Comments

CONSERVATIONIST'S STANDING TO CHALLENGE
THE ACTIONS OF FEDERAL AGENCIES

If eternal vigilance is the price of liberty, it is also the price of environmental quality. During the past several years, conservationists have turned to the courts with increasing frequency seeking an unbiased forum for review of environmentally undesirable government actions. But too often these representatives of the public interest find that the legal doctrine of standing to sue blocks their legal action against the offending agency. This Comment analyzes the effect of two recent Supreme Court cases, concerning the complex and confused area of standing to sue, in an attempt to show that granting standing to conservationists is both desirable and consistent with the present trend toward a liberalized law of standing.

The federal government has long possessed broad regulatory powers to preserve natural resources, and Congress has responded to recent concern for environmental quality by strengthening those powers. But administrative bottlenecks have often prevented effective implementation of available legislation, creating serious enforcement problems. Too often administrative indifference or misinformation engenders lethargic responses to impending environmental threats. Private actions to compel agencies to halt environmental damage may be the most effective means of stimulating needed enforcement. The effectiveness of the private, conservationist suit as a means of enforcing existing law, is closely related to the liberality of the doctrine of standing to sue, which determines who is a proper party to bring a legal action. The courts must be accessible to the qualified conservationist litigant.

On March 3, 1970, the Supreme Court of the United States handed down its decisions on the companion cases, Association of Data

Processing Service Organizations, Inc. v. Camp and Barlow v. Collins. The decisions, both written by Mr. Justice Douglas, established three general requirements of standing. First, there must be a case or controversy under Article III, Section 2 of the Constitution of the United States. Second, 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 or constitutional guarantee in question." Third, the statute whose guarantees are being invoked must not clearly and positively deny standing to the class of plaintiffs bringing the action.

This Comment will explore the tests for standing established by these two cases and their likely usefulness to conservationists: It will analyze what the tests mean, where they are unsettled and their possible constructions and applications in conservation disputes and it will consider the extent to which the cases facilitate environmental challenges to agency action.

Neither Data Processing nor Barlow was a conservation case and neither expressly created rules which settle the issue of standing for environmental litigation. Those cases, however, did establish broad new rules governing standing to challenge federal agency action, and the Court made specific reference to environmental interests in its discussion of the subject of standing:

[The] interest [sought to be protected], at times, may reflect 'aesthetic conservational, and recreational' as well as economic values . . . . We mention these non-economic values to emphasize that standing may stem from them as well as from the economic injury on which petitioner relies here.

Although this language indicates that the newly minted rules of standing were meant to affect conservation group standing, the facts of Data Processing and Barlow are not sufficiently similar to those of a conservation case to extrapolate a hard and fast rule governing conservation litigation.

8. The law concerning standing to review federal agency actions was inconsistent and complex prior to Data Processing. As the court put it in Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 861 (D.C. Cir. 1970): "The law of standing as developed by the Supreme Court has become an area of incredible complexity. Much that the Court has written appears to have been designed to supply retrospective satisfaction rather than future guidance."
10. Id. at 153.
13. For the facts of Data Processing, see text accompanying note 19, infra.
CASE OR CONTROVERSY

Quoting from *Flast v. Cohen*, the *Data Processing* opinion phrases the case or controversy requirement as a question of, "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." This section will examine the potential meaning of the new tests laid down by *Data Processing* and *Barlow*, keeping the goal of the true adversary proceeding clearly in mind.

The case or controversy requirement will be discussed in terms of two factors. The first factor, "injury in fact," means actual harm to the plaintiff's self-interest—harm which the plaintiff seeks to alleviate through the litigation. The second factor, plaintiff's commitment, involves the dedication of the plaintiff to its position in the litigation and probably provides a better measure, in conservation cases, of the plaintiff's qualification as a true adversary.

A. Injury in Fact

Neither *Data Processing* nor *Barlow* settled how the injury in fact test applies to environmental plaintiffs, and subsequent cases have not

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In *Barlow*, a group of tenant farmers from Alabama sought to challenge a regulation promulgated by the Secretary of Agriculture which permitted them to spend certain federal support payments for rent as well as for other expenses of farming. They claimed that their landlords could demand advance assignments of the payments for rent and then levy such high prices and interest that the subsidy would be consumed each year by high debt payments. *397 U.S.* at 160-64. The court held that, "there is no doubt that in the context of this litigation the . . . petitioners . . . have the personal stake and interest that impart the concrete adverseness required by Article III." *Id.* at 164.

15. 397 U.S. at 151-52 (emphasis added). The Court earlier explained the requirement this way:

> By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.


16. Where parties are genuine adversaries, there is reasonable assurance of a vigorous and complete presentation of the arguments for each side. The adversary context provides a full illumination of the issues and thus enables a court to make an intelligent, balanced judgment and to establish sound precedent.

17. Injury in fact is indirect evidence, based on the self interest of the plaintiff, that the plaintiff is a proper adversary. Evidence of plaintiff's commitment is direct evidence, based on his actions, that he will vigorously litigate the issues.
resolved that issue. In considering how an environmental plaintiff can meet the Article III test for standing, therefore, it is critical to determine whether he must allege a certain degree of harm or a distinctive harm, and if not, how a court will ascertain whether he will be a proper adversary under the case or controversy requirement.

On the surface, *Data Processing* lays down a strict Article III test for standing: Whether the complainant had alleged that the challenged federal agency action tended to cause him actual injury.\(^{18}\) However, to appreciate the full import of the test as used in *Data Processing*, it must be observed that the test was easily applied to that case's facts. Plaintiffs were in the business of selling data processing services to businessmen. They sought to challenge a ruling of the U.S. Comptroller of the Currency that banks could make data processing services available to other banks and to their customers. The Comptroller's ruling allowed new and substantial competition with the plaintiffs; the economic injury was manifest.\(^{19}\)

Although the Court cautions against facile generalizations about standing requirements,\(^{20}\) a dictum in *Data Processing* indicates that the injury in fact test is meant to be construed broadly: "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."\(^{21}\) The words "or otherwise" were superfluous to the actual holding and might be read to require the existence of non-economic injury as the first test of standing in a conservation suit.

With only one exception, every federal court which has sought to apply the *Data Processing* analysis of standing to a conservation case has required the existence of injury in fact. Five cases\(^{22}\) required an injury in fact for satisfaction of the Article III test, considering other factors, such as plaintiff's commitment, to be unimportant elements. A sixth case\(^{23}\) found it unnecessary to require injury in fact since plain-

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18. See text accompanying note 21 infra.
19. 397 U.S. at 152.
20. It narrowly classes *Data Processing* as a competitor's suit and distinguishes it from a taxpayer's suit, such as *Flast v. Cohen*. *Id.*
21. *Id.* (emphasis added).
tiff’s commitment supplied the necessary assurance of a full illumina-
tion of issues.

‘Injury in fact” is a pithy, quotable phrase; the above cases have
apparently applied it without examining the context in which it was em-
ployed by the Supreme Court. Since economic injury was clear and sub-
stantial in the facts of Data Processing, there was no need to go further
to find the requisite adversity. Still, the fact that these courts have at-
ttempted to apply injury in fact to environmental cases makes it neces-
sary to analyze more fully what the Supreme Court may have meant
by injury in fact.

It may be argued that “injury in fact” is a term of art which does
not have the same meaning as “injury” in the commonly accepted sense
of the word. Although Data Processing did not define injury in fact,
the phrase suggests two possible interpretations: It may require that a
plaintiff suffer a certain degree of harm; or it may require that the plain-
tiff suffer a special, distinctive harm.

If only a certain degree of harm will give rise to an injury in fact,
a method of ascertaining that degree must be established. Courts might
apply a vague standard of injury in fact, such as “significant harm” to
the plaintiff, on a case by case basis. But a careful application of such
a test would necessitate explanation of why the harm suffered by the
particular plaintiff was or was not significant or substantial. Since stand-
ing is a question of law, not of fact, the courts would be compelled to try
to create analytically defensible criteria, which could be applied to dif-
ferent sets of facts.

There are substantial difficulties in trying to create a uniformly ap-
plicable test of standing based on degree of harm. A uniform standard
of minimum harm would have to be applicable to all kinds of envi-
ronmental threats and their effects on human beings. Development of
a standard that would apply, for example, to both air pollution and the
destruction of recreation areas would have to overcome the difficulty in
determining which of these potential injuries is more harmful to the plain-
tiff, and in what way. The damage to health by pollution is not easily
compared with the deprivation of all future enjoyment of a wilderness
area. The injury to health is a direct threat to the welfare of the entire
society, though in some cases the damage is at least partially reversi-
ble.24 The loss of wilderness is perhaps a less direct threat to the en-

24. For example, lung damage from air pollution may heal when the individual
moves to a nonpolluted environment. Thus if lack of standing allows an agency deci-
sion to go unchallenged and this results in inadequate emission standards, the resulting
harm to many persons may be reversible if the standards are later tightened. Of course,
some persons may die from the pollution and to this extent the damage is clearly
not reversible.
tire society since some of its members do not care whether it exists or not, but for those who do care, the injury is not only very deep, but usually completely irreversible.\textsuperscript{25}

Whether a threatened injury to the public is great enough to warrant court intervention in the actions of a federal agency is a question which goes to the merits and to the extent of agency discretion, not to the issue of standing. As the Court stated in \textit{Flast v. Cohen}, the subject of standing refers only to whether the plaintiff is a proper party to bring a legal action.\textsuperscript{26} The extent of injury to society is irrelevant to the subject of standing; if injury is necessary, then the injury to be considered is that of the plaintiff.

In \textit{Flast v. Cohen} the Supreme Court held that it was irrelevant that the financial injury to the individual plaintiff taxpayer was minimal and indistinguishable from the injury to the other taxpayers.\textsuperscript{27} In an environmental case, the Court could hold that standing can exist even when the environmental injury to an individual plaintiff is minimal and indistinguishable from the injury to other citizens. At least so far as a requirement of injury is concerned, that would not bar standing to any conservationist litigant.\textsuperscript{28}

\textsuperscript{25} While it may be true that in several hundred or perhaps several thousand years, a freeway or a dam will decay and the landscape will return to a natural state, this is hardly relevant to the present desires of today's citizen. Even the 20 to 30 years required to replace a forest with second growth timber can be considered in practical terms irreversible to a large number of our citizens because by the time the area has become wilderness again (and it is also debatable whether second growth is actually wilderness), they will either be dead or too old to enjoy it.

\textsuperscript{26} 392 U.S. 83, 99-100 (1968).

\textsuperscript{27} \textit{id.} at 91-101.

\textsuperscript{28} Compare the "private attorney general" concept which was originated by Judge Frank in Associated Industries, Inc. v. Ickes, 134 F.2d 694 (2d Cir.), \textit{vacated}, 320 U.S. 707 (1943). See also L. \textit{JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION} 517 (1965). The concept was embraced by now Chief Justice Burger in Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1966). \textit{United Church of Christ} was cited with approval in \textit{Data Processing}. 397 U.S. at 154.

In \textit{United Church of Christ}, the plaintiff was allowed standing as a private attorney general because the governing statute conferred such a right on him, as a member of the public, to bring suit in the public interest. It is implicit in the private attorney general concept that only an injury in common with the rest of society is constitutionally necessary for standing.

Consider the following passage from \textit{Data Processing}:

[Plaintiff's] interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values. . . . We mention these non-economic values to emphasize that standing may stem from them as from the economic injury on which petitioner relies here. Certainly he who is likely to be financially injured, . . . may be a reliable private attorney general to litigate the issues of the public interest in the present case.

397 U.S. at 154 (emphasis added) (footnotes omitted). This statement seems to imply that there are non-economic values which can also establish that the plaintiff will be a reliable private attorney general.
If degree of injury is not a workable criterion for standing in conservation cases, then perhaps standing can be limited by requiring the plaintiff to allege that he has suffered a distinct and special environmental injury. Recent opinions which have suggested or imposed restrictive definitions of conservational injury have in fact required individualized, distinctive injury. But the cases have not examined and explained how to recognize a distinctive conservational injury.

*Environmental Defense Fund, Inc. v. Hardin* is a case in which standing was granted to a plaintiff who did not allege special injury. In that case the injury alleged by the plaintiff was the biological harm to man, caused by the continued use of DDT. Standing, it said, should be granted to consumers of regulated products and services, and man is a "consumer" of DDT. The reasoning of the case is applicable to other kinds of conservation cases. For example, the users of a national park are consumers of a governmental service and facility. Pollution is consumed and the sources of pollution are often subject to governmental regulation, as well as the products that the polluters are manufacturing. Moreover, *Environmental Defense Fund, Inc. v. Hardin* involved no class of individuals more strikingly injured than the plaintiffs, since DDT affects all people similarly. The case could be reconciled with the cases requiring special injury, if special injury is only necessary when there exists a class distinctly injured.

However, *Sierra Club v. Hickel* denied standing where there existed no class which suffered a more distinct conservational injury than the plaintiff. In that case, the Sierra Club sought to prevent commercial development which would have impaired the wilderness value of Sequoia National Park. A national park is intended to be used by all citizens of the United States. Thus, there is no class of people specially injured by its destruction. *Sierra Club v. Hickel* cannot be reconciled with *Environmental Defense Fund, Inc. v. Hardin*. It is not reasonable to assume that the Sierra Club was denied standing simply because it failed to allege the obvious fact that many of its members use Sequoia National Park. Furthermore, it would be contrary to much of the language in *Data Processing* and *Barlow* if the case only allowed local

Note that *Data Processing* speaks of the plaintiff as a "private attorney general" in spite of the fact that in that case the applicable statute did not confer standing on members of the public to sue in the public interest. *Id.* at 154. But see *id.* at 153 n.1.

29. The standard of special injury which courts have employed requires the plaintiff to be a local resident of the area of the resource threatened and a user of that resource. See text accompanying notes 35-42 infra.


31. *Id.* at 1096.

32. *Id.* at 1097.

property owners to sue, on the basis of their economic interest. *Sierra Club v. Hickel* impliedly requires that a plaintiff in a conservation suit always allege special injury.

A blanket requirement of special injury would deny standing to any environmentalist in cases like *Environmental Defense Fund, Inc. v. Hardin*. In such cases there could be a class of individuals who were specially injured economically, but no class specially injured by the environmental damage itself. A holding that no one could challenge the use of DDT because of its danger to the environment would be discordant with the passage in *Data Processing* which stressed that standing can stem from "aesthetic, conservational, and recreational" values. But such a holding must follow if distinctive harm is a necessary component of injury in fact.

An overly-narrow definition of the class most injured could lead to absurd results. The class most injured could be defined so narrowly that only individuals who were old and tubercular could bring suit to require a federal agency to meet its air pollution control responsibilities. However, other more reasonable definitions of the class most injured are possible. If the effects of threatened environmental damage are most critical locally, standing might be restricted to local users or consumers.

Several of the most current cases granting standing have found it necessary to consider whether plaintiffs were local residents of the area concerned. In *Citizens Committee for the Hudson Valley v. Volpe*, plaintiffs sought to enjoin the Secretary of Transportation from issuing a permit to allow construction of a causeway along a bank of the Hudson River. The fact that many of the members of the plaintiff organization were local residents was considered important to the grant of standing. In *Pennsylvania Environmental Council, Inc. v. Bartlett* the plaintiff sought an injunction against a highway relocation project which allegedly threatened trout in a fork of the Sinnemaboning Creek. The cases held that the injury in fact requirement was met by the Allegany

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34. See text accompanying note 12 *supra*.
35. Such an approach would be analogous to the common law of nuisance, which required highly distinctive harm. *See, e.g.*, Schroeder v. City of Lincoln, 155 Neb. 599, 52 N.W.2d 808 (1952). It might find some support from the concurring and dissenting opinion of Justices Brennan and White in *Data Processing* and *Barlow*. "The more 'distinctive or discriminating' the harm alleged and the more clearly it is linked to the defendant's action, the more easily a plaintiff may meet the constitutional test." 397 U.S. at 172 n.5. No subsequent decision has indicated that *Data Processing* and *Barlow* might require a highly individual conservational harm.
36. 425 F.2d 97 (2d Cir. 1970).
37. *Id.* at 99-100.
38. *Id.* at 103.
Mountain Trout Association and several individual sportsmen because the members of the Association and the sportsmen were frequent users of the trout stream.\textsuperscript{40} \textit{Sierra Club v. Hickel} distinguished \textit{Citizens Committee} by pointing out that in the latter case the Sierra Club was joined by local organizations made up of local residents and users of the area.\textsuperscript{41}

The "local users" criterion is not helpful in determining workable rules. It leaves unanswered how "local" the users must be in most situations and has no application at all in a case involving a national park. It seems impossible to justify and explain the distinction made in \textit{Sierra Club v. Hickel} between its own facts and those of \textit{Citizens Committee}, unless the difference is simply that the Sierra Club neglected to allege that many of its members frequently use Sequoia National Park. If \textit{Sierra Club v. Hickel} did turn on the insufficiency of the Sierra Club's allegations, then the case does not represent precedent for setting limits on the meaning of "local users."

In any event, restricting standing to local users will not necessarily prevent nationally based organizations such as the Sierra Club from meeting standing requirements. A local membership drive and a careful allegation of substantial local membership would perhaps suffice.\textsuperscript{42} Or the national organization might make efforts to stimulate interest in the issue among local citizens and organizations. The net results of the local user criterion would be additional expense to the national organization and possibly fatal delay.

The above discussion indicates that requiring either a high degree of injury or a distinctive injury creates serious difficulties in analysis and does not appear to serve any practical purpose. Another possible approach would be to say that any harm to a conservationist plaintiff can constitute injury in fact. Since any damage to the environment can be alleged to be injurious to society, and therefore an injury to each citizen as a consumer of the environment, the consequence of permitting any environmental damage to give rise to an injury in fact would be to make the injury in fact test completely unrestrictive in environmental litigation. But this is really only a circuitous route to the underlying conclusion that injury in fact is not a helpful test in environmental cases. This conclusion is buttressed by the basic purpose of the Article III requirement of standing. That purpose is stated in \textit{Data Processing} as follows:

\begin{quote}
[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to
\end{quote}

\begin{itemize}
\item[40.] \textit{Id.} at 245.
\item[41.] 433 F.2d at 33.
\item[42.] \textit{Citizens Committee} made reference to the local membership of the Sierra Club, which was allowed standing as a plaintiff in that case. 425 F.2d at 103.
\end{itemize}
be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.43

Thus, Article III limitations on standing serve only to ensure that the parties to a dispute are real opponents and will vigorously present their cases.

A strict requirement of injury in fact would only tend to assure an adequate presentation in conservation cases if conservationist plaintiffs brought actions to protect their own interests. In reality, litigation aimed at the protection of the environment is seldom motivated by narrow self-interest. The impetus for such litigation is moral and perhaps ideological; its purpose is the protection of the public interest.

There is fear that plaintiffs with purely ideological motives would only assert points in support of their stand in the litigation which accord with their ideology,44 and would thus not qualify as proper adversaries. But this problem could be solved by judicious allowance of intervention to those parties who would advance theories in support of plaintiff's cause of action which the original plaintiff has found unnecessary to pursue. A multiplicity of intervenors seems unlikely because of the expenses involved, and because environmental plaintiffs will tend to attempt consolidation of their arguments to save time and money.

Under Data Processing and Barlow, asserted injuries may be non-economic and traditional "legal interests" need not be asserted.45 To deny the existence of this substantial new freedom to litigate in the public interest is to ignore the spirit of those holdings.46 Since environmental litigation is rarely motivated by narrow self interests, to require injury to such an interest cannot serve to assure or enhance the adversary character of a dispute, but rather, only serves to keep public interest litigation out of court. The requirement of a case or controversy does not necessitate a rule that a plaintiff—who would challenge an action of a federal agency on the ground that the agency is not taking proper consideration of environmental quality—must be a member of the class specially or substantially injured.

B. Plaintiff's Commitment

Data Processing did not say that only injury in fact could satisfy the case or controversy requirement of standing but simply held that in-

43. 397 U.S. at 151-52 (emphasis added).
44. For an eloquent statement in favor of allowing the ideological plaintiff, see Jaffe, The Citizen as Litigant in Public Actions: the Non Hofeldian or Ideological Plaintiff, 116 PENN. L. REV. 1033 (1968).
45. 397 U.S. at 153-54.
46. Data Processing relied heavily upon the following two cases: Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965). 397 U.S. at 154.
jury in fact could meet the Article III requirement—in one type of case. *Data Processing* was a case involving clear financial interests. In such a case it is appropriate to consider the Article III requirement of standing solely in light of economic injury, for that injury alone will presumably cause plaintiff to defend his position vigorously, thus assuring the requisite adversary context. Furthermore, *Barlow* the companion case to *Data Processing*, did not even mention injury in fact but rather used the phrase “personal stake and interest.”

In two important conservation cases decided prior to *Data Processing*, the courts based their grants of standing on the presence of plaintiff's commitment. With a single exception, however, each federal

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47. 397 U.S. at 164.
48. Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), cited approvingly in *Data Processing*, 397 U.S. at 154; Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970). *Data Processing* and *Barlow* were handed down on March 3, 1970, while *Citizens Committee* was handed down on April 16. However the Citizens Committee opinion was clearly written without knowledge of those cases, since it failed to mention them.

In *Scenic Hudson* a conservation organization and several towns brought an action to set aside certain orders of the Federal Power Commission. The challenged orders permitted the construction of a hydroelectric project on the Hudson River. The case held that the commitment of the plaintiffs qualified them as litigants:

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 included in the class of 'aggrieved' parties under [the Federal Power Act]. We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.

354 F.2d at 616. However, the opinion also pointed out that the members of the plaintiff organization were residents and property owners in the area of dispute. *Id.*

In *Citizens Committee* plaintiffs sought to enjoin the Secretary of Transportation from issuing a permit to allow construction of a causeway along a bank of the Hudson River. The grant of standing turned on the plaintiffs' demonstrably genuine concern for the issue at bar. The court particularly stressed the facts that the plaintiffs were well organized and had made great efforts to further their cause before filing suit:

All plaintiffs made a vigorous effort to present their views to the New York Department of Transportation and to the federal officials responsible for granting the disputed permit. They have evidenced the seriousness of their concern with local natural resources by organizing for the purpose of cogently expressing it, and the intensity of their concern is apparent from the considerable expense and effort they have undertaken in order to protect the public interest which they believe is threatened by official action of the federal and state governments. In short, they have proved the genuineness of their concern by demonstrating that they are 'willing to shoulder the costly processes of intervention' in an administrative proceeding.

425 F.2d at 103.

49. Izaak Walton League of America v. St. Clair, 313 F. Supp. 1312 (D. Minn. 1970). In that case the Izaak Walton League brought suit to, inter alia, enjoin the Secretary of Agriculture from permitting two individuals to explore, drill, and remove minerals on certain lands included in the National Wilderness Preservation System. The court pointed to the long history of the League in conservation matters and concluded that: “There will be no ‘collusive suit’ nor a mere nominal presentation. This first requirement of *Association of Data Processing* and *Barlow* is thus met.” 313 F.
conservation case after _Data Processing_ which has sought to apply its analysis of standing has required the existence of injury in fact, with little emphasis on commitment.  

50. In Environmental Defense Fund, Inc. v. Corps of Engineers, 2 ENVIR. REP.—C A S E S 1173 (D.D.C. Jan. 27, 1971), two conservation organizations and a number of Florida residents sought to enjoin a canal project which allegedly threatened to pollute the state water supply and cause the destruction of unique timber. The case's discussion of the question of standing was terse, and did not attempt any real analysis. In a single puzzling sentence the court noted the commitment of the plaintiff organizations and concluded that the canal project would cause them injury in fact. "EDF and FDE which through their research and other activities have sought to preserve and enhance the natural environment for the benefit of posterity, will suffer real injury if the anticipated environmental damage occurs." _Id._ at 1174. The citizens, as residents of Florida, were also allowed standing, because they too would suffer "real injury." _Id._

In Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Penn. 1970), a conservation organization and a number of individuals sought an injunction against a highway relocation project which allegedly threatened trout in a fork of the Sinnemahoning Creek. _Bartlett_ proceeded on the assumption that injury in fact was the sole Article III determinant of standing. It said that _Data Processing_ and _Barlow_ applied a two pronged test of standing, which included the test of injury in fact and the zone of interest test [see text accompanying note 9 _supra_]. The court reviewed the allegations of the complaint, and concluded that the dispute would be presented in an adversary context. _Id._ at 245. The court purported to apply the injury in fact test, but certain allegations which it reviewed were more relevant to plaintiffs' commitment than to plaintiffs' injury: The court referred to an allegation of the complaint, that one of the principal purposes of the Pennsylvania Environmental Council was to prevent such environmental damage as that damage sought to be prevented by the lawsuit. The court also mentioned plaintiffs' allegations that they were representative of present and future generations with a property right in the area. _Id._ The organizational purpose of the Pennsylvania Environmental Council and the fitness of the plaintiffs to represent the interests involved go to the quality of plaintiffs' commitment, not to the nature of their injury.

A recent 9th Circuit decision on standing for conservation is _Sierra Club v. Hickel_, 433 F.2d 24 (9th Cir. 1970), _cert. granted_, 39 U.S.L.W. 3353 (U.S. Feb. 23, 1971). In that case the Sierra Club, on behalf of itself and its membership, sought to enjoin the Secretary of the Interior from permitting a large commercial and recreational development from being built in and near the Mineral King Area of the Sequoia National Park. The club was denied standing. _Id._ at 33. This case stands for the view that a personal injury in fact is the central, and perhaps the only aspect of the Article III requirement of standing:

We do not believe that the Sierra Club's complaint alleges that it or its members possess a sufficient interest for standing to be conferred. There is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing and distasteful to them. _Id._ For a comparison between _Sierra Club v. Hickel_ and _Environmental Defense Fund, Inc. v. Hardin_, see text accompanying notes 33-34 _supra_.

A later case from the 9th Circuit, Alameda Conservation Assoc., Inc. v. California, 2 ENVIR. REP.—C A S E S 1175 (9th Cir. Jan. 19, 1971), pursued the strict injury in fact analysis of _Sierra Club v. Hickel_. In _Alameda_ a conservation organization and a number of residents of the San Francisco Bay Area sought injunctions against the State of
Notwithstanding these cases, however, an environmental plaintiff’s dedication to his position in the litigation is highly relevant to the establishment of an adversary context, for there the actual injury threatened to the plaintiff is likely to be slight or difficult to define. Such an injury in itself offers little assurance that the plaintiff will be a satisfactory opponent in the litigation. But if the plaintiff is strongly committed, there is reasonable assurance that he will vigorously present his case, thus qualifying as an adequate adversary.

Recognition of the importance of the plaintiff’s commitment necessitates inquiry as to whether such commitment alone ensures adequate presentation. Specifically, can the court determine whether plaintiff is competent to defend his position in the litigation using only the criterion of commitment? Plaintiff’s demonstration of his willingness and capability to obtain good legal assistance supplies reasonable assurance that he is a qualified adversary. Furthermore, an organizational plaintiff whose central purpose is closely related to the type of issue being litigated and which has initiated the action should be assumed trustworthy to pursue the litigation. An individual who cannot demonstrate substantial personal harm should perhaps be required to show both his long interest in the area of concern and his financial commitment to the presentation of the case. Such issues of fact do not present difficult problems of analysis. The courts are experienced at solving more difficult issues than whether a suit is non-collusive and whether the plaintiff can reasonably be expected to present his case adequately.

The question of adequate presentation becomes particularly important when plaintiff’s personal stake in the case is minor or hard to define, as in several recent conservation cases. In each of those cases, despite plaintiff’s lack of personal injury, there was from the beginning strong assurance of adequate presentation, owing to plaintiff’s commitment. In fact, where the injury to plaintiff is minor or nebulous, the courts have tended to stress factors which relate to commitment, even while espousing injury in fact as the dispositive test. Typical is *Environmental Defense Fund, Inc. v. Hardin,* decided after *Data Processing* and *Barlow,* where plaintiff organization

California and Leslie Salt Company, in order to prevent the salt company from further filling the Bay. The organization was denied standing because it was not harmed as an organizational entity, but the local residents were granted standing on the ground that the Bay fill would cause them real injury.


52.  428 F.2d 1093 (D.C. Cir. 1970). See also the discussion of *Pennsylvania Environmental Council v. Bartlett* in note 50 supra.
sought an order compelling the Secretary of Agriculture to suspend all uses of the chemical DDT. The District of Columbia Circuit Court applied the rules of standing set forth in Data Processing and Barlow and held that the injury in fact requirement was satisfied by plaintiffs' allegations of biological harm to man and to other living things. Thus the court did not require an allegation of distinctive injury, but allowed plaintiff to allege harm to society as consumers of the regulated product. "Furthermore," the court said, "the consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem." Here it was appropriate to allow plaintiff's demonstrably strong commitment as probative of its qualification as an adversary, in the absence of any distinctive injury; there was no particular plaintiff most strikingly injured as there was in Data Processing, and hence, plaintiff's qualification as an adversary was demonstrated by its commitment rather than by its having suffered a special injury in fact. The D.C. Circuit thus essentially considered that the Environmental Defense Fund's commitment established it as a proper representative of the class alleged to be injured, under a broad reading of the injury in fact test.

There is no compelling public policy which requires that courts analytically strain to define and apply criteria of special conservational injury. Rather, it is reasonable to require an environmental plaintiff to allege only that he, either as an individual or a member of society, will suffer some injury if the agency action is not overturned. It should not be necessary that the injury be great, nor that the injury be to any extent peculiar to the plaintiff. However the plaintiff should be required to demonstrate a sufficient commitment to the subject of the litigation to assure a full and adequate presentation of the case. It is only through a showing of the plaintiff's commitment that the adversary character of a conservation case can be assured.

II

ZONE OF INTERESTS

Data Processing states that:

The question of standing . . . concerns, apart from the 'case' or

53. 428 F.2d at 1097.
54. Consider again these words from Data Processing: "Certainly he who is 'likely to be financially' injured . . . may be a reliable private attorney general to litigate the issues of the public interest in the present case." 397 U.S. at 154 (emphasis added). If the plaintiff's injury is important because it establishes that the plaintiff will be a reliable private attorney general, then in the absence of sufficient injury to the plaintiff to ensure such reliability, it should be reasonable to accept other evidence of plaintiff's reliability to litigate the case—namely plaintiff's dedication and commitment to the issue being litigated.
'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. Thus the Administrative Procedure Act grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute'. 89 Stat. 392, 5 U.S.C. § 702. That interest at times, may reflect 'aesthetic conservational and recreational' as well as economic values . . . .

The "zone of interests" test has been a fertile source of controversy. Opinions vary on the meaning, application, and usefulness of the test. The reference to "aesthetic conservational, and recreational" interests allows application of the test to permit suits by conservationists. But two important facets of the test are unresolved; First, how should complainant's interest be defined, and second, how should a court establish the extent of the zone of interests sought to be protected by a statute? If the interest asserted is broadly defined and if the extent of the zone of interests is inferred from the general policy of the relevant statute, the zone of interests test will be relatively unrestrictive. But if the interest asserted must be defined with great particularity and the extent of the zone of interests must be derived from the legislative history of the precise statutory language that applies, then the test will greatly restrict standing.

A. The Definition of the Complainant's Interest

To begin an analysis of the meaning of the zone of interests test,

55. 397 U.S. at 153-54.
56. Professor Kenneth C. Davis, in his article, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450 (1970), discusses the zone of interests test at length. He is highly critical of the test, and feels that it will unduly deny standing in many types of cases in which standing has been traditionally allowed. Sierra Club v. Hickel, citing Professor Davis' article, 433 F.2d at 28 n.1, also rejects the zone of interests test. After quoting the wording of the test in Data Processing, it says:

The significance of the language is not entirely clear. It is likewise not made clear in a companion case decided the same day and involving the same question. [Barlow v. Collins] We 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 [—the injury in fact test.]

Id. at 31.

Izaak Walton League of America v. St. Clair, 313 F. Supp. 1312 (D. Minn. 1970), actually treats the zone of interests test as a part of the injury in fact test. Izaak Walton League states:

The second Association of Data Processing requirement, a non-constitutional one, is that plaintiff must allege 'that the challenged action has caused him injury in fact, economic or otherwise.' . . . Whatever it is clear in the case at bar that this second requirement is met in any event as 'arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question' which the Association of Data Processing Court states to include: ' . . . That interest, at times, may reflect 'aesthetic conservational, and recreational' as well as economic values.'

313 F. Supp. at 1316-17.
the Court's meaning of "the interest sought to be protected by the complainant" should be examined. The inquiry will focus upon what the court intended when it used the word "interest."

In using the word "interest," the Court did not mean to refer only to a cause of action recognized at common law or a privilege conferred by statute. The "legal interest" test—requiring that plaintiff must claim a violation of one of his common law or statutory rights in order to have standing—was explicitly abolished by Data Processing. Thus the word "interest" was not intended in a technical legal sense.

It is possible that the "interest sought to be protected by the complainant" means nothing more than the specific relief demanded in the complaint, the correction of the alleged illegality. By such a definition, the interest sought to be protected in Sierra Club v. Hicke would not be the preservation of the Sequoia National Forest or the enjoyment of the Forest by plaintiff's members; rather, the interest sought to be protected would be enforcement of specific statutory requirements concerning the administration of national parks and forests. In Citizens Committee for the Hudson Valley v. Volpe, the "interest sought to be protected" would not be the preservation of the scenic value of the Hudson River area, but the requirement that the Corps of Engineers not exceed its authority by unlawfully issuing the permit for the construction of a "dike" in the Hudson River, without the express authorization of Congress.

The application of the zone of interests test in Barlow demonstrates that "the interest sought to be protected by complainant" probably means more than the specific relief demanded in the complaint:

The tenant farmers are clearly within the zone of interests protected by the Act. Implicit in the statutory provisions and their legislative history is a congressional intent to protect the interests of tenant farmers... The legislative history of the 'making a crop' provision, though sparse, similarly indicates a congressional intent to benefits the tenants. They are persons 'aggrieved by agency action within the meaning of a relevant statute..." The Court's reference to the interests of the tenant farmers in Barlow appears to contemplate the farmers' well being. Nothing other than the

58. Id.
60. Id. at 27.
61. 425 F.2d 97 (2d Cir. 1970).
62. Id. at 99-100.
64. Id. at 164-65.
plain import of the phrase, "the interest sought to be protected by the
complainant" seems to have been intended by the Court. Accordingly,
the word "interest" was intended to mean a benefit, value, or advantage.
The phrase might therefore be restated as follows: That benefit or value
which the complainant seeks to defend or maintain, or: That damage
or harm which the complainant seeks to prevent.

The question remaining is whether it is necessary to define narrowly
the exact benefit, value, or advantage sought to be protected by the
plaintiff. Professor K. C. Davis proceeds on the theory that the com-
plainant's interest must be defined narrowly. The following passages, in
which Professor Davis discusses Barlow, are central to this theory:

What was it that had to be within the zone of protected interests—
(a) the tenant farmers, (b) their interests in general, or (c) the par-
ticular interest they were asserting? Obviously, the answer should be
the particular interest they were asserting. . . . The Court's exclusive
focus on the 'interests of the tenant farmers', along with its complete
failure even to consider the particular interest they were asserting,
goes to the essence of the Court's analysis and holding.\(^6\)

Professor Davis' analysis appears to be sound, until he names the
particular interest which the court "inadvertently" failed to consider in
Barlow.\(^6\) The interest which he identifies is not the well-being of the
farmers, not their economic prosperity, not even their protection from
the economic exploitation of their landlords. Rather it is their interest
in not being able to assign their federal advance payments.\(^7\) Such in-
tense narrowing of the interest of complainant can only be termed indul-
gence in legal fictions for no apparent reason.

It would seem more in keeping with the tenor of Data Processing
and the holding of Barlow to identify, as the interest sought to be pro-
tected, a more general interest of the complainant.\(^8\) For example, if a

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65. Davis, supra note 56, at 455-56.
66. Id. at 456.
67. If the Court had not fallen into its inadvertence—if it had addressed
itself to the question whether the particular interest asserted was arguably
within the zone of interests to be protected—what would it have held? One
can only speculate: Probably no congressional intent can be found that the
interest of the farmers in continuing the restriction on their legal capacity to
make assignments either was 'to be protected' or was not 'to be protected.'

. . . In the remainder of this essay we shall assume that the Court's fail-
ure to reach the question whether the farmers' particular interest was enough
was only an inadvertence, and that the Court meant to establish two tests for
standing—'injury in fact' and whether the particular interest asserted is 'argu-
ably within the zone of interests to be protected or regulated by the statute
or constitutional guarantee in question.'

Id.

68. Note again the language of Barlow:
Implicit in the statutory provisions and their legislative history is a con-
gressional intent to protect the interests of tenant farmers. . . . The legis-
conservation group seeks to enjoin a federal agency from logging a forest, it is neither illogical nor inconsistent with Barlow to identify plaintiff's interest as his interest in preserving a unique valley forest in its natural state. Then if the federal agency has been given a statutory charge which makes it arguable that it has a duty to preserve the forest in its natural state, the complainant would meet the zone of interest test. Professor Davis' analysis would require the plaintiffs to allege the precise harm which would come to them from the logging of the forest; and his analysis would require the showing of a congressional intent to protect the plaintiffs from that precise harm.

Although this method of identifying the complainant's interest is neither logically necessary nor in keeping with Barlow, it does point up an unsettling aspect of the zone of interests test: namely, that it is impossible to know exactly how expansively or how narrowly to view the complainant's interest. There are indications, however, that the interest should be viewed as broad in scope. One such indication is that the interest must only be "arguably within the zone of interests sought to be protected."69 Another indication may also be found in Data Processing: "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend."70 At minimum, Data Processing makes it clear that the complainant's interest should not be analyzed according to the technique of Professor Davis.

**B. The Determination of the Extent of the Zone of Interests**

A court must decide the extent of the statutory zone of interests as well as the character of a complainant's interest. With respect to this decision it is appropriate to discuss how a court should determine the zone of interests.

A recent decision from the District of Columbia Circuit, National Welfare Rights Organization v. Finch,71 provides possible guidance in its thoughtful application of the zone of interests test. In that case plaintiff was a national organization with a membership composed largely of welfare recipients. Plaintiff sought to be admitted as a party to a hearing which would determine whether the state welfare laws of Nevada and Connecticut conformed sufficiently with the Social Security Act of

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70. Id. at 154.
71. 429 F.2d 725 (D.C. Cir. 1970).
1956 to allow those states to continue to receive federal aid for their welfare programs. The case pointed out the close relationship between standing to intervene in administrative hearings and standing to challenge and to enforce administrative action. It stated that:

Except for the adjustments necessary for assuring the manageability of administrative proceedings, the criteria for standing for review of agency action appear to assimilate the criteria for standing to intervene.\(^7\)

The case's analysis of the zone of interests test is relevant, then, in spite of the fact that it involved the standing of a party to intervene in an agency hearing.

*National Welfare Rights Organization* said that a statute's zone of interests includes the relevant interests of those persons intended to be the beneficiaries of the statutory scheme.\(^7\) It found that the plaintiff's relevant interests were included in the broad goals of the statute, as described in the *Conference Report*.\(^7\) The case rejected the idea that standing to challenge administrative actions must be based on a specific statutory grant or that the legislative history must affirmatively indicate an explicit intent to grant standing.\(^7\) It noted that statutory provisions explicitly granting standing are exceptional when viewed in the context of all legislative enactments which pertain to administrative proceedings. Therefore, it held, legislative silence does not tend to deny standing.\(^7\)

This proposition goes to the essence of the zone of interests test. There would be no point in speaking of a statutory zone of interests if only explicit statutory language could allow standing. The zone of interests test was designed to apply in the absence of a clear statutory provision granting or denying standing to sue.

The analysis of the zone of interests of *National Welfare Rights Organization* is in harmony with the application of the test by the Supreme Court. In *Barlow* the zone of interest test was also satisfied because the plaintiffs were beneficiaries of the statutory scheme. And the test was applied by looking to the broad purposes of the statute, not by scouring the statutory language and legislative history for references to the subject of standing.

Another case in which the court drew upon the broad declaration of policy of the statute to reach its conclusion was *Harry H. Price & Sons v. Hardin*.\(^7\) Plaintiff was a tomato repacker and wholesaler, who

\(^7\) Id. at 732-33.  
\(^7\) Id. at 734.  
\(^7\) Id. at 735 n.37.  
\(^7\) Id. at 732.  
\(^7\) Id.  
\(^7\) 425 F.2d 1137 (5th Cir. 1970).
purchased the majority of his tomatoes from Mexico. He sought an order enjoining the Secretary of Agriculture from enforcing the 1969 tomato import restrictions which had been promulgated pursuant to the Agricultural Marketing Agreement Act. The court held that plaintiff's claim was arguably within the zone of interests to be protected by the Act.\(^7\)

In *Environmental Defense Fund, Inc. v. Hardin*, "the 'zone of interests' sought to be protected by the statute included not only the economic interest of the registrant seller of DDT but also the interest of the public in safety."\(^7\) The case noted that the relevant statutory language made frequent mention of public safety\(^8\) and that the final *House Report* said that certain provisions of the act were designed to protect public safety.\(^9\)

In *Pennsylvania Environmental Council, Inc. v. Bartlett*,\(^9\) applicable statutes included clear statements of policy in favor of environmental protection. Thus the interests sought to be protected by plaintiffs were held to be within the statutory zone of interests. Quoting the district court opinion of *Citizens Committee for the Hudson Valley v. Volpe*,\(^8\) it declared the applicable rule to be:

> If the statutes involved in the controversy are concerned with the protection of natural, historic and scenic resources, then a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency.\(^8\)

The National Environmental Policy Act of 1969\(^8\) arguably grants standing to any party who would invoke its protections.\(^8\) However, it has not yet been determined what effect the Act will have once a federal agency gives lip service to ecological factors. Nevertheless, it is reasonably certain that other statutory provisions, governing federal agency environmental policy decisions, will remain crucial in many conservation suits.\(^7\) In order to obtain review based on the substantive provisions of those statutes, conservation groups will still have to show that the in-

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78. *Id.* at 1140.
80. *Id.*
81. *Id.* at 1095 n.2 & 1096 n.11.
84. 315 F. Supp. at 245.
87. For example, the definition of the word "dike" in the Rivers and Harbors Act of 1899 was central to the resolution of *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97, 100 (2d Cir. 1970).
terests which they seek to protect fall within the various statutory schemes of protection.

III

THE PRESUMPTION OF REVIEWABILITY AND ITS RELATIONSHIP TO THE ZONE OF INTERESTS TEST

Even if it is found that the case or controversy requirements are met and that the interest sought to be protected falls within the statutory zone of interests, a plaintiff may not obtain review of the agency action if the governing statute has precluded review to the class to which he belongs. According to the Data Processing case, the Administrative Procedure Act has created a strong presumption in favor of reviewability of federal agency actions. The case quotes from the House Report as follows:

The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute is certainly no evidence to withhold review.

Thus, unless a statute denies standing to the plaintiff on its face, it must include a very strong, clear implication of the denial of standing. Data Processing stated that: "There is no presumption against judicial review and in favor of administrative absolutism . . . unless that purpose is fairly discernible in the statutory scheme." And Barlow held that "the statutory scheme at issue here is to be read as evincing a congressional intent that petitioners may have judicial review of the Secretary's action."

Since the statutory scheme is presumed to allow judicial review unless there is "'clear and convincing' evidence of a contrary legislative intent" the presumption will be very useful to litigants who are urging an interpretation of a given statute in favor of reviewability. There is another, more significant effect of the presumption. It discourages tenuous and complex arguments about whether the Congress intended to allow judicial review to a particular party. Attorneys are no longer encouraged to make prolonged searches into legislative history for

88. In Association of Data Processing Orgs. Inc. v. Camp, 397 U.S. 150, 154 (1970) the Court said: "Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise."
91. 397 U.S. at 157.
92. Id. at 167.
93. Id.
oblique references to the subject of reviewability. Unless judicial review is denied upon the face of the statute, it may only be denied by clear inference from the broad statutory scheme.94

Cases which have applied the presumption of reviewability after Data Processing and Barlow have usually found it necessary to give only cursory attention to the problem of reviewability. Environmental Defense Fund, Inc. v. Hardin devoted a single paragraph to the subject of reviewability. It concluded that although the governing statute “provides that the Secretary ‘may’ suspend the registration of an economic poison that creates an imminent hazard to the public, . . . his decision is not thereby placed beyond judicial scrutiny.”95 Pennsylvania Environmental Council, Inc. v. Bartlett disposed of the issue in a single sentence; 96 Izaak Walton League of America v. St. Clair did so in a brief paragraph. 97 Harry H. Price & Sons v. Hardin98 allowed judicial review of a federal agency decision without any explicit discussion of whether review was precluded by statute. National Welfare Rights Organization v. Finch99 made careful analysis of statutory language and legislative history before concluding that the governing statute did not impliedly deny judicial review. The D.C. Circuit’s analysis did not follow the pattern set out in the majority opinions of Data Processing and Barlow but instead considered the issue of reviewability under the approach advocated in the concurring and dissenting opinion of Mr. Justice Brennan.100 Still, when a defendant can very convincingly argue that a statute impliedly precluded review, a court will be forced to make a careful study of the language and legislative history of that statute.

94. Contrast the approach of Mr. Justice Brennan, who wrote a concurring and dissenting opinion to Data Processing and Barlow. Mr. Justice Brennan argued that the canvass of statutory materials made for the zone of interests test ought to be considered an aspect of reviewability, not standing. And reviewability ought to be investigated as follows:

Pertinent statutory language, legislative history and public policy considerations must be examined to determine whether Congress precluded all judicial review, and, if not, whether Congress nevertheless foreclosed review to the class to which the plaintiff belongs.

Id. at 173. In addition, instead of requiring clear and convincing evidence to preclude judicial review, Mr. Justice Brennan suggests that “judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.” Id. at 174 (emphasis added).

95. 428 F.2d 1093, 1098 (D.C. Cir. 1970).
98. 425 F.2d 1137 (5th Cir. 1970).
100. See generally note 94 supra. National Welfare Rights Organization cited the first excerpt from Mr. Justice Brennan’s opinion which is quoted in note 94 supra. 429 F.2d at 735 n.38.
It is unlikely that there will be many cases which will hold both that plaintiff's interest falls within the zone of interests to be protected and also that the statute *impliedly* precludes judicial review. Both the zone of interests and the test for implied preclusion of review look to the statutory scheme of protection: there is considerable overlap between the tests. The zone of interests test is designed to determine whether a grant of standing to the plaintiff would be in harmony with the purposes embodied in the applicable statute. If the statute was designed to protect plaintiff's asserted interest, it is inferred that the Congress would grant standing to protect that interest.

In order to decide whether a statute impliedly precludes review to the plaintiff, it is highly relevant also to consider whether the statute was designed to protect that interest which the plaintiff is asserting. However, in considering whether a statute has impliedly precluded review other factors are sometimes present. If the statute explicitly grants standing to review agency actions to certain complainants, it might be inferred that it has denied standing to others. And there may be cases where agency decisions are based on such a high degree of expertise that a grant of standing to an intended plaintiff would be counterproductive of statutory goals, even though the applicable statute was clearly designed to protect the interest plaintiff is asserting. An example might be a case in which an organization challenges the radiation hazard standards of the Atomic Energy Commission as being inadequate to protect health and safety.

Together the tests seem to imply a single question: *Would the framers of the statute, had they thought of standing and understood the issue, have granted standing to this plaintiff?* If the statute explicitly limits or defines standing the solution is relatively straightforward. If not, the question can best be answered in light of the general policies enunciated in the statute. It will be remembered that courts which have applied the zone of interest test have generally done so according to the broad goals of the governing statute as expressed in either the statutory declarations of policy or in the statements of policy found in the final committee reports on the bill which was eventually enacted.

Since statutory interpretation is generally a judicial function, it is logical to leave standing and reviewability decisions to the courts so long as Congress does not act to explicitly limit reviewability. Certainly it is a step toward judicial honesty that courts are no longer required to engage in extended and fictitious inquiries into whether Congress actually intended to grant standing to the class to which the plaintiff be-

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101. Such an argument was unsuccessfully made in National Welfare Rights Organization v. Finch, 429 F.2d at 735-36.
longs. Rather, they need only decide whether a grant of standing is in accord with the basic policies of the governing statute.

CONCLUSION

*Data Processing* and *Barlow* have removed certain arbitrary legal obstructions to review of federal agency actions. The old inscrutable legal interest test of standing and the fictitious techniques of discerning the "legislative intent" for judicial review have been replaced by the more realistic but also difficult "concrete adverteness" inquiry, and the technique of discerning standing and reviewability from the statutory scheme.

There is compelling advocacy, notably from Professor Davis, in favor of making injury in fact the sole test of standing. The injury in fact test, standing alone, would be doctrinal artificiality. Injury in fact is no assurance of a sound adversary context nor is it a necessary condition for the adversary context to exist. The requisite adversity may be assured by a strong showing of plaintiff's commitment.

Still, injury in fact is not a harsh requirement if is not applied in a highly restrictive manner. But if the courts create minimum limits for an "injury" or decide that special or unique injury is necessary in conservation cases they will be replacing past artificiality and inconsistency with a new brand of the same.

The zone of interests test and the presumption of reviewability require the Congress to be explicit if it wishes to preclude judicial review. These tests transfer the issues of reviewability and standing more to the judicial branch, and compel the courts to create meaningful doctrines in place of their former dependence on the usually nonexistent will of Congress.

The movement and sense of *Data Processing* and *Barlow* is to reduce substantially the threshold requirements of standing and reviewability. Of course there will remain threshold rules by which courts can deny judicial review—for example, those of "ripeness," "political question," or frivolity.

Arguments on behalf of stringent requirements of standing are often based on the idea that the purpose of the courts is to redress individual wrongs to persons or legal entities. Perhaps the "legal interest" re-

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102. See note 56 *supra*.
104. C. Wright, *supra* note 103, at 43 & n.21.

Such an approach is demonstrably circular: if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected.

*Id.* at 43.
requirement was itself founded on the idea that only individuals with a traditionally recognized legal stake should have access to the court system.

Such arguments assume that ideologically motivated grievances should and can be vented through the legislature. But the political process on the federal level is not meaningfully responsive to a citizen or a small, poorly funded organization of citizens. And it is appropriate for the courts to correct concrete illegality, even if the motivation for the litigation is ideological. The staffing and the functions of the courts must be expanded to meet pressing public needs.¹⁰⁵

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