# 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 Other Widely Shared Injuries, p. 225.

# 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

### 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)

#### Discussed separately.

### 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.

# 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?

### 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?

### 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?