Cases that Shaped the Federal Courts

Lujan v. Defenders of Wildlife

1992

Justice Antonin Scalia

Federal Judicial Center
2020

Central Question

Could an environmental organization sue the federal government to challenge a regulation regarding protected species?

Historical Context

Rachel Carson's 1962 book, *Silent Spring*, which criticized the use of pesticides and eventually led to the ban of the dangerous chemical compound DDT, helped to set the stage for the modern environmental movement in the United States. With public awareness of environmental threats on the rise, the federal government in the 1960s regulated environmentally harmful activity with a newfound aggressiveness. The Clean Air Act of 1963 was quickly followed by the Water Quality Act of 1964 and the Motor Vehicle Pollution Act of 1965. Public activism culminated in the first Earth Day—a nationwide event in which an estimated 20 million people demonstrated in favor of greater environmental protection—on April 22, 1970.

Congress passed a bill, signed into law by President Richard Nixon in 1970, creating the Environmental Protection Agency. The establishment of the EPA led to a substantial increase in federal environmental regulation. One of the most significant acts that followed was the Endangered Species Act of 1973, aimed at the protection of fish, wildlife, and plant species threatened with extinction. The Act required the Secretary of the Interior to determine which species were endangered and to make regulations to protect those species. The *Lujan* case arose from a dispute over one such regulation and whether an environmental organization could sue in federal court to challenge its validity.

Legal Debates Before *Lujan*

The *Lujan* case addressed the issue of standing, a requirement that plaintiffs be the proper parties to bring the lawsuit in question. Generally speaking, standing exists if the plaintiff has a sufficient stake in a case to make the matter adversarial. If a plaintiff is found to lack standing to bring suit, there is no genuine "case or controversy" before the court as Article III of the Constitution requires, and the matter will not be heard. Standing is therefore one element of justiciability—the determination of whether a particular matter is an appropriate one to be resolved by a court of law.

Supreme Court jurisprudence on standing began to develop approximately seventy years prior to *Lujan*. Justice Louis Brandeis, and later, Justice Felix Frankfurter, supported the emerging regulatory state and believed that courts should defer, whenever possible, to the acts of democratically elected legislatures. Between the 1920s and the 1940s, these principles were manifested in decisions denying individual plaintiffs the ability to sue to

challenge federal legislation on constitutional grounds. Although the term "standing" was not yet used, these decisions rested on findings that the plaintiffs could not allege that their common-law rights had been violated or that a specific statute granted them the right to sue.

In 1946, Congress attempted to codify existing law on standing to sue the federal government by enacting the Administrative Procedure Act. The Act allowed plaintiffs to challenge the action of a federal regulatory agency if they had suffered a "legal wrong"—such that an interest protected by the common law or a statute was at stake—or if a "relevant statute" conferred standing upon them by authorizing those "adversely affected or aggrieved" to sue. The courts interpreted the APA standard broadly, particularly in the 1960s, frequently allowing challenges to regulatory action by those meant to be beneficiaries of the regulatory programs in question.

The Supreme Court made an influential shift in standing doctrine when it decided *Association of Data Processing Organizations v. Camp* in 1970. The standard the Court articulated took the focus away from the question of whether Congress had created a right to sue, and turned it toward the facts of the specific case at hand. Standing would exist for those who had suffered "injury in fact, economic or otherwise," and whose injury was "within the zone of interests" of the regulatory statute in question. *Data Processing* made it substantially more difficult for a plaintiff to challenge regulatory action by requiring a showing of actual injury rather than a mere threat to a legally protected interest. Many attorneys and scholars criticized the opinion, believing that the Court had interpreted the APA more narrowly than Congress had intended. In their view, the APA's use of the phrase "adversely affected or aggrieved" had been intended to confer standing upon citizens to enforce certain regulatory programs even if they had not suffered a specific injury in fact.

In later cases, the Supreme Court refined its determination of what constituted an injury in fact sufficient to confer standing. The plaintiff was required to show that the injury was attributable to the defendant and that the injury would be redressed by the relief sought in court. In one case, for example, indigent plaintiffs who had been denied care at a hospital sued the state over a change in tax policy that reduced hospitals' incentives to provide such care. The Court found that the plaintiffs lacked standing because they could not show that the denial of care was necessarily a result of the policy change and not based on other factors. In another case, a mother was found to lack standing to sue a local prosecutor on the grounds that he had failed to prosecute the child's father for not paying child support. A decision in her favor, the Court ruled, would not necessarily result in the payment of child support, because the father might be incarcerated rather than meet his financial obligation.

In 1984, the Court decided *Allen v. Wright*, which was an important precursor to the *Lujan* case. In *Allen*, the Court made an explicit link, for the first time, between the

concept of standing and the separation of powers. The plaintiffs, parents of African American schoolchildren, alleged that the Internal Revenue Service had not properly enforced a ban on certain tax deductions for racially segregated private schools. The Court denied standing on the basis that enforcement of the tax policy would not directly benefit the plaintiffs. Alleging a violation of federal law was not in and of itself a basis for bringing a suit against the government, the Court ruled. Moreover, the Court noted, allowing suits such as *Allen* would make the federal courts "virtually continuing monitors of the wisdom and soundness of Executive action," and would intrude on the President's constitutional responsibility to ensure the execution of federal law. These concerns reappeared in the *Lujan* case.

The Case

The *Lujan* case involved a dispute over the application of a regulation made to implement the Endangered Species Act of 1973. The Act provided that if a federal agency planned to do something that might harm an endangered species, it must first consult with the Secretary of the Interior. A 1978 regulation provided that the consultation requirement applied to actions agencies took both within the United States and abroad. A 1986 revision, however, limited the regulation to domestic activities.

In response to the revised regulation, several environmental organizations sued the Secretary of the Interior, asking a federal court to declare that the Endangered Species Act's consultation requirement must apply to foreign as well as domestic activities. The U.S. District Court for the District of Minnesota dismissed the case, finding that the plaintiffs lacked standing to bring suit. The U.S. Court of Appeals for the Eighth Circuit disagreed, reversing the dismissal and sending the case back to the district court. Both sides moved for summary judgment (a ruling deciding the case solely on the legal issues, when the facts are not in dispute), which the district court granted in favor of the plaintiffs, ordering the Secretary to revise the regulation accordingly. The Eighth Circuit affirmed the judgment, and the Secretary appealed to the Supreme Court of the United States.

The Supreme Court's Ruling

The Supreme Court reversed the judgment of the Eighth Circuit, ruling that the environmental organizations did not have standing to challenge the federal regulation at issue. As a result, the Court held, the trial court should have granted summary judgment in favor of the defendant. The vote to reverse was 7–2; six justices joined the majority opinion, written by Justice Antonin Scalia, except for one section which received a plurality of four votes (making the reasoning of that section less significant for precedential purposes).

Three justices wrote separate opinions concurring in the judgment, and one justice wrote a dissenting opinion.

The first portion of the Court's opinion dealt with the question of whether the plaintiffs' claims, if true, would establish that they had been or would imminently be injured by the government's regulation. Justice Scalia noted that making claims sufficient to establish standing was much more difficult in cases where the challenged government action was aimed at someone or something other than the plaintiffs themselves. The plaintiffs in *Lujan* alleged that the revised regulation—eliminating the consultation requirement for federal projects overseas—would result in increased extinction rates for endangered species. Two members of the Defenders of Wildlife organization alleged that they had traveled to habitats of endangered crocodiles in Egypt and endangered elephants and leopards in Sri Lanka, respectively. Both claimed a desire to return to observe those animals, which might be rendered impossible if the challenged regulation were not altered and the species became extinct as a result of proposed government projects.

The Court found these allegations insufficient to show that the plaintiffs would be "imminently" injured, even if the endangered species were placed at greater risk. Justice Scalia's opinion emphasized that, while the plaintiffs had claimed a general desire to return to Egypt and Sri Lanka, they had made no actual plans to do so, making any future injury too vague and uncertain to be rectified in court. The opinion also rejected three alternative theories for environmental standing—injuries to those using any part of a "contiguous ecosystem" adversely affected by a government activity; to those anywhere in the world with an interest in seeing or studying an endangered species so affected; and to those with a professional interest in species so affected. All of these broad concepts of standing, Justice Scalia wrote, were "beyond all reason," and involved no "factual showing of perceptible harm."

The one section of the opinion that received only a plurality of four votes addressed an additional aspect of standing—whether the plaintiffs' injuries, if proven, would be redressed by the relief they sought. Rather than challenging the funding of the specific government projects they opposed, the plaintiffs had elected to contest the rule regarding consultation, a more abstract and generalized basis for complaint. Ordering the Secretary of the Interior to change the regulation would only provide relief to the plaintiffs if it would actually result in consultation with respect to the specific projects at issue, something the plurality found to be uncertain. The lack of redressability, the plurality held, would have deprived the plaintiffs of standing even if they had alleged an actual or imminent injury.

In the last section of the opinion, the Court turned to the "citizen suit" provision of the Endangered Species Act, which purported to allow "any person" to bring suit based on a violation of the statute. In the view of the Eighth Circuit, this provision had created a "procedural right" regarding the consultation requirement, so that anyone could sue to

enforce it. The Court rejected the concept of standing based on such a procedural right. A plaintiff with "a generally available grievance about government," the resolution of which would benefit the public at large rather than the plaintiff in particular, was not entitled to bring a suit in federal court. Moreover, to grant the pubic a general right to sue to force government officials to comply with the law raised separation-of-powers issues by transferring to the judiciary the President's duty to "take Care that the Laws be faithfully executed." The most significant aspect of the *Lujan* decision was that it placed considerable constraints on the ability of Congress to confer standing by statutory enactment.

Justice Anthony Kennedy filed a concurring opinion in which he agreed that the plaintiffs had not shown an actual or imminent injury, but declined to join Justice Scalia's opinion on redressability. Kennedy went on to say, however, that while there must be "an outer limit to the power of Congress to confer rights of action," the increasing complexity of litigation made it necessary to remain open to the possibility that Congress could, under the right circumstances, create "a case or controversy where none existed before."

Justice John Paul Stevens concurred in the Court's reversal of the judgment in favor of the plaintiffs, but only because he did not believe that Congress had intended the consultation requirement to apply to agency actions in foreign nations. He disagreed with the majority on the issue of standing. "[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," he wrote. The injury to such a plaintiff would not be speculative, but would occur at the moment that species became extinct.

Justice Harry Blackmun wrote a dissenting opinion, joined by Justice Sandra Day O'Connor, in which he called the Court's decision "a slash-and-burn expedition through the law of environmental standing." Blackmun believed that the majority had held the plaintiffs to an excessively high standard on the standing issue. To avoid having their case dismissed on the legal issues without a trial, he asserted, the plaintiffs needed only to raise a "genuine issue" of material fact, but the majority had ignored this relatively low standard by weighing the evidence in order to determine the truth of the matter. Under the less rigorous standard, Blackmun felt that the plaintiffs had made allegations sufficient to confer standing. "I think a reasonable finder of fact," Blackmun wrote, "could conclude from the information in the affidavits and deposition testimony that either [of the plaintiffs] will soon return to the project sites, thereby satisfying the 'actual or imminent' injury standard." Blackmun vehemently disagreed with the majority's suggestion that the plaintiffs were required to present concrete plans to return, asserting that such a requirement would only lead courts to "demand more and more particularized showings of future harm."

Aftermath and Legacy

The *Lujan* decision proved to be controversial, drawing criticism from scholars who believed that it unduly narrowed standing doctrine and encroached on the power of Congress to create legal rights that could be enforced in federal court. Curtailing citizen suits, many feared, would make regulatory reform more difficult. Environmental organizations worried that the decision's strict standard for what amounted to a direct and particularized injury would severely limit their ability to bring suits against the government for violations of environmental laws.

In 2000, the Supreme Court issued another environmental standing decision, *Friends of the Earth v. Laidlaw Environmental Services*, and reached a different result. In that case, environmental protection groups sued an alleged river polluter pursuant to the citizen suit provision of the Clean Water Act. In addressing whether the plaintiffs had standing to sue, the Court applied the same test it had used in *Lujan*, requiring a concrete actual or imminent injury to the plaintiff that could be shown to have been caused by the defendant and which would be redressed by the relief sought. In *Laidlaw*, however, the Court determined that the plaintiffs had met all of these requirements and therefore had standing.

Individual members of the plaintiff organizations had alleged that they wished to hike, picnic, camp, fish, swim, and boat on or near the river, but could not do so because of the unpleasant appearance and smell of the river and the fear of harmful pollutants. Others claimed that they wished to buy homes near the river and could not, or that the value of their existing homes had been damaged because of the pollution. The Court found these allegations sufficient to establish a concrete injury in fact. The plaintiffs' expressed desire to utilize the river was distinguishable, the Court noted, from the indefinite "'some day' intentions" of the *Lujan* plaintiffs to visit foreign wildlife habitats. Because the plaintiffs had alleged specific injuries rather than a general violation of the law, they could rely on the citizen suit provision of the Clean Water Act in bringing the action.

In a significant 2007 case, *Massachusetts v. Environmental Protection Agency*, the state of Massachusetts was held to have standing to seek judicial review of the EPA's failure to regulate greenhouse gases pursuant to the Clean Air Act. Although Congress had authorized such a suit, the Court noted that the plaintiff was nevertheless required to allege a concrete and particularized injury pursuant to *Lujan*. The Court found the threat of greenhouse gas emissions sufficiently concrete, based in part on the fact that Massachusetts was a sovereign state with special interests in protecting its citizens and its natural environment. Activists cited the *Massachusetts* case as a landmark development for environmental regulation.

Discussion Questions

- How does the concept of establishing standing differ from proving a case on the merits?
- What are the reasons for the requirement of standing?
- Should a plaintiff be able to sue to challenge government action that may harm everyone in general and not the plaintiff in particular? Why or why not?
- Should there be limits on the ability of Congress to authorize citizen lawsuits to enforce federal statutes? Why or why not?
- Should the rules about standing be different in environmental cases? Why or why not?

Documents

Supreme Court of the United States, Opinion in *Lujan v. Defenders of Wildlife*, June 12, 1992

In Lujan*, the Supreme Court tightened the requirements for environmental standing. The plaintiffs' expressed desire to return to the habitats of endangered species at an indefinite future time was found to be insufficient to show an imminent injury arising from the government regulation at issue. The Court also rejected standing under the citizen suit provision of the Endangered Species Act, holding that those with general grievances about government lacked the right to sue.*

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 . . . th[e] 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." …

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. 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.… Thus, when the plaintiff is not himself the object of the government action or

inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.…

Respondents' claim to injury is that the lack of consultation with respect to certain funded activities abroad "increas[es] the rate of extinction of endangered and threatened species." 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 th[e] 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. Kelly stated that she traveled to Egypt in 1986 and "observed the traditional habitat of the endangered nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly," and that she "will suffer harm in fact as the result of [the] American … role … in overseeing the rehabilitation of the Aswan High Dam on the Nile … and [in] develop[ing] … Egypt's … Master Water Plan." … Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and "observed th[e] 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 "inten[t]" 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.…

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 righ[t]" 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.… To understand the remarkable nature of this holding one must be clear about what it does *not* rest upon: This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e. g., the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them). Nor is it simply a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff. Rather, the 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.…

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," Art. II, § 3. 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[.]

Document Source: *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–64, 571–74, 577 (1992).

Justice Anthony Kennedy, Concurring Opinion in *Lujan v. Defenders of Wildlife*, June 12, 1992

Justice Anthony Kennedy agreed with the majority of the Court that the plaintiffs in Lujan *had not shown an injury sufficient to give them standing to sue. His concurring opinion stressed that the actual injury requirement was a crucial part of the Article III design that federal courts hear only genuine "cases or controversies," that is, matters that were adversarial. Having said that, Kennedy recognized that Congress had the power to define injuries in a way that would create "a case or controversy where none existed before." The Court cited this language in its 2007 decision in* Massachusetts v. Environmental Protection Agency*, in which it found the state to have standing to sue the EPA over its failure to regulate greenhouse gas emissions.*

Although I agree with the essential parts of the Court's analysis, I write separately to make several observations.

I agree with the Court's conclusion in Part III-A that, on the record before us, respondents have failed to demonstrate that they themselves are "among the injured." …

I also join Part IV of the Court's opinion [regarding the "citizen suit" provision of the Endangered Species Act] with the following observations. 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, *Marbury v. Madison*, 1 Cranch 137 (1803), or Ogden seeking an injunction to halt Gibbons' steamboat operations, *Gibbons v. Ogden*, 9 Wheat. 1 (1824). 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." … 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.

Document Source: *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 579–81 (1992).

Linda Greenhouse, *The New York Times*, June 13, 1992

An article by New York Times *Supreme Court reporter Linda Greenhouse helped to put the* Lujan *decision in its larger context. The case occurred at a time when environmental lawsuits were becoming increasingly frequent, but represented a continuance of a trend whereby the Court was narrowing the circumstances under which the government could be sued.*

The Supreme Court today dismissed a challenge to the Interior Department's interpretation of the Endangered Species Act, ruling that the environmental group that brought the challenge was not sufficiently injured by the policy to be entitled to file a lawsuit.

In limiting its decision to the issue of legal standing to sue, the Court did not take a position on the substantive question in the case: the validity of a regulation issued during the Reagan Administration that limits the reach of an important provision of the Endangered Species Act to within the United States.

The regulation, which the Bush Administration supports, rejects the original interpretation by the Carter Administration, which required all Federal agencies to insure that no endangered or threatened species would be harmed by Federal activities overseas.

The decision today, written by Justice Antonin Scalia, left the Reagan Administration regulation open to challenge in a later lawsuit, if requirements for legal standing are met.

At the same time, the Court made clear that the lower Federal courts are to apply the rules of legal standing rigorously. Justice Scalia said that the courts should not permit lawsuits challenging a Government policy unless those bringing the challenge can show that the policy is "likely" to cause them direct and imminent injury.

The Court's decision on standing, supported by a 6-to-3 vote, applies to suits against Government policies generally and is not limited to the environmental area. But the long-running legal debate over standing has been particularly vigorous in the field of environmental regulation.

The environmental policies adopted during the Reagan and Bush Administrations have spawned many lawsuits, and those bringing the challenges often lack the direct economic interests that would automatically confer standing to sue. Obstacles to standing on the part of those who can claim little more than a general aesthetic or scientific concern could have the effect of making Administration policies of this sort unreviewable by Federal courts.

The Supreme Court has been cutting back on standing in environmental cases, and today's decision was a continuation of that trend. The majority's tone was notably hostile in its rejection of the concept of standing based on "procedural injury," an idea accepted by the lower court in this case to permit lawsuits by those who had not themselves suffered any concrete harm from the Government policy they were challenging.

Justice Scalia said that even if Congress opens the door to lawsuits of this sort through the inclusion of "citizen suit" provisions, such as a provision in the 1973 Endangered Species Act, the Federal courts would be barred from hearing such cases under Article III of the Constitution, which limits the jurisdiction of the Federal courts to concrete "cases" and "controversies." …

Both the standing issue in the case and the underlying dispute about the Endangered Species Act had attracted widespread interest in the environmental community. Lawyers for environmental groups predicted today that the challenge to the regulation was likely to be renewed in a lawsuit designed to overcome the hurdles that the Court established today. But they said that given the Court's mood and the Bush Administration's willingness to press the standing issue, the long-term outlook was unfavorable.

"This is one more nail in the coffin of citizen standing," said Robert Houseman, a lawyer for the Center for International Environmental Law, which filed a brief in the case.

The decision, Lujan v. Defenders of Wildlife, No. 90-1424, overturned a 1990 ruling by the United States Court of Appeals for the Eighth Circuit, in St. Louis. That court had granted standing to an environmental group, Defenders of Wildlife, to challenge the regulation limiting the Endangered Species Act to domestic projects.

The appeals court then found the regulation invalid and ordered the Interior Department to issue a new one that applied the law overseas. The Bush Administration appealed to the Supreme Court, both on the issue of standing and on the validity of the regulation.

Justice Scalia's majority opinion was joined by Chief Justice William H. Rehnquist and by Justices Byron R. White, Anthony M. Kennedy, David H. Souter and Clarence Thomas.

Justice John Paul Stevens concurred in the outcome of the case because, he said, he believed the Endangered Species Act was not intended to apply overseas. However, he disagreed with the decision on legal standing.…

Justice Harry A. Blackmun filed a dissenting opinion that was joined by Justice Sandra Day O'Connor. They said they would not join what they called "a slash-and-burn expedition through the law of environmental standing."

Defenders of Wildlife supported its claim to standing with affidavits of two members, who had visited areas in Egypt and Sri Lanka where Federal funds were being used for large public works projects. The two members said the projects posed threats to the habitats of several endangered species. They said they planned to return to the areas at some time in the future and would be injured by not being able to see the animals.

In his majority opinion, Justice Scalia said: "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."

Document Source: Linda Greenhouse, "Court Limits Legal Standing in Suits," *New York Times*, June 13, 1992, p. 12.

David G. Savage, *Los Angeles Times*, June 13, 1992

A Los Angeles Times *article on the* Lujan *decision provided further background on the case. The case was cited as an example of deference to the executive branch on the part of the Supreme Court under Chief Justice William Rehnquist.*

Rejecting a challenge by wildlife experts, the Supreme Court upheld a Bush Administration policy Friday that keeps the Endangered Species Act from being applied to U.S.-funded projects overseas.

The 7-2 decision is a victory for the President and his attorneys, but it came at an inopportune time: the day Bush arrived at the Earth Summit in Brazil to fend off criticism of his environmental record.…

In 1989, the Interior Department listed 1,046 animal species as endangered or threatened, 507 of which lived entirely outside the United States.

The ruling again appeared to indicate that the Rehnquist Court is inclined to defer to the wishes of the executive branch rather than Congress.…

Environmentalists quickly condemned the ruling.

"This is a disaster," said Brian O'Neill, a Minneapolis environmental lawyer. "It says the Administration can thumb its nose at Congress, and it makes it nearly impossible to get into court to do anything about it."

In defending the policy, Bush Administration lawyers argued that the United States should not use aid funds to try to force "a sort of land-use planning policy" on Third World nations.

At issue was the reach of the Endangered Species Act of 1973. In that measure, Congress set forth "the commitment of the United States to the worldwide protection of endangered species." The law requires federal agencies to "insure that any action authorized, funded, or carried out … is not likely to jeopardize the continued existence of any endangered species." …

During its first decade, the law was read by federal officials as applying to U.S.-funded projects both here and abroad. Environmentalists said the interagency consultations often resulted in modifying development projects so as to protect the habitats of endangered animals.

But in 1983, Interior Secretary James Watt, a Reagan appointee, proposed a change in policy. From that point on, he said, the Act will not apply to American efforts beyond U.S. borders.

When that policy became final in 1986, several wildlife experts, members of the Defenders of Wildlife, filed a citizen suit in a federal court in Minnesota.

Members of Defenders of Wildlife said dam projects aided with U.S. funds threatened the Nile crocodile in Egypt and elephant and leopard habitat in Sri Lanka.

Acting on the lawsuit, a federal appeals court in 1990 denounced the Administration's "radical shift" in policy and said it should be revoked. "We believe the Act, viewed as a whole, clearly demonstrates congressional commitment to worldwide conservation efforts," the three-judge panel said.

Bush Administration lawyers appealed and the Supreme Court reversed the decision Friday in Lujan v. Defenders of Wildlife, 90-1424.

Document Source: David G. Savage, "Court Upholds Bush Wildlife Policy Limits," *Los Angeles Times*, June 13, 1992, pp. 35, 56.

Cass R. Sunstein, *Michigan Law Review*, 1992

Constitutional scholar Cass Sunstein of the University of Chicago Law School and Department of Political Science discussed the implications of Lujan *in a law review article published shortly after the decision. He argued that the case did not mark a fundamental shift in the law of environmental standing, because plaintiffs who could make a showing that they used the resources in question would still be able to sue. This prediction was borne out by the Supreme Court's 2000 decision in* Laidlaw. *On the other hand,* Lujan *prohibited "pure" citizen suits, in which no particularized injury could be shown.*

Lujan settled some important questions. But it left many issues open, and it raised at least as many new ones. The future looks particularly murky in light of Justice Kennedy's concurring opinion, which refused to join the plurality on redressability, questioned any focus on the common law as the exclusive source of injury, and suggested relatively broad congressional power on the issues of injury and causation.…

The *Lujan* opinion does not reject a number of cases in which courts have given standing to environmental plaintiffs. On the contrary, it expressly endorses many such cases, even when the plaintiff is complaining that the executive has taken inadequate action to enforce the law. To this extent, the invalidation of the citizen suit allows a good deal of room for private litigants—regulatory beneficiaries—to initiate proceedings against the executive branch. The case therefore introduces some uncertainty into the law, but it probably does not work any fundamental shift in the environmental area.

The Court thus makes clear that, if an environmental plaintiff can show that its members use the particular environmental resource that is at risk, standing is available. It follows, for example, that a citizen in New York could, post-*Lujan*, complain about the

failure to enforce clean air or clean water requirements in New York. The Court suggests as much by invoking the Japan Whaling case to show that an environmental organization could complain of excessive whale harvesting when the "whale watching and studying of their members w[ould] be adversely affected by continued whale harvesting." The Court also says that a citizens' council has standing to bring suit to challenge environmentally harmful construction in the area where its members live.

It also remains clear that some procedural injuries can produce standing under Article III. The Court writes:

> This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g., the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them).

A citizen can thus complain about a failure to prepare an environmental impact statement (EIS) even though it is "speculative" whether the statement will cause the project to be abandoned.…

Perhaps the Court is endorsing Justice Kennedy's suggestion that "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." More deeply, however, I think that the Court's conclusion on this point exemplifies several of the problems associated with the whole notion of redressability. A procedural right is created, not because it necessarily yields particular outcomes, but because it structures incentives and creates pressures that Congress has deemed important to effective regulation. The same is true for the sorts of interests at stake in the ESA and in many other environmental statutes. Congress is attempting not to dictate outcomes but to create procedural guarantees that will produce certain regulatory incentives. Redressability in the conventional sense is irrelevant.

This point might well have arisen in *Lujan* itself. Even though it did not, the opinion makes clear that procedural harms remain cognizable when ordinary injuries are involved, despite the absence of redressability.…

Thus far I have explained the types of suits *Lujan* has left untouched. But it is equally clear that *Lujan* forecloses "pure" citizen suits. In these suits, a stranger with an ideological or law-enforcement interest initiates a proceeding against the government, seeking to require an agency to undertake action of the sort required by law. Many environmental statutes now allow such actions, and plaintiffs have brought many suits of this kind. Under *Lujan*, these suits are unacceptable. Congress must at a minimum "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." If

Congress has simply given standing to citizens, this requirement has not been met. The plaintiff must point to a concrete injury, not merely to a congressional grant of standing.…

The discussion thus far has focused to a large extent on changes in the law of injury in fact. *Lujan* extends this change, placing a renewed emphasis on the notion that the harm must be imminent and nonspeculative. This requirement will likely carry more weight than it has in the past. Before *Lujan*, requiring people to obtain a plane ticket or to make firm plans to visit the habitat of endangered species might well have been unnecessarily formalistic. Now such actions are apparently required. But this is not a fundamental revision of previous law.…

Harder questions could arise in consumer cases, which play a large role in contemporary administrative law. Suppose, for example, that the government imposes on automobile manufacturers fuel economy requirements that are less stringent than the law requires. Typically, plaintiffs will argue that their injury consists of a diminished opportunity to purchase the products in question. After *Lujan*, standing becomes a difficult issue in such cases. A court might find that the plaintiffs lack a concrete or particularized interest. They are perhaps not readily distinguished from the public at large. There is an issue about speculativeness as well: perhaps the relationship between a consumer and a product that he allegedly wants is the same as the relationship between the Lujan plaintiffs and an endangered species, in the sense that in neither case is it clear that the injury will occur as a result of the complained-of government acts.

A consumer case of this sort may differ from *Lujan*, however, in the important sense that a consumer who complains of a diminished opportunity to purchase a product can very plausibly claim that he will in fact purchase that product. This claim is probably less speculative than that in *Lujan*. It is possible to discount an "intention" to undertake difficult foreign travel at an unspecified time; the intention may not show sufficient likelihood of harm. But it is harder to discount an intention to purchase a specified product, which usually applies to a single, simple transaction. The distinction suggests that, at least as *Lujan* stands, it does not significantly affect the standard consumers' action. In the automobile case, the key point is that a more-or-less sharply defined category of consumers is distinctly affected in a relatively nonspeculative way, and this is probably enough for standing.

The same would be true in the standard broadcasting case, in which listeners or viewers in a defined area, or of defined programming, challenge an FCC decision that bears on their programming choices. If the FCC refuses to license a classical music station, there is a concrete injury, and it is sufficiently particularized under *Lujan*. The intention to listen to a station is not as conjectural as the travel intention at issue in *Lujan*.

Greater difficulties may arise in some similar actions, as when, for example, consumers challenge an FDA or EPA regulation allowing carcinogens to be added to food. There may be serious standing problems in such cases. A person complaining about such a regulation might be said to be suffering an injury that is speculative or generalized. This is especially likely insofar as the injury is characterized as an actual incidence of cancer. It is extremely speculative to suggest that the introduction of carcinogenic substances into food additives will produce cancer in particular human beings.

The issue becomes harder if the injury is characterized as a greater risk of cancer. In that event, the injury is less speculative; but it is unclear that it is sufficiently particularized. On Justice Kennedy's view, there is probably enough for standing, for he insisted that standing can exist even if the injury is very widely shared. This is indeed the correct view, because it is the most plausible conception of the injury that Congress sought to prevent. But the issue is now open.…

The status of the citizen suit is somewhat obscure after *Lujan*. At a minimum, we know that Congress cannot grant standing to people who have no personal stake in the outcome of an agency action. But Justice Kennedy, joined by Justice Souter, said that 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." This is a potentially crucial phrase. What does it mean? At a minimum, it means that Congress can create rights foreign to the common law. These include the right to be free from discrimination, the right to occupational safety, indeed, the vast panoply of statutory rights going beyond common law understandings. It must also mean that Congress has the power to find causation, perhaps deploying its factfinding power, where courts would not do so. Justice Kennedy thus suggests that Congress can find causation and redressability even where courts would disagree. Perhaps courts will review such findings under a deferential standard.

This view would not change the outcome in *Lujan*. In that case, there was no injury in fact. But it might well make a difference in the several cases in which the Court has previously rejected standing on grounds of causation and redressability. Congress might well have the power to alter those outcomes.

Document Source: Cass R. Sunstein, "What's Standing after Lujan? Of Citizen Suits, 'Injuries,' and Article III," *Michigan Law Review* 91, no. 2 (November 1992): 223–30 (footnotes omitted).

Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?