STANDING TO CHALLENGE UNLAWFUL COMPETITION UNDER THE NATIONAL BANK ACT

Under the characterization of "expanded banking services," national banks are offering to their customers an increasingly diverse assortment of traditionally non-banking services such as data processing, travel agency services, insurance agency services and security brokerage services.[1] Banks are entering these areas under authority granted to them by the Comptroller of the Currency, the chief regulatory officer of the national bank system.[2] This recent expansion of customer services has been frequently challenged by the established non-banking businesses with which the banks are in competition. These competitors have brought suits claiming that the banks are acting illegally, and that the Comptroller has exceeded his authority under the National Bank Act[3] in authorizing banks to perform these activities. Some of these suits have been dismissed for lack of standing on the grounds that the plaintiff possessed no legal right which was violated by the bank's entry into the plaintiff's type of business.[4] In others, standing has been found on the grounds that a person has standing to challenge unlawful competition resulting from activities which the defendant has no legal right to perform.[5] The use of these two theories of standing has resulted in opposite conclusions in cases which are factually similar, and they have caused considerable confusion and uncertainty concerning the rights of competitors to challenge alleged violations of the National Bank Act. This comment questions the validity of applying the present rules of standing to actions under the National Bank Act and of distinguishing between the two prevailing theories. It is submitted that Section 10 of the Administrative Procedure Act[6] and the recent

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1 For the bankers' point of view on the propriety of performing new types of services, see Harfield, Sermon on Genesis 17:20; Exodus 1:10 (A proposal for testing the propriety of expanding bank services), 85 Bank. L. J. 565 (1968); Huck, What is the Banking Business?, 83 Bank. L. J. 491 (1966).

For arguments for and against the expansion of banks' powers see Hearings on H.R. 9548 and H.R. 9822 before the Subcomm. on Bank Supervision and Ins. of the House Comm. on Banking and Currency, 88th Cong., 2d Sess. (1964); Hearings on H.R. 112, H.R. 117, and H.R. 10529 before the Subcomm. on Bank Supervision and Ins. of the House Comm. on Banking and Currency, 89th Cong., 2d Sess. (1966).

2 12 U.S.C. § 1 (1964), which creates the Bureau of the Comptroller of the Currency and empowers the Comptroller to administer generally the national banking laws. See also Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938) (establishing that rules and regulations issued by the Comptroller have the force and effect of law and are judicially noticed); Baltimore & O.R.R. v. Smith, 56 F.2d 799 (3d Cir. 1932) (finding that the policy of national banks, so long as it is lawful, is for the Comptroller to establish, but that, if otherwise, the court has jurisdiction).

3 13 Stat. 99 (1864) (codified, as amended, in scattered sections of 5, 12, 18, 19, 28, 31 U.S.C. (1964)).

4 E.g., Arnold Tours, Inc. v. Camp, 286 F. Supp. 770 (D. Mass. 1968), decision on appeal pending, No. 7192, 1st Cir.; Wingate Corp. v. Industrial Nat'l Bank, 288 F. Supp. 49 (D.R.I. 1968), decision on appeal pending, No. 7186, 1st Cir.

5 E.g., Saxon v. Georgia Ass'n of Independent Ins. Agents, 399 F.2d 1010 (5th Cir. 1968); Baker, Watts & Co. v. Saxon, 261 F. Supp. 247 (D.D.C. 1966).

6 60 Stat. 243 (1946), as amended, 5 U.S.C. §§ 701-02 (Supp. III 1965-67).

Supreme Court decision in *Flast v. Cohen*[7] provide more meaningful and reliable tests for determining standing in these cases.

I. The Recent Cases

In two recent cases, *Arnold Tours, Inc. v. Camp*[8] and *Wingate Corp. v. Industrial Nat'l Bank*,[9] the courts held that the competitors of national banks lacked standing to challenge allegedly illegal rulings of the Comptroller and the competition resulting therefrom. In a third recent case, *Saxon v. Georgia Ass'n of Independent Ins. Agents*,[10] the court concluded that the competitors of the banks had such standing.

In *Arnold Tours*, plaintiffs, travel agencies in Massachusetts, sought a declaration that rulings of the Comptroller authorizing the South Shore National Bank to engage in the travel agency business[11] were illegal because that business is neither incidental nor necessary to the business of banking. Under Section 24, Seventh, of the National Bank Act national banks possess "all such incidental powers as shall be necessary to carry on the business of banking."[12] Although the National Bank Act contains no provisions for judicial review of the Comptroller's rulings, plaintiffs argued that they had standing to challenge unlawful competition under the Act, and also that standing was provided by Section 10 of the Administrative Procedure Act.[13] Section 10 grants judicial review to persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute."[14] On defendant bank's

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[7] 392 U.S. 83 (1968).

[8] 286 F. Supp. 770 (D. Mass. 1968).

[9] 288 F. Supp. 49 (D.R.I. 1968).

[10] 399 F.2d 1010 (5th Cir. 1968).

[11] Comptroller's Manual for National Banks ¶ 7574 (1963):

> Incident to those powers vested in them under 12 U.S.C. 24, national banks may provide travel services for their customers and receive compensation therefore. Such services may include the sale of trip insurance and the rental of automobiles as agent for a local rental service. In connection therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank.

[12] 12 U.S.C. § 24, Seventh (1964). 12 U.S.C. §§ 24, Second to Sixth (1964) grant certain general corporate powers to national banks such as the power to have succession, to make contracts, to sue and be sued, to elect or appoint directors and to prescribe bylaws. Section 24, Seventh, provides that a national bank shall have power

> [t]o exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking. . . .

12 U.S.C. § 24, Seventh, then lists certain express activities which national banks may lawfully perform, such as negotiating and trading in notes and drafts, receiving deposits, buying and selling exchange and loaning money on security. The section then places certain restrictions upon banks relative to trading in investment securities. 12 U.S.C. § 24, Seventh (1964).

[13] 5 U.S.C. §§ 701-02 (Supp. III 1965-67).

[14] . . . [E]xcept to the extent that—

> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.
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> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. §§ 701-02 (Supp. III 1965-67).

motion for summary judgment the court held that plaintiffs lacked standing.

The court concluded that for standing plaintiffs must possess a legal right, derived either from the common law or a statute, to be free from the challenged competition with the bank.[15] Because plaintiffs possessed no such right the suit was viewed merely as one to enjoin unwanted competition.[16] An injured competitor has never been granted standing to challenge competition which is merely unwanted, without further showing that it was in some way illegal.[17] The court added that the Administrative Procedure Act provided no standing because the Act continued the "traditional requirements of standing,"[18] namely, that for standing plaintiff is required to possess a legal right deriving either from common law or statute.

In *Wingate*, plaintiff, a Rhode Island corporation marketing and performing data processing services for the general business public, sued to enjoin the Industrial National Bank of Rhode Island from engaging in the data processing business. A ruling of the Comptroller authorized national banks to offer data processing services to other banks and bank customers.[19] Plaintiff argued that such activities were neither incidental nor necessary to the business of banking as required by Section 24, Seventh, of the National Bank Act and were therefore illegal. Plaintiff claimed standing under Section 10 of the Administrative Procedure Act, and contended also that the Bank Service Corporation Act[20] provided the legal right to be free from competition with national banks that was necessary for standing. The Bank Service Corporation Act regulates the establishment and operation of corporations formed by national banks for the purpose of performing the banks' own data processing requirements.[21] It was argued that the Act manifested a congressional intent

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15 286 F. Supp. at 772.

16 Id. at 773.

17 See Hardin v. Kentucky Util. Co., 390 U.S. 1, 5-6 (1968), where the Supreme Court stated:

> This court, it is true, has 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. . . . Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Tennessee Power Co. v. TVA, 306 U.S. 118 (1939). . . .

18 286 F. Supp. at 772.

19 Comptroller's Manual for National Banks ¶ 3500 (1966):

> Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers.

20 76 Stat. 1132 (1962), 12 U.S.C. §§ 1861-65 (1964).

21 A bank service corporation is

> . . . a corporation organized to perform bank services for two or more banks, each of which owns part of the capital stock of such corporation, and at least one of which is subject to examination by a federal supervisory agency.

12 U.S.C. § 1861(c) (1964).

Bank services are defined as

> . . . check and deposit sorting and posting, computation and posting of interest and other credits and charges, preparation and mailing of checks, statements, notices, and similar items, or any other clerical, bookkeeping, accounting, statistical, or similar functions performed for a bank.

12 U.S.C. § 1861(b) (1964).

12 U.S.C. § 1864 (1964) states:

that the entry of banks into the data processing business be strictly regulated, and that open competition with existing computer firms was an invasion of plaintiff's legal rights under the Act.[22] The court held that plaintiff lacked standing under both statutes. The Administrative Procedure Act was found not to provide plaintiff with standing because plaintiff was not "adversely affected or aggrieved" under the National Bank Act since the Act was not intended to protect plaintiff from competition.[23] Similarly, the court found no intent to protect plaintiff in the Bank Services Corporation Act.[24] Because of the absence of such intent in either statute plaintiff possessed no legal right against competition and therefore had no standing to allege unlawful competition.

In a third recent case the court held that a competitor had standing to challenge allegedly illegal competition under the National Bank Act. In *Saxon v. Georgia Ass'n of Independent Ins. Agents*,[25] an association of independent insurance agents sought both a declaratory judgment that the Comptroller's ruling allowing national banks to engage in insurance agency activities in cities of over 5,000 population[26] was illegal, and an injunction against defendant national bank to prevent it from engaging in such activities. The insurance agents maintained that Section 92 of the National Bank Act prevented national banks from acting as insurance agents in cities of over 5,000 population because the statute specifically allows such activities only in cities where the population does not exceed 5,000.[27] The United States District Court for the Northern District of Georgia held that section 92 protects insurance agents from competition with national banks in cities of over 5,000 population, and that plaintiffs therefore had a legal right to show that the protection afforded them by section 92 had been violated.[28]

On appeal, the Court of Appeals for the Fifth Circuit decided first that section 92 prohibited national banks from engaging in the insurance agency business in cities of over 5,000 population, and that, since defendant bank was engaged in such activities, the competition it created with the insurance agents was unlawful.[29] The court then held that standing existed to challenge

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No bank service corporation may engage in any activity other than the performance of bank services for banks.

[22] 288 F. Supp. at 56.

[23] Id. at 52-53, 56.

[24] Id. at 56.

[25] 399 F.2d 1010 (5th Cir. 1968), aff'g Georgia Ass'n of Independent Ins. Agents v. Saxon, 260 F. Supp. 802 (N.D. Ga. 1967).

[26] Comptroller's Administrative Ruling No. 7110 (1963):

Incidental to the powers vested in them under 12 U.S.C. Sections 24 . . . , National Banks have the authority to act as agent in the issuance of insurance which is incident to banking transactions. Commissions received therefrom or service charges imposed therefore may be retained by the bank.

[27] . . . [National Banks] in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller . . . , act as the agent for any fire, life or other insurance company authorized by the authorities of the State . . . to do business in said State. . . .

12 U.S.C.A. § 92 (1964).

[28] 260 F. Supp. at 804.

[29] 399 F.2d at 1016.

the unlawful competition.[30] The court did not first consider whether plaintiffs possessed a common law or statutory right to be protected from competition; instead, it looked immediately to the legal authority of the defendant to engage in the activity. It was held that since the bank lacked the legal right to engage in insurance agency activities, the insurance agents had standing to enjoin the unlawful acts.[31]

The court found also that the insurance agents had a statutory aid to standing because the legislative history of section 92 manifested a congressional intent to protect them from competition with national banks in cities of over 5,000 population.[32] The court stated that this statutory aid was in addition to the agents' legal right to protect themselves from unlawful competition,[33] and thus implied that even without the statutory aid they would have had standing.

In a concurring opinion, Judge Thornberry disagreed with the majority that the insurance agents had a statutory aid to standing. He concluded that section 92 was not intended to protect insurance agents in cities of over 5,000 population from competition with national banks, but was intended only to strengthen banks in towns of under 5,000 population.[34] He disagreed also with the emphasis of the majority upon its finding that the bank was violating section 92. He stated that the court's method of first determining whether the activity was unlawful, and then discussing standing, implied that plaintiffs' standing—a procedural matter—somehow depended upon the determination of the merits of the substantive issue.[35] He concluded that it was the allegation of illegality which gave standing, not the courts ultimate finding of illegality.[36] He maintained further that, on the basis of the holding in *Flast v. Cohen*,[37] standing should be granted when parties are in a genuine adversary relationship, and that in the instant case plaintiffs had demonstrated a sufficient personal stake in the outcome to render it a genuine adversary contest.[38]

These three cases illustrate the two predominant theories of standing that are applied in cases challenging the legality of the Comptroller's rulings under the National Bank Act and the competition resulting from those rulings. Both theories start from the same premise, that injury sustained through business competition, in the absence of additional considerations, is never sufficient for standing to challenge the competition.[39] In *Arnold*[40] and *Wingate*[41] the courts applied the traditional theory of standing to challenge competition—that a person has no standing to challenge injurious competition

[30] Id. at 1016.
[31] Id.
[32] Id.
[33] Id. at 1018.
[34] Id. at 1019.
[35] Id. at 1020 n.3.
[36] Id.
[37] 392 U.S. 83 (1968).
[38] 399 F.2d at 1021.
[39] Arnold Tours, Inc. v. Camp, 286 F. Supp. at 772; Wingate Corp. v. Industrial Nat'l Bank, 288 F. Supp. at 55; Georgia Ass'n of Independent Ins. Agents v. Saxon, 399 F.2d at 1017.
[40] 286 F. Supp. at 772; 288 F. Supp. at 53, 56.
[41] 288 F. Supp. at 52, 53.

unless he possesses a legal right, derived either from common law or from statute, which was violated by the competition. *Wingate* also illustrates the additional requirement of the legal right theory which arises when a statutory right is claimed—that the statute must be intended to protect the challenging party from competition.[42] In *Georgia Association* the court was not concerned whether the plaintiff had a common law or statutory right or whether a relevant statute was intended to protect the plaintiff's competitive interest. The court determined standing by considering whether the challenged party had the legal right under a statute to engage in the competitive activities.[43] If no such right was found to exist the injured competitor had standing to challenge the illegal competition.[44]

These two theories of standing will be examined and their inherent inapplicability to suits challenging the legality of the Comptroller's rulings under the National Bank Act and the resulting competition will be shown. Then more valid methods of determining standing in cases of this type will be suggested. The first method involves application of Section 10 of the Administrative Procedure Act, and the second the underlying rationale of the decision in *Flast v. Cohen*.

II. The Present Theories

The legal right theory derives from several cases of which *Tennessee Elec. Power Co. v. TVA*[45] is representative. In *Tennessee Electric* standing was denied a private utility company to challenge the constitutionality of actions by the federal government which resulted in competition with the plaintiff. The Supreme Court applied the now "traditional" theory of standing. It reasoned that for standing the injured competitor needed a legal right, derived from common law or from statute, which was violated by the alleged illegal competition.[46] Because the Court found that no legal right of plaintiff was violated by the challenged activity, plaintiff lacked standing.

When a right derived from a statute is alleged as a basis for standing, as occurs in every case in which the legality of competition is challenged under the National Bank Act, the courts encounter considerably more difficulty in determining whether a legal right exists than in the relatively simple cases involving violations of common law rights. This difficulty arises because the plaintiff has a legal right under a statute only if the statute was intended to protect him from competition and, in many instances, the intent of a

[42] Id. at 52-53, 56.

[43] 399 F.2d at 1016-17.

[44] Id. at 1016.

[45] 306 U.S. 118 (1939). The line of cases in which it has been held that standing cannot exist in the absence of a common law or statutory right in the plaintiff dates at least from 1881. Railroad Co. v. Ellerman, 105 U.S. 166 (1881). The theory was further developed and most frequently applied in several cases arising out of the establishment by Congress of the Tennessee Valley Authority (Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938). The most recent application of the theory was in Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968).

[46] 306 U.S. at 137-38, where the Supreme Court deemed it essential to standing that plaintiff possess

> . . . a legal right, one of property, one arising out of contract, one . . . protected against tortious invasion, or one founded on a statute which confers a privilege.

statute is extremely difficult to ascertain. When such a congressional intent is found, plaintiff possesses a "statutory aid" to standing, and standing will be granted.

A. *The Statutory Aid Test*

The courts have indicated three steps by which the existence of a congressional intent to protect a plaintiff from competition is determined. The first step is to examine the language of the statute to determine whether it indicates an intent to protect the plaintiff, and thus gives him a right to be free from some or all types of competition. This is frequently the case where the statute gives the plaintiff a license, franchise or monopoly to operate a business,[47] and he obtains a right to be free from unlicensed competition. Possession of such a right gives him standing.

The second step is an examination of a statute's legislative history to determine whether congress intended to protect the plaintiff from competition[48] when no clear intent is obvious on the face of the statute. If the legislative history reveals such an intent the court will usually hold that the plaintiff has a legal right against competition and therefore has standing. In *Georgia Association*, for example, the court found an intent to protect insurance agents in cities of over 5,000 population in the congressional hearings on Section 92 of the National Bank Act.[49]

If neither the language of the statute nor its legislative history show an intent to protect the plaintiff, the third step is to determine whether there is a general congressional policy to protect the plaintiff from competition. Such a policy was found to exist in *Investment Co. Institute v. Camp*[50] where the legality of a Comptroller's ruling authorizing national banks to establish collective investment funds (mutual funds) was challenged. The court found a congressional policy of segregating the banking and investment businesses, and from the fact that Congress had consistently kept separate regulatory statutes for these businesses the court implied an intent to protect investment brokers from competition with national banks.[51] Thus, it held that the brokers had standing to challenge the invasion of the investment business by national banks.[52]

As a principle for determining standing to challenge allegedly illegal activities under the National Bank Act the statutory aid concept presents several problems. First, to determine the existence of a congressional intent to protect the plaintiff from competition, the courts, in most instances, must examine unreliable sources, such as an often ambiguous legislative history. For example, in *Georgia Association* the court was divided on the question whether Section 92 of the National Bank Act was intended to protect insurance agents. The majority held that their reading of the legislative history of the bill indicated that section 92 had such an intention.[53] Judge Thornberry,

[47] E.g., Frost v. Corporation Comm'r, 278 U.S. 515 (1929).
[48] Hardin v. Kentucky Util. Co., 390 U.S. 1, 6 (1968).
[49] 399 F.2d at 1016.
[50] 274 F. Supp. 624 (D.D.C. 1967).
[51] Id. at 636.
[52] Id.
[53] 399 F.2d at 1016.

on the other hand, disagreed with the majority as to the purpose of the section. He interpreted the legislative history as indicating a congressional intent to strengthen banks in small towns "where they needed strengthening," but not an intent to protect insurance agents in larger towns.[54]

Similarly, in *Wingate* the court had to determine the purpose of the Bank Service Corporation Act which regulated the data processing activities of national banks. Although the court concluded that the Act was not intended to protect existing data processing firms from competition with banks,[55] the existence of numerous conflicting and contradictory statements in the legislative history of the Act provides no clear basis for this conclusion.[56] The court apparently did not consult the legislative history at all[57] but derived its conclusion about the intent of the Act from the express terms of the statute. This was an apparent attempt to avoid interpretation of the confusing legislative history of the Act.

Because the determination of the congressional intent of a statute like any statutory construction involves an examination of ambiguous and conflicting statements in its legislative history, the statutory aid concept is as unreliable as the sources of the congressional intent. Under the statutory aid approach the plaintiff's standing frequently depends upon statements in the legislative history which may have little or no relationship to the actual purpose of a law or which may have been uttered by parties promoting narrow private interests. Also, standing is made to depend upon such things as the completeness of the legislative history or whether there was sufficient interest in the passage of the statute to produce a thorough debate. Ultimately, under the statutory aid theory standing depends upon the varied reaction of the individual judicial mind to evidence gleaned from non-judicial sources. Thus the statutory aid theory seldom supplies a sound basis for judicial determination of a person's right to his day in court.

Another difficulty with the statutory aid concept is that it cannot be applied in cases involving statutes intended to protect the public interest

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[54] Id. at 1019.

[55] 288 F. Supp. at 56.

[56] There is sufficient authority in the legislative history by which the court could have found that the purpose of the Bank Service Corporation Act was to protect the infant data processing industry from competition with banks, e.g.,

> . . . [T]he service corporations' activities could not "include any professional services of a kind which cannot properly be performed by corporations," that bank service corporations should not be used as devices or subterfuges to enable banks to get into nonbank activities. . . .

108 Cong. Rec. 21312 (1962) (remarks of Senator Robertson).

> In most cases, of course, it is expected that the total activity [providing services] for nonbank organizations would be relatively small, or there would be no nonbank services.

S. Rep. No. 2105, 87th Cong., 2d Sess. (1962), 2 U.S. Code Cong. & Ad. News 3878, 3883 (1962).

> The authorization to perform services for others that the owning banks [This provision was deleted from the final version of the bill.] is provided in order to permit full and efficient use of the equipment of the bank service corporation. The bill is not intended to enable banks to engage in nonbank business. . . .

Id. at 3881.

[57] 288 F. Supp. at 56.

because under such a statute no individual will be able to show a congressional intent to protect *him* from competition. The National Bank Act is a statute intended to protect the public interest in a sound credit system. Thus the statutory aid approach should not be used to determine standing in illegal competition cases under the Act.

The legislative history of the National Bank Act indicates that its immediate purpose was to finance the Civil War by the establishment of a sound national banking system and the issuance of a stable currency.[58] It has since served as the basic regulatory mechanism of the national bank system. It has been recognized to be in the general public interest to prohibit banks from engaging in non-banking activities.[59] The public interest lies not in the prevention of competition with other business, but rather in the prevention of all of the consequences flowing from unrestrained banking activity which might endanger bank assets and thereby weaken the banking system. The National Bank Act clearly protects the public interest by regulating the activities of national banks.

The result of applying the statutory aid concept to alleged violations of Section 24, Seventh, of the National Bank Act is that no injured competitor would have standing to sue for lack of any congressional intent to protect their particular competitive interest. Under the statutory aid test, section 24, Seventh, is essentially a legal no man's land in which no one apparently has standing to allege unlawful competition and to compel banks to perform only those functions which are necessary or incidental to banking. Thus, despite the probability that Congress never envisioned the travel agency business, for example, as being necessary or incidental to banking, national banks will continue conducting these activities, perhaps in violation of Section 24, Seventh, of the Act.[60]

This result is clearly undesirable because it ignores the broader public interest in a sound banking system, which would be served if competitors were granted standing in actions seeking to compel banks to exercise only those powers granted by the National Bank Act. Furthermore, it is unreasonable to think that Congress intended the broad outlines provided by section 24, Seventh, to be unenforceable in the courts merely because it legislated in the public interest. The only reasonable conclusion is that the statutory aid test

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[58] Special Message—Abraham Lincoln, On Financing the War, S. Jour. 37th Cong., 3d Sess. 121-22 (1863).

[59] 7 A. Michie, Banks and Banking § 154 (1944).

[60] In *Arnold Tours*, Appellant's brief argued:

> If the travel agents do not have standing, then national banks could go into the liquor business, laundry business, used-car business or construction business without any fear of reprisal. . . . [This decision] offers a *carte blanche* to national banks, a quasi-governmental business, to enter any business they want, irrespective of authority. . . . Because of the standing obstacle, the Comptroller's arbitrary decision gains a finality that is unchallengeable. Certainly Congress never intended unilateral decisions of the Comptroller to have such finality to them. This finality arises, not because of any legislative expression, but because of a judicially created theory of self-restraint which was never intended to apply to the instant situation. 3 Davis, Administrative Law Treatise, § 22.18, at 291-92.

Brief for Appellant at 24-25, on appeal of Arnold Tours, Inc. v. Camp, 286 F. Supp. 770 (D. Mass. 1968), to 1st Cir., No. 7192.

should not be used to determine standing in actions brought under the National Bank Act, because the test is clearly inapplicable to statutes like the Act which are intended to protect the public interest.

Thus, the statutory aid test suffers from two basic defects: it necessitates a judicial determination of congressional intent based upon often ambiguous and conflicting statements from non-judicial sources; and it provides no standing for competitors to challenge unlawful competition under statutes intended to protect the public interest. These two defects should make the statutory aid test inapplicable in unlawful competition cases under the National Bank Act. As a result, the legal right theory of standing, with the statutory aid concept as its pertinent aspect, is inapplicable to cases under the Act.

B. *The Test of Defendant's Conduct*

The legal right theory is inconsistent with the theory of standing that was applied in *Georgia Association*. There, the court was not concerned whether the plaintiff possessed any common law or statutory right which was violated by the defendant's competition, but it did attempt to determine whether the defendant had the legal right to engage in the competitive activity. The court held that an injured party has standing to challenge competition where the challenged party lacks the legal right to perform the competitive activity.[61] This theory of standing was applied early in *Baker, Watts & Co. v. Saxon*.[62]

In *Baker, Watts*, the legality of a Comptroller's ruling permitting national banks to underwrite securities not backed by the taxing power of a government entity was challenged. Plaintiffs, investment bankers, were granted standing to attack the ruling as violating the provision of Section 24, Seventh, of the National Bank Act which limits the power of banks to underwrite only general obligations of state or local governments.[63] The court concluded that the investment bankers had standing to challenge unlawful competition, that is, competition performed by a person who lacks the legal right or power to pursue the challenged activity. The court relied upon the "principle" that permits a person to "restrain the illegal authorization by the government of an unlawful undertaking."[64] The court distinguished *Tennessee Electric* and similar cases which applied the legal right theory of standing because these involved competition assisted by a loan or grant of government funds whereas the government in *Baker, Watts* only authorized the competition.[65] Because these cases were distinguishable from *Baker, Watts* the court was not bound

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[61] 399 F.2d at 1016-17.

[62] 261 F. Supp. 247 (D.D.C. 1966).

[63] 12 U.S.C. § 24, Seventh (1964) provides in part:

> . . . The limitations and restrictions herein contained as to dealing in, underwriting and purchasing for its own account, investment securities shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof. . . .

[64] 261 F. Supp. at 249; accord, Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 388 (8th Cir. 1966).

[65] 261 F. Supp. at 249.

to follow the legal right theory and deny standing because the plaintiffs lacked a legal right.

The theory in *Baker, Watts* that a competitor has standing to challenge the legality of competition in which the defendant has no legal right to be engaged is unacceptable. Under this theory the courts must first decide whether the activity is unlawful before they can determine whether standing exists. For example, in *Georgia Association* the majority first considered the legality of the Comptroller's ruling authorizing national banks to act as insurance agents and concluded that such activities were contrary to congressional intent, and, consequently, illegal. Then turning to whether the insurance agents had standing to bring the suit, the majority decided that they had standing because the competition was unlawful, and because the insurance agents had a legal right to be protected from unlawful competition.[66]

The difficulty with this procedure is that deciding whether the activity is unlawful involves an adjudication of the merits of the substantive issue. Most frequently, the very question asked the court by the plaintiff is whether the competitive activity is illegal. It is incongruous for the court to have to return to the question of standing after having made a determination of the main issue in the case, because standing has always been a procedural prerequisite which must be present before the plaintiff can be heard on the merits. Indeed, Judge Thornberry, concurring in *Georgia Association*, criticized the majority for determining the fact of illegality first, and then concluding that standing existed to challenge the unlawful activity, because this procedure implied that standing depended upon the decision of the substantive issue.[67]

The *Baker, Watts* theory contravenes traditional adjudicative procedure where standing must be found before the court will enter upon a consideration of the merits. Hence, to circumvent this problem under the theory of *Baker, Watts,* the only reasonable alternative would be to eliminate any requirement of standing and proceed directly to adjudication of the issue of legality. This practice would be undesirable because it would leave the courts with no basis for the determination of the parties entitled to standing. Some tests must exist for determining standing in order to avoid suits in which the plaintiff has no legitimate interest in the outcome—suits of a frivolous nature or intended merely to harass the defendant. Obviously, then, the purpose of standing will not be achieved by the elimination of that requirement but rather by the formulation of meaningful standards relevant to those underlying purposes. Section 10 of the Administrative Procedure Act and the rationale of *Flast v. Cohen*[68] provide more meaningful tests by which standing can be determined.

III. Meaningful Standards

A. *Section 10 of the Administrative Procedure Act*

Much of the confusion and inconsistency in the law of standing to sue under the National Bank Act would be removed if the courts were to interpret

[66] 399 F.2d at 1016.
[67] Id. at 1020 n.3.
[68] 392 U.S. 83 (1968).

correctly Section 10 of the Administrative Procedure Act. That section grants standing to persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute."[69] Under section 10, in order for the plaintiff to have standing he would have to show only that he is adversely affected by the alleged competition resulting from the Comptroller's ruling. The court would have no need to concern itself with the existence of a common law or a statutory right in the plaintiff, nor to make a determination of the substantive issue in the case prior to granting standing.

The crucial words in section 10 are "adversely affected or aggrieved." Some courts have interpreted these words to mean that in order for the plaintiff to have standing he must show that the agency has violated one of his legal rights.[70] These courts interpret section 10 as adding nothing new to the law of standing, and "continuing the traditional requirements of standing."[71] This interpretation is incorrect for several reasons. First, section 10, prior to the "adversely affected" clause, specifically states that persons suffering "legal wrong because of agency action" shall have standing.[72] If the words "adversely affected or aggrieved" were intended to refer to or describe violations of existing legal rights they would add nothing to the meaning of the statute which was not already encompassed in the term "legal wrong."[73] They would be mere surplusage.

Secondly, the legislative history of the Administrative Procedure Act indicates that Congress intended the words "adversely affected" to mean adversely affected by agency action in fact and not in law. Both the Senate and the House committee reports on the Act contain the statement: "This subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute."[74] Decisions holding to the contrary appear to ignore the usual meaning of the words "adversely affected in fact" and graft onto section 10 the requirement that plaintiff possess an established legal right.[75]

Finally, several decisions have interpreted statutory language similar to that of Section 10 of the Administrative Procedure Act as granting standing to those adversely affected by agency action. In *FCC v. Sanders Bros. Radio Station*[76] plaintiff asserted that a Federal Communications Commission grant of a construction permit for a new radio station would result in economic injury through competition with his station. He sued to enjoin the FCC from granting the permit and asserted standing under Section 402(b)(2) of the Communica-

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[69] 5 U.S.C. §§ 701-02 (Supp. III 1965-67).

[70] E.g., Rural Electrification Admin. v. Northern States Power Co., 373 F.2d 686 (8th Cir.), cert. denied, 387 U.S. 945 (1967). Association of Data Processing Serv. Orgs., Inc. v. Camp, 279 F. Supp. 675 (D. Minn. 1968).

[71] Arnold Tours, Inc. v. Camp, 286 F. Supp. 770, 772 (D. Mass. 1968).

[72] 5 U.S.C. § 702 (Supp. III 1965-67).

[73] American President Lines, Ltd. v. Federal Maritime Bd., 112 F. Supp. 346, 349 (D.D.C. 1953).

[74] S. Doc. No. 248, 79th Cong., 2d Sess. 212, 276 (1946).

[75] E.g., Pennsylvania R.R. v. Dillon, 335 F.2d 292, 294 (D.C. Cir. 1964), cert. denied, sub nom. American Hawaiian S.S. Co. v. Dillon, 379 U.S. 945 (1964), where standing under section 10 was made to depend upon the congressional purpose underlying the Merchant Marine Act of 1920, i.e., whether plaintiff had a statutory aid under the Act.

[76] 309 U.S. 470 (1940).

tions Act of 1934, which grants review of agency action to "any other person aggrieved or whose interests are affected."[77] The Supreme Court seemed to hold that when the legislation under which the competitive activity is attacked has not changed the basic system of competition, for example by creating a monopoly, a competitor has standing to challenge administrative action which adversely affects him by creating new competition.[78] Recognizing that economic competition alone is never a basis of standing, the Court granted standing on the ground that Congress may have granted judicial review to competitors under the Communications Act because it believed that a competitor would be "the only person having a sufficient interest to bring [the violation] to the attention of the appellate court. . . ."[79] Thus, because the plaintiff was adversely affected in fact by the action of the FCC, even though his interest was not a legal right to be free from competition, it was held that he had standing.

The holding in *Sanders* is the foundation for a series of subsequent cases[80] which have established the theory that plaintiffs representing the public interest rather than their own private interests should have standing as private attorneys general. In these cases involving statutes in which Congress has granted judicial review to persons adversely affected by agency action, the courts have reasoned that Congress intended to give these individuals standing, as private attorneys general, to challenge allegedly illegal activities to protect the public interest. For example, in *Scripps-Howard Radio, Inc. v. FCC*,[81] the facts were similar to *Sanders*; there was competition with the plaintiff as a result of a decision by the FCC to grant a new station license. Standing was granted under Section 402(b)(2) of the Communications Act. The Supreme Court found that the primary purpose of the Act was to protect the public interest in communications and that little if any concern was expressed for the rights of competitors.[82] Nevertheless, the Court held that, merely because the plaintiff was a private competitor, the Court was not compelled to ignore its obligation to protect the public's rights under the Act. The Court regarded judicial power to protect the public's rights as "not diminished" by the fact that a private litigant brought the action.[83] Under such circumstances the plaintiff had standing by virtue of the fact that he represented the public interest.[84]

In *Associated Indus. v. Ickes*[85] standing was granted under Section 6(b) of the Bituminous Coal Act of 1937,[86] which grants judicial review to "any person aggrieved" by an agency order. The Secretary of the Interior, pursuant to the authority vested in him by the Act, promulgated orders which increased

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[77] 48 Stat. 1093 (1934), as amended, 47 U.S.C. § 402(b)(6) (1964).

[78] 3 K. Davis, Administrative Law Treatise § 22.11 (1958).

[79] 309 U.S. at 477.

[80] E.g., Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); FCC v. National Broadcasting Co., 319 U.S. 239 (1943); Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir.), remanded per curiam, 320 U.S. 707 (1943).

[81] 316 U.S. 4 (1942).

[82] Id. at 14.

[83] Id. at 14-15.

[84] Id.

[85] 134 F.2d 694 (2d Cir. 1943).

[86] Act of Apr. 26, 1937, ch. 127, § 6(b), 50 Stat. 85.

the minimum price of coal. Plaintiffs, an organization of coal consumers, sought judicial review of the orders. Judge Frank, speaking for the court, pointed out that the statute specifically authorized a particular class of persons (persons aggrieved) to prevent alleged violations of the Act in the public interest, even though they could not show a past or threatened invasion of any legally protected substantive interest of their own.[87] The fact that the plaintiffs were consumers who were not directly regulated by the statute was not a detriment to standing, and the fact that the plaintiffs would suffer financially as a result of the order was sufficient to establish that they would be aggrieved within the meaning of the Act.[88] The court did not reject the rule of standing which requires a person to possess a legal right as a prerequisite of standing, but indicated that this rule is inapplicable in situations where a person is suing under a statute conferring standing on one adversely affected or aggrieved.[89] Where the statute itself authorizes standing for persons aggrieved, the doctrine of private attorneys general is applicable and it is unnecessary to search any further for a basis for standing.

Section 10 of the Administrative Procedure Act has also been interpreted as broadly as similar statutes have been construed in *Sanders* and cases subsequent thereto. In *American President Lines, Ltd. v. Federal Maritime Bd.*,[90] a steamship company sought an injunction to set aside a subsidy granted by the Federal Maritime Board to two competing shipping companies. The grants were made pursuant to the Merchant Marine Act[91] which contained no provisions for judicial review of the Board's actions. The company asserted standing under Section 10 of the Administrative Procedure Act. The court held that the injured competitor was adversely affected by the Board's ruling and therefore had standing to challenge the action under section 10.[92] It cited the holding in *Sanders*, and based its decision upon the similarity in language of the Communications Act and the Administrative Procedure Act.[93] More importantly, the court discussed the effect of the Administrative Procedure Act on the law of standing. It stated that the Act was not a "mere codification" of the preexisting law of standing,[94] and that its purpose was to check the arbitrary exercise of administrative power by giving injured citizens recourse to the courts.[95] The court concluded that while no new remedies were created by the Act, it broadened the scope of judicial review and enlarged the class of persons entitled to challenge administrative action.[96] The theory requiring a plaintiff to have a legal right was therefore held to be inapplicable to actions under the Administrative Procedure Act.

87 134 F.2d at 705.

88 Id.; accord, FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940).

89 134 F.2d at 699-705.

90 112 F. Supp. 346 (D.D.C. 1953).

91 46 U.S.C. § 1171-83(a) (1964).

92 112 F. Supp. at 348-49.

93 Id. at 349.

94 Id.

95 Id.

96 Id. For other decisions generally construing the Administrative Procedure Act as effectively enlarging the scope of judicial review of agency action and, consequently, increasing the availability of standing, see Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Di Costanzo v. Willard, 165 F. Supp. 533 (D.C.N.Y. 1958).

The private attorney general doctrine is an effective source of standing to allege violations of the National Bank Act under Section 10 of the Administrative Procedure Act. The public interest in a sound credit system and healthy economy is equally as great as its interest in the other areas in which the doctrine has been applied. Therefore, the argument for allowing standing to sue in the public interest is equally compelling in the National Bank Act cases. Courts which insist upon interpreting the "adversely affected" provision of Section 10 of the Administrative Procedure Act as requiring a legal right in the plaintiff seem to ignore the fact that under section 10 and similar statutory provisions courts have long been granting private competitors standing, and that standing has been granted upon the theory that such statutes indicate a congressional intent to empower any individual or class adversely affected under the statute to sue to prevent violations by government officials of their statutory powers.[97] Moreover, the fact that litigants in unlawful competition suits under the National Banking Act also have a direct pecuniary interest in the outcome tends automatically to guarantee that the public interest will be served by a thorough, vigorous and heated litigation of the issues under the Act.

But even without any theory of private attorneys general being applied, a simple reading of section 10 and its legislative history indicates that the prerequisite for standing required by the Act is that a person be adversely affected in fact by agency action and nothing more. It can be argued that even when no public interest is involved, a private competitor should have standing by virtue of the clear language and intent of section 10. Thus, there appears to be no reason why standing, under the Administrative Procedure Act, to allege violations of the National Bank Act should not have been granted in *Arnold* and *Wingate*.

B. *The Rule of* Flast v. Cohen

The effect of employing the Administrative Procedure Act in unlawful competition cases would be to broaden the availability of standing to allege a violation of the National Bank Act. This result accords with the recent Supreme Court decision, *Flast v. Cohen*,[98] which also increased the availability of standing to challenge governmental action. There, the Supreme Court held that a taxpayer had standing to challenge the constitutionality of a federal program involving the expenditure of tax funds for instructional purposes in religious-affiliated schools.[99] The Court felt that the plaintiff had established the necessary "nexus" between his status as a taxpayer and the type of legislative enactment attacked. Specifically, he had established a logical connection between his status and both the nature of the statute in-

[97] See 3 K. Davis, Administrative Law Treatise § 22.05 (1958), where it is stated:
> No good reason is apparent why the *Sanders* doctrine, as further developed by the later cases, should not be of general applicability whenever either the APA [Administrative Procedure Act] or another statute containing an "adversely affected" provision is applicable.

[98] 392 U.S. 83 (1968).

[99] Petitioners challenged the constitutionality of Titles I and II of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241(a)-41(m), 821-27 (Supp. II, 1965-66).

volved (direct financing of instruction in religious schools) and the clause under which the unconstitutionality was alleged (the congressional taxing and spending power).[100] Consequently, taxpayers have standing to challenge the constitutionality of a federal program if the court can find a clear connection between the status of a taxpayer and both the activity complained of and the alleged grounds of unconstitutionality.

Flast stated also that the criterion of adverseness should be emphasized in the determination whether standing existed. Rather than depending upon the existence of a legal right in the plaintiff, the Supreme Court sought to determine whether the plaintiff had such a personal stake in the outcome of the controversy as to render it a genuine adversary proceeding. It was felt that this requirement was essential to sharpen the presentation of issues before the Court, and to assure that they would be vigorously contested by genuinely interested parties.[101] Applying this reasoning in his concurring opinion in *Georgia Association*, Judge Thornberry concluded that the insurance agents should have standing because the adverseness of their interests to the allegedly illegal competition under the National Bank Act was clear, and the sufficiency of their personal stake in the outcome of the issue was indisputable.[102]

The *Flast* decision greatly weakens the prohibition against taxpayers' suits enunciated in *Frothingham v. Mellon*.[103] *Frothingham* has served as the foundation of the theory requiring a person to possess a legal right as a condition for standing, and the principles laid down in that decision have shaped the law of standing to such an extent that the legal right theory has gained firm acceptance.[104] *Frothingham* is the progenitor of cases like *Tennessee Electric*[105] which have denied standing in the absence of a legal right. Thus, the impact of *Flast* has been to weaken the legal right theory of *Tennessee Electric* by challenging its theoretical underpinning, and to replace the requirement that plaintiff possess a legal right with the principle that he need only show a logical connection between his status and the alleged illegal activity. If it is applied to unlawful competition cases under the National Bank Act this test would require that the injured competitor demonstrate that he was suffering financial injury from the competition, and alleged that the competition was unlawful under the Act. In most cases the competitor would be able to satisfy the court that he was in fact injured and, hence, he would have standing.

It is recognized that the holding in *Flast* goes no further than to estab-

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100 392 U.S. at 102-03.

101 The Court stated that standing depends upon whether the plaintiff has
". . . alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."
Baker v. Carr, 369 U.S. 186, 204 (1962).
392 U.S. at 99.

102 399 F.2d at 1021.

103 262 U.S. 447 (1923).

104 Baker, Watts & Co. v. Saxon, 261 F. Supp. 247, 249 (D.D.C. 1966); Saxon v. Georgia Ass'n of Independent Ins. Agents, 399 F.2d 1010, 1020 (5th Cir. 1968) (concurring opinion of Judge Thornberry).

105 306 U.S. 118 (1939).

lish the requirement of a financial "nexus" in taxpayer suits.[106] However, if this test is adequate where the plaintiff has no more than a taxpayer's interest in the outcome of the issue, it would seem even more compelling to apply it to cases where the plaintiff has a more substantial interest, where he is suffering financial injury directly traceable to allegedly unlawful competition. Moreover, in cases under the National Bank Act the alleged illegality stems from federal activities outside the lawful bounds of a statute the constitutionality of which is not questioned. Therefore, if the Supreme Court is willing to open to this extent the hitherto jealously guarded gates of standing to challenge the constitutionality of an act, logically a court should be even more inclined to allow standing to allege a violation of a constitutional act. The restrictions on standing to challenge the constitutionality of an act have always been more severe than those on standing to allege a mere violation of an act.[107]

Flast has reopened consideration of what constitutes standing to allege unlawful government activity, although it did not go so far as to overrule the long-standing prohibition against taxpayer suits established in *Frothingham*.[108] Nevertheless, under *Flast* standing should depend upon the existence of a logical connection between plaintiff's injury and the alleged illegal activity. If such a connection is established it will provide the type of genuine adversary interest necessary for a competent judicial resolution of the dispute. It is submitted that financial injury through competition with banks acting in violation of the National Bank Act is a sufficient "nexus" under the rule in *Flast* to provide injured competitors, such as those in *Arnold* and *Wingate*, with standing to challenge the activity.

Conclusion

In unlawful competition cases under the National Bank Act standing has been denied competitors in many cases in which the courts have employed the legal right theory because the plaintiff did not possess the necessary common law or statutory right to be free from competition with banks. In other cases standing has been granted on the theory that a competitor has standing to challenge competition resulting from activities which the bank had no legal right to perform. Neither of these theories provides a valid basis upon which standing should be determined.

Rather, Section 10 of the Administrative Procedure Act, which grants judicial review to persons "adversely affected or aggrieved by agency action," provides a meaningful test to determine standing to challenge alleged violations of the National Bank Act. The doctrine of private attorneys general, which gives private individuals standing to contest violations of statutes in the public interest, can also be employed to provide standing under Section 10 of the Administrative Procedure Act in these National Bank Act cases.

The reasoning of the recent Supreme Court decision in *Flast v. Cohen*, that standing exists where the plaintiff demonstrates a nexus between his status and the nature of the allegedly illegal activity sufficient to provide

106 392 U.S. at 102-03.

107 1 T. Cooley, Constitutional Limitations 338-39 (8th ed. 1927).

108 392 U.S. at 104.

genuine adversity, is applicable also to unlawful competition cases under the National Bank Act. The nexus between the injured competitor and the activity of the bank will usually be clear, and thus result in standing. These tests for standing eliminate the artificial limitations embodied in the theories now applied, and serve the public interest by expediting a final determination of the legality of the bank's activity.

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