Administrative Law -- Expansion of "Public Interest" Standing

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Administrative Law—Expansion of "Public Interest" Standing

The Federal Administrative agencies, regarded by New Dealers as the most effective political instrument for social and economic reform, have long since lost their progressive aura. The quest for revitalization has been carried on in the legislature and the law reviews for a generation. Mean-while, the federal judiciary has steadily widened public access to these centers of power. Judges have expanded the procedural law of "standing to sue" to urge upon the agencies broader value considerations and an affirmative burden of inquiry ever since the Supreme Court decided the "watershed case," FCC v. Sanders Bros. Radio Station. Development of standing is particularly evident in court review of Federal Power Commission and Federal Communications Commission proceedings, for these agencies have been the most criticized by courts and commentators. Two recent cases, setting aside FPC and FCC orders, have significantly broadened the right of standing. In remanding the records, the Courts of Appeals for the District of Columbia and Second Circuit made explicit the relationship between the public's right to participate in and appeal from agency action and the agencies' duty to plan in the public interest.

When it established a number of new agencies during the Depression, Congress typically provided that persons "aggrieved" by administrative action could initiate review by the courts. In the

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3 Jaffe, Judicial Control of Administrative Action 503 (1965) [hereinafter cited as Jaffe].
5 Jaffe 517.
8 E.g., Securities and Exchange Act § 9 (a), 48 Stat. 80 (1933), as amended 15 U.S.C. § 77i (1964); Federal Communications Act § 402(b)
absence of such statutes, the Supreme Court had not granted standing to parties who had not suffered a "legal wrong." This meant in practice that the petitioner was required to be a member of the class whose "interests" were protected by the challenged agency. For instance, in the Chicago Junction Case, a railroad was allowed to challenge an Interstate Commerce Commission order allowing a competing railroad to control a station used by both. But in L. Singer & Sons v. Union Pacific Ry. Co., non-members of the transportation industry had no standing to complain of ICC action permitting an extension of trackage that favored their competitor.

The Supreme Court did not follow the traditional theory of standing when faced with a suit brought under a "person aggrieved" statute. In FCC v. Sanders Bros. Radio Station it held that petitioner had no right to complain that it would suffer severe economic injury if the FCC licensed a competitor, because the act was not designed to protect existing licensees. Yet petitioner did have standing to sue, since it was definitely "aggrieved" by the licensing order. It could raise issues of law, and attempt to prove that the license grant was not in the "public interest." This was what Congress had intended by the review provision; if not, then such actions would be unreviewable and the section would be meaningless.

The distinction thus drawn between the basis for standing and the issues presentable on appeal greatly increased the opportunity for review. Since access to the courts now depended only on allegation of some adverse effect suffered, judicial review would no longer be a province wholly occupied by members of the regulated industry. The concept of "interest" was now poured into a new mold:


* L. Singer and Sons v. Union Pacific Ry. Co., 311 U.S. 295 (1940). The Court said petitioners must show a greater interest than "a common concern for obedience to law," id. at 302. Review was allowed to a "party in interest" under the Transportation Act, 24 Stat. 379 (1887), 49 U.S.C. § 1(20) (1964).
* 309 U.S. 470 (1940).
* Id. at 475.
* Id. at 477.
* Ibid.
that of "private Attorney General." Since "public interest" was to be the focus of the reviewing court's attention, the judges were encouraged to urge the agencies away from "industry orientation" and toward "consumer orientation."

In developing the theory of standing suggested in Sanders, the federal courts decided that aggrievement need not be financial, and allowed consumers as well as competitors to assert their view of the "public interest." The Court of Appeals for the District of Columbia, for example, thought that radio station KOA was aggrieved by a license grant to another station, which would interfere with KOA's signal. The Supreme Court affirmed, FCC v. NBC (KOA), on the narrower ground that KOA's license had been modified by the order, so it was a member of a class given a specific right of review by the statute. The FCC took advantage of this holding by arguing until recently that only those showing personal economic injury or electronic interference could appeal its orders. But the broad interpretation of "aggrieved" proposed in the court of appeals' opinion was reasserted by the same court in Office of Communications of United Church of Christ v. FCC. The implications that circuit had seen in Sanders in 1942 were fully realized in 1966, when it held that the FCC must allow "audience participation" in licensing proceedings.

An opinion by Judge Frank of the second circuit was important and influential in the process. Associated Industries v. Ickes held that a consumer's group threatened with financial loss by an order raising the fixed price of coal could challenge the order in court.

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14 Judge Frank's term in Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir. 1943), vacated as moot, 320 U.S. 707 (1943).
15 See Office of Communications of United Church of Christ v. FCC, 359 F.2d 994, 1004-05 (D.C. Cir. 1966); for a theory of "industry orientation" in federal regulation agencies, see JAFFE 10-16.
16 319 U.S. 239 (1943), affirming 132 F.2d 545 (D.C. Cir. 1942).
18 It stated that non-economic injury was recognized by the term "aggrieved," since otherwise non-profit radio stations could not appeal. NBC v. FCC, 132 F.2d 545, 547 (D.C. Cir. 1942). This court subsequently allowed users of a mass transit system to protest an agency action allowing use of radio broadcasts on buses, and the Supreme Court apparently agreed on the standing question. Pollak v. Public Utilities Comm'n, 191 F.2d 450 (D.C. Cir. 1951), rev'd on other grounds, 343 U.S. 451 (1952).
19 Id. at 1005.
20 Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir. 1943), vacated as moot, 320 U.S. 707 (1943).
In his opinion Judge Frank pointed out the revolutionary effect of Sanders' statement that Congress had conferred standing on parties who could not otherwise be heard. He dealt at length with the "case or controversy" requirement of the federal constitution. The required controversy existed, he said, when a public officer's action was attacked as a violation of his statutory powers. Since the Attorney General had always had constitutional authority to sue the officer, the problem was not whether a case existed, but rather who could bring it to court. Massachusetts v. Mellon disallowed federal taxpayer suits, so a private citizen could not sue a governmental officer on his own. Congress had the power to confer on him the standing of a "private Attorney General," however, and this is the meaning of the "persons aggrieved" statutes. Apparently this doctrine has been accepted by the Supreme Court, for the constitutional objections to a liberal standing policy voiced in some early cases have not been heard since.

Though we may regard the constitutional question as settled, the policy questions are not. If Congress has the power to grant standing to members of the public, how far has it exercised this power? And is there any basis outside the review statutes on which the right to standing may rest? The Supreme Court cited Associated Industries with approval in granting standing to a shareholder of a corporation affected by an SEC order. In two later cases, it again found standing despite the speculative or minimal nature of the injury. But the lack of a consistent theory was evident in one case that it heard without telling why. When the Secretary of the Interior and several electric cooperatives challenged an FPC order licensing a private power dam on the Roanoke River, Justice Frankfurter, speaking for the Court, said:

23 262 U.S. 447 (1923).
24 Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943). "It is within the power of Congress to confer such standing to prosecute an appeal." FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940).
We hold that the petitioners have standing. Differences of view, however, preclude a single opinion of the Court as to both petitioners. It would not further clarification of this complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations, to set out the divergent grounds in support of standing in these cases. 28

Consumer standing has been approved often, in recent years, where petitioners challenged rate fixing or natural gas licensing by the FPC. 29 The interest in these cases is usually economic, but sometimes not. 30 Members of the regulated group have been able to assert non-economic injury to gain standing before the FCC. 31 An important step was taken when a competitor who was not a broadcaster was allowed to protest the manner in which a license was used. 32 However, there had been no consumer standing before the FCC prior to 1966. And although the FPC had been challenged by conservation groups before, 33 their right to standing had not been

28 United States ex rel. Chapman v. FPC, 345 U.S. 153, 156 (1953). Congress had adopted a plan for development of the Roanoke River Basin. The Secretary of the Interior, who would have control over allocation of excess power produced by a Government dam, and the cooperatives, who were interested in purchasing cheap power, argued that the plan did not permit private operations within its territory. The lower court had denied standing, United States ex rel. Chapman v. FPC, 191 F.2d 796 (4th Cir. 1951).

29 California v. FPC, 353 F.2d 16 (9th Cir. 1965); City of Pittsburgh v. FPC, 237 F.2d 741 (D.C. Cir. 1956); Natural Gas Pipeline Co. of America v. FPC, 253 F.2d 3 (3rd Cir. 1958), cert. denied, 357 U.S. 927 (1958) (gas company which passed on rate increases to customers represented their interests as a matter of ethics and good business). "Essentially, the petitioners represent the ultimate consumers of the gas." Public Serv. Comm'n v. FPC, 257 F.2d 717, 720 (3rd Cir. 1958), aff'd sub nom. Atlantic Ref. Co. v. Public Serv. Comm., 360 U.S. 378 (1959).

30 Lynchburg Gas Co. v. FPC, 336 F.2d 942 (D.C. Cir. 1964) (under new rates petitioners would have to change suppliers).


33 National Hells Canyon Ass'n v. FPC, 237 F.2d 777 (D.C. Cir. 1956), cert. denied, 353 U.S. 924 (1957); Washington Dept. of Game v. FPC, 207 F.2d 391 (9th Cir. 1953), cert. denied, 347 U.S. 936 (1954). The right of associations to represent their members has long been recognized, and was specifically approved in National Motor Freight Traffic Ass'n v. United States, 372 U.S. 246 (1963) (per curiam).
made explicit or effective until *Scenic Hudson Preservation Conference v. FPC*.\(^\text{34}\)

One month before deciding *United Church of Christ*, the District of Columbia Court of Appeals heard a musicians' organization claim standing to represent the public's interest in live music programs, and to represent musicians aggrieved by a radio station's failure to present a promised amount of such programming.\(^\text{35}\) Though the issue was "well briefed" and presented "interesting and intriguing questions,"\(^\text{36}\) it was not decided. The court may have thought *United Church of Christ* presented a more clear-cut case for audience standing. Petitioners were religious and civil-rights groups claiming that television station WLBT in Jackson, Mississippi, unfairly discriminated against Negroes and Catholics in its programs, and carried excessive commercials. The FCC had heard complaints about WLBT before,\(^\text{37}\) but had continued to renew the station's license, an action in keeping with the agency's traditional reluctance to criticize program content.\(^\text{38}\) Faced with these circumstances, the court found that a grant of standing was "essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience..."\(^\text{39}\) It said "the concept of standing is a practical and functional one,"\(^\text{40}\) and has not remained static.

Similarly, in *Scenic Hudson* the court criticized the FPC's "narrow view" of standing.\(^\text{41}\) That case involved Consolidated Edison's application to build a hydroelectric plant at Storm King Moun-

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\(^{34}\) 354 F.2d 608 (2d Cir. 1965). The FPC argued that parties must show "personal economic injury resulting from the Commission's action" in order to obtain review. *Id.* at 615.

\(^{35}\) American Federation of Musicians v. FCC, 356 F.2d 827 (D.C. Cir. 1966).

\(^{36}\) *Id.* at 830. The case was decided on other grounds.

\(^{37}\) Office of Communications of United Church of Christ v. FCC, 359 F.2d 994, 998 (D.C. Cir. 1966); *Note, 77 Harv. L. Rev. 701, 710 (1964).*

\(^{38}\) *Note, 77 Harv. L. Rev. 701 (1964); Note, 68 Yale L.J. 783 (1959).* Private-TV, because it receives huge public grants from the nation in the form of licenses, should have a large dedication to the public service. But it has never paid more than lip service to the concept and the Federal Communications Commission has never made any sustained effort to force a shift in programming—for various reasons, the most important being the influence of the TV lobby in Congress. Markel, *A Program for Public-TV*, N.Y. Times, March 12, 1967, § 6 (Magazine), Part 1, 25, 126.

\(^{39}\) 359 F.2d at 1002.

\(^{40}\) *Ibid.*

\(^{41}\) *Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 615 (1965).*
tain in New York, "an area of unique beauty and historical significance." The complaining petitioners were an association composed of several non-profit conservation groups, and three municipalities in the area. They charged that the Commission had failed to give adequate consideration to non-economic values in its proceedings. The court discussed the congressional mandate for agency fostering of these interests, and said:

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be "aggrieved" parties. . . .42

Both courts rejected the objections that the Commissions could adequately represent the public interest, and that a broadening of standing would encourage participation by so many parties that proceedings would be unworkable.43 The District of Columbia court thought that FCC representation of the listener's interest was "no longer a valid assumption."44 And, the second circuit dismissed the FPC's fear that "literally thousands" would intervene and appeal by saying, "Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken."45 The courts suggested that formation of groups represent-

42 Id. at 616. Petitioners were said to have some economic interest, in addition, but this was not seen as an important factor. Ibid.

43 The courts have decided that the right of intervention should be tested by the same standards applied to the right of appeal, so the benefits extended by the instant cases can be taken advantage of by those seeking to participate in agency proceedings. See, e.g., American Communications Ass'n v. United States, 298 F.2d 648 (2d Cir. 1962); Public Serv. Comm'n v. FPC, 284 F.2d 200 (D.C. Cir. 1960); National Coal Ass'n v. FPC, 191 F.2d 462 (D.C. Cir. 1951). But cf. Local 282, Int'l Bhd. of Teamsters v. NLRB, 339 F.2d 795 (2d Cir. 1964); contra, Marine Engineers' Beneficial Ass'n v. NLRB, 202 F.2d 546 (3d Cir.), cert denied, 346 U.S. 819 (1953). Professor Davis thinks there should be a distinction between rules governing intervention and those controlling standing to appeal. Davis, ADMINISTRATIVE LAW TREATISE §§ 8.11, 22.08 (1964). The primary reason for limiting intervention is the fear that some parties seek only to delay the proceedings; but this objection would seem less forceful where the parties will not reap financial gain from delay.

44 359 F.2d at 1003. See 354 F.2d at 620. Cf. UAW v. Scofield, 382 U.S. 205 (1965); NLRB v. Local 2, United Ass'n of Journeymen, 360 F.2d 428 (2d Cir. 1966). These cases held that parties who brought or defended charges before the NLRB could intervene to assert their interest in court review of action taken by the Board.

45 354 F.2d at 617. The same language is found in JAFFE at 523. It has been said that the cost of taking a case of average complexity "adequately"
ing common interests would limit the number of participants.\textsuperscript{48} The courts clearly indicated in these two cases that their extension of standing was meant to provide \textit{effective} participation by representatives of non-economic public interests. They criticized the agencies for not realizing the duty to affirmatively pursue the good of the public as a whole, rather than that of the regulated industry, and to carefully consider alternative proposals put forth by the parties.\textsuperscript{47} The federal judiciary has not always been so forceful in encouraging agency planning. In early cases it was assumed that administrative bodies were vigorously reformist, and the courts left procedure to the agencies' discretion so long as private rights were given some protection.\textsuperscript{48} With the passage of the Administrative Procedure Act,\textsuperscript{49} however, Congress urged the courts to be more critical in examining agency action.\textsuperscript{50} The courts continue to approve agency planning and exercise of administrative discretion when directed toward broad policies.\textsuperscript{51} But they are more eager to remand records for further consideration where the agency has not adequately studied alternative proposals that appear prima facie to have merit.\textsuperscript{52} If the parties do not present alternatives, the agencies to the courts is "upwards of $5000." Gardner, \textit{The Administrative Process}, \textit{in \textbf{LEGAL INSTITUTIONS TODAY AND TOMORROW}} 108, 140 (Paulsen ed. 1959).

\textsuperscript{48} 359 F.2d at 1005; 354 F.2d at 617.

\textsuperscript{49} The Second Circuit said that the FPC's "role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it..." 354 F.2d at 620. See 359 F.2d at 1008.


\textsuperscript{52} See Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

\textsuperscript{53} See Namekagen Hydro Co. v. FCC, 216 F.2d 509 (7th Cir. 1954) (approving denial of license to build dam on river with special recreational qualities); FCC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961) (approving consideration of end—use of gas and conservation of resources); Goodwill Stations, Inc. v. FCC, 325 F.2d 637 (D.C. Cir. 1963) (FCC within power in modifying “clear channel” stations after expiration of license term); FCC v. Union Elec. Co., 381 U.S. 90 (1965) (FCC has jurisdiction over dams in non-navigable streams, under Commerce power). This last case appears to adopt the view of Justice Jackson, whose dissent in FCC v. Hope Natural Gas Co., 320 U.S. 591, 628 (1944), urged more comprehensive planning in rate-fixing cases, including a consideration of conservation policies.

are expected to seek them. In the instant cases, the courts further extended this liberal review policy. Alternatives to the hydroelectric plant on Storm King were discussed at some length by the second circuit, which found that they had such merit that the FPC exhibited a "disregard of the statute" by not receiving them. And the court in United Church of Christ mentioned several advantages to be found in refusing to license WLBT at all. By devoting such attention to alternatives, the courts stressed that the public interest requires affirmative planning rather than passive acceptance of the regulated industry's point of view.

As Professor Jaffe has pointed out, "the law of standing raises acute questions concerning the role of judicial review, or, more broadly, judicial control of public officers." Jaffe and other critics agree that agency practice badly needs changing. They point to "industry orientation," lack of political responsibility, failure to define policies, and stagnation in case-by-case nearsightedness. However, they differ on the function of the courts in bringing about reform, and the judges have not developed a consistent

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54 354 F.2d at 618-24.
55 Id. at 620.
56 359 F.2d at 1009.
57 "In these circumstances a pious hope on the Commission's part for better things from WLBT is not a substitute for evidence and findings." 359 F.2d at 1008. "The Commission's reviewed proceedings must include as a basic concern the preservation of natural beauty and of national historical shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered." 354 F.2d at 624. Compare Public Serv. Comm'n v. FPC, 257 F.2d 717 (3d Cir. 1958), aff'd sub nom. Atlantic Ref. Co. v. Public Serv. Comm'n, 360 U.S. 378 (1959). In that case the FPC had twice refused to grant a license to an oil producer at an unusually high rate; when the producer threatened to keep the oil out of the interstate market, the FPC capitulated. The court reversed, since there was no evidence that the high rate was in the public interest.
58 "BERNSTEIN 459.
60 Bernstein, Friendly and Shapiro counsel judicial restraint. BERNSTEIN
The courts have been content to rely on the vague language of the review statutes in overcoming agency opposition to broader standing. In the instant cases, though, are found the most explicit statements yet of the substantive reasons for procedural development: to make the agencies more responsive to the needs of the people. This underlying policy would seem inherent in the democratic form of government. The right which implements that policy, therefore, should be recognized as being derived from a more fundamental source than a statute. It is submitted that Congress in writing the review statutes, and the judiciary in interpreting them, have been, in effect, applying constitutional theory to the "fourth branch" of government. The checks on agency power provided by legislative limitation of duties, executive appointment of officers, and judicial review of actions, should be complemented by participation of interested parties in decision making. Perhaps the next step in the development traced in this note will be judicial recognition of a constitutional right to be heard in the administrative process, founded on the first amendment. As the late Professor Meiklejohn

96-97; FRIENDLY 1293; SHAPIRO 334-39. Jaffe also expresses caution, but argues for a "public action" open to all citizens with vigorous use of judicial discretion to limit appeals. JAFFE 523-24. Professor Davis disagrees, and would allow standing only to one "adversely affected in fact"; quaere whether he would extend that concept as far as the instant cases, and whether the general satisfaction he expresses for current review practice will continue. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 23-01 (1958), 22.10 (Supp. 1965). Reich is most enthusiastic about instances of judicial aggressiveness. Particularly, he regards United Church of Christ as revolutionary, and he praises both cases noted here. Reich 1248-55.

See text accompanying note 28 supra.

359 F.2d at 1001-02; 354 F.2d at 616. For an opinion sharply critical of efforts by the government to restrict standing, see United States v. Public Util. Comm., 151 F.2d 609 (D.C. Cir. 1945), cert. denied, 331 U.S. 816 (1947).

The movement of the case law toward "audience participation" suggests a striking similarity to the aim of "participatory democracy" espoused by "New Left" groups:

As a social system we seek the establishment of a democracy of individual participation, governed by two central aims: that the individual share in those social decisions determining the quality and direction of his life; that society be organized to encourage independence in men and provide the media for their common participation. STUDENTS FOR A DEMOCRATIC SOCIETY, PORT HURON STATEMENT 7 (1964).

It has been argued that the constitution guarantees the right to court review of arbitrary administrative action. Berger, Administrative Arbi-

has said, that amendment is concerned, "not with a private right, but with a public power, a governmental responsibility."---

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Admission to the Bar—"Good Moral Character"—Constitutional Protections

Traditionally, states have been free to set up bar admission standards as rigorous or as lenient as desired. Thus, it is permissible to require that the applicant for admission have graduated from law school, that he swear to uphold state and federal constitutions, and that he does not advocate violent overthrow of the government. Perhaps the most important requirement established by every state is that the applicant have "good moral character." This requirement allows the states a great deal of discretion in determining who will be admitted to the bar since the function of this requirement is to insure that only those who have sufficiently high moral character are allowed to practice law. Any determination of character is clearly a discretionary determination. Since the state impliedly warrants

"Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245.

2 E.g., Ex parte Florida State Bar Ass'n, 148 Fla. 725, 5 So. 2d 1 (1941).
3 In re Summers, 325 U.S. 561 (1945).
5 See Rules for Admission to the Bar (West 38th ed. 1963); 64 A.L.R.2d 301 (1959); Jackson, Character Requirements for Admission to the Bar, 20 Fordham L. Rev. 305 (1951). Besides use of the term "good moral character," courts draw analogy and support from the term "moral turpitude," i.e., if there is "moral turpitude," there is a lack of "good moral character." See Bradway, Moral Turpitude as the Criterion of Offenses that Justify Disbarment, 24 Calif. L. Rev. 9 (1935).
6 See Comment, 15 Stan. L. Rev. 500, 511 (1963) to the effect that the high moral character required is one that would enable the attorney to decide what is "right" for professional conduct as distinguished from private conduct.
7 As to what considerations should be taken into account in deciding this question, see Starrs, Considerations on Determination of Good Moral Character, 2 Catholic L. Rev. 161 (1956). As to whether a judge or other decision maker should follow his own convictions or that of the public in determining "good moral character," see Cahn, Authority and Responsibility, 51 Colum. L. Rev. 838 (1951).