Judicial Review of Treasury Regulations for Taxpaying and Nontaxpaying Citizens

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COMMENT

JUDICIAL REVIEW OF TREASURY REGULATIONS FOR TAXPAYING AND NONTAXPAYING CITIZENS

INTRODUCTION

On January 11, 1971, President Richard Nixon proposed a new system of liberalized rules for the depreciation of business equipment.\(^1\) Pursuant to the President's proposal, the Treasury Department issued a final set of regulations on June 22, 1971.\(^2\) These regulations were known as the "asset depreciation range" (A.D.R.) system.

Seeking to stimulate the economy and to end criticism of the A.D.R. system, Congress enacted a provision in the Revenue Act of 1971 which dealt with liberalized depreciation.\(^3\) This new act in essence joined the guideline life system of 1962\(^4\) with the A.D.R. system\(^5\) and labeled the new method of depreciation the "class life" system. The heart of the new method is embodied in a list of asset guideline classes, each having a corresponding depreciation range. For example, heavy construction equipment is in class 15.0 and has a depreciation

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5. See note 2 supra. The relationship between the A.D.R. system and the guideline life system is summarized in CCH Fed. Tax Rep. ¶ 1700 (1972) as follows:

   In 1942, the IRS issued Bulletin F, an item-by-item listing of useful lives for various types and kinds of assets (¶ 310E). These prevailed until 1962 when the IRS prescribed the depreciation guidelines in Rev. Proc. 62-21 (¶ 1763). The item-by-item listing was replaced with broad industry classes of assets with shorter guideline lives. A mechanical procedure—the reserve ratio test—was applied by agents to determine whether the deduction resulting from these more liberal rates was in line with the taxpayer's retirement and replacement policies. This test was complicated. Consequently, many taxpayers did not use the guidelines. To make it possible for taxpayers electing the guidelines to meet the reserve ratio test, special transitional rules were set forth in Rev. Proc. 65-13 (¶ 1767).

   In 1971, when many taxpayers were expected to fail the reserve ratio test, the IRS adopted the Asset Depreciation Range (ADR) System (¶ 1732A). Then, the Revenue Act of 1971 authorized a new class life system which would combine most of the provisions of the ADR System and some parts of the guidelines.

   The ADR System is also based on broad classes of assets. Instead of a guideline life, an asset depreciation range is provided. This range is from 20% below to 20% above the guideline lives. For each asset in a class, the taxpayer selects an asset depreciation period within the range for the class. This period is then treated
range of four to six years. Thus, to determine depreciation, a taxpayer need only classify his depreciable assets and depreciate within the range provided. It is a simple method which permits depreciation up to 20 percent faster than was previously permitted under the guideline life system.

Authority to formulate the list of classes was given to the Treasury Department. The 1971 addition to the Internal Revenue Code provides that a depreciation allowance should be based upon "the class life prescribed by the Secretary or his delegate which reasonably reflects the anticipated useful life of that class of property to the industry or other group." To fulfill this task, the Treasury Department created the Office of Industrial Economics which was charged with calculating and revising the class life system. The Treasury Department issued the first list of class lives in 1972.

 Suppose that in compiling class lives the Treasury Department misjudges the useful life of certain equipment, thereby allowing a faster write-off of depreciation than is reasonable. For example, if empirical research shows that heavy construction equipment has a useful life of 15 years (with a depreciation range of 12 to 18 years) instead of the five years provided by the class life system (with a depreciation range of four to six years), then use of the class life system would result in unrealistically rapid depreciation and consequently less tax revenue. Arguably, such a misjudgment would not "reasonably reflect the anticipated useful life" as required by the Code. Who would challenge such a classification? Clearly it would not be the user—he would benefit from excess depreciation expense. Similarly, it would not be the manufacturer who could boast of the rapid tax depreciation in his sales campaign. Furthermore, it is unlikely that the government would challenge the classification, since the expertise of its departments would be questioned thereby.

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for all purposes as the useful life—for computing depreciation, additional first-year depreciation, investment credit, etc. Under ADR, the taxpayer does not have to justify his retirement policies. There is no reserve ratio test. Once an asset depreciation period is selected for an asset, neither the taxpayer nor the IRS can change it. The ADR System applies to assets first placed in service after 1970. The ADR election is an annual one and applies to the assets first placed in service in each election year.

This paper explores the possibility of subjecting such an administrative ruling to judicial review initiated either by a taxpayer not benefited by the regulation or by a nontaxpayer. For either party to prevail he must prove that he has standing, that judicial review is available, and that there is a remedy which he can obtain by judicial review.

I. STANDING

Standing is an absolute requirement for any suit; without standing the suit will be dismissed regardless of the merits of the case. The powers of the federal courts are derived from Article III, which limits their power to consideration of "cases" or "controversies." This limitation has given rise to the standing doctrine, which requires that the party invoking federal court jurisdiction have "such a personal stake in the outcome of the controversy as to assure that concrete adversity which sharpens the presentation of issues." Historically, a plaintiff had standing to sue only if he had suffered a "legal wrong." To establish a legal wrong, the plaintiff was required to prove, for example, injury to a property or contract right or to a right conferred by statute or by the Constitution. If no obvious legal wrong existed, the plaintiff was denied access to the courts.

The first major change in the law of standing came in 1940 when the Supreme Court decided *FCC v. Sanders Brothers Radio Station*. In *Sanders* the Court found that an existing radio station had standing to challenge the action of the FCC in granting a certificate to a new competitor. Standing was based on an express provision of the Federal Communications Act which permitted any "aggrieved" person to appeal a decision by the Commission granting or denying a license. Thus,

14. See, e.g., Perkins v. Lukens Steel, 310 U.S. 113 (1940); Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939); Chicago Junction Case, 264 U.S. 258 (1924). In *Tennessee Electric Power*, the Court held that the plaintiff had no right to be free from government competition; therefore, no legal wrong was sustained when the government became a competitor, and thus there was no standing.
15. 309 U.S. 470 (1940).
even though there was no legal right to be free from competition, the statute expressly allowed the suit.

However, unlike the Federal Communications Commission, many agencies are not created with express statutory review provisions. To remedy this situation, Congress passed the Administrative Procedure Act. This act provides:

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.

Since this section of the Administrative Procedure Act (APA) distinguishes between those persons suffering a "legal wrong" and those persons "adversely affected or aggrieved within the meaning of a relevant statute," the APA might seem to provide a more liberal standard of review than the "legal wrong" test. Indeed, this position has been urged by one of the leading commentators in the field. However, the early decisions of the lower courts held that the APA merely formalized the existing test for standing, the "legal wrong" test.

Except for the case of Hardin v. Kentucky Utilities Co., the law of standing remained static until recently when the Supreme Court decided Flast v. Cohen, Association of Data Processing Service Organizations, Inc. v. Camp, and Barlow v. Collins. In these three opinions, the Court revamped traditional notions of standing.

In Flast, federal taxpayers sought to enjoin enforcement of an act authorizing federal expenditures to finance teaching and acquisition of materials for religious courses in religious and sectarian schools. The
plaintiffs relied on their status as taxpayers for standing. In an opinion by Chief Justice Warren, the Court held that the plaintiffs had standing and in so holding created a new test to determine standing. The Court reasoned that the standing requirement was necessary to ensure that the plaintiff's interest in the suit was sufficient to create a case or controversy.\textsuperscript{27} To gauge whether the plaintiff's interest was sufficient, the Court established a two-fold test:\textsuperscript{28}

First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.

In \textit{Data Processing} the Comptroller of the Currency, pursuant to the National Bank Act,\textsuperscript{29} promulgated a rule which authorized national banks to provide data processing services. Claiming injury to its interests as a competitor now deprived of potential clientele, the Association of Data Processing Service Organizations challenged the ruling. \textit{Barlow} involved a ruling of the Secretary of Agriculture which amended section 402(a) of the Food and Agriculture Act of 1965.\textsuperscript{30} Although the amendment actually expanded the power of farmers to assign government benefit payments "as security for cash advanced to finance making a crop,"\textsuperscript{31} it redefined "making a crop" to include rent paid.\textsuperscript{32} The result was that landlords demanded an advance assignment of the government benefits as a condition to obtaining a lease to work the farm. The amendment was challenged by farmers who were adversely affected.

In both \textit{Data Processing} and \textit{Barlow} the Court upheld the petitioners' claim of standing but in the process established a rather abstruse two-fold test: (1) the plaintiff must have suffered an "injury in fact, economic or otherwise,"\textsuperscript{33} and (2) the plaintiff must assert interests which are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."\textsuperscript{34}

\textsuperscript{27} Flast v. Cohen, \textit{supra} note 24, at 102.
\textsuperscript{28} Id. at 102.
\textsuperscript{32} 7 C.F.R. § 709.3 (1972).
\textsuperscript{33} 397 U.S. at 152.
\textsuperscript{34} 397 U.S. at 153.
Thus the Flast test of standing is different from that of Data Processing and Barlow. However, since standing is arguably a requirement stemming from Article III of the Constitution, there must be a test which states the constitutional minimum. The Court in Data Processing apparently interpreted the Flast test to require only "injury in fact" as a constitutional minimum, overlooking Flast's two-fold test for determining when a sufficient personal stake exists.

In fact, even if the constitutional minimum for standing is "injury in fact," a plaintiff cannot claim standing on that basis alone. In Data Processing, the court also required a showing that the plaintiff's interest was within the zone of interests sought to be protected by the statute in question. This added requirement reflects a policy decision that not every type of injury deserves redress.

It seems clear that only the first nexus required by Flast deals with injury in fact, while the second nexus narrows the type of interest the plaintiff must have in order to have standing. Thus he must show a specific constitutional limitation on the challenged legislative action. It may be that what Data Processing classified as "injury in fact" was meant to be the equivalent of the two-fold test in Flast. Justice Douglas did not clarify this point—rather he sought to distinguish Data Processing and Flast on the basis of their facts, the former being a competitor's suit, the latter a taxpayer's suit, and thus create a different test for standing in Data Processing.

35. See note 10 and accompanying text supra.
36. See text accompanying note 28 supra.
37. 397 U.S. 159, 172 (1970). Justice Brennan, concurring in part and dissenting in part, further defined "injury in fact" by stating:
   "For purposes of standing, it is sufficient that a plaintiff allege damnum absque injuria, that is, he has only to allege that he has suffered harm as a result of the defendant's action. Injury in fact has generally been economic in nature, but it need not be . . . ."
   Id. at 172 n.5 (emphasis added).
38. See text accompanying note 28 supra.
40. The test developed in Data Processing is set forth in the text accompanying notes 33-34 supra. It is difficult to relate the "injury in fact" language in Data Processing to the test in Flast. Arguably, the Flast test does establish the conditions under which the taxpayer is injured, but the second nexus required in Flast, showing a specific constitutional limitation in the taxing and spending powers, is unrelated to the plaintiff's injury. Rather, this second nexus focuses more closely on the type of interest alleged by the plaintiff. Thus, it seems that the first nexus in Flast equates with the Data Processing "injury in fact," while the second nexus is roughly equivalent to the Data Processing "zone of interests" test, at least in focusing more closely on the nature of the plaintiff's interest.
A party challenging a class life depreciation determination by the Secretary immediately is confronted with the problem of deciding which test for standing is applicable. This problem is particularly acute for the taxpayer because of the confusing distinction between taxpayer and competitor suits drawn in *Data Processing*. Although by no means clear, an attack of a depreciation ruling by the Secretary would probably be governed by the standing test set forth in *Data Processing*. *Flast* involved a challenge to the constitutionality of a federal statute authorizing federal expenditures; consequently, the *Flast* test is so narrowly tailored to that precise factual pattern that it cannot be applied meaningfully to a nonconstitutional challenge of administrative action. The fact that *Data Processing* distinguished *Flast* as a taxpayer's suit does not necessarily indicate that taxpayers involved in any kind of suit are limited to the *Flast* test. The distinguishing language of *Data Processing* makes more sense if interpreted to distinguish *Flast* not only because a taxpayer sued, but also because a taxpayer challenged the constitutionality of a federal statute. Thus the party challenging the Treasury Secretary's depreciation class lives is involved in an administrative law controversy, and his standing should be determined by the standards announced in the administrative law cases—*Data Processing* and *Barlow*. This conclusion is buttressed by the fact that the APA is applicable to the hypothetical case posed by this comment but was not applicable in *Flast*. Thus, a plaintiff must come within the *Data Processing* test. He must show both injury in fact and that he comes within the zone of interests sought to be protected or regulated by the statute in question.

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41. See text accompanying note 39 supra.
42. Thus in Arnold Tours, Inc. v. Camp, 408 F.2d 1147 (1st Cir. 1969), the court stated: *Flast v. Cohen* was not intended to have any major reshaping effect outside the area of standing determinations under Article III for taxpayer suits challenging the constitutionality of a federal taxing and spending statute. Such an approach to standing as used in *Flast*—one focusing solely upon an assessment of the degree of adversity and clarity of the particular case—if applied to questions of administrative law standing would disturb the entire judicial relationship to the administrative as presently understood by Congress. *Id.* at 1152. But see Troutman v. Shriver, 417 F.2d 171 (5th Cir. 1969).
43. The Administrative Procedure Act §§ 551(1)(A), and 701(b)(1)(A), 5 U.S.C. (1970), excludes Congress from its definition of agency. Since any attack on the constitutionality of a federal statute is necessarily a review of Congressional action, the Administrative Procedure Act does not apply. However, apparently the petitioners' claim in *Flast* also was based on a nonconstitutional challenge—that the defendants (Secretary of HEW and Commissioner
A. Injury in Fact

Although the cases following *Data Processing* have allowed a wide range of injuries to suffice for injury in fact, it is difficult to determine whether a taxpayer not receiving the challenged favorable treatment, or a nontaxpayer in the hypothetical posited by this comment has suffered an injury sufficient to constitute injury in fact. In seeking to establish injury in fact, the taxpayer and nontaxpayer have essentially different problems.

The taxpayer who asserts that he must pay more taxes because of the favorable depreciation treatment afforded others is confronted by the line of cases stemming from *Frothingham v. Mellon*, which hold that a federal taxpayer has no standing to challenge the constitutionality of a federal spending statute. The *Frothingham* rationale is that the monetary interest of a federal taxpayer in an expenditure program is not sufficient to ensure the necessary adversary interest. If that same rationale can be applied to challenges of administrative action the federal taxpayer may not have sufficient monetary interest to give him standing.

However, *Frothingham* has been the subject of much criticism from the commentators. Moreover, the Supreme Court broadened the

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44. See P.A.M. News Corp. v. Hardin, 440 F.2d 255 (D.C. Cir. 1971) (agricultural data news wire services had standing to challenge a government service in competition); Serritella v. Engelman, 339 F. Supp. 738 (D.N.J. 1972) (plaintiffs had standing to challenge reduction or termination of welfare benefits); Atlee v. Laird, 339 F. Supp. 1347 (E.D. Pa. 1972). In *Atlee* the court held that plaintiffs had standing to challenge a federal expenditure. The court stated, "For an economic injury to qualify as a sufficient personal stake, it need not be of any particular magnitude." Id. at 1355. For a thorough compendium of other cases, see Dugan, *Standing to Sue: A Commentary on Injury in Fact*, 22 CASE W. RES. L. REV. 256 (1971).

45. 262 U.S. 447 (1923).

46. *Id.* at 451.

47. K. DAVIS, * supra* note 21, § 22.09. Professor Davis argues that the *Frothingham* holding is wrong for four reasons: (1) Reasons relied on by the Supreme Court in the *Frothingham* opinion are contrary to the facts about our present tax system; (2) the law of the state courts is overwhelmingly and even almost uniformly opposed to the Supreme Court's doctrine; (3) the fact that the Supreme Court before developing the *Frothingham* doctrine upheld the standing of federal taxpayers shows that nothing in the Constitu-
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Frothingham rationale in Flast v. Cohen. In Flast, the Supreme Court held that federal taxpayers did have standing to challenge the constitutionality of a federal spending program. Although its statement was ambiguous, the Court held that a taxpayer has standing even if he alleges only monetary injury. If the monetary interest in Flast is sufficient to confer standing, the taxpayer in the posited hypothetical probably would have standing. Further, although no specific language to that effect is found in Flast, the Court arguably decided the Frothingham barrier should be lowered because, as a matter of policy, some federal taxpayers have a sufficiently adverse interest to be proper parties in a suit. This more liberal policy in favor of standing should be extended to other situations which likewise merit an expansion of the number of parties entitled to sue. In the context of the hypothetical case, the very fact that no one else is in a position to challenge the Secretary's determination indicates that the law of standing should be liberalized to permit a taxpayer to challenge the favorable treatment afforded another taxpayer. Since the precise test of Flast does not fit our situation, the courts may be persuaded to take one step beyond Flast by recognizing a taxpayer's standing to

For further criticism, see 17 N.Y.L.F. 911, supra note 23.

48. See note 24 supra.

49. See text accompanying notes 24-28 supra.

50. Arguably, the claimants in Flast had both a monetary interest and a religious interest in the litigation. However, the correct analysis seems to be that they alleged only the monetary interest and hence only monetary injury. Professor Davis states that in Flast the taxpayer's monetary interest is sufficient for standing. He reaches that conclusion for two reasons:

(1) the Supreme Court in Everson v. Bd. of Education, 330 U.S. 1 (1947) and Doremus v. Bd. of Education 342 U.S. 429 (1952) had already established that the necessary interest was a good faith pocket-book (monetary) interest, and

(2) the plaintiffs in Flast claimed neither religious injury nor religious interests.


The first reason is subject to the criticism that the cases cited dealt with state, not federal, taxes. Before Flast, the Supreme Court maintained that local taxpayers had standing whereas federal taxpayers did not. See, e.g., Frothingham v. Mellon, supra note 45.

51. The monetary injury in Flast was that portion of the total money spent by the federal spending program that could be attributed to the plaintiffs' taxes. Undoubtedly this sum is very slight. It has been estimated that the economic injury to the average federal taxpayer in Flast amounted to twelve cents. Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 611 (1968). It should be noted again that in a situation such as the posited hypothetical, the second nexus requirement in Flast is inapplicable as it is geared toward constitutional attacks on federal spending programs.

52. See notes 41, 42 and accompanying text supra.
challenge an arbitrary decision of an administrator solely on a showing of monetary injury.

The nontaxpayer challenging the Secretary's action will encounter even greater difficulty in showing injury in fact because a nontaxpayer cannot claim monetary injury. However, the nontaxpayer can assert two interests that may entitle him to standing: first, he may at some future time become a taxpayer and thus be injured in the same fashion as the taxpayer; and second, all citizens have a general interest in seeing our laws properly enforced, and more specifically in preventing arbitrary action by administrators.

The first of these interests is supported by the recent case of *Environmental Defense Fund v. Hardin.* In *Hardin,* five young mothers who either presently breastfed or intended in the future to breastfeed their babies challenged an administrative determination of the permissible use of DDT. The court held that the women had standing based on their contingent interest. However, any contingent interest may be subject to the objection that it is too remote to constitute injury in fact.

The second interest is essentially what is known as the "private attorney general" notion—that private citizens should have standing to challenge government action, especially when it appears likely that there are no other challengers. Best among the articles which discuss this interest is that of Professor Jaffe, who argues:

From the very beginning both our Constitution and our practice has sought to protect the individual *qua* individual and *qua* member of a minority from the abuse of power by the majority or by government in the name of the majority, despite the fact that majority rule through representation is the central institution of our democracy. Furthermore, democracy in our tradition emphasizes citizen participation as much as it does majority rule. Citizen participation is not simply a vehicle for minority protection, but a creative element in government and lawmaking. The usual taxpayer and citizen suit is thoroughly consistent

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with the primacy of majority rule. The issue will be the statutory au-
 thority of the official action, and the lawsuit itself will be prescribed
by statute.

Obviously, such statements delineate a policy of standing which
goes to the nature of American society and calls for a redefinition of
the role that the courts (and thus citizens) play in the fabric of our so-
ciety. Similar notions of standing have prevailed in several cases,\textsuperscript{56} although not with the far-reaching consequences desired by those that
adhere to Professor Jaffe's point of view. However, the private at-
torney general argument may be jeopardized by a recent United States
Supreme Court decision, \textit{Sierra Club v. Morton}..\textsuperscript{57}

The Sierra Club, whose goals include the preservation of the envi-
ronment, sought a declaratory judgment and an injunction to restrain
the Secretary of the Interior from approving a resort planned by Walt
Disney Enterprises, Inc., to be built in the Sequoia National Forest. In
attempting to prove standing, the Sierra Club did not allege injury to
itself or its members; rather the injury claimed was that the develop-
ment "would destroy or otherwise affect the scenery, natural and his-
toric objects and wildlife of the park and would impair the enjoymen-
t of the park for future generations."\textsuperscript{58} The Sierra Club sought standing
under a private attorney general argument, claiming that the suit was
a "public" action and that the club's longstanding interest and expert-
ise with such matters were sufficient to give it standing as a public
representative.

The Court agreed that the plaintiff's allegations were serious
enough to constitute injury in fact under the APA, but the Court re-
quired injury in fact \textit{to the person or persons suing}.\textsuperscript{59} In so holding,
the Court rejected any notion that the "special interest" of the Sierra
Club made it a representative party to bring the suit on behalf of the
public: \textsuperscript{60}

[A] mere "interest in a problem," no matter how longstanding the
interest and no matter how qualified the organization is in evaluating
the problem, is not sufficient by itself to render the organization "ad-

\begin{footnotes}
\item[57.] 407 U.S. 727 (1972).
\item[58.] \textit{Id.} at 735 n.8.
\item[59.] \textit{Id.} at 735.
\item[60.] \textit{Id.} at 739.
\end{footnotes}
versely affected” or “aggrieved” within the meaning of the APA. But if a “special interest” in this subject were enough to entitle Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide “special interest” organization, no matter how small or short-lived. And if any group with a bona fide “special interest” could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

This holding contradicts the trend of lower court opinions which allow the private attorney general notion to confer standing to sue on behalf of the public interest. Recognizing that standing is a constitutional restriction designed to ensure a proper representative, the Sierra Club Court reasoned that unless a “particular” plaintiff has been injured, that plaintiff cannot be a proper party to sue. The Court seemed to recognize that in this particular instance Sierra Club would have pursued the case with the requisite vigor, but feared that a liberal holding would open the courts to many plaintiffs with a so-called “special interest” who would not adequately represent the public.

The desire to limit access to those persons who will press the action adequately is certainly respectable. However, one may wonder whether the criteria of Sierra Club—injury in fact to the particular plaintiff—is an appropriate measure of a plaintiff's merits as proponent of the claim. A test which denies standing to such an obviously able plaintiff as the Sierra Club, while granting standing to a less able plaintiff merely because that particular plaintiff is injured in fact, misses the mark. The Constitution only requires that the plaintiff be a person whose interests are sufficiently adverse to ensure adequate representation. This adversity can be ensured without the Sierra

61. See notes 54-56 and accompanying text supra.
62. The Sierra Club Court followed the Data Processing test for standing and decided the case solely on the first part of that test, injury in fact. Data Processing made it clear that injury in fact was the only constitutional requirement flowing from Article III. 397 U.S. 150, 153 (1970). Thus the Sierra Club holding on the standing issue was probably a matter of constitutional law.
63. 405 U.S. at 739.
64. To highlight the potential absurdity of this result, Professor Davis posits the following example:
[T]he best law firm in the country . . . lacks standing to get an adjudication of law when neither it or its client has any interest at stake. . . . [A]n illiterate pauper who refuses legal assistance obviously has standing to challenge a $10 fine imposed on him, no matter how badly he may present his case.
65. See note 11 and accompanying text supra.
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Club test of injury in fact to the particular plaintiff. Perhaps the proper approach to standing is for the courts to adopt a case by case analysis and accept evidence as to the appropriateness of the particular plaintiff's allegation of standing rather than handling the question in such a mechanical fashion.66

At any rate, if the courts continue to apply the Sierra Club analysis, a nontaxpayer challenging arbitrary action by the Secretary probably will be precluded from basing his standing on the private attorney general notion.

B. Zone of Interests

Having demonstrated that he is "injured in fact," the plaintiff must show that his interests are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."67 This requirement has been severely criticized by commentators68 as being irrelevant to the standing issue. However, the "zone of interests" test probably represents a determination by the Court that not all injured parties should be compensated through judicial redress.69

Assuming that it is necessary to satisfy the "zone of interests" test in order to have standing to challenge administrative action, the test presents some rather awkward problems, largely because of the imprec-

66. Professor Davis has offered the following proposal:
A person whose legitimate interest is injured in fact or imminently threatened with injury by governmental action should have standing to challenge that action in absence of legislative intent that the interest is not to be protected.
K. Davis, supra note 64, § 22.08.
68. See K. Davis, supra note 64, § 22.07.
It should be noted that the dissenters in the Data Processing and Barlow cases agreed that the "zone of interests" tests had nothing to do with standing. Justice Brennan thought that the "zone of interests" test should be applied in deciding whether the agency action was subject to judicial review. See Data Processing, 397 U.S. at 170 (dissenting opinion).
69. Courts have imposed limits other than injury in fact from the very beginning of federal practice under the Constitution. The "legal wrong" test is a very good example. According to that test, the plaintiff must not only show injury but also must show that the injury is of a specific nature (e.g., breach of contract). See generally Comment, Judicial Review of Agency Action: The Unsettled Law of Standing, 69 Mich. L. Rev. 540 (1971).
sion with which the Court announced the test in *Data Processing*. A preliminary issue is which zone of interest is in question. The language in *Data Processing* indicates that the plaintiff must come within the zone of interests protected by the statute which is the basis of the claim. But are the interests to be protected limited to those found within the particular section of the statute which forms the basis of the claim, or may the whole statute be examined? Indeed, it has been argued that any statute, even one different from the statute forming the basis of the suit, that evidences an intent to protect the plaintiff's interests may properly be analyzed in determining the zone of interests. In the posited hypothetical, both taxpayers and nontaxpayers probably could argue successfully that they come within the zone of interests sought to be protected by the provision in question. That section authorizes the Secretary to make "reasonable" rulings. The "reasonable" standard probably was added to ensure that the Secretary's rulings did not result in the receipt of either too few or too many tax dollars. Thus, the likely rationale for the reasonableness limitation was to preserve the inherent equity in our tax system, sometimes referred to as either "horizontal equity or vertical equity." Basically this means that all citizens in this country, both taxpayers and nontaxpayers, are part of a cohesive whole, and as such have the right to ensure the equilibrium of the tax system.

The language in *Data Processing* provides that the plaintiff's interests only arguably need come within the zone of interests. The use of the term "arguably" evidences an intent to allow a wider range of interests to satisfy this test than just those interests which clearly fall within the protected zone of interests. Indeed, the lower court cases following *Data Processing* have interpreted the term "zone of

70. One major question is whether the Court meant to include the plaintiff's interest within the zone or the plaintiff himself. The Court in *Barlow* stated that the plaintiffs themselves were within the zone of interests. The outcome of this issue is in doubt. *Id.* at 522.

71. *Id.*


73. Horizontal equity has been stated to be the proposition that "people in equal position should pay equal amounts of tax." Vertical equity has been defined as the proposition that "people in unequal position should pay different amounts related in a meaningful fashion to difference in position." See Musgrave, *In Defense of An Income Tax*, 81 Harv. L. Rev. 44, 45 (1967).

interests" extremely liberally, and some courts have apparently ignored the requirement altogether. The result is that while the "zone of interests" standard probably continues as a test, its interpretation will be quite liberal. As a consequence, it seems that the interest of both the taxpayer and nontaxpayer in preserving the equity fundamental to our tax code is sufficient to allow these potential plaintiffs to satisfy the zone of interests test.

Having established that the plaintiffs in the posited hypothetical arguably have standing, we must analyze the other obstacles to a challenge of administrative action: whether judicial review is available at all, and whether the challenge fits within the scope of review allowable under the APA.

II. JUDICIAL REVIEW

Since perusal of the Internal Revenue Code reveals no specific grant of power to review Treasury Department determinations, any permissible judicial review must be governed by the APA. The APA states in part: "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."

This section of the APA was interpreted by the Supreme Court in Abbot Laboratories v. Gardner to create a presumption that judicial review is allowable. This presumption of judicial review is subject to: (1) statutes which preclude judicial review, and (2) agency action which is committed to agency discretion by law. An examination of these two exceptions is necessary.

75. See, e.g., P.A.M. News Corp. v. Hardin, 440 F.2d 255 (D.C. Cir. 1971) (the court gave a summary consideration of the "zone of interests" test, almost completely ignoring the test); Serritella v. Engleman, 339 F. Supp. 738 (D.N.J. 1972) (the court held that the plaintiffs had standing to challenge an order reducing and terminating welfare benefits. The court cited the "zone of interests" test, but did not apply it); Nat'l Ass'n of Letter Carriers v. Ind. Post. Serv. of Am., Inc., 336 F. Supp. 804 (W. D. Okla. 1971) (the court held that the interests of the postal carriers were within the "zone of interests" of the entire postal laws. The court also gave a very loose interpretation based on the "arginably" standard of Data Processing).


79. 5 U.S.C. § 701(1) and (2) (1970).
A. Statutory Preclusion

Is judicial review in the posited hypothetical precluded by statute? Arguably, sections 7421 and 7426 of the Internal Revenue Code call for preclusion. Section 7421 states:

(a)—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

In *Enochs v. Williams Packing and Navigation Co.* the Supreme Court stated, “The object of § 7421(a) is to withdraw jurisdiction from the federal and state courts to entertain suits seeking injunctions prohibiting the collection of federal taxes.” The purpose of the section, the Court continued, “is to permit the United States to assess and collect taxes allegedly due without judicial intervention.” In its analysis the Court did not advocate withdrawing jurisdiction over all suits, but only over those which would impede the collection or assessment of the tax. Since the hypothetical suit is a challenge to a ruling which does not seek to enjoin assessment or collection of a tax, section 7421 probably does not preclude review.

Section 7426 presents a larger hurdle, at least to the nontaxpayer. This provision outlines the civil actions which may be brought by persons other than taxpayers. Actions for wrongful levy, surplus proceeds and substituted sale proceeds are permitted. The chief question to be answered is whether the list is exclusive or whether other actions are available to the nontaxpayer. If the section is read to exclude all other actions by nontaxpayers, review of the class life depreciation range of course is precluded.

In *Abbott Laboratories v. Gardner* the Court read the statutory preclusion section very narrowly:

The question [as to whether there has been statutory preclusion of review] is phrased in terms of “prohibition” rather than “authori-

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81. *370 U.S. 1, 5 (1962).*
82. *Id.*
83. *Int. Rev. Code of 1954, § 7426(a).*
84. *387 U.S. 136 (1967).*
85. *Id. at 140.*
zation” because a survey of our cases shows 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.

In Association of Data Processing Service Organizations, Inc. v. Camp, 86 the Court placed emphasis on a statement in the House Report on the APA which concluded: “To preclude judicial review under [5 U.S.C. § 701] a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it.” 87 In synthesizing these two cases, it appears that the Court is not likely to find statutory preclusion of review, especially where there has only been a failure to provide for alternative civil actions in section 7426. Thus, it appears that neither section 7421 nor section 7426 precludes review.

B. Preclusion Where Committed to Agency Discretion by Law

The mere fact that review is not precluded by statute does not ensure that review is possible. The APA 88 provides that the review provisions of the Act will not apply if the agency action is committed to agency discretion by law. The Court, however, has read this exception quite narrowly. In Citizens to Preserve Overton Park, Inc. v. Volpe, the Court stated: 89

This [5 U.S.C. § 701(a)(2)] is a very narrow exception . . . . The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where “statutes are drawn in such broad terms that in a given case there is no law to apply.”

Section 167(m) of the Internal Revenue Code provides that a class life prescribed by the Secretary or his delegate should reasonably reflect the anticipated useful life of that class of property. Although the determination is to be made by the Secretary, his discretion is limited by the standard of reasonableness embodied in section 167(m). Since this exception is read very narrowly by the Court and since there is a dele-

86. 397 U.S. 150, 156 (1970).
89. 401 U.S. 402, 410 (1971).
gated standard of reasonableness, it appears that this exception like-
wise does not preclude judicial review.

III. SCOPE OF JUDICIAL REVIEW

Having determined both that plaintiffs may have standing and that
judicial review of the agency action is available, we must determine
the scope of judicial review. The scope of review is governed by the
APA, which provides:90

To the extent necessary to decision and when presented, the reviewing
court shall decide all relevant questions of law, interpret constitutional
and statutory provisions, and determine the meaning or applicability
of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably de-
layed; and

(2) hold unlawful and set aside agency action, findings and conclu-
sions found to be—

(a) arbitrary, capricious, an abuse of discretion, or otherwise
not in accordance with law;
(b) contrary to constitutional right, power, privilege or im-
munity;
(c) in excess of statutory jurisdiction, authority, or limita-
tions, or short of statutory right . . . .

The term “agency action” is defined as “the whole or part of an
agency rule, order, license, sanction, relief, or the equivalent or denial
thereof, or failure to act.”91 The determination by the Secretary of the
“class lives” which “reasonably reflect the anticipated useful life of
that class of property” probably would be considered an agency rule.92
Therefore, the Secretary’s depreciation class life determinations are
subject to review under the APA.

Although the Secretary’s determinations constitute agency action,

[T]he whole or a part of an agency statement of general or particular applicability
and future effect designed to implement, interpret, or prescribe law or policy or
describing the organization, procedure, or practice requirements of an agency and
includes the approval or prescription for the future of rates, wages, corporate or
financial structures or reorganizations thereof, prices, facilities, appliances, ser-
vices or allowances therefor or of valuations, costs, or accounting, or practices
bearing on any of the foregoing . . . .
the APA limits the theories which may be used to set aside such action. In order to succeed, plaintiffs must allege one of the enumerated theories. The basic premise of the hypothetical suit is that the Secretary's determination is unreasonable because the class life determinations are widely divergent from the actual life of the equipment within the classification. This challenge may be sustained under two sections of the APA. The plaintiff's allegations of an unreasonable determination despite a statutory requirement of reasonableness is in substance an allegation that the Secretary's action is "in excess of statutory authority, or limitations," one of the enumerated theories in the APA. Further, if the Secretary's determination has no basis in reality, another theory might be equally applicable, for the Secretary's determination might be "arbitrary" or "capricious" within the meaning of the APA. Consequently, the allegations of the plaintiffs in the posited hypothetical are within the scope of judicial review.

IV. FORMS OF RELIEF

A. Injunction

Having determined that the plaintiffs may have standing and that their claims are within the scope of judicial review, the court must determine whether the cause of action merits relief. While extensive discussion of the merits of the claim is inappropriate here, if the Secretary's ruling is unreasonable, the fact that Code section 167(m) demands "reasonableness" should be decisive. Assuming a victory on the merits, there are two basic forms of relief that the petitioners could seek—injunction and injunction with declaration under the Declaratory Judgment Act.

In seeking an injunction, the two largest obstacles facing the petitioner are proving that irreparable injury will follow if an injunction does not issue and demonstrating that there is no adequate remedy at

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93. See text accompanying note 90 supra.
94. The two possible provisions are in APA § 706 (2)(a) and (c). See text accompanying note 90 supra.
95. 28 U.S.C. §§ 2201, 2202 (1970). It should be noted that the prohibition in section 7421 of the Internal Revenue Code against enjoining the collection of income taxes does not impede our hypothetical plaintiffs because they are not seeking to restrain the collection of taxes but rather seek to restrain the Secretary from enforcing the unreasonable regulation.
law. Professor Davis, noting that these historical grounds for equitable relief may be disappearing, states:96

Injunction as a means of reviewing administrative action has moved away from its historical foundations in equity and has become a general-utility remedy for use whenever no other form of review proceeding is clearly indicated.

If Professor Davis' position prevails, it is clear that an injunction would issue in the hypothetical case. However, it is doubtful that the courts accept Davis' theory. The Supreme Court continues to allude to the traditional grounds for granting equitable relief. For example, in Reisman v. Caplin97 the Court denied both declaratory and injunctive relief based on the existence of an adequate remedy at law.98 Therefore, it seems that the historical foundations for such relief have not been abandoned totally. Accordingly, the court must make a determination as to whether the petitioners' claim satisfies the historical prerequisites.

Irreparable injury is a term with a legal definition that sometimes does not correspond to its literal meaning. For example, irreparable injury is defined in Schuetzle v. Duba99 to be damage which cannot be

96. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.04 (1958). Professor Davis arrives at his conclusion by analyzing several cases. In Stark v. Wickard, 321 U.S. 288 (1943), the Court granted an injunction "without considering whether the asserted interest in a money fund was entitled to equitable protection." K. DAVIS, supra, at 308. In United States v. ICC, 337 U.S. 426 (1949), the Court reviewed a denial of reparation "even though the only question was whether the plaintiff was entitled to a money award." K. DAVIS, supra, at 308. The three dissenting justices in that case remarked, "There is a total absence of any of the traditional grounds for equitable relief." 337 U.S. at 460.

97. 375 U.S. 440 (1964). In Reisman, the petitioners were attorneys for taxpayers seeking a declaratory judgment and injunction against the Commissioner of Internal Revenue and an accounting firm which had been working on the petitioners' financial records. The Commissioner issued a subpoena duces tecum to the accounting firm directing it to produce all audit reports and work papers in its possession. Petitioners objected to this procedure, claiming that it was an unlawful appropriation of their work product. The Court dismissed the complaint because the petitioners had an adequate remedy at law—they could obtain a stay of the order and challenge the summons on any appropriate ground.

98. See also Younger v. Harris, 401 U.S. 37, 43 (1971).

estimated by an accurate, objective standard but only by conjecture; it "does not have reference to amount of damage caused, but rather to difficulty . . . of measuring the amount of the damages inflicted." 100 The damage sustained by the petitioners due to the Secretary's erroneous computation is comprehended by this definition. What amount of money compensates the nontaxpayer plaintiff for a decision by the Secretary in excess of his authority? Further, it would be impossible to determine quantitatively the taxpayer plaintiff's increased tax liability caused by the faulty depreciation class lives promulgated by the Secretary which benefit other taxpayers. Surely the injury is irreparable.

Is there an adequate remedy at law? Generally there is an adequate remedy when the plaintiff can be compensated sufficiently by money damages. 101 However, it has been held repeatedly that where the ascertainment of damages is extremely difficult or impossible, there is no adequate remedy at law. 102 Further, the existence of a continuous injury may constitute irreparable injury and render a legal remedy inadequate. 103

It appears, then, that the petitioners can meet the historical requirements for an injunction. The probable outcome of the proposed suit is an injunction precluding the Secretary from enforcing the unreasonable class life determination.

B. Declaratory Judgment

Generally an injunction is combined with declaratory relief under the Declaratory Judgment Act. 104 However, occasionally the Court

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100. Id. at 757 (emphasis added). For other cases holding that irreparable injury exists when the extent of the injury only is subject to conjecture, see Hines v. Independent School Dist., 380 P.2d 943 (Okla. 1963); United Carbon Co. v. Ramsey, 350 S.W.2d 454 (Ky. Ct. App. 1961).


103. See W. DeFUNIAK, HANDBOOK OF MODERN EQUITY § 20 (2d ed. 1950).

has granted a declaratory judgment and also refused to grant injunctive relief. The Declaratory Judgment Act may be used "in a case of actual controversy" to decide the rights and other obligations of the interested parties. In *Golden v. Zwickler* the Court explained: "[T]he question in each case is whether the facts alleged, under all circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." In the proposed suit, the facts appear to present such a controversy; the injury threatened is imminent since the regulation is final and can effect income tax returns.

Perhaps the most difficult problem facing the petitioners in pursuit of a declaratory judgment is the following statutory limitation in the Declaratory Judgment Act: "except with respect to Federal taxes." Although this limitation has prevented use of declaratory relief in suits brought by tax debtors, suits by third party petitioners have been allowed.

If the petitioner is to prevail, he should stress his contention that injunctive relief is available to him. The court in *Filopowicz v. Rothensies* said, "[I]t would seem clear that if a court of equity could enjoin the collector for taking illegal action, a federal court similarly should be able to issue a declaratory judgment...." In *Tomlinson v. Smith* the court went even further when it stated that it would be "unreasonable" to think that a court capable of issuing in-
Junctive relief could not issue declaratory relief. If the petitioner seeking review of the Secretary's class life determination can enjoin the use of the regulation, it seems equally unreasonable to deny him declaratory relief.

It has been suggested that other possible exceptions to this tax limitation be established for revenue rulings and closing agreements for future transactions. The purpose of the Federal tax limitation is (1) to keep the initial consideration of tax liability from being transferred from the Internal Revenue Service to the federal courts, and (2) to stop the disruption of the orderly collection of taxes. Neither of these proposed exceptions would disrupt the collection of taxes since both the revenue ruling (or the closing agreement) and the relief are granted prior to the transaction. In addition, the consideration of tax liability still would remain with the Commissioner.

The present case is analogous to the proposed exceptions. Here the determination as to class lives remains with the Secretary and not with the courts. If it is argued that the use of the declaratory judgment would disrupt the orderly collection of taxes, then the courts should deny declaratory relief only when a petitioner seeks to avoid his personal tax liability; when other interests are at stake, declaratory relief should be granted. In addition, if the declaratory relief was sought shortly after the class life regulations became final but prior to the time that they become effective, much of this argument would become inapplicable. In conclusion, if the petitioners can persuade the courts that the underlying basis for the federal tax exception does not really apply, declaratory relief should be granted.

CONCLUSION

A challenge to the Secretary's depreciation regulations is fraught

116. See McGlotten v. Conally, 338 F. Supp. 448, 453 D.D.C. 1972). In McGlotten the court found the scope of the phrase “except with respect to Federal taxes” to be “coterminous with the breadth of the Tax Injunction Act, 26 U.S.C. § 7421(a).” Id. Thus when the petitioner does not seek to restrain the collector of tax, the exception does not apply.
117. In addition, the federal tax limitation may not apply when special and extraordinary circumstances exist. See, e.g., Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932); Jewel Shop of Abbeville v. Pitts, 218 F.2d 692 (4th Cir. 1955).
with difficulties. Standing probably is the chief obstacle; the petitioners must overcome the twin test of *Data Processing*. The taxpayer must convince the court that the standing concept, which exists to ensure the adequate presentation of suits, must not be allowed to create unchecked administrative power. If courts stringently define taxpayer standing, no one will be able to challenge even the most unreasonable agency regulations. These dire consequences seem sufficient to overcome the hackneyed fear of opening the floodgates to a multiplicity of lawsuits, a fear which should not be permitted to outweigh the need to provide a means of challenging arbitrary and unauthorized agency action.

For the nontaxpayer, *Sierra Club* is an additional major obstacle. However cogent the reasons may be for limiting suits in the *Sierra Club* situation, a challenge to arbitrary agency action poses more difficult problems than did *Sierra Club*. In *Sierra Club* the petitioner could easily have been assured of standing by merely alleging injury to one of its group; in the posited hypothetical, no such easy allegation is available. The difference should militate in favor of more liberalized standing law.

The concept of standing may be due for some serious revision. A system which initially only seeks to ensure properly prepared litigants and winds up prohibiting suits by such litigants patently needs revision. Problems such as those experienced by the proposed petitioners should lead the Court to liberalize the standing concept. If suit by the petitioners is not allowed, the plaintiffs must seek review elsewhere. But alternatives are few and difficult. Congressional review and action is unlikely unless the petitioners muster a strong lobby. Hence the courts must act or administrative agency action will continue unrestricted.

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