

1999

Federal Appellate Jurisdiction:
Its Elements and Its Evolving Content



Stanford University

Palo Alto, California

April 14-16, 1999

*The Federal Judicial Center
Presents a*

*Federal Appellate Jurisdiction:
Its Elements and Its Evolving Content*

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FEDERAL APPELLATE JURISDICTION: ITS ELEMENTS AND ITS
EVOLVING CONTENT

Stanford University, Palo Alto, California
April 14-16, 1999

Wednesday, April 14

8:00 a.m. WELCOME AND OPENING REMARKS

Dean Paul Brest, Stanford Law School
Judge Rya W. Zobel, Director, FJC

I. THE "NITTY-GRITTY" OF JURISDICTION

8:30 a.m. APPELLATE JURISDICTION: An overview of the basic statutory framework of federal appellate jurisdiction with emphasis on areas of current concern. This overview will cover §§ 1291 and 1292. Emphasis will be on such matters as Rule 54(b) certifications and appeals from denial of immunity. The statutes governing appeals in criminal cases will also be covered.

Judge Kenneth F. Ripple (CA 7)

9:15 a.m. Break

9:30 a.m. A LOOK AT THE APPELLATE STRUCTURE IN BANKRUPTCY CASES

Judge R. Guy Cole, Jr. (CA 6)

10:15 a.m. DISCUSSION OF REPORT OF COMMISSION ON STRUCTURAL
ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS

Judge Pamela Rymer (CA 9)

11:15 a.m. Break

11:30 a.m. SCREENING PRACTICES IN THE UNITED STATES COURTS OF APPEALS:
Small group discussions (11:30-12:30) followed by reports to the entire body (12:30-1:00). Discussion topics will include the techniques employed by the various circuits in screening cases for jurisdictional problems, ways in which circuits provide staff support for judges in the consideration of motions, and ways in which judges communicate with each other in determining the disposition of motions. (The FJC is compiling a description of current practice on these matters so that the discussion can focus on evaluating these methods rather than on their description.)

1:00 p.m. Adjourn

6:00 p.m.-
7:30 p.m. RECEPTION: Faculty, participating judges, and guests are cordially invited to attend a reception hosted by Stanford Law School in the Law School's Benjamin S. Crocker Garden.

Friday, April 16

**III. LIMITATIONS ON JUDICIAL AUTHORITY IMPOSED BY THE
SEPARATION OF POWERS DOCTRINE**

8:00 a.m. JUSTICIABILITY: This session will focus on a theoretical overview and a discussion of recent case law in the areas of standing, ripeness, mootness, and political question.

Prof. Susan A. Bandes, DePaul University
Prof. Stewart M. Jay, University of Washington

9:30 a.m. Break

IV. "HOT SPOTS"—PRESENT AND FUTURE

9:45 a.m. DOMESTIC AND INTERNATIONAL ARBITRATION: This is an area of increased visibility in federal practice. This session will deal with the basic statutory and treaty provisions and the applicable case law.

Judge Diane P. Wood (CA 7)

10:30 a.m. REVIEWING THE ADMINISTRATIVE DECISION IN A POST-CHEVRON ENVIRONMENT: This session will deal with the case law after Chevron. It will focus on the issues that have occupied the courts in the application of Chevron, such as the identification of those situations in which Chevron deference is required and those in which it is not required.

Dean Daniel B. Rodriguez, University of San Diego

11:15 a.m. Break

11:30 a.m. TREATMENT OF THE DUPLICATIVE ACTION IN FEDERAL COURT: Application of the Colorado River doctrine is becoming a topic of increased concern. This session will outline the basic principles and then discuss the issue as treated in the emerging case law.

Prof. Martin H. Redish, Northwestern University

12:30 p.m. Adjourn

Thursday, April 15

II. LIMITATIONS ON JUDICIAL AUTHORITY IMPOSED BY OUR FEDERALISM

8:00 a.m. **HABEAS CORPUS PRACTICE UNDER THE NEW STATUTORY SCHEME:**
After a brief review of the statutory scheme, the focus of the discussion will be the emerging issues of interpretation that are confronting the courts.

Prof. Evan Tsen Lee, University of California, Hastings
Prof. Ira P. Robbins, American University

9:15 a.m. Break

9:30 a.m. **THE PRISON LITIGATION REFORM ACT:** After a brief review of the statutory scheme, this session will focus on emerging issues of interpretation that are confronting the courts.

Prof. Lynn S. Branham, University of Illinois
Prof. John C. Yoo, University of California at Berkeley

10:45 a.m. Break

11:00 a.m. **IMPLEMENTING THE HABEAS CORPUS ACT AND THE PLRA THROUGH
LOCAL RULE, INTERNAL OPERATING PROCEDURES, AND STAFF
SUPPORT**

Judge Michael Daly Hawkins (CA 9)
Ms. Cathy Catterson, Clerk of Court (CA 9)

11:45 a.m. Break

12:00 noon **THE ELEVENTH AMENDMENT AND THE IMMUNITY DOCTRINES:** This session will deal with recent case law developments in this area and suggest areas of future concern.

Prof. Erwin Chemerinsky, University of Southern California

1:00 p.m. Adjourn

SUMMARY OF FEDERAL STANDING LAW

I. GENERAL CONSIDERATIONS

A. *Standing requires as a constitutional minimum* that the plaintiff allege (1) an *actual injury* that is (2) *causally related* to the challenged government action. "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*

1. The party invoking federal jurisdiction bears the burden of establishing these elements.
2. The amount of proof needed to establish these elements varies with the stage of the litigation:
 - a. *Pleadings*: general factual allegations are sufficient; court assumes that proponent could produce specific evidence to support the elements of standing.
 - b. *Summary judgment*: proponent must set forth by affidavit or other evidence specific facts sufficient to establish the necessary elements of standing.
 - c. *Trial*: if the proponent's facts necessary to establish standing are controverted, they must be established adequately by the evidence adduced at trial.

B. *Reasons for the Article III standing requirement*: (1) enhances likelihood of vigorous representation; (2) provides an actual, not hypothetical setting; (3) avoids the court becoming involved in abstract controversies that serve no practical end; and (4) averts interference with other branches of government. "Article III standing . . . is a 'means of defin[ing] the role assigned to the judiciary in a tripartite allocation of power . . . and 'a part of the basic charter . . . provid[ing] for the interaction between [the federal] government and the governments of the individual states.'" (*Spencer v. Kemna*, quoting *Valley Forge Christian College v. Americans United for Separation of Church and State*) "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*

C. *Prudential limitations on standing*: Even if Article III standing exists, the Court may decline to grant standing for prudential reasons (e.g., a litigant generally may not assert the rights of third parties). These limitations can be overridden by congressional dictate: "Congress' decision to grant a particular plaintiff the right to challenge an act's constitutionality . . . eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit." *Raines v. Byrd*

II. ACTUAL INJURY AND CAUSATION REQUIREMENTS

A. Actual Injury

1. The plaintiff must show an invasion of a legally protected interest that is
 - (a) Concrete and particularized, and
 - (b) Actual or imminent, not conjectural or hypothetical.
2. Examples of possible actual injuries: monetary loss, pain and suffering, deprivation of liberty by incarceration, invasion of privacy by illegal search, the desire to use or observe an animal species or a part of the environment, inability to obtain information that a statute requires to be made public, or a feeling of personal stigma.
3. A mere ideological grievance is not enough (e.g., *Sierra Club v. Morton*, *Allen v. Wright*). That is, standing may not be founded on a bare interest in forcing the government to comply with the law (*Allen*; *Linda R.S. v. Richard D.*, *Lujan v. Defenders of Wildlife*; *U.S. v. Hays*).
4. Failure of the defendant to obey the law in the past does not establish standing unless the plaintiff shows a present injury (e.g., damages), a continuing violation or the imminence of a future violation (*Steel Co. v. Citizens for a Better Environment*; *Los Angeles v. Lyons*).
5. A plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself (*Steel Co.*; *Diamond v. Charles*).
6. A claim for punitive damages that are payable to the government does not by itself establish standing (*Steel Co.*).
7. Congress may create statutory rights, and thereby define “injuries” recognized by law (e.g., an aesthetic interest in an unpolluted environment). However, the plaintiff must still show that the injury is “actual” in the sense described above; the same is true with respect to the causality requirement (*Lujan*).
8. Citizen-suits: Congress may provide that citizens have standing to redress harms to the public from violations of the law (e.g., environmental pollution statutes). But, the citizen-plaintiffs must themselves have suffered an injury (e.g., loss of chance to observe endangered species) or they must have a claim to a bounty for winning the suit (*Lujan*).
9. “Procedural injuries”: A plaintiff has standing to claim that the government failed to follow

procedures required by law, provided that the plaintiff has a personal stake in the proper use of the procedures (e.g., law gives citizens affected by a government project the right to be consulted prior to approval of the action). Note: the person who has been given a procedural right to protect that individual's interests has standing without meeting the normal standards for immediacy of the harm and redressability (*Lujan*).

10. Legislative standing: Members of a legislative body do not have standing to challenge the constitutionality of legislation merely because it was enacted over their objections (*Raines v. Byrd*). However, lawmakers possess the requisite personal interest to establish standing to contest a legislative action that allegedly deprives them of their right as a legislator to vote on the measure (*Coleman v. Miller*).

11. Claims by associations: "[A]n association may have standing solely as the representative of its members. . . . The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*; see *Sierra Club v. Morton*.

B. Causation

1. Two types of causality must be present in all claims:

- a. Casual relation between injury and government action.
- b. Causal relation between remedy and actual relief from injury.

2. Causality must not be "too remote," "too speculative," or "too attenuated." Factors to consider:

- a. If the party bringing the suit is the object of government action or inaction, "there is ordinarily little question" that the injury is sufficiently "actual" for standing, and "that a judgment preventing or requiring the action will redress it." *Lujan*
- b. If the asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone other than the person invoking the court's jurisdiction, standing is "substantially more difficult to establish." *Lujan* (*Allen v. Wright*; *Eastern Kentucky Welfare Rights Organization v. Simon*). However, this is not an absolute prohibition to standing (compare *Duke Power Co. v. Carolina Environmental Study Group*, *Regents of the University of California v. Bakke*, *U.S. v. SCRAP* and *N.E. Florida Chapter of Assoc. Gen'l Contractors v. Jacksonville*, in which the causal chain depended on the actions of third parties).

c. Federal courts should not control the executive's priorities for administering and enforcing laws (e.g., *Allen*; *Simon*; *Linda R.S.*; *Rizzo v. Goode*; *Los Angeles v. Lyons*). However, "those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground . . . even though the agency . . . might later, in the exercise of its lawful discretion, reach the same result for a different reason." (*FEC v. Akins*) Moreover, Congress may authorize standing to challenge the lawfulness of an agency's decision not to undertake enforcement action. *Id.*

d. Standing may not be based on possible future injuries when there is not a "substantial probability" that plaintiff will suffer an injury that would be redressed by the relief requested (e.g., *Lyons*; *Warth v. Seldin*). Note that this same plaintiff may have standing to sue for damages caused by *past* government acts.

e. Standing may be established by showing that the actions of the defendant denied the plaintiff the opportunity to compete fairly, even if plaintiff cannot prove the likelihood of ultimate success in the competition. In *Clinton v. City of New York*, the Court acknowledged that it "routinely recognizes probable economic injury resulting from [governmental actions] that alter competitive conditions as sufficient to satisfy the [Article III 'injury-in-fact' requirement] It follows logically that any . . . petitioner who is likely to suffer economic injury as a result of [governmental action] that changes market conditions satisfies this part of the standing test."

Examples: *Bakke*, holding that plaintiff was denied a constitutional right to be considered by a state medical school without regard to race; *N.E. Florida Chapter*, finding "injury in fact" from inability to compete equally in bidding process due to a race-based set-aside program; *Clinton v. City of New York*, upholding standing to challenge President's use of line-item veto to cancel a tax benefit that would have given plaintiff a "statutory bargaining chip" in contractual negotiations.

III. SPECIAL RULES FOR TAXPAYER AND CITIZEN SUITS

A. Taxpayer and citizen standing to challenge government action usually is *not* permitted (that is, when the plaintiff's "injury" is suffered generally by all citizens or taxpayers).

1. Taxpayer standing requires showing a "logical nexus" between the plaintiff's status as a taxpayer and the constitutional rights being asserted. This nexus requirement originated in *Flast v. Cohen*, in which the general question of taxpayer standing was considered: "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. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional

infringement alleged.”

2. Taxpayer suits are permitted to challenge government *spending* that is prohibited by specific constitutional provisions. For example, numerous cases have allowed taxpayers to attack government spending on the ground that it violated the Establishment or Free Exercise Clauses of the First Amendment (e.g., *Flast v. Cohen*—taxpayer had standing to attack a federal statute providing funds to religious schools). Note the tension here with *Richardson*, which alleged that CIA’s secret budget violated a specific constitutional mandate.
3. Taxpayer suits are not allowed merely on a claim that government is not following the law, e.g., by disposing of property allegedly in violation of the Establishment Clause (*Valley Forge Christian College*).
4. The “nexus” requirement does *not* apply to cases of “citizen standing since the *Flast* nexus test is not applicable where the taxing and spending power is not challenged.” *Duke Power Co. v. Carolina Environmental Study Group*
5. Citizen standing may be established by a statute that protects a broad class of individuals from injury. For example, Congress may give voters standing to challenge the failure of an organization to register as a political committee (and thus to engage in certain recordkeeping and public disclosures) because the information provided to the public as a result of the suit would aid voters in evaluating candidates for office; see *FEC v. Akins*.

B. Examples of disallowed taxpayer/citizen standing:

1. *Schlesinger v. Reservists to Stop the War*: Association of present and former members of the military Reserves claimed that the Reserve membership of certain members of Congress violated the Incompatibility Clause, which provides that “no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office. Denying standing, the Court wrote: “The only interest [is one] shared by all citizens. [The] claimed nonobservance [of that Clause], standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury.”
2. *U.S. v. Richardson*: Taxpayer challenged the Central Intelligence Agency Act of 1949, which provided that CIA expenditures must remain secret, as offending Article I, § 9, cl. 7 of the Constitution, which requires that “a regular statement of Account of the Receipts and Expenditures of all public Money shall be published from time to time.” According to the Court, the plaintiff’s claim was only “a generalized grievance” that was “common to all members of the public. While we can hardly dispute that this respondent has a genuine interest in the use of funds and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute.”

3. *Frothingham v. Mellon*: Taxpayer was not permitted to bring suit under the Tenth Amendment to enjoin congressional expenditures under a federal statutory program to reduce maternal and infant mortality. If the Court were to allow the suit, it would “assume a position of authority over the governmental acts of another and co-equal department.”

C. Examples of Permitted Taxpayer/Citizen Suits

1. Taxpayer challenges to government expenditures in support of religion (see *Flast*, supra).
2. *Duke Power*: Plaintiffs were 40 people who lived in the vicinity of planned nuclear plants, an environmental group, and a labor organization. Plaintiffs contended that the Price-Anderson Act, which limits the total liability of a nuclear plant operator for a single accident to \$560 million, violated the Due Process and Takings Clauses because they would not be adequately compensated in the event of a major nuclear accident. Despite the fact that a major accident could cause damages to large numbers of people, the Court granted standing to the plaintiffs. “Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.”

IV. PRUDENTIAL STANDING LIMITS

A. These are standing limits that are Court-devised but are not mandated by Article III. In other words, Congress could order the federal courts to hear claims otherwise barred by prudential limitations. An explicit statutory grant of authority to bring suit “eliminates any prudential standing limitations.” (*Raines v. Byrd*, quoted in *FEC v. Akins*)

B. Three types of prudential standing limits have been defined:

1. *Third-party (jus tertii) standing disfavored* (that is, a party usually may not assert the rights of others). “In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.” *Powers v. Ohio*

a. Requirements for third-party standing: A party can assert the constitutional rights of another person if three conditions are met:

- (1) The claimant has suffered an “injury in fact,” thus giving him or her a ‘sufficiently concrete interest’ in the outcome of the issue in dispute”;
- (2) The claimant and the person whose rights are being asserted have a “close

relationship”; and

(3) There exists “some hindrance to the third party's ability to protect his or her own interests.” *Powers v. Ohio*, quoting *Singleton v. Wulff*

b. *Special consideration for appellate cases*: If the lower court already has entertained the relevant constitutional challenge and the parties have sought or at least have never resisted an authoritative constitutional determination, an appellate court may decide to relax prudential concerns: “In such circumstances, a decision by us to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence. Moreover, insofar as the applicable constitutional questions have been and continue to be presented vigorously and “cogently,” . . . the denial of *jus tertii* standing in deference to a direct class suit can serve no functional purpose.” *Craig v. Boren*

c. Examples of disallowed *jus tertii* standing:

(1) *United States v. Raines*: The Court refused to permit certain Georgia public officials to defend against application of the Civil Rights Act to their official conduct on the ground that the statute also might be construed to encompass the “purely private actions” of others. “[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.”

(2) *Warth v. Seldin*: Various organizations and individuals in Rochester, New York, brought suit against the town of Penfield to enjoin application of its exclusionary zoning ordinance. “Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.” An organization (Metro-Act) that included residents of Penfield was denied standing despite its claim to represent their interests in residing in an integrated community. “We do not understand Metro-Act to argue that Penfield residents themselves have been denied any constitutional rights, affording them a cause of action under 42 U.S.C. § 1983. Instead, their complaint is that they have been harmed indirectly by the exclusion of others.”

d. Examples of permitted *jus tertii* standing:

(1) First Amendment overbreadth cases: A speaker whose speech is *not* protected under the First Amendment may challenge the government regulation on the ground that it would be unconstitutional *as applied to others*; the overbroad applications must not only be real (i.e., likely to occur), but substantial in relation to the statute’s plainly

legitimate sweep. The purpose of the overbreadth doctrine is to protect against chilling the First Amendment rights of parties not before the court. See *Broadrick v. Oklahoma*

(2) *Miller v. Albright*: Plaintiff was born out of wedlock in 1970 in the Philippines. Her mother was a Filipino national; her father was an American citizen now residing in Texas who served in the U.S. military in the Philippines at the time of plaintiff's conception. Her parents never married. In 1992, the State Department denied plaintiff's application for registration as a United States citizen. After a Texas court granted Mr. Miller's petition for a paternity decree finding him to be her father, petitioner reapplied for citizenship status, which was again denied on the ground that the Texas decree did not satisfy a statutory requirement that a child born out of wedlock and outside the United States to an *alien mother* and an *American father* be legitimated before age 18 in order to acquire citizenship. Plaintiff and her father then sued the Secretary of State in federal court, seeking a judgment declaring her to be a United States citizen. They emphasized that the citizenship of an out-of-wedlock, foreign-born child of an *alien father* and an *American mother* is established at birth under the same statute, and alleged that the different treatment of citizen fathers and citizen mothers violated the father's Fifth Amendment equal protection right by impermissibly utilizing the suspect classification of gender. A majority of the Justices (comprised of concurring and dissenting opinions) held that plaintiff had standing to assert the rights of her father.

(3) *Powers v. Ohio*: White criminal defendant could challenge exercise of race-based peremptory challenges by prosecutor that excluded African-American jurors. "[A] prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large. . . . The [practice also] causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. . . . [R]acial discrimination in the selection of jurors "casts doubt on the integrity of the judicial process," . . . and places the fairness of a criminal proceeding in doubt.' . . . Active discrimination by a prosecutor during this process condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law. The cynicism may be aggravated if race is implicated in the trial." Although "individual jurors subjected to racial exclusion have the legal right to bring suit on their own behalf, . . . [as] a practical matter, however, these challenges are rare." (quoting *Rose v. Mitchell*) See also *Campbell v. Louisiana* (white defendant has the requisite third-party standing to raise equal protection and due process challenge to discrimination against black persons in the selection of grand jurors).

(4) *Craig v. Boren*: Tavern owner was allowed to assert sex discrimination claim on behalf of men between the ages of 18 and 21 who were forbidden to purchase beer by state law (women in the same age group were allowed to buy beer). Vendor was "entitled to assert [equal protection] rights of third parties [young men] that would be

diluted or adversely affected should . . . the statutes remain in force. . . . Otherwise, the threatened imposition of governmental sanctions might deter . . . vendors from selling . . . beer to young males, thereby ensuring that enforcement of the challenged restriction against the (vendor) would result indirectly in the violation of third parties' rights."

(5) *Griswold v. Connecticut*: Physicians charged with dispensing birth control devices in violation of state law prohibiting their use had standing to assert constitutional privacy rights of patients. "Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime. . . . The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." *See also Doe v. Bolton* (abortion providers could assert fundamental rights of patients).

(6) *Barrows v. Jackson*: White seller of residential property to African-Americans in violation of racial covenant was sued for damages by neighboring property owners. The Court held that the defendant could assert the rights of the buyers in attacking the covenant as racially discriminatory. "[I]t would be difficult if not impossible for the persons whose rights are asserted [the buyers] to present their grievance before any court."

(7) *Pierce v. Society of Sisters*: A private and a parochial school had standing to bring suit to enjoin enforcement of a state statute requiring children to attend public schools. No parent or guardian to whom the act applied was a party, but the Court held that the act was unconstitutional because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

2. *Generalized grievances may not be brought*. "Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." (*FEC v. Akins*)

- a. Relation to "taxpayer suits": The Court at times has not clearly stated whether its refusal to hear a "generalized grievance" asserted by taxpayers or citizens was based on constitutional limits or prudential concerns. However, in general the Court treats the issue as a prudential consideration provided that the citizens who are so authorized personally meet the actual injury and causation requirement of Article III, even if the injury is one shared by large numbers of people.

- b. Congress can authorize citizen standing even though the injury is widely shared among the populace, see *Akins*, so long as Article III requirements are met (e.g., *Lujan*—citizen suit provision in Endangered Species Act not alone sufficient to confer standing in the absence of concrete injuries to plaintiffs). For example, Congress has authorized citizens

to bring suits as “private attorneys general,” e.g., to enforce federal water pollution laws.

c. Examples of disallowed “generalized” claims: *Schlesinger v. Reservists to Stop the War*; *U.S. v. Richardson*; *Frothingham v. Mellon* (supra, § III).

d. Example of permitted “generalized” claims: *FEC v. Akins*; *Flast v. Cohen*; *Duke Power* (supra, § III).

3. Plaintiff’s complaint must fall within the “zone of interests protected by the law.”

a. The Administrative Procedure Act (§10(a)) provides a right of judicial review to “a person suffering legal wrong because of agency action, or [to a person adversely affected or aggrieved by agency acting within the meaning of a relevant statute. . . .” For a plaintiff to have standing under the this section, “the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute . . . in question.” *National Credit Union Administration v. First National Bank & Trust Co.*, quoting *Association of Data Processing Service Organizations, Inc. v. Camp*

b. The “zone of interests” test does *not* require that Congress specifically intended to protect the plaintiff’s particular interests. Rather, it is sufficient if the plaintiffs interests are among those “arguably . . . to be protected by the statutory provision at issue.” (*National Credit Union*) However, standing will be denied if the plaintiff’s interests are only “marginally related to or inconsistent with the purposes implicit in the statute.” *Clarke v. Securities Industry Assoc.*

c. Examples of claims held to be within “the zone of interests”

1. *National Credit Union v. First National Bank*: Commercial banks had standing to challenge interpretation of the Federal Credit Union Act by the National Credit Union Administration; the agency’s decision expanded the membership potential of credit unions, thereby harming the competitive position of banks. Although Congress did not intend to protect banks when it restricted the allowable membership of credit unions, one of the purposes of the statute was to limit the markets of credit unions. As competitors of credit unions, the plaintiff banks had an interest in restricting their rivals’ markets.

2. *Assoc. of Data Processing Service Organizations v. Camp*: Data processing corporation and trade group had standing to challenge decision of Comptroller of Currency under the National Bank Act to permit national banks to perform data processing services for other banks and bank customers. As competitors of banks in offering such services, plaintiffs were “aggrieved persons” entitled to judicial review of the Comptroller’s interpretation.

3. *Arnold Tours v. Camp*: Travel agents were afforded standing to contest decision of Comptroller of Currency to allow national banks to operate travel agencies, even though the legislative history of the relevant statute did not disclose a specific congressional intent to protect rival travel agents. As in *Data Processing*, it was sufficient that the Comptroller's decision threatened the competitive interests of plaintiff travel agents.

4. *Investment Co. Institute v. Camp*: Investment company trade association and several individual investment companies had standing to dispute Comptroller of Currency's interpretation of Glass-Steagall Act permitting national banks to operate mutual funds. Notwithstanding that the Act's language and legislative history evinced no concern for investment companies, the effect of the Comptroller's decision was to harm competitive position of plaintiffs.

5. *Clarke v. Securities Industry Assoc.*: Securities dealer association was allowed to invoke the McFadden Act to contest decision of Comptroller of the Currency to authorize certain national banks to offer discount brokerage services outside their home states. Under this Act, banks were restricted to operating in their home states, which showed a congressional "concern to keep national banks from gaining a monopoly over credit and money." *Id.* "The interest of the securities dealers in preventing national banks from expanding into the securities markets directly implicated this concern because offering discount brokerage services would allow national banks 'access to more money, in the form of credit balances, and enhanced opportunities to lend money, viz., for margin purchases.'" *National Credit Union*, quoting *Clark*.

d. Example of claim held to be outside the "zone of interests":

Air Courier Conference v. APWU: The interest of Postal Service employees in maximizing employment opportunities was not within the "zone of interests" to be protected by the postal monopoly statutes, and hence those employees did not have standing under the APA to challenge a Postal Service regulation suspending its monopoly over certain international operations. As interpreted by the Court, the purpose of the statute was solely to increase the revenues of the Post Office and to ensure that postal services were provided in a manner consistent with the public interest; the statutory purpose was not to protect employment interests of postal workers.

CASES CITED

Air Courier Conference v. APWU, 498 U.S. 517 (1991)
Allen v. Wright 468 U.S. 737 (1984)
Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970)
Association of Data Processing Services Organizations v. Camp, 397 U.S. 150 (1970)
Barrows v. Jackson, 346 U.S. 249 (1953)
Broadrick v. Oklahoma, 413 U.S. 601 (1973)
Campbell v. Louisiana, 118 S.Ct. 1419 (1998)
City of Los Angeles v. Lyons, 461 U.S. 95 (1983)
Clarke v. Securities Industry Assn., 479 U.S. 388 (1987)
Clinton v. City of New York, 118 S.Ct. 2091 (1998)
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