

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN M. HARLAN

March 10, 1971

Re: No. 61 - Investment Co. Institute v. Camp

Dear Potter:

Putting aside the merits for the time being, I regret to say that I am having difficulty with the discussion of standing in your proposed opinion for the Court. The issue appears to me to be one of considerable complexity, requiring a more detailed examination than it presently receives.

The complications stem from the fact that, as all three judges on the Court of Appeals agreed, the pertinent sections of the Glass-Steagall Act, as well as the legislative history, evince no congressional intention to protect any class to which the plaintiffs in No. 61 belong. Thus Judge Bazelon stated: "The Glass-Steagall Act was not intended by Congress to protect mutual funds from competition from banks, so they do not have standing as intended beneficiaries" 420 F.2d, at 96. See also *id.*, at 98-100. Judge Burger, as he then was, and Judge Miller were of the same view: "It is equally clear that giving even the broadest reading of the legislative history embellishing the Act will not support the conclusion that Congress meant to bestow upon Appellees any protection from competitive injury." *Id.*, at 105 (footnote omitted). See also *id.*, at 105-106 n.7, 108. It appears reasonably plain that the Act was adopted despite its anticompetitive effects, not because of them. The petitioner in No. 61 is unable to point to any legislative history to the contrary. See its Reply Brief at 27-29 and n.27.

This being the case the discussion of standing by Mr. Justice Black, speaking for the Court in Hardin v. Kentucky Utilities Co., 390 U.S. 1, 5-6 (1968), is directly in point:

"This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations. Railroad Co. v. Ellerman, 105 U.S. 166 (1882); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Tennessee Power Co. v. TVA, 306 U.S. 118 (1939); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule, at least since the Chicago Junction Case, 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision."

I do not believe that Association of Data Processing Service Organization v. Camp, 397 U.S. 150 (1970), requires the opposite result from the one suggested by this passage from Hardin. Data Processing held that, aside from "case-or-controversy" problems not present here, the crucial question in ruling on a challenge to standing is "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." 397 U.S., at 153. That question was resolved in favor of the Data Processors because "§ 4 [of the Bank Service Corporation Act] arguably brings a competitor within the zone of interests protected by it." Id., at 156. Similarly, in the companion case of Barlow v. Collins, 397 U.S. 159, 164 (1970), we held that tenant farmers had standing to challenge a regulation of the Secretary of Agriculture as inconsistent with a certain statute for they were "clearly within the zone of interests protected by the Act." We found, upon a review of the relevant materials, that "[i]mplicit in the statutory provisions and their legislative history is a congressional intent that the Secretary protect the interests of tenant farmers." Ibid.

I note that your opinion does not refer to the "arguably protected" test of Data Processing, which divided the Court in that case. Even on the assumption -- which seems to me highly doubtful -- that ICI's monopolistic interests are "arguably protected," this would not dispose of the matter under Data Processing. As Professor Jaffe has observed with respect to that case,

"The sense of the holding is ambiguous because it is not clear what is to be considered on 'the merits.' Is it a further inquiry into whether the statute means to protect plaintiff or simply whether the action is ultra vires? In earlier cases (e. g., Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968)) plaintiff was held to have standing but lost on the merits because the action was held valid. If, now, plaintiff gets by the motion to dismiss because 'arguably within the zone of interests to be protected,' does he automatically win if the action is held invalid?" Jaffe, Standing Again, 84 Harv. L. Rev. 633, 634 n. 9 (1971).

It may be that a negative answer to Professor Jaffe's question is to be inferred from the following passage in Data Processing:

"Whether anything in the Bank Service Corporation Act or the National Bank Act gives petitioners a 'legal interest' that protects them against violations of those Acts, and whether the actions of respondents did in fact violate either of those Acts, are questions which go to the merits and remain to be decided below." 397 U.S., at 158.

This passage seems to indicate that the existence vel non of a "legal interest" is distinct from the issues of standing and reviewability on the one hand and from the legality of the administrative conduct on the other. The only relevant issue which appears to satisfy these conditions is whether the plaintiff's interest is "actually" as well as "arguably" within the zone of interests intended to be protected.

If despite this passage there is no further inquiry into whether a person "arguably" protected is "actually" protected

-- and the proposed opinion engages in no such inquiry -- then we have gone even beyond the position advocated by the dissent in Data Processing. The dissent there would not only have required injury in fact and the absence of an intent to preclude judicial review generally; it would also have investigated "whether Congress nevertheless foreclosed review to the class to which plaintiff belongs." 397 U.S., at 173. In the latter connection, the dissent observed that "[w]here, as in the instant cases, there is no express grant of review, reviewability has ordinarily been inferred from evidence that Congress intended the plaintiff's class to be a beneficiary of the statute under which the plaintiff raises his claim." Id., at 174. While it may be that facts other than an intent to protect plaintiff's class would also give rise to a conclusion of "reviewability" in the dissent's terminology, I would not have thought that evidence of an "arguable" intention to protect was sufficient, particularly if the intention disappeared on closer examination.

In raising these questions, I do not mean to suggest that I have decided ICI lacks standing. It may well be, as Professor Jaffe and all three judges below concluded, albeit for differing reasons, that there is some judicial discretion to hear claims despite the absence of standing in the traditional sense, and that this is an appropriate case for the exercise of such discretion. But this is not what I understand your opinion to hold, and I fear that I cannot agree to its "standing" holding as I presently understand it. (Nor have I yet made a sufficient study of the case to come to rest on the merits.) I of course shall welcome your views on these matters.

Sincerely,


J. M. H.

Mr. Justice Stewart

CC: The Conference