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Where Do We Stand Now - Manuel Lujan, Jr., Secretary of the Interior, Petitioner v. Defender of Wildlife

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NOTE

Where Do We Stand Now?

Manuel Lujan, Jr., Secretary of the Interior, Petitioner v. Defender of Wildlife

One of the most fundamental principles of our judicial system is that aggrieved parties are entitled to their day in court to argue the merits of their case. But the right to sue is not unrestricted. Article III, Section 2 of the United States Constitution extends the power of the federal judiciary only to "cases and controversies." This restriction is rooted in the separation of powers implied by the structure of the Constitution. Simply put, the legislative branch, i.e. Congress, is empowered "to make all laws"; the executive branch, i.e. the President and the executive agencies, is empowered to "take Care that the laws be faithfully executed"; and the federal judiciary is empowered to adjudicate the legal rights of individuals under the laws of the United States.

A primary purpose of the cases or controversies requirement is to ensure that the courts will not intrude into areas which are committed by the Constitution to other branches of government.[1] Interpretation of this restriction on judicial power has resulted in a number of doctrines which stem from Article III. These doctrines, such as ripeness, political question and standing, are concepts which allow the judiciary to limit access to the courts if the judges determine that it is not appropriate for an unelected, unrepresentative branch of government to resolve a particular dispute. Any of these doctrines can be and are used by the judiciary to close the doors to the courts. Recently, the requirements associated with standing have been used by the United States Supreme Court to deny a decision on the merits of certain environmental cases where the plaintiffs have not demonstrated sufficient concrete injury.

For example, in *Lujan v. Defenders of Wildlife*,[2] several environmental groups challenged a regulation promulgated by the Department of the Interior which rescinded the requirement to consult with the Department when foreign projects with United States support destroyed species pro-

1. Allen v. Wright, 468 U.S. 737, 750 (1984).
2. 112 S.Ct. 2130 (1992) [hereinafter *Defenders V*].

tected under the Endangered Species Act of 1973.[3] In *Lujan*, the Supreme Court used the doctrine of standing to deny an association of environmental groups the right to a resolution of their case on the merits. However, *Lujan* should not be viewed as slamming the door on standing for environmental organizations. Rather, it simply reemphasizes old, familiar hurdles and requires more particularized recitations of harm. This Note describes the statutory and case law underpinnings of the *Lujan* decision, outlines the development of the *Lujan* case, analyzes the affirmative lessons learned and errors to be avoided that can be extracted from the opinions, and applies these lessons to a pending environmental case in which standing is a threshold issue.

UNDERLYING LAW

In order to understand the reasoning in *Lujan*, at a minimum, it is necessary to outline recent case law related to standing and particular aspects of the Endangered Species Act.

Selected Case Law Related to Standing[4]

Organizational Standing.

For an organization to sue on behalf of its members, it must meet a three-part test.[5] Only one of the elements is in contention here: the organization may assert the rights of its members if the members would otherwise have standing to sue in their own right. An organization can meet this element of the test for standing if at least one member can overcome the constitutional and prudential barriers to standing.

Constitutional or core components of standing.

Over the years, numerous United States Supreme Court decisions have defined and refined the requirements that the Court interprets as being essential components of standing which meet the case or controversy provision of Article III. Three fundamental requirements are considered an "irreducible minimum"[6] by the Court. First, the plaintiff must show that he/she has personally suffered or will suffer an injury-in-fact. This may be defined as an actual or threatened[7] invasion of a legally-pro-

3. 16 U.S.C. §§ 1531–1544 (1988).

4. *See* M. Wolok, Note, *Standing for Environmental Groups: Procedural Injury as Injury-in-Fact*, 32 Nat. Res. J. 163 (1992). This note summarizes the history of standing as applied to environmental groups.

5. Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 343 (1977). The other two parts of the test are: 1) that the interests which the organization seeks to protect must be related to the organization's purpose, and 2) that neither the claim asserted nor the relief requested may require the participation of individual members in the lawsuit.

6. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982).

7. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); *Valley Forge*, 454 U.S. at 472.

tected interest which is, a) concrete and particularized,[8] and b) "actual or imminent, not 'conjectural' or 'hypothetical.'"[9] Second, a causal link must exist between the injury and the challenged action. That is, the injury must 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."[10] Third, it must be "likely," as opposed to "speculative," that the injury will be "redressed by a favorable decision."[11]

Prudential requirements.

In addition to the core or constitutional requirements of standing, the Supreme Court has, over the years, imposed certain prudential limitations on standing which are "part of judicial self-government."[12] Prudential limitations allow the courts to reject a suit, even when the constitutional requirements are met. Prudential restrictions can be overcome by congressional creation of a private right of action such as is conferred in the citizen suit provisions in the ESA. However, constitutional barriers to citizen suit cannot be overcome by congressional fiat.[13]

Procedural injury as a ground for standing.

A fourth concept developed in case law which is relevant to *Lujan v. Defenders of Wildlife* is the doctrine of procedural injury as a ground for standing. According to this legal theory, a procedural injury occurs when an administrative agency allegedly violates a procedural requirement of a law and when Congress expressly or impliedly creates a legal interest in persons to affect agency decisions through the violated procedures. Through 1990, six federal circuits and several federal district courts recognized procedural injury as a form of injury-in-fact.[14] However, a 1986 D.C. Circuit dissenting opinion by Justice Scalia[15] foreshadowed his plurality opinion for the Court in *Lujan v. Defenders of Wildlife*. In *Center for Auto Safety*, Justice Scalia implied that organizational plaintiffs carry the initial burden of pleading specific facts to back up allegations of injury-in-fact. While that case did not allege procedural injury, the importance of concrete injury was stressed as a requirement of standing.

8. Allen v. Wright, 468 U.S. 737, 756 (1984); Warth v. Seldin, 422 U.S. 490, 508 (1975); and Sierra Club v. Morton, 405 U.S. 727, 740–41 n.16 (1972).

9. Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

10. Simon v. Eastern Kentucky Welfare Rights Organizations, 426 U.S. 26, 41–42 (1976).

11. *Id.* at 38, 43.

12. 112 S. Ct. at 2136.

13. Gladstone, Realtors v. Village of Bellwood, 441 U.S. at 100.

14. *See* Wolok, *supra* note 4, for an excellent discussion of the development of the doctrine of procedural standing. Wolok's footnote 105 lists the federal circuits and districts that have recognized procedural injury-in-fact.

15. Center for Auto Safety v. National Highway Traffic Safety Administration, 793 F.2d 1322 (D.C. Cir. 1986).

In *Lujan*, Justice Scalia makes it clear that a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all normal standards for redressability and immediacy;" however, the violation of procedural rights alone, without injury to concrete interests, is insufficient to confer standing.[16]

Endangered Species Act of 1973[17]

Four sections of the Endangered Species Act (ESA) relate to the standing issue. First, the Secretaries of Interior and Commerce are required to determine which species of wildlife and plants are endangered or threatened with extinction and to list such species.[18] This section is not limited to domestic application and more than half of the listed species are species whose primary ranges are outside of the United States.[19] This section is important to the *Lujan* case because the alleged potential injuries to listed species were in foreign countries.

Second, Section 1540(g), "Citizen Suits," states that:

> any person may commence a civil suit on his own behalf—(A) to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation listed under the authority thereof; or . . . (C) against the Secretary (of Interior) where there is alleged a failure of the Secretary to perform any act or duty under Section 1533 of this title which is not discretionary with the Secretary.[20]

The importance of this section in *Lujan* is that it arguably creates a legal interest in all citizens to sue for a violation of ESA consultation procedures, regardless of specific injury.

Third, under Section 1532(13), environmental associations are "persons" and may bring suit in their own names.

Fourth, the codification of the ESA Section 7(a)(2) at 16 U.S.C. Section 1536 (a)(2) states that:

> 2) Each Federal agency *shall*, in consultation with and with the assistance of the Secretary (DOI), insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . .[21]

16. *Defenders V*, 112 S. Ct. at 2142–43 n.7.
17. 16 U.S.C. §§ 1531–1534.
18. *See* 16 U.S.C. § 1533.
19. Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1037 (8th Cir. 1988) [hereinafter *Defenders II*].
20. 16 U.S.C. § 1540(g).
21. 16 U.S.C. § 1532(13) (emphasis added).

This is the procedural section of the ESA that Defenders allege the Department of the Interior violated. If procedural injury, as interpreted by a number of circuits prior to *Lujan*, is sufficient grounds for standing, then this provision plus the citizen suit provision above would be sufficient to create standing for the plaintiffs to have their case heard on the merits.

In accordance with Section 7(a)(2) of the ESA, in 1978 the Fish and Wildlife Service and the National Marine Fisheries Service, on behalf of the Secretary, published a final rule establishing procedural regulations governing interagency consultation under Section 7 of the ESA. This stated that the obligations imposed by Section 7 applied "extraterritorially,"[22] i.e. outside of the United States. However, on August 8, 1979, Leo Kuliz, the Solicitor of the Department of the Interior (DOI), sent a letter to the Assistant Secretary for Fish, Wildlife, and Parks (DOI) expressing reservations about this interpretation of Section 7.

In 1983, a revised regulation was proposed which reinterpreted Section 7(a)(2) to require consultation only for agency actions in the United States or on the high seas.[23] This rule was finalized in 1986[24] and became 50 C.F.R. 402.01 (1991). It limits the consultation requirement to the United States and the high seas. The substance of the *Defenders* claim is that the rule is invalid because it violates the plain language and the legislative history of the Endangered Species Act. In 1987, Defenders sued the Secretary of the Department of Interior under the citizen suit provision of the ESA. Their arguments for standing primarily rested on the allegation that the rescission of the rule violated a procedural right to have consultation occur and that the citizen suit provision conferred a legal interest in the enforcement of the procedures guaranteed by the Endangered Species Act.

POSTURE OF THE CASES

Defenders of Wildlife v. Hodel (Defenders I)[25]

Statement of the Case

In 1987, the Defenders of Wildlife brought suit, in the United States District Court of Minnesota, challenging the Secretary of Interior's promulgation of a rule,[26] under the Endangered Species Act. The rule rescinded a previous requirement that government agencies consult with the Secretary when agency action in foreign countries might jeopardize endangered or threatened species or their habitat. In support of their right to bring suit, the plaintiffs' complaint[27] stated that the members of their

22. 43 Fed. Reg. 870, 874 (1978).
23. 48 Fed. Reg. 29,990 (1983).
24. 51 Fed. Reg. 19,926 (1986).
25. 658 F.Supp. 43 (D. Minn. 1987) [hereinafter Defenders I].
26. 51 Fed. Reg. 19,930 (1986).
27. Amended Complaint ¶2.

organization benefited both professionally and personally from observing endangered and threatened species whose primary ranges are outside of the United States. This, claimed Defenders, gave them an interest in enforcing the ESA. Apparently the complaint did not allege any specific agency action in foreign countries that had adversely affected endangered species as a result of the Secretary's reinterpretation of Section 7.

The Secretary moved to dismiss for lack of plaintiffs' standing and finally, in a memorandum in opposition to defendant's motion, the plaintiff listed eight projects in foreign countries which they alleged harmed endangered species. However, because the standing issue related to the injury suffered by the plaintiffs, not the animals, this response was something of a legal non sequitur.

The district court granted the Secretary's Motion to Dismiss for plaintiffs' lack of standing. It gave two reasons. First, the allegations of general benefit were insufficient to constitute an injury-in-fact. Second, in light of the fact that all of the listed foreign projects had begun before the reinterpretation of Section 7, the court concluded that it was possible that consultation had already occurred and, because the plaintiffs did not raise the issue of a mandate for continuing consultation, no harm, or injury-in-fact, had been shown.

Analysis

First, plaintiffs should have argued that reinitiation of formal consultation is required even if consultation has occurred for specific listed projects, when new information indicates that a proposed or ongoing action may jeopardize endangered or threatened species or their habitat.[28] If Defenders had been specific about the consultation status of each project and had outlined new information that would require reconsultation, it seems likely that the court could not have used this rationale to deny standing.

Second, this case was joined after *Sierra Club v. Morton*,[29] in which the United States Supreme Court held that mere interest in the problem of environmental protection is insufficient to confer standing. In that case the Court denied the Sierra Club standing because it failed to allege that any of its members would be directly affected by the Mineral King development. In *Defenders I*, the organization did not heed the lesson of *Sierra Club v. Morton* and their action was dismissed for lack of subject matter jurisdiction, i.e. no case or controversy, no standing. They, like the Sierra Club, failed to list, as individual plaintiffs, members who would be harmed by the increased risk to endangered species caused by the new recission of the need for consultation.

28. Sierra Club v. Marsh, 816 F.2d 1376, 1387 (9th Cir. 1987).
29. 405 U.S. 727 (1972).

Defenders of Wildlife v. Hodel (Defenders II)[30]

Statement of the Case

In *Defenders II*, the Defenders appealed the dismissal of their suit, saying that the District Court had erred by denying them standing to sue. The Eighth Circuit reversed the District Court and held that plaintiffs did have standing to challenge the Secretary's reinterpretation of the Section 7 consultation requirement.

Apparently, Defenders' briefs argued a number of new, salient facts which persuaded the court that they satisfied the constitutional requirements for standing. For example, Defenders claimed that their members used at least some of the specific area affected by the eight listed foreign projects. Under its injury-in-fact discussion, the court cites *Wilderness Society v. Griles*[31] for the proposition that when the government acts directly against a third party (i.e. the agencies) whose expected response will in turn injure the plaintiff, the relevant injury-in-fact inquiry is whether "the third party's response to the challenged governmental action will injure the plaintiff at all."[32] The court also cites *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*[33] and *Sierra Club v. Morton*[34] for the proposition that, "[a]n interest in aesthetic, conservational, and recreational values will support standing when an organizational plaintiff alleges that its members use the area and will be adversely affected."[35] The court concluded that the Defenders alleged sufficient injury-in-fact under these standards.

In addition, the Court of Appeals interprets the complaint to allege a procedural injury. The Secretary acknowledges that a procedural injury would be a judicially cognizable injury-in-fact, but he contends that this is not alleged in the complaint. The Eighth Circuit found that Defenders plead a procedural harm.[36]

The second element of constitutional standing is causation. The Defenders' claim is that if agencies which contribute funding to foreign projects are not required to consult with the Secretary, then there is an enhanced risk that those projects will harm endangered and threatened species and their habitat and that will, in turn, harm the aesthetic and professional interests of its members who use the specific areas listed. Circuit Judge Wollman concludes that the District Court erred when it found that consultation may already have occurred because for at least one of the eight projects, the complaint alleges that no Section 7 consultation was

30. Defenders of Wildlife v. Hodel, 851 F.2d 1035 (8th Cir. 1988) [hereinafter *Defenders II*].
31. 824 F.2d 4, 11 (D.C. Cir. 1987).
32. *Id.*
33. 412 U.S. 669 (1973).
34. 405 U.S. 727 (1972).
35. *Defenders II*, 851 F.2d at 1040.
36. *Id.* at 1041.

ever conducted and, for purposes of a motion to dismiss against Defenders, the court must accept that allegation as true. Furthermore, Judge Wollman cites *Sierra Club v. Marsh*[37] for the proposition that reconsultation is required when any new information reveals that ongoing projects may harm endangered or threatened species or their habitat. Judge Wollman concludes that the District Court erred when it ruled that the reinterpretation of Section 7 could not have caused the plaintiffs harm because all of the projects were initiated prior to the new rule. Under *Marsh*, he concluded they were under a continuing duty to consult until the new rule wiped out that obligation.

Judge Wollman goes further in his causation discussion by citing the Ninth Circuit opinion in *City of Davis v. Coleman*[38] for the idea that it is not reasonable to require a plaintiff to prove that the challenged action will have particular environmental effects, because to require proof of harm would require "the plaintiff [to] conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake."[39] The import of this reasoning is that Defenders, essentially, need not prove causation in order to satisfy the Eighth Circuit.

In fact, Judge Wollman goes so far as to cite the Washington, D.C. Circuit for finding that when Congress authorizes citizen suits, Congress itself has legislated both the requisite causation *and* redressability.[40] He says that he agrees with "Defenders' contention that Congress has determined that the remedy for the harm to their members' personal, professional, and aesthetic interest in endangered species is consultation between the Secretary and the action agency."[41]

Analysis

In *Defenders II*, the Eighth Circuit performed feats of syllogistic magic in an effort to allow Defenders a shot at the allegedly invalid regulation reinterpreting Section 7. Clearly, the Judge is stretching a point to allow Defenders their day in court. However, the Eighth Circuits' reasoning and holdings on standing are eventually overturned by the Supreme Court;[42] therefore, the lessons learned from this iteration are largely negative. These arguments are unpersuasive on the issue of standing.

However, despite the liberal interpretation of the citizens' right to sue, in Part I[43] of his opinion, Judge Wollman lights the fuse under what may be the biggest time bomb of the Defenders' suit: redressability. There,

37. 816 F.2d 1376 (9th Cir. 1987).
38. 521 F.2d 611, 670–71 (9th Cir. 1975).
39. *Defenders II* (quoting City of Davis v. Coleman, 521 F.2d 661, 670–71 (9th Cir. 1975)).
40. Center for Auto Safety v. NHTSA, 793 F.2d 1322, 1334–35 (D.C. Cir. 1986).
41. *Defenders II*, 851 F.2d at 1043.
42. *Defenders V*, 112 S.Ct. 2130 (1992).
43. *Defenders II*, 851 F.2d at 1043.

he cites two Appeals Court rulings that, "After consultation, 'the final decision of whether or not to proceed with the action lies with the agency itself. Section 7 does not give the Department of the Interior a veto over the actions of other federal agencies, provided the required consultation has occurred.'"[44] This limits consultation to a procedural inquiry. Thus, even if consultation does not occur and there is a procedural injury-in-fact, if the agency could then proceed anyway, it is difficult to argue that requiring consultation would redress the potential harm to endangered species. They may be harmed whether or not there is consultation.

Defenders of Wildlife v. Hodel, (Defenders III)[45]

Statement of the Case

After the Eighth Circuit found that Defenders did have standing, the case was remanded to the District Court. At that level, both parties filed cross-motions for summary judgment. After reviewing the standards for summary judgment, the court denied the Secretary's motion because it "fe[lt] that the Eighth Circuit ha[d] already determined the standing question in this case."[46] The court then analyzed the merits of the claim on the basis of the plain language and the legislative history of the ESA. Summary judgment was granted to Defenders on the merits.

Analysis

Because the purpose of the analysis in this paper is to deduce the current status of standing requirements, the discussion of the merits of the case is omitted here.

Defenders of Wildlife v. Lujan (Defenders IV)[47]

Statement of the Case

When the District Court accepted the decree of standing from the Eighth Circuit and awarded summary judgment to the plaintiffs on the merits, the Department of the Interior appealed. At that point, most of the arguments on both sides of the standing (and the merits) issue had been aired previously. This appeal was tried before a four-judge panel with Circuit Judge Gibson writing the opinion.

This time around, the Eighth Circuit, perhaps persuaded by Judge Gibson, who had taken part in the *Defenders II* appeal, decided unanimously that: 1) Defenders had standing to challenge the regulation, and 2)

44. *Id.* at 1037 (quoting National Wildlife Federation v. Coleman, 529 F.2d 359, 371 (5th Cir.), *cert. denied* 429 U.S. 979 (1976); *see also* Sierra Club v. Froehlke, 534 F.2d 1289, 1303 (8th Cir. 1976).

45. 707 F.Supp. 1082 (D. Minn. 1989) [hereinafter *Defenders III*].

46. *Id.* at 1084.

47. Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990) [hereinafter *Defenders IV*].

that the challenged regulation was invalid because Congress intended to extend the consultation obligation of Section 7 of the ESA to agency actions in foreign countries as well as in the United States and on the high seas.[48]

Analysis

At this time, the Secretary only questioned the injury-in-fact criteria. He did not contend that the causation and redressability requirements were not met. This is important because it is a tacit admission that the causation and redressability requirements may not truly be required for constitutional standing. In an unpublished manuscript,[49] Richard Brown argues that the causation and redressability standards evolved from the prudential "zone of interests" test and, therefore, may be fulfilled by a congressional grant of a private right of action in citizen suit provisions. Unfortunately, Justice Scalia and the current Court still include causation and redressability in the three-part test for constitutional standing. Still, it may be productive in future cases to argue that causation and redressability requirements evolved from prudential, not constitutional, concerns and that prudential concerns may be overcome by a legislative grant of standing to sue in citizen suit provisions.

A second point which may be useful in future argument is the court's discussion of procedural injury. It quotes *Fernandez v. Brock* for the proposition that,[50] "In determining whether a given statutory duty creates a correlative procedural right, we look to the statutory language, the statutory purpose, and the legislative history," and finds that for the Endangered Species Act, the Congress intended to create "correlative procedural rights . . . the invasion of which [is] sufficient to satisfy the requirement of injury-in-fact in article III."[51] Unfortunately, this line of reasoning probably would not be productive because the Supreme Court, in *Defenders V*, disagreed with the Eighth Circuit.

Lujan v. Defenders of Wildlife (Defenders V)[52]

Statement of the Case

When the Eighth Circuit found for Defenders on the issue of standing and on the merits, the Secretary petitioned for certiorari to the Supreme Court. The Supreme Court granted a writ of certiorari and on June 12, 1992 handed down the opinion that reversed the Eighth Circuit holding and held that Defenders did not have standing.

48. *Id.* at 117.
49. R. Brown, *Congressional Interpretation of Article III—An Opportunity Missed in* Defenders of Wildlife v. Hodel (unpublished manuscript, University of New Mexico School of Law, 1991).
50. 840 F.2d 622, 630 (9th Cir. 1988).
51. *Id.*
52. 112 S.Ct. 2130 (1992).

Analysis

The Court was divided on the issues. Justices Blackmun and O'Connor dissented. Justice Stevens concurred in the judgment but not in the reasoning. Justices Kennedy and Souter joined Justices Scalia, Rehnquist, White, Thomas and Stevens to create a seven-to-two majority on the judgment; but, on grounds different from Stevens, they differed with the plurality on the reasoning in Part III-A of the opinion, which part related to injury-in-fact. The plurality, in an opinion delivered by Justice Scalia, consisted of only four justices: Scalia, Rehnquist, White and Thomas. This suggests that careful analysis may offer lines of argument that could find favor with a future plurality or majority and that might allow environmental groups to prevail on the issue of constitutional standing.

In order to organize the threads of the analysis of *Defenders V*, first, the plurality arguments will be outlined. Second, the dissent's reasoning will be contrasted. Finally, the opinions of the three "swing" Justices, Kennedy, Stevens, and Souter, will be analyzed to determine whether their concerns could be melded with the dissents' opinion to construct a useful line of future argument.

Reversing the summary judgment for Defenders, the majority concludes that Defenders did not have standing to bring suit. In Part II, Justice Scalia outlines the three irreducible elements which he says a plaintiff must prove to attain constitutional standing. These are: 1) injury-in-fact, i.e. a concrete and particularized, actual or imminent invasion of a legally protected interest; 2) causation, i.e. the injury has to be "fairly traceable" to the challenged action of the defendant, not the result of independent action of a third party not before the court; and 3) redressability, i.e. it must be "likely," not "speculative" that the injury will be redressed by a favorable decision.

In Part II, Justice Scalia's arguments seem to focus on causation and redressability. The recission of the regulation interpreting Section 7 by the defendant, the Secretary of the Interior, applies to agencies not before the Court. Justice Scalia says in this case, causation and redressability hinge on the response of the agencies to the regulations and then, in turn, the foreign countries must respond to agency recommendations and actions. Because third-party responses are involved, the plaintiff bears an additional burden to demonstrate causation and redressability.

In Part III-A, Justice Scalia applies these principles. He concludes that Defenders did not meet the burden, on motion for summary judgment, of setting forth specific facts demonstrating, at least, injury-in-fact and redressability. Defenders' claim to injury is that lack of consultation with respect to certain United States-funded activities abroad "increas[es] the rate of extinction of endangered and threatened species."[53] Even

53. Complaint ¶ 5, app. 13.

though he admits that the desire to observe animal species, even for purely aesthetic purposes, is a cognizable interest, Scalia asserts that Defenders would have had to show that listed species were in fact threatened by cited projects and that one or more members would be *directly* affected by the increased threat to listed species in order to meet the injury-in-fact requirement.

The Defenders alleged the following facts to establishing injury-in-fact. Ms. Joyce Kelly traveled to Egypt in 1986 and observed the habitat of the Nile crocodile (but did not actually see one). She stated that she hoped to return to observe the crocodile directly. Her claim is that she will be harmed if the United States aids the rehabilitation of the Aswan High Dam. Ms. Amy Skilbred traveled to Sri Lanka in 1981 and observed the habitat of the Asian elephant, leopard and other endangered species (but, again, did not actually see these). She hoped to return and claimed that the Mahaweli Project would jeopardize the habitat of these endangered species and thus would harm her chances of observing these animals on a hoped-for return trip. Scalia finds these potential future harms not "actual or imminent."[54]

Next, the opinion rejects three theories of standing proposed by Defenders. The first theory, "ecosystem nexus," proposes that "any person who uses *any part* of a "contiguous ecosystem" adversely affected by a funded activity has a standing even if that activity is located a great distance away."[55] This was previously rejected in *Sierra Club v. Morton*[56] and in *Lujan v. National Wildlife Federation*,[57] in which the Court held that the member claiming injury must use the *specific area* affected by the challenged activity.

The theory of "animal nexus" is that anyone who has an interest in seeing or studying endangered animals anywhere on the planet has standing. This is rejected as far too attenuated an interest under *Sierra Club* and *National Wildlife Federation*.

Third, the theory of "vocational nexus" would confer injury-in-fact on anyone who has a professional interest in endangered animals, no matter where the animals are located. Justice Scalia implies by his reasoning that, even if a single project would harm a species that a specialist is studying, as long as there are other populations and as long as the scientist has no tie with that specific location, then even vocational nexus is too speculative to confer injury-in-fact.

At least two lessons can be learned from Part III-A. First, organizations hoping for standing to challenge federally funded actions should start a registry of all scientific projects related to endangered or threatened

54. *Defenders V*, 112 S.Ct. at 2139.
55. *Id.*
56. 405 U.S. 727 (1972).
57. 405 U.S. 871 (1990).

species anywhere in the world and then sign up those investigators as members. This process would ensure that organizations have direct ties with specific locations. Second, they should fund less litigation and more science that would demonstrate the link between specific projects and risk to endangered species. More lawsuits do no good if environmental groups are not able to achieve standing, and standing will be difficult to achieve without more specific research which addresses injury-in-fact and causation.

In Part III-B, Justice Scalia is only joined by three other Justices, Rehnquist, White, and Thomas; therefore, this may be taken as dicta. This part raises a still unresolved redressability issue: Even if the Secretary returns to the former interpretation of Section 7 and requires consultation by the agencies, are the funding agencies bound by that requirement? Would a requirement to consult redress the harms Defenders claim? Justice Scalia states "this is very much an open question."[58] He contends that, because jurisdiction depends on the facts at the time the complaint was filed and because at that time at least one agency contested consultation as related to foreign projects, that at that time, there was no certain redressability. When the Secretary promulgated the first regulation, he thought it was binding, but that position was repudiated by the Solicitor General.[59]

In fact, in *Defenders II*, Judge Wollman pointed out that, even if the agencies must consult, there is no requirement that they change their actions in conformity with those consultations.[60] In *Sierra Club v. Froehlke*, the Eighth Circuit stated that, "Consultation under Section 7 does not require acquiescence. Should a difference of opinion arise as to a given project, the responsibility for decision after consultation is not vested in the Secretary but in the agency involved."[61] In *National Wildlife Federation v. Coleman*, the Fifth Circuit said, "Section 7 does not give the Department of Interior a veto over the actions of other federal agencies, providing that the required consultation has occurred."[62] The lack of a veto power applies to United States high seas and foreign actions; redressability could prove to be a problem in many ESA challenges.

Defenders challenged the rescission of a regulation[63] that previously required interagency consultation when foreign projects supported by the United States threatened species protected by the Endangered Species Act. Such consultation is procedural in nature; Justice Scalia notes that for procedural injuries which also meet the injury-in-fact test, neither lack of redressability nor immediacy should bar suit for lack of standing.

58. *Defenders V*, 112 S. Ct. at 2140.
59. *Id.*
60. *Defenders II*, 851 F.2d at 1037.
61. Sierra Club v. Froehlke, 534 F.2d 1289, 1303 (8th Cir. 1976) (citing National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir. 1976).
62. Coleman, 529 F.2d at 371.
63. 48 Fed. Reg. 29,990.

Therefore, if a procedural injury is found, the fact that an agency may proceed in spite of an unfavorable consultation should not create a redressability problem when standing is considered.

This section, III-B, is a warning for the future. If the Endangered Species Act is brought up for reauthorization in 1992, it is essential that consultation regulations be clearly mandatory and applicable to foreign projects. It is also essential that funding for such projects must be withdrawn if the consultation demonstrates harm to endangered species or their habitat, which harm cannot or will not be mitigated. Otherwise, mere consultation will not redress the alleged harms and United States tax dollars will continue to contribute to the extermination of species.

Part IV of the majority opinion may be the key to solving the potential causation and redressability problems. In this section Scalia essentially notes that when a plaintiff has successfully demonstrated that he/she has, in truth, suffered a procedural injury, that is, if the disregard of a procedural requirement "could impair a separate concrete interest of theirs,"[64] then "[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."[65]

Thus, as long as there is procedural injury-in-fact, the citizen suit provision provides standing to challenge agency procedures without regard to the immediacy of the injury or redressability. Obviating the need to show redressability logically obviates the need to show its reciprocal, causation. Redressability in this case means that if the courts require a particular action (consultation), a particular harm (increased risk to endangered species) will not occur. This assumes underlying causation, i.e. that a particular action causes a particular harm. If a showing of procedural and actual injury presumes redressability, then it also presumes the underlying causation. Such a presumption might be subject to rebuttal, but the burden for showing lack of harm would be on the defendant instead of requiring the plaintiff to do the scientific research required to demonstrate the increased risk of harm. This implied shift of the burden of proof may be important in later cases.

If procedural and actual injury are found, then under Justice Scalia's reasoning, it may be presumed that the requested remedy would redress the harm. Then, the burden would shift to the defendant to establish, by credible research, that the proposed action had not caused or would not cause the alleged harm. If that were successfully demonstrated, then the courts might find that the requested remedy (curtailing the proposed action) could not redress the alleged harm. Thus, if the presumption of redressability is rebuttable and not absolute, it would be possible to lose

64. *Defenders V*, 112 S. Ct. at 2142.
65. *Id.* at 2142–43 n.7.

standing if the opposition successfully showed that the presumption of redressability is not correct under a given fact pattern.

Even if causation and redressability are presumed upon a showing of procedural injury, when plaintiffs seek adjudication in the courts, they cannot bypass the absolute, rock-bottom requirement that the party seeking review must have suffered a concrete injury. Apparently the majority of the Court has compromised a bit. Even though the majority seems to agree that Congress can confer statutory standing in citizen suit provisions to challenge agency procedures under a law, that does not abrogate the foundation constitutional requirement that the parties must have suffered a concrete and particularized injury.

The final lesson to be learned from Scalia's opinion is that environmental organizations should ally with professionals such as big game outfitters and photo safari guides, as well as zoological and botanical researchers. Such individuals have concrete and particular, often pecuniary interests in biodiversity and the perpetuation of species. Next time out of the gate, Defenders need to list as plaintiffs a couple of members who have an incontrovertible personal, preferably economic, interest that would be damaged by the challenged action.

Dissent: Justices Blackmun and O'Connor

The dissent's first point of contention is that in order to survive the Secretary's motion for summary judgment, Defenders only need to have raised a "genuine issue" of material fact as to standing.[66] They need not at that stage prove that they were actually or imminently harmed. Blackmun points out that the majority confuses the Defenders' evidentiary burden (affidavits asserting specific facts) with the standard of proof for summary judgment (i.e. the existence of a genuine issue of material fact). Blackmun has a point. Defenders may not have proved specific facts which would mandate standing, but they did allege facts which if, for purposes of summary judgment, are taken to be true, *did* raise genuine issues of material fact regarding standing. Therefore, when the Eighth Circuit affirmed the District Court's decision to deny the Secretary's motion for summary judgment on the issue of standing, that decision was correct because there were genuine issues of material fact.

Blackmun and O'Connor believe that the majority requirement for a concrete citation of specific plans to return to a site at a specific time "will resurrect a code-pleading formalism in federal court summary judgment practice . . . ."[67] This is a logical inference from Scalia's opinion. However, the injury-in-fact requirement is a valid criteria for a case or controversy; the environmental groups must be as specific as possible about concrete injury to members at the pleadings stage.

66. Fed. R. Civ. P. 56(c).

67. *Defenders V*, 112 S. Ct. at 2153 (Justice Blackmun, joined by Justice O'Connor dissenting).

The dissent accepts the ecosystem nexus theory of injury in that "environmental destruction may affect animals traveling over vast geographical ranges . . . ."[68] Under those circumstances the Court would probably find such a nexus appropriate, although in this case, Defenders do not allege such a range. The lesson here is that if an organization is unable to prove specific use of a particular area, it may be possible to identify an endangered species in that area that migrates into a specific area that *is* utilized by members. If an organization can do this, it should then try the ecosystem nexus theory.

The dissent next addresses the plurality opinion that Defenders did not demonstrate redressability. The first obstacle is that third-party agencies cannot be made to consult with the Secretary because they, arguably, are not subject to the Secretary's regulations. The dissent points out that in prior litigation, the Secretary has taken the position that the regulations *are* binding on other agencies and that the Secretary and the Solicitor General may not conveniently change that position for purposes of this suit. The lesson here is that a redrafted ESA must make it clear that final DOI regulations do bind federal action agencies.

The second redressability issue addressed by the dissent is that the plurality suggests that, even if consultation does occur, the agencies are still not required to terminate funding and the harm could still occur. Therefore, simply compelling consultation would not, in the plurality view, redress the alleged harm. The dissent points out that the goal of a procedural requirement like consultation, as in a National Environmental Policy Act Environmental Impact Statement, is better informed decisions with more opportunity to consider and implement mitigation measures. That goal would be achieved by requiring consultation.

Finally, the dissent takes on the separation of powers issue. Just how far may Congress go in conferring private rights of action on citizens who wish to challenge government action? The dissent argues that Congress may simply confer constitutional standing if the government violates its own regulations or if the Executive agencies promulgate rules which violate procedures mandated by Congress. They argue that most government conduct can be classified as "procedural" and that procedural injuries caused by government action may be redressed by the courts without additional proof of standing. The example they give is the issuance of a pollution permit and the right of those affected by the pollution to sue. The majority would say that such a procedural injury can abrogate the need to demonstrate immediacy and redressability (and thereby causation), but that injury-in-fact must still be shown. In the pollution permit example, injury, and therefore standing, would be clear.

68. *Id.* at 2154 (citing Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986) and Arkansas v. Oklahoma, 112 U.S. 1046 (1992)).

Perhaps the dissent misinterprets the majority here. Scalia says specifically, "We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing."[69] This decision only transfers power to the Executive to the extent that Executive decisions may be unreviewable if their actions cause no particular harm. If harm can be demonstrated, then agency procedural violations are reviewable.

Kennedy and Souter

The short opinion by these two justices identifies several important points of logical concurrence with the dissent that may build future pluralities. They agree that it is silly to require plaintiffs to make specific plans (buy airplane tickets) to demonstrate potential harm. However, something more than vague hopes to see animals is required. They cite with favor the ecosystem nexus approach in the whaling case.[70] In the future, if an ecosystem nexus approach or a professional nexus approach is reasonable under the facts, then Kennedy and Souter might join Blackmun, O'Connor and Stevens in finding injury-in-fact.

The second issue addressed is: What are the outer limits of Congress' right to "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . ?"[71] Kennedy says that, "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."[72] One way for Congress clearly to accomplish this goal, of linking the injury to the class of people allowed to bring suit, would be to revise the wording of the Endangered Species Act. A revised citizen suit provision could be worded as follows: "that inasmuch as the extinction of species may harm a broad class of citizens through loss of opportunities for aesthetic appreciation, recreational enjoyment, economic benefit, and professional study, among other things, any person who suffers such personal harms because the government violates the procedural strictures of the ESA and its enabling regulations, may sue to enforce those procedures." That wording would probably get the support of at least five justices and possibly nine. Injury-in-fact is clearly required by such wording.

Stevens, Concurring in the Judgment

Stevens' opinion is a mixed blessing. On remand, the District Court granted Defenders' motion for summary judgment on the merits

69. *Defenders V*, 112 S. Ct. at 2143 n.8.

70. *Id.* at 2146 (Justice Kennedy, joined by Justice Souter, concurring in part and concurring in the judgment).

71. *Id.*

72. *Id.*

and denied the Secretary's motion for summary judgment on the issue of standing. The Eighth Circuit affirmed and the Supreme Court majority reversed and remanded. Effectively, this mooted a rehearing on the merits due to lack of standing. Stevens concurs in the judgment of reversal because, on the merits, he does not believe that Congress intended the consultation requirement to apply to actions in foreign countries.[73] The effect of the reversal is to sustain the DOI regulation that consultation is only required for agency actions in the United States and on the high seas. Stevens' position is, of course, arguable, but whatever the arguments, it could be remedied by more specific language in the ESA that Congress intends consultation to apply to projects the United States funds or partially funds in foreign countries.

On the standing issue, Justice Stevens disagrees with the majority and concludes that Defenders have standing to sue. In fact, he takes an expansive view of injury-in-fact and concludes that plaintiffs Kelly and Skillbred have demonstrated that they will be injured if the projects destroy endangered species or their habitat.

SUMMARY OF LESSONS LEARNED ABOUT STANDING

Injury-in-fact is the one absolute and fundamental requirement for demonstrating constitutional standing. If a professional, economic, ecosystem or other concrete nexus can be proved, it is likely that injury-in-fact will be demonstrated to the satisfaction of at least five members of the United States Supreme Court (Blackmun, O'Connor, Stevens, Kennedy, and Souter). The more concrete and particularized the injury, the more the Court will approach unanimity on this issue.

Causation should be addressed and shown, especially if the injury is not due to a procedural violation. Scalia, writing for Rehnquist, White, and Thomas, finds that, "there is much truth to the assertion that 'procedural rights' are special"[74] and that a person accorded a procedural right (by Congress) does not have to meet the normal standards for redressability and immediacy and, by implication, causation. Kennedy and Souter would probably agree with this view for procedural injury and might go further in that Congress may, more generally, confer standing for any type of injury as long as injury-in-fact is satisfied. Stevens finds the harm, in this case, substantive and he finds that the injury was redressable. By implication, this may indicate that Stevens would want all three elements addressed even for a procedural injury. Blackmun and O'Connor apparently believe that a procedural injury *is* an injury-in-fact. However,

73. *Defenders V*, 112 S. Ct. at 2147 (Justice Stevens, concurring in the judgment).
74. *Id.* at 2142 n.7.

they discuss redressability, so it does not seem that they find this concept contained within procedural injury. In summary, whether or not an organization pleads procedural injury, it would be prudent to address thoroughly all three elements and to point out that the citizen suit provision surely obviates the need to satisfy prudential requirements.

APPLICATION TO A PENDING CASE

On May 28, 1992, the Fund for Animals, the Defenders of Wildlife, In Defense of Endangered Species, and nine named individual plaintiffs joined together to file a complaint against the Secretary of the Interior, Manuel Lujan, and the Director of the United States Fish and Wildlife Service (FWS), John Turner, in the United States District Court for the District of Columbia.[75] Claim One is that defendants are unreasonably delaying the listing of endangered and threatened species. Claim Two is that the FWS has unlawfully employed the "warranted but precluded designation" to deny the protections of the Endangered Species Act to endangered and threatened species. Such a designation means that there is sufficient information to warrant listing a species, but the FWS finds that it is not possible to finalize the listing because of the workload related to pending proposals.[76] Plaintiffs seek a court order essentially declaring that their claims are true and directing FWS to expedite the process in accord with a schedule to be determined by the court. They also seek an injunction precluding a continuation of past "delay" tactics, implementing a monitoring system, and directing FWS to conduct annual scientific review of all "warranted but precluded" species. They brought suit under the citizen suit provision of the ESA. The lessons learned above with regard to standing may be applied to this case, in a general way, on the basis solely of the complaint.

Injury-in-fact

In the Fund for Animals complaint, three problems may exist with the injury-in-fact requirement. First, while it is true that organizations may seek and attain standing as organizations if their essential missions have been harmed (the apparent strategy of the organizational plaintiffs in this case), it would be prudent to add at least one individual plaintiff from each organization who has suffered a concrete and particularized individual harm. Perhaps some of the individual plaintiffs already joined are members of the plaintiff organizations. If so, the organizational affiliation

75. Fund for Animals, et al. v. Lujan and Turner, No. 92-800 (D.D.C. filed May 28, 1992).
76. *Id.* at 28.

should be specified. In addition, the organizations need to be more specific about exactly how the delays have impaired their information flow.

A second point relates to injury-in-fact. The plaintiffs claimed that because of the delays, it has been necessary to finance alternative efforts to protect species.[77] In order to support this allegation of harm, specific activities undertaken should be listed and dollar figures given, if known.

Third, for purposes of withstanding a motion to dismiss for lack of standing, the general claims of injury are probably sufficient to establish standing. However, for trial and summary judgment motions, the allegations need to be more specific. For example, X is a professional outfitter and guide who leads people into the wilderness to observe endangered and threatened species in their native habitat. Accelerated extinctions are costing him business. Y is a professor of botany studying wetlands ecosystems; the threatened destruction of wetlands in her study area will destroy her data base. She could finish four more papers but for that destruction and may not make tenure because of it. Z is a nature photographer who had hoped to publish a coffee table book showing the flora and fauna of a particular area. There are X endangered or threatened species there. A proposed development may destroy the habitat before he can finish the book. Concrete economic harms get a lot of sympathy with the current Supreme Court. However, less pecuniary harms to aesthetic, recreational and other interests, are, of course, also cognizable.

Causation and Redressability

The Fund for Animals suit asserts that, because the FWS has not formally listed category 1 and 2 species that it knows to be endangered or threatened, these species are at increased risk of extinction and such extinctions would, in fact, harm the plaintiffs. The complaint implies procedural injury but this should be specifically argued.

Because most of the Justices in *Defenders V* addressed causation and/or redressability, even when there is a procedural injury, it would be prudent to allege: 1) causal links between not listing species and threatened harm, and 2) the ways in which listing would protect species from extinctions that in turn would harm members.

CONCLUSION

The principal lesson of *Lujan v. Defenders of Wildlife (Defenders V)* is that when environmental organizations challenge governmental actions, they must take care to make it clear that their members have suffered concrete, particular injuries that were caused by the government action and

77. *Id.* at 5.

that the requested remedy will redress the asserted harm. Procedural injuries are "special" and may obviate the need to establish redressability, and perhaps causation, but a prudent complaint should carefully establish injury-in-fact, causation *and* redressability because the Supreme Court justices are divided on the need to address all three. Citizen suit provisions in legislation may safely be viewed as obviating only the need to address specifically prudential standing concerns. Congress may not, by fiat, confer constitutional standing.

The essence of *Defenders V* is that in order for the court to hear a case, concrete harm to at least one individual is absolutely required. It is ironic that, because of the case or controversy requirement of the Constitution, harm to people must be found in order to preserve endangered animals and plants. If it can be demonstrated that people are harmed by agency actions, then, indirectly, it may be possible to rescue many imperiled species from the brink of extinction.

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