# A Reflection on "Adversely Affected in Fact" as a Criterion of Standing in American Administrative Proceedings : Usiug Professor Davis' Doctrine as the Basis of the Discussion

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# A REFLECTION ON "ADVERSELY AFFECTED IN FACT" AS A CRITERION OF STANDING IN AMERICAN ADMINISTRATIVE PROCEEDINGS

## ……USING PROFESSOR DAVIS' DOCTRINE AS THE BASIS OF THE DISCUSSION……

AKINOBU TANSO

## INTRODUCTION

1). The primary purpose of this paper is to examine the propriety of using "adversely affected in fact" as the criterion of standing and, at the same time, point up several legal problems which existing legal principles produce in the law of standing. It is very interesting to consider the standing problem in administrative law in regard to the conflict between "supremacy of law" and positive acceptance of the administrative function, or, to state it differently, between traditional and progressive legal theory.[1]

During the end of the nineteenth century and the beginning of the twentieth century, the principles of freedom of property and freedom of contracts had widely been modified through so-called social and economic legislation, i.e., Interstate Commerce Act, antitrust laws, labor laws and social security laws etc..[2] In that stage, however, the modification of classic principles of law by those laws was not recognized as raising a fundamental problem which deeply touched the core of the modern law; lawyers were unaware that at issue was a fundamental change in the law.[3] As case law accumulated concerning the administrative

organ's management of antitrust and labor laws areas, however, administrative law became widely recognized as a new type of law which embodied an inherent conflict with "supremacy of law", the fundamental principle of Anglo-American law.[4] It became an important political problem whether or not limitation of private rights by the Executive should be permitted and whether or not it is proper for an administrative agency to decide legal questions. Such action was strongly condemned by the lawyers who supported traditional judicial procedure. It was argued that the delegation of power to administrative agencies might resulted in the dictatorship of the Executive. Nevertheless, administrative law grew as "an unwelcomed guest" in the field of jurisprudence.[5]

The following three measures represent a compromise proposal between the lawyers who adhered to the traditional "supremacy of law"view (the Supreme Court and the American Bar Association) and the lawyers who supported the positive function of administrative agencies.[6]

(1) The court should control the power delegated to administrative agencies by Congress to maintain the flexibility of governmental action.

(2) Administrative agencies should provide procedures closely approximating judicial proceedings for administrative disposals which restricts private rights, especially property rights.

(3) Judicial review should be established to ensure relief for persons injured by administrative agencies.

Eventually, reluctant acceptance of the necessity of administrative bodies in the United States caused the administrative agencies to be controlled by the above three measures. In the United States, judicial review as a means of judicial control of administrative action developed along with the growth of administrative law.[7] In England, judicial review did not develope in the same way.[8] Here is an outstanding cha-

racteristic of American administrative law. The recognition that property rights could be controlled by administrative agencies seemed to disregard the principle of "supremacy of law". However, since administrative action is ultimately controlled by judicial power, "supremacy of law" has not been disregarded, but has been up-dated in this present complicated social-economic situation.[9] In this sense, the court is the final judge of the legality of administrative action. There are indications, as will be indicated in the following chapter, that the Supreme Court and the American Bar Association are adopting the attitude of narrowing the scope of standing in administrative proceedings. It seems to me that this attitude contradicts their tendency of broadening the principle of "supremacy of law". When a conservative group which did not welcome the appearance of administrative law because it violated "supremacy of law", opposes the expansion of the scope of standing,[10] it will result in narrowing the scope of judicial review and in turn limiting the "supremacy of law".[11]

The split in thinking between lawyers in regard to the law of standing has made decisions concerning standing more and more complicated. Judicial review is not only a sourceof contradiction among conservative lawyers, as we have seen above, but also poses questions for progressive lawyers, as we will see in examining Professor Davis' opinion later.

In any event, the standing problem contains many difficult questions and is still in a complicated state, both in progressive and conservative opinion. In this paper the writer will mainly examine the criterion of standing, "adversely affected in fact", which was proposed by Professor Davis, and will strive to point out the problems which his doctrine contains.

11). Professor Davis decides the problem of judicial review of adminis-

trative action into the following five questions. They are "whether, when, for whom, how and how much judicial review should be provided". The problem of standing which is dealt with in this paper is "for whom judicial review should be provided.[12] Professor Jaffe phrases the standing problem as "whom may invoke review ?"[13]

Persons injured by illegal administrative action can not always get judicial review. If he lacks standing, then judicial review is refused. If so, under what requirements and when can his standing be recognized ?

The law of federal courts in this respect is especially complicated and contradictory according to the cases. The Supreme Court has very frequently added to the confusion by not following the principle of stare decisis. One may regard it as settled that a person whose "legal right" is injured by administrative action has standing. In this respect, by extending the test "legal right" further, Professor Davis attempts to spread the scope of judicial review. In addition to expanding the scope of review, Professor Jaffe wants to unify federal and state laws into a unified system of administrative law.[14]

For convenience, the author has divided the problem of "adversely affected in fact" into two parts: (1) the criterion of standing of the person "adversely affected in fact" (chapter Ⅰ) (2) the criterion of standing of the person whose interest was not injured directly or standing as a representative of the public (chapter Ⅱ). To consider more accurately, many categories could have been used but in this paper the author employed only two parts in order to precisely demonstrate the problem. The reasons why the problem has been divided into two parts are as follows: when the person sues the administrative agency (1) in case the interest of the individual is "adversely affected in fact"

(2) in case the public interest is injured by the administrative disposition, it would appear that there are major differences between (1) and (2) concerning the significance and degree of "adversely affected in fact". That is to say, in the first case, excluding the position of a defendant who is an administrative agency and not a private person infringing upon a private person's right, the administrative procedure is almost the same as a civil proceeding. In the second case, that is, in the case of governmental action to which functions such as protection of "public interest" is particularly recognized, the test "adversely affected in fact" will supposedly have a more or less different meaning from the first case. Especially, on many occasions the injury of "public interest" is not always concerned with the immediate injury of the interest of the individual.

Here two questions arise. The first question is whether the test "adversely affected in fact" is an adequate one even in the first case (chapter Ⅰ) The second question is whether the test "adversely affected in fact" can be applied to the proceedings for the "public interest" (chapter Ⅱ).

Professor Davis believes that his criterion can be employed in both instances.[15] The writer, however, can not fully agree. Then, what kind of problems does the test "adversely affected in fact" contain?

Here, the writer should transfer to examine the standing problem of a person whose interest was injured by an administrative agency.

## I. Is "ADVERSELY AFFECTED IN FACT" AN ADEQUATE CRITERION WHEN CONFERRING STANDING ON AN INDIVIDUAL IN ADMINISTRATIVE PROCEEDINGS ?

What requirements should an individual person injured by illegal administrative action satisfy in order to appeal the action of the administrative agency? Generally speaking, to have standing in general proceeding in federal court when a person's "legal right" is injured two requirements must be satisfied ——— "case and controversy" as required by Article Ⅲ of the Constitution and "legal injury". "Damnum absque injuria" (damage without injury in the legal sense) is not sufficient ———. These two requirements are equally essential for standing in administrative proceedings. Therefore, they will be explained in more concrete detail.

Federal courts can not deal with any case if there is no "case and controversy". If this be so, what is the concrete meaning of "case and controversy" ? Insofar as dealing with the standing problem is concerned, "case and controversy" in Article Ⅲ of the Constitution requires that the interest of both parties should confront and conflict with each other.[16] The other requirement, "legal injury"[17], means that no matter how violent a tort, no matter how great a damage, standing will not be conferred upon the person if the person "adversely affected" has "damnum absque injuria "(damage not recognized as a basis for relief). Although these two requirements, as far as a suit is concerned, are minimal, even when they are satisfied, it does not necessarily follow that standing to sue an administrative agency is conferred in every case.

If so, what other requirements are necessary ? The other requirement is the so-called problem of standing such as "legal right" asserted by the Supreme Court or "adversely affected" asserted by Professor Davis and others.[18] In this respect American case law has so complicated that I can not imagine that a definite rule concerning standing in administrative law has yet been established. However, it is, at least, clear that a person whose "legal right" is injured by governmental action always has standing in administrative proceedings. This rule has been established by the following cases :

(A) Tennessee Electric Power Co. v. T. V. A.[19] In this case, eighteen competing companies "sought to enjoin electric power production by T. V. A. on the ground that the generation and sale of power would be unconstitutional".[20] The Supreme Court held that since the plaintiffs had no "legal right" injured by the operation of the T. V. A., they lacked standing to sue the T. V. A.. In any event, the Court had, in this case, established a rule that a person "adversely affected in fact" by administrative action does not necessarily have standing to sue an administrative agency unless his "legal right" had been injured. The phrase "legal right" as used here refer to those rights arising from ownership of property, rights arising out of contracts, the right to be protected against trespass and rights based upon law which guarantees certain privileges.

(B) Alabama Power Co. v. Ickes.[21] Here, the Court held, as it did in the Tennessee Electric, that a person who asserts an "adverse effect" due to competition from public utilities which receive from the federal government has no standing to sue.

(C) Perkins v. Lukens Steel Co..[22] Under the Public Contracts Act of 1936 (the Walsh-Healey), "sellers of goods to the federal govern-

ment must agree, ……, to pay their employees who produce those goods not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work".[23] …… The companies argued that the agency had based its determination of the wage on an incorrect interpretation of the above statute. Although the Circuit Court of Appeals concluded that the appellants had standing, the Supreme Court decided that competing companies did not have standing on account of being without the "controversy". The court held that in order to have standing, appellant must show an injury to some special "right" which is different from showing that the public interest is injured or is going to be injured.

Judging from the conclusions of the above cases, there is no room to doubt that the Supreme Court has not recognized standing of all persons suffering real damage but only those who had some special "right" injured. To sum up these cases, only a person whose "legal right" is injured always has standing to sue the administrative agency.
However, it is difficult to say whether the person whose interest other than "legal right" is injured, conversely, will absolutely not be permitted to have standing. In other words, (1) shouldn't standing be conferred upon a person who is "adversely affected in fact" by administrative action ? or (2) isn't it suitable to confer standing upon the person as a representative of the public ?

Although the Supreme Court recognizes standing only in those persons whose "legal right" has been injured by administrative action shouldn't standing be granted to persons "adversely affected in fact" to achive social justice ?[24] (Professor Davis' opinion)

When one considers that nowadays most of the state courts have recognized the standing of persons "adversely affected in fact", is it all

the more appropriate for the Supreme Court to recognize and adopt the new test "adversely affected in fact" in order to unify both federal and state laws and to systematize American administrative law ?[25] (Professor Jaffe's opinion)

Professor Davis was the first man to strongly assert that standing should be conferred upon any person "adversely affected in fact". He argued that adoption of this criterion would bring many benefits to the law of standing; the following being the most important[26] :

(1) The fundamental principle of social justice requires that standing should be recognized to the person "adversely affected in fact". To refuse relief to such person is against social justice.

(2) If the Court adopts this simple test, the unnecessary complexities of the law of standing will disappear.

(3) The intention of the Administrative Proceeding Act* (hereafter referred to as A P A) is to recognize standing not only to the person whose "legal right" is injured but also to the person "adversely affected in fact".

* Section 10 of the A P A provides: Except so far as (1) statutes preclude review or(2) agency action is by law committed to agency discretion ——— (a) right of review ——— any person suffering legal wrong because of any agency action or "adversely affected" or "aggrieved" (the quotation-mark was added by the writer) by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Although the legislative history of A P A, Professor Davis thought, is not always incompatible with counter views, it is sufficient to support his opinion, because , according to the committees of the Senate and House, "this subsection confers a right of review upon any person 'adversely

affected in fact' by agency action or 'aggrieved' within the meaning of relevant statute"[27](The writer added this quotation-mark).

Thus, Professor Davis argued that the person "adversely affected in fact", unless there is special reason to deny it, would have the right to appeal. However, are three reasons enumerated above sufficient reasoning to expand standing from "legal right" to "adversely affected in fact"? I have questions about each point of his reasoning.

First of all, the point that the non-conference of standing upon a person "adversely affected" is contrary to the principle of social justice. Insofar as the problem is considered merely from the standpoint of the individual in relation to the government ——— that is, from the standpoint of protecting the individual's right against the government ———Professor Davis' opinion may be proper. Governmental action, however, is theoretically done in the interest of general society. For example, under confiscatory acts (eminent domain proceeding[28]) personal interest are injured by the general interest of society (even though compensation is given to the person injured). Even if the adequacy of compensation can be contended, it is questionable whether the person "adversely affected" should be conferred standing to sue the confiscatory action itself of government. In this sense, I differ a little with his view.

Secondly, though Professor Davis asserts that the Court's acceptance of this simple and brief concept will lead to the disappearance of the complexities of the law of standing, I can not immediately agree with his opinion even as to problems concerning the construction of statutes.

Generally speaking, since governmental action in administrative cases strangly influences wide-spread areas, it seems to me that the test "adversely affected in fact" is too wide a concept to lessen or eliminate the

complexities of the law of standing.[29] Especially, in case of recognizing such a wide test as "adversely affected in fact" we will need to make exceptions to this criterion. However, the recognition of too many exception will, after all, lead to the denial of that principle and will not help to make standing simple and brief.

Thirdly, I can not necessarily agree with his opinion that the legislative history of A P A (section 10) supports his test "adversely affected in fact". In my opinion the legislative history of that statute can be interpreted in two ways : that is , to agree and disagree his opinion. According to the statement of the Attorney General to the Senate Judicial Committee, section 10 article (a) has been explained as follows :

> Any person suffering legal wrong because of any agency action, or "adversely affected" or "aggrieved" by such action within the meaning of any relevant statute, shall be entitled to judicial review of such action. This reflects existing law. In Alabama Power Co. v. Ickes (302 U. S. 464), the Supreme Court stated the rule concerning persons entitled to judicial review. Other cases having an important bearing on this subject are : Massachussetts v. Mellon (262 U. S. 447), the Chicago Junction case (264 U. S. 258), Sprunt & Son v. United States (281 U. S. 249), and Perkins v. Lukens Steel Co. (310 U. S. 113). An important decision interpreting the meaning of the terms "aggrieved" and "adversely affected" is Federal Communication Commissions v. Sanders Brothers Radio Station[30] (309 U. S. 470) .....

Denying the rule established by the above cases, the Sanders case declared the rule that standing should be conferred not only upon the person whose "legal right" is injured but also the person "adversely affected in fact".[31] The Sanders case was the first "Supreme Court case

recognizing standing in absence of violation of 'legal right' of the plaintiffs".[32] In this case plaintiffs, the existing station, contended that the Federal Commission's granting of a new license to a new broadcast station would intensify competition and would damage the plaintiffs economically. While the Court stated in its opinion that the purpose of the Act is clear "that no person is to have anything in the nature of a property right as a result of the granting of a license", and "plainly it is not the purpose of the Act to protect a license against compeition but to protect the public",[33] the Court, on the other hand, recognized the standing of the existing station. If we trace the Court's opinion in which it stressed the interest of the public , it ought to have denied standing of the existing station. The existing station, however, was conferred standing by the special act, the Communication Act of 1934. (I think the Court should deny standing in the light of the principle of the antitrust laws unless the Communication Act existed).[34] Therefore, in relation to standing stated above, there is the cogent opinion that the Sanders case only shows the interpretation of the term "adversely affected" or "aggrieved".[35] In the statement concerning standing in the Senate Judicial Committee, Mr. McCarren, the chief of the Senate Judicial Committee, explained it while reading it to the Senate without any opposition,[36] and in the discussion of the Representative any intention to modify the rule of the present case law was not showed at all,[37] that is, the criterion of the law of standing is considered an injury of "legal right".

Even the Task Force which favored the expansion of the scope of judicial review at its maximum did not mention anything in respect to standing.[38] Although Professor Davis asserts that adoption of the test "adversely affetced in fact" is desirable and even suitable as the interpretation of the existing law concerning standing (A P A and cases), his

explanation in support of his view is not always convincing. However, pointing out the contradicton among the cases concerning the law of standing, Professors Davis, Jaffe and Schwartz[39] all strongly contend that the present law of standing by the Supreme Court should be based.

After all, the existing law of standing seems to be interpreted in two ways, both of which carry equal weight. In the case of Professor Davis, his intention to expand the scope of judicial review and lessen the complexities of the law of standing is strongly directed at extending the criterion to "adversely affected in fact". However, he did not attempt to concretely demonstrate the objective necessity of a new criterion.

Will the substitution of these problems for the following three propositions be unsuitable?

(1) What unreasonable points appear from the standing of protecting the rights of the individual when courts permit standing only to person whose "legal right" is injured and do not permit it to persons "adversely affected" ?

(2) What unreasonable points in past cases can his criterion relieve ?

(3) Even if the expansion of the scope of standing is desirable to protect the rights of the individual, to what extent should standing be expanded from the standpoint of the policy concerning the proceedings as a legal system? Especially, when the possibility of misuse of the judicial system and the crowded condition of the courts are considered.[40]

While Professor Davis has demonstrated that it is proper to interpret the cases concerning standing with his test "adversely affected in fact", if he has, on the other hand, attempted to approach the three problems which are stated right above, his arguments respecting expansion of standing would be perfect, leaving no room for dissenting.

"The test of the soundness or unsoundness of judge-made law, I think, is effect upon living people: all other tests are necessarily subordinate to this one" (Professor Davis).[41] I can entirely agree with Professor Davis' great conception and hard effort to establish the new administrative law from this viewpoint. However, when he attempts to bring a new criterion into the law of standing (as well to establish administrative law as a new science in jurisprudence), he will be required to demonstrate consistency and adequacy of interpretation of case law and adaptability to the change of social-economic background under the new criterion. Unless the demonstration respecting these points is convincing, there is no rebuttal to the criterion that the test "adversely affected in fact" is no more than a concept brought into the law of standing with complete disregard for the other conditions in order to expand the scope of judicial review.[42] Such an attempt is analogous to sewing the fox's skin to the lion's.

What Professor Davis has attempted to demonstrate seems to be limited to showing the consistency or propriety of his interpretation of the cases and the statutes by his criterion. Incidentally, when there are two ways of interpretation both of which carry equal weight, what decides the superiority of the interpretation of law is whether they can be adapted to the social background. In this sense adaptability of the law of standing to the social-economic background can become an important problem.

However, to me as a foreigner, this problem is insoluble due to a lack of knowledge of the history of American legal thought, national feeling and the social-economic background. Therefore, by using several Japanese cases, I want to show my questions to Professor Davis in a more concrete form. Reflection on the Japanese standing scene to be

useful for us to understand the following points: (a) the meaning of adaptability of the law of standing to social-economic background. (b) legal theoretical approach in considering the boundry of the standing. Although it is very questionable whether discussion of the Japanese cases can serve as a substitute for demonstration which was not attempted by Professor Davis, and whether we can directly compare standing in Japanese law with standing in American law, I shall examine how and to what extent the criterion of standnig has been extended by courts and scholars in Japanese administrative proceedings.

A. In Japanese administrative tribunals, as in the present law by the Supreme Court in the United States, the person whose definite "legal right" was not injured does not have standing to sue an administrative agency (Article 61 of Meiji Constitution of Japan). In Japanese administrative law "legal right" in this sense, was the most important criterion concerning standing. In the cases before World War II, there were several decisions which had strictly obeyed this rule. For example, (a) The person who has no definite right can not be called the one whose "legal right" is injured[43] (Japanese Administrative Case-book, vol. 3. p. 50, Meiji 25, in A. D. 1883). (b) Unless the person's "legal right" is directly injured he can not institute a suit against the administrative tribunal according to the Law No. 100 of Meiji 23 year.[44]

We can easily find many cases in the same vein as these before World War II. However, like in the United States, efforts to expand the scope of standing in Japanese administrative proceedings have been made by many judges and scholars since the Meiji era.[45] How and to what extent have cases and theories concerning administrative law expanded the scope of standing in Japan ? Also, in the Japanse administrative tribunals, how was the test "injury of legal right" applied and

interpreted to adapt the law to the actual phases of human life ?

(A) Against Akita-prefecture Governor's grant to transfer the public property of the shore of a Lake Hachirogata to private ownership, plaintiff asserted that his right to use the public water was injured by the Governor's disposition. ····· Therefore, that administrative disposal should be revoked. ····· The court decided that the Governor's (defendant's) grant to transfer the disputed land without attaching any condition to it, should override the right of the plaintiff to use the water. ····· it should be said to have injured his so-called legal right".[46]

(B) Against Tokushima-prefecture Governor's grant to execute construction of an electric plant in the Nakagawa river, inhabitants around it claimed revocation of administrative disposition on the ground that the Nakagawa river is their only means of conveyance for the neighboring inhabitants. Namely, that the river has been used to carry wood, charcoal, fish, rice and wheat. The Governor's disposition injured water-rights of the inhabitants. Although the Governor asserted that plaintiff had no right to sue the court decided that the inhabitants near the river have the right of customary law to use the running water.[47]

(C) A certain company was permitted to measure the volume of runnig water so that the inhabitants around the river could not use the water for drinking. Inhabitants sued on the ground that the company injured their right to use the running water. The court adjudicated that the administrative grant injured the inhabitants' right to use running water by the administrative disposition to measure the volume of the river.[48]

As we can learn from the several cases stated above, use of the water

by inhabitants living near a river for drinking, drifting wood, and sailing skiffs etc., did not amount to any more than simple common use of public ownership. Accordingly, it is questionable whether or not it could be called a right. However, even in such cases, if the interest of the public is damaged by an illegal administrative disposal, it would be considered proper for the interested party to claim relief. In these cases unless a person's "legal right" in a strict sense was injured he did not have the right to claim relief in the administrative tribunals. Therefore, it was considered that it would confine administrative relief to an unreasonably narrow scope. While administrative courts superficially adhered to the requirement of "injury of right", in practice, they recognized that the "rights of the customary law" such as the right to drink, to drift woods and to sail skiffs, or "special interest" of utilizing the river, were also almost equal to a legal right. By interpreting the concept of "right" as widely as possible, the courts have made an effort to make the best use of the administrative function. As we have seen so far, standing in Japanese administrative proceedings has been recognized for protection of the public where there is a request to revoke an administrative disposition. Indeed, although the "rights of the customary law" or the "interest" to drink, to drift and to sail were small, they were indispensable to the life of the public.

As mentioned above, the Japanse administrative courts had to recognize the expansion of standing to protect the "rights on the customary law" or "legal interest" of the individual.

B. It was necessary, as repeatedly mentioned, to have one's "legal right" injured by the illegal administrative disposition as the requirement to institute proceeding against an administrative agency. Analyzing here the nature of a private person's public right"[49], we can divide them

into the following four categories; (a) active public right, (b) negative public right, (c) public right as recognized in the customary law and (d) legal interest. Rough explanation concerning each category is given as under.

(a) Active public right ——When a statute provides for the public right of an individual person, it is common to make provisions while paying attention only to the positive dimension which each right has as its character. Accordingly, for instance, in case of injury of the public right to claim pension money (Japanese Pension Act, section 13) or the case of one's estate being damaged or of injury by a public establishment(Municipal Act, section 130. subsection 2, secten 110. subsection 2), the injury of the public right is sure to become the cause of an administrative suit.

(b) Negative public right —— On the other hand, even in the case of not providing for the existence of any special right to protect the interest of the individual person, there are many cases where a statute provides for public right in the negative form, cornsidering that the interest of the person much not be injured by governmental action. Rights of this type are commonly referred to as civil rights. But, in case the person's negative public right is injured —— for instance, in the case of illegally charged tax, or the case of an illegal prohibition to carry on business or the case of an illegal order dissolving an association —— , it properly becomes the cause of an administrative suit. In short, when a person's active or negative public right is injured by administrative action, there is no room to doubt that this injury can give standing for an administrative suit.*

* Active public rights are almost equal to the right of the person whose "legal right" was injured in fact by administrative agencies, and nega-

tive public rights are roughly equal to the categories of the right other than one whose interest was directly injured by the governmental action.

(c) Public right on customary law ——— The problem here lies in whether or not the affairs mentioned above can be recognized as being based upon the "right on customary law". Insofar as it was considered and interpreted as being a kind of right, courts could recognize standing fo the public in administrative proceedings. Because the courts could not shut their eyes to the important fact that the right to live the public which is superior to provisions of law was going to be injured, and courts had to extend standing to protect this right.[50] (Compare that the extention of the scope of standing in American administrative law has been mainly developed in the field of the operation of the F. T. C., I. C. C. and N. L. R. B..)

(d) Legal interest[51] ——— Some Japanese scholars asserted that injury of "legal interest" should be interpreted in the same sense as an individual's "legal right" being illegally injured and the person's injured "legal interest" should provide a basis for standing to sue the administrative agency.

As we have so far considered, in Japanese administrative law the scope and criterion of standing is as complicated as America's. Thus I could not always ascertain the clear-cut rule of standing even in Japanese administrative law. However, what can be concluded above is that the scope or criterion of standing does not go beyond the boundary of "right on customary law" or at least "legal interest". Because the law of standing in Japan had to meet the requirement of law (Meiji Constitution).

By the above explanation of the law of standing in Japan, I hope I could, to a certain extent, explain the reason why the scope of standing

in Japanese law had to be extended by judges and scholars and to what extent the scope of standing was extended by them. And I also noticed that Professor Davis' test "adversely affected in fact" has gone far beyond the legal basis compared to the Japanese law. Therefore, I am in doubt as to whether, supposing that such a wide test as "adversely affected in fact" be recognized, new problems such as missuit and an overbundance of cases in courts will not appear.

C. In addition to the above problem, another problem is posed here. The problem is closely related to the requirement "legal injury". When Professor Davis' test "adversely affected in fact" goes beyond legal limitation and means the interest of all persons who were "adversely affected", then his test will conflict with the second requirement "legal injury" and not become effective unless the requirement "legal injury" is eased. First of all, we will follow the decision of the Supreme Court concerning "legal injnry".

(a) In Tennessee Electric Power Co. v. T. V. A., the appellants assert," ····· that this competition will inflict substantial damage upon them. The appellees admit that such damage will result, but contend that it is not the basis of a cause of action since it is damnum absque injuria ····· a damage not consequent upon the violation of any right recognized by law".[52]

In short, the Supreme Court held that the appellants lack standing to institute suit concerning the constitutional problem because of absence of "legal injury".

(b) In Alabama case, "Unless ····· , it is clear that petitioner has no such legal injury as enables it to maintain the present suit.·· The term "direct injury" is there used in its legal sense, as meaning a wrong which directly results in the violation of legal right".[53]

In this case "legal injury" is clearly explained in relation to legal right.

(c) In Perkins case the Court's attitude is not different from the former two.

> "An injury, legally speaking, consists of a wrong done to a person, or in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense(damnum absque injuria) does not lay the foundation of an action, ……. The claim that petitioner will be injured, perphaps ruined, by the competition of the municipalities brought by the use of money, therefore, presents a clear case of "damnum absque injuria."[54]

As I explained above concerning the second requirement "legal injury", the Supreme Court held that injury must be legal one. If it be not so, then injury is only "damnum absque injuria" so that plaintiffs lack standing. Accordingly, Professor Davis' criterion which goes beyond legal basis is in disregard to the requirement of "legal injury". Therefore, his test "adversely affected in fact" needs to be modified or needs solution concerning the conflict. Anyhow, it is important problem to be considered whether "legal injury" must be interpreted like the Supreme Court's interpretation, or whether it can not be interpreted as a "benefit of suit" (This problem will be explained in detail in chapter Ⅱ).

In this chapter the test "adversely affected in fact" was mainly considered from the standpoint of right of the individual against governmental actions. In case the existing law of standing can be interpreted in two ways both of which carry equal weight, the interpretation for getting support should be upon the superior adjustment of law to social-economic background. Incidentally, though Professor Davis has eagerly insisted upon the extention of the scope of judicial review and simplify

the complicated standing law, he did not forward any concrete proof concerning the social-economic propriety of widening the scope of the criterion.

Although Professor Davis' motive to attempt to expand the scope of standing for the extention of the scope of judicial review can be completely approved, several questions remain : (1) doesn't the criterion of standing go beyond the boundary of law ? (2) isn't there a need to draw a certain line to his test "adversely affected in fact" ? (3) can such a wide test as "adversely affected" effectively function as a criterion of standing ? and (4) can the test "adversely affected in fact" be adjusted to the other requirement "legal injury" ? Though Professor Davis attempts to explain the whole standing problem by one test "adversely affected in fact" consistently, it will be examined in the next chapter whether his criterion can be effective and suitable one.

## II. STANDING OF PERSONS OTHER THAN THOSE "ADVERSELY AFFECTED IN FACT"

In this chapter the standing problem concerning persons other than those "adversely affected in fact" will be dealt with and the propriety of the criterion thereof will be examined. The standing of persons other than those "adversely affected in fact" can roughly be divided into the following three categories* : (1) standing of persons indirectly "adversely affected" (2) standing of persons who have no right to represent others (3) so-called organization suits (suit between governmental agencies).

When standing is conferred upon the person not "adversely affected in fact", can the test "adversely affected in fact" be a criterion capable of giving a consistent explanation for the standing problem ? This point will be more thoroughly examined later.

In Japan neither a suit by a third person, nor a mass suit, has been recognized, but in the United States the above classifications (1) and (2) are recognized by progressive administrative law scholars and many lower courts.[55] The Supreme Court, however, still has not recognized standing of persons other than those "adversely affected in fact".

* More classification could be made, but classification itself has no special meaning. The important thing is for what purpose the matter is divided and how does classification serve to solve or clarify the problem. My purpose in the above classification is as follows : in administrative proceedings, the element of immediate conflict of interests between two parties as there is in civil proceedings, is lacking since the public interest is the overriding element.

Judging from the cause of the rise of American administrative law in the twentieth century, administrative action very frequently affects economic affairs or civil affairs by protecting the interest of the public such as consumers, laborers, taxpayers and general society.

In general, administrative action is primarily aimed at protecting the "public interest" beyond the interest of the individual. Professor Jaffe seems to have attempted to organize new administrative law from this aspect ("public interest" ——— public right).[56] When the administrative action is stimulated by public interest, can the two requirements ——— "case and controversy" and "legal injury" ——— suffice without any modification ? For, insofar as "public interest is concerned, the conflict of interest between both parties frequently becomes weakened to some extent or disappears. It seems to me that "case and controversy" as a requirement of an action must be modified to a certain extent.

In this chapter the standing as a representative of the public in re-

lation to these problems shall be examined. Incidentally, mass suits or suits by representatives of them have not been permitted in Japan except in a few special cases. The courts do not generally permit a third person with no interest in a case to institute an action.

Though it will be examined later, a suit by a third person seems to have been recognized in the United States (see, Scripps- Howard Radio v. F. C. C.[57], F. C. C. v. N. B. C.(K.O.A.)[58] and Associated Industries v. Ickes)[59].

This difference between both countries seems to be based on a characteristic of each country's administrative law. That is to say, Japanese administrative law was established mainly by putting emphasis on the controlling the people by the government ; whereas American administrative law, as shown by its history, has been formed by emphasizing the regulation of collective economic activities or collective labor activities etc. for the protection of the people.

While progressive administrative law scholars admit that regulation by an administrative agency is a necessary evil, they show a strong desire to extend standing to the consumer, taxpayer and citizen in order for them to control the administrative agencies. Insofar as they attempt to expand the scope of judicial review against administrative action, it can be said that their attempt is at the same time, serving to develop "supremacy of law" in a more concrete and detailed form.[60]

(1) Standing as the representative of the public( taxpayer, consumer and citizen etc.)

(A) Standing as a representative of the public ——— In Scripps-Howard Radio v. F. C. C., person whose private interest was not injured by governmental action was recognized as having standing as a representative of the public. A typical case of this kind is the Scripps-Howard case.

The decision held that the "Communication Act of 1934 did not create new private rights. The purpose of the act was to protect the public interest in communications. By section 402 (b) (2) Congress had given the right of appeal to persons 'aggrieved' or to those whose interest were 'adversely affected' by the commission's action. But these private litigants have standing only as representative of the public interest."[61]

The minority opinion in that case by Mr. Justice Douglas, contended that unless the litigant can show that his individual interest has been unlawfully invaded, there is merely "damnum absque injuria". He argued that, in this case, there was no cause of action on merits so that the case lacked the element of "case and controversy".[62]

In F. C. C. v. N. B. C. (K.O.A.),[63] the Court also conferred standing upon private persons in accordance with the rule of the Sanders case. In that case, the F. C. C. permitted W. H.D.A. to increase its power, and K. O. A. explained that F. C. C. 's order was illegal. K. O. A. was recognized as having standing. The most interesting aspect of that case was the minority opinion by Mr. Justice Frankfurter and Mr. Justice Douglas stated some doubts about the requirement of "case and controversy"[64] and Mr. Justice Frankfurter also argued[65] that K. O. A. had to show that it's interest was "adversely affected in fact".

The test "case and controversy", stated by Mr. Justice Douglas in several cases, should be more carefully considered. Insofar as Professor Davis wants to recognize standing for persons other than those "aggrieved", his adherance to the requirement "case and controvesy" seems to result in a contradiction in his approach. This is so because, as far as the standing law is concerned, "case and controversy" means a conflict of interest of both parties. Recognizing the standing of persons

other than those "adversely affected in fact" would result in recognition even in the absence of any "case and controversy". That is, there would be no conflict of interests between two parties. Since what is called a "case and controversy" has been held to be an indispensable requirement for standing, there should be no standing, as Mr. Justice Douglas pointed out, because of the absence of any "case and controversy". In other words, conferring standing on persons who sue as representatives of the public seems to conflict with Article 111 of the Constitution. On the assumption that they want to be in harmony with the "case and controversy" requirement of the Constitution, it would seem they would have to deny standing to third persons as Mr. Justice Douglas and Mr. Justice Frankfurter did. It is interesting to speculate whether Professor Davis and Professor Jaffe have considered this problem.

Professor Davis theorized under the Sanders doctrine the following three points[66]: (1)" The person with standing represents the public interest and (2) does not represent his own private interest, and (3) the interests asserted on the appeal may be different from those which confer standing to appeal".

Professor Davis seems to support the conclusions of the Sanders case. If so, he must recognize that a person can have standing to represent the "public interest" in the absence of injury of any private interest ——— what then does his test "adversely affected in fact" mean ? Provided that "case and controversy" means that the interests of both confront each other, it is evident that the person with standing who represents the "public interest" but does not represent his own private interest will not satisfy this requirement. Namely, the person who represents the "public interest" but does not represent his own "private interest" is not in a relationship whereby his interest conflicts with the "public

interest". Therefore, the following interesting rule must be formalized in the Sanders case : (3) The interests asserted on the appeal may be different from those which confer standing to appeal."

This third rule in the Sanders case was interpreted by Professor Davis to mean that the interests belonging to a person are split into two parts : the interest asserted on appeal and the interest which confers standing to appeal. He did not make it clear whether "the interest which confers standing to appeal "has an immediate connection with his test "adversely affected in fact", or "case and controversy", or whether "the interest asserted on the appeal" directly means "public interest" or not. "Public interest" asserted on the appeal at a minimum, however, is separated from the interest of the person "adversely affected in fact" or from the interest demanded by the "case and controversy" requirement. Davis' opinion respecting this point is not so clear but, insofar as the question was submitted by Mr. Justice Douglas and Mr. Justice Frankfurter, this problem should be resolved by him.[67] Otherwise, his argument in favor of using "adversely affected in fact" as a new criterion of standing will not be convincing.

Professor Jaffe seems to have shown more clearly the gap between "public interest" and" adversely affected in fact" or "case and controversy" than Professor Davis. We can understand it better from the following quotation:

> "it might be argued that whatever the purported rationale of the Sanders and Scripps-Howard cases, a decision upholding the justifiability of a suit brought by a person of very limited class which is in fact "adversely affected" is not a precedent for permitting actions by the unlimited class of citizen and taxpayer.[68] (The writer adds the quotation-mark and underlines)

Although standing of a person "adversely affected" is clearly within the scope of "case and controversy", in the case of standing conferred upon an unlimited class of citizens or taxpayers, conflict of interest between two parties is attenuated or sometimes may not exist at all. However, Professor Jaffe also skips over[69] to the "private Attoney General" doctrine enunciated by Judge Frank without fully explaining the problem of recognizing standing when there is a gap between "public interest" and "adversely affected" or "case and controversy". In this sense, Professor Jaffe's opinion on this will be the same as Professor Davis'.

In any event, it seems to me that there is no such theoretical continuity between the Sanders case and Scripps-Howard case as Professor Jaffe and Professor Davis believe, except for the similarity of their conclusions.

Next, in order to make the point at issue clearer, the so-called "private Attorney General" doctrine should be reflected in the Associated Industries case[70] which was proposed by Judge Frank.

> "For then and actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceeding, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to present action by an officer in violation of his statutory powers ; for then, in like manner, there is an actual controversy, and there is nothing constitutionally pohibiting Congress from empowering any person, official or not, to institute a proceeding involving such controversy, even if the sole purpose is to vindicate the public interest. Such persons, so

authorized, are so to speak, private Attorney Generals".[71]

According to the "private Attorney General" doctrine above, Congress can confer the right to institute proceedings upon private persons as representatives of the public. Although his theory is very interesting as a skillful exercise in analogical construction, it does not go beyond that. In administrative proceedings, recognizing such a wide standing ——— i.e. to a "person immediately not adversely affected" in the name of "public interest" will result in ignoring the requirements of the Constitution. Because there is no conflict of interests between two parties. Therefore, I suppose that Judge Frank, in order to overcome this dilemma, had to devise his doctrine. In any event, Professor Davis and Professor Jaffe seem to have agreed with and cited this theory only to the extent that the "private Attorney General" doctrine results in recognizng standing of person other than "adversely affected" and in its turn extending judicial review.

Paradoxically speaking, since they realize the absence of any "case and controversy", it appears that they had to fill up the hole with the "Attorney General" doctrine. In filling the hole thusly, even if that theory seemed to be suitable, it does not seem that it could fully deal with the absence of a "case and controversy" in the Sanders and Scripps cases. Because, when Mr. Justice Frankfurter, in the case of F. C. C. v. N. B. C. stated in the minority opinion that K. O. A. should be required to show an interest injured in fact, when Mr. Justics Douglas expressed some doubts about "case and controversy" in the same case, and when in the Frothingham v. Mellon[72] majority opinion denied the standing of general taxpayers by saying as follows :

"the taxpayer's interest in the moneys of the Treasury "is comparatively minute and indeterminable: and the effect upon future taxation,

of any payment ····· , so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity,"[73]

they were used to show that the person whose interest was not injured was not conferred standing because of the lack of "case and controversy". And as far as "case and controversy" is concerned, it seems to me that this interpretation of "case and controversy" is more natural than Davis'.

According to the interpretation of the Court, to have standing, the challenger must show "that he has sustained or is immediately in danger of its enforcement, and not merely that he suffers in some infinite way in common with people generally."[74] The interpretation given to "case and controversy" in the cases stated above seems to represent a natural and adequate interpretation of that provision of the Constitution. In short, it has been definitely shown that there was a gap which needed to be filled between so-called "public interest" and the test "adversely affected in fact" as discussed by Professor Davis dealt in connection with the Sanders and Scripps-Howard cases and the "private Attorney General" doctrine. So far as the author has been able to observe, instead of explaining the problem "case and controversy" which was proposed by Mr. Justice Douglas and Mr. Justice Frankfurter, Professor Davis seems borrow Frank's doctrine which is convenient and substitute it for his theory.

However, the problem should be explained in more detail from the inherent standpoint of administrative law. Professor Jaffe frankly recognized himself that :

he failed "to see how an appeal statute could constitutionally authorize a person who shows no "case and controversy "to call on the

court to review an order of the Commission[75] ..... .

Needless to say, it will be very hard to deal with this problem and remain logically consistent. However, now that the speciality of administrative law has been established on the basis of a concept of "public action"[76] ——— "public interest" or administrative action ——— , the theory of new administrative law, I guess, should resolve dilemma of relationship between "public interest" and "adversely affected in fact" or "case and controversy". Administrative law has closely related with the function of the F. T. C., I. C. C. and N. L. R. B. etc.. There is deep concern about the substantive law[77] dealing with ratemaking, contracts of collective bargaining and collective economic activities etc.. This reflects an understanding that these agencies have an important duty in the protection and adjustment of various interests including the public interest.

Incidentally, when there is any need to confer standing upon a person, lik ( a citizen or taxpayer, who has no immediate interest against the administrative ageney from the standpoint of controlling the administrative agency, how should "case and controversy" be interpreted ? Moreover, in that situation, would Professor Davis' test "adversely affected in fact" involve any difficulty for the sake of consistency in the solution of these problems ?

Another requirement, "legal injury" also become a problem where standing is conferred on a person other than one "adversely affected in fact." (see, chapter 1. C.) As a general rule, judicial relief is available only to the persons who have a beneficial interest in the revocation or alteration of an administrative disposition. This rule, if departed from, would result in defendants being unnecessarily bothered by useless suits. A person whose only interest is that common to all in serving adequate

enforcement of law and ordinances has been considered not sufficient to invoke the judiciary. If this rule is not held constant, until a plaintiff has been held to have no standing, administrative agencies can not be relieved from the annoyance of useless proceedings by common people.

Therefore, when considering the case of recognizing representatives of the public, it is questionable whether the requisite of "legal injury" can also be applied without some modification.

If we can regard the problem of "damnum absque injuria" as equivalent with the problem of "benefit of suit", the suit by the person who has not been "adversely affected" come to lack the requirement "benefit of suit". In the minority opinion in F. C. C. v. N. B. C. (K. O. A.), Mr. Justice Frankfurter felt it necessary for K. O. A. to show its interest as having been injured in fact, which can be considered the lack of "benefit of suit" (damnum absque injuria).

Now, in order to arrive at a convincing solution of the problem, we must recognize that public action is required to protect the "public interest." Therefore, even when private interest was not directly injured by governmental action, recognizing standing of the the third person will be required to protect the "public interest."

(B) In the case of taxpayers ——— Here, the examination shall done whether a taxpayer can challenge public expenditure by the federal or state government.

First of all, let's try to consider federal court law. Although there are several old cases in which the taxpayer was allowed to sue, Bradfield v. Roberts[78] and Heim v. McCall[79] and etc., nowadays almost all federal courts have abolished the rule that a federal taxpayer has standing to challenge the legality of a federal expenditure. A most well-known precedent concerning standing

of a federal taxpayer is Frothingham v. Mellon case.[80]

> The court in this case held that a federal taxpayer's interest in the money of Treasury' 'is comparatively minute and indeterminable; and the effect upon future taxation of any payment out of the funds is so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." ..... "To have standing, the challenger must show that he has sustained or is immediately in danger of its enforcement, and not merely that he suffers in some indefinite way in common people generally."

Therefore, federal taxpayers do not have standing. As far as the federal taxpayers are concerned, the rule of this case has afterward been observed and regarded as the established rule. (see, Doremus v. Board of Education[82] and Clemen Martin v. Dick.)

As Professor Davis has pointed out, "in contrast with the federal courts, many state courts have recognized standing" to the state taxpayer or citizen as a representative of the public. Even the Frothingham case stated above said that the taxpayers of the self-government body, state or municipal, are in a different position than are federal taxpayers and the interest which the taxpayers of self-governing body have concerning expenditure of local government is direct so that getting relief by injunction is not unsuitable.[83]

In any event, standing between federal and state law are quite different, and the difference is deeply concerned with "case and controversy". However, Professor Jaffe wants to deny these differences.[84]

(C) In the case of citizens ——— Many state courts have recognized not only a taxpayer's standing to challenge state expenditures but also a citizen's standing to challenge even governmental action which has no connection with the expenditure of tax funds. For instance, in

Kuhn v. Curran, petitioner who had been a "resident and taxpayer" was held to have standing to challenge the statute altering the judicial system of state ; in Andersen v. Rice,[85] a citizen who was "resident and taxpayer" was recognized to have standing to challenge state statute concerning state police system.

In People ex rel. Pumpyansky v. Keating,[86] the courts of New York also recognized the standing of a "resident and citizen" who challenged the validity of a license issued to a seller of newspapers (for booth) on a streeet corner. Doremus v. Board of Education[87] case held "a citizen and taxpayer to have standing to challenge the reqirement of Bible reading in the public schools. This case was subsequently dismissed on appeal to the U. S. Supreme Court because of lack of standing.

(D) In the case of consumer ——— "When price, rates or rents are administratively fixed, ····· do the purchasers, rate-payers" and so-called general consumers "have standing to challenge an order[88] ?"

The Supreme Court does not recognize so-called general consumers as having standing. For instance, in Atlanta v. Icks,[89] a city challenged an order fixing a minimum price for coal. The Court decided that consumers do not have standing in such a case. The Supreme Court also held to the same effect in the case of rate-making (see, Wright v. Central Key Gas Co.[90]). Cases in the lower courts, however, have come to different conclusions.

In Associated Industries v. Icks, the standing of consumers was recognized. Professor B. Schwartz has argued that :

"it is difficult to see why a consumer does not direct personal interest in administrative action which affects the product service which he purchases. If the price which he has to pay is increased by administrative order, it is not unreal to hold that he does not have a

personal interests in having the order in question reviewed."[91]

He strongly asserted that consumers should therefore have standing. Enumerating three reasons, Professor Davis said that the "Atlanta case is not law."[92] In the first place, Section 10 (a) of the A P A, especially the sentence "any person 'adversely affected' is entitled to have standing," is considered the rule of the Atlanta case to be changed.

"The second reason is that the Atlanta case is not supported by its citations and the thorough consideration of the problem came in the Associated Industries case, which held the opposite on the basis of the Sanders and other F. C. C cases decided since the Atlanta case.

"The last reason is that in the U. S. ex. rel. Chaman v. Federal Power Commission,[93] the Supreme Court uphold the standing of a cooperative representative consumers.

However, the writer cannot agree with his conclusions since the Supreme Court has not granted consumers standing to challenge rate-fixing by administrative agencies and I think that represents American law on the rate-fixing problem.

Judging from the above cases, federal law seems to be entirely different from state law insofar as standing of representatives of the public (consumer, taxpayer and citizen) is concerned. Therefore,, Professor Jaffe seems to attempt to unify and systematize the federal and state laws in his prominent thesis "Standing In Public Action."[94]

Speaking to the Supreme Court's determination of standing of a taxpayer by the amount of the taxes involved as in the Frothingham case, Professor Jaffe argued that plaintiff's tax obligation was in no way related to the illegal expenditures or the standing of the taxpayer in administrative proceedings. He argued that standing should be decided from the point of the "public interest". The author can agree with

his desire to establish the new theory of law. Administrative law has, it is true, been established under the principle of "public interest". This is especially evident in the recognition of standing of private persons as representatives of the public.

However, as far as Professor Davis attempts to comprehend and systematize administrative law under the principle of "public interest" with the theory of "public action". His theory seems to conflict with Professor Davis' criterion "adversely affected in fact". Though Professor Jaffe does not criticize Professor Davis' criterion, I feel that he needs to reconcile the conflicts of their theories.

The solution of this conflict between their theories seems to lie, as far as standing is concerned, in the resolution of the conflict between "public interest" and "adversely affected". Professor Davis seems to be too intent on expanding the scope of standing to think about all the various problems of standing in administrative law consistently.

In short, I feel that Professor Davis' theory of standing in administrative law is not clearly distinguished from the standing in common law or equity law.

(2) Standing to assert the rights of other persons

Although the suit to protect the public (plaintiff is a member of the public) was permitted (see, 1), the question remains whether the suit will be permitted to the person who has no right to represent others. In most of the cases standing of the person who has right to represent the others was denied (for instance, Tilestone v. Ullman[95]), but in several cases it was recognized. In Pierce v. Society of Sister,[96] the Court allowed the private school to challenge the Act which provided for children attending public school. In this case the private school asserted that the Act violates the right of children and parents to select their

own school and the Court recognized standing of the person who has no right to represent others.

The cases which followed the Pierce case are Wuchter v. Pizzutti[97] and Helvering v. Gerhadt.[98] In these cases standing was recognized on the ground that the interest of the group including the plaintiff was injured. However, in the stage where the standing of the person who has no right to represent other is recognized (the so-called suit of the third person), it seems to me that Davis' test "adversely affected" can not be recognized as the criterion of standing.

(3) Organization suit ——— Suit between administrative agencies

Although the concept of agency suits exists in Japanese adminstrative proceeding law, they are not permitted in American administrative law. Organization suit permits an administrative agency as plaintiff to sue another administrative agency concerning a dispute between them or between an administrative agency and public body.

This suit does not attempt to protect the rights of individuals but strives solely to achieve the proper execution of statute for the public interest. Therefore, standing in an organization suit can not be denied by the test "adversely affected in fact".

Department of Labor and Industry v. Unemployment Compensation Board[99] represents a sort of organization suit. The court, however, did not recognize the standing of the Department of Labor and Industry since that department was not a party aggrieved within the meaning of statute. However, in view of the increase in administrative activities, will not the organization suit for the maintainance of statute be demanded in the future ? If such suits will evolve, "adversely affected" as a test of standing will not be useful at all, because administrative agencies are never injured by each other. Organization suit will be only used for

securing a more unified and consistent interpretation of statutes.

**Conclusion**

This main purpose of this paper was to consider the propriety of the criterion of standing, "adversely affected in fact", which has been developed by Professor Davis. While the intent of law scholars such as Professors Davis and Jaffe, to expand the scope of standing in administrative proceedings, can be entirely recognized, the test "adversely affected in fact" seems to be too wide a concept to adopt as a unified and consistent criterion of standing. Even in case the test "adversely affected in fact" can be evaluated as a concept of expanding the scope of protection of the people, it could not be adopted as a test, since the criterion is too vague and could be interpreted in any way one likes. Even if such a wide test is recognized, should there be no problems of misuse and overbundance of the suits beyond the capacity of the court ?

(2) From the standpoint of maintaining "public interest" the test "adversely affected in fact" can not be used as it is, neither is the test suitable as a unified criterion. Since the test "adversely affected in fact" seems to conflict with the two requirements, "case and controversy" and "legal injury", it could not be criterion of standing in administrative proceedings insofar as these legal problems can not be resolved. How could Professor Davis reconcile his criterion with the two requirements stated above?

(3) Finally, as is generally known, a dilemma does exist between "supremacy of law" and administrative law. While regarding administrative law as a necessary evil, administrative law scholars want to regulate the executive as widely as possible by expanding the scope of standing in administrative procedure and judicial review. On the contrary, the American Bar Association and the Supreme Court which advo-

cate the "supremacy of law" did not welcome the rise of administrative law. Through advocating the "supremacy of law", the American Bar Association and the Supreme Court seem to be, strangely, narrowing the scope of standing and judicial review in comparison to the administrative law scholars. They clearly contradict their position on the "supremacy of law" as a result.

Though, as has been stated, many unproprieties and questions have been shown to Professor Davis' criterion "adversely affected in fact" and the writer has touched upon Davis' legal method and "supremacy of law in this process, if I were an American, the problem would seem different. However, it is impossible to change my places. Accordingly, this paper has resulted in pointing up some legal problems concerning standing and could not suggest any concrete means of resolution to the problems.

End

## Footnotes

1. Dickinson, Administrative Justice And The Supremacy Of Law (1927), 36—7. M. F. Stone, The Common Law In The United States (1936), 50 Harv. L. Rev. 4, 17.
2. The so-called social-economic legislations was based upon the modification of freedom of contracts and freedom of property right. For instance, restraint of free contracts (or free trade), collective contracts etc. antitrust and labor laws. See, T. Kawashima, Theory Of Property Right (1949), 20—50
3. In the Anglo-American thought in which propriety of each problem is emphasizd, it seems to be natural that the modification of fundamental principle by new laws was not perceived so sensitively by lawyers.
4. Dicy, The Development of Administrative Law In Engladd. 31. L. Q. R. 148. M. F. Stone, The Common Law In The United States (1936), 50 Harv. L. Rev. 4, 17. As progressive administrative scholars in Engalnd, Porfessors Robson and Jenning etc.. W. A. Robson, Justice And Administrative Law (1951).

5. In the United Sates, W. Gellhorn, Federal Administrative Proceedings (1941), Ch. 1. The Aeministrative Agency —— A Threat to Democracy? 1 — 40. In England, Dicy, Law Of The Consitution (8th ed), Introduction, p. xxxvii (The Board of Education v. Rice (1911), A. C. 179. Local Government Board v. Arlidge (1913), A. C. 120, in these cases administrative law was first recognized).
6. C. K. Allen, Bureaucracy Triumphant(1931), 61
7. This is the most outstanding character of American law. K. Arly, The Future of Judge-made Public Law In England —— Problem of Practical Jurisprudence , Colum. L. Rev. 61 (1961). As Professor Davis pointed out, in England judicial review was not imortant problem in administrative law. The most famous administrative law textbook is "Justice And Administrative Law (1951) by Robson.
8. De Smith, Judicial Review Of Administrative Action (1959), 4.
9. Dicy divided the meaning of supremacy of law into three meanings. The supremacy of law I says here mainly means the second meaning : namely, people of every class are subject to the ordinal common law which is carried on by ordinal judicial court. Dicy, Lectures On The Relation Between And Public Opinion In Engalnd During The 19th Century(1900) 202-3.
10. Nowadays, there is no person who denies the existence of administrative law. However, as we will notice, the Supreme Court is inclined to deny standing of the public. In Frothingham case ····· , even if they admit standing of the public, it is based upon a special act.
11. It is very important for Ango-American laws.
12. Kenneth Culp Davis, Administrative Law Text (1956), 396.
13. Jaffe and Nathanson, Admistrative Law —— Cases and Materials —— (1961) 83. Professor W. Gellhorn describes standing problems under the following title "Standing To Secure Judicial Review" (1954), 204-41
14. Jaffe, "Standing Of Public Action", 74 Harv. L.Rev. 1213 (1961)
15. In this paper, the following books by Davis are mainly refered; Cases And Administrative Law (1951), Standing to Challenge The Governmental Action, 39 Minne. L. Rev. (1955), The Future of Judge-Made Law In England; A Problem Of Practical Jurisprudence, 61 Colum. L. Rev. (1961)
16. As cases which are concerning with "case and controversy", Inre Pacific Ry. Commission, 32 Fed. Rep. 241, 255(1887). Muskrat v. U. S., 219 U. S. 346 (1911). These cases defines the judicial power by "case and controversy". As the requirements of"case and controversy," there are three requisites; adverse

parties, real interst and actual controversies. As far as the standing problem is concerned, it is said that it means the conflict of the interested parties.

17. In regard to this concept, Tennessee Electric Power Co. v. T. V. A. 306 U. S. 118 (1939) and Alabama Fower Co. v. Ickes, 303 U. S. 464 (1938) argued in detail. It means damage without in the legal sense.
18. It is difficult to understand whether the test of standing problem is requirement of standing or criterion itself.
19. 306 U. S. 118 (1939)
20. Jaffe and Nathanson, id. at 856
21. 302 U. S. 464 (1938)
22. 310 U. S. 113 (1940)
23. 310 U. S.125
24. K.C. Davis, Text, 398. "Standing To Challenge Governmental Action," 39 Minne. L. Rev. 352
25. Jaffe, "Standing In Public Action", 74 Harv. L. Rev. 1265-1293(1961)
26. Davis, id. 354-6
27. Sen. Doc. no.248, 79th Cong., 2d Sess. 212, 276 (1946)
28. I don't know "Eminent Domain Proceeding" so much, so that when I considered confiscatory problem I thought of Japanese one. In this sense I am in doubt whether I can insert this law here or not. I may rectify this part after investigation in more detail.
29. This problem should be decided from the policy of proceedings (misuse or overbundance of cases beyond a court capacity).
30. Sen. Doc. no. 248, 79th Cong., 2d Sess. 230 (1940)
31. F.C.C. v. Sanders Brothers, 309 U. S. 470 (1940)
32. Jaffe, id. at 12
33. Jaffe and Nathanson, id. 845
34. According to Communication Act of 1934, I think standing of existing station was conferred. If there is no Communication Act, the existing station would not be conferred standing. In Sanders case, standing was given by statute(1934) 48 Stat. 926 (1934), 47 U. S. C. A. 402 (b)
35. Sen. Doc. no. 248, 79th. Cong.2d Sess. 230, 413 (1946)
36. id. at 310
37. Task Force Report On Legal Service And Procedure (1955). Hoover Commission And Task Force Report, Symposium N Y U, L. Rev.(1955)
38. id. at 369

39. B. Schwarz, "A Decade Of Administrative Law", 51 Mich. L. Rev. 775, 847-51 (1953)
40. I don't know the situation of American courts. In Japan the Supreme Court always has two or three thousand cases. If Japanese Supreme Court adopts such a wide test as "adversely affected in fact", the Supreme Court has to deal with the more cases. As the result, right of the people can not be protected by the delay of suit. In the United States, how about that ?
41. Davis, 61 Colum. L. Rev. (1961) 214
42. In this country science of jurisprudence is confined to interpretation of case (law), however, I think, the necessity of new test is not required for the sake of interpretation of law but for the purpose of adaptation of law to new social economic situation. I am sorry I could not find out his consideration about that kind of problem.
43. Japanese Administrative Case-Book, vol. 3, p. 50 Meiji 25 in A. D. 1883
44. id. vol. 26, p. 80 Meiji 31, in A. D. 1889
45. Minobe (Tatsukichi), "Constitution of Japan"(1940)
46. Japanese Administrative Law Case-Book, no. 39 year. p.632 Meiji 39, in A. D. 1897
47. id. vol. 545 p. 966 Meiji 45, in A.D. 1903
48. id. vol. Taisho 3. Taisho 3, p. 1413
49. Public right is the right recognized in relation to the public law, which governments, state or local, have against the people and at the same time the people have against the governments. In this paper, I mainly consider the public right which is seen from the relation of people against the government. Japanese Law Dictionary(1959), 268
50. Although examples of expansion of standing in Japanese law were limited to the special field of existence right to live stated above, such a situation of standing might symbolize the special social-economic situation in Meiji and Taisho eras of Japan.
51. Shuichi Sugai, "Standing in Administrative Proceedings ; Hōgakuronsō, vol. ,
52. 306 U.S. 118(1939), at 137
53. 302 U. . 464 (1938), 478, 479
54. 310 U. S. 113, 125 (1940)
55. As I should explained later, in this country the above classification (1) and (2) are recognized by lower courts —— According to Professor Davis' Textbook, (a) standing to assert public rights (b) standing to assert the right of

another (c) standing of taxpayers, ratepayers, tenants etc. are recognized. See, Davis Textbook 396-419

56. In this respect, the Supreme Court's decisions are not so definite.

56. Jaffe's conclusion is different ( I must explain that in more detail but don't have time to make up it)

57. 316 U. S. 414 (1942)

58. 319 U. S. 239(1943)

59. 134 F. 2f 694 (2d Cir. 1943)

60. In the second meaning which Dicy says about supremacy of law, all cases are finally controlled by judicial court.

61. 316 U. S. 4 (1942)

62. 316 U. S. 4, 21

63. 319 U. S.239 (1943)

64. 319 U. S. 264

65. 319 U. S. 248

66. Davis, Administrative Law Text (1955), 403

67. F. C. C. v. N. B. C (KOA), 264, 248. In relation with this point we can find out many cases.

68. Jaffe, id. 1314

69. The reason why I dare to say is due to find out here the characteristic of administrative law theory. Without considering the legal problems about this point, he substitutes the private Attorney Genral doctrine for his explanation.

70. 134 F. 2d 694 (2d Cir.)

71. Davis, id. 404. Davis quoted this part from the Associated Industries v. Ickes.

72, 262 U.S.447 (1923)

73. 262 U. S. 447 (1923)

74. Davis, id. 407

75. Davis, id. 21 Cite Jaffe's article, "Standing In Public Action", 74 Harv. L. Rev. 1313

76. Professor Jaffe attempts to systematize the administrative law by the theory of Public Action or Pubilc Interest(not private action or interest). If he can succeed his experiment that will be very understandable. id. Harv. L. Rev. (1961) 1265, 1276, 1384 and 1292 ff.

77. If we can divide the law into two parts , substantive and procedural laws, anti-trust law, labor law, criminal law and civil law etc. are subject to substantive law

and, on the other hand, civil procedural law, administrative law and criminal law are subject to procedural law. Needless to say, even antitrust law and labor law include the procedural provisions in themselves. Pure administrative law which say here exclude these precedural law. In short, in so far as classification is helpful for the solution of problem, it has significance. According to continental law, principles of procdural law is quite different from substantive law's principles.

78. 175 U. S. 291 (1899)
79. 239 U. S. 175 (1915)
80. 262 U. S. 447 (1923) —— It is usually called Massachusetts Mellon case.
81. 5 N.J. 435, 342 U. S, 429 (1950)
82. 97, Supp. 761 (1951)
83. Acording to Professor Davis, in 1929 nineteen states recognized standing of the state taxpayers and only four states denied standing of taxpayers. It is said that at present thirty two states recognized standing of taxpayers and there is no state which completely ignores taxpayer's standing.
84. Jaffe id. 74 Harv. L. Rev. (1961) 1293
85. 294 N. Y. 207 (1945)
86. 277 N. Y. 271 (1938)
87. 168 N. Y. 190 (1901)
88. 5 N. J. 435, 75 A 2d 8080 (1950)
89. Davis, id. 411
90. 297 U.S. 539 (1936)
91. B. Schwartz, id. 775, 850
92. Davis. id. 412
93. 345 U. S. 1531 (1953)
94. Jaffe, id. 1215
95. 318 U. S. 44 (1943)
96. 268 U. S. 510 (1925)
97. 276 U. S. 13 (1928)
98. 304 U. 3. 405 (1938)
99. 362 Pa. 342, 67A 2d 114 (1949)

（後記）本稿は滞米中ペンシルバニヤ大学のベンダー（Paul Bender）教授に提出し，コロンビア大学でジョン（Jone）教授に討議してもらったものである。 今日読み返してみて検討し直すべき点があるのに気付くが，今のところ余裕がないので後日の訂正を期す外ない。

さように不充分な，しかも私の専門ではない小論を敢えて林田・具島両先生の還暦のお祝いに捧げた理由を一，二弁明しておきたいと思う。

林田先生には，九大赴任以来，公私にわたり大変お世話になったので，先生の還暦のお祝いには，せめて経済法に関連する行政法上の問題についての論文を捧げたいと思っていたが，予定通り研究が進まなかったことと，次の理由から，本稿を捧げることにしたわけである。次の理由とは，具島先生がアメリカ国務省の招待で渡米なされたのが，私の滞米中のことであったので，数回お会いして郷愁を癒してもらったことがある。それは，大雪の降る日のワシントンのホテルの一室であり，粉雪の舞うペンシルバニヤ・ロー・スクールの正門前であり，残雪の中に立ったフィラデルフィヤ郊外の工場の中であり，……そして，やわらかな春の陽を楽しむワシントンの公園の鳩の群の中であったように記憶する。本稿は，その前後に書かれたものであるので，私にとって何とはなしに懐しい思いがして，具島先生にお捧げするのにも，相応しいように思えたからである。ただ形式内容共に心もとないもので，甚だ恥かしい次第である。両先生に御笑読いただければ有難い限りである。