

STANDING: SUITS AGAINST FEDERAL REGULATORY AND ADMINISTRATIVE AGENCIES—INVESTMENT COMPANY INSTITUTE v. CAMP

In 1962,¹ regulatory responsibility for the fiduciary activities of national banks was transferred from the Federal Reserve Board to the Comptroller of the Currency (Comptroller).² Since that time the Comptroller has exercised authority under the Federal Reserve Act to grant national banks, by special permit, the authority to exercise trust and other fiduciary powers.³ In April, 1963, the Comptroller issued revised Regulation 9 which, for the first time, permitted national banks to commingle managing agency accounts as an aspect of their fiduciary powers.⁴ Pursuant to this regulation,⁵ the First National City Bank of New York (Citibank) obtained the Comptroller's approval to organize and operate a commingled managing agency account, thus marking the entry of national banks into the mutual fund industry.⁶ Fearing the competitive impact of this move, the Investment Company Institute (ICI) brought suit against the Comptroller and Citibank, praying for a declaratory judgment invalidating so much of the Comptroller's Regulation 9 as permitted national banks to operate this type of account.⁷

¹ Prior to 1962 statutory authority for the regulation of the fiduciary activities of national banks was vested in the Board of Governors of the Federal Reserve System. Federal Reserve Act of 1913, ch. 6 § 10(k), 38 Stat. 251, 262 (1913), as amended, 12 U.S.C. § 248(k) (1970). The statute as amended permits the Board to assign any of its functions, except those relating to rulemaking or pertaining principally to monetary and credit policies, to one or more hearing examiners, members or employees of the Board, or Federal Reserve Banks.

² 12 U.S.C. § 92a (1970).

³ 12 U.S.C. § 92a(j) (1970) provides that the Comptroller is authorized to issue such rules as he deems necessary to enforce the proper exercise of those powers.

⁴ See 12 C.F.R. § 9.18 (1971). In addition to the types of collective investment funds permitted under the prior regulation this revision provided that national banks were authorized to invest funds held in collective investment accounts. 12 C.F.R. § 9.18(a) (3) (1971). Moreover, the revised regulation allowed the Comptroller to approve collective investment of such funds in a manner other than those expressly provided by Regulation 9. 12 C.F.R. § 9.18(c)(5) (1971).

⁵ 12 C.F.R. § 9 (1971). Since the fund was to be regulated by both securities and banking laws, the Bank's offering of the plan required the prior approval of three agencies: the Comptroller of the Currency, the Federal Reserve Board, and the Securities and Exchange Commission. The controlling statutes for securities regulation are the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-52 (1970), and the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1970). The relevant banking statute is the Glass Steagall Act of 1933, 12 U.S.C. §§ 24 Subd. Seventh, 78, 377-78 (1970).

⁶ For a history of Citibank's fund, see generally Hearings on S. 2704 Before the Subcomm. of the Senate Comm. on Banking and Currency, 89th Cong., 2d Sess. (1966); see also Note, *Commingled Trust Funds and Variable Annuities: Uniform Federal Regulation of Investment Funds Operated by Banks and Insurance Companies*, 82 Harv. L. Rev. 435 (1968); Comment, *Banks, Trusts and Investment Companies: The Commingled Investment Funds*, 115 U. Pa. L. Rev. 1276 (1967); Comment, *Of Banks and Mutual Funds: The Collective Investment Trust*, 20 Sw. L. J. 334 (1966).

⁷ The scope of this comment is limited to the implications of the Court's holding

The Comptroller responded by challenging the standing of ICI, a national association of mutual funds and their investment advisors and underwriters, contending that mere competitive injury caused by federally authorized action does not, without more, confer standing upon the injured party.

The District Court for the District of Columbia held that ICI had standing as an implied beneficiary of the banking laws⁸ and invalidated the challenged regulation because it allowed national banks to engage in the securities investment business in direct contravention of

on the issue of standing in *ICI*. The following outline of the issues raised on the merits is provided for the purpose of background.

In defense of Regulation 9, the Comptroller argued that: 1) Citibank's fund as organized under Regulation 9 constituted the fiduciary relationship required under the banking statutes; 2) Sections 16, 21, 20 and 32 of the Glass Steagall Act, 12 U.S.C. §§ 24 Subd. Seventh, 78, 377-78 (1970), while prohibiting national banks from engaging directly in the securities business or affiliating with organizations dealing in securities, apply only where banks invest depositors' funds and thus are not controlling when a bank establishes a fund similar to Citibank's in which customers purchase "units of participation" in an account to be managed by their bank; 3) any danger of aggressive use of the fund by Citibank was minimal since, unlike a mutual fund plan, the bank received only a set fee for managing the fund instead of a "sales load" or the charge normally required of a customer on initiation in the mutual fund. Furthermore, there was no redemption charge to customers in the fund comparable to the fee paid by mutual fund investors when they sell their fund shares.

The District Court for the District of Columbia ruled that: 1) the relationship between the bank and an individual participant in the fund was that of agent-principal and not that of beneficiary-trustee as required under the Federal Reserve Act, 12 U.S.C. §§ 92a (a), (j) (1970). *Investment Company Institute v. Camp*, 274 F. Supp. 624, 639-40 (D.D.C. 1967). Although § 92a(j) does allow a national bank to offer the same fiduciary services to customers that a local state bank might offer, the relevant New York statutes do not authorize a state bank to operate a commingled managing agency account. *Id.* at 641; 2) the units of participation issued were securities which Citibank, as a national bank, was prohibited from selling under §§ 16 and 21 of the Glass Steagall Act of 1933, 12 U.S.C. §§ 24, Subd. Seventh, 378 (1970). *Id.* at 645-47; 3) the bank's affiliation with the commingled account was prohibited by §§ 20 and 32 of the Act, 12 U.S.C. §§ 378, 78. *Id.* at 644-45, 647-48 (1970).

On an appeal by the Comptroller, the court of appeals reversed the district court on the merits, ruling that the Glass Steagall Act was designed to prohibit bank investment of depositor funds and thus that it did not apply where the bank invested funds as a managing agent of customer funds in a commingled account. 420 F.2d 83 (D.C. Cir. 1969). The Supreme Court of the United States on certiorari held that the operation of a collective investment fund of the kind approved by the Comptroller, that is, in direct competition with the mutual fund industry, involves a bank in the underwriting, issuing, selling and distributing of securities in violation of §§ 16 and 21 of the Glass Steagall Act. *Investment Company Institute v. Camp*, 401 U.S. 617 (1971).

For a background of the issues raised on the merits, see Comment, *NASD v. SEC—Standing to Sue, Economic Power, Banks and Mutual Funds*, 55 Va. L. Rev. 1493 (1969); Note, 44 N.Y.U. L. Rev. 1135 (1969).

⁸ *Investment Company Institute v. Camp*, 274 F. Supp. 624, 636 (D.D.C. 1967). The court found in the Glass Steagall Act "a clear Congressional policy which sought to separate national commercial banking from the securities business. . . . This competition is illegal in the sense that Congress has indicated its policy of separating the two financial institutions and this Regulation allows in an indirect manner a joinder of these interests. The plaintiffs were the recipients by implication of Congressional protection."

the Glass Steagall Act of 1933.⁹ On appeal by the Comptroller, the Court of Appeals for the District of Columbia Circuit affirmed the lower court on the issue of standing,¹⁰ apparently reasoning that, since ICI was the only party likely to contest the Comptroller's order, the importance of a decision on the merits compelled a finding of standing to vindicate the public interest.¹¹ However, the appellate court reversed the district court's decision on the merits, holding that the administrative actions were fully consonant with the regulatory purposes of the Glass Steagall Act.¹² On certiorari, the United States Supreme Court held that ICI had standing to challenge the validity of Regulation 9 and that the regulation was invalid.¹³ The rationale of the Court's holding on the issue of standing was that: 1) ICI had suffered injury in fact from the competition of the banks; 2) Congress had arguably legislated against the competition which ICI challenged; and 3) Congress had not intended to proscribe judicial review of the challenged federal agency action.¹⁴

The *ICI* test for standing, if literally interpreted, represents a shift from the Court's longheld position that "economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations."¹⁵ Previously, a competitor had standing in suits of this nature only when the statutory provision invoked reflected a legislative purpose to protect a competitive interest, that is, only when the injured interest was a legally protected interest.¹⁶ To support

⁹ See note 7 *supra*.

¹⁰ *National Ass'n of Securities Dealers v. SEC*, 420 F.2d 83 (D.C. Cir. 1969). NASD had intervened before the Securities and Exchange Commission to oppose the grant to Citibank's fund of any exemption from the provisions of the Investment Company Act of 1940. After the SEC granted the exemption, NASD sought review in the District of Columbia Circuit. On review, the case was consolidated with *ICI*.

¹¹ The majority opinion of the court, a *per curiam* statement, was accompanied by the concurring opinions of Chief Judge Bazelon and Judge Burger (now Mr. Chief Justice Burger). Judge Bazelon admitted that ICI could meet none of the traditional criteria of standing in suits against federal regulatory and administrative agencies. However, he found that standing should be granted to ICI since it was the most likely petitioner to assert the public interest in the enforcement of the Glass Steagall Act. 420 F.2d at 100. Judge Burger, with whom Judge Miller concurred, disagreed with the rationale of the Bazelon opinion but agreed that ICI should be granted standing because of the substantial issues presented in the case. 420 F.2d at 108.

¹² 420 F.2d at 84. The court's *per curiam* opinion simply stated that the actions of the SEC and the Comptroller were fully consonant "with the statutes committed to their regulatory jurisdictions." A full discussion of the merits is contained in Chief Judge Bazelon's concurring opinion. 420 F.2d at 85-95. See also note 7 *supra*.

¹³ *Investment Company Institute v. Camp*, 401 U.S. 617 (1971).

¹⁴ *Id.* at 620-21.

¹⁵ *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 5 (1968), reiterating a proposition stated as early as *Railroad Co. v. Ellerman*, 105 U.S. 166, 173 (1881).

¹⁶ *Tennessee Elec. Power Co. v. T.V.A.*, 306 U.S. 118 (1939), see text at p. 294 *infra*. *F.C.C. v. Sanders Bros Radio Station*, 309 U.S. 470 (1940), see text at pp. 294-95 *infra*. *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968), see text at pp. 296-97 *infra*. Cf. *Chicago*

this new test of standing, the Court cited its recent decision in *Association of Data Processing Service Organizations, Inc. v. Camp* which held that a complainant had standing if he were "arguably within the zone of interests protected by a statute."¹⁷ However, the *Data Processing* test appeared to be a mere modification of the legal interest approach to standing rather than the generically different and substantially broader test set forth in *ICI*. While neither the *Data Processing* nor the *ICI* test for standing is without ambiguity, they both clearly represent a trend "toward enlargement of the class of people who may protest administrative action."¹⁸ This comment analyzes the development in this area of the law beginning with *Data Processing* and culminating in *ICI*. It concludes that standing is now assured to persons who sustain competitive injury resulting from arguably unauthorized administrative action, provided that judicial review of the challenged action is by statute neither expressly precluded nor limited to a class of persons of which the petitioner is not a member.

I. THE PRE-Data Processing DECISIONS

Traditionally, the doctrine of standing has posed a formidable obstacle to suits brought against officials of federal regulatory and administrative agencies. Plaintiffs suffering injury as a result of allegedly unauthorized federal agency action have been consistently denied judicial review on the basis of this "complicated specialty of federal jurisdiction . . ."¹⁹ As a result, actions of the various federal agencies have remained essentially insulated from judicial review.²⁰ The restrictions imposed by the concept of standing derive from the constitutional requirement that federal courts limit their jurisdiction to "cases" and

v. Atchinson, T. & S.F. Ry. Co., 357 U.S. 77 (1958), involving two competitors one of whom alleged that the other was operating illegally because it had not complied with certain licensing requirements imposed by the city of Chicago. The Court held that the plaintiff had the necessary "personal interest in the outcome" to create a controversy, and thus had standing. It was enough that the plaintiff had sustained injury in fact from competitive activity which was allegedly violative of a licensing statute designed to promote public safety. 357 U.S. at 83-4.

¹⁷ 397 U.S. 150, 153 (1970).

¹⁸ *Id.* at 154.

¹⁹ *United States ex rel. Chapman v. F.P.C.*, 345 U.S. 153, 156 (1953).

²⁰ E.g., *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), petition for cert. filed, 39 U.S.L.W. 3215 (U.S. Nov. 15, 1970) (No. 939) (conservation group lacks standing to challenge construction of ski resort on national forest land); *South Hill Neighborhood Ass'n, Inc. v. Romney*, 421 F.2d 454 (6th Cir. 1970) (groups interested in preservation of historic landmarks denied standing). Commentators have noted the prohibitive effect of standing requirements on plaintiffs seeking judicial review of the failure of federal administrators to enforce housing regulations. See Comment, *Judicial Review in Urban Renewal Cases: Concepts and Consequences*, 57 Geo. L.J. 615 (1969); Note, *Protecting the Standing of Renewal Site Families to Seek Review of Community Relocation Planning*, 73 Yale L.J. 1080 (1964). Similar difficulty has been encountered by environmental interest groups in suits against federal agencies. See Comment, *Standing of Conservation Organizations to Challenge Federal Administrative Action in Federal Court*, 12 B.C. Ind. & Com. L. Rev. 637 (1971).

"controversies."²¹ This requirement is satisfied when a plaintiff establishes a personal interest in the outcome of the controversy, thus assuring the concrete adverseness upon which courts rely for illumination of the issues presented.²² However, largely as a matter of judicial restraint, the Supreme Court has generally required something more to satisfy the standing requirement where a person seeks review of federal agency action.²³ In addition to the requisite personal stake, a plaintiff has generally been required to demonstrate that he has suffered injury to a legally protected interest or that he has standing to sue in the public interest.²⁴ However, whether the plaintiff sought to establish standing under the legal interest theory or by asserting the public interest, the chances of reaching the merits of the case were often minimal because of the limited grant of standing afforded under either approach.

The legal interest theory, typically, has required a complainant to show either that his claim arose from a common law contract or property right or that his standing was "founded on a statute which confers a privilege."²⁵ An action brought in the public interest has usually been predicated on a statutory provision allowing "any . . . person . . . aggrieved or whose interest is adversely affected by federal agency action" to bring suit.²⁶ However, even under this theory a complainant

²¹ U.S. Const. art. III, § 2. The basic justification for the existence of standing is that it staves off judicial involvement in political questions, advisory opinions, friendly or collusive suits, and avoids unnecessary interference with governmentally delegated functions. See generally 3 K. Davis, *Administrative Law Treatise* §§ 22.01 et seq. (1958) [hereinafter cited as Davis]; L. Jaffe, *Judicial Control of Administrative Action*, chs. 12-13 (1965). See also Bickel, *Forward: The Passive Virtues, The Supreme Court, 1960*

²² *Baker v. Carr*, 369 U.S. 186, 204 (1962). See also *Flast v. Cohen*, 392 U.S. 83, 101 (1968) which involved the standing of a taxpayer to challenge a federal program providing financial assistance to parochial schools. The Court required the plaintiff to show both a logical nexus between his status as a taxpayer and the specific constitutional limitation on the congressional taxing and spending power, as well as injury in fact. *Id.* at 102-03. For an analysis of *Flast*, see Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 63, 224-31 (1968).

²³ Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 468-69 (1970). The reason advanced for requiring additional standing criteria in competitors' suits such as that in *ICI* is that stringent standing requirements prevent disruption of the federal administrative process by businesses alleging illegality of any federal agency action which affords a competitor a comparative advantage. See, e.g., *Alabama Power Co. v. Ickes*, 302 U.S. 464, 466-67 (1938); *Pennsylvania R.R. v. Dillon*, 335 F.2d 292 (D.C. Cir. 1964); see also Jaffe, *Standing To Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255 (1961).

²⁴ For a discussion of these standing criteria see generally, 3 Davis, *supra* note 21, at §§ 22.04-05; 22.01, 22.11; L. Jaffe, *Judicial Control of Administrative Action*, chs. 12-13 (1965).

²⁵ *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939). See also note 24 *supra*.

²⁶ E.g., the Federal Communications Act § 402(b)(2), 47 U.S.C. § 402(b)(6) (1970), provides judicial review for persons "aggrieved or whose interests are adversely affected by any order of the Commission granting or denying [an] . . . application." The "person aggrieved" provisions have spawned a number of decisions on standing. See Comment, *Competitors Standing to Challenge Administrative Action—Recent Federal Developments*, 48 N.C. L. Rev. 807, 815-20 (1970).

has been required to show a specific congressional authorization to sue. The legal interest test, as originally conceived in *Tennessee Electric Power Co. v. Tennessee Valley Authority*,²⁷ was marked by ambiguity and fallacious reasoning. In *Tennessee Power*, nineteen power companies challenged the constitutionality of the Tennessee Valley Authority (TVA). Although recognizing the severe financial injury which the plaintiffs would sustain due to governmentally created competition in the business of electrical power supply, the Court held that the plaintiffs did not have standing to challenge federal agency action because they could not demonstrate that their legal rights had been violated.²⁸ The problem with the legal interest concept of standing is that the *controversy* in most law suits is precisely this point—whether the plaintiff has a legally protected interest or right which the defendant has invaded or has threatened to invade. Thus, under the legal interest theory, the courts and the parties were embroiled in the merits of the case within the context of the standing issue. Commenting on the judicial reasoning spawned by *Tennessee Power*, one authority has observed that:

A plaintiff who seeks to challenge governmental action always has standing if a legal right of the plaintiff is at stake. When a legal right of the plaintiff is not at stake, a plaintiff sometimes has standing and sometimes lacks standing. Circular reasoning is very common, for one of the questions asked in order to determine whether a plaintiff has standing is whether the plaintiff has a legal right, but the question whether the plaintiff has a legal right is the final conclusion. . . .²⁹

Within three years after *Tennessee Power*, the Court was again faced with a "competitors" lawsuit in which the plaintiff complained of economic injury and unauthorized federal agency action, but in which he could not demonstrate a legally protected right. Because of the restrictive nature of the *Tennessee Power* decision³⁰ the Court found it necessary to recognize an alternative means of granting standing to persons who did not meet the legal interest test. In *FCC v. Sanders Brothers Radio Station*,³¹ the petitioner was an owner of a radio station and a licensee under the Federal Communications Act (FCA). He claimed that a Federal Communications Commission grant

²⁷ 306 U.S. 118, 137-38 (1939).

²⁸ *Id.* In defining a "legally protected interest" the Court was particularly careful to note that the plaintiff's competitive injury, regardless of its substantiality, did not qualify as a protected legal interest. The Court denied standing despite allegations that the federal agency action in question was unauthorized. *Id.*

²⁹ 3 Davis, *supra* note 21, at 217.

³⁰ Professor Davis has called the *Tennessee Power* test "palpably false" concluding that "[i]f this proposition were the law, then no one could challenge a statute outlawing the Baptist Church, or prohibiting Republican speeches, or denying criminal defendants a jury trial, or authorizing unlawful searches, or compelling witnesses to testify against themselves." K. Davis, *Administrative Law Text*, 401 (1959).

³¹ 309 U.S. 470 (1940).

of an operating license to a competitor was illegal per se because it caused competitive injury to an existing licensee—the petitioner. The Court found that the petitioner had not suffered injury to a legally protected interest but nevertheless held that he did have standing to sue in the public interest. To resolve the issue of standing, the Court looked to Section 402(b)(6) of the FCA, which provides for the right of appeal “by any . . . person . . . aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application . . . [for an operating license].”³² The Court construed this provision as a congressional grant of standing to sue in the public interest:

Congress . . . may have been of [the] opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the . . . court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing³³

Thus in *Sanders* the Court opened a new, albeit narrow, avenue to suits challenging federal regulatory action. Under *Sanders* a plaintiff has standing in such a suit when he can demonstrate injury in fact and when the controlling legislation *expressly* provides for judicial review but does not prescribe the class of qualified complainants.

In 1946, it appeared that Congress had significantly expanded the legal interest test when it enacted the Administrative Procedure Act (APA).³⁴ Section 10(a) of the APA, on its face, purported to grant standing to anyone aggrieved by agency action within the meaning of a relevant statute.³⁵ Moreover, the legislative history indicated that section 10(a) was intended to promote judicial review of federal agency action by granting standing to persons adversely affected by such agency action where the pertinent regulatory legislation did not contain express review provisions.³⁶ However, the courts, since *Kansas City Power & Light Co. v. McKay*,³⁷ have consistently interpreted the section as a mere codification of the legal interest test.

³² 47 U.S.C. § 402(b)(6) (1970).

³³ 309 U.S. at 477.

³⁴ 5 U.S.C. §§ 551-59, §§ 701-06 (1970). See §§ 701-06 which are pertinent to judicial review.

³⁵ APA § 10(a), 5 U.S.C. § 702 (1970). Section 10(a) provides: “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”

³⁶ “This subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute.” S. Doc. No. 248, 79th Cong., 2d Sess. 212, 276 (1946). For a vigorous argument that APA Section 10(a) should carry this interpretation, see 3 Davis, *supra* note 21, at 211-13. See also Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 465-68 (1970); Comment, *Standing to Challenge Unlawful Competition Under the National Bank Act*, 10 B.C. Ind. & Com. L. Rev. 421, 431-35 (1969).

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

In *McKay*, under a fact situation substantially similar to that of *Tennessee Power*,³⁸ the plaintiffs claimed standing contending that they were parties aggrieved by agency action within the meaning of Section 10(a) of the APA. Since *Tennessee Power* had held that competitors in the plaintiffs' position had no right to sue, the plaintiffs argued, in effect, that the APA's provision for judicial review supplied an independent basis for standing. The court, however, took a far more restrictive view. Referring to the language of section 10(a) as "terms of art,"³⁹ the court held that the section was enacted "for the benefit of 'any person suffering legal wrong,' that is, one whose legal rights have been violated."⁴⁰ Thus, the *McKay* court interpreted the section as merely a restatement of existing law, and required a showing that either a legal right had been violated (*Tennessee Power*) or that an express review provision was part of the statutory scheme (*Sanders*) as prerequisite to a challenge of a federal regulatory or administrative action.⁴¹ The *McKay* interpretation of section 10(a) has received general judicial acceptance. While there is a growing body of case law to the contrary, courts have generally regarded the APA as merely a codification of existing concepts of standing rather than as an expansion of the federal law of standing.⁴²

In *Hardin v. Kentucky Utilities Co.*,⁴³ the Supreme Court held that a petitioner could challenge federal agency action by demonstrating, through an examination of the legislative history of the relevant statute, that in enacting the legislation Congress had intended to protect his interests. The petitioner, a privately owned public utility, claimed standing to seek an injunction against TVA expansion into an area which the petitioner was serving. The power company claimed standing based upon a provision in the TVA Act of 1959 which barred TVA expansion beyond areas for which the TVA was "the primary source of power supply on July 1, 1957. . . ."⁴⁴ On the basis of the legislative history, the Court determined that the petitioner had standing. The Court found that Congress had enacted the statute primarily

has since reconsidered its interpretation of the APA and has given section 10(a) a literal application and full recognition of the broad scope of standing the Act provides. See *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). However, the predominant judicial interpretation of section 10(a) remains narrow.

³⁸ As in *Tennessee Power*, the plaintiffs were a group of electric utility companies challenging the legality of federal assistance to other electrical utility companies within the same area that plaintiffs were either servicing or intending to serve. 225 F.2d at 927.

³⁹ *Id.* at 932.

⁴⁰ *Id.*

⁴¹ *Id.* at 932-34.

⁴² E.g., "[T]his [aggrieved persons] clause 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. Pierce & Son, Inc. v. Hardin*, 299 F. Supp. 557, 562 (N.D. Tex. 1969). See also *Braude v. Wirtz*, 350 F.2d 702 (9th Cir. 1965); *Duba v. Schuetzle*, 303 F.2d 570 (8th Cir. 1962); *Harrison-Halsted Community Group, Inc. v. Housing and Home Finance Agency*, 310 F.2d 99 (7th Cir. 1962).

⁴³ 390 U.S. 1 (1968).

⁴⁴ *Tennessee Valley Authority Act of 1933* § 15d(a), 16 U.S.C. § 831n-4(a) (1970).

for the purpose of protecting the competitive position of a class of persons to which the petitioner belonged.⁴⁵ Significantly, *Kentucky Utilities* did not require the petitioner to show either a protected legal interest or an express statutory provision conferring standing. However, the usefulness of the test was seriously limited by the cumbersome study of legislative history required of the petitioner before the Court would grant standing.

Thus, prior to *Data Processing*, the Court had developed the law of standing in suits against federal agencies essentially within the context of a "legal interest." Although each new test the Court pronounced provided petitioners new alternatives by which to achieve standing, the criteria for standing remained characterized, and hence restricted, by "legal interest" overtones. Plaintiffs were required to demonstrate either a particular type of injury or evidence of congressional intent in order to establish standing. Finally, in *Association of Data Processing Service Organization, Inc. v. Camp*,⁴⁶ the Court announced a standard which, in light of its application in *ICI*, eliminates the legal interest requirement previously necessary to a plaintiff's challenge of federal agency action.

II. THE *Data Processing* RATIONALE

In *Data Processing* the Supreme Court held that a competitor has standing if a) he has suffered injury in fact, b) his interest to be protected is arguably within the zone of interests to be protected or regulated by the statute or congressional guarantee in question, and c) judicial review of the challenged agency action has not been precluded.⁴⁷ The complainants in *Data Processing* sought to challenge a ruling by the Comptroller of the Currency which permitted national banks to make data processing services available to other banks and to bank customers.⁴⁸ The complainants satisfied the Article III "cases" and "controversies" requirement by alleging that the challenged ruling could cause a loss of future profits and that one of the defendants had acquired business previously belonging to one of the complainants.⁴⁹ Despite the allegation of economic injury and the questionable validity of the Comptroller's ruling, the lower courts had denied standing because the complainants could demonstrate neither a violated legal interest nor a statutory grant of standing.⁵⁰ The Supreme Court re-

⁴⁵ 390 U.S. at 6-7.

⁴⁶ 397 U.S. 150 (1970).

⁴⁷ *Id.* at 153-58.

⁴⁸ Comptroller's Manual for National Banks 3500 (October 15, 1966), cited in full by the Court. 397 U.S. at 152.

⁴⁹ 397 U.S. at 152.

⁵⁰ *Association of Data Processing Service Organizations, Inc. v. Camp*, 279 F. Supp. 675 (D. Minn. 1968). Essentially, the district court based its holding on a "long and well established line of judicial authority holding that plaintiffs whose only injury is loss due to competition lack standing to maintain legal action to redress their economic injury." *Id.* at 678. The circuit court ruled that standing to challenge alleged illegal

versed, noting that "the existence . . . of a 'legal interest' is a matter quite distinct from the problem of standing."⁶¹ The Court summarily disposed of the "legal interest" test by stating that the test concerns the merits of the case and not standing. The Court further stated that the question of standing, apart from the "cases" and "controversies" test,⁶² is concerned with the question of whether the complainant's interest is "arguably within the zone of interests . . . protected . . . by the statute . . ."⁶³

Undoubtedly, this new test of standing was designed to enlarge the class of persons able to challenge federal administrative action.⁶⁴ But whether the *Data Processing* decision abrogated the legal interest test entirely or merely modified it by reducing the quantum of proof required to establish standing was not made clear. The modification theory is supported by the language of the new test which faintly echoes the "legal interest" line of decisions. Further support is found in the Court's discussion of *Chicago v. Atcheson, T. & S.F.R. Co.*,⁶⁵ and *Hardin v. Kentucky Utilities Co.*,⁶⁶ cases involving statutes which allegedly protected the complainants against the challenged competition. Nonetheless, a closer analysis of the decision suggests that the legal interest test was indeed put to rest. However, the test that petitioner must be "arguably within the zone of interests" establishes a result but does not set forth the criteria by which achievement of this result may be ascertained. Nor did the Court elaborate upon the practical application of this test; rather, the majority simply concluded that Section 4 of the Bank Service Corporation Act of 1962⁶⁷ "arguably brings a competitor within the zone of interests protected by it."⁶⁸

Section 4 of the Act provides that "[n]o bank service corporation may engage in any activity other than the performance of bank services." While arguably designed to protect a bank competitor's economic interests, the section does not, on its face, evidence an intent to protect competitors in general or a specific class thereof. Moreover, it may be argued from the statutory language that section 4, despite its

competition will attach only where the plaintiffs possess a legal interest or where Congress has recognized the need for review of administrative action and the plaintiff is so significantly involved as to be allowed to represent the public. *Association of Data Processing Service Organizations, Inc. v. Camp*, 406 F.2d 837, 839-44 (8th Cir. 1969).

⁶¹ 397 U.S. 150, 153 & n.1.

⁶² *Id.* at 151-52.

⁶³ *Id.* at 153.

⁶⁴ The Court noted that "[w]here statutes are concerned, the trend is toward the 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." 397 U.S. at 154. Furthermore, the Court clearly put to rest the notion of a presumption against judicial review, "unless that purpose is fairly discernible in the statutory scheme." 397 U.S. at 157.

⁶⁵ 357 U.S. 77 (1968).

⁶⁶ 390 U.S. 1 (1968).

⁶⁷ Bank Service Corporation Act of 1962, 76 Stat. 1132, codified at 12 U.S.C. § 1864 (1970).

⁶⁸ 397 U.S. at 156.

anticompetitive effects, was enacted in order to limit banks to banking functions.⁵⁹ However, the Court refused to inquire further into the matter because to do so would "implicate the merits."⁶⁰ Thus the net effect of the decision is that a competitive interest is arguably within the zone of interests protected by a statute if the injury results from competitive activity which is arguably prohibited by the statute. Although this interpretation of the decision requires something more than injury in fact in order to establish standing, a "legal interest" no longer need be shown, at least as the phrase has been previously understood. While this expansive reading of the *Data Processing* case seems justified, the Court appeared immediately to withdraw to a modified legal interest theory of standing in the companion case of *Barlow v. Collins*.⁶¹

In *Barlow*, a group of cash-rent tenant farmers challenged an amendatory regulation promulgated by the Secretary of Agriculture which permitted the tenants to assign their right to government subsidy payments as security for the rental payments of the land which they leased.⁶² The subsidies were paid pursuant to the upland cotton program, enacted as part of the Food and Agricultural Act of 1965 (FAA).⁶³ The relevant statutory provision permitted the assignment of payments only "as security for cash or advances to finance making a crop." Prior to 1966, "making a crop" was defined by regulation to exclude assignments securing the cash rent for a farm.⁶⁴ Under this regulation, tenant farmers were able to form cooperatives in order to purchase the necessary supplies at the best available price. The regulation, as amended, deleted the exclusion and expressly permitted assignments to secure cash rent.⁶⁵ As a result, the landlords were permitted to demand advance assignment of subsidy benefits as a condition to leasing the land. Upon assignment, the tenants lost their only security and thus were unable to obtain the financing needed for farming from anyone except the landlords. Now captive consumers, the tenants were

⁵⁹ This inference is supported by the Court's analysis and primary reliance on the First Circuit's reading of § 4 in *Arnold Tours, Inc. v. Camp*, 408 F.2d 1147, 1153 (1st Cir. 1969), cert. denied, 397 U.S. 987 (1970). Quoting the First Circuit the Court stated:

Section 4 has a broader purpose than regulating only the service corporations. It was also a response to the fears expressed by a few senators that without such a prohibition, the bill would have enabled "banks to have engaged in nonbank activity" . . . and thus constitute "a serious exception to the accepted public policy which strictly limits banks to banking." . . . We think Congress has provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against.

397 U.S. at 155.

⁶⁰ *Id.* at 156.

⁶¹ *Id.* at 159.

⁶² 7 C.F.R. § 709.3 (1971).

⁶³ Section 402(a) of the Food and Agricultural Act of 1965, 79 Stat. 1194, codified at 7 U.S.C. § 1444 (1970). See 397 U.S. at 160 n.1.

⁶⁴ 20 Fed. Reg. 6512 (1955), discussed by the Court at 397 U.S. at 160-61.

⁶⁵ 7 C.F.R. § 709.3 (1971).

compelled to pay exorbitant prices and rates of interest in order to obtain their supplies.⁶⁶

In order to determine whether the tenant farmers had standing to challenge the Secretary's regulation, the Supreme Court applied the test devised in *Data Processing*. Finding that the tenant farmers had the requisite personal interest in the outcome, and that they were clearly included within the zone of interests protected by the FAA, the Court held affirmatively.⁶⁷ In reaching its decision, the Court noted that the FAA requires the Secretary of Agriculture to "provide adequate safeguards to protect the interests of tenants . . ."⁶⁸ and, "as far as practicable, [to] protect the interests of tenants."⁶⁹ Examining the legislative history of the FAA, the Court found evidence of a "congressional intent to benefit the tenants."⁷⁰ Although this evidence tangentially related to the tenants' ability to assign their subsidy payments, the Court did not mark this as the "injured interest" of the petitioners which fell within the zone of interest protected by the FAA. Instead, the Court indicated that standing was based on congressional concern for the tenants' welfare rather than on any particular interest they asserted.⁷¹

The Court's scrutiny of the legislative history in order to discover congressional intent to protect the tenants is strongly reminiscent of the legal interest theory and seems to indicate that the *Data Processing* test in application is merely an expansion of the old test of standing. As Justices Brennan and White noted in their dissent on the issue of standing in both *Data Processing* and *Barlow*, while the majority had purportedly rejected the legal interest test, *Barlow* clearly reflected the circular reasoning which had discredited the old standard.⁷² The majority's consideration of the legislative history resulted in a direct implication of the only substantial issue in the case: "does the statutory language 'making a crop' create a legally-protected interest for tenant farmers in the form of a prohibition against the assignment of their federal benefits to secure cash rent?"⁷³

The ambiguities of the new test, as formulated and applied in *Data Processing* and *Barlow*, were reflected in the opinions of lower courts applying the new standard. The decisions indicated varying degrees of acceptance of *Data Processing*: 1) only an inferential reliance on the new test with the basis of the court's holding essentially

⁶⁶ 397 U.S. at 163.

⁶⁷ *Id.* at 164.

⁶⁸ 7 U.S.C. § 1444(d)(10) (1970). 397 U.S. at 164.

⁶⁹ 16 U.S.C. § 590 h(b) (1970). 397 U.S. at 164.

⁷⁰ 397 U.S. at 164-65.

⁷¹ *Id.*

⁷² *Id.* at 168.

⁷³ *Id.* Justice Brennan argued that the Court's decision in *Flast v. Cohen*, 398 U.S. 83 (1968), supported a test of standing which would require only a showing of "injury in fact." While Justice Brennan acknowledged that *Flast* was a taxpayer's suit, he did not find it necessary to distinguish, for the purpose of standing, a suit against a federal regulatory or administrative agency.

grounded in an "injury in fact" test and a consideration of the relevant statutory materials;⁷⁴ 2) reliance on a status of the petitioner which could "arguably" qualify his standing;⁷⁵ or 3) a liberal application of the test, granting the plaintiff standing because he had sustained injury in fact due to federal agency action, and had asserted that the federal action was "arguably" unauthorized.⁷⁶ The problems of definition in the new test for standing may be attributed, in part, to the fact that both *Data Processing* and *Barlow* were remanded for trial on the merits after the question of standing had been resolved.⁷⁷ Had it chosen

⁷⁴ *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970) (residents, businessmen and representatives of private civic organizations in urban renewal areas had standing to seek injunctive relief against issuance of a contract of insurance or guaranty and against the execution or performance of a contract for rent supplement payments for an apartment project which was about to be constructed in the renewal area. The court found that petitioners had suffered and possibly would continue to suffer injury in fact as members of a potentially displaced community. The court further found that judicial review was not denied by relevant legislation. Id. at 818.). *Delaware v. Pennsylvania N.Y. Cent. Transp. Co.*, 323 F. Supp. 487 (D. Del. 1971) (standing granted to seek injunctive relief to petitioner alleging injury in fact to the local environment by a dike and fill operation by the U.S. Army Corps of Engineers in the Delaware River. Id. at 492-93.) Cf. *Klanke v. Camp*, 320 F. Supp. 1185 (S.D. Tex. 1970) (standing granted to challenge Comptroller of the Currency's alleged arbitrary and capricious denial of an application for a national bank charter. The court noted that *Data Processing* encouraged the enlargement of the class of petitioners who could challenge allegedly unauthorized activity of the Comptroller where injury in fact was sustained and judicial review was not expressly or impliedly precluded in the relevant legislation. Id. at 1187-88.)

⁷⁵ *Nader v. Volpe*, 320 F. Supp. 266 (D.D.C. 1970). The court found that plaintiff had standing under the *Data Processing* test to seek an injunction which would restrain the Dept. of Transportation from granting extensions of the effective date of a federal motor vehicle safety standard to car manufacturers. According to the court, the purpose of the controlling statute was to reduce "traffic accidents and deaths and injuries to persons resulting from traffic accidents." Id. at 269. However, the court apparently reasoned that plaintiff Nader could assert the public interest because of his position on the National Motor Vehicles Safety Advisory Council and his status as a national crusader for automobile safety and not because of the "mere fact that he uses automobiles. . . ." Id. at 269.

⁷⁶ *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970), where the court held that corporations which had formerly supplied the government with ball point pens had standing to challenge an allegedly illegal letter of commitment from the government to the National Industries for the Blind which guaranteed purchases of 70% of the estimated government's ball point pen requirements. The court held that the *Data Processing* standard required that 1) "the party must allege that the challenged action has caused him injury in fact . . ."; 2) "the agency has acted arbitrarily . . . or in excess of its statutory authority, so as to injure an interest that is 'arguably within the zone of interests to be protected or regulated by the statute . . . in question . . .'"; 3) "there must be no 'clear and convincing' indication of a legislative intent to withhold judicial review." Id. at 1207. See also *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970).

⁷⁷ Under a fact situation strikingly similar to that of *Data Processing*, the Court applied the new test in *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970), holding that a group of travel agencies were "arguably" within the zone of interests protected by § 4 of the Bank Service Corporation Act and thus had standing to challenge a regulation of the Comptroller of the Currency permitting national banks to offer travel arrangement services to their customers. The per curiam decision merely applied, without clarifying, the ambiguous standard of *Data Processing* and *Barlow*.

to hear the merits of the cases, the Court presumably would have demonstrated both the "zone of interests" protected or regulated by the relevant regulatory statute and the relationship to that zone of the "injured" interest asserted by the petitioner. Thus, a discussion of the merits would more precisely illustrate the limits of the new test as well as its difficulties. Herein lies the significance of *Investment Company Institute v. Camp*,⁷⁸ in which the Court went to the merits after finding that the petitioners had standing. Although *ICI* does not completely resolve the problems arising from *Data Processing*, the decision does eliminate many of the uncertainties of that case.

III. *Investment Company Institute v. Camp*

In *ICI*, the Court's treatment of the standing issue was brief. The Court ruled that the *Data Processing* test controlled and held that the petitioners had standing to challenge Regulation 9 because: petitioners had suffered injury in fact from the competition of the banks; Congress had arguably legislated against the competition which *ICI* challenged; and Congress had not intended to proscribe judicial review.⁷⁹ These criteria for standing clarify the fundamental ambiguity of the *Data Processing* standard. Under *Data Processing*, the plaintiff had to show that he was "arguably within the zone of interests."⁸⁰ In *ICI*, where judicial review had not been expressly precluded by statutes, the plaintiff had to show that Regulation 9 permitted competition which was *arguably unauthorized*. Thus, the Court's interpretation of *Data Processing* was that a competitor is "arguably within the zone of interests" protected by a statute if his injury results from federally authorized action which *arguably* is beyond the statutory scope of the challenged federal agency. It is submitted that the *ICI* interpretation of the *Data Processing* test indicates a total abrogation by the Court of the legal interest test. That this is the correct reading of *Data Processing* is supported not only by the language used in *ICI* but, more importantly, by the Court's interpretation of the legislative history of the Glass Steagall Act in the decision on the merits of the case.

In a rather extensive treatment of the legislative history of the Glass Steagall Act, the majority did not uncover any evidence of a congressional concern for the Investment Company Institute or others

Data Processing and *Barlow* are discussed in Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450 (1970); Jaffe, *Standing Again*, 84 Harv. L. Rev. 633 (1971) (this article also discusses *Arnold Tours, Inc. v. Camp*); The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 177 (1970); Comment, *Competitors Standing to Challenge Administrative Action—Recent Federal Developments*, 48 N.C. L. Rev. 807, 826-30 (1970); Comment, *Judicial Review of Agency Action: The Unsettled Law of Standing*, 69 Mich. L. Rev. 540 (1971); Note, 23 U. Fla. L. Rev. 206 (1970). For a discussion of the implications these cases may have for conservation groups, see Comment, *Standing of Conservation Organizations to Challenge Federal Administrative Action in Federal Court*, 12 B.C. Ind. & Com. L. Rev. 637 (1971).

⁷⁸ 401 U.S. 617 (1971).

⁷⁹ *Id.* at 620-21.

⁸⁰ See text at pp. 297-99 *supra*.

in the same class.⁸¹ Indeed, the Court's opinion cited legislative history which evidenced no more than a congressional concern for the solvency and security of national banks. The Court noted that in the Glass Steagall Act Congress

had in mind and repeatedly focused on the more subtle hazards that arise when a commercial bank goes beyond the business of acting as fiduciary or managing agent and enters the investment banking business either directly or by establishing an affiliate to hold and sell particular investments. This course places new promotional and other pressures on the bank which in turn creates new temptations.⁸²

The focus of the pressures and temptations was upon the relationship between a national bank and its affiliate collective investment fund. When the Glass Steagall Act was under consideration in 1933, Congress was concerned about bank involvement in the investment field for a variety of reasons, including: (a) the possibility of a loss of public confidence in a bank should its affiliate fare badly; (b) the temptation on the part of a bank to shore up an affiliate through improvident loans; (c) the development of a "salesman's interest" by a bank for its affiliate, *i.e.*, the promotional incentives the bank would have in the performance of its fund, for, if the fund were less successful than the traditional mutual funds, the bank would lose the resulting fees; and (d) the temptation to make credit facilities more freely available both to investors in the affiliate and to companies whose stock the affiliate held.⁸³ Central to the problems which the Glass Steagall Act was intended to prevent was the fear that public confidence in banking institutions could be destroyed by unsound commercial banking practices.

Thus, in finding that Congress "did legislate against the competition that the petitioners challenge,"⁸⁴ the Court apparently meant that Congress not only legislated against the challenged activity but that it did so, in part, for reasons founded upon the resulting competition. However, as the legislative history indicates, the prohibitions of the Glass Steagall Act were designed to keep banks *out of*, and not to protect persons *within*, the securities investment industry.⁸⁵ Congress was

⁸¹ In discussing the Glass Steagall Act, the Court did not refer to a congressional concern to protect the mutual fund industry but discussed only the congressional prohibition on national bank participation in the securities investment market. Furthermore, the majority never discussed a congressional concern for the stability of the stock market or the securities investment field in general. The Court observed merely that the fund "finds itself in direct competition with the mutual fund industry." *Id.* at 625. The purpose of this statement was to show the similarities between the collective investment fund of the Bank and the mutual fund industry, and not to indicate a congressional intention to protect ICI and those similarly situated from bank competition. *Id.*

⁸² *Id.* at 630-31.

⁸³ *Id.* at 631-32.

⁸⁴ *Id.* at 621.

⁸⁵ The Court quoted a statement by Senator Buckley made at the time the Glass Steagall Act became law:

not concerned with the impact the added bank competition would have on the investment field but rather with the ill effects such competition could have on national banks. The zone of interests to be protected by the Glass Steagall Act encompassed the interest of the general public in the promotion and preservation of "prudent and disinterested commercial banking practices which would generate confidence in the commercial banking system."⁸⁶ There was nothing in the Court's reading of the legislative history which indicated a congressional design to protect the mutual fund industry or any class of persons from bank competition.⁸⁷ On the contrary, there existed a clear expression that Congress intended to minimize the anticompetitive aspects of the Glass Steagall Act.⁸⁸ Thus while *Barlow*, with its examination of legislative history supporting the conclusion that the tenant farmers were clearly within the zone of protected interests, seems to limit the meaning of *Data Processing*, the legislative history in *ICI* illustrates that the *Data Processing* test is applicable even where a statute bears no relation to competitive injury.

Shortly after the *Data Processing* decision, one commentator suggested that the Court would move to a standing test requiring only "injury in fact."⁸⁹ Indeed, the Court in *ICI* seems to have come close to this proposition. The Court has defined persons "arguably within the zone of interests" to include everyone alleging injury in fact resulting from "arguably" unauthorized regulatory action. However, requiring a complainant to allege that the challenged action is arguably unauthorized appears to be no more than that required of any plain-

If we want banking service to be strictly banking service, without the expectation of additional profits in selling something to customers, we must keep the banks out of the investment security business. 75 Cong. Rec. 9912 (1932).

Id. at 634. The Court then went on to state:

The language that Congress chose to achieve this purpose includes the prohibitions of § 16 [of the Glass Steagall Act] that a national bank "shall not underwrite any issue of securities or stock" and shall not purchase "for its own account . . . any shares of stock of any corporation," and the prohibition of § 21 [of the Glass Steagall Act] against engaging in "the business of issuing, underwriting, selling, or distributing . . . stocks, bonds, debentures, notes, or other securities."

Id.

The Court's study of the legislative history surrounding the Glass Steagall Act further revealed that "[e]ven before the passage of the Act it was generally believed that it was improper for a commercial bank to engage in investment banking directly." *Id.* at 629.

⁸⁶ *Id.* at 634.

⁸⁷ Justice Harlan emphasized this point in his dissent: "[T]he Court cannot mean . . . that it was Congress' purpose to protect petitioners' class against competitive injury for . . . neither the language of the pertinent provisions of the Glass Steagall Act nor the legislative history evinces any congressional concern for the interest of petitioners and others like them in freedom from competition." *Id.* at 640.

⁸⁸ *Id.* at 640. Justice Harlan observed that: "[I]t appears reasonably plain that, if anything, the [Glass Steagall] Act was adopted despite its anticompetitive effects rather than because of them."

⁸⁹ Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 457-58 (1970)

tiff. Essentially, the complainant is required only to state a claim upon which relief can be granted. Thus, in suits involving action by agencies whose regulatory function is concerned with activities affecting the general public interest, and whose actions are not insulated by statute from judicial review, nor limited to a particular class of persons, an allegation of injury in fact should be sufficient to establish standing. This result is not novel but is fully consonant with the express language of the standing provision in the Administrative Procedure Act which the courts, until *Data Processing*, had interpreted as only a codification of the legal interest test.⁹⁰

The only remaining obstacle to a trial on the merits in suits where the relevant statute does not limit standing to a particular class of petitioners should be congressional prohibition of judicial review of the challenged federal agency action. This, however, is a question of reviewability and not of standing. Moreover, it is well settled that such a congressional prohibition must be made explicit in the relevant statutory language. In general, judicial review of agency action is the rule rather than the exception.⁹¹ Although the approach to the problem of standing proposed by the *ICI* decision might be criticized as opening the old and rusty floodgates of litigation, the *ICI* test still requires a plaintiff to show that he has a personal stake in the outcome of the case and that the activity of which he complains is "arguably" illegal.

Two important questions remain unanswered by the *ICI* decision. The first is whether standing will be granted to a plaintiff harmed by allegedly unauthorized federal agency action where the relevant legislation was designed to protect a class of persons of which the plaintiff is not a member. Although Justices Brennan and White argued in their dissenting and concurring opinion to both *Data Processing* and *Barlow* that a simple allegation of injury in fact should be sufficient to establish standing in a suit brought against a federal agency,⁹² it appears that the application of *Data Processing* will be limited to cases involving statutes which (a) do not preclude judicial review and (b) do not contain a legislative grant of standing. That is, the *Data Processing* test as interpreted and applied in *ICI* will permit judicial review of federal administrative action in those cases where, prior to *Data Processing*, review would not have been possible even though the pertinent regulatory statute did not preclude review. Thus, *ICI* should not be interpreted as an automatic bestowal of standing upon petitioners having a competitive interest adversely affected by federal agency action. Rather, it should more properly be viewed as the Court's

⁹⁰ See pp. 295-96 *supra*.

⁹¹ In *Data Processing*, the Court stated that "[t]here is no presumption against judicial review and in favor of administrative absolutism, unless that purpose is fairly discernible in the statutory scheme." 397 U.S. at 157. See also *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and *Switchmen's Union of N. America v. National Mediation Board*, 320 U.S. 297 (1943).

⁹² 397 U.S. at 167-68. See text accompanying notes 72, 73 *supra*.

limited grant of standing to the most likely petitioner, the competitor, where the public interest is threatened by arguably unauthorized agency action.

The second question is whether the grant of standing in this limited situation will be extended to a petitioner who is not a competitor. While competitive harm provided the requisite injury in fact in both *Data Processing* and *ICI*, the Court's discussion of the statutes involved in each case, as well as their legislative history, failed to evince any sense of congressional concern for competitors. Indeed, it appears that the congressional concern in each statute was the public's interest in the solvency and security of national banks. Furthermore, Justice Douglas, in writing the *Data Processing* opinion, clearly indicated that the zone of interests protected by a regulatory statute could include "'aesthetic, conservational, and recreational' as well as economic values. . . ."⁹³ Thus it would appear that the *ICI* decision may have applicability in situations other than the competitor's lawsuit where groups seek to advance the purely public interest.

CONCLUSION

The standing to sue doctrine has traditionally been an obstacle to suits brought against federal administrative or regulatory agencies. Although plaintiffs have alleged that unauthorized federal agency action has caused them injury, courts have consistently denied them judicial review on the basis of standing. In *Data Processing* the Supreme Court reassessed the criteria of standing for suits of this nature and held that a plaintiff should be required only to allege that the challenged agency action caused him "injury in fact, economic or otherwise" and to assert an interest which is "arguably within the zone of interests protected by the statute or constitutional guarantee in question." Although the new test appeared to alter significantly the previous standing criteria, precisely how and to what degree remained unclear. Much of this ambiguity has been eliminated by *Investment Company Institute v. Camp*, where the Supreme Court held that standing is established when a complainant states injury in fact caused by allegedly illegal but federally authorized competition, and asserts the protection of regulatory legislation which neither prohibits judicial review nor limits it to a particular class of petitioners. Thus the *Data Processing* test, as applied in *ICI*, will now assure judicial review of allegedly unauthorized federal agency action. It is suggested that this is the most liberal precedent for the determination of standing in suits brought against federal regulatory or administrative agencies whose enabling legislation fails to indicate any class of prospective petitioners.

It remains to be seen whether standing will be granted to all petitioners who sustain injury in fact where the relevant regulatory legislation does not preclude judicial review. It has been suggested that

⁹³ 397 U.S. at 154.

the *Data Processing-ICI* line of decisions will have limited applicability and will serve as precedent for standing in a competitor's suit only where the pertinent statute does not limit standing to a particular class of persons. In this limited situation, the important question to be answered is whether *noncompetitors* will be able to establish standing to sue under the *Data Processing* test. It would appear from dicta in the *Data Processing* majority opinion that the new test may indeed be available in a noncompetitor suit in which the petitioner seeks to protect the public interest. This prospect, if realized, would be the most significant ramification of the *Data Processing* solution to the problems of standing.

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