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Administrative Law-Judicial Review of Agency Decrees-Competitor's Standing to Sue

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COMMENTS

ADMINISTRATIVE LAW—JUDICIAL REVIEW OF AGENCY DECREES—COMPETITOR'S STANDING TO SUE

The *Elizabeth Federal Savings and Loan Association et al. v. Howell* case, 24 N.J. 488, 132 A.2d 779 (1957), written by the late Chief Justice Arthur T. Vanderbilt during the week preceding his untimely death,[1] allowed parties in competition standing to seek judicial review of an agency decision favorable to a petitioner although competitors had no statutory right to a hearing. The problem of standing to review administrative decrees has long been in a state of perplexity due to the conceptual approach taken in attacking it. The present case deals with the question clearly and succinctly and accomplishes the result, favored by authorities in the field of administrative law,[2] which allows "standing to sue."

The action was brought to review a determination by the Commissioner of Banking and Insurance granting the Colonial Savings and Loan Association [3] permission to establish a branch office in an area occupied by the objecting banks.[4] Colonial contracted to purchase the Excelsior Building and Loan Association to enable them to open a branch office under the applicable statute.[5] Despite the statute being void of any provision which required notice or hearing, the competitors asked to be heard. The Commissioner granted them an informal hearing to oppose Colonial's application. He then considered "matters not of record" and allowed the petitioner permission to establish a branch office.

The competing parties asserted a right to judicial review on the ground that they were "aggrieved" since the Commissioner's order would allow Colo-

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[1] 80 N.J.L.J. 309 (June 20, 1957).

[2] DAVIS, ADMINISTRATIVE LAW c. 16 (1951).

[3] Colonial Savings and Loan Association of Roselle Park, hereinafter referred to as Colonial.

[4] Elizabeth Federal Savings and Loan Association, Emerald Savings and Loan Association, Union County Savings Bank, Central Home Trust Company, City Federal Savings and Loan Association and the Union County Trust Company.

[5] N.J.S.A. 17: 12A-21, subdivision B, the applicable statute reads: "Notwithstanding any of the other provisions or limitations of this section, any association into which another association has been merged or which has acquired, by purchase, reorganization, or in any other manner, all or a substantial portion of the assets of another association, may, with the permission of the commissioner, and under such terms and conditions as he may prescribe, maintain the office previously maintained by such other association, or a *suitable substitute* therefor, as a branch office; provided, however, that *the commissioner shall first determine that the maintenance of such branch is in the public interest and will be of benefit to the area served* by such branch *and to the members of the association.*" (Emphasis supplied.)

nial to compete directly with them.[6] Colonial contended that the complainants had no standing to appeal because they "have nothing more to serve in their objection to the Commissioner's determination than their own self-interest." "They are merely competitors," and as such "have neither a direct and certainly not a substantial interest in the Commissioner's Order." [7] The Supreme Court then certified the entire matter on its own motion.[8] The question which the court considered first and which is the subject of this comment was whether competitors had standing to seek judicial review. The court held that the right to judicial review of administrative decisions inheres in those who are "aggrieved" as a result of the action sought to be reviewed even though they legally may be refused a hearing. A requirement that there be some interest to be protected beyond a mere abstraction was invoked, but "slight private interest, added to and harmonizing with the public interest" was deemed sufficient to grant standing.[9]

The court reasoned that the establishment of a new branch in an area amply served with banking institutions might adversely affect the public interest by prejudicing the stability of existing associations. If one banking institution fails because of an increased competitive burden, "elements of public distrust and lack of faith are inevitably transmitted" to surrounding institutions.[10] Competing banks are probably the only parties with sufficient private interest, added to and harmonized with public interest, to request review of the Commissioner's determination. The court went on to say,

> "If such banking institutions do not have the necessary standing, *who then is there who can or will challenge an administrative decision favorable to the applicant?* Without standing in the appellants . . . the Commissioner's action . . . right or wrong, proper or arbitrary, takes on a conclusive character *to the* possible great *detriment of the people* as a whole." [11] (Emphasis supplied.)

The case takes on even greater import upon considering the basis of the court's decision. If parties in competition are denied the power to check an abusive act of an administrative agency, the interest of the public sought to be protected may readily suffer. When matters are of importance to the economic

[6] Appeal was taken under New Jersey Revised Rule 4: 88-8, which allows review of the final decision of any state administrative agency to the Appellate Division.

[7] 132 A.2d at 786.

[8] Matters may be certified to the Supreme Court of New Jersey on its own motion under New Jersey Revised Rule 1: 10-1(a).

[9] See also Greenspan v. Division of Alcoholic Beverage Control, 12 N.J. 456, 97 A.2d 413 (1953) (property owner allowed standing to review grant of liquor license); Al Walker, Inc. v. Borough of Stanhope, 23 N. J. 657, 130 A.2d 372 (1957) (dealer in home trailers in a nearby community, not a property owner nor resident of the Borough, had standing to attack an ordinance restricting use of trailers). The New Jersey Constitution does not confine the exercise of judicial power to "case" or "controversy" as does the Federal Constitution. For a full discussion on certiorari in New Jersey, see Ward v. Keenan, 3 N.J. 298, 302-309, 70 A.2d 77, 78-82 (1949).

[10] See Delaware County National Bank v. Campbell, 378 Pa. 311, 106 A.2d 416 (1954).

[11] 132 A.2d at 787.

welfare of the community and the interest of the public in general, they should not be "insulated from judicial review."

Few men are as well versed in the field of administrative law as was the late Chief Justice Vanderbilt. His writings in the area were themselves exhaustive.[12] The logical means by which this case was decided allows it to stand on its own merits, reinforced only by the stature of its author.

The problem to be considered here is standing to seek judicial review of administrative action, which necessitates the institution of a judicial proceeding before an appellate court. This should not be confused with the right to be heard initially on the determination of the administrative agency nor the right to intervene. Whether the person seeking judicial review was "aggrieved," despite his not being a party to the agency proceeding, will in most cases determine whether or not he will be granted standing. Most of the problems in the field arise out of the interpretation and application of this word "aggrieved." The cases indicate no appreciable difference between one who has an "interest," one who is "adversely affected," and one who is "aggrieved." [13]

In determining whether or not a petitioner has sufficient interest to assert review, the court, unless it finds a specific violation of a constitutional requirement, must first look to the legislative intent of the statute granting the agency power. Advocates of standing base their argument on the premise that he who has sufficient private interest to seek review is the only party both willing and able to challenge an agency action. Moreover, standing is a safeguard to the exercise of arbitrary discretion by an administrative tribunal. Conversely, those who are opposed to the foregoing propositions revert to the antiquated doctrines in this area, of "damnum absque injuria" and the requirement of "case" or "controversy." It is their notion that if we allow those with substantial interests the right to judicial review, we will be flooding the courts with "hundreds of thousands" of cases and thus will be "clogging" the administrative process. This argument lacks validity because the first decision in an administrative area will have a stare decisis effect. Where courts of appeal have exclusive jurisdiction to review, the filing of a petition with one court by an "aggrieved" party will prevent other courts from entertaining similar petitions.[14]

[12] Vanderbilt, *Judicial Councils and Administrative Justice,* 19 J. AM. JUD. SOC'Y. 137 (1936); *Some Fundamentals of Administrative Law,* 57 Iowa State Bar Assoc. 68 (1938); *Technique of Proof Before Administrative Bodies,* 24 IOWA L. REV. 464 (1939); *The Federal Administrative Procedure Act and the Administrative Agencies* (1947); *Administrative Procedure: Shall Rules Before Agencies Be Uniform?,* 34 A.B.A.J. 896 (1948); *Minimum Standards of Judicial Administration* (1949); *The Doctrine of the Separation of Powers and Its Present Day Significance* (1953); *Hoover Commission and Task Force Reports on Legal Services and Procedures—a Symposium,* 30 N.Y.U.L. REV. 1267 (1955).

[13] Davis, *Standing to Challenge and to Enforce Administrative Action,* 49 COLUM. L. REV. 759 (1949).

[14] See Associated Industries v. Ickes, 134 F.2d 694 (2d Cir. 1943), dismissed as moot, 320 U.S. 707 (1943); DAVIS, ADMINISTRATIVE LAW 716 (1951).

Decisions which have used the simpler and more satisfactory means of allowing one who is "aggrieved" standing to challenge an administrative action have come from the state courts. In their approach they have been pragmatic rather than conceptual. The Supreme Court of the United States has recently referred to the law of standing as a "complicated specialty of federal jurisdiction." [15] The federal law in this area is undeniably "complicated," [16] but it is no more a specialty of federal jurisdiction than it is a specialty of state law.

In order to get a clear picture of the law of standing it is necessary to review the federal cases which have been instrumental in giving it substance. The problem evolves from the artificial means used by the federal courts in achieving a favorable result. As a practical matter this impairs one's ability to predict the result of a given situation. The most prominent Supreme Court case recognizing standing is *FCC v. Sanders Brothers.*[17] Sanders sought standing to review a FCC decision allowing a petitioner a license to operate, alleging an insufficiency of advertising revenue and talent in the area to support an additional station. The case was carried to the United States Supreme Court which held that economic injury to an existing rival radio station is not, apart from considerations of public convenience, interest or necessity, a separate element upon which the FCC must make its findings.[18] The Court then discussed whether or not one has a "property right" as a result of having a license. In concluding that a license does not grant such a "right," the opinion observed that the purpose of the act involved was not to protect a licensee against competition but to protect the listening public.[19] It went on to say,

> "Congress . . . may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal. We hold, therefore, that the respondent had the requisite standing to appeal and to raise, in the court below, any relevant question of law in respect to the order of the Commission." [20]

The *Sanders* doctrine was extended in the *Scripps-Howard Radio v. FCC*[21] and the *FCC v. NBC (KOA)* [22] cases. The *Scripps-Howard* case held that those "adversely affected" have standing only as representatives of the public interest. The *KOA* case is more significant in that the Commission allowed

[15] United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 156 (1953).
[16] Davis, *Standing to Challenge Governmental Action,* 39 MINN. L. REV. 353, 354 (1955).
[17] 309 U.S. 470 (1939).
[18] *Id.* at 473.
[19] *Id.* at 475.
[20] *Id.* at 477.
[21] 316 U.S. 4 (1942).
[22] 319 U.S. 239 (1943).

KOA only limited participation in a hearing on a petition to increase another station's power. By a four-to-two decision KOA was given standing to get review. The Court pointed out that despite the lack of "property right," "economic injury gave the existing station standing to represent questions of public interest and convenience." [23]

The principle that has evolved from this doctrine allows one standing to attack an administrative action where his only interest is to avoid increased competition. The problem is dealt with at two levels. In order for a competitor to be allowed standing he must first show the possibility of injury to his own substantial competitive interest. Once allowed standing he asserts the listening public's interest in order to influence the court's decision. Judicial review is granted although the appellant has no "legal right" at stake. What is novel about this doctrine is that the person with standing (1) represents the public interest, and (2) does not represent his own private interest, and (3) the interests asserted on the appeal are different from those which confer standing to appeal.[24]

The *Sanders* doctrine is a departure from the federal decisions preceding it as the party seeking review was aggrieved but had not yet suffered any damage.[25] Prior to this the Court would refuse the complainant's relief by holding that there was no "justiciable issue" or that the action could not lie as there was a lack of "case" or "controversy." [26] When the party challenging an administrative action had a greater right to review than anyone else, and was refused standing, it was the equivalent of a holding of unreviewability.[27]

The inconsistency in the *Sanders* doctrine is evident. By granting parties the power to review, *i.e.* standing, although they have no "legal right," the Court is allowing them a remedy without a "right." [28] Although one has no "property right," he is allowed to protect his economic interest. The doctrine emerging from these three cases is precisely the sort of artificiality that the Court has characteristically eschewed.

The distinction between the language used in the *FCC* cases and in the *Elizabeth Savings and Loan Association* case is clear; in the latter instance the court allowed the parties standing and relief as a matter of *right*.[29] Even

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[23] *Id.* at 247.

[24] DAVIS, ADMINISTRATIVE LAW 698 (1951).

[25] See Muskrat v. United States, 219 U.S. 346 (1911), which illustrates the federal requirement of case or controversy.

[26] See Associated Industries of New York v. Ickes, 134 F.2d 694, 700-705 (2d Cir. 1943).

[27] See Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

[28] Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. at 365 (1955).

[29] Davis, *Standing to Challenge and to Enforce Administrative Action*, 49 COLUM. L. REV. at 786 (1949).

though the licensee may have no "property right," he may be considered "aggrieved" within the meaning of a review provision. He should then be allowed to assert his own interest, rather than that of the public's, on securing judicial review. In so reasoning the court in the *Elizabeth Savings* case has satisfied the problem of "case" or "controversy," escaped needless confusion about the distinction between "rights" and "interests," and foremost, has ended the artificiality of pretending that a private party may not represent his own interest.

The substance of the *Sanders* doctrine, as distinguished from the artificial technique used therein, is likely to endure, and has in fact gradually creeped into fields other than broadcasting. The most all-encompassing federal opinion relative to standing was written by Judge Frank in *Associated Industries of New York v. Ickes*,[30] where an association of coal consumers challenged an order increasing the minimum prices of coal. The statute allowed any person "aggrieved" the right to seek review. After analyzing the *Sanders* doctrine, the court reasoned that Congress was probably even more interested in protecting consumers than competitors and held that the association, as a consumer, had standing to review the Secretary's order.

The federal courts have not confined the right to standing exclusively to those who were a party to the agency proceedings. Any person actually "aggrieved" is a person who has a right to challenge. Otherwise, if judicial review could be had only by a party to the administrative hearing, it could be denied by a commission's forbidding one the right to be heard.[31]

It is not suggested that all of the acts of administrative tribunals be subjected to judicial review nor that a disinterested party be allowed standing to challenge an agency's acts. The problem of differentiating between reviewable and nonreviewable, between "aggrieved" and "not aggrieved," calls for the best judicial talents. Only when there is an adverse effect upon the competitor's position, as in the *Sanders* case, or in analogous shipping,[32] or banking situations,[33] should government action be reviewable; thus, not all govern-

[30] 134 F.2d 694 (2d Cir. 1943). This case brought to light the doctrine of "private Attorney Generals" [*sic.*] which permits an adversely affected private party to assert the public interest in challenging administrative action whenever a statute provides for review by one who is "aggrieved." As a practical matter, an association of coal consumers is more apt to organize and try to protect the public's interest than an association of radio listeners, which would otherwise have been necessary to effect the same result that the *Sanders* case achieved.

[31] See National Coal Association v. FPC, 191 F.2d 462, 467 (D.C. Cir. 1951), where parties held to have standing to challenge the grant of a certificate to construct a natural gas pipeline included not only an association of coal producers, but also the United Mine Workers, representing employees of coal producers, and the Railway Labor Executives Association, representing employees of competing railroads.

[32] American President Lines v. Federal Maritime Board, 112 F. Supp. 346 (D.D.C. 1953), a shipping line was allowed standing to seek review of the grant of a subsidy by the Board to two competing lines.

[33] 24 N.J. 448, 132 A.2d 779 (1957).

mental action which benefits a particular economic interest should be subject to review. A good illustration where the court was justified in not granting standing was in the case of *Atlantic Freight Lines, Inc. v. Summerfield.*[34] In that case a competing motor carrier sought to enjoin the Postmaster General from issuing a postage stamp in commemoration of the 125th anniversary of the B. & O. Railroad's incorporation. The court held that the plaintiff had no standing to sue as the possible free advertising of the competitor did not involve a direct enough injury.

Without the right to standing, there is no "justiciable controversy" to which the federal judicial power can validly be applied. The decisions are not consistent. Ever since the *Sanders* case economic interest has been sufficient to confer the right to review. More recent opinions have gone so far in broadening that scope to allow one with a slight "property interest," likely to be affected, standing.[35] On the other hand there have been several cases which have added to the confusion by taking a narrower approach to the subject.[36] In a case closely analogous to the *Elizabeth Savings* decision the court refused "to consider the question of appellants' standing." [37]

At a federal level, the practical problem of defining the term "aggrieved" has not yet been properly considered. The Administrative Procedure Act [38] grants standing to "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of

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[34] 204 F.2d 64 (D.C. Cir. 1953).

[35] Granik v. FCC, 234 F.2d 682 (D.C. Cir. 1956). The federal courts in more recent instances have tended to be lenient in granting standing to those with an economic interest. See City of Pittsburgh v. FPC, 237 F.2d 741 (D.C. Cir. 1956) (consumer who had no interest to be considered in the administrative determination, but was likely to be aggrieved was allowed standing as the only person with sufficient interest to bring errors of law in the Commission's action to the attention of the appellate court); Breswick & Co. v. United States, 134 F. Supp. 132 (S.D.N.Y. 1955) (stockholder allowed standing); Board of Public Utility Com'rs v. United States, 132 F. Supp. 379 (D.N.J. 1955) (state and its regulatory agency were held to have standing to challenge ICC action granting a railroad's application to abandon the operation of a ferry within the state); Pacific Inland Tariff Bureau v. United States, 129 F. Supp. 472 (D.Ore. 1955) (carriers allowed standing to enjoin railroads and ICC from putting into effect and approving a reduction in railroad rates on certain interstate shipments); Atchison, Topeka & Santa Fe R. Co. v. Summerfield, 128 F. Supp. 266 (D.D.C. 1955) (railroad which carried three-cent mail allowed standing to attack Postmaster General's experimentation with air transportation of three-cent mail).

[36] See Benson v. Schofield, 236 F.2d 719 (D.C. Cir. 1956) (association of milk producers' mere loss of income as a result of the extension of a milk marketing area constituted *damnum absque injuria* which would not confer standing); Home Gas Co. v. FPC, 231 F.2d 253 (D.C. Cir. 1956) (gas line supplier was not considered aggrieved by the Commission's directing another corporation to serve natural gas in an area already being served by petitioner); First National Bank v. Federal Savings & Loan Association, 225 F. 2d 33 (D.C. Cir. 1955) (competing banks had no standing to secure review of the Board's granting permission to two associations to establish branch banks); Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir. 1955) (private electric power companies were not granted standing to enjoin federal agencies from carrying out a federally supported power program); State Board of Funeral Directors v. Beaver Co. Funeral Directors Assn., 70 Dauph. County Ct. Rep. 118 (1957) (lower court refused protestant-association standing, as not a party nor person aggrieved, to review the Board's grant of a license to an undertaker).

[37] First National Bank v. First Federal Savings & Loan Association, *supra* note 36.

[38] Section 10, 60 STAT. 243 (1946), 5 U.S.C. § 1009(a) (1952).

the revelant statute." The act fails to clarify what is meant by "aggrieved" and also leaves the term "legal wrong" to be dealth with by the court's imagination. In *Clement Martin v. Dick Corporation* [39] the plaintiff asserted a right to review under Section 10(a) of the APA in order to restrain the Surgeon General of the United States from giving effect to his approval of a contract with the defendant for the construction of a hospital. Plaintiff's low bid for the construction contract had been rejected and he alleged fraud and illegality. The court held that the plaintiff was not "adversely affected" or "aggrieved" by any action within the meaning of any relevant statute under which the APA might be invoked. Review was also refused with respect to the grounds asserted by him as a taxpayer.[40] The APA was deemed not to create rights but to confer jurisdiction to review discretionary acts of agencies which affected statutory rights. This sort of interpretation does violence to the notion of standing to protect even the public's interest. As the complainant lacked standing to review the Surgeon General's acts, there was *no one* who would be able to bring judicial review. His arbitrary acts could go unhampered. The American Bar Association's Draft of the Proposed New Code of Federal Administrative Procedure [41] improves on the original act but still leaves much to be desired in defining terms.

The *Elizabeth Savings* case demonstrates a distinct departure from the artificial conceptualism used by the federal courts in arriving at their conclusion. The future will determine its import. The result itself is more favorable as it clearly institutes another safeguard upon the administrative process. It allows the community protection from the arbitrary acts of administrative agencies without clogging that process.

As has been recognized, the problem of standing has long been confused by the fictional processes used by the federal courts. Despite this confusion there has been a distinguishable evolution of case law allowing standing to seek judicial review. The manner by which such results have been achieved has long been criticized. This criticism has reached a high point, the complexities of the process require greater safeguards, the public interest must be protected. The time is ripe, the case well-reasoned, its author, "the leading jurist of his day."

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[39] 97 F. Supp. 961 (W.D.Pa. 1951).

[40] The court relied upon Massachusetts v. Mellon, 262 U.S. 447 (1923), under which a taxpayer was not allowed standing to review an action in the federal courts. *Id.* at 964.

[41] Section 1009 (a) Reviewable Acts, (b) Standing to Seek Review. See 9 AD. L. BULL. 184, 194 (July 1957).