

Winter 2002

# Blackletter Statement of Federal Administrative Law: Standing

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## Recommended Citation

Farina, Cynthia R., "Blackletter Statement of Federal Administrative Law: Standing" (2002). *Cornell Law Faculty Publications*. Paper 756.

<http://scholarship.law.cornell.edu/facpub/756>

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#### IV. STANDING

##### A. Overview

Standing doctrine determines “whether the particular [litigant] is entitled to an adjudication of the particular claims asserted.” *Allen v. Wright*, 468 U.S. 737, 752 (1984). It comprises both constitutional requirements and prudential elements.

Article III’s limitation of the judicial power to “Cases” and “Controversies” imposes three standing requirements. The party must have suffered an *injury* that is *traceable* to the actions of the opposing party and *redressable* by the relief requested from the court. Although these are constitutional requirements, Congress has some power to affect their application to particular situations, as discussed below.

Beyond these constitutional minima, additional prudential restrictions may apply as a matter of “judicially self-imposed limits on the exercise of federal jurisdiction.” *Allen v. Wright*, 468 U.S. at 751. Such restrictions include:

- (1) a prohibition against parties raising claims or defenses that involve a third party’s legal rights (the *jus tertii* limitation);
- (2) a requirement that the injury be arguably within the *zone of interests* protected or regulated by the statute invoked; and
- (3) a prohibition against litigating *generalized grievances*. (This restriction may have a constitutional dimension as well.)

Congress may, by statute, override prudential restrictions on standing.

The general standing requirement for review of agency action under the APA is codified in § 702, which provides 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.” Although this language significantly broadened pre-APA availability of standing to challenge agency action, it does not confer standing to the limits of what is constitutionally possible. In addition to showing that she has suffered a constitutionally cognizable injury caused by the agency’s action, the plaintiff relying upon § 702 must show that her injury is “arguably within the zone of interests to be protected or regulated

by the statute . . . in question.”

Individual regulatory statutes may contain their own standing provisions. Statutory language authorizing challenge by “any person aggrieved” has traditionally been interpreted to confer standing to the full extent of Article III, without regard to such prudential limitations as the zone-of-interests requirement. Citizen-suit provisions (e.g., those conferring standing on “any person” without further requirements) are usually given this interpretation as well. Other kinds of statutory standing provisions are typically construed to incorporate the zone-of-interests test and other prudential requirements absent evidence of a different legislative intent.

An association has standing to sue on behalf of its members when “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 342 (1997). The second of these criteria is construed very leniently, and the third comes into play principally in suits for monetary relief, in which the amount of recovery might vary among individuals. Usually, therefore, the only important question in litigation is whether the first criterion is met.

## **B. Constitutional and Prudential Requirements Regarding Injury**

### **1. The Constitutional Injury-In-Fact Requirement**

The basic Article III requirement is “injury in fact.” Constitutionally cognizable injuries can include harm to nonmonetary intangible interests, as well as economic or tangible harm. For example, so long as it is individually experienced, harm to environmental, recreational, or aesthetic interests can support standing. The injury must be actual or imminent, not conjectural or hypothetical. Mere ideological objection to government behavior does not constitute a constitutionally cognizable injury.

In addition to the kinds of harm to person or property that would have been recognized at common law, “[t]he actual or threatened injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.” *Warth v. Seldin*, 422 U.S. 490, 900 (1975). Such statutory rights can include rights to information, access, and participation.

The right of a prevailing party to claim a statutory bounty satisfies the

injury-in-fact requirement, although provisions for the recovery of attorneys' fees and litigation costs do not.

## 2. Injury from Violation of Procedural Requirements

When a challenged agency action harms an underlying substantive interest of the plaintiff, she has standing to challenge the agency's failure to follow proper procedures even though she cannot prove that the procedural error actually changed the substantive outcome. For example, a taxpayer whose tax liability is increased by a new regulation can challenge the adequacy of the notice of proposed rulemaking, even though it cannot be shown that but for the error a more favorable regulation would have ensued.

Cognizable injury may also arise from a procedural violation without a showing that the violation endangers a concrete substantive interest of the plaintiff, but there is some uncertainty about the situations in which this can occur. The uncertainty stems from the holding in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), that, in at least some situations, a violation of procedural duties alone fails to satisfy the Article III injury requirement.

It is clear, notwithstanding *Lujan*, that Congress can confer upon individuals a right personally to obtain notice of, observe, or get information about an agency activity without regard to their having a particular substantive interest, and that this right can be judicially enforced without reference to any additional, underlying substantive injury. Examples of such rights include the right to attend meetings and otherwise have access to government proceedings under the Government in the Sunshine Act and the Federal Advisory Committee Act. Freedom of Information Act rights and voter rights to certain information under the Federal Election Campaign Act are analogous sorts of rights, denial of which will support standing without regard to proof of harm to a particular, underlying substantive interest. *See infra* § B.3.

It is also clear, from *Lujan* itself, that Congress does not have the power to confer standing upon individuals to enforce a procedural requirement without regard to their underlying substantive interests *if* the procedural requirement entails a purely internal agency activity as to which persons like the plaintiff have no legal claim to involvement or information. The Endangered Species Act consultation provision challenged in *Lujan* was such a purely internal executive-branch activity, in which outsiders were given no statutory right of participation or access.

The uncertainty arises when a procedural requirement:

(1) *does* entail a right on the part of a person like the plaintiff *individually* to obtain notice of, observe, participate in, or get information about an agency activity, but

(2) Congress has not been explicit as to whether the requirement was intended to be enforceable without regard to the plaintiff's having a particular underlying substantive interest, and the Supreme Court has not provided a definitive construction of the statute.

Examples include APA § 553 notice-and-comment requirements and the public-hearing requirements in numerous organic statutes.

Although some lower courts have construed *Lujan* as automatically requiring an underlying substantive interest in all such cases, this interpretation is not inevitable. The procedural requirement sought to be enforced in *Lujan* was not such a right of individual participation or access, a distinction that seems important in light of the continued enforceability of individual (though widely shared) rights of notice, participation, and information such as those created by GITSA, FACA, FOIA, and FECA. It may be that the availability of standing in such cases properly depends, in the first instance, on construing the particular statute or regulation that creates the procedural requirement. Specifically, the question would be whether this particular statute or regulation intended to confer a right of individual participation, access, etc., enforceable without regard to whether the agency action on the merits threatens a discrete substantive interest of the plaintiff.

So far, the Supreme Court has not clearly indicated how such cases are to be analyzed and resolved.

### 3. Generalized Grievances vs. Harm to Informational Rights and Other Broadly Shared Interests

The status and proper application of the "generalized grievances" restriction is also currently somewhat unsettled.

The refusal to predicate standing on harm that is "shared in substantially equal measure by all or a large class of citizens," *Warth*, 422 U.S. at 499, has historically been categorized as prudential, and judicial reluctance to entertain such litigation emerged in cases in which specific statutory

authorization for suit was lacking. In *Lujan v. Defenders of Wildlife*, the Court for the first time construed a statute that attempted to extend standing to “any person”; its analysis suggested that the generalized grievance restriction has constitutional as well as prudential elements.

The core constitutional content, which Congress may not obviate, is that harm to the general interest shared by all citizens in the government conforming its conduct to law is not a judicially cognizable injury. Accordingly, a statute purporting to allow “any person” to challenge agency action is constitutionally ineffective to the extent that it attempts to authorize suit by a plaintiff who cannot demonstrate some distinct, constitutionally cognizable injury.

Statutes can, however, create and/or protect broadly shared interests, harm to which can constitutionally support standing. For example, individual voters can vindicate a “concrete, though widely shared” right to election-finance information allegedly required by statute to be made public. *Federal Election Comm’n v. Akins*, 524 U.S. 11, 24 (1998). Similarly, an individual denied access to information allegedly required to be disclosed by FOIA or to a meeting allegedly required to be open under GITSA or FACA has standing to litigate the denial, even though all citizens have an identical right of access.

#### 4. The Prudential Zone-of-Interests Requirement

In addition to a cognizable injury in fact, standing to review agency action under APA § 702 requires that the injury be “arguably within the zone of interests to be protected or regulated by the statute . . . in question.” *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970). Whether the prudential zone-of-interests requirement applies when review is sought under other statutes is a matter of statutory interpretation. In general, courts construe standing provisions to include the zone requirement unless the particular statutory language signals a legislative intent to grant standing more broadly. Examples of language that obviates the zone-of-interests requirement are true citizen-suit provisions (authorizing suit by “any person” with no further requirement) and, traditionally, “any person aggrieved” provisions.

A plaintiff who is a member of either (1) the group directly regulated by, or (2) the group intended as beneficiaries of, the relevant statute is indisputably within its zone of interests. Membership in either of these groups can be established by considering the particular statutory provision forming

the basis of suit, even if the goals of that provision appear in tension with the overall purposes of the statute generally. Thus, a party having an economic interest in avoiding stringent environmental regulation can be within the zone of interests of a generally pro-conservation statute if he is suing to enforce a specific provision the purpose of which is to avoid unnecessary economic impact.

The zone-of-interests requirement produces greater controversy and confusion when applied to a claimant who has an actual *but not directly intended* stake in the regulatory scheme. The most common example of such incidentally implicated interests are competitors of the regulated industry. Their financial stake in the continued or enhanced regulation of others provides the requisite injury in fact. In general, such incidentally-implicated parties will satisfy the zone-of-interests requirement *unless* their “interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” *Clarke v. Securities Industry Ass’n*, 479 U.S. 388, 399 (1987). They do not need to prove that Congress intended to benefit them or persons similarly situated. As with members of the regulated and intended beneficiary communities, congruence between their interests and the statutory purposes can be assessed under the particular statutory provision forming the basis of their challenge, even if these interests do not align with what appear to be the statute’s overall objectives.

##### 5. The Prudential Limitation on Raising the Rights of Third Parties

The *jus tertii* prohibition is a judicially self-imposed limit on the exercise of jurisdiction that plays an important role in adjudication of constitutional questions but has not been very significant in limiting judicial review of agency action under the APA or specific organic statutes.

A litigant attempting to challenge government action on grounds that it violates the constitutional rights of a third party may be prohibited from doing so unless (1) the third party has suffered an injury in fact; (2) the litigant and the third party stand in some close relationship; and (3) “some hindrance” impedes the third party’s ability to assert her own rights. *Campbell v. Louisiana*, 523 U.S. 392 (1998).

Perhaps because the zone of interests test serves a function similar to that of the *jus tertii* doctrine, these limitations are not prominent in administrative law cases (other than cases raising constitutional questions). Plaintiffs who have established standing on their own behalf (including

satisfying any applicable zone-of-interests requirement) are regularly permitted to attack agency action on grounds that the agency has failed to protect the interests of the public or some other group of third-party beneficiaries of the regulatory statute at issue.

### C. Traceability & Redressability

The constitutionally required elements of *traceability* and *redressability* ensure that there is at least a reasonable probability that the plaintiff's injury was caused by actions of the defendant and will be remedied by the relief requested from the court.

Although they are separately stated in contemporary standing doctrine, the requirements of traceability and redressability are typically analyzed in tandem. There is, however, one important category of case in which the analyses may diverge. If the court's remedial options are limited by statute or other law, the injury may indeed be traceable to the defendant's action, but incapable of being redressed by any of the available remedies. For example, a plaintiff who has suffered an environmental injury concededly caused by the defendant will be denied standing on redressability grounds where the wrongdoing had ceased before the suit was filed, the plaintiff cannot demonstrate a reasonable likelihood that it will recur, and the only statutory remedies are prospective injunctive relief and civil penalties payable to the government.

Traceability and redressability analysis tends to be very fact-specific, and in most cases there is no ready formula for predicting when a court will conclude that the causal chain has become too uncertain or attenuated. Cases attempting to challenge either favorable tax treatment of a third party or decisions not to prosecute appear to follow a pattern of dismissal because of failure to satisfy traceability and redressability requirements.

The outcome of the traceability and redressability inquiry can be highly dependent upon how the injury is defined. For example, if the harm to a plaintiff challenging an affirmative action program is defined as not obtaining the relevant position or contract, the plaintiff will often be unable to show that she would have obtained the benefit but for the challenged program. However, the Court defines the injury in such cases as a diminished opportunity to compete for the desired outcome, a definition that eliminates problems of traceability or redressability.

A similar definitional issue is posed by the suggestion, advanced by some judges, that complaints by regulatory beneficiaries categorically pres-



ent difficult traceability and redressability problems. For example, it has been argued that consumers who can satisfy the particularized injury requirement and wish to challenge an agency's failure to adopt more rigorous fuel economy standards for automobiles must also show that, if a more demanding rule were adopted, manufacturers would change their designs rather than pay noncompliance penalties. This argument defines the relevant injury as the behavior, *vel non*, of the regulated entities. Alternatively, several lower court cases define the injury from under-regulation as the agency's failure to adjust the legal incentives for private behavior in ways that further the ultimate statutory objectives. So understood, regulatory beneficiary claims present no special traceability or redressability problems.

Complaints about procedural violations provide another example. If the injury is defined as actually obtaining favorable agency action on the merits, the plaintiff will rarely be able to show that correcting the procedural errors is likely to change the outcome. Language in *Lujan* suggests that plaintiffs asserting procedural rights do not have to meet the "normal" standards for redressability, but does not explain why constitutional requirements would be more lenient for procedural claims than for substantive ones. If, however, the injury is defined not as the substantive harm flowing from the agency's ultimate decision, but rather as denial of the right to participate in an administrative decisional process conducted as required by law, then no special traceability or redressability standard is needed to explain why courts routinely reverse agency action for procedural error even though the agency may ultimately reach the same substantive outcome.

Congress can, by appropriate legislation, influence the traceability and redressability analysis. Just as statutes can define new cognizable injuries, so they can "articulate chains of causation that will give rise to a case or controversy where none existed before." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and in the judgment). Some early lower court cases had refused to defer to legislative determinations about causation, but the Supreme Court recently resolved a difficult redressability question by looking in part to congressional findings that, the Court said, "warrant[] judicial attention and respect." *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 185 (2000).