

Supreme Court of the United States

October
██████ TERM, 1969

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Supreme Court, U. S.
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In the Matter of:

Docket No. 85

ASSOCIATION OF DATA PROCESSING
SERVICE ORGANIZATIONS, INC., ET AL.,

Petitioners,

vs.

WILLIAM B. CAMP, COMPTROLLER OF THE
CURRENCY OF THE UNITED STATES, ET AL.,

Respondents.

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on behalf of Petitioners 31

- - -

IN THE SUPREME COURT OF THE UNITED STATES

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ASSOCIATION OF DATA PROCESSING)
SERVICE ORGANIZATIONS, INC., ET AL.,)
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Petitioners)
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WILLIAM B. CAMP, COMPTROLLER OF THE)
CURRENCY OF THE UNITED STATES, ET AL.,)
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Respondents)
)

No. 85

Washington, D. C.
November 18, 1969

The above entitled matter came on for argument at
10:58 o'clock a.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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ALAN S. ROSENTHAL, ESQ.
Civil Division, U. S. Department of Justice
Washington, D. C.
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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 85. Association of Data Processing Service Organizations against Camp.

Mr. Gross, you may proceed whenever you are ready.

ORAL ARGUMENT BY BERT M. GROSS, ESQ.

ON BEHALF OF PETITIONERS

MR. GROSS: Mr. Chief Justice and may it please the Court: In the present case this Court is called upon to resolve a conflict between the Courts of Appeals for the Eighth Eighth Circuit and the First Circuit regarding a threshold question of standing to suit.

This case arose in the District Court for the District of Minnesota and it was dismissed upon motion and before trial on the grounds that the Petitioner lacked standing to maintain this litigation. This ruling was affirmed by the Court of Appeals for the Eighth Circuit, and about the same time a substantially identical case arose in Rhode Island and the Court of Appeals for the First Circuit reached a precisely opposite result that Petitioners in that case do have standing to maintain this particular type of litigation.

This case arose from the Eighth Circuit. The First Circuit case is presently pending on petition for certiorari.

The facts in this case are limited to the complaints because the case was dismissed on motion prior to trial or pretrial.

1 Petitioners were the plaintiffs and they are the
2 Association of Data Processing Service Organizations which is
3 a trade association of businesses engaged in rendering data
4 processing services to the general business community.

5 The other Petitioner is Data Systems, Incorporated,
6 a Minnesota Corporation, a member of the association which is
7 referred to as ADAPSO and Data Systems is engaged in rendering
8 data processing services in Minnesota.

9 Respondents are the American National Bank and Trust
10 Company of St. Paul, a national bank and the Comptroller of the
11 Currency.

12 The facts allege that Data Systems was engaged in
13 the data processing business in Minnesota and that the American
14 National Bank was similarly engaged in the data processing
15 business, and as a matter of fact, Data Systems had agreed to
16 perform certain services for a particular customer. It later
17 turned out that the customer began doing business with the
18 American National Bank. There is no question about that.

19 The complaint alleges that the action of the
20 American National Bank in performing data processing services
21 was unlawful in that it violated the powers given national
22 banks under the national banking laws. The complaint asked
23 for declaratory relief and that the bank's action was unlawful;
24 asked for injunctive relief and it asked for damages.

25 The complaint also asked for declaratory relief

1 that the Comptroller of the Currency was acting unlawfully
2 when he authorized national banks to engage in the general
3 data processing business.

4 The Comptroller's authorization is found on Page 2
5 of Petitioner's brief and it's in a paragraph of the Comp-
6 troller's manual for national banks. It states as follows:

7 "Incidental to its banking services a national bank
8 may make available its data processing equipment or perform
9 data processing services on such equipment for the banks and
10 bank customers." It's the last three words that gives the
11 banks assumed authority to do this type of activity.

12 Q Well, they could have had it without that
13 regulation -- Let's assume that it just started out doing it.

14 A If they had authority under the Acts of
15 Congress, they would not need this specific authorization.

16 Q Then the question is the statute; isn't it?

17 A That's correct; the question is statutory
18 authority.

19 In our brief we have raised the general question of
20 standing to sue and we have discussed the so-called "legal
21 right theory" the requirement that a plaintiff must have a
22 legal right to have standing to maintain an action of this
23 nature. This rule was probably most prominently denounced in
24 the case of Tennessee Electric Power versus TVA in 36 U. S.
25 Reports. But this was not the issue that divided the Courts

1 of Appeals for the First and the Eighth Circuits and I would
2 talk to that narrower issue which did divide the circuits.
3 And that's the question of statutory aid to standing.

4 The rule generally may be stated that if a competi-
5 tor can show that a statute was intended to protect these
6 competitive or economic interests, then he has standing to
7 complain of unlawful competition and we believe that a
8 statute is applicable in this case and that statute is the
9 Bank Service Corporation Act. That's found in 12 U.S. Code,
10 Sec. 1864. The relevant portion is quoted in our brief at
11 Page 2. This is a 1962 statute.

12 It is therefore extremely important to examine the
13 legislative purpose of the Bank Service Corporation Act to
14 decide ex culpa the protection afforded the data processing
15 industry.

16 The basic purpose of the Act is undoubted. It was
17 to allow smaller banks to achieve more effective competition
18 against larger banks by joining together to invest in Bank
19 Service Corporation subsidiaries. Two or more banks can now
20 join together to form a bank service corporation which will
21 rendering data processing services for the banks. Such things
22 as sorting checks and reconciling statements and that sort of
23 thing.

24 Prior to 1962 it was felt that banks could not invest
25 in corporations of this type, so the basic purpose was to

1 authorize national banks to join together in this function.

2 Now, the question promptly came up as to the extent
3 that bank service corporations could engage in the general
4 data processing business and the compromise or result reached
5 by the House of Representatives which had the bill initially,
6 was to permit Bank Service Corporation subsidiaries to perform
7 these services for nonbank customers to the extent of one-
8 half of their total activities. Not to exceed one-half of
9 their total activities could be performed for nonbank cus-
10 tomers.

11 When the bill got to the Senate certain Senators
12 were not satisfied with even this restriction and a Minority
13 Report was issued by the Senate Banking and Currency Committee.
14 Senators Proxmire, Neuberger and Douglas issued a report
15 criticizing the one-half limitation as being excessive.

16 That's found in our brief on Page 33, excerpts from
17 that report. I'll read the Court one sentence, and this is
18 the basic point of the Minority Report. They stated that
19 "adequate justification has not been demonstrated for extend-
20 ing this exemption to permit banks to engage in the business
21 of data processing which this bill permits up to 50 percent
22 of the total activity of a bank service corporation.

23 Senator Proxmire went further. He introduced an
24 amendment on the Floor of the Senate to prohibit bank service
25 corporations totally from engaging in data processing services

1 for nonbank customers. And there could be no question as to
2 the reasons for Senator Proxmire's amendment. He was per-
3 fectly clear on the reasons and they were to protect the data
4 processing industry.

5 On Page 35 of our brief we have quoted from certain
6 from Senator Proxmire, and I'll read a few sentences
7 so that the Court can see exactly what the Senator was driving
8 at with his amendment.

9 He stated that "banks have customer lists and they
10 can offer their customers, for instance, the service of hand-
11 ling their receivables, which would give the banks a substan-
12 tial advantage over other legitimate, long-established business
13 providing this kind of service. A number of these businesses
14 have informed me and other Senators that this kind of compe-
15 tition would be very unfair. It would be unfair because the
16 banks could use their own personnel; charge merely the out-
17 of-pocket costs and the unfair competition would drive busi-
18 nesses now offering this kind of service to the wall.

19 "These are the reasons why I have offered this
20 amendment. With the adoption of the amendment I think we are
21 in a position to have a bill to provide what the banks really
22 want; what the members of the committee feel is justified and
23 at the same time safeguard legitimate business enterprises
24 which might otherwise be out of business."

25 The Proxmire Amendment passed and the Bank Service

1 Corporation Act, as presently enacted into law states as
2 follows: "No bank service corporation may engage in any
3 activity other than the performance of bank services for
4 banks."

5 We believe that this case requires in unique
6 fashion an interpretation of the scope of the so-called
7 "statutory aid to standing doctrine." In previous cases the
8 Courts have been faced with the question of whether a statute
9 was designed to protect the competitive interest.

10 If the statute was designed to protect the compe-
11 titive interest then the Courts held that the protected
12 competitor had standing to maintain his litigation on the
13 merits.

14 On the other hand, if the statute or constitutional
15 provision was not so designed and was not intended to offer
16 protection to competitive interests then the competitors were
17 held not to have standing.

18 However, in this case we have a situation that is
19 not occurred before, to the best of our research and Respon-
20 dents have cited no cases showing a situation where there is
21 a undoubted Congressional purpose to protect a competitive
22 interest, but from a source of competition which is slightly
23 different, although closely related to the actual source of
24 competition.

25 Here we are dealing with competition by national

1 banks themselves. The statute, according to its words, was
2 -- said that no Bank Service Corporation subsidiary shall
3 engage in data processing activities.

4 So we have a situation where it appears to us that
5 Respondents are arguing as follows: Assume that Bank A and
6 Bank B get together to form a subsidiary bank service corpora-
7 tion. That corporation begins to engage in activities which
8 appear to be data processing for the general business commun-
9 ity. In that situation we must assume that a competitor
10 like the Petitioner has standing.

11 However, assume that Bank A and Bank B, instead of
12 forming a subsidiary corporation, decide on their own,
13 individually, to offer the same type of data processing ser-
14 vices.

15 Respondent say there is no standing because there is
16 no statutory aid to standing.

17 Q Under your view of the standing issue would we
18 or would we not reach the merits; namely the question of the
19 authority of the Comptroller to authorize it?

20 A No, Your Honor; not in this situation.

21 Q The case would go back to the Court of Appeals.

22 A The case would go back for trial.

23 Now, we can assume even further. The Bank Service
24 Corporation Act says that if two banks get together to form
25 a subsidiary and one bank leaves and withdraws that the other

1 bank; the other individual bank may carry on with the Bank
2 Service Corporation. So, we have a situation of one bank
3 having a Bank Service Corporation subsidiary, if it engages
4 in data processing activities where the Petitioners can't
5 attack. And yet if the parent corporation engages in the self-
6 same activities there is no standing, according to the
7 Respondents.

8 We feel that this is an effort by the banks and by
9 the Comptroller of the Currency to adopt a very broad and ex-
10 pensive interpretation of the restrictive doctrine of standing.
11 We feel that they are pushing the doctrine of standing beyond
12 any reasonable purpose.

13 The rules of standing have the effect of preventing
14 an inquiry into the merits of litigation and we feel that
15 rules that have this effect of preventing reaching the merits
16 should be rather narrowly and restrictively interpreted. And
17 in close cases the doubt should be resolved in favor of
18 reaching the merits, particularly where the merits are impor-
19 tant and the merits are important in this type of bank case.
20 It's important to the banks; it's important to the Petitioners
21 it has important implications --

22 Q What bearing do you think the Flast case has
23 if any?

24 A Your Honor, I feel that Flast v. Cohen shows
25 a philosophy of standing that would grant standing in this case.

1 The facts, of course, and the situation are different, but
2 Flast versus Cohen has a philosophy of inquiring into the
3 personal interest of the petition; it inquires into the con-
4 crete adverseness of the parties; whether the case is in
5 appropriate form for judicial resolution. Rather than seeking
6 to find some undefined legal right you look at the factual
7 adverse interest; you look at the type of case. If you look
8 at our case through the view of Flast and Cohen, there clearly
9 is standing. These people are adverse under any test.
10 Petitioners have been harmed; undeniably at this juncture of
11 the case they have been harmed. They allege they have been
12 harmed and their complaint was dismissed before trial. The
13 case is appropriate for judicial treatment. We asked for the
14 interpretation of the statute of Congress.

15 We think that competitors in this situation are the
16 best persons to try the merits of this litigation and probably
17 the only persons. We feel that it is unlikely that the merits
18 will ever be reached if a competitor does not bring this type
19 of litigation.

20 So, we feel that under Flast versus Cohen we do have
21 standing. We have adversity; we have this personal stake;
22 we have a concrete case. And in addition we have important
23 issues on the merits, and finally, we have a statute of
24 Congress where Congress clearly was trying to protect the
25 data processing industry from a type of national bank

1 competition. This is what the First Circuit felt was
2 sufficient for standing; and this is what we believe is
3 sufficient for standing.

4 Q Well, suppose then some prior cases in the
5 courts would have been decided differently under your theory.

6 A Not under the narrow scope of statutory
7 aid to standing, Your Honor --

8 Q You mean --

9 A Well, we have two basic issues, Your Honor.

10 Q Would you say it isn't enough for standing just
11 to show an economic injury?

12 A Oh, I think it is if you overrule about three
13 or four cases in this court.

14 Q Are you suggesting that we do that?

15 A Yes, Your Honor; and in our brief we said that
16 rather extensively. We don't believe that Tennessee Electric
17 Power is an adequate type of case for adequate determination
18 of this issue. We think it should be abandoned.

19 Q But, excepting those cases, you still think
20 you have standing in this case?

21 A Yes. Following Tennessee Electric Power we
22 think we have standing under the Doctrine of Statutory Aid to
23 Standing.

24 Q And the statutory aid was the bank service
25 corporation?

1 A That is correct.

2 Q That's the only source --

3 A That's the only statute we rely on, Your Honor.

4 Q What you say is that although the Bank Service
5 Corporation Act is a separate act there is enough intermission
6 between the two to bring into play that doctrine.

7 A That is correct, Your Honor. We feel that the
8 Administrative Procedure Act bears on this issue, too; in part.

9 Now, the judicial review provisions of the APA are
10 familiar. It reads that a person suffering legal wrong be-
11 cause of agency action, adversely affected or aggrieved by
12 agency action, in the meaning of a relevant statute is en-
13 titled to judicial review there.

14 We feel that the Bank Service Corporation Act is a
15 relevant statute under the APA. And we think that reading the
16 APA in conjunction with the Bank Service Corporation Act there
17 certainly is standing.

18 The Bank Service Corporation Act is relevant because
19 it bears on this problem. It was an undoubted congressional
20 response or effort to protect data processors. For this
21 reason we feel it is relevant.

22 Q Did the First Circuit decision follow the
23 decision of the Eighth in this case?

24 A The First Circuit was after --

25 Q Was after?

1 A Yes, it was, Your Honor.

2 Q And is the argument you are now making addressed
3 to the Eighth Circuit?

4 A It was, Your Honor. It was addressed in our
5 brief and rather prominently displayed. It was not ---

6 Q Yes, I know. They dismissed it simply by
7 saying that was a separate statute.

8 A In a footnote, Your Honor.

9 So, we feel that under the Bank Service Corporation
10 Act and under the Administrative Procedure Act. Not only by
11 the Administrative Procedure Act but that Act read in conjunc-
12 tion with the Bank Service Corporation Act, there certainly is
13 enough Congressional protection afforded the data processors
14 to give them standing to reach the merits of this case.

15 MR. CHIEF JUSTICE BURGER: Mr. Rosenthal.

16 ORAL ARGUMENT BY ALAN S. ROSENTHAL, ESQ.

17 ON BEHALF OF RESPONDENTS

18 MR. ROSENTHAL: Mr. Chief Justice and may it please
19 the Court: Over a period of almost 90 years, beginning with
20 its decision of 1882 when Railroad Company against Ellerman,
21 this Court has consistently adhered to the rule that where, as
22 is concededly the case here, there is no special statutory
23 provision or judicial review that complaintants seeking to
24 attack governmental action which does not more than increase
25 competition against it, show that he possesses a legally

1 protective right to be free from that competition.

2 Now, the Court has further made it clear that if, as
3 is also true in this case, no such legally-protected right
4 was conferred by license or franchise, a plaintiff must be
5 able to demonstrate that, as this Court put it just two terms
6 ago in Hardin against Kentucky Utilities: the particular
7 statutory provision invoked reflects a legislative purpose to
8 protect a competitive interest.

9 If, but only if, such a purpose appears, and we
10 again quote from Hardin -- "Injured competitor has standing to
11 require compliance with that provision."

12 Now, notwithstanding the present reliance of
13 Petitioner upon the Bank Service Corporation Act, to which
14 I will turn in a few minutes, the fact remains that its
15 complaint invoked only the Incidental Powers Clause of the
16 National Bank Act. The provision of 12 USC 24 (7th) which
17 authorizes national banks to exercise, and I quote: "Such
18 incidental powers as shall be necessary to carry on the
19 business of banking."

20 Specifically, as Petitioners complaint reflects,
21 their attack upon the Comptroller's ruling that national banks
22 may provide data processing services to other banks and bank
23 customers was based exclusively on the proposition that such
24 services do not come within the purview of the Incidental
25 Powers Clause.

1 Q Is that pleading argument the fatal argument?
2 I mean, is that a fatal thing from their point of view?

3 A Well, it is fatal, Mr. Justice Harlan, from
4 their point of view for the reasons that they cannot as they
5 do now, assert that the conduct which they are seeking to
6 enjoin violates any statute but the National Bank Act.

7 Q Yes, well, as far as the pleading issue is
8 concerned, the Court of Appeals did notice it, even in a
9 footnote, and ruled against them.

10 A That's right.

11 Q So they didn't rely on any pleading defect.

12 A No, it isn't a matter, Your Honor, of the
13 pleading defect. The point is that the complaint alleges a
14 violation of the National Bank Act for the good and sufficient
15 reason that that was the only act which they could claim had
16 been violated and it wasn't an inadvertent failure to allege
17 a violation of the Bank Service Corporation Act.

18 Q What you're saying is that the change of theory
19 or the putting forward an additional theory that came into
20 counsel's mind after the filing of the complaint?

21 A What I'm saying, Your Honor, is that they seek
22 to base their claim of standing upon a statute which they
23 cannot claim has been violated. That's essentially what it
24 comes down to. And --

25 Q Your basic provision on standing, as I read your

1 brief is that you've got to reach the merits of this case in
2 order to give them standing.

3 A No, Your Honor, that is not our position.

4 Q Why not?

5 A Our position is that they lack standing
6 irrespective of whether the National Bank Act precludes banks
7 from engaging in the activity which they seek to enjoin. Our
8 position rests upon this proposition even if it could be said
9 on the merits that Section 24(7th) precludes the activity of
10 which the complain. The fact remains that Section 24(7th)
11 was not enacted to protect any competitive interest of these
12 Petitioners or any other potential competitors of national
13 banks.

14 And that for this reason, under the Federal Standing
15 Doctrine: Armand, Tennessee Power v. TVA and the Hardin case
16 is the last expression of the Court, they lack standing; that
17 they would only have standing if they could show -- not merely
18 that the statute was violated, but that it was intended to
19 protect a competitive interest of theirs.

20 Q Who could attack this statute under -- who could
21 raise this question of --

22 A I would think in the circumstances -- present
23 circumstances, the action on the part of a bank in violation
24 of the Act could be challenged by bank supervisory authorities,
25 it is possible that with respect to some provisions of the

1 National Bank Act it might have been designed to protect,
2 possibly the solvency of banks. That their depositors or
3 customers might have a outstanding --

4 Q More shareholders.

5 A Shareholders; correct.

6 Q They would in any event --

7 A I would think so, if the shareholder gets
8 a -- which I think he would verylikely be able to in many
9 instances, at least, that the procedure which was being
10 violated by the bank was intended to insure the solvency of
11 the bank.

12 Additionally, if Your Honor pleases, any time that
13 Congress sees fit to insert in this statute a person aggrieved
14 provision, review would be available at the behest of people
15 who would qualify as persons aggrieved.

16 Now, Congress has not chosen to clothe these
17 Petitioners with the status of essentially private fraternities
18 generally.

19 Q Your position makes it very hard, doesn't it,
20 for anyone to attack, excepting government agents.

21 A Your Honor, there are areas -- many areas in
22 which the superintendents of compliance with statutory man-
23 dates rests with the Congress itself.

24 Q Well, then, what do you say to the question I
25 asked you: Doesn't it make it almost impossible for anybody

1 to challenge it except the bank officers or Superintendent
2 of Banks himself?

3 A I would think, Your Honor, with respect to this
4 particular provision there are few individuals that have
5 standing to attack this provision; that's correct, in court.

6 Q Would the stockholders -- the bank stockholders?

7 A The stockholders -- well, not -- certainly --

8 Q On the basis of ultra --

9 A Yes, I would think that it is quite possible
10 the stockholders would, but in the realm of competitors and
11 the realm of individuals such as these petitioners who are
12 complaining of competitive activity on the part of the banks,
13 their remedy lies with the Congress to which they have gone,
14 repeatedly; both before and after the passage of the Bank
15 Service Corporation Act.

16 Q Then are you telling us that's the way the
17 Congress wants it?

18 A Precisely, Mr. Justice of the Court; that the
19 name ADAPSO itself, has been before the Congress; it has
20 fought after the Bank Service Corporation act was passed to
21 have Congress specifically preclude data processing service
22 activities on the part of banks except as they related to
23 internal operations of the bank.

24 They have also called to the Congress's attention
25 the absence of a judicial review provision and the necessity

1 for such a provision and to this point those pleas have fallen
2 on deaf ears.

3 Now, we say it is quite appropriate for the Congress
4 to decide whereas here there is no legally-protected right of
5 the Petitioner's being invaded. It is open to the Congress to
6 decide the extent to which it wishes to deputize these
7 Petitioners or any other class as private attorneys general
8 to enforce what they say is the public interest in compliance
9 with the National Bank Act.

10 Q May I ask you a question: Again, assuming that
11 they are right and that Congress has made it unlawful for
12 these banks to do exactly what they are charged with doing
13 and did it in order to protect competitors, it is your
14 position that nobody can challenge it except the bank exam-
15 iners?

16 A No, Your Honor. If Congress had done this for
17 the protection of competitors, then under the established
18 standing doctrine, the latest decision being Your Honor's
19 decision in -- in Hardin.

20 Q That's their argument; isn't it?

21 A But we insist, if the Court pleases, that the
22 restrictions which they seek to enforce, a restriction of the
23 National Bank Act was not intended to protect a competitive
24 interest, and indeed, they don't argue to the contrary. They
25 have never suggested, either in the lower courts or in this

1 Court that the purpose of the --

2 Q I misunderstood their argument here.

3 A No. Their contention is that in the Bank
4 Service Corporation Act, specifically with relation to
5 Section 4 of that Act, that Congress manifested an intent to
6 protect data processors from the kind of competition of which
7 they complain.

8 Q Now, assume that that's true; let's assume it
9 was passed for that purpose. Is it still your -- it may be
10 sound, I'm not saying it's not -- I want to get just how far
11 it goes. It's still your argument, notwithstanding the ex-
12 pressed desire of Congress to give these kind of competitors
13 a protection, that none of them can raise it?

14 A No, that's not my argument, Your Honor.

15 If the Bank Service Corporation Act and its legisla-
16 tive history manifested a Congressional intent to protect data
17 processing service companies from competition on the part of
18 national banks then I would certainly agree that under the
19 teachings of this Court, just recently again in the Hardin
20 case, standing would exist.

21 What we say is that there isn't a jot or syllable
22 in the legislative history of the Bank Service Corporation Act
23 to indicate any Congressional intent to protect the Bank Ser-
24 vice Corporation from the competition of which they are com-
25 plaining here.

1 Now, the --

2 Q Well, let me ask you the question my brother
3 Harlan asked you a little bit ago: If that's the case,
4 aren't you saying that we have to look at this Act in order to
5 see whether that was its purpose to decide standing?

6 A The only extent that you have to look to the
7 Bank Service Corporation Act -- again, in response to Mr.
8 Justice Harlan, I suggested that we did not need to reach the
9 merits of this controversy, because the merits, of course, are
10 in terms of an alleged violation of the National Bank Act and
11 it's not necessary to reach that question, whether or not the
12 National Bank Act was violated in order to decide standing.

13 Now, with respect to the BankService Corporation
14 Act the only thing that is required is to examine its legis-
15 lative history and determine whether the Congress was intending
16 by that act to any extent to protect a competitive interest of
17 data processing service companies against national bank com-
18 petition.

19 Q Well, supposing this suit arose under the
20 Bank Servicing Act, would you question standing?

21 A If this was an attack upon a Bank Service
22 Corporation activity, I think then the/question would be much
23 closer. I say that --

24 Q Wouldn't it be clearly against you?

25 A I don't think so, Your Honor, for this reason:

1 Q Why not?

2 A Because the only statement in the entire
3 legislative history of the Bank Service Corporation Act that
4 manifested any concern for the protection of data processors
5 was the statement on the Floor by Senator Proxmire. Now, this
6 Court has cautioned before --

7 Q Well, what about the provision itself?

8 A The provision itself could have been for many
9 different reasons. In the Congressional mind the provision
10 itself might have been, again, because of a feeling that the
11 bank service corporations in the general public interest
12 without relation to any specific competitive group, should not
13 be engaging in activities other than the providing of bank
14 services to banks. There is no way of really telling what of
15 the myriad approaches there may have been.

16 But this much is clear: We're dealing with national
17 banks here. Congress in connection with the Bank Service
18 Corporation Act, both Banking and Currency Committees: the
19 Committee in the House and the Committee in the Senate, were
20 specifically apprised of the fact that national banks were
21 engaging in this activity.

22 Now, if there were --

23 Q Would it bother you to tell a man who doesn't
24 know all about bank services, exactly what bank services --
25 precisely what bank services are involved?

1 A What --

2 Q This banking service company; what is it?

3 A What is a Bank Service Corporation?

4 Q What are they doing; yes. Then we can see who
5 the competitors are.

6 A Well, there is no bank service corporation
7 involved in the present case, Your Honor.

8 Q That's right, it's the banks. But what are the
9 bank services that are being performed that they object to?

10 A The bank services -- well, what they seek to
11 enjoin as being outside the scope of 24(7th) is the providing
12 of data processing services to the customers of the bank.

13 Q What are they data processing?

14 A You mean what kind of services?

15 Q Yes.

16 A Well, it would include, for example, putting a
17 company's payroll through a computer. It's the kind of record
18 and bookkeeping type of services which today are provided in
19 most up-to-date business establishments on an automatic basis.

20 Q That's precisely what's involved?

21 A That is correct. But getting back, if I may,
22 just for a minute, to the legislative history of the Bank
23 Service Corporation Act, isn't it reasonable to assume that
24 had there been this concern that Petitioners insist existed,
25 of regarding competition on the part of banks themselves,

1 and national banks in particular with data processing service
2 companies.

3 Section 4 would not have been cast as it is solely
4 in terms of the Bank Service Corporation, but would have em-
5 braced the banks as well. And in point of fact, Section 5 of
6 the Act does deal with banks in a completely, of course, un-
7 related context.

8 Now, we think it is very difficult for Petitioners
9 to seriously argue here that even though the statute which
10 they claim is being violated, and the only statute, the
11 National Bank Act, was not intended for their protection; and
12 they admit this, implicitly, at least; that they have standing
13 to complain of violations of the National Bank Act on the
14 basis of a statute which on its face does not apply to bank
15 service corporations.

16 Circumstances where the Congress, both Congressional
17 Committees were informed that banks were engaging in this
18 activity and not only does the Act not refer to banks in this
19 context, but there wasn't one single suggestion in the Com-
20 mittee Report of either Committee that this was an activity
21 that should be legislated against.

22 Q What was the original motive power that led to
23 the Bank Servicing Act.

24 A You mean the motivation for the Act?

25 Q Yes.

1 A It was considered in 1962, both by the Comp-
2 troller of the Currency and the Federal Reserve Board that a
3 bank was precluded -- absolutely precluded from owning stock
4 in another corporation. The purpose of the Bank Service
5 Corporation Act was to enable to invest in these bank service
6 corporations so that the banks -- particularly small ones --
7 could combine to obtain the advantage of -- among other
8 things, automated facilities, which individually they could
9 not have purchased.

10 The whole motivation of the Act, indeed, was to
11 provide an assistance to banks, not to impose any kind of
12 restrictions that are not already there. And I think that
13 Representative Multer, who is a senior member of the Banking
14 and Currency Committee really admonished against the kind of
15 approach which the Petitions advance here in a quotation
16 which appears in the amicus curiae brief of the American
17 Banker's Association on Page 12. I won't read the quote but
18 he specifically indicates that he wants to make it abundantly
19 clear that this bill was not intended to go outside of the
20 very language appearing in the bill and goes on to say that it
21 will not interfere with any authority now vested in banks
22 and that it simply sets up a new means by which individual
23 banks can acquire these additional services. And it was part
24 and parcel of the conferral of this benefit upon banks that
25 this restriction was put in which limits the Bank Service

1 Corporation to forming bank services for banks.

2 Q Now, what was the motivation for that Section
3 4. I had in mind what Judge Bailey Aldrich says about the
4 motivation. I haven't independently looked at the legislative
5 history but he -- at least it was very clear to him that that
6 motivation came from the National Society of Public Accoun-
7 tants who were afraid of the competition; who didn't want the
8 competition.

9 A It was initially spearheaded by that group but
10 I think that, if Your Honor pleases, that the actual motiva-
11 tion of the Congressional adoption of this provision was to
12 just get that Bank Service Corporation Act. It was in the
13 form of a compromise.

14 Q Well, but you compromise with what interests
15 on the other side?

16 A Well, I don't think there is any indication,
17 beyond Senator Proxmire, of an interest in data processing
18 companies but even so, the interest was reflected only in the
19 context of the activities of the Bank Service Corporation
20 itself.

21 Now, I wish to stress again that, as is set out in
22 somelength in the amicus brief of the American Banker's
23 Association, there have been several bills before the Congress
24 since 1962 in which there has been -- in connection with which
25 there has been a request, usually spearheaded by ADAPSO, that

1 there be a prohibition directly imposed upon banks with
2 respect to data processing service activities.

3 Another thing --

4 Q Has any Committee Report of the Congress said
5 in substance, what Congressman Multer said in the quote that
6 you referred to?

7 A Well, I think that the thrust of the Committee
8 Report -- I don't recall, Mr. Chief Justice, whether there is
9 a specific statement in the Committee Reports to that effect,
10 but the full thrust of the reports of two Houses -- majority
11 views, particularly -- I wish to stress that the Petitioners
12 here in the statement which they quote from supplemental
13 Minority views and even there it doesn't go into really the
14 matter of protection of competitors, but simply solvency.

15 The whole thrust, really of the Majority views of the
16 two committees is that this is an act which is designed to
17 legislate in the area of bank service corporations, and not in
18 any other area. And we think that it really is not an appro-
19 priate basis for carrying over this statute into another area
20 and allowing it to be used as a statutory aid standing to
21 question activity under a statute which was not intended to
22 protect the competitor who is bringing the charge.

23 Q Mr. Rosenthal, as I understood you in answer to
24 a question of Mr. Justice Harlan, you said that if the facts
25 of this case were that a bank service corporation was

1 performing these services for a hardware store directly, yet
2 that these Petitioners would still not have standing?

3 A No, Your Honor. I suggested that possibility.
4 All I meant to say was that that would be a much closer case.
5 There they well might be found to have standing and on the
6 other hand there was an argument at least, that they would
7 lack standing.

8 But that, again, I want to stress is a completely
9 different situation than the one which is before the Court
10 here, where they are not invoking as the basis --

11 Q The Bank Service Corporation Act; I understand
12 that.

13 A That's another statute.

14 I will only add, if the Court pleases, that for the
15 reasons that I have held in our brief we do not believe that
16 there is any reason why this Court should adopt the alterna-
17 tive suggestion of Petitioners that the rule of Armand,
18 Tennessee Power and Hardin be discarded.

19 We think that that rule does not, as Petitioners
20 suggest, we think the rule does not leave the public interest
21 unprotected. We think what it does do is leave it to the
22 Congress and appropriately so, to determine where the super-
23 intendants of administrative action should be in both circum-
24 stances where the claimant can point to the invasion of no
25 legally-protected right.

1 We think that fundamentally what the role is -- the
2 proper role of the Court is the guardian of legally-protected
3 rights and interests. I think that outside of that realm,
4 it is perfectly appropriate for Congress to make the decision
5 as to whether it wishes the Court to extend judicial review
6 to those who, like these Petitioners, can claim solely an
7 aggrieved fact.

8 Q Mr. Rosenthal, do you think Flast against
9 Cohen would have any bearing on this situation?

10 A Flast and Cohen, Mr. Justice Harlan, we believe
11 to be fully consistent with the standing basis upon which we
12 rely.

13 In Flast and Cohen this Court held that so far as
14 the Article III requirement of the case in controversy was
15 concerned, it was enough that there be a substantial personal
16 stake. But the Court there was confronted with a situation
17 where there was obviously a legal right involved. As the
18 Court construed the First Amendment an individual has a right
19 to legally-protected -- constitutionally-protected right to
20 be free from having his tax monies expended for or in the
21 furtherance of a religious purpose.

22 I would only add that in just last June this Court
23 in Jenkins versus McKeithen, the opinion of Mr. Justice
24 Marshall specifically indicated, referring to Flast against
25 Cohen, that something more than adversary interest is necessary

1 to confer standing. There must be, in addition, some connec-
2 tion between the official action challenged and some legally-
3 protected interest -- challenging that action.

4 And while Mr. Justice Marshall's opinion again was
5 for himself and two other justices, as we have read the con-
6 ccurring and dissenting opinions, there was no disagreement or
7 misinterpretation of Flast.

8 And we would submit, if the Court pleases, that in
9 this case Petitioners have not established the requisite
10 connection between the official action which they challenge and
11 the action of the Comptroller interpreting the National Bank
12 Act, some legally-protected interest which they possess.

13 But, insofar as the National Bank Act is concerned,
14 as they admit themselves, competitors have no legally-protected
15 interest.

16 For these reasons, we respectfully submit that the
17 judgment of the Court below should be affirmed.

18 MR. CHIEF JUSTICE BURGER: Thank you Mr. Rosenthal.

19 Mr. Gross you have about ten minutes.

20 REBUTTAL ARGUMENT BY BERT M. GROSS, ESQ.

21 ON BEHALF OF PETITIONERS

22 MR. GROSS: If the Court please, we cannot agree
23 that assuming that we have standing to challenge the action
24 of the wholly-owned subsidiary of a national bank that we do
25 not have standing to challenge the identical activity of the

1 National Bank itself. We think that that cuts the doctrine
2 of standing too finely.

3 As far as the legislative purpose of the Bank
4 Service Corporation Act, the Respondents have stated that we
5 only have Senator Proxmire's statements as to the purpose for
6 Section 4. But, of course, Senator Proxmire introduced this
7 section; he explicitly stated his reasons for doing so and it
8 was passed.

9 There is another statement which we have quoted in
10 a footnote in our brief at Page 33 and this is from Senator
11 Busch. Senator Busch said, "I join with the Senator; that is
12 Senator Proxmire, in support of the bill. I think the
13 Senator's amendment is well taken." I think it is advisable to
14 try this situation out at the bank level before we authorize
15 banks to go into competition with other service organizations
16 in providing the type of service contemplated here.

17 Q Then you are getting at the merits; aren't you?

18 A No, Senator Busch is saying again that we
19 should not authorize banks to go into competition. We're
20 presenting this only for a statement of the interest that was
21 trying to be protective -- that they were trying to protect the
22 competitive interests and this is what gives us standing. It
23 is the Congressional intent or purpose to protect competitive
24 interests, which gives us standing. And we do not go into the
25 merits at this time.

1 As far as reaching the merits of the case and the
2 question of whether or not the merits will ever be reached,
3 and who can reach the merits if we cannot; we frankly do not
4 think that the Comptroller of the Currency is an adequate
5 person to reach the merits of this situation.

6 Number one: he had already decided that the banks do
7 have authority under the statute. Secondly, and in a broader
8 sense, there have been recently in the Courts of Appeals, six
9 cases regarding entry by national banks into various areas of
10 business endeavor which have not previously been considered
11 traditional banking areas.

12 of
13 Now, /these six cases, four cases the Courts of
14 Appeals held standing; two they held no standing. Of the three
15 cases that actually reached the merits, two of the three held
16 that the bank action was illegal. In all these cases this
17 action was authorized by the Comptroller of the Currency. So,
18 on the merits the Comptroller is batting one out of three on
19 the legality of bank actions.

20 And on these terms, we think that judicial review is
21 needed and this is a traditional function of the Courts, to
22 decide the question of statutory interpretation.

23 For these reasons we repeat that we feel that we do
24 have standing in this case.

25 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Gross.
Thank you Mr. Rosenthal, for your submissions. The case is

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submitted.

(Whereupon, at 11:43 the argument in the
above-entitled matter was concluded)