Florida Law Review

Volume 25 | Issue 1 Article 12

September 1972

Administrative Law: Standing to Represent the Public Interest--The Password is Injury

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ADMINISTRATIVE LAW: STANDING TO REPRESENT THE PUBLIC INTEREST – THE PASSWORD IS INJURY

Sierra Club v. Morton, 405 U.S. 727 (1972)

Petitioner, a national conservation club,[1] brought suit under the Administrative Procedure Act[2] (APA) to halt proposed commercial recreational development of Mineral King Valley in the Sequoia National Forest.[3] Asserting a special organizational interest in conserving national parks and forests, but refusing to allege any direct effect on the Club or its members, petitioner sought declaratory and injunctive relief restraining the Secretaries of the Interior and Agriculture from approving the project.[4] The district court's preliminary injunction[5] was reversed by the Court of Appeals for the Ninth Circuit[6] on the ground petitioner did not allege sufficient injury to deserve standing.[7] On certiorari, the Supreme Court affirmed and HELD a longstanding special interest in a problem by even the most qualified organization is not alone sufficient to give that organization standing to secure judicial review under the APA.[8] Justices Brennan, Douglas, and Blackmun dissented.[9]

Article III of the United States Constitution restricts federal judicial power to cases and controversies.[10] Effectuating this limitation the Supreme Court has followed a policy of deciding cases only when strictly necessary.[11] The judge-made rule of standing[12] supports this "strictly necessary" policy[13] by insuring that a party seeking relief presents his dispute in an adversary

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1. The Sierra Club is a non-profit corporation with 78,000 members nationally. 405 U.S. 727, 735 n.8 (1972).

2. 5 U.S.C. §§101 *et seq.* (1970) [hereinafter cited as APA].

3. In 1965 the Forest Service of the Department of Agriculture invited interested parties to submit proposals for creation of a recreational development in Mineral King Valley. The plan submitted by Walt Disney Productions was approved in January 1969. In connection with the plan, the Department of the Interior proposed to allow the State of California to build a road traversing Sequoia National Park and also issued a permit for construction of a power transmission line. Additionally, the Secretary of Agriculture agreed to issue revokable permits for construction of ski lifts, motels, pools, parking lots, and sewage treatment facilities on the forest land. The cost of the complex is expected to exceed $35 million and is designed to accommodate 14,000 visitors daily. 405 U.S. at 729.

4. *Id.* at 734-36.

5. Sierra Club v. Hickel, Civil No. 51,464 (N.D. Cal., filed July 23, 1969).

6. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

7. *Id.* at 30.

8. 405 U.S. at 739.

9. *Id.* at 741-60.

10. U.S. CONST. art. III, §2.

11. Rescue Army v. Municipal Court, 331 U.S. 549 (1947).

12. "Apart from Article III jurisdictional questions, problems of standing, as resolved by this Court for its own governance, have involved a 'rule of self-restraint.'" Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 154 (1970). *See also* Barrows v. Jackson, 346 U.S. 249, 255 (1953).

13. *See* Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

context and in a form capable of judicial resolution.[14] The standing requirement, therefore, is not fulfilled by merely alleging meritorious issues[15] or invasions of a protected interest.[16] The requirement is met only when a "proper party" makes such allegations.[17] To be a proper party to challenge administrative action a litigant must show either a sufficient personal stake in the controversy[18] or a statutory grant of judicial review.[19]

Without the aid of a statute authorizing judicial review[20] litigants faced tremendout difficulty in showing a personal stake in challenges to administrative action.[21] Realizing this, Congress in 1946 passed the Administrative Procedure Act,[22] which provides in part: "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."[23] Early decisions interpreting the APA, however, confused and frustrated the Act's intended liberalization of judicial review by applying definitions of "legal interest" and "legal wrong" extant prior to passage of the APA.[24] In

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14. Flast v. Cohen, 392 U.S. 83, 101 (1968). *See also* Chicago v. Atchison, T. & S.F.R.R., 347 U.S. 77, 83-84 (1958).

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

16. *Id.* at 100.

17. *Id.*

18. Baker v. Carr, 369 U.S. 186, 204 (1962). *See also* Barlow v. Collins, 397 U.S. 159, 164 (1970); Giles v. Harris, 189 U.S. 475, 486 (1903); L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 501 (1965).

19. Although Congress may not confer jurisdiction on federal courts to render advisory opinions, Muskrat v. United States, 219 U.S. 346 (1911), or to entertain "friendly suits," United States v. Johnson, 319 U.S. 302 (1943), or to resolve "political questions," Luther v. Borden, 48 U.S. (7 How.) 1 (1849), "where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue' . . . is one within the power of Congress to determine." 405 U.S. 732 n.3.

20. Courts were willing to relax the restrictive legal right requirement, *infra* note 21, when a litigant could assert some statutory authority for judicial review. *See* Scripps-Howard Radio v. FCC, 316 U.S. 4, 14 (1942) (Communications Act of 1934 conferred standing on radio station as "person aggrieved" to contest FCC's grant of license to another station notwithstanding there was no legal right to be free from competition). *See also* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). Then in Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir.), *dismissed as moot*, 320 U.S. 707 (1943), Judge Frank, following what he believed to be the rationale of *Scripps-Howard*, formulated the now-famous theory that a private party would have standing as a "private attorney general" to sue in the public interest when authorized by a statute conferring judicial review. *Id.* at 704. For a criticism of Judge Frank's Interpretation *see* Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1314 (1961). *See also* Berger, *Standing To Sue in the Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968).

21. *See, e.g.*, Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939) (standing exists only when challenged administrative action invades a "legal right"). *See also* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

22. 5 U.S.C. §§101 *et seq.* (1970).

23. 5 U.S.C. §702 (1970).

24. *See, e.g.*, Duba v. Schuetzle, 303 F.2d 570, 574 (8th Cir. 1962); Ove Gustavsson Contracting Co. v. Floete, 278 F.2d 912, 914 (2d Cir. 1960); Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 932 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955).

1970 the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp*[25] resolved some of the confusion concerning standing under the APA. Recognizing the trend toward enlargement of the class of people who may protest administrative action,[26] the Court enunciated a two-pronged test of standing to obtain judicial review of agency action under the APA: (1) the litigant must allege that the challenged action has caused him "injury in fact," and (2) the alleged injury must be to an interest "arguably within the zone of interests to be protected or regulated" by the statute that the agency allegedly violated.[27]

Although *Data Processing*'s two-pronged test clarified the various, often conflicting, interpretations of the APA's review provisions[28] and recognized the Act's liberal intent,[29] the new test was not without its own ambiguities. The injury-in-fact requirement was easy enough to meet by a litigant suffering personal economic loss,[30] but it posed a more confusing problem for parties claiming injury to the public interest. Even though *Data Processing* held the injured interest need not be economic but could reflect "aesthetic, conservational, and recreational" values,[31] the Court provided no insight as to how the latter injuries to the public interest must be demonstrated.

Thus, the courts had to resolve the question of how an environmental organization might suffer sufficient injury to its conservational interest to give it standing under the APA. If a location were damaged or threatened by governmental action, more liberal courts[32] would grant standing to an organization that had demonstrated a special interest in that location.[33] In

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25. 397 U.S. 150 (1970).

26. *Id.* at 154.

27. *Id.* at 153-54. *See also* Barlow v. Collins, 397 U.S. 159 (1970), decided the same day as *Data Processing*. Justices White and Brennan (concurring and dissenting in *Data Processing* and *Barlow*) rejected the second half of the majority's test. They felt standing should be based only on a showing of injury in fact and that the question of whether the plaintiff's interest is one protected by a statute goes to the merits of the case. *Id.* at 172. Their view is supported in Davis, *Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

28. *See* note 24 *supra*.

29. *See* text accompanying note 26 *supra*. *See also* Davis, *supra* note 27, at 468.

30. Both *Data Processing* and *Barlow v. Collins* involved economic loss. Economic injury had long been recognized as sufficient for standing. *See, e.g.*, Hardin v. Kentucky Util. Co., 390 U.S. 1, 7 (1968); Chicago v. Atchison T. & S.F.R.R., 357 U.S. 77, 83 (1958); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940).

31. 397 U.S. 150, 154 (1970).

32. *See, e.g.*, West Virginia Highlands Conservatory v Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Environmental Defense Fund, Inc. v. HEW, 428 F.2d 1083 (D.C. Cir. 1970); Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 728 (S.D. Ark. 1971); Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alaska 1971); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 878 (D.D.C. 1971); Izaak Walton League v. St. Clair, 313 F. Supp. 1312 (D. Minn. 1970).

33. *See* Sierra Club v. Hardin, 325 F. Supp. 99, 110 (D. Alaska 1971): "Any other

Citizens Committee for the Hudson Valley v. Volpe,[34] for example, the Committee and the Sierra Club were granted standing because their past activities and conduct "exhibited a special interest" in the preservation of the Hudson Valley environment.[35] Likewise, in *West Virginia Highlands Conservatory v. Island Creek Coal Co.*[36] the Conservatory was deemed a proper party because of its past dedication "to preserving natural, scenic, and historic areas in the West Virginia highlands."[37]

Other courts, notably the Ninth Circuit Court of Appeals, employed a narrower concept of organizational standing.[38] Thus, when the instant case reached the Ninth Circuit, the Sierra Club's demonstrated interest in the Mineral King Valley's environment was held insufficient to give it standing to challenge respondents' alleged environmental degradation.[39] The Ninth Circuit desired an additional allegation that somehow Club property would be damaged, its organization endangered, or its status threatened by the contested development.[40]

The Supreme Court in the instant case was therefore faced with resolving conflicting views of what must be alleged in order to establish standing by those claiming injury to widely shared interests of a non-economic nature. The Court agreed with the Club's allegation that destruction of the scenic, natural, and historic objects of the park would constitute "injury in fact"[41] but ruled that the "injury in fact" test encompassed more than an injury to a cognizable interest; it required the party seeking review to be among the injured.[42]

Apparently feeling that an allegation of special interest in the Valley would be sufficient to allow standing to argue in the public interest,[43] the Sierra Club refused to allege that it or its members would be affected in any of their activities by the development.[44] The instant Court felt this approach

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rule would have the practical effect of preempting many meritorious actions, as one individual, or a small number of individuals, would have to sustain the entire financial burden of the lawsuit."

34. 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970).

35. *Id.* at 103. *See also* Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 616 (2d Cir. 1965).

36. 441 F.2d 232 (4th Cir. 1971).

37. *Id.* at 235. *See also* Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238, 245 (M.D. Pa. 1970).

38. *See, e.g.*, Alameda Conservation Ass'n v. California, 437 F.2d 1087 (9th Cir.), *cert. denied*, 402 U.S. 908 (1971); Brooks v. Volpe, 329 F. Supp. 118 (W.D. Wash. 1971); Citizens Comm. for the Columbia River v. Resor, 2 ERC 1683 (D. Ore. 1971).

39. Sierra Club v. Hickel, 433 F.2d 24, 33 (9th Cir. 1970).

40. *Id.* at 30. *See* Alameda Conservation Ass'n v. California, 437 F.2d 1087, 1090 (9th Cir. 1971) (a more liberal approach would "wreak havoc with administration of government"). The Ninth Circuit's approach was especially crucial to environmental groups, since 75% of public lands are located within its jurisdiction. Carver, *The Federal Proprietary Functions — A Neglected Aspect of Federal Administrative Law*, 19 AD. L. REV. 107, 113 (1966).

41. 405 U.S. at 734.

42. *Id.*

43. This had been sufficient in the more liberal lower courts. *See* note 32 *supra*.

44. 405 U.S. at 735 n.8.

not only misunderstood traditional "public action" requirements,[45] but also provided no objective basis upon which to disallow suits by other special interest groups, however small or short-lived.[46] The Court reasoned that the history and spirit of requirements for actions brought on behalf of the public established a dual proposition: first, "injury in fact," whether economic, aesthetic, or conservational, affords standing to seek review; second, only after standing is obtained by establishing injury may a litigant argue the public interest in support of his claim.[47]

As Mr. Justice Blackmun noted in his dissent, the instant decision represents a practical method of retaining the traditional notions of standing.[48] New situations and novel litigation concepts, however, are becoming increasingly difficult to fit into such traditional notions. Moreover, the validity of the Court's rationale may be questionable. Its contention that to allow organizational standing to protect the public interest upon a showing of special interest would offer no objective standard for preventing special interest groups from clogging the courts with ill-founded claims ignores the Court's traditional ability to recognize and separate the frivolous from the meritorious.[49] In addition, courts have recognized that less stringent standing requirements have not resulted in increased case loads.[50] Arguably, the enormous cost of instituting such litigation will act as an additional barrier to frivolous suits.[51]

An alternative to the instant result, urged by Mr. Justice Douglas, is to confer standing upon the environmental objects themselves,[52] letting the forests, parks, and rivers sue in their own names with "[t]hose who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled as its legitimate spokesmen.[53] Although appearing to be a novel approach, it merely borrows from inveterate procedures, such as *in rem* actions, that have already proved their utility.[54]

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45. *Id.* at 736. *See* note 20 *supra.*

46. *Id.* at 739.

47. *Id.* at 737-38. For the distinction between standing to initiate review proceedings and standing to assert the rights of the public or third persons once the proceedings are initiated *see* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§22.05-.07 (1968).

48. 405 U.S. at 755-56. Mr. Justice Blackmun urged in the alternative that the court either grant standing to the Sierra Club on condition it amend its complaint to conform to the majority's specifications or adopt the special interest test employed by the liberal lower courts. *Id.* at 756-58. Mr. Justice Brennan concurred with the latter alternative. *Id.* at 744.

49. *Id.* at 758.

50. *See* Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 872-73 (D.C. Cir. 1970).

51. Such a cost factor was considered in Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97, 103 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970). *See also* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 523 (1965); Note, *Competitor's Standing To Challenge Administrative Action Under the APA*, 104 U. PA. L. REV. 843 (1956).

52. 405 U.S. 727, 741-42 (1972).

53. *Id.* at 745. *See also* Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

54. *See generally* G. GILMORE & C. BLACK, ADMIRALTY 31 (1957).

That the majority was not prepared to depart from the traditional concept of standing does not mean that the instant decision bodes bad favor for environmentalists. Importantly, the Court made clear that an organization whose members are injured may represent those members in obtaining judicial review[55] and once review is obtained may argue in the public interest.[56] It is also significant that the instant Court affirmed the Ninth Circuit's denial of standing but did not adopt that lower court's opinion requiring the Club to demonstrate injury to its property or organization.[57] Instead the Court implied that to obtain review the Club need only show significant effect to recreational value of members who are real users of the area in question.[58]

But this traditional fusion of "personal stake" and "injury in fact" standing requirements now applied to public environmental litigation leaves many questions unanswered. Who would qualify as a real user of an area? How many real users are needed? Must a user also be a local resident? What is a significant effect to a user? How could a club have standing to challenge desecration of remote and uninhabited areas? Thus, the instant decision must be greeted by environmental groups with guarded optimism, welcoming the rejection of the Ninth Circuit's strict standing requirements, but waiting for the Court to ossify its implicated guidelines into law through future litigation. Whatever the future ramifications of the holding, the immediate effect of denying petitioner standing may be as described by Justice Blackmun:[59]

> [T]hat the 35.3 million dollar complex, over 10 times greater than the Forest Service's suggested minimum, will now hastily proceed to completion; that serious opposition to it will recede in discouragement; and that Mineral King . . . will become defaced, at least in part, and, like so many other areas, will cease to be "uncluttered by the products of civilization."

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55. 405 U.S. at 739.
56. *Id.* at 737.
57. Sierra Club v. Hickel, 433 F.2d 24, 30 (9th Cir. 1970).
58. 405 U.S. at 735.
59. *Id.* at 756.