Supplementary Material

Chapter 10: The Reagan Era—Judicial Power and Constitutional Authority

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Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)

The Endangered Species Act instructed each federal agency to consult with the Secretary of the Interior to insure that no federal project would jeopardize the existence of an endangered species. In 1978, the Fish and Wildlife Service determined that this requirement applied to actions taken outside the United States, but the Secretary of the Interior soon questioned that determination and the rule was eventually rescinded. Members of the Defenders of Wildlife environmental group sued the Secretary of the Interior (Manuel Lujan at the time of the Supreme Court's decision) in federal district court seeking to have the new rule (that act only applied to domestic projects) overturned. The district court dismissed the case on the grounds that the plaintiffs did not have standing to bring the suit, but a divided circuit court reversed that ruling. In a 7–2 decision, the U.S. Supreme Court reversed the circuit court, concluding that the environmentalists did not have standing to challenge the rule. In doing so, the Court set up higher hurdles for interest groups seeking judicial review of agency actions.

The ability of the plaintiffs to bring the suit was complicated by the fact that they were concerned with the potential consequences of future projects in foreign countries. Defenders of Wildlife offered several arguments for the standing of its members to sue, including a congressionally created "procedural injury" when the agencies failed to follow statutory guidelines for action, "injury in fact" from the harm that would be suffered by the loss of endangered wildlife, and "nexus" injuries in which the loss of a species would have secondary effects on the plaintiffs. Many supporters of the environmental statues preferred a broad reading of standing requirements, which would allow a range of interested parties to intervene in executive decisions before particular harms were evident. Critics were concerned that expansive standing rules would simply allow interested citizens with no particularized grievance to force judicial monitoring of executive decision making.

Why is the Court concerned about standing? What might be the difficulties of allowing any professor of ornithology to sue the Department of the Interior over how an endangered species of eagles is protected? Are the rules elaborated by the majority a mere "formality"? Could an individual unhappy with the Food and Drug Administration's handling of a cancer drug be able to sue the agency on the grounds that the individual might eventually get cancer and need the drug? If any judicial order is likely to have only a small effect on the causes of the plaintiff's injury, is a suit sustainable? What is the importance of redressability? Can the courts hear cases in which the judiciary is incapable of remedying the injury? How much control must the judiciary have over a potential remedy to the injury to create a legally cognizable case?

JUSTICE SCALIA delivered the opinion of the Court.

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While the Constitution of the United States divides all power conferred upon the Federal Government into "legislative Powers," Art. I, § 1, "the executive Power," Art. II, § 1, and "the judicial Power," Art. III, § 1, it does not attempt to define those terms. To be sure, it limits the jurisdiction of federal courts to "Cases" and "Controversies," but an executive inquiry can bear the name "case" (the Hoffa case) and a legislative dispute can bear the name "controversy" (the Smoot–Hawley controversy).

Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. . . . One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III—"serving to identify those disputes which are appropriately resolved through the judicial process,"—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. *Allen v. Wright* (1984).

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. . . .

. . . . When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.

. . . . Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their "'special interest' in the subject." . . .

With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members—Joyce Kelly and Amy Skilbred. . . . Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and "observed the habitat" of "endangered species such as the Asian elephant and the leopard" at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she "was unable to see any of the endangered species"; "this development project," she continued, "will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited . . . [, which] may severely shorten the future of these species"; that threat, she concluded, harmed her because she "intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard." When Ms. Skilbred was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that "I intend to go back to Sri Lanka," but confessed that she had no current plans: "I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future."

We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species—though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce "imminent" injury to Mses. Kelly and Skilbred. That the women "had visited" the areas of the projects before the projects commenced proves nothing. As we have said in a related context, "'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" . . . And the affiants' profession of an "intent" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the "actual or imminent" injury that our cases require.

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Respondents' other theories are called, alas, the "animal nexus" approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the "vocational nexus" approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not "an ingenious academic exercise in the conceivable," but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. . . . It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.

Besides failing to show injury, respondents failed to demonstrate redressability. Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. . . .

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. . . . The short of the matter is that redress of the only injury in fact respondents complain of requires action (termination of funding until consultation) by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action.

A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. . . .

The Court of Appeals found that respondents had standing for an additional reason: because they had suffered a "procedural injury." The so-called "citizen-suit" provision of the ESA provides, in pertinent part, that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter." The court held that, because § 7(a)(2) requires interagency consultation, the citizen-suit provision creates a "procedural right" to consultation in all "persons"—so that anyone can file suit in federal court to challenge the Secretary's (or presumably any other official's) failure to follow the assertedly correct consultative procedure, notwithstanding his or her

inability to allege any discrete injury flowing from that failure. . . . [T]he court held that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental "right" to have the Executive observe the procedures required by law. We reject this view.

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy. . . .

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. . . . Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches. "The province of the court," as Chief Justice Marshall said in *Marbury v. Madison* (1803), "is, solely, to decide on the rights of individuals." Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. . . . To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed." It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "'virtually continuing monitors of the wisdom and soundness of Executive action.'" We have always rejected that vision of our role. . . .

Nothing in this contradicts the principle that "the . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" . . . As we said in *Sierra Club v. Morton* (1972), "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." . . .

Reversed.

JUSTICE KENNEDY, with whom JUSTICE SOUTER joins, concurring in part.

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While it may seem trivial to require that Mses. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, nor do the affiants claim to have visited the sites since the projects commenced. . . . I am not willing to foreclose the possibility, however, that in different circumstances a nexus theory similar to those proffered here might support a claim to standing. . . .

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. . . . As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission. . . . In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. . . . In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements,

because while the statute purports to confer a right on "any person . . . to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter," it does not of its own force establish that there is an injury in "any person" by virtue of any "violation."

The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that "the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United* (1982). In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.

An independent judiciary is held to account through its open proceedings and its reasoned judgments. In this process it is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied. The concrete injury requirement helps assure that there can be an answer to these questions; and, as the Court's opinion is careful to show, that is part of the constitutional design.

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JUSTICE STEVENS, concurring in the judgment.

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In my opinion a person who has visited the critical habitat of an endangered species has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction. Congress has found that a wide variety of endangered species of fish, wildlife, and plants are of "aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." Given that finding, we have no license to demean the importance of the interest that particular individuals may have in observing any species or its habitat, whether those individuals are motivated by esthetic enjoyment, an interest in professional research, or an economic interest in preservation of the species. . . .

The Court nevertheless concludes that respondents have not suffered "injury in fact" because they have not shown that the harm to the endangered species will produce "imminent" injury to them. I disagree. An injury to an individual's interest in studying or enjoying a species and its natural habitat occurs when someone (whether it be the Government or a private party) takes action that harms that species and habitat. In my judgment, therefore, the "imminence" of such an injury should be measured by the timing and likelihood of the threatened environmental harm, rather than . . . by the time that might elapse between the present and the time when the individuals would visit the area if no such injury should occur.

To understand why this approach is correct and consistent with our precedent, it is necessary to consider the purpose of the standing doctrine. Concerned about "the proper—and properly limited—role of the courts in a democratic society," we have long held that "Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party." *Warth v. Seldin* (1975). The plaintiff must have a "personal stake in the outcome" sufficient to "assure that concrete adverseness

which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." For that reason, "abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. . . . The injury or threat of injury must be both 'real and immediate,' not 'conjectural,' or 'hypothetical.'" . . .

Consequently, we have denied standing to plaintiffs whose likelihood of suffering any concrete adverse effect from the challenged action was speculative. . . . In this case, however, the likelihood that respondents will be injured by the destruction of the endangered species is not speculative. If respondents are genuinely interested in the preservation of the endangered species and intend to study or observe these animals in the future, their injury will occur as soon as the animals are destroyed. Thus the only potential source of "speculation" in this case is whether respondents' intent to study or observe the animals is genuine. . . .

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[As for redressability, we] must presume that if this Court holds that § 7(a)(2) requires consultation, all affected agencies would abide by that interpretation and engage in the requisite consultations. . . . Moreover, if Congress has required consultation between agencies, we must presume that such consultation will have a serious purpose that is likely to produce tangible results. . . .

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[A] reading of the entire statute persuades me that Congress did not intend the consultation requirement in § 7(a)(2) to apply to activities in foreign countries. Accordingly, notwithstanding my disagreement with the Court's disposition of the standing question, I concur in its judgment.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, dissenting.

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To survive petitioner's motion for summary judgment on standing, respondents need not prove that they are actually or imminently harmed. They need show only a "genuine issue" of material fact as to standing. . . . This is not a heavy burden. A "genuine issue" exists so long as "the evidence is such that a reasonable jury could return a verdict for the nonmoving party [respondents]." . . .

Were the Court to apply the proper standard for summary judgment, I believe it would conclude that the sworn affidavits and deposition testimony of Joyce Kelly and Amy Skilbred advance sufficient facts to create a genuine issue for trial. . . .

I think a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the "actual or imminent" injury standard. . . . A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. . . .

By requiring a "description of concrete plans" or "specification of when the some day [for a return visit] will be," ante, at 564, the Court, in my view, demands what is likely an empty formality. No substantial barriers prevent Kelly or Skilbred from simply purchasing plane tickets to return to the Aswan and Mahaweli projects. This case differs from other cases in which the imminence of harm turned largely on the affirmative actions of third parties beyond a plaintiff's control. . . .

I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code-pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm. . . .

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I have difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims. As I understand it, environmental plaintiffs are under no special constitutional standing disabilities. Like other plaintiffs, they need show only that the action they challenge has injured them, without necessarily showing they happened to be physically near the location of the alleged wrong. The Court's decision today should not be interpreted "to foreclose the possibility . . . that in different circumstances a nexus theory similar to those proffered here might support a claim to standing."

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. . . . Respondents have raised at least a genuine issue of fact that the projects harm endangered species and that the actions of AID and other United States agencies can mitigate that harm.

. . . . I do not share the plurality's astonishing confidence that, on the record here, a factfinder could only conclude that AID was powerless to ensure the protection of listed species at the Mahaweli project.

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The Court expresses concern that allowing judicial enforcement of "agencies' observance of a particular, statutorily prescribed procedure" would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.

Under the Court's anachronistically formal view of the separation of powers, Congress legislates pure, substantive mandates and has no business structuring the procedural manner in which the Executive implements these mandates. To be sure, in the ordinary course, Congress does legislate in black-and-white terms of affirmative commands or negative prohibitions on the conduct of officers of the Executive Branch. In complex regulatory areas, however, Congress often legislates, as it were, in procedural shades of gray. That is, it sets forth substantive policy goals and provides for their attainment by requiring Executive Branch officials to follow certain procedures, for example, in the form of reporting, consultation, and certification requirements.

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Congress legislates in procedural shades of gray not to aggrandize its own power but to allow maximum Executive discretion in the attainment of Congress' legislative goals. . . . The Court never has questioned Congress' authority to impose such procedural constraints on Executive power. Just as Congress does not violate separation of powers by structuring the procedural manner in which the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures.

To prevent Congress from conferring standing for "procedural injuries" is another way of saying that Congress may not delegate to the courts authority deemed "executive" in nature. . . . Here Congress seeks not to delegate "executive" power but only to strengthen the procedures it has legislatively mandated. . . .

Ironically, this Court has previously justified a relaxed review of congressional delegation to the Executive on grounds that Congress, in turn, has subjected the exercise of that power to judicial review. *INS v. Chadha* (1983). The Court's intimation today that procedural injuries are not constitutionally cognizable threatens this understanding upon which Congress has undoubtedly relied. In no sense is the Court's suggestion compelled by our "common understanding of what activities are appropriate to legislatures, to executives, and to courts." In my view, it reflects an unseemly solicitude for an expansion of power of the Executive Branch.

It is to be hoped that over time the Court will acknowledge that some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty. . . .

In short, determining "injury" for Article III standing purposes is a fact-specific inquiry. . . . There may be factual circumstances in which a congressionally imposed procedural requirement is so insubstantially connected to the prevention of a substantive harm that it cannot be said to work any conceivable injury to an individual litigant. But, as a general matter, the courts owe substantial deference to Congress' substantive purpose in imposing a certain procedural requirement. . . . There is no room for a per se rule or presumption excluding injuries labeled "procedural" in nature.

In conclusion, I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. In my view, "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison* (1803).