 208-26 (1962). Such questions are deemed "non-justiciable." Justiciability involves a consideration of whether "the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Id.* at 198.

¹⁵ 392 U.S. 83 (1968).

¹⁶ *Id.* at 106.

¹⁷ See note 14 *supra*.

II. STANDING TO SEEK JUDICIAL REVIEW

The Legal-Interest Test and Administrative Agencies. The legal-interest test played a much more limited role in determining standing to seek judicial review of an administrative agency proceeding as opposed to determining standing to sue generally. In 1940, the Supreme Court explained: "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.*"¹⁸ With respect to most regulatory agencies, Congress had provided such legislation, which conferred standing to seek judicial review on persons "adversely affected" or "aggrieved" by a particular agency action.¹⁹ These provisions were considered by courts to be legislative exceptions to the court-created, legal-interest test.²⁰ Thus, persons who were able to bring themselves within the statutory ambit were afforded judicial review even though they sought protection of "non-legal" interests.²¹

Attempts to extend the protection of non-legal interests into areas not expressly covered by an "aggrieved-person statute" met with little success.²² In 1946, the Administrative Procedure Act²³ was passed, and it provides that: "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."²⁴ Some courts

¹⁸ Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940) (emphasis added).

¹⁹ See, e.g., Securities Act of 1933, § 9(a), 15 U.S.C. § 77(i)(a) (1964) ("any person aggrieved by an order of the Commission"); Communications Act of 1934, § 402(b)(2), 47 U.S.C. § 402(b)(2) (1964) (a person "adversely affected" or "aggrieved" by commission action); Federal Aviation Act § 1006(a), 49 U.S.C. § 1486(a) (1964) ("any person disclosing a substantial interest" in an order).

²⁰ See note 36 *infra*; Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 933 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955); Associated Indus. v. Ickes, 134 F.2d 694, 699-703 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

²¹ The courts still required a "potential direct, substantial injury or adverse effect from the administrative action under consideration." Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1000 (D.C. Cir. 1966). However, many "non-legal," and sometimes indirect and remote, interests were protected: E.g., passenger has standing to challenge ICC rules allowing racial segregation in railroad dining cars, Henderson v. United States, 339 U.S. 816 (1950); likely economic injury suffered as a result of the awarding of a broadcast license, FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); representatives of an appreciable portion of a television viewing audience have standing to challenge FCC license renewal on the grounds that the proposed licensee practiced religious and racial bias in its programming, Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); citizen's group has standing to challenge FPC river project as affecting their recreational and aesthetic interests, Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); coal consumers' interest in low coal prices sufficient to give standing to challenge a minimum price order, Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943); potential electrical interference caused by proposed licensee sufficient to give complainant standing, NBC v. FCC (KOA), 132 F.2d 545 (D.C. Cir. 1942), *aff'd*, 319 U.S. 239 (1943).

It should be noted that the above persons were deemed representatives of the public interest and were not allowed to press private claims. The "aggrieved-person statutes" were passed in an effort to allow public participation to assist agencies in formulating regulations in the public interest. Scripps-Howard Radio v. FCC, 316 U.S. 4, 14 (1942).

²² See, e.g., Troutman v. Shriver, 417 F.2d 171 (5th Cir. 1969), *cert. denied sub nom.* Troutman v. Rumsfeld, 370 U.S. 923 (1970); Armco Steel Corp. v. Stans, 303 F. Supp. 262 (S.D.N.Y. 1969); Safir v. Gulick, 297 F. Supp. 630 (E.D.N.Y. 1969).

²³ 5 U.S.C. § 702 (Supp. V, 1969).

²⁴ *Id.*

held that Congress intended thereby to extend the liberalized standing requirements to persons aggrieved by a determination of *any* administrative agency—whether covered by an aggrieved-person statute or not.²⁵ Others treated the APA as a mere codification of pre-existing law and reiterated the position that, absent an aggrieved-person statute, one must show an infringement of a legally protected interest before the jurisdiction of the federal courts may be invoked.²⁶

The Impact of Data Processing and Barlow. In the companion cases of *Association of Data Processing Service Org's v. Camp*²⁷ and *Barlow v. Collins*²⁸ the Supreme Court completely rejected the legal-interest test as an element of standing.²⁹ The Court construed the APA not "grudgingly, but as serving a broadly remedial purpose,"³⁰ and held that the injury required for standing was "injury *in fact*, economic or otherwise."³¹ However, the Court was unwilling to leave injury in fact as the only requirement of standing, and it added two tests which, according to the concurring and dissenting opinion of Justices Brennan and White,³² were entirely policy-based—not constitutionally required. Thus, a plaintiff must show that "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."³³ For this requirement, the Court appeared to follow the language of the APA, as "zone of interests to be protected or regulated by the statute or constitutional guarantee" corresponds to the APA grant of standing to a person "aggrieved by agency action within the meaning of a relevant statute."³⁴ The Court also looked to the APA

²⁵ *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967); *Scanwell Labs. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970); *Norwalk CORE v. Norwalk Redevel. Agency*, 395 F.2d 920 (2d Cir. 1968); *American President Lines v. Federal Maritime Bd.*, 112 F. Supp. 346 (D.D.C. 1953).

²⁶ *Arnold Tours, Inc. v. Camp*, 408 F.2d 1147 (1st Cir. 1969), *judgment vacated*, 397 U.S. 315 (1970); *Association of Data Processing Serv. Org's v. Camp*, 406 F.2d 837 (8th Cir. 1969), *rev'd*, 397 U.S. 150 (1970); *Barlow v. Collins*, 398 F.2d 398 (5th Cir. 1968), *rev'd*, 397 U.S. 159 (1970); *Harrison-Halsted Community Group v. Housing & Home Fin. Agency*, 310 F.2d 99 (7th Cir. 1962); *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955); *Atcheson, T. & S.F. Ry. v. United States*, 130 F. Supp. 76 (E.D. Mo.), *aff'd*, 350 U.S. 892 (1955).

²⁷ 397 U.S. 150 (1970). In *Data Processing* a rule promulgated by the Comptroller of the Currency allowed national banks to make data processing services available to other banks and bank customers. It was challenged by an incorporated association of data services organizations, which alleged that the Bank Service Corporation Act, 12 U.S.C. §§ 1861-65 (1964), conferred standing to challenge the rule, since, it was argued, a legislative purpose to protect competitive interests can be found therein. Section 1864 of that Act provides: "No bank service corporation may engage in any activity other than the performance of bank services for banks."

²⁸ 397 U.S. 159 (1970). In *Barlow* tenant farmers who were eligible for payments under the Upland Cotton Program, part of the Food and Agriculture Act of 1965, 7 U.S.C. § 1444(d) (Supp. IV, 1968), challenged a regulation promulgated by the Secretary of Agriculture which allowed assignment of those payments to secure leases of farmland. It was alleged that unscrupulous landowners would require such assignments as a condition to allowing leases to the tenant farmers.

²⁹ "The 'legal interest' test goes to the merits. The question of standing is different." *Association of Data Processing Serv. Org's v. Camp*, 397 U.S. 150, 90 S. Ct. 827, 829 (1970).

³⁰ 90 S. Ct. at 831.

³¹ *Id.* at 829.

³² *Id.* at 839.

³³ *Id.* at 830 (emphasis added).

³⁴ See note 23 *supra*, and accompanying text.

for its third standing requirement: whether Congress has expressly or impliedly precluded judicial review of the agency determination in question.³⁵ Thus, the Court treated the APA as a legislative exception to the court-made rules of self-restraint, and adopted the APA provisions as the Court would any other congressional regulation of its jurisdiction.³⁶

III. NATIONAL WELFARE RIGHTS ORG'N V. FINCH

The *National Welfare*³⁷ court had no difficulty determining that the NWRO had standing to seek judicial review of a decision of the Secretary of Health, Education and Welfare involving state conformity with federal welfare standards. It merely applied the three-pronged test enunciated in *Data Processing* and *Barlow*. The "injury in fact" was obviously economic.³⁸ The purposes of the Social Security Act of 1935 clearly included the protection of welfare recipients—thus, bringing the NWRO "within the zone of interests" to be protected by a "relevant statute." Finally, the court was unable to find an express or implied congressional intent to preclude judicial review of the Secretary's determination.³⁹

Having found that the NWRO had standing to seek judicial review, the court went further⁴⁰ and held that the NWRO also had standing to intervene as a party in any conformity hearings held by the Secretary.⁴¹ The court pointed out that agency determinations are presumed to be correct on review, and that agency findings of fact are binding on the courts. Therefore, the court reasoned that the right to seek judicial review of an agency action would be without substance unless one were allowed to

³⁵ The pertinent provision of the Administrative Procedure Act provides for judicial review "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (Supp. V, 1969).

³⁶ "Apart from Article III jurisdictional questions, problems of standing, as resolved by this Court, have involved a 'rule of self-restraint for its own governance.' . . . Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise." *Association of Data Processing Serv. Org'ns v. Camp*, 397 U.S. 150, 90 S. Ct. 827, 830 (1970).

³⁷ *National Welfare Rights Org'n v. Finch*, 429 F.2d 725 (D.C. Cir. 1970).

³⁸ The court gave the following summary of the position of the NWRO:

If the Secretary finds there is conformity, and hence the flow of federal funds is uninterrupted, appellants may claim that by his action they are prevented from participating in a fully complying program which would be in effect had the Secretary found nonconformity and thus stimulated the states to adjust their laws. Or if the Secretary fails to call the states to account for maladministration of a conforming plan, the welfare recipients may have reason to complain. . . . More importantly, if the Secretary finds nonconformity and terminates federal grants, appellants may allege that they are being cut off from welfare payments without being afforded a hearing.

Id. at 734-35 n.34.

³⁹ The court rejected the argument that a congressional intent to deny review to welfare recipients could be implied from the fact that the legislative history of the Social Security Act indicated an intent to strengthen federalism by allowing states the right of appeal. "Clearly it is not contrary to that purpose that welfare recipients also have standing to seek review." *Id.* at 736.

⁴⁰ See L. JAFFEE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 524 (1965): "[T]here is no logically necessary relationship between the right to an administrative hearing and a right to appeal." However, "[c]ourts and lawyers state or assume without much reflection that standing to appeal does involve a right to administrative hearing . . ." *Id.* at 525.

⁴¹ However, the court expressly held that the NWRO has no right to participate in the Secretary's informal negotiations. Further, the court said that the Secretary's right to terminate a hearing upon a determination by him that the state is in conformity is not limited by its holding. 429 F.2d at 739.

present evidence and shape the issues on which the action is based.⁴² The court further supported its holding as a first step toward halting the "escalating involvement of federal courts in this highly complicated area of welfare benefits."⁴³ Full initial participation in administrative proceedings, the court added, would diminish the number of wasteful remands for improper exclusion of parties—a common phenomenon of administrative law.

The court did not overlook the possible consequences of its holding on administrative efficiency, but stated: "Efficient and expeditious hearings should be achieved, not by excluding parties who have a right to participate, but by controlling the proceeding so that all participants are required to adhere to the issues and to refrain from introducing cumulative and irrelevant evidence."⁴⁴ Thus, the threshold question of standing cannot be used by administrative officials to exclude from hearings persons who are likely to suffer injury in fact as a result of a proposed agency action, if such persons meet the other requirements of *Data Processing and Barlow*.

IV. CONCLUSION

Although the court rejects such a prediction, it seems apparent that its holding will greatly enlarge the number and scope of administrative hearings⁴⁵—perhaps overly taxing the capacity of administrative officials to effectively manage and control their own proceedings. Still the concept of "private attorneys-general,"⁴⁶ or American ombudsmen,⁴⁷ litigating in the public interest,⁴⁸ is a comforting one in the face of ever-increasing governmental regulation and control. The problem is one of balance. While the court apparently conferred on welfare recipients a substantive right of intervention, it indicated that agency officials possess some discretion to limit that right in order to conduct proceedings that will effectively serve the public interest.⁴⁹ Thus, the right to seek judicial review

⁴² The court cites *American Communications Ass'n v. United States*, 298 F.2d 648, 650-51 (2d Cir. 1962), wherein it was said: "[H]ere intervention is necessary in order to make the right of review effective. [Petitioning for the taking of new evidence] is not an effective substitute for the right to adduce evidence, to cross examine witnesses, and to present arguments at the initial hearing."

⁴³ *Rosado v. Wyman*, 90 S. Ct. 1207, 1223 (1970).

⁴⁴ 429 F.2d at 738, quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 265 F.2d 364, 368 n.1 (D.C. Cir. 1959).

⁴⁵ "[I]f the relaxation of standing requirements does not necessarily expand the number and scope of administrative hearings, recent experience demonstrates that almost inevitably it does have that effect." L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 525 (1965).

⁴⁶ See Judge Frank's comment in *Associated Indus. v. Ickes*, 134 F.2d 694, 704. (2d Cir.), vacated as moot, 320 U.S. 707 (1943).

⁴⁷ For a discussion of the ombudsman as an outgrowth of the "welfare state," see McClellan, *The Role of the Ombudsman*, 23 U. MIAMI L. REV. 463 (1969).

⁴⁸ Of course, it is entirely possible that the public interest will be lost in the shuffle. See Friedman, *Special Interest and the Law*, 51 CHI. B. RECORD 434 (1970).

⁴⁹ Thus, the court said: "Except for the adjustments necessary for assuring the manageability of administrative proceedings, the criteria for standing for review of agency action appear to assimilate the criteria for standing to intervene." 429 F.2d at 732-33 (emphasis added). Accordingly, "as *Scenic Hudson* [Preservation Conference v. FPC, 354 F.2d 608, 617 (2d Cir. 1965)] established for the FPC, agencies have some discretion in limiting intervention. '[R]epresentatives of common interests by an organization such as [intervenor] serves to limit the number of those