1-1-1972

Standing: A Public Action Requires a Direct Private Wrong

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stressed the concept that "good citizens . . . must be informed."[32] Hopefully, the courts will recognize the realities of today's suburban communities and allow such activity unless it is certain that there is a public area which is reasonably accessible. If the courts fail to require this, the right of expression will be severely restricted.

In the final analysis, these problems may be more imaginary than real. If any one of the test factors are missing, there is no language in the holding which should prevent courts from subordinating private property rights to the first amendment rights which were involved in these cases. In any event, and regardless of how the courts will treat these factors, the *Logan Valley* "functional equivalency" test is dead.

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STANDING: A PUBLIC ACTION REQUIRES A DIRECT PRIVATE WRONG

The defendant, United States Department of the Interior, was in the planning stages of developing Mineral King Valley into an extensive recreational ski resort. Plaintiff, Sierra Club, claiming a special interest in the conservation and sound maintenance of the nation's national parks, brought suit for a declaratory judgment and a preliminary and permanent injunction restraining federal officials from approving the development. Plaintiff relied upon section 10 of the Administrative Procedure Act as a basis for judicial review, claiming itself to be a "person aggrieved" within the meaning of the Act.[1] Plaintiff did not allege that the threatened action would affect the club or its members personally, but rather maintained that its special interest in conservation was encompassed by the Act and was an adequate basis for standing. The United States District Court for the Northern District of California granted a preliminary injunction. The Court of Appeals for the Ninth Circuit reversed,[2] holding that the plaintiff did not have standing because it failed to allege any private wrong. The court also held that the plaintiff failed to show an irreparable injury justifying a preliminary injunction. On writ of certiorari, the Supreme Court of the United States *held*, affirmed: A litigant has standing under the Administrative Procedure Act to seek judicial review only if he can show that he has suffered or will suffer injury, economic or otherwise. As the plaintiff in the instant case had not alleged injury to itself or its members, it was without standing to maintain the action. *Sierra Club v. Morton*, 92 S. Ct. 1361 (1972).

32. Marsh v. Alabama, 326 U.S. 501, 508 (1946).

1. 5 U.S.C. § 701 (1970).
2. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

The Administrative Procedure Act, upon which the Sierra Club based its standing, 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."[3] The question presented in *Sierra Club* was whether a party who, as a representative of the public interest, is seeking to challenge agency action in an attempt to protect the environment, is "adversely affected" by such action so as to have standing to sue without an allegation of some direct personal injury.

The instant question was not a new one for the federal courts, and for purposes of this article, the case of *Scenic Hudson Preservation Conference v. Federal Power Commission*[4] is a convenient point of departure. In *Scenic Hudson*, an unincorporated association, consisting of a number of nonprofit conservationist organizations, was held to have standing to obtain a review of a decision of the Federal Power Commission which granted a license to a New York power company to build a hydroelectric project. The relevant statute under which the plaintiffs claimed standing was section 313(b) of the Federal Power Act, which reads:

> [A]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located . . . .[5]

Although the plaintiffs had not alleged any "personal, economic injury resulting from the Commission's action,"[6] the court reasoned that the Federal Power Act required the Commission to adopt a plan which would take into account the conservation of natural resources. Therefore, the plaintiffs could be considered as within the scope of the Federal Power Act.

In *Citizens Committee v. Volpe*,[7] conservationist associations were held to have standing to challenge administrative action allegedly dangerous to the preservation of national resources without a showing of any direct personal or economic harm to themselves. The plaintiffs were an unincorporated association of citizens who resided near a proposed expressway which was to run along the Hudson River bank, and a national conservation organization (the Sierra Club) which had substantial membership in the area and which had a history of involvement in the preservation of national resources. The plaintiffs asserted the interest of the public in the natural resources, scenic beauty, and historical value of the immediate area threatened, and further claimed that they were "ag-

3. 5 U.S.C. § 702 (1970).

4. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

5. 16 U.S.C. § 825*l*(b) (1970).

6. Scenic Hudson Preserv. Conf. v. Federal Power Comm'n, 354 F.2d 608, 615 (2d Cir. 1965).

7. 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970).

grieved," for purposes of judicial review, when the Army Corps of Engineers acted adversely to the public interest.

The court agreed with the plaintiffs' contention and held that the plaintiffs were aggrieved by agency action within the meaning of a relevant statute[8] and were, therefore, entitled to review under the Administrative Procedure Act.[9] Drawing upon a concept developed in earlier cases,[10] the court stated that the plaintiffs were "serving as 'private Attorney Generals,' "[11] and went on to state that

> the public interest in environmental resources . . . is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest.[12]

The Supreme Court case of *Association of Data Processing Service Organizations, Inc. v. Camp*[13] represents a major effort by the court to clarify the requisites of standing in the area of public law. In *Data Processing*, the plaintiffs, who were in the business of providing data processing services for the community at large, brought an action to enjoin the Comptroller of the Currency from promulgating a ruling permitting national banks to make data processing services available to bank customers. They claimed that such a ruling was in violation of the Bank Service Corporation Act of 1962[14] and would infringe upon the plaintiffs' financial interests.

The Court, in deciding that there was standing, set forth a "two-pronged" test whereby a party would have standing upon a showing that first, the plaintiff alleges "that the challenged action has caused . . . injury in fact, economic or otherwise,"[15] and secondly, 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."[16] In *Data Processing*, the plaintiffs were able to meet these re-

8. The plaintiffs relied upon two statutes. Rivers and Harbors Appropriation Act of 1899, section 9, 33 U.S.C. § 401, and Department of Transportation Act, 49 U.S.C. § 1655(g) (1970).

9. Citizens Comm. v. Volpe, 425 F.2d 97 (2d Cir. 1970).

10. Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943). Scripps-Howard Radio, Inc. v. F.C.C., 316 U.S. 4 (1942). In *Ickes*, the court stated that the plaintiff need not have a private interest; it is enough that a statute authorizes him to represent the public interest as a "private attorney general."

11. Citizens Comm. v. Volpe, 425 F.2d 97, 102 (2d Cir. 1970).

12. *Id.* at 105. It should be noted that the standing of the two conservationist groups was considered separately from that of co-plaintiff Village of Tarytown through whose boundaries the proposed expressway was to run. Therefore, it cannot be inferred that the tangible injury which threatened the village conferred any additional status upon the associations' claims.

13. 397 U.S. 150 (1970) [hereinafter referred to as *Data Processing*].

14. 12 U.S.C. § 1864 (1970). According to this statute, no bank service corporation may engage in any activity other than the performance of bank services for banks.

15. Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 152 (1970).

16. *Id.* at 153. With this new standard, the Court eliminated the "legal interest" test,

quirements since they had alleged bank competition which caused them economic injury (injury in fact), and since the interest sought to be protected was held to be arguably within the zone of interests to be protected by the Bank Service Corporation Act. The plaintiffs were, therefore, " 'aggrieved' persons . . . entitled to judicial review"[17] under section 702 of the Administrative Procedure Act. It should be noted that the Court did not limit the "interests to be protected" prong of the test to economic interests, but recognized that such interests may at times reflect " 'aesthetic, conservational, and recreational' " values.[18]

In the instant case, the Sierra Club alleged that it had, by its activities and conduct, exhibited a "special interest" in national resources, especially the Sierra Nevada Mountains, and that it served as a "representative" of the public in matters involving these resources. Moreover, the club alleged that its "interests would be vitally affected" and that it would be "aggrieved" by the threatened development of Mineral King.[19] On this basis, the Sierra Club contended that it had established its own protected interest in conservation and, therefore, should be permitted to act as representatives of the public in order to protect its interests.

It is submitted that the rationale behind the "public action" concept is that administrative agencies, such as the Department of the Interior, have the power to make far-reaching changes in society. Often, powerful commercial special interest groups work hand-in-hand with these government agencies to bring about these changes, be they beneficial or undesirable. In contrast, the public cannot effectively mobilize its vast resources to counter every threatened action. Therefore, the need arises for some organization close to the particular problem to act as a "private attorney general" in order to present the contrary view to the courts for their determination.[20] Moreover, where direct injury is required, no one would have standing to protest even the most outrageous destruction of virgin wilderness.[21]

In *Sierra Club*, the Supreme Court did not consider the alleged destruction of the environmental and aesthetic balance of Mineral King to be insufficient as a basis for injury in fact under the *Data Processing*

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which it condemned as erroneously going to the merits. The legal interest test required that the right invaded be one arising out of property, contract, or tortious invasion, or be one founded on a statute which confers a privilege. *See* Association of Data Processing Service Orgs. v. Camp. 406 F.2d 837 (8th Cir. 1969).

17. Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 157 (1970). As to the validity of the *Data Processing* test, see, Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

18. Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 154 (1970), *citing* Scenic Hudson Preserv. Conf. v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965) *and* Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966), in support of this statement.

19. Brief for Petitioner at 17-18, Sierra Club v. Morton, 92 S. Ct. 1361 (1972).

20. *Id.* at 19.

21. *Id.* at 23.

test. Rather, the court stressed that such harm must be tied to a discernible party or to a specified segment of society at large.[22]

The public action theory presented by the Sierra Club was, in the Court's opinion, based upon a "misunderstanding" of previous cases which purported to grant standing in the public interest. To clarify and settle the point, the Court stated that some personal and direct injury in fact is necessary to establish standing to seek judicial review, but "once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate."[23]

The argument that the special interest of the Sierra Club was proof of its real and bona fide concern, sufficient to place the parties in an adversary context and to fulfill the injury in fact requirement of *Data Processing*, was also rejected. The Court reasoned that mere special interest in a problem is not sufficient to render the party "adversely affected" within the meaning of section 702 of the Administrative Procedure Act. Moreover, such a requirement would in reality be no requirement at all, since any person or group could claim such a "special interest" with no guarantee that those bringing the action would have a direct stake in the outcome.[24]

The decision in *Sierra Club v. Morton*, while regretfully being too formalistic and technical, should not be a severe practical impediment in future environmental law cases. At most, environmentalist organizations will be forced to carry on proceedings through a fiction of having a local resident or user of threatened lands as the complaining party. It is submitted that in view of this possible development, the Court's requirement that injury in fact be some direct personal harm will be a meaningless obstacle.

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22. 92 S. Ct. at 1364. It should be noted that the Court concerned itself with only the "injury in fact" requirement of *Data Processing*, and did not consider any questions regarding the meaning of the "zone of interests" test or its possible application to the facts of the instant case. *Id.* at 1365 n.5.

23. *Id.* at 1367.

24. *Id.* at 1368.