# Standing - Jurisdiction and Injury

# Learning Objectives for this Module

## Learn the difference between jurisdiction and standing

## Learn the theories of standing and how they are used in adlaw cases

## Learn the difficulties of assessing probabilistic injuries

## Learn the special nature of procedural injuries

# Reading Assignment

## Chapter 6 to 241.

# Issues to be addressed

## Getting to Court is Not Winning!

### Remember from due process

#### Getting a hearing is not the same as prevailing in the hearing

#### Remember Marbury!

### If you cannot get to court, you cannot win

#### Why is getting to court good even if you cannot win?

## Jurisdiction – Statutory or Constitutional Basis

### Jurisdiction is the starting point.

#### Must be present or the claim is void

#### Can be raised at any time, including by the court on its own (sua sponte)

##### Why isn't a jurisdictional claim waived if opposing counsel does not raise it?

### 28 USC § 1251. Original jurisdiction

#### (a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

#### (b) The Supreme Court shall have original but not exclusive jurisdiction of:

##### (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

##### (2) All controversies between the United States and a State;

##### (3) All actions or proceedings by a State against the citizens of another State or against aliens.

#### The Role of Congress

##### Except for the original jurisdiction of the United States Supreme Court that is in the constitution, and the constitutional requirement for a case and controversy, everything else is statutory

##### Congress creates, and can limit, jurisdiction and standing, within the constitutional limits.

### 28 USC § 1331. Federal question

#### The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

##### Why will this always give you jurisdiction in a federal agency action?

#### If the agency enabling act contains a provision controlling jurisdiction, it preempts § 1331.

### *5 USC § 706. Scope of review*

#### *To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -*

##### *(1) compel agency action unlawfully withheld or unreasonably delayed; and*

##### *(2) hold unlawful and set aside agency action, findings, and conclusions found to be -*

###### *(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;*

###### *(B) contrary to constitutional right, power, privilege, or immunity;*

###### *(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;*

###### *(D) without observance of procedure required by law;*

###### *(E) unsupported by substantial evidence in a case subject to sections* [*556*](http://biotech.law.lsu.edu/Courses/study_aids/adlaw/556.htm) *and* [*557*](http://biotech.law.lsu.edu/Courses/study_aids/adlaw/557.htm) *of this title or otherwise reviewed on the record of an agency hearing provided by statute; or*

###### *(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.*

##### *In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.*

#### ***§ 706 is the key source of jurisdiction for agency actions, unless the enabling act contains its own jurisdictional provisions, which many do.***

### 28 USC § 2342. Jurisdiction of court of appeals

#### Administrative Orders Review Act (Hobbs Act)

#### Why would Congress move most agency appeals to the circuit courts, as opposed to the district courts as specific in § 1331?

##### What sort of actions are usually reviewed by circuit courts?

##### What is the rationale for having agency cases heard in the courts of appeals?

#### Location limits – Congress can set the appeals court for the agency appeals

##### Most challenges to rules under the Clean Air have to be in the DC Circuit.

### OSHA Example

#### Enabling act says that actions may be brought under 29 U.S.C. § 655(f) in circuit courts

##### The statute is silent as to whether this is the exclusive source of jurisdiction

#### Could you use 1331 to get into district court about a suit over an OSHA action covered by 655?

##### specific statutes govern over general statutes, and to allow a plaintiff to choose a suit in district court over the specific statute's provision of review in a court of appeals would thwart the purpose of the specific statute

#### What if it were an OSHA action not covered by 655, such as the failure to make a rule?

##### What is the legislative intent?

## Jurisprudential Standing

### Constitutionally Required Standing

#### All cases must meet this standard

#### While the United States Supreme Court can interpret what it means, the court cannot abolish it

### Prudential standing

#### Additional statutory or judicial limits over the constitutional requirements

### What is the Test for Constitutionally Required Standing? (*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992))

#### Injury in fact

#### Causation

#### Redressability

### Representational Standing

#### When can associations bring actions on behalf of their members?

##### At least one member must have standing

##### It must fit the organizational mission

#### The remedy must not require the participation of individual plaintiffs, beyond the standing analysis

##### Limited to injunctive relief or declaratory judgments

##### Individual damages would require that every plaintiff claiming damages to have standing.

#### Why is representational standing important for environmental and poverty action groups

##### Why might businesses with money still need it?

### Agency action against your client

#### FCC makes a rule requiring cable companies to allow all ISPs access to communications links to customers under the same terms.

##### A part of net neutrality.

#### Would a cable company have standing?

##### Injury?

##### Causation?

##### Redressability?

#### Anytime the agency action is directed toward your client, and affects your client’s legal rights, and is a final agency action (discussed later), you have standing.

### Congressional Standing

#### Congressman wants to challenge the constitutionality of a statute

##### Is there a particularized (personal) injury?

#### What are the separation of powers issues?

##### What is the proper remedy for a congressman?

##### Why would the court be unwilling to intervene?

##### (Raines v. Byrd, 521 U.S. 811 (1997))

#### What about a congressman suing the president for making war without a congressional declaration?

#### What about Congress defending a law? (Remember Chadha)

## Recreational, Aesthetic, or Environmental Injury

### Sierra Club v. Morton, 405 U.S. 727 (1972)

#### Just loving trees from far away is not enough

#### If you use the area for recreation, this can be enough

### Given Lujan, why would just loving trees not be enough for standing?

#### When might this affect whether a case can be brought?

#### What if you are worried about trees on inaccessible land?

### Example: Damn that Mouse!

#### Corps wants to build a dam that will destroy a scenic river and the habitat of an endangered mouse

##### Sally has hiked there and will in the future

##### John has spent his life defending endangered species, but has no future plans to visit this area.

#### Who has standing and why?

##### What if John were a scientist studying the mouse in his lab and it is only found in this habitat?

## Animal Standing

### Do animals have constitutional rights?

#### Is there a constitutional right to bear dogs?

#### Are dogs really just people in little fur coats?

### What is the test for standing to challenge agency actions that affect animals?

#### What if you work with lab animals?

#### Does it matter when?

#### Visit the zoo regularly?

### Why is animal standing very controversial?

## Probabilistic injury

### Risk as Injury

#### Historically, courts have accepted a theoretical risk of harm, such as increased risk of cancer from a landfill, as injury

#### Louisiana Environmental Action Network v. U.S. E.P.A., 172 F.3d 65 (D.C. Cir. 1999)

##### Risk posed by toxic wastes in landfill

##### Is this a real risk?

##### What are the policy implications?

##### What happens to the neighborhood if plaintiff's win?

##### What could the effect be on the NO cleanup after a storm like Katrina?

### Public Citizen, Inc. v. National Highway Traffic Safety Admin., 489 F.3d 1279 (D.C. Cir. 2007)

#### at least both (i) a substantially increased risk of harm and (ii) a substantial probability of harm with that increase taken into account.…If the agency action causes an individual or individual members of an organization to face an increase in the risk of harm that is ‘‘substantial,’’ and the ultimate risk of harm also is ‘‘substantial,’’ then the individual or organization has demonstrated an injury in fact.…In applying the ‘‘substantial’’ standard, we are mindful, of course, that the constitutional requirement of imminence as articulated by the Supreme Court…necessarily compels a very strict understanding of what increases in risk and overall risk levels can count as ‘‘substantial.’’

#### The court wanted specific numbers, which are expensive to get.

### Summers v. Earth Island Institute, 555 U.S. 488 (2009)

#### Forest service makes a rule that some timber sales can be made without the usual statutory notice and comment.

#### What is plaintiff’s problem in getting standing to contest the rule?

#### Plaintiff argues that at least one of its many members will be affected by any possible sale

#### What does the Court say about this probabilistic injury?

##### When will the injury be real?

### Monsanto Co. v. Geertson Seed Farms, 130 S.Ct. 2743 (2010)

#### Organic farmers contest a Dept. of Agriculture decision to deregulate the planting of GM alfalfa.

##### How could this injury them?

##### Could they show a certainty that one would be injured?

#### The United States Supreme Court accepted this probabilistic injury.

##### How can you distinguish the cases?

##### Do the plaintiffs have to do anything in Summers while waiting for the timber to be cut?

##### What do the Geertson plaintiffs have to do to detect possible damage?

### Clapper v. Amnesty International USA, 568 U.S. XXX (2013)

#### See study questions

### Rethinking Risk as Injury

#### Must there be a substantial risk of injury, rather than just a theoretical risk of injury?

#### Why is this easy to satisfy if the class is big enough and you have some evidence of risk?

##### NRDC v. EPA, 464 F.3d 1 (D.C. Cir. 2006)

##### 2 of 500,000 of their members might get cancer

### Fear as Injury

#### Why is this key to many toxic tort cases?

##### How can this be manipulated by attorneys?

##### How was this used in the BP spill?

##### Why does this complicate allowing fear to trigger standing?

#### Is there a real violation, such as violating a permit to dump toxic materials?

##### This creates a plausible fear if you swim in the river.

##### Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167 (2000)

## Procedural Injury

### In Lujan, the procedural violation was the failure of the agency to do an inter-agency consultation.

#### Was the public allowed to participate in this?

#### Why does this keep DOW from being able to state an injury?

#### Procedural injuries still require the nexus to the activity.

### How can a procedural violation cause substantive injury?

#### What was the injury in the procedural due process claims we talked about in Chapter 4?

### Example – The Dredge Permit

#### The Corps does not do the required public hearing before issuing a dredge and fill permit.

#### You are counsel for DOW and you claim your injury is the failure to be able to comment on the permit.

##### Is this enough to get standing?

##### Does the denial of the right to comment constitute injury?

#### What about a landowner whose land would be affected by the change in runoff?

## Informational Injury

### FOIA provides that anyone may request and receive non-privileges government documents.

#### What is the injury if the agency refuses to provide a document that is available under FOIA?

#### Why does this depend on the statutory policy of the FOIA?

### Example - FEC Classification Decision

#### FEC does not classify an organization as one that must make public reports of its finances, which are then published by the FEC.

##### Does a plaintiff who wants info on the group have standing to contest the classification?

#### How did the Court use the purpose for collecting the information to support the plaintiff's standing claim?

##### "Here, Congress, by passing the Act with the disclosure requirement, had deemed the information to be important to inform voters.“

##### Federal Election Commn. v. Akins, 524 U.S. 11 (1998)

### Lujan Revisited as an Informational Injury

#### The Endangered Species Act requires an agency to get a Biological Opinion before issuing a permit.

##### Lujan said that failing to get the opinion was not a procedural injury.

#### How could you argue, using the FEC example, that failure to obtain the Biological Opinion, which would be a public document, is an informational injury?

##### The ESA allows citizens to sue if it is violated.

##### Assume your group publishes the opinions.

### Injury to All

#### The usual remedy for “injury to all” cases is legislative or executive, not judicial.

##### Taxpayers, for example, have very limited standing as such.

#### In the FEC case, everyone was denied the information about the contributions. There was standing because Congress said in the enabling legislations that ‘‘any party aggrieved’’ by a Commission denial of its complaint could obtain judicial review of the denial.

#### In the absence of specific statutory authorization, most injury to all cases will not get standing.

## *Zone of Interests*

### *5 USC 702*

#### *A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.*

#### *The courts have used 702 to narrow claims to what the court determines is the purpose of the statute. This is similar to the test in torts for negligence per se – is the person who was injured in the class of persons intended to be protected by the statute, and is the injury the sort of injury that the statute was intended to prevent?*

### *Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517 (1991)*

#### *Do postal workers have a right to challenge changes in the rules giving a monopoly on 1st class mail because they see it as undermining their job security?*

#### *The monopoly on first class mail was intended to assure the financial stability of the post office. Modern technology and alternative delivery systems like UPS and FedEx changed the mail delivery world and the post office was adapting. The statute was passed long before there were any postal unions.*

#### *Would postal workers be in the zone of interest?*

### *Bennett v. Spear, 520 U.S. 154 (1997)*

#### *Ranchers want to contest rules under the Endangered Species Act limiting the release of water from dams.*

#### *What is the Endangered Species Act (ESA) problem?*

##### *They want the water for their grass and do not care about the endangered species.*

#### *The ESA requires that the agency rely on the best available data and is a procedural type of injury so that the injury requirements are relaxed.*

#### *How would you argue that the ranchers are furthering the purpose of the act by demanding more data, even though this will likely delay the implementation of the plan to save the endangered species?*

### *Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970)*

#### *Just to keep things confused, in this case the court allowed competitors of banks to contest rule changes that would have let banks do data processing*

#### *The intent of the law was to protect banks from bad business decisions, not to protect competitors*

#### *The court found that the plaintiffs challenge to the law would further its purpose - limit the conflicts for banks - even if they were not the intended beneficiaries.*

#### *Not overruled, but maybe out of date.*

### *Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918 (D.C. Cir. 1989)*

#### *Trade group represents providers of advanced waste treatment services. EPA adopts rule requiring less complete treatment of waste.*

#### *The plaintiff wants to contest the rule because it weaken their competitive advantage.*

#### *Remembering the importance of cost benefit analysis, why might EPA not demand the highest level of treatment?*

#### *Would this plaintiff be in the zone of interest?*

### *Honeywell International, Inc. v. EPA, 374 F.3d 1363 (D.C. Cir. 2004)*

#### *Plaintiff contests the EPA allowing a product made by a competitor to be substituted for a CFC.*

#### *In this case, there were very specific standards that had to be met before products could be certified to be sure that they would perform safely and protect the ozone.*

#### *Why does the specificity of the standard help plaintiff's case, i.e., how is this like the rancher’s case?*

#### *Can you distinguish this from Hazardous Waste because the rule which was being limited could be implemented in many different ways, some of which might have benefited plaintiffs but not the environment?*

#### *Or is this just confusion in the courts?*

### *Example: Internet Book Stores*

#### *IRS allows non-profit college book stores to operate on the Internet*

#### *Other Internet books stores object*

#### *What is the analysis?*

#### *What is the purpose of the non-profit exception and the underlying law?*

#### *Why might this further the purpose of the law?*

### *Zone of Interests Review*

#### *Is the plaintiff's interest directly addressed by the statute or reg?*

#### *Is the plaintiff's interest congruent with the statute, so that enforcing it furthers the purpose of the statute or reg?*

#### *Courts have bought this, but it is shakey*

#### *When can the party contest whether the statute or reg is correctly applied - ranchers/Honeywell?*

#### *Still must show direct impact*

## Causation for Standing

### Procedural Violations and Causation

#### NEPA requires an Environmental Impact Statement (EIS) before the Corps issues a permit for a dam.

##### An EIS requires fully analyzing the risks of the project and its CBA

##### Once it is done, you can built the project irrespective of the risks and CBA that was determined.

##### It is meant to create public discussion which can allow other political forces affect the decisionmaking.

##### Why would it be hard to shows that requiring an agency do to EIS would affect the outcome of agency decisiomaking?

#### The Corps issues the permit without the EIS

#### How does failing to do the EIS make the final agency action – building the dam – illegal?

#### Do you have to show that that had the Corps done the EIS, the permit for the dam would not have been issued?

#### Is this partially driven by the nature of the EIS, i.e., that it is only informational and does not prevent issuing the permit?

### Confusion with Harmless Error

#### 5 U.S.C. § 706 (Civil procedure)

##### “In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.”

#### Some courts have required plaintiff to show it is substantially probable that the procedural breach will cause the injury

##### Is this a proper standard for a procedural violation, such as failing to do an EIS?

#### Must the plaintiff show that it is more than theoretically possible for the violation to affect the outcome?

##### How could the agency show that the EIS could not have altered the decisionmaking?

##### Congress directed the Corps to rebuild the New Orleans levees after Katrina.

##### Would an EIS affect the Corps decision to build the levees?

### What type of Causation?

#### Must the government’s violation directly affect plaintiff?

#### Does the EPA’s failure to regulate greenhouse gasses directly affect MA’s coastline?

#### What directly affects the coast?

#### Does the EPA’s regulatory failure contribute to the climate change that affects the ocean?

## Redressability

### You have to be able to show that the remedy you seek from the court would address your problem

#### The agency must have the power to grant your remedy

#### The remedy must address your client's problem

#### If you have stated a concrete claim for injury to your client caused by the agency’s action, you probably have also met this standard

### Does the remedy you are asking for help your client?

#### Group challenged the tax exemption for a hospital, saying it did not deliver enough charity care to justify the exemption

#### Why is the plaintiff asking for this remedy?

#### Would denying the exemption increase charity care?

#### What if plaintiffs could show that the exemption is so valuable that hospitals always cave in before losing it?

##### Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976)

### Procedural Violations and Redressability

#### Assume you have stated a real procedural injury

##### Is there still a redressability problem because the plaintiff cannot show that fixing the violation would result in a favorable result?

#### In Lujan v. Defenders of Wildlife, the Court said, “[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."

##### Do you still have to show a theoretical effect if the procedure is fixed?

##### What if Congress has directed the agency do the project (without waiving environmental regs) and the agency claims it will do it no matter what the EIS says?

#### Mass v. EPA

##### Is it likely that having the EPA regulate GHGs from cars in the US while have a measurable effect on climate change?

##### How do you argue that these regs nevertheless meet the redressability stand?

# Evaluation Questions

## Jurisdiction – Statutory or Constitutional Basis

### What do we mean when we talk about the original jurisdiction of the United States Supreme Court?

#### Are federal agency actions within the original jurisdiction of the United States Supreme Court?

#### Where does jurisdiction for actions that are not part of original jurisdiction come from? (Exclude pure constitutional claims such as *Bivens –* discussed in section on suing the government.)

### Looking back at the basic statutes which can give you statutory jurisdiction, be prepared to explain how you would use them to state a claim against an agency and how the court resolves potential conflicts between them, such as the OSHA case where it was unclear in which court the action should be filed.

### What is the case and controversy requirement?

#### Can case and controversy be waived by Congress?

#### What does this prevent advisory opinions from federal courts?

## Jurisprudential Standing

### Discuss the components of standing:

#### Injury

#### Causation

#### Redressability

### Associations and Third Parties

#### What does an association have to show to get standing?

#### What are the limits on the remedies in association standing cases?

#### Why is associational standing important to vindicate individual rights?

### The Sierra club needs a member with standing to contest an order allowing the cutting of redwood trees in a wilderness area that is remote, but is accessible to hikers.

#### Joe really likes trees and thinks about them a lot. He wants to protect the redwoods, but he never gets out of NYC. Can he get standing?

#### What will a person need to show to get standing?

### The EPA has issued a permit to cut bristlecone pine trees on a mountain top that is not accessible to the public.

#### What standing problem does this create when the Sierra Club wants to contest the order?

### What are the issues with getting standing to challenge agency actions that affect animals?

#### What if you want to challenge regulations on lab research animals?

#### What if you want to challenge the regulations on keeping animals in the zoo?

### Indigent rights plaintiffs claim that non-profit hospital does not provide adequate indigent medical care to justify its non-profit tax exemption. They ask the IRS to cancel the hospital’s non-profit status. What are they trying to accomplish? What is the standing issue in this case? (*Eastern Kentucky*)

### What is the special problem with redressability for procedural injuries?

#### How have the courts relaxed the traditional notions of causation for procedural injuries, i.e., what are examples of how you can show redressability when you cannot prove that the result would have changed if you were given the proper procedure?

### "Injury in fact" and "zone of interest" tests.

#### Distinguish the "injury in fact" and "zone of interest" tests.

#### Ranchers do not want their irrigation water used to help endangered species. They contest the EIS (environmental impact statement) supporting the release for the endangered species. (*Bennett v. Spear,* 520 U.S. 154 (1997). Standing or not and why?

#### Mail carriers want to sue to prevent the post office from allowing a private company to carry mail. - in the zone of interest and the mail carriers. (*Air Courier Conference of America v. American Postal Workers Union*) Standing or not and why?

#### How was the zone of interest different between a trade organization who wanted the EPA to have more rigorous standards for waste treatment (*Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C. Cir. 1989)) and a company contesting whether a CFC replacement met the statutory requirements? (*Honeywell International, Inc. v. EPA*, 374 F.3d 1363 (D.C. Cir. 2004))

#### Using these examples of how the court has addressed the zone of interest problem, how would you apply them in analyzing new fact situations?

### Probabilistic injury

#### Why did having 500,000 members make it easier for an NGO to get standing in case based on exposure to a toxin with a low probability of causing injury? (*NRDC v. EPA*, 464 F.3d 1 (D.C. Cir. 2006)?)

#### How do you use the violation of an EPA permit for the release of a pollutant into a river to help you get standing for a when the actual risk of injury is low? (*Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000))

#### How has the United States Supreme Court recently used “substantial probability” to increase the burden on environmental groups challenging safety standards? (*Public Citizen, Inc. v. National Highway Traffic Safety Admin.*, 489 F.3d 1279 (D.C. Cir. 2007))

#### Why didn’t plaintiffs get standing in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009) (the tree cutting permit case) but did get standing in *Monsanto Co. v. Geertson Seed Farms* (the GMO seeds case), 130 S.Ct. 2743 (2010)

#### Why were plaintiffs unable to get standing in *Clapper v. Amnesty International USA*, 568 U.S. XXX (2013) (the phone tap case)?

##### What did they say their injury was?

##### Why was this not *Geerston Seed*?

##### How would you use Edward Snowden’s disclosures to argue to the court they should rethink this case?

#### How would you these cases as a general model for arguing for or against standing in probabilistic injury cases?

### Congressional Standing

#### Does congress have standing to sue to overturn its own laws?

##### What is the separation of powers issue?

##### What is the proper remedy for a congressman who does not like a law?

##### What doctrine would the court likely use to abstain in these cases?

#### How would you argue that Congress can defend a law, such as the Defense of Marriage Act, before the United States Supreme Court if the DOJ will not?

##### What case would you cite as support for this position?