Some Thoughts on the Constitution and the Environment

by David Bookbinder

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I. The Senate Filibuster

I think Richard Lazarus was right when he said that the biggest constitutional impediment to environmental law in the United States may be Article I, §5 of the U.S. Constitution, which provides that each House of Congress may make its own rules. We see that clearly in the "Sacred Quest for 60," as we try to craft a climate bill that can make it through the U.S. Senate.

There is a second, more subtle way in which the Rule of 60 makes things more difficult, which is that it muddles the head count, and thus accountability in general. A 60-vote threshold gives senators the opportunity to say, "Well, sure, I'll vote for it," knowing that they may never have to, because leadership rarely will take a vote on bills subject to a filibuster unless it has 60 votes locked up. Thus, many senators can indicate support for a bill, while knowing the odds are that they will never have to go on record and actually vote for it. And if, for one procedural reason or another, the issue is then recast into a form requiring a simple majority, anything can happen. You may start out with a 58-vote head count when you need 60, and then suddenly have 48 when you're looking for 51 on the same issue. Welcome to Washington.

Apropos of Senate whip counts, as soon as the Waxman-Markey climate bill passed the U.S. House of Representatives last year, I edited the automatic signature at the bottom of my e-mails to include the statement: "Waxman-Markey: if you don't have 60, you'd better have 41." If you don't have 60 votes to pass a bill, you'd better have 41 to block whatever bad thing the Senate may come up with instead. So, I put that on my e-mail because I wanted people to keep that in mind: If you don't have 60, you'd better have 41.

II. Standing

Ed Kneedler was talking about the Article III standing issue in *Summers v. Earth Island Institute*.[1] I think that there is a legitimate separation-of-powers issue lurking in Article III, when one branch of the federal government—Congress—authorizes suit against another branch—the executive—and makes the third branch—the judiciary—the arbiter of those disputes. However, as it has evolved and expanded, I think it has become one of the most profoundly antidemocratic features of American law. Citizens go to court seeking to hold the executive branch accountable to the law. They ask federal courts, neutral third parties, to decide either that: "Yes, the executive branch followed the law," or "No, the executive branch didn't follow the law." And every time a court declines to find standing, that court is preventing citizens of the United States from holding the executive branch accountable to the very laws that those citizens, via their representatives in Congress, created. So, keep in that mind when you hear all that high-flying rhetoric about separation of powers.

I have a second criticism of Article III standing doctrine. I said that there is a core separation-of-powers concern when federal courts are adjudicating cases brought by citizens against the executive branch pursuant to an act of Congress. However, what that has to do with litigation exclusively between private parties is utterly beyond me. And yet, somehow the federal courts have enthusiastically taken this whole Article III standing analysis involving litigation against the executive branch and dumped it onto litigation solely between private parties.

And lastly, as to *Summers* itself, I'm not sure you quite caught this part of it. The regulation being challenged in *Summers* exempted certain timber sales in national forests from the requirement of pubic notice and comment. The point of the regulation was to deprive the public of advance notice of these projects, a truly antidemocratic step. And the U.S. Forest Service argued, and the U.S. Supreme Court endorsed, the principle that citizens don't have standing to challenge logging plans for these projects unless they can say: "We use that specific part of the forest," but the Forest Service doesn't provide any public notice before it logs those areas. In other words, unless the citizens are literally standing there while the logging is going on, they will never be able to establish standing to challenge the project. Neat, huh?

III. Climate Standing

Standing to sue for climate change-related injury was obviously a major issue in *Massachusetts v. EPA*.[2] *Massachusetts*

1. 129 S. Ct. 1142, 39 ELR 20047 (2009).

2. 549 U.S. 497, 37 ELR 20075 (2007).

was somewhat odd from our perspective because we filed a standing appendix in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit with hundreds of pages of declarations and affidavits from citizens, environmental groups, states, etc. Nevertheless, all three opinions in the D.C. Circuit focused solely on state standing, and in particular on Massachusetts losing coastal territory, which was fine. There was no need to go branching off into *parens patriae* standing if a state is actually losing its physical territory, and I don't see any stronger case for injury than that.

Oddly enough, the Supreme Court seemed unsure about this, which I found really remarkable. I remember giving a lecture on *Massachusetts* at Yale Law School, sponsored jointly by the Environmental Law Society and the Federalist Society. And someone from the Federalist Society side of things got up and started railing about how *Massachusetts* treated state standing and I said: "Hold it, aren't you a Federalist Society member? Shouldn't you be glad that federal courts are giving special consideration to states?" Nothing trumps the Federalist Society's principles of federalism like their blatant political prejudices.

Aside from this special solicitude for states—which I think will prove to be a double-edged sword—the only other development that came out of *Massachusetts* was how it dealt with the redressability issue. Injury is no longer a question; it is real, it is palpable, and it is happening now. As Judge Peter W. Hall wrote in *Connecticut v. AEP*[3] about the loss of the California snow pack, and Justice John Paul Stevens wrote in *Massachusetts* about the loss of state land, the effects are being felt now. Traceability is also not hard to deal with: if you emit greenhouse gases (GHGs) or if you're a regulatory agency allowing gases to be emitted beyond what a statute permits, then you're part of the problem.

The tough issue is what I would call "non-quantifiable redressability." We have lots of GHG emissions, but each source is only emitting a relatively small amount. Yes, it's contributing to climate change, but if you reduce these particular emissions, how will it actually help things? And I think *Massachusetts* answered that, saying that by reducing emissions you are keeping the problem from getting worse, and that satisfies the redressability criterion. And there is no requirement that the government must go after all the emissions at once, which is good, because otherwise nothing would ever get done.

And since then, with some outliers, I think the courts have been fine on climate standing. I think the *Native Village of Kivalina v. Exxon Mobil Corp.*[4] district court decision, where on a motion to dismiss the court held as a matter of law that the plaintiffs could not prove causation, was an error that the U.S. Court of Appeals for the Ninth Circuit will fix fairly soon.

The other decision worth noting since *Massachusetts* is *Center for Biological Diversity (CBD) v. Department of Interior,*[5] where Judge David B. Sentelle, who had written one of the three opinions in the *Massachusetts* D.C. Circuit case, and one of the two opinions on standing, said *Massachusetts* doesn't really mean anything. He said three or four times that *Massachusetts* is confined to its facts, it only deals with state standing, etc. And then he talked about how climate change is generalized injury that affects everybody and, therefore, there is no injury that can support standing.

Interestingly, that particular philosophy was just endorsed by the Obama Administration. One of the defendants in *Connecticut* is the Tennessee Valley Authority, a federal agency. When the other defendants sought Supreme Court review of the U.S. Court of Appeals for the Second Circuit decision, the Solicitor General asked the court to grant certiorari, but only in order to vacate the decision and send the case back to the court of appeals for dismissal on either of two grounds, one of which was prudential standing. According to the Administration, because climate change affects everyone, it causes only "generalized injury" that courts should not address. We'll see how that flies.

Getting back to Judge Sentelle's opinion in the *CBD* case, he also said some pretty amusing things about causation. The plaintiff was seeking to compel National Environmental Policy Act[6] analysis of the GHG emissions from oil that was going to be produced off the coast of Alaska, and Judge Sentelle said that CBD could not show any injury from those gases because the chain of causation is too long: first, the oil has to be pumped out of the well. Then, it has to be transported. Then, it has to be refined. Then, it has to be sold to a gas station. Then, someone has to buy it and pump it into their car and burn it while driving, and all of that is simply "too speculative" a chain of causation. Now, Judge Sentelle can break that chain up into as many links as he likes, but think about it. What else do you think happens to that oil? I think you can take judicial notice of the fact that North Shore crude winds up in gas tanks. There is absolutely nothing "speculative" about that.

The next developments on climate standing will be in various D.C. Circuit challenges to the U.S. Environmental Protection Agency's (EPA's) first steps toward regulating GHGs. To date, some 55 petitions have been filed just on the endangerment finding, and I expect the U.S. Department of Justice (DOJ) to move to dismiss all of these on the grounds that there is no standing to challenge the endangerment finding per se. It's just a scientific finding. There are no regulations. No one is affected by that finding alone and, assuming that these cases are not consolidated with the vehicle GHG standards case, we will presumably see DOJ filing this motion. It

3. 582 F.3d 309, 39 ELR 20215 (2d Cir. 2009).
4. No. 08-1138, 39 ELR 20236 (N.D. Cal. Sept. 30, 2009).
5. No. 07-16423, 39 ELR 20193 (9th Cir. Sept. 14, 2009).
6. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.

would be nice to see all the horrible standing law being used against someone else.

There are also the challenges to EPA's famous Tailoring Rule, where EPA decided to phase in one form of regulation for stationary sources. The Clean Air Act (CAA)[7] says any source emitting more than 250 tons per year of any "regulated pollutant" is subject to the prevention of significant deterioration and new source review provisions. It's very clear, and you can't avoid those words. But EPA says it is going to start by regulating only sources emitting greater than 75,000 tons per year. Now, it's going to be interesting to see who has standing to challenge that. If you emit more than 75,000 tons, you're regulated either way, with or without this rule. No injury. And if you emit less than 75,000 tons, you're off the hook. How can you be injured by that?

So, the industry lawyers have been thinking: "Well, we're going to find an industry where the players are sources that emit between 70 and 80,000 tons per year and claim that the rule gives an unfair advantage to some members within a particular industry bracket." And the D.C. Circuit will then have to decide whether that sort of competitive injury is within the zone of interests of the CAA. Stay tuned.

Last, but certainly not least, is the issue of standing in climate legislation (if we ever get a climate bill). One of the thorniest issues we wrestled with in Waxman-Markey, Kerry-Boxer, and all these others, was standing. The good news is that we do not need to create standing for anything related to carbon allowance trading schemes: the environmental groups simply buy allowances and/or offsets, and then we'll have an economic stake in that game and thus standing.

The hard issue is standing for judicial review of the dozens and dozens of rulemakings that such legislation will require, any one of which might have only a very minute impact on GHG emissions. And this worried the drafters on Capitol Hill. It worried the environmentalists. There was a lot of dialogue about this, and in the end, three ways were proposed to deal with this. The first one was actually included in the discussion draft of Waxman-Markey, and the plan was to take *qui tam* and apply it to review of agency actions such that if you successfully challenge an EPA rulemaking in the D.C. Circuit, you will be paid a bounty. No kidding. I don't know how many iterations of Waxman-Markey there were before that plan collapsed. It just wasn't going to work; no way Congress was going to put a bounty on suing federal agencies. Not that it's necessarily a bad idea—personally, I think it would be kind of fun.

The second idea that they came up with was simply extensive findings, and a version of this was in the bill as passed by the House. Findings, findings, findings, findings about how bad GHGs are, how each ton of GHGs causes injury to citizens of the United States, etc., etc., and by doing this, Congress will have found both that any amount of emissions causes injury and that this injury can be redressed.

Finally, while the "extensive findings" route can't hurt, I had another possible solution. Standing is a judicially manufactured doctrine, and it's a constitutional one to boot, so ultimately it is totally up to a court to decide whether or not it wants to hear a case. In the final analysis, you simply cannot force standing down a court's throat. You can't force standing down Judge Sentelle's throat. You can't force it down the Supreme Court's throat. So, why don't you accept that, do a 180, and simply have a provision in the statute inviting the federal judiciary to help implement this statute? Something along the lines of: "We find that Article III judicial review of executive branch actions is a critical and necessary part of making this incredibly complex scheme to save the planet work. So, how about it." Period. Invite them into the tent, instead of trying to drag them in.

My proposal was rejected, probably because of the attitude in Congress that (a) we've never done anything like that before, and (b) Congress does not ask for help, Congress tells people what to do. So, if and when we ever get the 51 votes or 60 votes necessary in the Senate, if we ever get climate legislation, we will see how Congress finally tries to deal with the standing issue, and then we'll see how the courts react to it.

Thank you.

7. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.