Administrative Law and Regulation

The Supreme Court's Standing Problem

*By Ronald A. Cass**

A STANDING START

Standing is a concept that at its core signals a peculiar problem. In ordinary damage actions, the question of standing is irrelevant: either you can prove that you have been wronged in a way that generates liability or you cannot. But where a claimant seeks something else—especially a declaration that a government agent has acted improperly, with or without a corresponding command for different action—standing law is critical. Without some limitation on who can sue, the courts become conduits for constant challenges to the decisions of the other branches of government, transforming the least dangerous branch into the most powerful one, with unlimited second-guessing authority.

Initially, the Supreme Court found standing to challenge government action in only two settings—claimants either needed a legal right implicated in the litigation, as where they had been denied something to which they were legally entitled, or they needed a specific grant of authority to come into court. The divergent conclusions in *Perkins v. Lukens Steel Co*.[1] and *FCC v. Sanders Bros. Radio Station*[2] illustrate the application of those tests, with Sanders Bros. granted standing only because the Communications Act expressly authorized suit by any "person aggrieved or whose interests are adversely affected" by a decision of the FCC.

The Administrative Procedure Act, which was drafted contemporaneously with the *Lukens Steel* and *Sanders Bros.* decisions, provided for the two alternative avenues to judicial review of agency action, declaring that "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."[3] The matter seemed settled for the next quarter century. After Justice William O. Douglas wrote the majority opinion in *Association of Data Processing Service Organizations v. Camp*,[4] blending the two tests into a single, slightly incoherent hybrid, however, all bets were off. The Court has struggled now for forty years to bring sense to the law of standing. Based on recent performance, that struggle continues.

STANDING'S RISE AND FALL

The Court's move toward more permissive standing culminated in the infamous *SCRAP* decision—*United States v. Students Challenging Regulatory Agency Procedures*[5]—allowing a suit concocted by five law students as a project. Their appeal of an Interstate Commerce Commission decision to allow an across-the-board rate increase (which the students said violated the National Environmental Protection Act by failing to give a discount to recyclable materials) provided the thinnest imaginable basis for standing, yet contained enough allegations of personal harm from the damage the claimants hypothesized would be visited on the environment to satisfy five members of the Court. It is not unfair to characterize *SCRAP* as a triumph of artful pleading over practical judgment.

Until recently, *SCRAP* stood as the acknowledged high-water mark for standing. Decisions almost immediately after *SCRAP*—such as *United States v. Richardson*,[6] *Schlesinger v. Reservists Committee to Stop the War*[7] and *Warth v. Seldin*[8]—rejected suits as failing to state a real case or controversy as required by Article III, the unwaivable minimum for standing. Although those cases were not cast as appeals of agency action, the Court's insistence on both specific, particularized harm and its redressability from the litigation as constitutionally mandated elements of standing marked a clear turn away from *SCRAP*. Despite a decidedly unsteady line in the Court's standing decisions, by the time Justice Antonin Scalia penned the majority opinion in *Lujan v. Defenders of Wildlife*[9] it was widely conceded that the heyday of easy standing had gone. Indeed, while not formally overruling it, *Lujan* seemed to signal that *SCRAP* would not be decided the same way if the case came before the Court again.

Lujan in fact was very similar to *SCRAP*. Both cases were based on purported violations of environmental laws that were broadly drafted and gave rights of citizen suit. Both were predicated on assertions that plaintiffs would not be able to enjoy particular aspects of the environment that the laws protected absent some change in government action. Both claims stretched credulity in their connection of the supposed injury to the agency action at issue. The most significant difference between *Lujan* and *SCRAP* was not the claimed basis for standing but the way the Court responded to it.

Despite the assertion by Justice John Paul Stevens that the *Lujan* majority showed special disdain for environmental plaintiffs, the Court's reluctance to entertain challenges to administrative action lightly—especially at the behest of individuals who failed to demonstrate injuries that were substantially and immediately connected to the challenged conduct—was part of a broader pattern of concern about the roles of the courts and the political branches of government. During the 1980s and 1990s, the justices had become more concerned about being asked to intervene in essentially political disputes, a concern that had held sway prior to the 1960s. While the justices have not been shy about invalidating laws they view as inimical to constitutional command, they have been wary about being made the deciders of last resort in ordinary political contests.

The prevailing view has been that Congress has primacy in deciding how far to go in reducing environmental threats—or addressing other concerns—and in assigning responsibilities for administering duly enacted congressional policy choices to members of the executive branch. Judges can be asked to resolve

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legal disputes that require decision whether administrators have carried out relevant legislative directives. But the courts do not sit as general courts of revision. In that vein, the Court, most notably in *Heckler v. Chaney*,[10] turned away suits asking the judicial branch to decide when agencies should file enforcement actions—those matters are generally committed to agency discretion and not subject to judicial review. The resistance to grants of standing that effectively eliminate any restriction on judicial appeals of administrative decisions is part and parcel of the view that courts' review role is as an adjunct to legal disputes, not as the final stage in ordinary political disputes. Justice Scalia made that point emphatically in *Lujan*.

SPLIT DECISIONS

Although the view articulated by Justice Scalia in *Lujan* has gained ground over the past three decades, the justices have not been of one mind as to just how much courts should defer to the other branches, and how ready courts should be to instruct agencies on their assigned duties. Recent standing decisions illustrate the divisions.

Prior to Chief Justice John Roberts and Justice Samuel Alito joining the Court, the Court appeared to be divided into three blocs with respect to standing. Justices Breyer, Ginsburg, Souter, and Stevens were generally aligned on the pro-standing side. Justices Scalia and Thomas formed the bloc most skeptical of standing claims. Chief Justice Rehnquist along with Justices O'Connor and Kennedy occupied territory between those camps. While some cases adhered to the *Lujan* line, alignment of any justice from the middle group with the "soft standing" crowd moved the Court to a decidedly different posture.

In *Federal Election Commission v. Akins*,[11] Justice Stephen Breyer's majority opinion found standing for individuals who disagreed with positions taken by the American Israel Public Affairs Committee (AIPAC) to challenge the Federal Election Commission's decision not to pursue AIPAC for alleged violations of federal election laws. The claim was that AIPAC was a "political committee" engaged primarily in supporting candidates, rather than an issue-oriented entity, and therefore was required to provide information about its supporters and other matters to the FEC. Having failed to persuade the FEC that AIPAC had violated the law the complainants sought judicial direction that would mandate enforcement activity. The Court found that complainants had a sufficient personal interest to challenge the FEC decision, emphasizing that a different decision on AIPAC's status would have required AIPAC to disclose information desired by complainants.

Akins illustrates a sharp divide between the "soft standing" and the "hard standing" camps. Dissenting Justices Scalia, O'Connor and Thomas saw the outcome in *Akins* as starkly at odds with *Heckler* as well as with the standing analysis in *Lujan.* The dissenters expressed again their strong concerns that overly liberal standing rules transfer power from the political branches to the courts in ways at odds with constitutional design. That concern supports a more restrictive rule. Justice Breyer and the majority, however, were not concerned about the general issue of institutional competence, preferring to address the matter on the basis of the individual case. The broad right-of-review provision at issue in *Akins* persuaded the majority that the political branches had knowingly subjected FEC enforcement choices to judicial review, which in the majority's view eliminated the basis for prudential concerns with standing.

Essentially the same division and same result obtained in *Friends of the Earth v. Laidlaw Environmental Services, Inc.*[12] Two environmental groups were given standing to sue the defendant corporation for failing to comply with restrictions on its discharge of certain pollutants. Justice Ruth Ginsburg's opinion for the majority accepted plaintiffs' assertions of personal harm from the violations, notwithstanding the district court's findings that the violations had no adverse effect on the environment and the absence of support for the alleged personal connections to the supposed environmental harms. The majority made clear its willingness to accept the vaguest assertions of personal harm from environmental degradation as sufficient for standing when legislation included a broad right-of-review provision, moving the Court back toward its position in *SCRAP*. Justices Scalia and Thomas again registered a vigorous dissent.

STANDING IN THE ROBERTS COURT

The addition of Chief Justice Roberts and Justice Alito to the Court has shifted the center of gravity on standing issues slightly toward the standing skeptics. Roberts and Alito have staked out territory between the Scalia-Thomas position and Justice Kennedy's less clearly defined (and more malleable) approach. Their voting pattern, however, looks very similar to the "hard standing" justices, leaving Kennedy now as the lone swing vote.

Like Chief Justice Rehnquist and Justice O'Connor, whom they succeeded, the newest members of the Court accept the *Lujan* formulation requiring claimants to demonstrate "an injury that is concrete, particularized, and actual or imminent, fairly traceable to the defendant's challenged behavior, and likely to be redressed by a favorable ruling."[13] Like Scalia and Thomas, Roberts and Alito are skeptical of broadly empowering judges to supervise the other branches. They see judges as required to evaluate those branches' compliance with legal commands only as part of the courts' mandate to adjudicate legal rights in more defined conflicts between discrete parties. In Lon Fuller's terms, the newest justices join with Scalia and Thomas in seeing courts as arbiters of concrete, bipolar arguments, not "polycentric" disputes that implicate large numbers of potential contestants. But the new Chief Justice and Justice Alito are more willing than Justices Scalia and Thomas to try and fit those instincts within the language of prior cases and to address them on a case-by-case basis.

So, for instance, in *Hein v. Freedom from Religion Foundation, Inc.*,[14] Justice Alito wrote a decision, joined by the Chief Justice and Justice Kennedy, rejecting a challenge to executive use of funds to support conferences and other outreach to faith-based organizations. The plurality accepted the precedent of *Flast v. Cohen*,[15] which had allowed taxpayer standing to challenge congressional spending programs as violating the Establishment Clause, but the plurality concluded that *Hein* differed from *Flast* in questioning discretionary executive actions, rather than specific congressional action. For Alito, Roberts, and Kennedy, that difference put plaintiffs outside the limited ambit of taxpayer standing approved in

Flast. While Justice Kennedy wrote separately to emphasize his support for *Flast*, Roberts and Alito were content to accept it in form, but not in substance. The remaining six justices saw no meaningful difference between the claims in *Hein* and *Flast*, with Justices Scalia and Thomas urging express overruling of *Flast* and Justices Souter, Stevens, Ginsburg, and Breyer arguing that standing in *Hein* should follow directly on the basis of *Flast*'s precedent.

As in *Hein*, Chief Justice Roberts and Justice Alito generally have agreed with Justices Scalia and Thomas on outcomes even if not on analysis. In cases like *DaimlerChrysler v. Cuno*[16] and *Lance v. Coffman*[17] (both rejecting standing), and *Davis v. FEC* (confirming standing), those four justices were in accord. They were in accord as well in *Massachusetts v. Environmental Protection Agency*,[18] dissenting from the majority's conclusion that standing existed for Massachusetts to obtain judicial review of the EPA's decision not to regulate carbon dioxide emissions as a pollutant under the Clean Air Act.

Massachusetts v. EPA deserves special attention because, with Justice Kennedy swinging over to the "soft standing" crowd for that case, the Court finally rendered a decision that threatened *SCRAP*'s position as the epitome of liberal standing. The majority opinion, written by Justice Stevens, predicated standing on a conjectural set of claims that, even if accepted, hardly amounted to a demonstration of harm that was actual or imminent. Turning Justice Stevens's complaint in *Lujan* about the Court's inhospitable treatment of environmental claims on its head, *Massachusetts v. EPA* is best explained by the majority's extraordinary solicitude for any suit assertedly filed to protect the environment. As Chief Justice Roberts's opinion for the four dissenting justices explains, it is difficult to state with a straight face that *any* of the traditional requisites for Article III standing was met. Instead, standing rested on a remote, speculative, generalized harm that was extremely unlikely to be significantly ameliorated—much less remedied—by the actions plaintiffs sought. Further, the dramatic revision of standing law there was merely prelude to a decision requiring the majority to bend, twist or overlook a host of other administrative law doctrines to reach its desired result.

LOOKING AHEAD

Standing law today defies ready description in neutral, analytic terms. The tug-of-war between the four-justice "soft standing" bloc and the four justices that take a harder line toward standing continues to produce decisions that swing between those poles. Although Justice Kennedy may find the outcomes congenial in all cases, no one else seems able to articulate a coherent rationale for the pattern of Supreme Court decisions over the last decade. It remains to be seen whether the Court will drift toward the liberal standing position of thirty-five years ago or return to the harder standing line taken for much of the 1980s and 1990s. For the moment, the Court's standing decisions constitute a warning that real injury and actual redressability will most likely be required—but they also invite appeals to the instincts that brought Justice Kennedy along in a case that defied all the imprecations of the prior three decades about the risks of making standing law an open door.

Endnotes

1 310 U.S. 113 (1940).
2 309 U.S. 470 (1940).
3 5 U.S.C. § 702.
4 397 U.S. 150 (1969).
5 412 U.S. 669 (1973).
6 418 U.S. 166 (1974).
7 418 U.S. 208 (1974).
8 422 U.S. 490 (1975).
9 504 U.S. 555 (1992).
10 470 U.S. 821 (1985).
11 524 U.S. 11 (1998).
12 528 U.S. 167 (2000).
13 Davis v. Federal Election Commission, 128 S.Ct. 2759, 2768 (2008).
14 127 S.Ct. 2553 (2007).
15 392 U.S. 83 (1968).
16 547 U.S. 332 (2006).
17 127 S.Ct. 1194 (2007)
18 127 S.Ct. 1438 (2007).