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Web site: http://www.uky.edu/~raswan0/conlaw/lujan.html

LUJAN v. DEFENDERS OF WILDLIFE, 504 U.S. 555 (1992)

JUSTICE SCALIA delivered the opinion of the Court with respect to Parts I, II, III-A, and IV, and an opinion with respect to Part III-B, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE THOMAS join.

I

The ESA [Endangered Species Act] seeks to protect species of animals against threats to their continuing existence caused by man. Section 7(a)(2) of the Act then provides . . .:

"Each Federal agency shall . . .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 . . . critical [habitat]."

In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secretary of Commerce, respectively, promulgated a joint regulation stating that the obligations imposed by 7(a)(2) extend to actions taken in foreign nations. The next year, however, the Interior Department began to reexamine its position. A revised joint regulation, reinterpreting 7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was proposed in 1983, and promulgated in 1986.

Shortly thereafter, respondents, organizations dedicated to wildlife conservation and other environmental causes, filed this action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of 7(a)(2) and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation. The District Court granted the Secretary's motion to dismiss for lack of standing. The Court of Appeals for the Eighth Circuit reversed by a divided vote. . . . [Secretary Lujan now appeals to the U.S. Supreme Court.]

II

While the Constitution of the United States divides all power conferred upon the Federal Government into "legislative Powers," Art. I, 1, "[t]he executive Power," Art. II, 1, and "[t]he judicial Power," Art. III, 1, it does not attempt to define those terms. . . . Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. . . . One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III - "serv[ing] to identify those disputes which are appropriately resolved through the judicial process," - is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-

or-controversy requirement of Article III.

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not `conjectural' or `hypothetical,'" Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." The party invoking federal jurisdiction bears the burden of establishing these elements. . . .

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depend considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction - and perhaps on the response of others as well. The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict, and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.

III

We think the Court of Appeals failed to apply the foregoing principles in denying the Secretary's motion for summary judgment. Respondents had not made the requisite demonstration of (at least) injury and redressability.

A

Respondents' claim to injury is that the lack of consultation with respect to certain funded activities abroad "increas[es] the rate of extinction of endangered and threatened species." Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured. To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their "`special interest' in th[e] subject."

With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two

Defenders' members - Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and observed the traditional habitat of the endangered Nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly, and that she will suffer harm in fact as the result of [the] American . . . role . . . in overseeing the rehabilitation of the Aswan High Dam on the Nile . . . and [in] develop[ing] . . . Egypt's . . . Master Water Plan. Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and "observed th[e] habitat" of "endangered species such as the Asian elephant and the leopard" at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she "was unable to see any of the endangered species"; "this development project," she continued, will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited . . . [, which] may severely shorten the future of these species"; that threat, she concluded, harmed her because she "intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard." When Ms. Skilbred was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that "I intend to go back to Sri Lanka," but confessed that she had no current plans: "I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future." . . .

[T]he affiants' profession of an "inten[t]" to return to the places they had visited before - where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species - is simply not enough. Such "some day" intentions - without any description of concrete plans, or indeed even any specification of when the some day will be - do not support a finding of the "actual or imminent" injury that our cases require.

Besides relying upon the Kelly and Skilbred affidavits, respondents propose a series of novel standing theories. The first, inelegantly styled "ecosystem nexus," proposes that any person who uses any part of a "contiguous ecosystem" adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach, as the Court of Appeals correctly observed, is inconsistent with our opinion in [an earlier case], which held that a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity, and not an area roughly "in the vicinity" of it.

Respondents' other theories are called, alas, the "animal nexus" approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the "vocational nexus" approach, under which anyone with a professional interest in such animals can sue. . . . It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.

B

Besides failing to show injury, respondents failed to demonstrate redressability. . . .

[T]he agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. [I]t is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve. There is no standing.

IV

[The ESA allowed any citizen to challenge an action under the ESA, but the Court declared Congress could not grant the authority for any citizen to sue under the ESA, because the "injury" requirement of standing must still be met.]

* * *

We hold that respondents lack standing to bring this action, and that the Court of Appeals erred in denying the summary judgment motion filed by the United States. The opinion of the Court of Appeals is hereby reversed, and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE SOUTER joins, concurring in part and concurring in the judgment.

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

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

With respect to the Court's discussion of respondents' "ecosystem nexus," "animal nexus," and "vocational nexus" theories, I agree that, on this record, respondents' showing is insufficient to establish standing on any of these bases. I am not willing to foreclose the possibility, however, that, in different circumstances, a nexus theory similar to those proffered here might support a claim to standing. See Japan Whaling Assn. v. American Cetacean Society, (1986) ("[R] espondents . . . undoubtedly have alleged a sufficient `injury in fact' in that the whalewatching and studying of their members will be adversely affected by continued whale harvesting"). . .

In light of the conclusion that respondents have not demonstrated a concrete injury here sufficient to support standing under our precedents, I would not reach the issue of redressability that is discussed by the plurality in Part III-B.

I also join Part IV of the Court's opinion . . .

JUSTICE STEVENS, concurring in the judgment.

Because I am not persuaded that Congress intended the consultation requirement in 7(a)(2) of the ESA to apply to activities in foreign countries, I concur in the judgment of reversal. I do not, however, agree with the Court's conclusion that respondents lack standing because the threatened injury to their interest in protecting the environment and studying endangered species is not "imminent." Nor do I agree with the plurality's additional conclusion that respondents' injury is not "redressable" in this litigation.

In my opinion, a person who has visited the critical habitat of an endangered species has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction. Congress has

found that a wide variety of endangered species of fish, wildlife, and plants are of "aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." Given that finding, we have no license to demean the importance of the interest that particular individuals may have in observing any species or its habitat, whether those individuals are motivated by esthetic enjoyment, an interest in professional research, or an economic interest in preservation of the species. . . .

The plurality also concludes that respondents' injuries are not redressable in this litigation . . . [I]t is not mere speculation to think that foreign governments, when faced with the threatened withdrawal of United States assistance, will modify their projects to mitigate the harm to endangered species.

JUSTICE BLACKMUN, with whom Justice O'CONNOR joins, dissenting. . . .

I think a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the "actual or imminent" injury standard. . . . Contrary to the Court's contention that Kelly's and Skilbred's past visits "prov[e] nothing," the fact of their past visits could demonstrate to a reasonable factfinder that Kelly and Skilbred have the requisite resources and personal interest in the preservation of the species endangered by the Aswan and Mahaweli projects to make good on their intention to return again. Similarly, Kelly's and Skilbred's professional backgrounds in wildlife preservation, also make it likely - at least far more likely than for the average citizen - that they would choose to visit these areas of the world where species are vanishing.

The Court also concludes that injury is lacking, because respondents' allegations of "ecosystem nexus" failed to demonstrate sufficient proximity to the site of the environmental harm. . . . Many environmental injuries, however, cause harm distant from the area immediately affected by the challenged action. Environmental destruction may affect animals traveling over vast geographical ranges, or rivers running long geographical courses. . . .

The Court also rejects respondents' claim of vocational or professional injury. The Court says that it is "beyond all reason" that a zoo "keeper" of Asian elephants would have standing to contest his government's participation in the eradication of all the Asian elephants in another part of the world. I am unable to see how the distant location of the destruction necessarily . . . mitigates the harm to the elephant keeper. If there is no more access to a future supply of the animal that sustains a keeper's livelihood, surely there is harm. . . .