Data Processing Detective Story

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Caleb Nelson, *"Standing" and Remedial Rights in Administrative Law*, 105 **Va. L. Rev.** __ (forthcoming 2019), available at SSRN.

After the slog of teaching constitutional standing—*Lujan*, *Massachusetts, Freedom from Religion, Akins, Spokeo*, and the rest of that crowd—it is always a relief to get to statutory standing. "Here's the deal," I say to the class, "statutory standing is just a matter of finding a statutory right of action to challenge agency action. You can find that ticket to judicial review in many enabling acts. But the most important one for our purposes is the APA's right of action established by 5 U.S.C. §§ 701-706. Section 702 says you can use that right of action so long as you have 'suffer[ed] legal wrong because of agency action, or [have been] adversely affected or aggrieved by agency action within the meaning of a relevant statute.' The Supreme Court has told us that a plaintiff can qualify under the 'adversely affected or aggrieved' prong of § 702 by claiming that agency action has harmed interests that 'arguably' fall within the 'zone of interests' protected by a statute or constitutional provision that the plaintiff asserts the agency action has violated. And the Supreme Court has also told us, a whole bunch of times, that this arguably-within-the-zone test for invoking the APA's right of action is super-easy to satisfy."

Thanks to reading Caleb Nelson's splendid article, *"Standing" and Remedial Rights in Administrative Law*, I see that things are not so simple as I thought. The major project of Professor Nelson's article is to explain how the consensus understanding of the expansive reach of remedial rights under the APA evolved from a profound misreading of the source of the arguably-within-the-zone test, Justice Douglas's opinion for the Supreme Court in *Association of Data Processing Service Organizations v. Camp*. The upshot of Professor Nelson's analysis is that *Data Processing*, properly understood, does not stand for the proposition that satisfying the arguably-within-the-zone test is enough for a plaintiff with constitutional standing to invoke the APA's right of action. To get to this conclusion, Professor Nelson takes a deep dive into the evolution of standing doctrine during the middle half of the twentieth century. The result is a terrifically lucid and engaging account, filled with telling details—notably including Professor Nelson's recounting, based on both published opinions and internal correspondence, of the doctrinal duel between Justice Douglas and Justice Brennan over the framework for standing in *Data Processing* and its companion case Barlow v. Collins. (Pp. 37-52.)

Part I of the article sets the stage by offering a concise and informative account of the evolution of judicial review of agency action during the decades of the twentieth century that preceded *Data Processing.* Then as now, judicial review might take the form of nonstatutory review—e.g., a plaintiff might sue an officer in equity to enjoin illegal action. Professor Nelson emphasizes that, to make use of this device, a plaintiff needed to show that, in addition to violating the law, an officer's action invaded the plaintiff's "legal rights." Complicating matters, however, he also observes that "[t]he Supreme Court never fully specified the criteria for determining whether a particular statutory or constitutional provision gave 'legal rights' to particular people." (P. 13.)

Alternatively, a plaintiff might be able to pursue statutory review, i.e., make use of an express right of action created by Congress for review of particular agency actions. For instance, § 402(b) of the Communications Act of 1934 authorized "any…person aggrieved or whose interests are adversely affected by any decision of the [Federal Communications] Commission granting or refusing any such application" to seek judicial review from the D.C. Circuit. Unlike nonstatutory review, a person invoking statutory review did not need to establish that she had suffered a "legal wrong" or invasion of a "legal right." Such a plaintiff just needed to satisfy the requirements that Congress had spelled out for using the statutory right of action.

Then along came § 702 of the APA, which provides that "[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." At first, courts and commentators, for the most part, interpreted this provision as carrying forward the rights to judicial review available before the APA's enactment. The first prong, covering persons who had suffered "legal wrong," carried forward the availability of nonstatutory review; the second prong, covering persons "adversely affected or aggrieved," recognized that plaintiffs might make use of express statutory review proceedings where available. (Pp. 23-27.)

Before *Data Processing,* two doctrinal impulses worked to broaden availability of the APA's right of action. First, the Warren Court developed a practice of finding implied rights of action to challenge agency statutory violations that seemed premised on a very generous understanding of the scope of plaintiffs' "legal rights." (P. 29.) Second, Professor Kenneth Culp Davis pushed for a far more expansive understanding of the reach of the "adversely affected or aggrieved" prong of § 702. According to Professor Davis, rather than merely acknowledging that a plaintiff might invoke statutory review, this prong of § 702 instead authorized any person "who is in fact adversely affected" by illegal agency action to obtain relief through the APA. (P. 25.)

Whew. That's a lot of ground to cover. The key thing to see for the present purpose, however, is that, before *Data Processing,* to satisfy § 702 and use the APA's right of action, a plaintiff had to either demonstrate that she had suffered "legal wrong" or else satisfy the terms of a particular enabling act's statutory right of action.

At last we come to Part II and Professor Nelson's detailed dissection of *Data Processing* itself. Most readers of JOTWELL's Administrative Law page will recall that *Data Processing* involved a challenge to a decision by the Comptroller of the Currency that allowed national banks to perform data processing services incidental to their banking services. The plaintiffs were, just as one might expect, in the data-processing business. They contended that the Comptroller's decision conflicted with provisions of the National Bank Act and the Bank Service Corporation Act of 1962. Justice Douglas, writing for the Court, explained that standing has both constitutional and non-constitutional dimensions. The data processors satisfied the constitutional requirement for standing, rooted in Article III's case-or-controversy limitation, as they had plainly suffered an "injury-in-fact" due to increased competition from banks. As for standing's non-constitutional requirement, Justice Douglas explained that this turns on "whether the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." The Court concluded that the plaintiffs' interest in avoiding competition from banks "arguably" fell "within the zone of interests protected" by § 4 of the Bank Services Act. Therefore, the plaintiffs had what we have come to call statutory standing.

The key to *Data Processing* is to understand just what Justice Douglas meant by "standing." As Professor Nelson explains, before *Data Processing,* courts had often used this term when assessing whether a source of law gave a plaintiff a right of action in the circumstances of a case. (P. 5.) By contrast, in *Data Processing,* Justice Douglas intended the non-constitutional dimension of "standing" merely to screen out plaintiffs who were "not even in the ballpark of having a right of action." (P. 107.) He did not contemplate that the lax arguably-within-the-zone test would determine whether a plaintiff actually had the proper type of "legal interest" to support a remedial right to challenge a given violation of law.

Over time, however, courts began treating *Data Processing*'s arguably-within-the-zone test not as a preliminary "ballpark" screen but as a definitive test for determining availability of the APA's right of action. Characterizing the consensus that evolved on this point after about 1980, Professor Nelson writes, "[f]or more than a generation,…courts have assumed that when an agency violates statutory or constitutional limitations on its authority, everyone who is suffering 'injury-in-fact' and whose interests are even 'arguably' within the relevant 'zone' can obtain relief under the APA (unless a more specific statute supplants this right of action." (P. 4.) He adds that, in keeping with this expansive understanding of *Data Processing,* some of the very brightest lights of administrative law have characterized this opinion as a "watershed" (Mashaw), a "Revolution" (Justice Breyer), and an "Earth-Shattering Kaboom" (Lawson). (P. 4.)

But, according to Professor Nelson, *Data Processing* itself did no such kabooming. More particularly, properly read, *Data Processing* does not stand for the proposition that any plaintiff who satisfies the arguably-within-the-zone test can, without showing anything more, lay claim to statutory standing under the APA. Instead, in keeping with earlier law, *Data Processing* contemplates that a plaintiff, at least absent help from an express statutory right of action, must still demonstrate that she challenges an agency action that did harm to her cognizable "legal interests." On this view, statutory standing to use the APA's right of action does not extend nearly so far as most everyone has been saying it does for the last few decades.

After Part II's dissection of *Data Processing*, Part III turns to exploration of how and why this opinion came to be so widely misunderstood as well as some "ironic consequences" of the modern reading. (Pp. 68-69.) As with the rest of the article, Professor Nelson tells an intricate and detailed story—interweaving judicial precedents and academic work of another era—in a remarkably engaging way.

Speaking of ironies, I would just like to share a half-baked thought about constitutional standing that crossed my mind after reading *"Standing" and Remedial Rights in Administrative Law* a couple of times. According to Professor Nelson's account, at the time of *Data Processing,* Justice Douglas intended "standing" to function as a preliminary screen with modest constitutional and statutory requirements. Justice Brennan pushed for an even more modest framework that would have confined the "standing" inquiry to the question of whether a plaintiff had suffered an injury-in-fact sufficient to satisfy Article III. On either approach, constitutional standing would not do a lot of work. The great misreading of *Data Processing,* however, made remedial relief generally available under the APA without regard to whether agency action infringed on a plaintiff's "legal rights." Might eliminating the legal rights inquiry from statutory standing have left greater space for it to complicate constitutional standing? We speak of constitutional standing as requiring an "injury-in-fact," but we all know that this requirement might better be styled as an "injury-in-law"—i.e., the type of injury that the law is willing to recognize as sustaining standing.[1] If statutory standing had stayed a bit tougher, might constitutional standing have had less work to do and remained a little easier? That might have been nice.

In closing, *"Standing" and Remedial Rights in Administrative Law* is a terrifically informative and well-written article that makes the development of the doctrine of statutory standing and the availability of the APA's right of action into a page-turner.

1. Cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (declaring that injury-in-fact requires "an invasion of a legally protected interest").

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