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LA CONSTITUTION DES ETATS-UNIS ET LES QUESTIONS DE L'ENVIRONMENT ET DES RESSOURCES NATURELLES: L'ACCÈSS DES CITOYENS OUX COURS DANS UN SYSTÈME FEDERALISTE

THE UNITED STATES CONSTITUTION AND ENVIRONMENTAL/NATURAL RESOURCE ISSUES: CITIZEN ACCESS TO THE COURTS IN A FEDERALIST SYSTEM

LA CONSTITUCIÓN DE LOS ESTADOS UNIDOS Y LAS CUESTIONES AMBIENTALES Y DE RECURSOS NATURALES: EL ACCESO DEL CIUDADANO A LAS CORTES EN UN SISTEMA FEDERAL

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The United States Constitution And Environmental/Natural Resource Issues: Citizen Access To The Courts In A Federalist System

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Introduction

For over 200 years, the federal courts of the United States have wrestled with the constitutional limitations that arise from our Federalist system of government. As Alexis de Tocqueville, the French philosopher and observer noted after his famous tour of the young nation in 1831, almost all political issues in America wind up as legal disputes in the courts because of the nature of this constitutional system. He remarked that, in America, "few laws can escape the searching analysis of the judicial power for any length of time, for there are few that are not prejudicial to some private interest or other, and none that may not be brought before a court of justice by the choice of the parties or by the necessity of the case."[1]

During most of the Twentieth Century, the federal courts have played a central role in resolving concrete disputes and establishing sensible guidelines for industry, government and citizens. Many of these disputes center on the ever-present tensions that

are found in a Federalist constitutional system that balances the role of (1) a strong central government, (2) 50 parallel state governments that focus on more parochial concerns, and (3) the competing rights of private citizens, companies, and organizations to resolve disputes in a court of law.

As more nations around the world join in new federalist-type legal/political systems (such as the European Union), jurists, lawyers, and advocates will face new challenges as they travel down roads unfamiliar to their traditional legal systems. Over two centuries of constitutional jurisprudence in the federal courts of the United States can serve as a useful roadmap for judges and lawyers around the world as they confront new problems and seek new solutions.

This paper examines how the courts of the United States have resolved certain "federalist" constitutional issues in the context of environmental and natural resource law. In particular, we focus on the criteria affecting access to the federal courts. The issue of access is critical – in our democratic society, life-tenured federal judges wield tremendous power over significant national policy issues. To temper that power, and respect the "checks and balances" of the constitutional system, the federal courts have developed strict rules regarding the criteria for gaining access to the courthouse door. As de Tocqueville recognized, the danger of having so strong a judiciary and a tendency for all disputes to eventually flow toward its purview is tempered by the fact that a jurist "judges the law only because he is obliged to judge a case."[2] The access limitation is implicates each of the three distinguishing characteristics of the American judiciary recognized by de Tocqueville: "rights must be contested in order to warrant the

interference of a tribunal," the judiciary "pronounces on special cases, and not upon general principles," and the judicial power "can act only when it is called upon."[3]

While some of the basic principles surrounding these checks on power and limits on access to the courts date back to the founding of the Republic in 1789, they have been repeatedly applied to many hotly contested disputes that arise in this area – including hazardous waste management, clean water and air enforcement, endangered species protection, and taking of private property by regulatory actions. As the reader will observe, many of these issues continue to dominate the legal and political landscape of the United States. While not a comprehensive study, this paper provides a good introduction to how the American system has addressed these important issues.

The Federalist System and the Role of Judicial Review

The American Republic creates a unique political system in which the central federal government, the 50 state governments, and indivdual citizens each are players on the grand stage of governance. Under the United States Constitution and the federalist system it created, the central federal government is granted certain enumerated powers, with even these constrained by specific guarantees of rights to individuals (mostly set forth in the "Bill of Rights," the first 10 amendments to the Constitution). The remaining powers generally are reserved to the States, which also are constrained by the Bill of Rights, and which was extended to the states after the American Civil War through passage of the Fourteenth Amendment to the Constitution.

The central federal government itself is set up in three branches – the President as Executive, the Congress as the Legislature and the federal judiciary, with the United

States Supreme Court as the ultimate authority on the Constitution. Perhaps most unique in the American system is the role of the independent federal judiciary in umpiring disputes between and among the federal branches, as well as those affecting the states and citizens. The federal courts exercise an independent role in defining the law and resolving major disputes. And, the concept that the federal judiciary is, for all practical purposes, the final arbiter of the law is one of America's most unique contributions to the democratic experience. Surely, the federal courts were created to resolve concrete disputes, "cases and controversies," between and among parties, but the scope of its sphere of influence was not always clear. Indeed, the scope of its powers and, consequently, the rights and powers of the parties that come before it, continues to evolve. Such is the strength, flexibility and uncertainty of a common law system in which judges, not legislators and executives, establish constitutional principles.

After over 200 years of jurisprudence, much has been settled regarding the judiciary's role in governance and its role in defining the rights, powers, and obligations of the federal government, the state governments, and the people to themselves govern. As new "federalist" type regimes emerge on the world stage, a study of the American experience is bound to have some influence in shaping those systems. Undoubtedly, decisions must be made to determine how values unique to those regimes can be harmonized with the American model, including the role of the judiciary in defining the law and umpiring disputes among competing sovereigns.

We begin with first principles. In the landmark case of *Marbury v. Madison*,[4] the U.S. Supreme Court for the first time decided that it had the power to declare invalid

a federal statute enacted by Congress as conflicting with the U.S. Constitution. Chief Justice John Marshall's decision for the Court unabashedly established the doctrine of judicial review, holding that "[i]t is emphatically the province and duty of the judiciary to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operations of each."[5] *Marbury* defines a hierarchy of laws within the United States. The Constitution is the supreme law controlling the federal Congress, Executive, and the remainder of the government, including the judiciary. The courts, through judicial review, are charged with preserving the boundaries of each participant's conferred authority within this hierarchy (the "separation of powers"). As the Court stated in *Marbury*, "[t]he distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation."[6]

Marbury resolved an unsettled question in American law – whether the judiciary could, in the process of resolving disputes properly before it, invalidate a democratically produced law and, hence, constrain the authority of the elected branches. By answering in the affirmative, the federal judiciary set its role as a forum in which individuals could not only resolve their disputes between each other but also in which the role of the federal government vis-a-vis individuals and the States could be defined and limited.

The Threshold Question – Jurisdiction And Access to the Courts

Before a federal forum can be accessed to resolve a dispute, a federal court must determine that it has jurisdiction. As the U.S. Supreme Court recently explained in an environmental-related case, "Without jurisdiction a court cannot proceed at all in any

cause."[7] Thus, the awesome power of judicial review is checked from becoming an unlimited power in which the judiciary may sit and pass judgment on any matter for any reason. Instead, the United States Constitution's Article III carefully defines the jurisdiction of the federal courts, precluding the judiciary from sitting as an advisory high council and limiting it to a forum where only actual "cases and controversies" are decided.

Defining this limitation plays a critical role in defining the scope of electoral autonomy and the role for individuals and the public to participate in the governing process through the courts rather than merely through accessing the elected branches. Ostensibly, a judiciary with the power to review the actions of the elected branches could serve as a powerful tool for interest groups to accomplish political ends they are incapable of achieving in the democratic process. However, the jurisdictional requirements of Article III are intended to limit such circumvention by ensuring that only real disputes by real parties with real injuries come before the courts. This narrow view of the authority of the federal courts should make it the "least dangerous branch" of government.[8]

Once jurisdiction is proper, the independent judiciary is isolated from political forces – federal judges have life tenure – and it can neutrally apply and interpret the Constitution and laws of the United States. Navigating these jurisdictional boundaries is a sensitive task for many litigants in federal courts, including those wishing to gain access and those interested in denying court access to others. With increasing attempts to use the powerful avenue of judicial review to reach political ends, the U.S. Supreme

Court has given heightened attention to jurisdictional "access" boundaries in recent years and, consequently, the exact parameters of federal court jurisdiction continue to evolve.

"Standing" -- Defining Access to Judicial Review

In recent years, numerous cases have outlined the principles of "standing" to bring suit, *i.e.* defining who can bring suit as a plaintiff in the federal courts and what type of claims they may bring. The U.S. Supreme Court in *Allen v. Wright*[9] defined the basic elements of standing in relation to the limits of Article III of the U.S. Constitution, holding that the judiciary is powerless to hear a grievance unless it is a "case or controversy" within the meaning of Article III. In other words, standing is a threshold jurisdictional issue.

A plaintiff must satisfy three requirements to establish standing. The Supreme Court recently summarized these three tests:

> As we have frequently explained, a plaintiff must meet three requirements in order to establish Article III standing. *See, e.g., Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, [120 S.Ct. 693, ___ (2000)]. First, he must demonstrate "injury in fact"–a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (internal quotation marks and citation omitted). Second, he must establish causation–a "fairly … trace[able]" connection between the alleged injury in fact and the alleged conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41 (1976). And third, he must demonstrate redressability–a "substantial likelihood" that the requested relief will remedy the alleged injury in fact. *Id.*, at 45. These requirements together constitute the "irreducible constitutional minimum" of standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), which is an "essential and unchanging part" of Article III's case-or-controversy requirement, *ibid.,* and a key factor in dividing the power of

> government between the courts and the two political branches, *see id.*, at 559—560.[10]

When a plaintiff predicates standing on the alleged invasion of a "procedural" right, special considerations come into play. In fact, whether and how one establishes standing in such situations is still an evolving question. In a footnote, the Supreme Court in *Lujan v. Defenders of Wildlife* stated in *dicta* that "a person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."[11] Although plaintiffs, particularly citizen and NGO environmental groups have seized upon *Defenders* footnote 7 as opening the door to standing on procedural claims, the text of the Court's decision cautioned that the underlying procedural requirement must be such that disregarding it would impair a "separate concrete interest" of the plaintiff.[12]

One of the most important appellate courts has examined this issue, denying procedural standing to environmentalist groups in the *Florida Audubon Society* case.[13] The plaintiffs sought to challenge an alleged procedural violation of the National Environmental Protection Act ('NEPA") – the Treasury Department's decision not to prepare an Environmental Impact Statement ("EIS") on the effects of a tax credit for a fuel additive (ethanol). The plaintiffs had argued that the tax credit stimulated increased production of the crops from which ethanol was derived, with the accompanying environmental dangers that would damage wildlife areas which the plaintiffs visit. The majority held that, under *Defenders* footnote 7, plaintiffs lacked standing because "a prospective plaintiff must demonstrate that the defendant caused the particularized injury, and not just the alleged procedural violation."[14] The four dissenting judges would

have found standing, stressing that the standard of "immediacy" is relaxed, and the plaintiffs need not wait for the threatened injury to occur in actuality before they could bring suit.[15]

In *Sierra Club v. Morton*,[16] the Supreme Court recognized that the injury required for standing under Article III may exist solely by virtue of a statute creating a legal right. Thus, economic or even aesthetic injuries may be sufficient to employ the power of judicial review. Nonetheless, actual individual injury must be established. And, if an association desires to bring suit, an individual member must have standing to sue and the purpose of the suit must be connected to the purpose of the association.[17]

In *Lujan v. Defenders of Wildlife*, the Supreme Court qualified this statement on Congress's power to confer standing through the creation of a legal right.[18] It reiterated that generalized citizen grievances are barred under the standing doctrine, and that the "case or controversy" requirement is a constitutional one which Congress cannot override.[19] In other words, Congress cannot confer constitutional standing by statute – it cannot expand standing to areas of generalized grievances or citizen suits precisely because it cannot expand the jurisdictional reach of Article III of the Constitution.

In *Defenders of Wildlife*, conservation and other environmental groups sued the Secretary of the Interior and the Secretary of Commerce challenging a joint revised rule issued by the agencies limiting the geographic scope of § 7(a)(2) of the Endangered Species Act[20] ("ESA") to the United States and the high seas after initially promulgating a regulation interpreting that section to apply to actions in foreign nations. The plaintiffs charged that the revised rule misinterpreted the statute, and they brought

suit pursuant to the ESA's "citizen-suit" provision, which states that "any person may commence a civil suit" for certain types of violations of the Act.[21] Despite the broad language of the citizen suit provision, the Supreme Court held that the plaintiffs lacked standing. In so holding, the Court recognized that Congress is limited in the types of "injuries" it can deem cognizable under Article III:

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. . . .This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. . . . But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Stark v. Wickard*, 321 U.S. 288, 309-310 (1944) (footnote omitted).
>
> "Individual rights," within the meaning of this passage, do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public. *See also Sierra Club [v. Morton]*, 405 U.S., at 740-741, n.16."[22]

In addition, as a prudential standing requirement that applies unless expressly negated by Congress, the plaintiff's complaint must fall within the "zone of interests" protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.[23] In other words, the plaintiff must be an intended beneficiary of the statute to have standing. "[T]he breadth of the zone of interest varies according to the provisions of

the law at issue."[24] Importantly, the Supreme Court recently held that the citizen-suit provision in the ESA was an expression of negation of the prudential zone of interest test for those suits. The Court explained:

> The first question in the present case is whether the ESA's citizen suit provision . . . negates the zone of interests test (or, perhaps more accurately, expands the zone of interests). We think it does. The first operative portion of the provision says that "any person may commence a civil suit" – an authorization of remarkable breadth when compared with the language Congress ordinarily uses. Even in some other environmental statutes, Congress has used more restrictive formulations, such as "[any person] having an interest which is or may be adversely affected," 33 U.S.C. § 1365(g) (Clean Water Act); see also 30 U.S.C. § 1270(a) (Surface Mining Control and Reclamation Act) (same); "[a]ny person suffering legal wrong," 15 U.S.C. § 797(b)(5) (Energy Supply and Environmental Coordination Act); or "any person having a valid legal interest which is or may be adversely affected . . . whenever such action constitutes a case or controversy," 42 U.S.C. § 9124(a) (Ocean Thermal Energy Conversion Act). And in contexts other than the environment, Congress has often been even more restrictive. . . . [25]

The Supreme Court also considered the zone of interests test in *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*.[26] The Private Express Statutes (PES), a group of laws establishing the United States Postal Service monopoly, allows the Service to suspend its monopoly on any mail route where the "public interest" so requires. Seeking review under the Administrative Procedure Act ("APA"), unions representing Service employees challenged a Service rule that suspended its monopoly to allow international remailing, a practice which allows private companies to deliver letters sent to foreign addresses to foreign post offices as outside the "public interest." The Supreme Court held that the unions did not fall within the zone of

interests protected by the PES and thereby lacked standing to seek review of the rule. The purpose of the monopoly, the court found, was to provide a revenue protection measure for the Service. Furthermore, the suspension provision existed to ensure postal delivery throughout the country, for which continued revenue protection is necessary and must not be threatened by suspension, and the "public interest" considerations that must be made relate to that purpose. In so holding, the Supreme Court also determined that the purpose of the statute did not extend to protecting jobs or other labor protections for the unions. As such, they did not fall within the zone of interests protected by the statute and could not seek review of the Service's rule.

Industry, just like employees and citizen groups, also faces barriers to judicial review of some laws under both the constitutional and prudential elements of standing. Standing questions arise when statutes, particularly procedural statutes, are designed to benefit non-economic interests such as the environment (*e.g.*, requiring a federal agency to analyze the environmental impact of its actions) or the sovereignty and policies of the States (*e.g.*, requiring a federal agency to consult with the states before taking certain actions). If, for example, a federal agency violates a procedure that was designed solely to accommodate state governments or solely to accommodate the environment in adopting a rule, businesses (even though adversely affected by that rule) face difficulties raising challenges to that rule based on the violation of a statutory procedure.

A recent debate on the interests protected by NEPA provides a good example of the application of the zone of interests test in relation to business concerns. In *Friends of the Boundary Waters Wilderness v. Dombeck*,[27] the U.S. Court of Appeals for the

Eighth Circuit considered whether a business could challenge an agency action for failure to conduct an adequate Environmental Impact Statement as required by NEPA.

The plaintiffs argued that the business could not bring such a claim because, as the Supreme Court has found, the overall purpose of NEPA is to establish "a broad national commitment to protecting and promoting environmental quality."[28] Many courts have agreed with the plaintiffs in *Friends of the Boundary Waters Wilderness*. For example, the U.S. Court of Appeals for the Ninth Circuit has held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA."[29]

However, in interpreting the Endangered Species Act in *Bennett v. Spear*, the Supreme Court recently found that "[w]hether a plaintiff's interest is arguably protected by the statute within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question . . . but by reference to the particular provision of law upon which the plaintiff relies."[30] Relying on *Bennett*, the Eighth Circuit in *Friends of the Boundary Waters Wilderness* concluded that, because the particular provision the business claimed the agency violated was designed to protect the "human environment" – a term defined to include economic and social effects of agency action along with environmental effects – the business was within the zone of interests of the relevant provision of NEPA and had standing to challenge the agency action based on its violation.[31]

But the case law remains divided on whether and when economic interests have NEPA standing. Despite *Bennett*, some courts have reached conclusions directly

opposite of the Eighth Circuit's holding in *Friends of the Boundary Waters Wilderness* and continue to limit NEPA's zone of interest solely to environmental concerns.[32]

The NEPA cases are just one example of the struggle facing both industry and citizen groups. The next section turns to some of the recent developments at the Supreme Court in which litigants and the courts continue to wrestle with standing doctrine.

Recent Developments in Citizen Participation in the Enforcement of Laws

In 1970 in *United States v. Students Challenging Regulatory Agency Procedures* ("*SCRAP*"),[33] the Supreme Court held that a student group had standing to challenge a railroad rate increase in review proceedings before the Interstate Commerce Commission. The student group alleged that it wished to camp, hike, fish, and sightsee at various natural sites and that the rate increase would impinge on those activities because it would increase the cost of shipping recyclable materials and therefore the cost of recyclable materials themselves, hence resulting in some increase in the number of non-recyclable materials, such as bottles and cans, in the natural areas the group wished to enjoy without interference from such debris. The student group was considered to have standing based on a speculative and indirect causal chain eventually leading to real harm to the environment.

As described above, more recent cases had appeared to place significant new limitations on standing which might call into question the "open door" approach of *SCRAP*. However, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,[34] the Supreme Court this year found standing for plaintiffs based on a

general causal chain, even though the lower court held that no environmental harm had resulted from the company's alleged unlawful waste water discharges.

The issue in *Laidlaw* was whether private citizens may sue a company that allegedly harmed the environment in order to impose additional penalties beyond those already assessed by a state agency and where such additional penalties are payable only to the federal government. In other words, if the plaintiffs ultimately prevail in the case, they do not receive any damages or any other substantive award. In ruling that the citizen group had standing, the *Laidlaw* majority reasoned that environmental standing was designed to redress harm to the human plaintiff and not harm to the environment. It thus found standing from the plaintiffs' subjective averments of adverse impacts on their environmental enjoyment, notwithstanding the fact that there was no harm to the environment.

Laidlaw operated a hazardous waste incinerator and related wastewater treatment plant in Roebuck, South Carolina. It held a Clean Water Act permit to discharge limited quantities of various pollutants into the North Tyger River. Because of equipment design problems, Laidlaw violated the technical elements of its permit limitations numerous times between 1987 and 1995, in particular by discharging mercury in excess of its permitted levels. In the spring of 1992, Friends of the Earth and another environmental group took the preliminary steps necessary to commence a federal citizen suit against Laidlaw for its Clean Water Act violations. Anticipating the case and hoping to fend off extensive litigation, Laidlaw contacted South Carolina state environmental authorities,

who initiated their own enforcement proceeding and then settled the matter for $100,000 in civil penalties.[35]

Friends of the Earth immediately filed suit under the Clean Air Act in federal court. Shortly after the suit was commenced, but long before judgment was rendered, Laidlaw again violated its mercury-discharge limitations. Approximately two years after Laidlaw's last mercury-discharge violation, the trial court entered judgment in favor of the environmental plaintiffs based on the technical permit violations. It denied the plaintiffs' request for injunctive relief because the improper discharge practice had long since been remedied, but awarded over $400,000 in statutory civil penalties to the United States Treasury.[36]

Friends of the Earth appealed to the United States Court of Appeals for the Fourth Circuit, but only on the ground that the penalty award to the federal government was inadequate. Laidlaw cross appealed, arguing that Friends of the Earth lacked standing to bring the suit in the first instance.[37] The Fourth Circuit assumed, *arguendo*, that Friends of the Earth had standing, but it ruled that the case had became moot because Laidlaw had complied with the conditions of its permits before judgment was entered. Thus, injury to Friends of the Earth's ability to enjoy the environment had been corrected. Moreover, given Friends of the Earth's decision to appeal only the size of the penalty, the only form of relief available (additional penalties payable to the federal treasury) could not defeat mootness because such an award would not redress Friends of the Earth's alleged injuries.[38]

The U.S. Supreme Court concluded that Friends of the Earth possessed standing to bring suit. It held that the plaintiffs had demonstrated injury in fact based on their allegations of subjective harm. For example, one Friends of the Earth member averred in affidavits that he lived near Laidlaw's facility; that he occasionally drove over the North Tyger River and it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river near the facility, but would not do so because he feared the water was polluted.[39] The majority noted that the Court had in the past upheld environmental standing based on the lessening of purely aesthetic values such as those desccribed.[40]

Justice Scalia dissented, finding that there was no evidence of a nexus between what was deterring individuals such as Friends of the Earth members from using the North Tyger River and Laidlaw's behavior. He concluded that the mere fact that the river looked and smelled polluted did not mean that plaintiffs' "injuries" suffered therefrom were traceable to Laidlaw's mercury discharges.[41] The majority brushed Scalia's concern aside, noting that they saw "nothing 'improbable' about the proposition that a company's alleged discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms."[42]

The majority also rejected Laidlaw's argument that Friends of the Earth could not demonstrate "redressability" because the civil penalties at stake were payable only to the United States Treasury, not the plaintiffs.[43] The majority reasoned that redressability existed because penalties would deter future unlawful conduct of a similar nature by

Laidlaw.[44] However, the majority limited its holding to "the ordinary case", explaining that "there may be a point at which the deterrent effect of a claim for civil penalties becomes so insubstantial or so remote that it cannot support citizen standing. [But the] fact that this vanishing point is not easy to ascertain does not detract from the deterrent power of such penalties in the ordinary case."[45] Nonetheless, the Court's limitation signals the possibility that citizen standing will not exist in every civil penalties case.

In considering the mootness issue, the majority held that one of its recent decisions on that issue was inapposite. In *Steel Co. v. Citizens for a Better Environment*,[46] the Court held that an environmental plaintiff lacked standing because the conduct being complained of had terminated *before* suit was brought. The Court had held that the requirements for standing and mootness do not always overlap. "Voluntary cessation" of an improper act does not moot a case. Under *Steel Co.*, however, it does deprive a plaintiff of standing. Thus, Laidlaw's voluntary cessation (although it may have deprived a plaintiff of standing if the facts were similar to *Steel Co.* and no civil penalties were involved) was insufficient to trigger mootness.[47] Importantly, the Court left open the defense that a company such as Laidlaw could show that it was clear that its violations would not recur and thereby carry the burden of proof to show that the case was moot under the "voluntary cessation" doctrine.[48]

A similar extension of citizen standing to bring enforcement action also occurred this past year in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.[49] In that case the Supreme Court considered whether a private person has

standing under Article III to litigate claims of fraud on behalf of the federal government. The statute involved was the False Claims Act, a Civil War-era law that allows a private person to bring a *qui tam* action — i.e., a civil action "for the person and for the United States Government" — for treble damages plus penalties of up to $10,000 per false claim against the government. If successful, the person bringing the action (known as the "relator") may collect up to 30 percent of the amount recovered by the government plus attorney fees.

In *Stevens*, an employee of Vermont's environmental regulatory agency sued the agency alleging that it had cheated the federal government by encouraging its employees to submit inflated work reports that were then cited in requests for federal funding.[50]

The question of standing related to the nature of the injury asserted. If there was a false claim, the injury was to the United States rather than the relator. The Court refused to find that the interest in the bounty – a concrete interest in the outcome of the case – alone constituted a sufficient "injury in fact" to constitute standing.[51] As the court explained, such a definition of standing injury would equally apply to "someone who has placed a wager upon the outcome" on the case.[52] Nonetheless, the Court found that the government may properly "assign" its damages claim to a private litigant.[53] Such assignments satisfy "representational standing." The Court's reliance on the historical background supporting *qui tam* actions may prove to be a limit on the extension of *Stevens*, and it may be limited to actions in law (for damages) rather than equitable actions (for injunctions).

Conclusion

As the reader can see, the constitutional power of the federal courts to decide important environmental and natural resource matters is broad. To preserve that power, and to protect the integrity of the independent judiciary, the courts have established jurisdictional criteria that limit the "standing" of private citizens to litigate disputes. The United States Supreme Court and the lower courts continue to shape the federal common law in this area. As this body of law evolves, both industry and private citizens will continue their struggle to seek resolution of critical disputes.

ENDNOTES

1 ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 101-02 (Bradley ed. 1945)

2 *Id* at 103.

3 *Id.* at 99.

4 5 U.S. (1 Cranch) 137 (1803).

5 *Id.* at 176-77.

6 *Id.* at 176.

7 *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)

8 *See* THE FEDERALIST No. 78, at 522 (Jacob E. Cooke ed. 1961) ("the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution"). *See also generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

9 468 U.S. 737 (1984).

10 *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S.Ct. 1858, 1861-62 (2000).

11 504 U.S. 555, 572 n.7.

12 *Id.* at 572.

13 94 F.3d 658 (D.C. Cir. 1996).

14 *Id.* at 664.

15 *Id.* at 678. (Rogers, J., dissenting).

16 405 U.S. 727 (1972).

17 *See Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

18 504 U.S. at 555 (1992).

19 *Id.* at 576-78.

20 16 U.S.C. § 1536(a)(2).

21 16 U.S.C. § 1540(g)(1).

22 *Defenders of Wildlife*, 504 U.S. at 577-78.

23 *See Bennett v. Spear*, 520 U.S. 154, 162-64 (1997). *See also Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

24 *Bennett*, 520 U.S. at 163.

25 *Id.* at 164-65. The Court continued, explaining additional support:

> Our readiness to take the term "any person" at face value is greatly augmented by two interrelated considerations: that the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so called "private attorneys general" – evidenced by its elimination of the usual amount in controversy and diversity of citizenship requirements, its provision for recovery of the costs of litigation (including even expert witness fees), and its reservation to the Government of a right of first refusal to pursue the action initially and a right to intervene later.

Id. at 165.

26 498 U.S. 517 (1991).

27 164 F.3d 1115 (8th Cir. 1999)

28 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

29 *See Nevada Land Action Ass'n v. U.S. Forest Service*, 8 F.3d 713, 716 (9th Cir. 1993). *See also Western Radio Services Co., Inc. v. Espy*, 79 F.3d 896 (9th Cir. 1996).

30 520 U.S. at 175-76.

31 *Friends of the Boundary Waters Wilderness*, 164 F.3d at 1125-26.

32 *See, e.g., Arizona Cattle Growers' Ass'n v. Cartwright*, 29 F. Supp. 2d 1100, 1107-10 (D. Az. 1998).

33 412 U.S. 669 (1973).

34 120 S. Ct. 693 (2000).

35 *Id.* at 701-02.

36 *Id.* at 702.

37 Laidlaw also argued that, since the facility had now closed and was no longer operating, any request for an injunction was moot. *Id* at 702.

38 *Id.* at 702, 711.

39 *Id.* at 704.

40 *Id.* at 705.

41 *Id.* at 714.

42 *Id.* at 706.

43 *Id.*

44 *Id.* at 706-07.

45 *Id.* at 707.

46 523 U.S. 43 (1998).

47 *Laidlaw*, 120 S.Ct. at 708-10.

48 *Id.* at 711.

49 120 S.Ct. at 1858.

50 *Id*. at 1860-61.

51 *Id*. at 1862.

52 *See also Diamond v. Charles*, 476 U.S. 54, 69-71 (1986), (holding that the award of attorney fees alone cannot create standing because it is merely a "consequence"

of and “unrelated to” the litigation and, as a result, “cannot be fairly traced to” the law at issue and the “mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable.”)

53 *Stevens*, 120 S.Ct. at 1863.