UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 48 | Number 4 Article 5

6-1-1970

Competitors' Standing to Challenge Administrative Action -- Recent Federal Developments

David G. Crockett

COMMENTS

Competitors' Standing to Challenge Administrative Action—Recent Federal Developments

I. INTRODUCTION

Given the extensive scope and impact of actions by federal administrative agencies, their decisions are likely to affect the activities of competitors in many fields. When an agency's actions give one competitor an advantage, rivals frequently seek judicial redress. Two initial problems must be met before a court will consider the merits of a challenge to a decision of an agency: the particular competitor seeking redress must establish that it has standing—meaning that it is a proper party to secure review—and also that the action challenged is judicially reviewable. Establishing either standing or reviewability has proved an insurmountable hurdle in numerous past competitors' suits, but one might well conclude from several recent federal cases that these barriers are being lowered.[1]

Professor Kenneth Davis aptly posits the question to be considered in this comment: "Should one whose only interest in administrative action is avoiding new or increased competition or reducing existing competition have standing to challenge the administrative action?"[2] Professor Davis' answer is "generally yes," despite "unnecessary complications."[3] In contrast, the Court of Appeals for the First Circuit stated recently that, with certain exceptions, "[i]t has long been settled that an ordinary competitor has no standing to complain of a party's lack of legal authority to engage in his business, in a suit against the competitor, the government, or both."[4] Perhaps Professor Louis Jaffe's statement that "[t]he law of standing is basically a judicial construction with

[1] A parallel softening of requirements for standing to secure review in suits brought to seek redress for injury to the public is noted in Comment, *Administrative Law—Expansion of "Public Interest" Standing*, 45 N.C.L. REV. 998 (1967).

[2] 3 K. DAVIS, ADMINISTRATIVE LAW § 22.11, at 254 (1958).

[3] *Id.*

[4] Arnold Tours, Inc. v. Camp, 498 F.2d 1147, 1149 (1st Cir. 1969), *vacated and remanded*, 38 U.S.L.W. 3369 (U.S. March 23, 1970) (No. 128). *Arnold Tours* is a consolidation of two cases and includes *Wingate Corp. v. Industrial Nat'l Bank.*

statutory overlays of uncertain effect"[5] is nowhere more accurate than in the area of competitors' standing to challenge administrative actions. In view of the recent widely varying approaches and tests applied to determine questions of such standing,[6] one might add that the judicial constructions have also been of uncertain effect.

In *Data Processing Service Organizations, Inc. v. Camp*,[7] a recent effort to resolve these conflicting approaches toward problems of standing, Mr. Justice Douglas' opinion for the Supreme Court noted that "[g]eneralizations about standing to sue are largely worthless as such."[8] Several general summations of the law of standing have been attempted by courts in the course of well-considered opinions,[9] but, especially in light of the as-yet-unknown ramifications of *Data Processing Service*, one can only concur with the observation by Justice Douglas. That the courts' positions in past decades have fluctuated between broad and restrictive views of competitors' standing is nevertheless clear. This comment will summarize these fluctuations in the development of private parties' standing to challenge administrative conduct, note recent cases in this area, and, in the context of this background, attempt an evaluation of the decision in *Data Processing Service* and its probable influence.

II. The Legal-Right or Interest and the Statutory-Aid Tests

Although a presumption favoring reviewability of an administrative action[10] generally aids competitors seeking redress, no such presumption

[5] L. Jaffe, Judicial Control of Administrative Action 502 (1965) [hereinafter cited as Jaffe].

[6] *Compare, e.g.*, Saxon v. Georgia Ass'n of Independent Ins. Agents, Inc., 399 F.2d 1010 (5th Cir. 1968) *with* the concurring opinion in National Ass'n of Sec. Dealers, Inc. v. SEC, 38 U.S.L.W. 2020, 2022 (D.C. Cir. July 1, 1969) (en banc), *petition for cert. filed*, 38 U.S.L.W. 3185 (U.S. Nov. 10, 1969) (Nos. 835 and 843).

[7] 38 U.S.L.W. 4193 (U.S. March 3, 1970).

[8] *Id.*

[9] *See, e.g.*, Curran v. Laird, 38 U.S.L.W. 2319 (D.C. Cir. Nov. 12, 1969) (slip opinion at 3-7); National Ass'n of Sec. Dealers, Inc. v. SEC, Civil No. 21,662 (D.C. Cir. July 1, 1969) (concurring opinion by then-Judge Burger, slip opinion at 36-40), *petition for cert. filed*, 38 U.S.L.W. 3185 (U.S. Nov. 10, 1969) (Nos. 835 and 843); Arnold Tours, Inc. v. Camp, 408 F.2d 1147, 1149-50 (1st Cir. 1969), *vacated and remanded*, 38 U.S.L.W. 3369 (U.S. March 23, 1970) (No. 128); Association of Data Processing Service Organizations, Inc. v. Camp, 406 F.2d 837 (8th Cir. 1969), *rev'd*, 38 U.S.L.W. 4193 (U.S. March 3, 1970).

[10] *See* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). In the context of a non-competitor's suit brought by persons regulated by the challenged admin-

has been held to favor a competitor's standing to challenge a rival's authority to compete. In several cases a competitor was damaged in fact, but such damage, without more, was held *damnum absque injuria* that did not confer standing to complain.[11] The general rule has been that a competitor lacked standing to challenge another's right to engage in his business,[12] this principle being grounded both on the traditional rationales behind standing doctrines generally[13] and on the policy favoring free competition in the marketplace.[14]

At least two judicial exceptions[15] to the general rule developed,

istrative action, the Court stated, "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." *Id.* at 140. *See also* JAFFE at 336-53; K. Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411 (1954).

This presumption favoring review has seemed somewhat tempered in cases involving competitors. *See* Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943) (Mediation Board's determination that union was improper unit representative not a proper subject for review). In that case Justice Douglas stated, "Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied." *Id.* at 301. *See also* REA v. Central Louisiana Elec. Co., 354 F.2d 859 (5th Cir. 1966). A private utility company sought to enjoin an REA construction loan, which enabled an electric co-operative to compete. The court stated, "[W]e are totally convinced that Congress has never . . . intended that loans by [REA] should be reviewable in the courts . . . . Regardless of how outrageous or unfair the making of this loan may seem, the remedy is not in the courts but in the Congress." *Id.* at 864. And *see also* Pennsylvania R.R. v. Dillon, 335 F.2d 292 (D.C. Cir.), *cert. denied*, American-Hawaiian S.S. Co. v. Dillon, 379 U.S. 945 (1964).

[11] *See, e.g.*, Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 140 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938); Railroad Co. v. Ellerman, 105 U.S. 166, 173-74 (1881).

[12] Arnold Tours, Inc. v. Camp, 408 F.2d 1147, 1149 (1st Cir. 1969), *vacated and remanded*, 38 U.S.L.W. 3369 (U.S. March 23, 1970) (No. 128).

[13] *Id., citing* Flast v. Cohen, 392 U.S. 83, 91-101 (1968).

[14] 408 F.2d at 1149.

[15] A possible third exception might obtain when a competitor complains of competition that is unlawful as to him apart from considerations of the rival's or the agency's authority. Such a situation might arise from the rival's violation of the antitrust laws, in which case a suit directly against the offending party would be in order, or from administrative sanction of unfair, coercive, or conspiratorial methods of competition. *See, e.g.*, Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938). *But cf.* Camp v. Investment Co. Institute, Civil No. 21,662 (D.C. Cir. July 1, 1969) (concurring opinion), *petition for cert. filed*, 38 U.S.L.W. 3185 (U.S. Nov. 10, 1969) (Nos. 835 and 843) ("As a general rule, competitors lack standing to challenge competition created or enhanced by governmental action, even if it is illegal, unless they can claim the benefit of an implied or express statutory aid to standing." Slip opinion at 25.) (*Investment Co. Institute* is a consolidation of three lower-court cases referred to as National Ass'n of Sec. Dealers, Inc. v. SEC, 38 U.S.L.W. 2020 (D.C. Cir. July 1, 1969)); Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955).

however, under which a competitor might be considered to have standing. The first exception was recognized when the petitioner asserted that an administrative agency had sanctioned action infringing upon some "legal right," such as one vested by public charter or contract, that the complainant had to engage in a restricted field of competition.[16] The legal-right test was also employed when competitors challenged administrative conduct allowing competition in areas of unrestricted entry. In these cases the formula often applied was that the complaining competitor, to establish standing, must show infringement of a legal interest—"one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[17]

The second major exception to the general rule arose when a competitor could show a "statutory aid to standing" for a class of persons including himself.[18] In applying this exception, the courts looked to the legislative background of the relevant statute, including the provisions for review of the challenged agency's actions. Congress sometimes specifically provides that certain persons are entitled to have judicial review of an agency's conduct;[19] the enabling acts of many agencies, however, contain more general provisions for review by "parties aggrieved" or "parties in interest,"[20] and some acts make no provision whatever for review.[21]

When the statutory aid to standing is contained in a general-review provision of an act or when the statute provides no indication of who is to be accorded review, the courts' inquiries have focused on legislative history to discern whether a congressional concern for the plaintiff's competitive position was present. If such concern is found, then, in Professor Jaffe's phrase, "[T]he plaintiff's stake in his competitive position is 'legally protected,' and he has standing."[22] Yet a fair inference

[16] *E.g.*, Frost v. Corporation Comm'n, 278 U.S. 515 (1929).

[17] Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939).

[18] *E.g.*, Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968).

[19] See, *e.g.*, National Labor Relations Act, 29 U.S.C. § 151, § 160 (1964) (allowing review of decisions by the Labor Board on petition by any union or employer affected by Board orders).

[20] *E.g.*, Securities and Exchange Act of 1933 § 9(a), as amended, 15 U.S.C. § 77i (1964); Federal Communications Act § 402(b)(2), 47 U.S.C. § 402(b)(6) (1964); Federal Power Act § 313(b), 16 U.S.C. § 825(1)(b) (1964); Federal Food, Drug and Cosmetic Act § 701(f), 21 U.S.C. § 371(f) (1964) (parties "adversely affected"); Natural Gas Act § 19, 15 U.S.C. § 717(r) (1964); Administrative Procedure Act § 10(a), 5 U.S.C. § 1009(a) (1964).

[21] *E.g.*, Housing Act of 1949 § 2, 42 U.S.C. § 1441 (1964).

[22] JAFFE at 510.

might be drawn from the general provisions for review that are typical in many acts that Congress intended to defer questions of standing to the judiciary.[23] Moreover, application of a test for standing based on implicit congressional intent has spawned much confusion.[24]

Perhaps the confusion apparent in the courts' applications of the statutory-aid test for standing can be attributed to some degree to the concurrent influence of the legal-right test. As both tests came to be well-established, some courts used one test to the exclusion of the other[25] while a few attempted, without notable success, to reconcile them.[26] The courts applying arguably better reasoning used legal-right language to state a conclusion already reached through the analytical approach of the statutory-aid test.[27]

A. Evolution and Demise of the Legal-Right or Interest Test

A leading decision involving application of the legal-right test is *Tennessee Electric Power Co. v. TVA*.[28] Fourteen power companies appealed the dismissal of a suit to enjoin operations of the Tennessee Valley Authority. The Supreme Court held that the appellants' state franchises did not confer a "right" to be free from competition. The power companies urged that they nevertheless could challenge the constitutionality of the enabling act authorizing competition by TVA and maintained that as competitors they could base standing on a right to be free from unconstitutional, and hence unlawful, competition. The Court rejected this argument and held that the power companies had no standing. The Court stated that ". . . the damage consequent on competition, otherwise lawful, is . . . *damnum absque injuria*, and will not

[23] Comment, *Standing to Challenge Administrative Conduct, Recent Developments in the Federal Common Law*, 44 TUL. L. REV. 95, 97 (1969).

[24] *See, e.g.*, South Suburban Safeway Lines, Inc. v. City of Chicago, 416 F.2d 535 (7th Cir. 1969). Although the court could find no basis for standing, it was "assumed" in order to reach the issue of reviewability. The court stated, "In the instant case the questions (1) [of implied statutory aid to standing], (2) [of reviewability], and (3) [of] the scope of judicial review, tend to merge into one." *Id.* at 539.

[25] *E.g.*, Armco Steel Corp. v. Stans, 303 F. Supp. 262 (S.D.N.Y. 1969).

[26] *E.g.*, National Ass'n of Sec. Dealers, Inc. v. SEC, 38 U.S.L.W. 2020 (D.C. Cir. July 8, 1969) (concurring opinion by then-Judge Burger), *petition for cert. filed*, 38 U.S.L.W. 3185 (U.S. Nov. 11, 1969) (Nos. 835 and 843).

[27] *E.g.*, Association of Data Processing Service Organizations, Inc. v. Camp, 406 F.2d 837 (8th Cir. 1969), *rev'd*, 38 U.S.L.W. 4193 (U.S. March 3, 1970).

[28] 306 U.S. 118 (1939).

support a cause of action or a right to sue."[29] Because the appellants could show no invasion of a legal right, they lacked standing. Professor Davis has criticized the language employed by the Court as unsound:

> The catch lies in the two words "otherwise lawful." The plaintiffs were asserting that the competition was unlawful, and the Court was denying them an opportunity to show the unlawfulness. The question was not whether the plaintiffs had standing to challenge lawful competition but whether they had standing to challenge competition the lawfulness of which was at issue . . . . The Court should have said that the plaintiffs were asserting "a legal right,—one arising out of the Constitution."[30]

The Court similarly found the lack of an invasion of a legal right to deny standing in *Perkins v. Lukens Steel Co.*[31] Iron and steel manufacturers contended that the Secretary of Labor's erroneous interpretation of the Public Contracts Act forced them to pay minimum wages that were incorrectly determined in order to obtain government contracts. The Court of Appeals for the District of Columbia had enjoined officers of the government from requiring provisions in governmental purchasing contracts for the payment of minimum wages, and contracts had been made without such a requirement for more than a year. The Supreme Court reversed and dismissed the appellees for lack of standing. Provisions of the Public Contracts Act were for the benefit of the government, which can buy from whomever it pleases, the Court reasoned. The Act, the Court stated, "was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders . . . ; [r]espondents, to have standing in court, must show an injury or threat to a particular right

[29] *Id.* at 140.

[30] 3 K. DAVIS, ADMINISTRATIVE LAW § 22.04, at 217-18 (1958). Professor Davis criticized similar reasoning in Alabama Power Co. v. Ickes, 302 U.S. 464 (1938), in which the Court held that public utilities lacked standing to challenge federal grants and loans under the Emergency Relief Appropriations Act. Plaintiffs in that case urged that the statutes authorizing the grants to their competitors were unconstitutional and hence unlawful. The Court held that no legal right had been invaded and the plaintiffs, therefore, had no standing: "If [plaintiff's] business be . . . destroyed . . . it will be by lawful competition from which no legal wrong results." 302 U.S. at 480. *But cf.* Frost v. Corporation Comm'n, 278 U.S. 515 (1929), holding that a franchisee of a state had standing to secure an injunction against an illegal grant of a franchise to a competitor because such a grant was unconstitutional.

[31] 310 U.S. 113 (1940). Since the Court used this approach only one month after its decision in FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), which expanded the concept of statutory aid for standing (see text accompanying note 41 *infra*), *Perkins* considerably compounded the confusion already present.

of their own, as distinguished from the public's interest in the administration of the law."[32]

The language of *Tennessee Electric Power* and the approach implicit in *Perkins* were undermined several years later by the Court's reasoning in *City of Chicago v. Atchison, T. & S. F. Ry.*[33] In that case, several railroads discontinued a contract with Parmelee Transportation Company for transportation of rail passengers between terminals in Chicago and contracted instead with another company that had been organized at their request. After the railroads announced the change, the city council amended an ordinance to require a determination that public convenience and necessity required additional transportation service before a license could issue. The city council reserved for itself final discretion in the determination. The newly-organized company sought a declaratory judgment that the ordinance was invalid or inapplicable, and the Court of Appeals for the Seventh Circuit so held. Parmelee, having intervened, appealed, and the Supreme Court held that it had standing:

> 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. Parmelee contends that this operation is prohibited by a valid city ordinance and asserts the right to be free from unlawful competition. [The competitor], on the other hand, suggests that Parmelee has no standing because the city ordinance is invalid and [its] operation is lawful competition, citing *Alabama Power Co. v. Ickes* . . . and *Tennessee Electric Power Co.* . . . . We do not regard either of these cases as controlling here. *It seems to us that [the newly-formed competitor's] argument confuses the merits of the controversy with the standing of Parmelee to litigate them* . . . Parmelee's standing could hardly depend on whether or not it is eventually held that [its competitor] can lawfully operate without a certificate of convenience and necessity.[34]

Implicit in the circumstances giving rise to the unanimous result in *Perkins* was the Court's consideration that lengthy delays of vital administrative functions that litigation might cause were not in the public interest. Therefore, absent an invasion of a legal right, as established

[32] 310 U.S. at 125-26. *Perkins* has been legislatively reversed. *See* Scanwell Labs, Inc. v. Thomas, 38 U.S.L.W. 2454 (D.C. Cir. Feb. 13, 1970) (slip opinion at 13-17); 3 K. DAVIS, ADMINISTRATIVE LAW § 22.04, at 220 (1958).

[33] 357 U.S. 77 (1958).

[34] *Id.* at 83-84 (emphasis added).

by controlling precedent, private parties were not to be allowed to effect frustrating delays in the name of the public interest. Similar policy considerations regarding the urgency of the statute challenged, viewed in the context of pressures of the Depression, probably guided the Court's determination in *Tennessee Electric Power*. As Professor Jaffe has observed, "[T]he clue to standing in these cases has been to look . . . to the statutory purposes."[35] This theory indeed serves as an explanation of the results reached in *Perkins* and in the "power" cases, in which it is also to be noted that clearly no statutory aid to standing or express congressional intent to protect the plaintiffs' competitive positions appeared in the enabling legislation. But the "clue" of which Professor Jaffe speaks hardly refutes the logic of Professor Davis' criticism or the approach of the Court in *City of Chicago*. When a competitor attempts to base standing on his right to be free from unlawful competition, a decision denying him standing to show that the competition is unlawful on the ground that he has no right to be free from lawful competition begs the question.

In *Data Processing Service Organizations, Inc. v. Camp*,[36] the rationale employed in *City of Chicago* prevailed, and the Supreme Court rejected the legal-right test for standing. An association of data-processing firms, which sold their services to businesses generally, sought to challenge a ruling by the Comptroller of the Currency allowing national banks to make such services available to bank customers. The Court of Appeals for the Eighth Circuit found that there was no statutory aid for the petitioners' claims of standing and dismissed because there was no showing of an invasion of "a legal interest [created] by reason of statutory protection . . . ."[37] The Court of Appeals for the First Circuit in a case involving substantially identical circumstances had found a statutory aid and had held that a data-processing firm has standing to contest rulings by the Comptroller.[38] The Supreme Court, declining the opportunity to apply the reasoning of the First Circuit, nevertheless reversed the Eighth Circuit's denial of standing. In doing so, the Supreme

[35] JAFFE at 509.

[36] 38 U.S.L.W. 4193 (U.S. March 3, 1970).

[37] Association of Data Processing Service Organizations, Inc. v. Camp, 406 F.2d 837, 843 (8th Cir. 1969), *rev'd*, 38 U.S.L.W. 4193 (U.S. March 3, 1970).

[38] Arnold Tours, Inc. v. Camp, 408 F.2d 1147 (1st Cir. 1969), *cert. denied* (as to Industrial Nat'l Bank v. Wingate Corp. and Camp v. Wingate Corp.), 38 U.S.L.W. 3369 (U.S. March 23, 1970) (Nos. 129 and 225) (hereinafter cited as Arnold Tours, Inc. v. Camp (Wingate) when cited for the aspect of the decision dealing with bank competition to the data-processing firm).

Court stated that "[t]he legal interest test goes to the merits."[39] Hence, the Court refused to use that test to resolve the issue of standing.

B. Evolution of the Statutory-Aid Test

Judicial interpretation of legislative intent or statutory aid as a basis for standing has been utilized at least since the *Chicago Junction Case*[40] in 1924. A railroad's standing to challenge approval by the Interstate Commerce Commission 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. Although freedom from competition was not a sufficient ground for standing, the Court found a legal interest in being free from unequal treatment by the ICC[41] and based standing on a determination that an interest intended by Congress to be protected had been denied that protection.

Several years later, in both *L. Singer & Sons v. Union Pacific R.R.*[42] and *Alexander Sprunt & Son v. United States*,[43] non-members of the transportation industry were denied standing to challenge ICC orders. These decisions thus emphasize that the grounds for standing found in the *Chicago Junction Case* were based upon legislative intent expressed by statute. The growth of the new doctrine was to be intermittently tempered, however, by the influence of cases in which the legal-interest test was alone applied. Hence a chronological summarization of the leading cases in which the statutory-aid test was followed reveals successive expansions of the doctrine, each of which is followed by a partial retrenchment contracting standing for competitors.

The broader interpretation of legal interest recognized in *Chicago Junction* was practically dispensed with in *FCC v. Sanders Brothers Radio Station*.[44] An existing radio station sought to challenge a grant by the Federal Communications Commission of a license to a competitor on the ground that another station would not serve the "public interest, convenience, and necessity."[45] The statutory aid to standing that was invoked was language in the FCC Act providing for judicial review for persons "aggrieved or whose interests are adversely affected by any order

[39] 38 U.S.L.W. 4193, 4194 (U.S. March 3, 1970).
[40] 264 U.S. 258 (1924).
[41] *Id.* at 267.
[42] 311 U.S. 295 (1940).
[43] 281 U.S. 249 (1930) (*followed* in Freeport Sulphur Co. v. United States, 199 F. Supp. 913 (S.D.N.Y. 1961)).
[44] 309 U.S. 470 (1940).
[45] *Id.* at 472.

of the Commission granting or denying [an] . . . application."[46] This language was held sufficient to confer standing. "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public,"[47] the Court stated, and a broadcasting license was expressly denied the status of a property right. Nevertheless, the Court found Congress' "opinion" to be that "one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license."[48] In *Scripps-Howard Radio, Inc. v. FCC*[49] the Court declared that the "public action" that was allowed to be maintained by private parties in *Sanders Brothers* was not an expansion of the substantive law of standing; private litigants were to have standing "only as representatives of the public interest."[50]

Perhaps the most liberal extension of the statutory-aid test for standing appeared in *Associated Industries, Inc. v. Ickes*,[51] in which the court termed the new basis for standing to be the doctrine of "private attorney generals" and applied the concept to hold that consumers had standing as "persons aggrieved" to challenge an agency's order fixing the prices of sellers from whom they purchased coal. The court's opinion summarized the rationale of *Sanders* and then expanded it:

> Although one threatened with financial loss through increased competition resulting from unlawful action of an official cannot, solely on that account, make the proper showing to maintain a suit against the official, absent such a statute, yet the "person aggrieved" statute gives the needed authority to do so to one who comes within that description . . . . *If, then, 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.*
>
> Of course not every person is a "person aggrieved." But the Supreme Court has explicitly told us that one threatened with financial loss through increased competition resulting from a Commission's order is "aggrieved," and entitled as such to a review notwithstanding that the very statute pursuant to which he obtains review is designed

[46] Federal Communications Act § 402(b)(2), 47 U.S.C. § 402(b)(6) (1964).
[47] 309 U.S. at 475.
[48] *Id.* at 477.
[49] 316 U.S. 4 (1942).
[50] *Id.* at 14.
[51] 134 F.2d 694 (2d Cir.), *dismissed as moot*, 320 U.S. 707 (1943).

> to keep competition alive and confers upon him no property right which gives him any kind of immunity from competition. . . . [T]here is more reason why *Congress should be deemed to have intended* to confer such a power on consumers than to authorize the holder of a radio station license to obtain review of an administrative order, issued under the Communication Act, subjecting him to increased competition.[52]

Shortly after *Associated Industries*, the Supreme Court in *Stark v. Wickard*[53] held that milk producers were entitled to challenge administrative deductions from payments for their milk under the milk price-support program. But the Court's language indicated a more restrictive approach than that suggested by *Associated Industries*. Citing, among other cases, *Tennessee Electric Power Co. v. TVA*,[54] *Alabama Power Co. v. Ickes*,[55] and *Perkins v. Lukens Steel Co.*,[56] the Court declared that though the deductions had a detrimental effect on the producers' prices, that detriment might be *damnum absque injuria*. The Court reemphasized the necessity of an alleged infringement of a legal right before the complainant could have standing.

> It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally. . . . *To reach the dignity of a legal right* in the strict sense, *it must appear* from the nature and character of the legislation *that Congress intended to create a statutory privilege protected by judicial remedies*.[57]

Judicial evolution of the statutory-aid approach to standing could have been altered considerably by legislation at this juncture if the Administrative Procedure Act[58] of 1946 (APA) had been interpreted as an expression of congressional intent to make the doctrine advanced in

---

[52] *Id.* at 705 (emphasis added).
[53] 321 U.S. 288 (1944).
[54] 306 U.S. 118 (1939).
[55] 302 U.S. 464 (1938).
[56] 310 U.S. 113 (1940).
[57] Stark v. Wickard, 321 U.S. 288 at 304, 306 (emphasis added).
[58] 5 U.S.C. §§ 1001-1011 (1964). Section 1009(a) states: "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Sanders applicable to administrative agencies generally.[59] The issue was squarely presented in *Kansas City Power & Light Co. v. McKay*,[60] in which the Court of Appeals for the District of Columbia held private power companies lacked standing to challenge various agencies' operation of federally supported power programs. The facts were substantially similar to those in *Tennessee Electric Power*. The plaintiffs asserted that passage of the APA conferred upon them, as parties aggrieved by agency action, standing to maintain the suit. Since the opinion in *Tennessee Electric Power* held that competitors in the plaintiffs' position had no right to sue, they were arguing, in effect, that the APA's provision for judicial review supplied an independent basis for standing. The court rejected this contention and interpreted the APA as a restatement rather than as an expansion of judicial precedent regarding standing.

Some courts have construed *Kansas City Power & Light* as authority for the proposition that legislatively-conferred standing can be found only if the particular statute involved expressly provides for review of the challenged agency's actions.[61] The Supreme Court, however, explicitly refuted this view in *Hardin v. Kentucky Utilities Co.*[62] The Court held that when plaintiff was within the class that the statute was designed to protect, "no explicit statutory provision is necessary to confer standing."[63] The erroneous interpretation of *Kansas City Power & Light* appears to persist nevertheless,[64] though perhaps only as a result of unintentionally loose phraseology.

---

[59] Professor Davis has forcefully advocated just such an interpretation. K. DAVIS, ADMINISTRATIVE LAW § 22.02 (1958).

[60] 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955).

[61] Indeed, the view seems to have been that of the court rendering the decision in *Kansas City Power & Light*. *See* Curran v. Laird, 38 U.S.L.W. 2319 (D.C. Cir. Nov. 12, 1969) (slip opinion at 6). Another restrictive view of standing was expressed by the same circuit in *Lee v. CAB*, 225 F.2d 950, 951 (D.C. Cir. 1955): "The right to review of agency action is usually restricted to persons whom the agency regulates and affects adversely." This generalization, of course, has had significant exceptions. The leading ones include *Philco Corp. v. FCC*, 257 F.2d 656 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 946 (1959) (manufacturers of radio equipment held to have standing to challenge a relicensing granted to competitor's wholly-owned subsidiary without a hearing) and National Coal Ass'n v. FPC, 191 F.2d 462 (D.C. Cir. 1951) (association of coal interests had standing to attack certification of new natural gas service).

[62] 390 U.S. 1 (1967).

[63] *Id.* at 7.

[64] [T]his ['adversely affected or aggrieved'] clause [of the APA] refers only to situations in which a particular statute expressly confers standing on a person who is adversely affected or aggrieved by agency action under that statute." Harry H. Price & Son v. Hardin, 299 F. Supp. 557, 562 (N.D. Tex. 1969).

The real conceptual difficulty presented the judiciary by the concurrent and often inconsistent influences of the legal-right and the statutory-aid tests is illustrated by the diverse rationales employed by the various courts involved in the litigation of *Kentucky Utilities Co.* The trial court in *Kentucky Utilities Co. v. TVA*[65] advanced an explanation that sought to distinguish *Tennessee Electric Power* from the case before it. In *Kentucky Utilities Co.*, a privately-owned public utility claimed standing to seek an injunction against expansion by TVA into an area that it was serving. The plaintiff based standing on section 15d of the 1959 TVA Act,[66] which barred expansion by TVA beyond areas for which TVA was "the primary source of power supply on July 1, 1957." This section, the plaintiff claimed, was enacted to protect it and other established utilities from intrusion by TVA. The present expansion, the plaintiff argued, was unlawful because it violated the limitation of section 15d. Defendant TVA asserted that the plaintiff lacked standing under the authority of *Tennessee Electric Power*, but the court held it distinguishable. In that case, said the court, the competition

> was legal in itself, but was attacked on the basis that either the statutes authorizing the activities . . . were unconstitutional or that the officers and agencies had exceeded their authority under the Act . . . . The distinction in these cases is that the competition *was shown to be legal* while in the case under consideration it is claimed that the competition is illegal by reason of the unlawful conspiracy and the alleged violation of the 1959 TVA Act.[67]

In *Tennessee Electric Power*, however, the Supreme Court did not show the competition to be legal since the holding denying plaintiff's standing precluded the necessity for a decision on the merits.[68] Consequently, while the trial court's decision on standing in *Kentucky Utilities Co.* was affirmed, its rationale, based on distinction of the precedents urged for a denial of standing, is specious.

Both the basis for standing and the merits of the controversy in *Kentucky Utilities Co.* depended on the construction and interpretation of the same clause of a statute. Affirming the trial court on standing,[69]

[65] 237 F. Supp. 502 (E.D. Tenn. 1964), *rev'd*, 375 F.2d 403 (6th Cir. 1966), *rev'd on other grounds sub nom.*, Hardin v. Kentucky Util. Co., 390 U.S. 1 (1967).

[66] Tennessee Valley Authority Act § 15d(a), 16 U.S.C. § 831n-4(a) (1964).

[67] Kentucky Util. Co. v. TVA, 237 F. Supp. at 505-06 (emphasis added).

[68] *See* Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 152 (1939) (dissenting opinion).

[69] Kentucky Util. Co. v. TVA, 375 F.2d 403 (6th Cir.), *rev'd on other grounds sub nom.*, Hardin v. Kentucky Util. Co., 390 U.S. 1 (1967).

the Court of Appeals for the Sixth Circuit, apparently for organizational convenience and not for analytical purposes, discussed the merits, then addressed itself to the standing issue, and finally resolved the substantive issue. The court's discussion of the merits dealt extensively with the legislative history of the TVA Act of 1959. This history revealed an intention to protect the plaintiff and other competitors from TVA expansion, the court concluded, and therefore the plaintiffs had standing. The court's opinion also distinguished the precedent that was urged in the argument opposing the plaintiff's standing. After summarizing the "power" cases, the court stated that "[t]heir surface analogy [to the *Kentucky Utilities* case] is immediately dissipated by the fact that in none of them was the plaintiff's suit planted on a federal statute enacted specifically for the protection of the involved plaintiff."[70]

The Supreme Court reversed the decision of the court of appeals on the merits, but affirmed its decision, and implicitly its approach, on the issue of standing.[71] The Court determined that there was standing because Congress had enacted the statute upon which the plaintiff relied for a primary purpose of protecting the competitive position of a class to which the plaintiff belonged. Referring to the "power" cases that both lower courts had sought to distinguish from the case before them, the Court stated,

> [C]ompetitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury.[72]

The Court's own statement, then, suggests that the actual ground for decision in the "power" cases was a finding of no statutory intent to protect the interests of the plaintiffs in those cases.

III. Recent Developments

Before the Supreme Court's absolute rejection in *Data Processing Service Organizations, Inc. v. Camp*[73] of the legal-right test, the federal courts in considering standing of non-competitors to challenge administrative conduct seem to have been placing progressively less emphasis

[70] 375 F.2d at 416.
[71] Hardin v. Kentucky Util. Co., 390 U.S. 1 (1967).
[72] *Id.* at 6.
[73] 38 U.S.L.W. 4193 (U.S. March 3, 1970).

on the necessity of an alleged violation of a legal right.[74] No such parallel trend can be said to have occurred in suits involving competitors' standing. Few courts considered a competitor's standing to challenge an agency's decisions without citing the general rule that economic injury resulting from lawful competition cannot of itself confer standing on a competitor to question the legality of its rival's business. At least since the decision in *Hardin v. Kentucky Utilities Co.*,[75] most courts appeared to be placing more stress on finding implicit statutory aids to standing. The manner and order in which the courts approached the exceptions to the general rule, however, continued to vary.

In both *Armco Steel Corporation v. Stans*[76] and *Troutman v. Shriver*,[77] the courts were urged to hold that the plaintiffs' standing was derived from statutory aids and other sources. Both courts reviewed the legislative intent behind the relevant statutes involved to discern if there had been concern for the plaintiffs' competitive positions. The court in *Armco* found an "implicit" concern for competitors such as the plaintiff and held standing was present. The court in *Troutman* determined that no intent to protect the class of competitors to which the plaintiff belonged had been expressed, nor could any such intent be fairly inferred. Therefore, the court concluded, the plaintiff had shown no legal right to be free from competition and hence lacked standing.[78]

The Court of Appeals for the Seventh Circuit pursued a similar analysis

[74] *See, e.g.*, Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 933 (2d Cir. 1968) ("A 'legal right' to protection means, in the abstract, nothing at all. The . . . answer turns on whether Congress' purpose in enacting [the relevant statute] was to protect [plaintiffs'] interest."); Powelton Civic Home Owners Ass'n v. HUD, 284 F. Supp. 809, 821 (E.D. Pa. 1968) (Under the APA, "[e]ven if the plaintiffs had no legal right to challenge the substantive correctness of the Secretary's decisions on federal grants, they would be entitled to challenge the propriety of the Secretary's decisional procedures."). *But see* Barlow v. Collins, 398 F.2d 398 (5th Cir. 1968), *rev'd*, 38 U.S.L.W. 4195 (U.S. March 3, 1970); Harrison-Halsted Community Group, Inc. v. Housing & Home Fin. Agency, 310 F.2d 99 (7th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963) (plaintiffs could show no injury to a protected legal right and hence lacked standing).

[75] 390 U.S. 1 (1967).

[76] 303 F. Supp. 262 (S.D.N.Y. 1969) (involving the Foreign Trade Zones Act, 19 U.S.C. §§ 81a-81u (1964)).

[77] 417 F.2d 171 (5th Cir. 1969), *petition for cert. filed sub nom.*, Troutman v. Rumsfeld, 38 U.S.L.W. 3224 (U.S. Dec. 8, 1969) (No. 933) (involving the Economic Opportunity Act of 1964, Act of August 20, 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified in scattered sections of 42 U.S.C.)).

[78] See also Safir v. Gulick, 297 F. Supp. 630 (E.D.N.Y. 1969), the court adopted substantially the same analytical approach in holding that a carrier lacked standing to challenge rate subsidies by the Maritime Administration to a group of competing carriers.

to reach a unique conclusion in *South Suburban Safeway Lines, Inc. v. Chicago.*[79] A private bus service challenged a grant of federal funds to the city's transit authority. Rejecting the provision in the APA concerning "persons aggrieved" as an independent basis for standing, the court found the transportation industry to be one of free competition and held applicable the general rule denying standing to competitors. Upon review of the statute,[80] which the plaintiff urged implicitly conferred standing, the court concluded that, while there was "[c]oncern that private ownership of existing mass transportation systems should not be unnecessarily or unfairly disturbed . . . ," there was no "[c]larity of purpose to prohibit competition with private [competitors] which was manifest in the statute in *Hardin* [*v. Kentucky Utilities Co.*[81]]."[82] Nevertheless, the court "assumed" that South Suburban had standing. The case presented close questions on implied legislative intent to confer standing, extent of agency discretion, and scope of allowable review; so the court apparently felt that granting standing was justifiable in order to reach the issue of reviewability and reject the suit on that ground.

In a different factual context, the same difficulties with standing, extent of discretion, and reviewability divided the Court of Appeals for the District of Columbia Circuit in *Curran v. Clifford.*[83] National Maritime Union President Curran brought suit on behalf of the union's members against various governmental officials to require enforcement of the Cargo Preference Act.[84] Use by the Department of Defense of foreign flag ships in transporting military cargo to Viet Nam permitted shipowners to man their vessels with foreign, non-unionized crews. Curran asserted that both the union's status under the APA as a "person aggrieved" and the implicit intent underlying the Cargo Preference Act conferred standing to bring the action.

Judge Wright, joined by Chief Judge Bazelon, thought that the implicit legislative intention for the Cargo Preference Act to benefit American seamen did confer a legal right to seek redress. Even if this interpretation was incorrect, the judges concluded, the case presented an exception to the rule of *Kansas City Power & Light Co. v. McKay*[85]

[79] 416 F.2d 535 (7th Cir. 1969).
[80] Urban Mass Transportaton Act of 1964, 49 U.S.C. §§ 1601-11 (1964).
[81] 390 U.S. 1 (1967).
[82] 416 F.2d at 539.
[83] 37 U.S.L.W. 2390 (D.C. Cir. Dec. 27, 1968), *vacated on rehearing sub nom.*, Curran v. Laird, 38 U.S.L.W. 2319 (D.C. Cir. Nov. 12, 1969).
[84] Cargo Preference Act of 1904, reenacted in 1956, 10 U.S.C. § 2631 (1964).
[85] 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955).

that "aggrievement in fact" is insufficient alone to confer standing. Since there was an injury in fact, and since the union was likely to be the only party to challenge the actions of the Secretary of Defense, Judge Wright stated:

> We should opt for a test of standing, at least in cases challenging administrative action, that would leave it in the discretion of the court to grant or deny standing where the plaintiff can claim no infringement of a legal right, but has in fact suffered or is suffering a palpable, concrete injury.[86]

The opinion went on to hold that the actions challenged were reviewable.

Judge Leventhal, though agreeing that the plaintiff had standing, disagreed with the majority's alternative basis for so holding.[87] He criticized the "novel" concept of "discretionary standing," and said that he would have rested the plaintiff's standing on an implicit statutory intent to confer a legal interest to challenge a disregard for legislation enacted in part for their benefit. But the administrative decisions for which review was sought, Judge Leventhal believed, were wholly discretionary and hence nonreviewable; to hold otherwise, he stated, could "prove to be a peek like Pandora's."[88]

This first opinion was vacated, but the issues in *Curran* again divided the court on rehearing en banc.[89] The majority of four judges agreed with Judge Leventhal's views. Finding that an intention to protect the union's competitive interests could be fairly attributed to Congress, the majority held that Curran had standing but that the challenged conduct was within the discretion of the Executive and hence nonreviewable. Summary judgment for the Secretary of Defense was granted. Judge MacKinnon concurred in the result, but would have denied standing to the plaintiff because "[t]o say that the matter is discretionary . . . is merely a recognition . . . that the . . . Act does not confer any legally protected right on Curran and the persons he sues for."[90] Judge Wright, Chief Judge Bazelon, and Judge Robinson dissented from the holding on reviewability, but concurred on the issue of standing. Again, however, they argued that even in the absence of an alleged infringement of an

[86] Curran v. Clifford, 37 U.S.L.W. 2390 (D.C. Cir. Dec. 27, 1968) (slip opinion at 5), *vacated on rehearing sub nom.*, Curran v. Laird, 38 U.S.L.W. 2319 (D.C. Cir. Nov. 12, 1969).

[87] *Id.* (slip opinion at 21).

[88] *Id.* (slip opinion at 34) (concurring opinion).

[89] Curran v. Laird, 38 U.S.L.W. 2319 (D.C. Cir. Nov. 12, 1969).

[90] *Id.* (slip opinion at 25) (opinion concurring in the result).

implicit legal right, standing should be accorded in the discretion of the court to a plaintiff aggrieved in fact.[91]

Since different statutes present problems in divergent settings, perhaps the diversity in approaches to competitors' standing would not seem remarkable. Identical diversity of approaches and apparent confusion, however, recently developed in a line of cases involving challenges to administrative action that were based on substantially the same provisions of the national banking statutes. The provision most often involved in litigation grants power to national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking."[92] The Comptroller of the Currency has promulgated regulations pursuant to this language allowing the national banks to engage in such businesses as insurance, mutual funds, touring services, and data processing. The affected competitors have brought many suits challenging these regulations.

The Court of Appeals for the Fifth Circuit adopted the approach of looking to see whether there was any legislative intent to confer a legal right for competitors in *Saxon v. Georgia Association of Independent Insurance Agents, Inc.*[93] The court found just such an intent from the relevant legislation[94] involved in the case and held that insurance agents in small towns had standing to challenge regulations allowing intruding competition from national banks. After first discussing the merits and concluding that the regulations were in violation of statutory standards, the court next examined the question of standing and advanced an alternative theory that even outside the statutory aid to standing, the plaintiffs could protect themselves from unlawful competition. Judge Thornberry concurred in the first holding on the issue of standing, but observed that the alternative ground related to the merits rather than to the status of the complaining party.[95]

Members of the mutual-fund industry challenged the Comptroller's regulations allowing national banks to operate collective investment funds

[91] *Id.* (slip opinion at 26) (opinion dissenting in part and concurring in part).
[92] National Bank Act § 5136, 12 U.S.C. § 24(seventh) (1964).
[93] 399 F.2d 1010 (5th Cir. 1968).
[94] National Bank Act § 92, 12 U.S.C. § 92 (1964).
[95] Saxon v. Georgia Ass'n of Independent Ins. Agents, Inc., 399 F.2d 1010, 1020 n.3 (5th Cir. 1968) (concurring opinion). Judge Thornberry's view was shared in Association of Data Processing Service Organizations, Inc. v. Camp, 406 F.2d 837, 842 n.10 (8th Cir. 1969), *rev'd on other grounds*, 38 U.S.L.W. 4193 (U.S. March 3, 1970) and Arnold Tours, Inc. v. Camp, 408 F.2d 1147, 1150 (1st Cir. 1969), *vacated and remanded*, 38 U.S.L.W. 3369 (U.S. March 23, 1970) (No. 128).

as a trust-department service in *Camp v. Investment Company Institute.*[96] The court held in a per curiam opinion that the plaintiffs had standing to seek relief but that no violations of the statutes involved[97] had occurred. Hence the Securities and Exchange Commission's and Comptroller's regulations were upheld on the merits. The concurring opinions by Chief Judge Bazelon and then-Judge Burger revealed differences, however, on the standing issue.

Chief Judge Bazelon stated:

> As a general rule, competitors lack standing to challenge competition created or enhanced by governmental action, even if it is illegal, unless they can claim the benefit of an implied or express statutory aid to standing. . . . The Glass-Steagall Act was not intended by Congress to protect mutual funds from competition from banks, so they do not have standing as intended beneficiaries; and the Act contains no aggrieved party provision . . . . The District Court held, however, that the ICI was an implied, though not an intended beneficiary of the Glass-Steagall Act, and granted it standing to sue as a private attorney general to enforce the separation between commercial banking and securities dealing, despite the absence of an aggrieved party provision to support that role.
>
> We are all agreed that this holding is exceptional, but so is this case. While the majority concludes from the cases that there is no satisfactory authority for standing, I find in those cases no reason to deny standing, and good reason to grant it. First, the authorities for the rule denying competition are inapposite. Second, the basic justification for entertaining competitors' suits to challenge administrative action as statutory aggrieved parties, intended beneficiaries, or licensees is to vindicate a public interest, and not a private right. The absence of a statutory aid to standing in this case is adventitious, and I would grant appellants standing to assert the public interest without it.[98]

Judge Burger, joined by Judge Miller, was unable to accept the rationale of Judge Bazelon's opinion. After an able summary of the various exceptions to the general rule denying standing to competitors chal-

[96] 38 U.S.L.W. 2020 (D.C. Cir. July 8, 1969), *petition for cert. filed,* 38 U.S.L.W. 3185 (U.S. Nov. 11, 1969) (No. 843).

[97] Glass-Steagall Act §§ 16, 20, 21, and 32, 12 U.S.C. §§ 24(seventh), 377, 378, 78 (1964).

[98] Camp v. Investment Co. Institute, 38 U.S.L.W. 2020 (D.C. Cir. July 8, 1969) (slip opinion at 25) (concurring opinion), *petition for cert. filed,* 38 U.S.L.W. 3185 (U.S. Nov. 11, 1969) (No. 843).

lenging a rival's authority to compete, Judge Burger concluded that the plaintiffs could fit their claim into no presently recognized exception. He further noted, however, that the parties were indeed adverse, and, moreover,

> on this record the alternative to a grant of appellees' claim to standing would be to effectively frustrate any challenge to the regulations in question. . . .
>
> I am unable to set aside my grave doubts as to Appellees' standing to institute and maintain these suits. However, in the uncertain state of the law as to standing, there is something to be said on both sides of that question. I therefore resolve my doubts in favor of Appellees and concur . . . [in holding] that the Appellees have standing. I am influenced substantially . . . by the need for judicial examination of the important questions raised.[99]

IV. Implications of *Data Processing Service Organizations, Inc. v. Camp*

Efforts of data-processing-service firms to challenge regulations by the Comptroller of the Currency allowing national banks to compete produced conflicting holdings from the First and Eighth Circuits. In *Arnold Tours, Inc. v. Camp*,[100] the Court of Appeals for the First Circuit held that travel agencies lacked standing to complain of competition from banks pursuant to regulations promulgated by the Comptroller, but that a data-processing company was within a class intended by Congress to be protected from such competition[101] by the Bank Service Comporation Act[102] and hence had standing. The legislative history of the Act, the court stated, showed "a broader purpose than regulating only the service corporations."[103] The court reasoned,

> "[w]hen Congress so explicitly provides protection for a particular business against competition from a regulated national entity—even though indirectly by regulating a subsidiary—standing exists at least

[99] *Id.* (slip opinion at 47) (concurring opinion).

[100] 408 F.2d 1147 (1st Cir. 1969), *vacated and remanded*, 38 U.S.L.W. 3369 (U.S. March 23, 1970) (No. 128).

[101] Arnold Tours, Inc. v. Camp (Wingate), 408 F.2d 1147 (1st Cir. 1969), *cert. denied*, 38 U.S.L.W. 3369 (U.S. March 23, 1970 (Nos. 129 and 225).

[102] Bank Service Corporation Act § 4, 12 U.S.C. § 1864 (1964) states: "No bank service corporation may engage in any activity other than the performance of bank services for banks."

[103] 408 F.2d at 1153.

to entertain complaints by that business concerning its competitive relationship to the national entity."[104]

Confronted with an indistinguishable fact situation in *Association of Data Processing Service Organizations, Inc. v. Camp*,[105] the Eighth Circuit denied standing. The statutory aid to standing given so much weight by the First Circuit was dismissed by the Eighth Circuit in a footnote: "The reliance on the Bank Holding Company Act of 1966 and the Bank Service Corporation Act is misplaced. Neither act is applicable here."[106]

On certiorari, the Supreme Court rejected the Eighth Circuit's result and also purported to reject the First Circuit's approach.[107] The First Circuit in *Arnold Tours* had stated, "We think Congress has provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against."[108] Justice Douglas, writing for the Court, refused to approve: "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."[109] The new test to be applied to standing, the Court held, is whether an "injury in fact" has been alleged, and, if so, whether the "interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[110]

The conflicting results reached by the courts of appeals in *Arnold Tours* and *Data Processing Service*; the difficulties with intermingled issues of standing and reviewability encountered in *South Suburban Safeway Lines, Inc. v. Chicago*,[111] *Curran v. Laird*,[112] and *Camp v. Investment Company Institute*;[113] and the circuitous reasoning too often employed by courts relying on the legal-right test for standing all under-

[104] *Id.*
[105] 406 F.2d 837 (8th Cir. 1969), *rev'd*, 38 U.S.L.W. 4193 (U.S. March 3, 1970).
[106] *Id.* at 843 n.12.
[107] Association of Data Processing Service Organizations, Inc. v. Camp, 38 U.S.L.W. 4193 (U.S. March 3, 1970).
[108] Arnold Tours, Inc. v. Camp (Wingate), 408 F.2d 1147, 1153 (1st Cir. 1969), *cert. denied*, 38 U.S.L.W. 3369 (U.S. March 23, 1970) (Nos. 129 and 225).
[109] Association of Data Processing Service Organizations, Inc. v. Camp, 38 U.S.L.W. 4193, 4195 (U.S. March 3, 1970).
[110] *Id.* at 4194.
[111] 416 F.2d 535 (7th Cir. 1969).
[112] 38 U.S.L.W. 2319 (D.C. Cir. Nov. 12, 1969).
[113] 38 U.S.L.W. 2020 (D.C. Cir. July 8, 1969), *petition for cert. filed*, 38 U.S.L.W. 3185 (U.S. Nov. 11, 1969) (No. 843).

scored the need for clarification. The Supreme Court's express disapproval of the legal-right test should resolve the latter problem. In completely rejecting the legal-interest approach, as formulated and applied in *Tennessee Electric Power Co. v. TVA*,[114] the Court clearly relied on sound principle and precedent. Unfortunately, however, the formalistically-structured tests proposed in *Data Processing Service* will fail to resolve the myriad of other difficulties faced in recent cases and indeed may engender further confusion and uncertainty in the law of standing.[115]

The first prerequisite of the Supreme Court's new test for standing, "injury in fact," has presented few problems in the past and would seem unlikely to do so in the future. But the obscurity of the second test, "whether the interest sought to be protected is arguably within the zone of interests protected or regulated by the statute or constitutional guarantee in question," seems likely to present more problems than it resolves. Many of these potential difficulties are recognized in an opinion by Justice Brennan, joined by Justice White, who concurred in the result but dissented from the Court's treatment of standing:

> What precisely must a plaintiff do to establish that "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute"? How specific an "interest" must he advance? Will a broad, general claim, such as competitive interest, suffice, or must he identify a specific legally protected interest? When, too, is his interest "arguably" within the appropriate "zone"? . . . .[116]

The Court's application, as well as its formulation, of the new test fails to be instructive. When, as in *Data Processing Service*, a competitor relies upon an implicit statutory aid to standing, the view taken by a particular court of the policy underlying the relevant statute is perhaps the determinative factor; and, as *Arnold Tours* illustrates, that factor may well be variable. The Court's treatment of the legislative background in *Data Processing Service* hardly serves to eliminate this variable. The opinion seems simply to agree with the result of the lower court in *Arnold Tours*, to criticize the verbalization of the reasoning employed, and to state that the Court's own phraseology allows that result also. The only guide that

[114] 306 U.S. 118 (1939).

[115] The sources and extent of this confusion were examined in an excellent opinion, Scanwell Labs, Inc. v. Thomas, 38 U.S.L.W. 2454 (D.C. Cir. Feb. 13, 1970).

[116] Association of Data Processing Service Organizations, Inc. v. Camp, 38 U.S.L.W. 4193, 4201 (U.S. March 3, 1970) (opinion concurring and dissenting).

the Court provides for applying the new test indicates a more liberal view of standing for competitors, but is as vague as the formulation of the rule itself: "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend."[117]

Structurally, the opinion in *Data Processing Service* clearly segregates the issue of standing from that of reviewability. The tests employed for resolution of the issue of judicial review, however, remain substantially the same, for reviewability "turns on 'the existence of courts and the intent of Congress as deduced from the statutes and precedents.' "[118] The presumption in favor of review is to be indulged unless a contrary purpose "is fairly discernible in the statutory scheme. . . . [Here t]he Acts do not in terms protect a specified group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Act are easily identifiable."[119] The only distinction between the inquiry into standing and the inquiry into review that is apparent from the decision is that a clear presumption favoring review exists, but only a "trend" favors standing. Obviously, such a distinction will be of little aid to future determinations in the lower courts.

Identical analysis and language was employed by the Court in a companion case, *Barlow v. Collins*,[120] which involved a challenge by tenant farmers to the validity of regulations promulgated by the Secretary of Agriculture. The challenged regulations allowed landlords to require the plaintiffs to assign advance payments under the Upland Cotton Program to them as a condition precedent for a lease to work the land. After assigning these payments, the tenant-plaintiffs were forced to borrow money at high interest rates for their necessary living expenses during the remainder of the growing season. The Court held the plaintiffs had standing to bring the action and used the same two-step test advanced in *Data Processing Service*. The plaintiffs in *Barlow* were essentially aggrieved as persons regulated, and not as competitors, but the tests for standing proposed by both Justices Douglas and Brennan do not distinguish between competitors' and noncompetitors' suits. The policy for free competition manifested itself formerly in the general presumption

[117] *Id.* at 4194.
[118] *Id.* at 4195.
[119] *Id.* The accuracy of the latter statement is, of course, questionable.
[120] 38 U.S.L.W. 4195 (U.S. March 3, 1970).