The proposed amendment would waive sovereign immunity only in matters covered by the APA and only in suits not prohibited by the exceptions to the judicial review provision.[101] The limitations on relief in statutes already granting waiver would not be changed nor would defenses available to the government be affected.[102] It is generally agreed that the proposed statute would not result in undue judicial interference with governmental operations and it is viewed as the most appropriate method to abrogate sovereign immunity.[103]

VII. JUDICIAL REVIEW—STANDING

THE DATA PROCESSING STANDARD AND THE RETURN OF DISCRETIONARY FACTORS

In spite of recent attempts by the Supreme Court to clarify and redefine the doctrine of standing,[1] the lower courts still appear to be immersed in the complexity and confusion which has historically plagued this area of federal law.[2] To a large extent many of these

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the additional burden on government lawyers can be justified on the same basis as is judicial review in general—the desirability of a judicial determination of the legality of official action. The ideal of a government under law can be realized only if persons are provided with an adequate set of judicial remedies against that government, its officials and its agencies. *Id.* at 428.

101. Administrative Procedure Act, § 10(a), 5 U.S.C. § 701(a) (1970). To this extent, the amendment and the theory of implied waiver are quite similar. See note 62 *supra*. However, the amendment is preferable since it expressly deals with many other issues in regard to sovereign immunity which are never considered in the implied waiver theory. For example, the amendment would eliminate the prior problems encountered by litigants in naming the proper party defendant when suing the government. *See* S. 3568, 91st Cong., 2d Sess. (1970) and S. 598, 92d Cong., 1st Sess. (1971). *See generally* Cramton, *Nonstatutory Review* 449-59. For a discussion of separate legislation waiving sovereign immunity in suits involving land title disputes with the United States, see Steadman, *supra* note 22, at 45-79.

102. DAVIS (Supp. 1970) § 27.00-8; Cramton, *Nonstatutory Review* 418; *1969 Duke Project* 218-20.

103. DAVIS (Supp. 1970) § 27.00-8; Cramton, *Nonstatutory Review* 425; *1969 Duke Project* 218-20.

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1. Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968); Hardin v. Kentucky Util. Co., 390 U.S. 1, 5-7 (1968).

2. The law of standing has been characterized as a "complicated specialty of federal jurisdiction." United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 156 (1953). It has also been called "one of the most amorphous concepts in the entire domain of the public law. That this statement is undoubtedly true is evidenced by the mental gymnastics through which the courts

problems can be attributed to the Court's use of standing rhetoric in some of its earlier decisions to mask the actual, but unarticulated, effectuation of discretionary considerations[3]—a procedure which it has subsequently indicated is incompatible with the theoretical underpinnings of the doctrine.[4] It is also impossible to completely discount as a contributing factor a basic reluctance on the part of some lower courts to abandon subliminal discretionary powers, which had been wrought by the subtle manipulation of both parties and issues, and which had proven singularly effective in shaping and controlling the controversies presented for judicial resolution.[5] A final element which must be included in the calculus is the lack of direction provided by the Court's recent standards, that not only have proven to be imprecise and inherently ambiguous, but which were handed down without any clear guidelines as to their applicable parameters under varying factual circumstances.

As a term of art, the concept of standing eludes precise definition;[6] however, when placed within the context of the constitutional schema, its proper function becomes considerably easier to develop. Given a basic analytical model for federal judicial review, the concept of "pure," or constitutional, standing is concerned with the threshold evaluation of the relationship between the particular complainant and the issues he is attempting to litigate.[7] Theoretically at least, this standing determination should be resolved without the incursion of judicial discretion, as the concept is designed to perform the function of determining whether a "concrete adverseness" exists[8] sufficient to

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have passed in determining standing issues." Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 861 (D.C. Cir. 1970). *See generally* DAVIS (Supp. 1970) ch. 22.

3. However at times the Supreme Court's failure to raise the standing issue when clearly applicable has proven equally confusing. *See, e.g.*, Lamont v. Postmaster General, 381 U.S. 301 (1965).

4. *See* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968).

5. *See* JAFFE 503; *1970 Duke Project* 279; Comment, *The Erosion of the Standing Impediment in Challenges by Disappointed Bidders of Federal Government Contract Awards*, 39 FORDHAM L. REV. 103, 108-09 (1970).

6. Flast v. Cohen, 392 U.S. 83, 98-99 (1968).

7. In *Flast*, the Court defined standing as that aspect of a court's determination which was designed to assure that the issues "will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.* at 101.

8. Baker v. Carr, 369 U.S. 186, 204 (1962). Here the Court noted that standing functioned "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions."

overcome the case or controversy requirements of article III.[9] If a complainant is capable of surviving this initial screening he can then be said to have the constitutional potential, but not necessarily the right, to bring the judicial machinery to bear on the issues he has raised. In addition to this constitutionally prescribed minimum, the Court itself has superimposed a second level of discretionary limitation on the availability of the judicial forum;[10] and, aside from semantic differences caused by the wording used to denote article III criteria, it has been the formulation of this second, discretionary level which has shifted as the standing issue has developed over time.

Much of the Supreme Court's effort in this area can be viewed as an attempt to formulate a standard which both allows the lower courts a certain degree of flexibility, a goal which is pragmatically necessary to insure an effective judicial system, and at the same time provides sufficient direction to curb the potential for abuse which naturally inheres whenever that flexibility is introduced. However, a dissipation of the clarity and uniformity of the decisions came as a logical outgrowth of the early standard which the Court had established to meet this problem—the litigant's ability to allege and demonstrate the violation of some "legal right,"[11] which involved a showing either that judicial review had been expressly granted by statute, or that there had been some deprivation of the complainant's common-law rights.[12] While superficially simple and easy to apply, as a practical

9. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, or other public Ministers and Consuls;—to all cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects. U.S. CONST. art. III, § 2.

10. *See* Barrows v. Jackson, 346 U.S. 249, 253-58 (1953). This statement is subject of course to the right of Congress to resolve these questions to the extent that its decision does not conflict with Article III. Muskrat v. United States, 219 U.S. 346 (1910). *See also* Ashwander v. TVA, 297 U.S. 288, 346 (1935) (concurring opinion).

11. *See* Tennessee Power Co. v. TVA, 306 U.S. 118, 137-38 (1939), where the Court defined "legal rights" as those of property, arising out of contracts, protected against tortious invasion, or founded on a statute expressly conferring a privilege. *See also* Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); The Chicago Junction Case, 264 U.S. 258 (1924); Edward Hines Trustees v. United States, 263 U.S. 143 (1923); *In re* Ayers, 123 U.S. 443, 447 (1887).

12. Tennessee Power Co. v. TVA, 306 U.S. 118, 137-38 (1939). See *1970 Duke Project* 264, for examples of express statutory grants. However, until recently, few statutes expressly provided for such judicial review and thus most of the law in this area has been based on common-law developments. *See generally* JAFFE 502.

matter the "legal right" language proved to be unworkable; any evaluation of whether a particular claimant's legal rights had been violated necessarily depended on the merits of his allegation—merits which theoretically could not be reached unless the court had first determined standing to exist.

This inherent circularity allowed the individual courts wide latitude to expand or contract the parameters of standing depending upon their reactions to the circumstances in any given case.[13] Further, because the standing determination came procedurally prior to any evaluation of the issues on the merits, the exercise of judicial discretion at this point proved singularly effective in controlling, or avoiding altogether, those particular issues which the courts felt for policy reasons should not be litigated,[14] even though in many instances the unarticulated rationale behind denying review might have been as easily and perhaps more properly effectuated by other jurisdictional concepts.[15] The deeper the question of "pure" standing was buried in discretionary policy considerations, and the more hidden the real determinative factors were, the more complex and logically incomprehensible the standing question became.

While several noteworthy exceptions were allowed to the basic

13. Professor Davis comments on the plight of a plaintiff attempting to challenge illegal agency action:

> 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, for if the plaintiff has standing his interest is a legally-protected interest, and that is what is meant by a legal right. 3 DAVIS 217.

14. It has been argued that the retention of the "legal right" test was in all probability motivated by

> various ideas not appearing on the face of formal opinions such as the notion that the law of standing can keep judges from assuming too much governmental power, that it can limit courts to appropriate subject matter, that it can help assure competent presentation of cases, and, above all, that it can protect against a flood of litigation that might so much overburden the courts as to produee a disasterous deterioration in the quality of all that courts do. DAVIS (Supp. 1970) 723.

But see Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 470-71 (1970). *See also* Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966) (statement by Burger, J.).

15. *E.g.*, justiciability, ripeness, mootness, exhaustion and abstention. *See generally* Barlow v. Collins, 397 U.S. 159, 171 n.3 (1970).

"legal rights" test,[16] it was not until *Flast v. Cohen*[17] that the Supreme Court began to move away from a substantive evaluation of the complainant's allegations in determining his standing to litigate. In *Flast* the Court specifically emphasized that the standing issue was involved only with a focus on the particular party seeking review, and not on the substantive content of the issues he sought to raise.[18] Implicit in the Court's approach to the problem[19] is a tacit recognition that it had

16. Examples of such exceptions can be found in challenges of administrative decrees. *See* Matson Nav. Co. v. Federal Maritime Comm'n, 405 F.2d 796, 798 (9th Cir. 1968). *See generally* B. SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 185-86 (1962). *But cf.* Comment, *Competitors' Standing to Challenge Administrative Action—Recent Federal Developments*, 48 N.C.L. REV. 807, 820-21 (1970). If the competition created by the agency action is itself illegal, then the injured competitor will be granted standing even in the absence of any specific "legal right" to be free from competition generally. *See* Seanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); NASD, Inc. v. SEC, 420 F.2d 83 (D.C. Cir. 1969), *vacated on other grounds sub nom.* Investment Co. Institute v. Camp, 401 U.S. 617 (1971). A second general area that has been excepted from the "legal right" requirement is that of suits brought to vindicate the public interest. *See also* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); Associated Indus., Inc. v. Ickes, 134 F.2d 694 (2d Cir.), *vacated on suggestion of mootness per curiam*, 320 U.S. 707 (1943). *See generally* JAFFE 459-500.

17. 392 U.S. 83 (1968).

18. The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wished to have adjudicated. . . . [W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable . . . .

. . . .

[T]he question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. *Id.* at 99-101.

19. *Flast* granted standing to a taxpayer for purposes of challenging the constitutionality of a federal program which provided funds to parochial schools for purchases of textbooks and other educational materials. The Court outlined a dual-nexus approach to the standing issue:

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction. *Id.* at 102-03.

See Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968), asserting that the Court's distinction between the right to challenge under specific and non-specific clauses of

become necessary to gradually strip away the discretionary considerations to expose more clearly the underlying constitutional issue. The movement appeared to be directed toward forcing the true decisional elements into the open by attempting to limit the opportunity for exercises of subliminal judicial controls. Thus while the constitutional requirements remained basically unchanged, there was a fundamental shift in the judicially-imposed limitations, which had the immediate effect of expanding the class of litigants accorded an opportunity to obtain judicial relief,[20] and also, quite naturally, of expanding the scope of the issues subjected to review.

Data Processing v. Camp—*The Promulgation of a New Standard*

The process of separating the discretionary considerations from the "pure," or constitutional, test for standing,[21] was significantly advanced by the Supreme Court, at least in theory, in two recent concurrent cases: *Association of Data Processing Service Organizations, Inc. v. Camp*[22] and *Barlow v. Collins*.[23] In these cases the Court finally laid to rest the traditional concept that standing questions were concerned with the existence or non-existence of some judicially cognizable "legal interest." Having thus completely abandoned the previously acknowledged criteria, if as a practical matter any could really be said to have existed, the Court went on to promulgate a new standard comprised of two symbiotic requirements, one constitutional and one judicially self-imposed, which were to be satisfied before standing would be granted.[24] First, the complainant must demonstrate

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the Constitution elevates form over substance and is not viable. Professor Davis also argues that an individual should have the same right to challenge a statutory violation as he does a constitutional one because "[a] person who has standing to challenge for one kind of illegality that adversely affects him necessarily has standing to challenge for another kind of illegality that adversely affects him to the same extent." *Id.* at 604. *But see* Douglas, *The Bill of Rights is Not Enough*, 38 N.Y.U.L. REV. 207, 227 (1963), asserting that judicial rules are in fact often designed to protect preferred constitutional rights.

20. *See, e.g.*, Davis, 37 U. CHI. L. REV., *supra* note 14, at 457, pointing out the Court's unwillingness since the *Flast* decision to dismiss a case for lack of standing, as indicative of the liberalizing trend. *But see* 23 VAND. L. REV. 814 (1970), arguing that the *Data Processing* standard is fundamentally the same as the "legal interest" test. *See also* Note, *Standing to Challenge Federal Administrative Actions in the Wake of* Association of Data Processing Service Organizations, Inc. v. Camp, 1 LOYOLA U. (CHI.) L.J. 285, 297 (1970).

21. *See* Flast v. Cohen, 392 U.S. 83 (1968).

22. 397 U.S. 150 (1970).

23. 397 U.S. 159 (1970).

24. A third element that comprises a part of the Court's initial determination, but that is theoretically not a part of the standing issue, is the question of reviewability which the Court in

that he is capable of sustaining his article III case or controversy burden. To do this he must be able to allege that the challenged action has caused him some form of "injury in fact, economic or otherwise."[25] Second, the complainant must demonstrate that there at least *arguably* exists some basis upon which his complaint could be predicated if the court finds it to have substance. This in turn is met by the ability to allege that the particular interest he seeks to have protected falls "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[26] The two tests were designed to work in conjunction with one another in evaluating the complainant and his allegations; and in every instance where a complainant is capable of alleging an "injury in fact" with relation to the particular "zone of interests" within which his allegations place him, he has met the *Data Processing* test.[27]

Data Processing couched in terms of whether or not judicial review of the agency action had been precluded. 397 U.S. at 156. *See generally* DAVIS 498-520 (discussing fundamental issues involved in reviewability). *See also* 397 U.S. 159, 167-78 (1970) (concurring opinion).

25. 397 U.S. 150, 152 (1970).

26. *Id.* at 153.

27. *See generally* DAVIS (Supp. 1970) 22; Davis, 37 U. CHI. L. REV., *supra* note 14, at 450; Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); *1970 Duke Project* 264-81; *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 177 (1970); Comment, *Standing to Sue: A Commentary on Injury in Fact*, 22 CASE W. RES. L. REV. 256 (1971); Comment, *Standing to Challenge Administrative Action: The Concept of Personal Stake*, 39 GEO. WASH. L. REV. 570 (1971); Comment, *Judicial Review of Agency Action: The Unsettled Law of Standing*, 69 MICH. L. REV. 540 (1971); Comment, 48 N.C.L. REV., *supra* note 16, at 826-30; Note, *The Essence of Standing: The Basis of a Constitutional Right to be Heard*, 10 ARIZ. L. REV. 438 (1968); Note, 1 LOYOLA U. (CHI.) L.J., *supra* note 20, at 285; 23 VAND.,L. REV. 814 (1970).

But it is important to note, most particularly in the context of organizational suits, that the *Data Processing* test is *not* the exclusive standard which can be applied by the courts. The Supreme Court explicitly inferred that a second set of criteria was not precluded by its decisions in *Data Processing* and *Barlow*:

> The third test mentioned by the Court of Appeals, which rests on an explicit provision in a regulatory statute conferring standing and is commonly referred to in terms of allowing suits by "private attorneys general," is inapplicable to the present case. 397 U.S. 150, 153 n.1 (1970).

As an initial matter, private attorney general suits necessarily demand that the requirements of article III be met, thus yielding the same basic evaluative and interpretive flexibility that occurs under *Data Processing*. *Compare* Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), *cert. granted*, 401 U.S. 907 (1971), *with* EDF, Inc. v. Army Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1971). The two approaches, however, differ in the "rule of self-restraint" which they impose upon the courts. Barrows v. Jackson, 346 U.S. 249, 253 (1953). Given a showing of "concrete adverseness," private attorney general suits have traditionally required that the claimant further allege at least an implicit grant of statutory authorization to maintain his

A broad survey of the decisions after *Data Processing*, however, reveals that the new standard has thus far failed to eliminate the problems it was designed to overcome. The lower courts have not been been able to develop a consistent approach to standing questions through the use of the standard, and the result can be seen in the wide divergence of interpretations that the courts have given the functional variables in the standard—"arguably," "zone of interests," and "injury in fact"—in resolving the issues that have surfaced. But of greater concern, the existence of such conceptual divergence is indicative of the underlying potential for the re-introduction of discretionary factors which the standard was, at least in part, created to restrict.

This disparity between the intended and actual applications of the standard can be seen as a product of a very real inability to apply the Court's theoretical formulations in a practical context. Analytically the Court has approached the standing issue from the premise that substantive determinations are to be involved solely with the merits of the claim, which necessarily demands that standing questions

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action, limiting the issues which he can raise only to those which will vindicate the "public interest." *See* Associated Indus., Inc. v. Ickes, 134 F.2d 694 (2d Cir.), *vacated on other grounds*, 320 U.S. 707 (1943); *cf.* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). *See also* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). However, the recent trend has been to expand the scope of the test by abandoning the requirement of statutory authority, substituting in its stead a presumptive grant of standing where the claimant has alleged that agency action has unlawfully or arbitrarily deviated from the controlling statutory scheme. *See* Peoples v. Dep't of Agriculture, 427 F.2d 561, 563 (D.C. Cir. 1970) (holding that presumptive standing would be granted a complainant who alleged that the Secretary of Agriculture had unlawfully deviated from statutory requirements in a food stamp program); Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 872 (D.C. Cir. 1970) (dealing with the requirement of an administrative illegality and declaring that the public interest specifically lies in protecting against the exercise of arbitrary powers by the agencies). The result has been a gradual shift in the basic determination from whether Congress intended to benefit the class of which the complainant is a member, to whether Congress intended to immunize the particular agency action from judicial review. NASD, Inc. v. SEC, 420 F.2d 83, 96 (D.C. Cir. 1969), *vacated on other grounds sub nom.* Investment Co. Institute v. Camp, 401 U.S. 617 (1971).

For example, in *National Helium Corp. v. Morton*, ___ F.2d ___ (10th Cir. 1971), a corporate complainant brought an action to challenge the Secretary of the Interior's termination of certain government helium contracts on the grounds that the decision was procedurally defective and contrary to the public interest. Although the claimants were clearly incapable of sustaining their burden under the *Data Processing* "zone of interests" test, standing was granted to them as private attorney generals. While there was no nexus between the alleged injury (financial) and the interest being asserted (public), the court held that under the private attorney general theory "[i]t is not a part of our function to weigh or proportion these conflicting interests. Nor are we called upon to determine whether persons seeking to advance the public interest are indeed conscientious and sincere in their efforts." ___ F.2d at ___.

should be divorced from the substance which underlies them. However, as a practical matter, this theoretical analysis is incapable of being applied in a concrete situation since *any* evaluation of a complainant's allegations, however minimal, inescapably involves some weighing of their legal validity. Yet when practical demands allow this opportunity for substantive evaluation, it becomes a relatively simple matter to judicially manipulate the definitions accorded the variables of the standard to encompass as broad an evaluation of the substance as the bias of the particular court feels appropriate in any given instance. Thus in analyzing an allegation in terms of the "injury in fact" requirement, for example, it becomes a relatively simple matter to shift emphasis subtly from the abstract finding of an injury as required by the Court and apparently defined according to basically objective, non-legal standards,[28] to a purely substantive evaluation of the alleged injury as a product of judicial willingness, or power as the case may be, to vindicate the "legal right" which necessarily underlies it.[29] In a similar manner the "zone of interests" requirement can be manipulated from an abstract and relatively detached determination emphasizing the "arguably" element of the *Data Processing* standard, and using a broadly construed "zone" as its basis,[30] to a careful substantive examination into the actual scope of the particular statute or constitutional guarantee in question as it directly applies to the litigant's complaint.[31] Once this definitional manipulation begins to occur, the resolution of standing questions evolves into a function of

28. In *Data Processing* the complainants filed suit contesting an interpretive ruling made by the Comptroller of the Currency which authorized national banks to provide data-processing services to their customers. It was claimed that as a result of the ruling the data-processing industry would be subject to increased competition which would create substantial financial harm to the members of the organization. Here both the district court, 279 F. Supp. 675 (D. Minn. 1968), and the court of appeals, 406 F.2d 837 (8th Cir. 1969), denied complainants standing on the grounds that they did not have a private legal interest, had failed to plead a legal wrong that was recognized at law, and had not proven that their particular status was one protected by any statute. The Supreme Court reversed, finding that the harm to the organization and its constituent members was sufficient for article III purposes.

29. *See* DAVIS 222. *But see* JAFFE 501.

30. *See* Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). *See also* Comment, 69 MICH. L. REV., *supra* note 27, at 551-55; Comment, *NASD v. SEC—Standing to Sue, Economic Power, Banks and Mutual Funds*, 55 VA. L. REV. 1493 (1969); 50 B.U.L. REV. 417 (1970).

31. *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 446 F.2d 1158 (9th Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3265 (U.S. Nov. 26, 1971) (No. 71-708).

the particular forum rather than solely an evaluation of the relationship between the litigant and his allegations. However the inference is clear from the *Data Processing* opinion, particularly in light of the Court's application of its standard in *Barlow*,[32] that the Court did not intend the two tests to be substantively applied; nor did it seem to feel that such a result was a conceptually viable one. As a result, in many instances the resolution of standing questions has become as much a function of the particular forum as it is of the relationship between the claimant and the issues he is attempting to raise.

To a certain extent, however, the problems that have arisen under *Data Processing* have evolved from the Court's having been overinclusive to the point of having stripped away judicial discretion from the standing issue without concurrently providing an acceptable outlet for discretionary distinctions. For example, under the *Data Processing* standard there is no allowance for a "best plaintiff rule," nor is there any effective method of curbing piecemeal adjudication. In every instance where the complainant can carry his standing burden as to even one issue in a complex factual situation, *Data Processing* requires the court to hear his claim on that issue regardless of any external considerations which may militate against maintenance of the suit. As a result some courts have felt forced to circumvent the Supreme Court's directives where no other alternative appears, or where they seem to feel the need of stricter controls over access to the forum. The inherent flexibility of the *Data Processing* standard, produced as it is in part by its definitional imprecision and

32. In *Data Processing* the Court said that the "zone of interests" test was designed to evaluate the "interest sought to be protected by the complainant." The Court then went on to examine the effects of the APA and the broad scope of interests which had been found sufficient to constitute the basis for standing in other cases. *See* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616 (1965); Abington School Dist. v. Schempp, 374 U.S. 203 (1962). The Court noted economic as well as non-economic "values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here." 397 U.S. at 154. Throughout this portion of the opinion, the Court seems to be equating the concept of an injury and an interest such that the language "the interest sought to be protected by . . ." could be quite consistently read to mean "the injury sought to be protected against by. . . ." Such a reading would mesh with the balance struck by the Court in *Data Processing*, where the injury was the economic loss caused by allegedly illegal competition and the "zone of interests" was evaluated in terms of protecting against that competition. It would also be consistent with the Court's analysis in *Barlow*, where the recognition that the "relevant statutes" were designed to protect complainants was tied to the allegation that they had suffered "injury in fact from the operation of the amended regulation." *Id.* at 163; *cf.* Comment, 69 MICH. L. REV., *supra* note 27, at 551-55.

in part by its impracticality, has permitted the courts to accomplish these subliminal objectives while still purporting to follow the directives of the Supreme Court.[33] However, the resulting attempts to use standing rhetoric to justify decisions based on considerations not properly included in the standing determination under the Court's formulation has caused the confusion which has pervaded this particular area of the law.

A dramatic illustration of the confusion precipitated by the combination of vague standards and the subtle re-introduction of discretionary factors can be found in two recent cases decided by the Court of Appeals for the Ninth Circuit, in which two panels of the court managed to deny standing under diametrically opposed rationales while still purporting to be using the *Data Processing* standard. In *Sierra Club v. Hickel*[34] the court denied standing to a national environmental organization which had sought to challenge the Secretary of the Interior's grant of a permit allowing the commercial development by a private business enterprise of an area which included part of Sequoia National Park. The court held that the complainant lacked standing because he had failed to allege injury to a "direct and obvious interest,"[35] which the court held necessary to meet the dictates of article III, and then went on to assert that "injury in fact" was the sole criterion that was to be applied under *Data Processing*. In discussing its dismissal of the "zone of interests" test the court said that

> [t]he significance of the language is not entirely clear . . . . [W]e submit that it does not establish a test separate and apart from or in addition to the test which the Court first looked to in *Camp* [injury in fact] . . . '[s]tanding to sue,' as the phrase indicates, refers to the posture of the plaintiff and not to the 'legal interests' to be unravelled.[36]

However even a cursory examination reveals that this interpretation is incompatible with the concept of standing as it evolved in *Data Processing* and was applied in *Barlow*. The Supreme Court made a

33. *See* Barlow v. Collins, 397 U.S. 159, 167-78 (1970) (concurring opinion), where Justice Brennan accepted the majority's "injury in fact" standard but rejected its "zone of interests" test on the grounds that any inquiry into such a "zone" was concerned with the question of reviewability and not with the standing determination. *See generally* Comment, 69 MICH. L. REV., *supra* note 27, at 560.

34. 433 F.2d 24 (9th Cir. 1970), *cert. granted*, 401 U.S. 907 (1971).

35. 433 F.2d at 32-33.

36. *Id.* at 31.

point in each of those cases to apply both tests to the allegations, even going so far as to *number* them in *Barlow*,[37] and was explicit in establishing that each test performed a different function in the standing determination. Where "injury in fact" operated to insure satisfaction of article III requirements,

> [t]he question of standing . . . concerns, *apart from* the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.[38]

While this elimination of the "zone of interests" test from the standing determinant in *Sierra Club* does have some support in the Supreme Court[39] and is espoused by certain of the commentators,[40] it is definitely not the view taken by the *Data Processing* majority.

In *Trafficante v. Metropolitan Life Insurance Co.*[41] the Court of Appeals for the Ninth Circuit denied standing to residents of an apartment complex in a suit against its owners for allegedly engaging in discriminatory rental practices. Here the court did not deny that the litigants had suffered the alleged "injury in fact," a finding which seemingly would satisfy the *Sierra Club* test and terminate any further inquiry into the standing issue. However the court then went on to evaluate the claim substantively, holding, after a careful examination of the statutes upon which the complaint was based, that under the first statute review was precluded,[42] and under the second the litigants

37. 397 U.S. 159, 164 (1970).

38. 397 U.S. 150, 153 (1970) (emphasis added).

39. See note 33 *supra*.

40. *See generally* DAVIS ch. 22; Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969); Davis, 35 U. CHI. L. REV., *supra* note 19; Jaffe, 116 U. PA. L. REV., *supra* note 27; Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

41. 446 F.2d 1158 (9th Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3265 (U.S. Nov. 26, 1971) (No. 71-708).

42. Fair Housing Title (Title VIII) of the Civil Rights Act of 1968, 42 U.S.C. §§ 3610, 3612 (1970). Here the court made a careful examination of all relevant sections of Title VIII and the applicable legislative history before holding that the Act gave the Attorney General exclusive right to sue to correct patterns and practices of discrimination. The court then went on to make its finding that, because the allegations did not assert that any of the complainants were the direct object of a discriminatory housing practice proscribed by the Act, the injury alleged was the result of a "pattern or practice" of diserimination through the maintenance of a "white ghetto" and review was thereby precluded.

were not "arguably within the zone of interests" which it protected.[43] In an analysis reminiscent of pre-*Flast* substantive "legal rights" determinations, the court of appeals reasoned that because the complainants were unable to allege that "they themselves had been denied *any of the rights* granted by . . ."[44] either statute, access to the forum would be denied. However, the substantive approach adopted in *Trafficante* is irreconcilable with both the "injury in fact" approach used in *Sierra Club* and the standard promulgated in *Data Processing*. If the court had followed *Sierra Club*, the "zone of interests" test should have been rejected altogether; and, under *Data Processing*, the court would have been restricted to an examination solely of the zone of interests to be protected by the statute and not to the specific legal rights that it in fact had created.[45]

In looking behind the use of the *Data Processing* language in *Sierra Club* and *Trafficante*, however, the decisions can be seen to have a common thread in the unstated, but clearly evident, reluctance of the courts to abandon discretionary control over the availability of the judicial forum. In *Sierra Club* the court redefined "injury in fact" to include only those injuries which it considered to be "direct and obvious,"[46] and while this is clearly inconsistent with the demise of the requirement that there be a direct, personal injury sustained to overcome article III constraints,[47] the court was thereby enabled to exclude a particular class of litigants which it may have felt was motivated by interests less adverse than those of other potential complainants then presently available to bring suit.[48] Having thus inter-

43. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. Civil Rights Act of 1866, 42 U.S.C. § 1982 (1970).

44. 446 F.2d at 1160 (emphasis added). The court carefully reviewed Jones v. Mayer Co., 392 U.S. 409 (1968), and the cases which followed it, distinguishing the present case on the grounds that while it was clear that the purpose of Congress was to forbid racial discrimination affecting the civil rights enumerated in the Act, the court could find no clear indication that Congress intended to allow third party enforcement of these rights, or an independent cause of action by one not so discriminated against or interfered with.

45. 397 U.S. 150, 153 (1970).

46. 433 F.2d 24, 32-33 (9th Cir. 1970).

47. See note 76 *infra* and accompanying text.

48. The real underlying issue that appears to be at the center of the controversy in this case, however, is the question of whether groups such as the Sierra Club will be able to challenge agency actions which affect the environment in areas where no local plaintiffs exist to give standing under the traditional approach. Office of Communication of United Church of Christ

preted "injury in fact" to allow this type of evaluation, any discretionary limitations which might have been imposed by a "zone of interests" test became completely subsumed under the court's flexible "injury in fact" definition. In *Trafficante* it seems equally probable that the substantive evaluation of the "zone of interests" test was dictated by discretionary considerations not clearly explicated on the face of the decision. Other plaintiffs that the court felt were demonstrably more appropriate to litigate the issues involved had subsequently filed suit, and the court, in order to leave itself free to make a later determination on the merits, narrowly construed the "zone of interests" test to preclude review by the complainants in the action then before it.[49]

Experience with the "Zone of Interests" Test

Even with the confusion over the proper application of *Data Processing*, however, several noticeable trends have begun to emerge from the recent cases. These trends indicate that at the present time the courts are generally continuing the pre-*Flast* expansion of potential litigants by liberally applying standing requirements. But it should be emphasized at this point that while movement is clearly toward encouraging more widespread access to the judicial forum, the flexibility inherent in the "zone of interests" and the "injury in fact" tests which has allowed such liberalization carries with it the inescapable potential for a change to a more restrictive outlook on the part of the courts. Thus, just as the policy of minimizing the consideration of extraneous factors in the standing determination may be easily undermined in the free play of the *Data Processing* language, the analyses involved in evaluating expansion are equally applicable to movement in the opposite direction.

With the "zone of interests" test, the problem is esentially twofold. First, the court must delineate the *scope* of the interests which will compose the applicable "zone" of that "zone of interests" sur-

v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom.* Consolidated Edison Co. v. Scenic Hudson Preservation Conf., 384 U.S. 941 (1966); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967); *cf.* Powelton Civic Homeowner's Ass'n v. HUD, 284 F. Supp. 809 (E.D. Pa. 1968). *See generally* Comment, *Conservationist's Standing to Challenge the Actions of Federal Agencies*, 1 ECOLOGY L.Q. 304 (1971); Comment, *Judicial Review of Administrative Action Involving Environmental Problems*, 5 SUFFOLK L. REV. 1090 (1971); 71 COLUM. L. REV. 172 (1971); 16 VILL. L. REV. 729 (1971).

49. *See* 446 F.2d at 1163 n.10.

rounding the statute invoked. Second, the degree of attenuation allowable between the interests claimed by the litigant and those clearly within that "zone" must be established so that the "arguably" concept will have some meaning.

Scope of the "Zone." While there are undoubtedly instances in which the boundaries of the "zone" are clearly established, and where a party is unquestionably either within or without it, in the vast majority of cases the resolution of this question will depend upon what the court perceives as the applicable legislative intent.[50] The courts have, however, long recognized that this type of determination is extremely imprecise due to the paucity of relevant materials and the nature of the subject matter involved; and this lack of precision becomes particularly apparent when the courts are required to determine legislative intent without delving into substantive issues.[51] The cases after *Data Processing* indicate a progressively liberal approach to the "zone of interests" test through expansions in the breadth of inquiry into legislative history, and the concurrent relaxation of demands for a tight nexus between statute and alleged injury. In *Lodge 1858, A.F.G.E. v. Paine*[52] the Court of Appeals for the District of Columbia Circuit examined the applicable civil service laws,[53] the statute creating the administrative agency, and the legislative history of subsequent relevant statutes to determine that a statutory scheme existed which protected the allegedly infringed interest of the claimants. Then in *Harry H. Price & Sons, Inc. v. Hardin*,[54] the Fifth Circuit held, without specific reference to any statutory provisions of legislative history explicitly including the class of which he was a member,[55] that the indirect effects of a regulatory scheme on the complainant were

50. *See* Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957 (1940); Stringham, *Crystal Gazing: Legislative History in Action*, 47 A.B.A.J. 466 (1961).

51. The Supreme Court itself seemed to recognize the necessity of broadly construing both the "arguably" and the "zone of interests" standards to favor review even where the connection between the interest claimed and the applicable legislative intent appears tenuous. *See* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). *See generally* DAVIS ch. 22.

52. 436 F.2d 882 (D.C. Cir. 1970).

53. Here employees of NASA challenged the agency's dismissal of civil service employees while it continued to retain contract workers. *Id.* at 884; *accord*, Chris Berg, Inc. v. United States, 426 F.2d 314 (Ct. Cl. 1970). *See also* National Welfare Rights Org. v. Finch, 429 F.2d 725 (D.C. Cir. 1970).

54. 425 F.2d 1137 (5th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971).

55. *See 1970 Duke Project* 270.

sufficient to bring him within its "zone of interests" for purposes of meeting the *Data Processing* requirements. Following these cases the appearance of a judicial willingness to grant standing where the basic concerns of the statute involved merely *appeared* to touch upon the invaded interest came as a logical advance. In *Ely v. Velde*,[56] the District Court for the Eastern District of Virginia granted standing to residents of an area described as a "uniquely historical and architecturally significant rural community"[57] to challenge a Law Enforcement Assistance Administration grant designed to finance construction of a penal institution which the state intended to locate in the community. Noting that the "relevant statute" for standing purposes under section 10(a) of the Administrative Procedure Act[58] need not necessarily be the one upon which the agency has relied in making its determinations,[59] the court went on to hold that the statutes which the complainants had invoked were "designed to foster both improvement and maintenance of areas such as [the one here], when the national interest is served by so doing."[60] The question of whether protection of this particular area was encompassed in that "national interest" was left for a later determination on the merits; however, the initial finding that there existed such a "zone of interests" was made by the court without any express evaluation of either the statutory language or the legislative history of the statutes upon which it had relied. Similarly in *Delaware v. Pennsylvania New York Central Transportation Co.*[61] the District Court for the District of Delaware granted standing in an action brought to challenge the Army Corps of Engineers' issuance of a permit allowing a railroad company to dike and fill the shoreline of a navigable river. The claimants were multiple, ranging from the state to an individual resident of the area,

56. 321 F. Supp. 1088 (E.D. Va. 1971).

57. *Id.* at 1089.

58. 5 U.S.C. § 702 (1970).

59. Here the court noted that while cases involving section 10(a) "generally consider the relevant statute to be the one upon which the particular agency relies for authority of its actions, the court does not consider these cases controlling on the point." 321 F. Supp. at 1091-92. In support of this the court cited Barlow v. Collins, 397 U.S. 159 (1970), which would also indicate that the courts do not consider the "zone of interests" test merely to be a restatement of the language in section 10(a), as has been contended. *See generally* DAVIS ch. 22; Comment, *Standing for Review of Actions by Federal Administrative Agencies*, 23 U. FLA. L. REV. 206 (1970).

60. 321 F. Supp. at 1092.

61. 323 F. Supp. 487 (D. Del. 1971).

and the court held, without examining either statutory language or legislative history, that the alleged injuries were "obviously" within the "zone of interests" of the relevant statutes,[62] apparently basing its decision on a reading of the statutes' nominal concerns rather than on any analysis of their content.

However, where the courts do deny standing, even under circumstances in which it would appear equally "obvious" that the interests asserted by the claimant are not protected by the statute which he has invoked, the courts appear to feel constrained to explicate the reasoning behind their decision to deny the claimant access to judicial review. Thus in *Intercontinental Placement Service v. Hodgson*[63] the District Court for the Eastern District of Pennsylvania denied an employment agency standing to contest the Secretary of Labor's suspension of an immigration occupational precertification list under the Immigration and Nationality Act[64] only after establishing by a careful examination of the statute and the applicable legislative history that the congressional intent was totally unrelated to the alleged injury.[65] Here the court did not deny that the complainant had suffered an injury as a direct result of the Secretary's actions, but a clear differentiation was made between the allegation of an "injury in fact" and the allegation necessary to meet both aspects of the *Data Processing* standard. While the injury to the employment agency may have given rise to an undeniable interest in the Secretary's actions, the relevant standing question under *Data Processing* was limited to whether or not the statute cited had been designed to protect that interest.[66]

62. Here the court first noted that "no explicit statutory provision is necessary to confer standing." *Id.* at 492, then held *inter alia* that the complainants had "alleged adverse effects on the environment, a subject obviously within the 'zone of interests' to be protected by the National Environmental Policy Act of 1969, Public Law 91-190, 83 Stat. 852." 323 F. Supp. at 492. *See* Hardin v. Kentucky-Util. Co., 390 U.S. 1, 7 (1968).

63. 52 F.R.D. 376 (E.D. Pa. 1971).

64. *See* section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14) (1970).

65. The precertification list involved here was a part of the 1965 amendments to the Act, and the court found that it was designed to protect, through regulation, the national economy and the country's existing work force. The complainant had a direct interest in the list, having used it in negotiating contracts between aliens and employers in its principal service, locating jobs for entering aliens. However, standing was denied because none of the interests alleged by the complainant could be matched with the congressional intent bebind the amendments. 52 F.R.D. at 378.

66. *See also* Pullman, Inc. v. Volpe, ____ F. Supp. ____ (E.D. Pa. 1971).

The Meaning of "Arguably." At the same time that some courts are expanding the "zone of interests" by presuming legislative intent where superficial review of a statute would appear to favor protection of the claimant's interest, a second avenue in the liberalization of standing requirements concentrated on the functional definition to be accorded the "arguably" variable of the test. While it is patent that a narrow reading of this term can be highly restrictive,[67] particularly when coupled with a substantive evaluation of the applicable "zone of interests," there appears to be little movement in this direction. For example in *P.A.M. News Corp. v. Hardin*[68] the Court of Appeals for the District of Columbia Circuit granted a private news service standing to enjoin the Secretary of Agriculture from establishing a similar service on an allegation that the direct governmental competition would infringe on the claimant's first amendment rights. In finding that both tests of the *Data Processing* standard had been met, the court held that the "[a]ppellant's legal position may not be correct, but it is not frivolous. Appellants are entitled to present their legal theory in court, and it is clearly incorrect to deny them that opportunity by prejudging the substantive issue."[69] Implicit here is the recognition that the "zone of interests" test functions primarily as a control over the issues the claimant will be allowed to litigate, the "arguably" concept necessarily being broadly construed to insure that it impinges to the minimum extent possible upon the substance of the case.

Similarly in *Sierra Club v. Hardin*[70] the District Court for the District of Alaska granted a national conservation organization, and various local complainants, standing to maintain a class action against the Secretary of the Interior challenging his decision to sell certain national forest timber to a private business enterprise. Here the court first recognized the limiting function that was to be performed by the "zone of interests" test,[71] but went on to hold that,

67. See the discussion of *Trafficante, supra* notes 41-49 and accompanying text.

68. 440 F.2d 255 (D.C. Cir. 1971).

69. *Id.* at 257.

70. 325 F. Supp. 99 (D. Alas. 1971).

71. Basically the constitutional constraints imposed on the courts by the standing issue demand an examination of the claims in the allegations purely in terms of the complainant's ability to demonstrate sufficient adverseness for proper judicial review, *see* note 8 *supra* and accompanying text, but there is no *constitutional* requirement that the complainant demonstrate that adverseness as to every allegation he makes before access to the courts will be allowed in the first instance. Under the more traditional approach to standing problems there was no conscious attempt to segregate the issues arising out of a single challenged action, and standing

given the strong presumption favoring judicial review[72] and the importance of environmental issues, where the connection between statute and alleged interest is tenuous the "arguably" aspect of the test should control, even in the face of some reservations on the standing question.[73]

Relaxation of Procedural Requirements. A third avenue of expansion in the "zone of interests" test can be seen in the emergence of a willingness on the part of some courts to relax the procedural requirements of *Data Processing.* For example, in *Northwest Residents Association v. Department of Housing and Urban Development*[74] a local homeowners' association and individual property owners filed suit to challenge FHA approval of mortgage payment subsidies which were designed to finance the construction of what the claimants alleged would be saturation-type housing. The District Court for the Eastern District of Wisconsin found that the necessary allegation of an "injury in fact" had been made, but that the complainants had failed to make any allegation of being "affected or aggrieved . . . within the meaning of any relevant statute" under the Administrative Procedure Act and thus had made no showing that they could satisfy a "zone

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to litigate one issue often was enough to permit litigation of any other issues that were involved. With *Data Processing*, however, the inclusion of a "zone of interests" test may function to separate each issue for standing purposes. By focusing attention on each issue the *Data Processing* test may thereby induce courts to unnecessarily restrict a complainant's role even after he has demonstrated the requisite elements of standing as to part of his claim. Thus in Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alas. 1971), the court held that

> Standing to challenge the sale and permit under acts which clearly evince an intent on the part of Congress to promote 'aesthetic, conservational and recreational' interests, however, does not necessarily imply standing to challenge other aspects of the transactions under statutes which merely reflect a general intent to protect the citizen in his capacity as a taxpayer. *Id.* at 111.

72. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967); *cf.* Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943). *See also* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 156-57 (1970).

73. *Cf.* NASD, Inc. v. SEC, 420 F.2d 83 (D.C. Cir. 1969), *vacated on other grounds sub nom.* Investment Co. Institute v. Camp, 401 U.S. 617 (1971). *But see* Judge Burger's separate opinion where he stated that

> I am unable to set aside my grave doubts as to Appellees' standing to institute and maintain these suits. However, in the uncertain state of the law as to standing, there is something to be said on both sides of that question. I therefore resolve my doubts in favor of the Appellees . . . . I am influenced substantially, as I indicated at the outset, by the need for judicial examination of the important questions raised. 420 F.2d at 108.

See also City of Lafayette v. SEC, F.2d (D.C. Cir. 1971).

74. 325 F. Supp. 65 (E.D. Wis. 1971).

of interests" test.[75] The court here not only made its own determination that such a "relevant statute" existed, but then went on to hold that for standing purposes the complainants were "arguably within the zone of interests" that were protected by it, thus making the requisite *Data Processing* showing.

Experience with the "Injury in Fact" Test—Collective Organizations

An examination of recent cases also reveals that the potential for discretionary input is not limited solely to manipulation of the "zone of interests" test. Particularly with the elimination of a requirement that the claimant sustain a direct, personal injury to overcome article III limitations,[76] the "injury in fact" test is subject to a similar quantum of judicial manipulation and the problems raised in trying to reconcile the variables comprising this test—the nature and the degree of injury which will be recognized as sufficient to provide the requisite "concrete adverseness"—are evident in every area. The basic issues that arise, however, can be clearly illustrated by an examination of the variety of judicial responses toward collective organizations which have brought suit to vindicate the rights and interests of their members.

Whenever a collective organization attempts to assume the role of litigant, the basic conceptual issue is the conflict between its ability to adjudicate the legal interests of its members, as individuals or in the aggregate, and its ability to adjudicate only those interests accruing to it as a legal entity in some way divorced from its membership. In *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*,[77] the District Court for the Eastern District of Pennsylvania held that a building contractors' organization lacked standing to contest hiring restrictions placed in federally funded construction contracts which were designed to favor the employment of minority

75. Here the court based initial jurisdiction on 5 U.S.C. § 702 (1970), which specifies that in order to have standing a party must be "affected or aggrieved . . . within the meaning of a relevant statute." Standing for the claimants in the present case was ultimately based for *Data Processing* purposes on § 2 of the Housing and Urban Development Act of 1968, 12 U.S.C. § 1701(t) (1970). *See* 325 F. Supp. at 68.

76. Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 615 (2d Cir. 1965). The elimination of this requirement marked a definite shift in the Court's emphasis towards article III problems. For an example of the traditional view, *see, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951). *See generally* Comment, 39 GEO. WASH. L. REV., *supra* note 27.

77. 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir. 1971).

groups.[78] The court clearly differentiated between the legal position of the organization and the rights of its members by granting each of the individual contractors standing because it found them "personally" affected by the agency action, but at the same time denying the organization standing on the grounds that it lacked the requisite "personal stake" in the outcome of the litigation. The decision was bottomed on the court's interpretation and application of the general concept that standing questions must focus solely on the particular party seeking review and not on the issues being litigated.[79] Here the organization, as such a party, was deemed unable to allege a sufficient "injury" to itself; but as a practical matter the decision seems unrealistic, as it is difficult to conceive of an organization lacking adversity while being composed entirely of adverse parties.[80]

This restrictive application of the "injury in fact" test to the collective organization was also followed in *Sierra Club v. Hickel*,[81] where the organization had not alleged a direct injury to any of its members who could assert a discernable local interest in the outcome of the litigation. The court treated this defect in the allegations as having effected a shift in the status of the organization from its representative capacity to one where it functioned solely as a distinct legal entity asserting an injury to its own interests. With this shift the court also demanded a concurrent shift in the showing required to meet the dictates of article III, the "injury in fact" evaluation being made solely in terms of the organizational entity and not in terms of its membership. In denying standing, the court held that while the Sierra Club had alleged an interest in the Secretary's actions its interests were not sufficiently "direct and obvious" to constitute an "injury in fact" under the *Data Processing*[82] test, thereby clearly differentiat-

78. The hiring requirements being contested here were prescribed in all federal contracts, and federally funded construction contracts, as a part of the controversial Philadelphia Plan which was designed to give assistance to minority-race construction workers. The Philadelphia Plan became effective on September 29, 1969, having been implemented on the authority of the Secretary of Labor under Executive Order No. 11,246, §§ 201-405, 30 Fed. Reg. 12319 (1965), *as amended*, Exec. Order No. 375, 32 Fed. Reg. 14303 (1965), *as amended*, Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969), and provided that all contractors not only cease discriminatory practices against minority workers, but required that they take affirmative action to insure their employment.

79. 311 F. Supp. at 1007.

80. *But see* Alameda Conservation Ass'n v. California, 437 F.2d 1087 (9th Cir.), *cert. denied*, 402 U.S. 908 (1971). *See also* Petterson v. Resor, 331 F. Supp. 1302 (D. Ore. 1971).

81. 433 F.2d 24 (9th Cir. 1970). *See* note 34 *supra* and accompanying text.

82. *Id.* at 30. *But see* West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971); Izaak Walton League of Am. v. Macchia, ___ F. Supp. ___ (D.N.J. 1971).

ing the legal status of the collective organization from that of its individual membership.[83]

The restrictive interpretation of the "injury in fact" test used by the court in *Sierra Club*, however, appears to be in stark contrast to the far more pervasive liberalization of standing requirements wrought by the majority of recent cases. Concurrent with the liberal construction of the "zone of interests" test there has been a widespread movement to broadly construe the elements of "injury in fact" so as to expand the issues which will be capable of being brought for judicial review. This trend has been particularly evident in the area of environmental law; however, it is by no means limited to such suits.[84] The same basic issue of the sufficiency of injury required of a collective organization to meet an "injury in fact" test was indirectly raised in *Federation of Homemakers v. Hardin*[85] where a consumer organization sought to challenge the Secretary of Agriculture's authorization of allegedly misleading labels on certain foodstuffs.[86] The

83. For further examples of the possible methods of limiting the "injury in fact" test see Dugan, *Standing, 'The New Property,' and the Costs of Welfare: Dilemmas in American and West German Provider-Administration*, 45 WASH. L. REV. 497, 515 (1970). The Ninth Circuit ostensibly predicated its decision in *Sierra Club* on the failure of the national organization to join with "local conservation organizations made up of local residents and users of the area affected by the administrative action." 433 F.2d at 33. While this failure to join local residents does have a certain surface appeal, and has been utilized by other courts in assessing standing claims, *see, e.g.*, Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), it cannot be reconciled with the *Data Processing* standard. Under *Data Processing* the proper focus is solely to be on the party seeking judicial review, and thus the court is required to evaluate only the *particular* litigant against the issues raised in the allegations. Therefore the joinder or non-joinder of any additional parties should theoretically be completely irrelevant to the ability of each individual litigant to meet the *Data Processing* standard. While the presence of local interests may be deemed either beneficial or essential, depending upon the interpretation accorded the "injury in fact" test, such interests must be alleged as a part of the organization's complaint and cannot be imputed from other parties to the same action. *Compare* Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970) (see notes 34, 81 *supra*, and accompanying text), *with* Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970); Upper Pecos Ass'n v. Stans, 328 F. Supp. 332 (D.N.M. 1971); EDF, Inc. v. Corps of Engineers, 324 F. Supp. 878 (D.D.C. 1971) *and* Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1971).

84. *See, e.g.*, Tucker v. Hardin, 430 F.2d 737 (1st Cir. 1970); National Welfare Rights Org. v. Finch, 429 F.2d 725 (D.C. Cir. 1970); EDF, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); EDF, Inc. v. HEW, 428 F.2d 1083 (D.C. Cir. 1970); North City Area-Wide Council, Inc. v. Romney, 428 F.2d 754 (3d Cir. 1970).

85. 328 F. Supp. 181 (D.D.C. 1971).

86. The complainants alleged violations of the Wholesome Meat Act, 21 U.S.C. § 601 *et seq.* (1970), which was enacted to protect the health and welfare of consumers by insuring that they have access to wholesome and properly marked meats. "It is essential in the public interest

District Court for the District of Columbia granted standing on the basis of the injury caused to the organization's consumer constituents without any showing that a particular member of the organization had been directly harmed by the Secretary's actions, and without any examination of whether the organization itself had suffered an injury separate from that to its members. While it remains unclear whether the district court's integration of individual membership interests into those of the representative body will be applicable in every case,[87] this holding clearly appears more consistent with the approach adopted in *Data Processing* than the holding in *Sierra Club*. Although one of the parties in *Data Processing* was an organization comprised of data processing services, the Court granted standing to the claimants on an allegation of a competitive injury which could only have been sustained by one of the members of the association.[88]

Conclusion

The fundamental problem with the *Data Processing* standard lies in the ability of individual courts to make subjective determinations which are capable of being rationalized under a purportedly objective standard. While the inherent flexibility of such a formulation may prove over the long run to be the most valid approach to the standing issue, that flexibility results in a situation where the biases of the court applying the standard become the crucial factors rather than the standard itself. Up to now this flexibility has manifested itself in an expansive liberalizing of standing requirements to the extent that, for example, in *Reservists Committee to Stop the War v. Laird*[89] the District Court for the District of Columbia granted standing without

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that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged . . . ." *Id.* § 602.

87. A clear illustration of the potential problems which may arise in this type of situation is where the collective organization is a labor union composed of both whites and blacks, and the issue is whether the union will strike to contest alleged discrimination in hiring practices, or to effectuate a minority-group minimum employment quota. *But cf.* Amalgamated Meat Cutters and Butcher Workmen of N. Am. v. Connally, ___ F. Supp. ___ (D.D.C. 1971) (granting standing to the union to challenge the validity of the government's wage-price freeze without any discussion of the standing issue); Southern Christian Leadership Conf. v. Connally, ___ F. Supp. ___ (E.D. Mich. 1971). *See generally* Comment, 39 GEO. WASH. L. REV., *supra* note 27, at 594-600.

88. 397 U.S. at 152.

89. 323 F. Supp. 833 (D.D.C. 1971).

any allegation of a traditionally cognizable "injury in fact." In *Reservists Committee* an association of military reservists, and certain of its individual members, had brought a declaratory judgment action challenging the military status of certain members of Congress based on the broad constitutional prohibitions in article I against dual office-holding.[90] The grant of standing was predicated solely on the complainants' position as citizens, and in abandoning the "injury in fact" language the court outlined in its stead three bases for its decision: while the injury involved might well be hypothetical, the hypothesis was inherent in the constitutional provision itself; the issue being litigated was extremely narrow and involved a self-executing provision of the Constitution; and the interests asserted by the complainants were "undoubtedly" those which the provision in question was designed to protect.[91]

The decision in *Reservists Committee* is clearly a departure from the more traditional attitude toward standing questions but, while limited in large measure to its facts, it is also indicative of the degree to which judicial discretion functions in the standing area and the expansiveness with which the courts have generally been willing to approach individual cases. While the discretionary flexibility currently serves to allow courts to protect private interests which heretofore were considered outside the purview of the judicial power, it is nevertheless true that in the absence of any objective criteria establishing the appropriate parameters of acceptable discretionary considerations, the lower courts will remain free to expand or contract access to the forum for reasons completely unrelated to the standing issue. Therefore the task presently facing the Supreme Court is to articulate a set of guidelines to govern standing questions so that future decisions will evolve out of a more uniform recognition of the proper factors which should be held to comprise a valid request for judicial relief. Until that is done, there can be little hope that any logical consistency will obtain in this area of the law.

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90. No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office. U.S. CONST. art. I, § 6.

91. *But see* Lamm v. Volpe, ___ F.2d ___ (10th Cir. 1971) (where the concept "citizen standing" was rejected in a suit brought under a claim that there had been a violation of tenth amendment rights).