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EXTENSION OF THE BASIS FOR STANDING IN JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS

Parties adversely affected by the final decision of a federal administrative agency often resort to federal courts in seeking judicial review of the agency determination.[1] But in view of the number of administrative decisions rendered annually, it would be an undue burden for the federal courts to undertake review of all or even most of the decisions.[2] There must, therefore, be some means of selecting or limiting judicial review to those parties who have a direct interest and who can show a justiciable controversy. The troublesome problem of selecting or limiting parties entitled to judicial review has resulted in the rather complex federal doctrine of standing to secure judicial review of agency action.[3]

Recently, in *National Association of Securities Dealers, Inc. v. SEC*,[4] the United States Court of Appeals for the District of Columbia Circuit held that an association representing members of the mutual fund industry had standing to challenge action by the Comptroller of the Currency granting certain fiduciary powers to national banks.[5] The grant of such fiduciary powers by the Comptroller[6] enabled First National City Bank (FNCB) to engage in the operation of a commingled managing agency account[7] (Account), an activity in direct competition

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[1]During the 1966 term more than one-fourth of all cases decided on the merits by the Supreme Court were reviews of administrative actions—the largest single category of the Court's work. Black, *The Supreme Court-1966 Term*, 81 HARV. L. REV. 69, 128-29 (1967). One-third of all cases decided on the merits by the Supreme Court in 1954-56 were reviews of administrative actions. Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 793 (1957).

[2]Approximately 80,140 formal proceedings for the determination of private rights and duties were commenced before more than 100 boards, commissions and other governmental agencies during the fiscal year 1960. FINAL REPORT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 25 (1962).

[3]United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 156 (1953). *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.01 (1958); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1268 (1961).

[4]No. 20,164 (D.C. Cir., July 1, 1969), *petitions for cert. filed*, 38 U.S.L.W. 3185 (U.S. Nov. 10, 1969) (No. 835), (U.S. Nov. 12, 1969) (No. 843).

[5]In 1962 Congress transferred power to regulate fiduciary functions of national banks from the Federal Reserve Board to the Comptroller of the Currency, 12 U.S.C. § 92a(a) (1964).

[6]12 C.F.R. § 9.18 (1969) (collective investment).

[7]Under the plan approved by the Comptroller pursuant to 12 C.F.R. § 9.18 (1969) the Account is, with several notable exceptions, similar to an open-end mutual investment fund. It is managed by FNCB as agent, pursuant to a management agreement designating the customer as principal and conferring broad investment powers upon FNCB.

The customer, in exchange for a minimum deposit of $10,000, receives an

with the mutual fund industry.

For this reason, Investment Company Institute[8] (ICI) brought suit in the United States District Court for the District of Columbia seeking a declaratory judgment[9] to invalidate certain of the regulations promulgated by the Comptroller[10] on the ground that such regulations permitted national banks to engage in an activity allegedly unauthorized and illegal under the Glass-Steagall Act.[11] The district court found that ICI was an implied beneficiary of congressional intent under the Glass-Steagall Act and therefore had standing to challenge the Comptroller's determination. On appeal the Comptroller asserted that

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undivided interest in the commingled fund of the Account evidenced by "units of participation." Such units may be redeemed at net asset value without imposition of any sales load or redemption charge, or they may be transferred to other participants in the plan. The commingled fund of the Account, in turn, is invested in securities, principally common stocks and convertible bonds, offering an opportunity for income and long term capital growth.

FNCB is designated both as investment adviser and statutory underwriter for the Account with a five-member Committee (not more than three of whom are affiliated with FNCB) operating the Account and having powers similar to those of a board of directors.

The Account differs from most open-end mutual funds, first, because the securities of the Account can be marketed only to bank customers through the trust department of the bank, rather than through the wide public distribution channels normally utilized by underwriters of mutual fund issues. Second, compensation to the bank may not exceed one-half of one percent per annum of the average net asset value of the fund as contrasted with load or redemption charges imposed by most mutual funds. Third, operation of the Account is subject to the continuing supervision of the Comptroller.

The Account itself is registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-8 (1964), as an investment company and the units of participation are registered under the Securities Act of 1933, 15 U.S.C. § 77a (1964).

The format of the plan of the Account accommodates two separate sets of statutes inasmuch as it is designed to conform to the banking laws administered by the Comptroller of the Currency as well as those statutes administered by the Securities and Exchange Commission.

[8]ICI is an association of mutual funds and their advisers and underwriters.

[9]Investment Co. Inst. v. Camp, 274 F. Supp. 624 (D.D.C. 1967).

In an action filed in the district court, ICI challenged the determination of the Comptroller approving the plan of the Account and sought to enjoin FNCB's operation of the Account. From an adverse decision in the district court the Comptroller and FNCB appealed. *Id.* National Association of Securities Dealers, Inc. had originally intervened in proceedings before the SEC to challenge exemptions made to FNCB permitting operation of the Account under the Investment Company Act of 1940. The association representing the securities dealers then filed a petition in the court of appeals to review the order of the Commission granting the exemptions. Both appeals were consolidated for decision in the principal case. National Ass'n of Sec. Dealers, Inc., No. 20,164 (D.C. Cir., July 1, 1969).

[10]ICI sought to invalidate so much of the regulation of the Comptroller as permitted national banks to engage in operation of this type account. *See generally* 12 C.F.R. § 9.18 (1969).

[11]12 U.S.C. §§ 377, 378 (1964).

ICI was without standing to maintain an action for judicial review of his determination.[12]

In order to reach the merits of the case it was first necessary for the court of appeals to determine that ICI was a proper party to challenge the action of the Comptroller. Although the district court's decision granting standing based on ICI's status as an implied beneficiary of congressional protection was rejected, standing was nevertheless granted. In a per curiam opinion, the majority of the court of appeals expressed reservations concerning the standing of ICI to challenge the Comptroller but nevertheless, allowed it, in order to reach the merits.[13] First, there was ample evidence of factual aggrievance sufficient to sharpen the issues and the controversy for a judicial determination, inasmuch as bank competition permitted by the regulations allowing the Account would have a considerable adverse economic effect on the mutual fund industry.[14] Second, a matter of great public interest was involved in assuring proper administration of the Glass-Steagall Act.[15] Third, the absence of any "aggrieved party" provision in the relevant statute made it apparent that, as a practical matter, the mutual fund industry was the only party likely to challenge the administrative action of the Comptroller. A denial of standing would in effect afford rulings of the Comptroller almost complete immunity from judicial review when, as here, the Comptroller's ruling is favorable to the party asking for it.[16]

Broadly speaking, the question of standing involves a determination of *who* may challenge administrative action.[17] Traditionally, only those parties showing an invasion of some legally protected right have standing to seek judicial review of administrative action.[18] Such legal right may arise as the result of constitutional, statutory or common law protection.[19]

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[12]Brief for Camp at 16-28 and Reply Brief for Camp at 2-12, National Ass'n of Sec. Dealers, Inc. v. SEC, No. 20,164 (D.C. Cir., July 1, 1969).

[13]This comment is concerned neither with the merits of the case nor with the standing of National Association of Securities Dealers, Inc. It deals solely with the problem of ICI's standing to challenge the action of the Comptroller and to challenge competition by FNCB.

[14]National Ass'n of Sec. Dealers, Inc. v. SEC, No. 20,164 at 33, 47 (D.C. Cir., July 1, 1969).

[15]*Id.*

[16]*Id.*

[17]3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.01 (1958).

[18]*See generally* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).

[19]*See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152-53 (1951) (concurring opinion of Frankfurter, J.)

There is abundant authority for the proposition that competition created by administrative action, without more, does not in and of itself confer standing on a party to challenge such action merely on the basis of its administrative origin.[20] Economic injury caused by lawful competition is regarded as *damnum absque injuria*.[21] Moreover, the mere allegation that the activity causing economic injury is illegal or unauthorized under a particular statute administered by an agency does not confer the requisite standing on a party not intended to be protected by the statute.[22] The principal rule of standing is that it focuses on the party seeking to bring his complaint before a federal court and not on the issues he wishes to have the court adjudicate.[23]

In *Pennsylvania Roalroad v. Dillon*,[24] Judge Burger, speaking for the majority of the court, stated: "Allegation of a legally protected right is a constitutional predicate of standing to attack governmental action."[25] The relevant inquiry goes, then, to the type of status a complaining party must assert in order to gain standing.

One class of cases holds that a party has standing to challenge agency action if there has been an invasion of his legal rights.[26] Although standing was denied in *Tennessee Electric Power Co. v. TVA*,[27] where private power companies sought to enjoin TVA from distributing power in areas where they held non-exclusive public utility franchises from the state, the Supreme Court clearly stated the criteria necessary to show an invasion of common law or statutory rights. The Court said that the private power companies, threatened with direct and special injury as the result of the action of a governmental agency, had no standing to sue

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[20]Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Rural Elec. Admin. v. Central La. Elec. Co., 354 F.2d 859 (5th Cir.), *cert. denied*, 385 U.S. 815 (1966); Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955).

[21]Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).

[22]Flast v. Cohen, 392 U.S. 83 (1968); Association of Data Processing Serv. Organizations, Inc. v. Camp, 406 F.2d 837 (8th Cir.), *cert. granted*, 37 U.S.L.W. 3489 (June 24, 1969). In support of the conclusion that the Glass-Steagall Act was not intended to protect the securities industry see 75 CONG. REC. 9913-14 (1932) (remarks of Senator Bulkley).

[23]Flast v. Cohen, 392 U.S. 83, 99 (1968).

[24]335 F.2d 292 (D.C. Cir.), *cert. denied*, American-Hawaiian S.S. Co. v. Dillon, 379 U.S. 945 (1964).

[25]335 F.2d at 294.

[26]Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Frost v. Corporation Comm'n, 278 U.S. 515 (1929); *see* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Edward Hines Yellow Pines Trustees v. United States, 263 U.S. 153 (1923); Railroad Co. v. Ellerman, 105 U.S. 166 (1881); Doehla Greeting Cards, Inc. v. Summerfield, 116 F. Supp. 68 (D.D.C. 1953).

[27]306 U.S. 118 (1939).

> unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege . . . .[28]

A second class of cases confers standing on a party who can show that he was an intended beneficiary under a particular statute or regulatory scheme.[29] In *Hardin v. Kentucky Utilities Co.*,[30] a private utility company was granted standing as an intended beneficiary under a provision of the Tennessee Valley Authority Act of 1933[31] prohibiting TVA from expanding its authority outside certain geographical areas. The theory allowing standing was that such statutory provisions reflected an intent on the part of Congress to protect certain competitive interests. Recently, an association of insurance agents was granted standing to challenge action by the Comptroller allowing national banks to engage in the sale of insurance, an activity alleged to be unlawful or unauthorized under the Glass-Steagall Act,[32] on the theory that the association of insurance agents was the beneficiary of congressional intent under the Glass-Steagall Act. The court in *Wingate Corp. v. Industrial National Bank*[33] granted standing to a data processing firm on the ground that it was an intended statutory beneficiary under the Bank Service Corporation Act.[34] Moreover, state banks have generally been held to be intended beneficiaries under the Glass-Steagall Act in the so-called "branch banking" cases.[35]

A third class of cases affords a basis for standing where Congress has provided in its legislative enactment that certain parties should

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[28]*Id.* at 137-38.

[29]Where Congress has enacted some regulatory scheme as to a particular industry, competitors have been granted standing as intended beneficiaries under the statute. City of Chicago v. Atchison, T. & S.F. Ry., 537 U.S. 77 (1958) (railroad was an intended beneficiary where statute regulated the number of market entrants); Chicago Junction Case, 264 U.S. 258 (1924) (railroad was an intended beneficiary where statute required equal treatment of competitors).

[30]390 U.S. 1 (1968).

[31]§ 15d, 16 U.S.C. § 831n-4(a) (1964).

[32]Saxon v. Georgia Ass'n of Ind. Ins. Agents, 399 F.2d 1010 (5th Cir. 1968).

[33]Arnold Tours, Inc. v. Camp, 408 F.2d 1147 (1st Cir. 1969), *petition for cert. filed*, 38 U.S.L.W. 3038 (U.S. June 11, 1969) (No. 225) (*Wingate* is consolidated with *Arnold Tours*). *Contra*, Association of Data Processing Serv. Organizations, Inc. v. Camp, 406 F.2d 837; (8th Cir.), *cert. granted*, 37 U.S.L.W. 3489 (U.S. June 24, 1969) (No. 1246).

[34]§ 4, 12 U.S.C. § 1864 (1964).

[35]Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 323 F.2d 290 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965); National Bank v. Wayne Oakland Bank, 252 F.2d 537 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958); Wisconsin Bankers Ass'n v. Robertson, 190 F. Supp. 90 (D.D.C. 1960), *aff'd*, 294 F.2d 714 (D.C. Cir.), *cert. denied*, 368 U.S. 938 (1961); Commercial State Bank v. Gidney, 174 F. Supp. 770 (D.D.C. 1959).

have the right of judicial review of administrative action.[36] In *FCC v. Sanders Bros. Radio Station*,[37] the Supreme Court noted that although the Federal Communications Act did not insure freedom from competition, a licensee could, nevertheless, have standing to challenge administrative action under the "aggrieved party" provision of the Federal Communications Act.[38] Two years later in *Scripps-Howard Radio, Inc. v. FCC*,[39] the Court stressed the fact that a party claiming standing under an aggrieved party provision had standing only as a representative of the public interest. A party claiming standing to assert his rights in the public interest is, in reality, a private attorney general.

In *Associated Industries v. Ickes*,[40] the court discussed the underlying concept of the private attorney general doctrine:

> [Congress] can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person . . . authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.[41]

A party may claim standing under the aggrieved party provision of a relevant statute as a private attorney general to vindicate the public interest even though there is no property right involved.[42] Thus, the

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[36]*E.g.*, National Motor Freight Traffic Ass'n, Inc. v. United States, 372 U.S. 246 (1963) (per curiam); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

[37]309 U.S. 470 (1940).

[38]The Communications Act of 1934 § 402(b), 47 U.S.C. § 402(b) (1964) provides in part:

> Appeals may be taken . . . (1) By any applicant . . . whose application is denied . . . (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application . . . .

[39]316 U.S. 4 (1942).

[40]134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

[41]134 F.2d at 704.

[42]FCC v. National Broadcasting Co., 319 U.S. 239 (1943); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

concept of private attorney general stresses vindication of the public interest rather than any private legal right possessed by the party whose standing is challenged.[43] Under a provision requiring the party to be adversely affected or aggrieved, the requirement for standing is generally two-fold. First, the party must be adversely affected in fact, and second, the factual aggrievance must be the result of action by the agency charged with administration of the statute.[44] In *National Coal Association v. FPC*,[45] where the Commission granted a certificate of public convenience and necessity for construction of a gas transmission pipe line, Judge Bazelon, speaking for the majority, held that a trade association of fuel companies and the labor unions to which the employees of the fuel companies belonged, were sufficiently aggrieved by the action of the Commission to maintain an action for judicial review pursuant to the aggrieved party provision in the Natural Gas Act.[46] However, where there is no aggrieved party provision or other statutory aid to standing,[47] courts have generally denied standing to a party challenging administrative action which creates unauthorized competition even where the public interest is involved.[48]

Independent of any traditional basis for standing, there is some support for the proposition that aggrievance in fact is sufficient to confer standing under section 10(a) of the Administrative Procedure Act.[49] The relevant portion of that statute now reads as follows:

> 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.[50]

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[43]American Trucking Ass'ns v. United States, 364 U.S. 1 (1960); Transcontinental Bus Sys., Ins. v. CAB, 383 F.2d 466 (5th Cir. 1967), *cert. denied,* 390 U.S. 920 (1968); Mondakota Gas Co. v. FPC, 232 F.2d 358 (D.C. Cir.), *cert. denied,* 352 U.S. 846 (1956). *See also* Rural Elec. Admin. v. Northern States Power Co., 373 F.2d 686 (8th Cir.), *cert. denied,* 387 U.S. 945 (1967).

[44]Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

[45]191 F.2d 462 (D.C. Cir. 1951).

[46]§ 19(b), 15 U.S.C. § 717r(b) (1964), provides in part: "Any party... aggrieved by an order issued by the Commission . . . may obtain a review of such order in the court of appeals of the United States...."

[47]There is no statutory aid to standing for aggrieved parties under applicable banking laws. Glass-Steagall Act, ch. 89, 48 Stat. 162 (1933) (codified in scattered sections of 12 U.S.C.).

[48]Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), *cert. denied,* 350 U.S. 884 (1955).

[49]5 U.S.C. § 702 (Supp. IV, 1968); *see* American President Lines, Ltd. v. Federal Maritime Bd., 112 F. Supp. 346 (D.D.C. 1953); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.02 (1958).

[50]5 U.S.C. § 702 (Supp. IV, 1968) (emphasis added).

The legislative history of the Administrative Procedure Act, however, supports the conclusion that it was not intended to alter then existing law on the question of standing by creating an entirely new basis for standing to secure judicial review of administrative action.[51] This conclusion is supported by at least one writer[52] as well as a numerical majority of courts that have considered the point.[53]

An analysis of the status of ICI in *National Association of Securities Dealers* supports the conclusion that it cannot claim standing within any of the categories previously discussed which are traditionally recognized as conferring standing to secure judicial review of administrative action. The operation of a competitive business does not infringe upon or violate any property right of ICI, such as a license or certificate of convenience issued by any regulatory authority; there was no breach of contract inasmuch as no contract existed between the parties; and the action of the Comptroller in permitting bank operation of the Account cannot be said to have inflicted any tortious injury on ICI. For those reasons, ICI cannot claim standing on the basis of an invasion of its legal rights.[54]

The legislative history of the Glass-Steagall Act indicates that the Act was directed toward protection of the bank depositor rather than toward any protection or regulation of the securities industry.[55] ICI, therefore, cannot claim standing either as an express or an implied beneficiary of the congressional scheme of protection in the Glass-Steagall Act.

Although the competition generated by the action of the Comptroller caused aggrievance in fact due to the detrimental economic impact upon members of ICI, it cannot claim standing as a private attorney general inasmuch as the Glass-Steagall Act contained no aggrieved party provision.[56] Furthermore, the court rejected ICI's contention that

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[51]S. Doc. No. 248, 79th Cong., 2d Sess. 310 (1946); *see* 92 Cong. Rec. 2158, 5654 (1946).

[52]L. Jaffe, Judicial Control of Administrative Action 528-30 (1965).

[53]Arnold Tours, Inc. v. Camp, 408 F.2d 1147 (1st Cir.), *cert. granted,* 38 U.S.L.W. 3015 (U.S. May 19, 1969) (No. 1407, 1968 Term; renumbered No. 128, 1969 Term); Rural Elec. Admin. v. Northern States Power Co., 373 F.2d 686 (8th Cir.), *cert. denied,* 387 U.S. 945 (1967); Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965); Duba v. Schuetzle, 303 F.2d 570 (8th Cir. 1962); Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), *cert. denied,* 350 U.S. 884 (1955). *Contra,* American President Lines, Ltd. v. Federal Maritime Bd., 112 F. Supp. 346 (D.D.C. 1953).

[54]Cases cited note 25 *supra.*

[55]National Ass'n of Sec. Dealers, Inc. v. SEC, No. 20,164 at 43 (D.C. Cir., July 1, 1969).

[56]Glass-Steagall Act, ch. 89, 48 Stat. 162 (1933) (codified in scattered sections of 12 U.S.C.).

Chief Judge Bazelon, in his concurring opinion, said it was fortuitous that