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Justiciability: Barriers to Administrative and Judicial Review

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Overview

- Standing
- Mootness
- Ripeness

Standing

- Does the party bringing suit have a concrete stake in the outcome for a true case or controversy to exist
- Focuses judicial resources
- Prevents judiciary from interfering with decisions of political branches

Standing

- Three part test
  - Injury in fact that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"
  - Injury is fairly traceable to the challenged conduct of the defendant
  - Injury is likely to be redressed by a favorable judicial decision
- Organizations can bring suit on behalf of their members
  - Members must have standing in their own right, interests are germane to organization's purpose, and individual members are not required to participate

Standing

- Standing on one claim is standing for all?
  - NEPA challenges of government analysis of climate change impacts
  - *CBD v. DOI*, 563 F.3d 466 (D.C. Cir. 2009) – no standing for climate change impacts alone
  - *WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013) – for NEPA challenges (and procedural injury), if standing can be established for one claim then the claims related to climate change impacts can also proceed
    - Procedural harm must be tied to a concrete and particularized substantive injury
    - Standing sufficient to challenge analysis of local environmental impacts
    - No standing based on effects of climate change, but court could hear climate change claims based on local impacts injury

Standing

- Standing for climate change claims when no local claims are brought?
  - *WildEarth Guardians v. BLM* (No. 15-8109 10th Cir.)
    - Only climate change claims are before the Tenth Circuit
    - Standing rests on local environmental impacts
    - Looking to stretch D.C. Circuit rationale
    - Is there concrete and particularized injury resulting from alleged failure to consider climate change impacts
    - Is plaintiffs' injury detached or connected to the procedural injury complained of

Standing

- *US Forest Service v. Cottonwood Environmental Law Center* (No. 15-1387, U.S. Sup. Ct., cert. petition pending)
  - Ninth Circuit held that Plaintiffs had standing to bring ESA consultation claims against programmatic action that authorized no site-specific project and no concrete effects on Plaintiffs
  - Seeks to apply *Summers* decision and correct the "Ninth Circuit's continued adherence to its flawed approach to standing and ripeness"
  - US asserts that there must be a linkage between the project and the claimed injury, and a concrete and particular project must be connected to the procedural loss
  - Conflicts with Sixth, Seventh, and D.C. Circuits' application of *Summers*

Standing

- Standing before the Interior Board of Land Appeals (IBLA)
  - Standing test tracks Article III, but is derived from federal regulations
    - 43 C.F.R. 4.410(a)
  - No clean distinction between standing and ripeness – ripeness usually subsumed in standing inquiry
  - *Board of County Commissioners of Pitkin County, Colorado*, 186 IBLA 288 (2015) – challenge to Suspensions of Operations for oil and gas leased parcels
    - IBLA rejected all theories of standing:

      (i) no real and immediate injuries from lease suspensions;

      (ii) no injury from diversion of organizational resources; and

      (iii) no injury from loss of sales tax revenue

Mootness

- First cousin of standing – doctrine of standing set in a time frame
- A case is moot if a change in circumstances means that a judicial ruling will no longer affects the rights of the litigant
- A case is not moot as long as the parties have a concrete interest, however small, in the outcome of the litigation
- Not mooted by voluntary cessation of unlawful conduct
- Moot case can still be heard if challenged action is capable of repetition yet is likely to evade judicial review

Mootness

- Recent example in litigation over EPA's MATS standards
  - D.C. Circuit upheld MATS; Supreme Court reversed – *Michigan v. EPA*, 135 S. Ct. 2699 (2015)
  - Remand without vacatur by D.C. Circuit, subsequent challenge to Sup. Ct., and EPA submitted supplemental cost analysis
  - EPA argued that cert petition was mooted by cost analysis; Petitioners argued capable of repetition
  - Sup. Ct. declined to hear the case

Ripeness

- Is judicial intervention timely?
- Prevents courts from getting involved in abstract disagreements and protect agencies from judicial interference
- Two part test: (i) fitness of the issues for judicial decision; and (ii) hardship to the parties of withholding court consideration
- Fitness test considers whether issue is purely legal, whether it would benefit from a more concrete setting, and whether the agency action is final
- Hardship test focuses on whether postponing judicial review would impose an undue burden on the parties or would benefit the court
- Hardship test is satisfied in an agency action has a direct, coercive effect on a party

Ripeness

- Recent example in *Hawkes* case before Supreme Court – 136 S. Ct. 1807
  - Court analyzed finality only, but ripeness was fully briefed by the parties
- Implicates scope of hardship requirement
  - Whether an agency action that compels a certain response, which the party would not take but for the agency action, satisfies the hardship requirement
- The Corps offered an overly formalistic approach to ripeness
- *Hawkes* is in tension with prior ripeness decisions in *National Park Hospitality Ass'n* and *Toilet Goods Ass'n*

Questions?

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