SUPREME COURT OF THE UNITED STATES

No. 90–1424

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONER *v.* DEFENDERS OF WILDLIFE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 12, 1992]

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

I part company with the Court in this case in two respects. First, I believe that respondents have raised genuine issues of fact—sufficient to survive summary judgment—both as to injury and as to redressability. Second, I question the Court's breadth of language in rejecting standing for "procedural" injuries. I fear the Court seeks to impose fresh limitations on the constitutional authority of Congress to allow citizen-suits in the federal courts for injuries deemed "procedural" in nature. I dissent.

Article III of the Constitution confines the federal courts to adjudication of actual ``cases'' and ``controversies.'' To ensure the presence of a ``case'' or ``controversy,'' this Court has held that Article III requires, as an irreducible minimum, that a plaintiff allege (1) an injury that is (2) ``fairly traceable to the defendant's allegedly unlawful conduct'' and that is (3) ``likely to be redressed by the requested relief.'' *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

To survive petitioner's motion for summary judgment on standing, respondents need not prove that they are actually or imminently harmed. They need show only a ``genuine issue'' of material fact as to standing. Fed. Rule Civ. Proc. 56(c). This is not a heavy burden. A ``genuine issue'' exists so long as ``the evidence is such that a reasonable jury could

return a verdict for the nonmoving party [respondents].'' *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This Court's ``function is not [it]self to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'' *Id.*, at 249.

The Court never mentions the ``genuine issue'' standard. Rather, the Court refers to the type of evidence it feels respondents failed to produce, namely, ``affidavits or other evidence showing, through specific facts'' the existence of injury. *Ante*, at 6. The Court thereby confuses respondents' evidentiary burden (*i.e.*, affidavits asserting ``specific facts'') in withstanding a summary judgment motion under Rule 56(e) with the standard of proof (*i.e.*, the existence of a ``genuine issue'' of ``material fact'') under Rule 56(c).

Were the Court to apply the proper standard for summary judgment, I believe it would conclude that the sworn affidavits and deposition testimony of Joyce Kelly and Amy Skilbred advance sufficient facts to create a genuine issue for trial concerning whether one or both would be imminently harmed by the Aswan and Mahaweli projects. In the first instance, as the Court itself concedes, the affidavits contained facts making it at least ``questionable'' (and therefore within the province of the factfinder) that certain agency-funded projects threaten listed species.[1] *Ante*, at 7. The only remaining issue, then,

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[1]The record is replete with genuine issues of fact about the harm to endangered species from the Aswan and Mahaweli projects. For example, according to an internal memorandum of the Fish and Wildlife Service, no fewer than eight listed species are found in the Mahaweli project area (Indian elephant, leopard, purple-faced languar, toque macaque, red face malkoha, Bengal monitor, mugger crocodile, and python). App. 78. The memorandum recounts that the Sri Lankan government has specifically requested assistance from the Agency for International Development in ``mitigating the negative impacts to the wildlife involved.'' *Ibid.* In addition, a letter from the Director of the Fish and Wildlife Service to AID

is whether Kelly and Skilbred have shown that they personally would suffer imminent harm.

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. The Court dismisses Kelly's and Skilbred's general statements that they intended to revisit the project sites as ``simply not enough.'' *Ante*, at 8. But those statements did not stand alone. A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. Contrary to the Court's contention that Kelly's and Skilbred's past visits ``proves nothing,'' *ante*, at 8, 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. Cf. *Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983) (``Past wrongs were evidence bearing on whether there is a real and

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warns: ``The magnitude of the Accelerated Mahaweli Development Program could have massive environmental impacts on such an insular ecosystem as the Mahaweli River system.'' *Id.*, at 215. It adds: ``The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife.'' *Id.*, at 216. Finally, in an affidavit submitted by petitioner for purposes of this litigation, an AID official states that an AID environmental assessment ``showed that the [Mahaweli project] could affect several endangered species.'' *Id.*, at 159.

immediate threat of repeated injury'') (internal quotations omitted). Similarly, Kelly's and Skilbred's professional backgrounds in wildlife preservation, see App. 100, 144, 309–310, 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.

By requiring a ``description of concrete plans'' or ``specification of *when* the some day [for a return visit] will be,'' *ante*, at 8, the Court, in my view, demands what is likely an empty formality. No substantial barriers prevent Kelly or Skilbred from simply purchasing plane tickets to return to the Aswan and Mahaweli projects. This case differs from other cases in which the imminence of harm turned largely on the affirmative actions of third parties beyond a plaintiff's control. See *Whitmore* v. *Arkansas*, ___ U.S. ___, ___-___ (1990) (harm to plaintiff death-row inmate from fellow inmate's execution depended on the court's one day reversing plaintiff's conviction or sentence and considering comparable sentences at resentencing); *Los Angeles* v. *Lyons*, 461 U.S., at 105 (harm dependent on police's arresting plaintiff again and subjecting him to chokehold); *Rizzo* v. *Goode*, 423 U.S. 362, 372 (1976) (harm rested upon ``what one of a small unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures''); *O'Shea* v. *Littleton*, 414 U.S. 488, 495–498 (1974) (harm from discriminatory conduct of county magistrate and judge dependent on plaintiffs' being arrested, tried, convicted, and sentenced); *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969) (harm to plaintiff dependent on a former Congressman's (then serving a 14-year term as a judge) running again for Congress). To be sure, a plaintiff's unilateral control over his or her exposure to harm does not *necessarily* render the harm non-speculative. Nevertheless, it suggests that a finder of

fact would be far more likely to conclude the harm is actual or imminent, especially if given an opportunity to hear testimony and determine credibility.

I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code-pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm. Just to survive summary judgment, for example, a property owner claiming a decline in the value of his property from governmental action might have to specify the exact date he intends to sell his property and show that there is a market for the property, lest it be surmised he might not sell again. A nurse turned down for a job on grounds of her race had better be prepared to show on what date she was prepared to start work, that she had arranged daycare for her child, and that she would not have accepted work at another hospital instead. And a Federal Torts Claims Act plaintiff alleging loss of consortium should make sure to furnish this Court with a ``description of concrete plans'' for her nightly schedule of attempted activities.

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. *Ante*, at 9. To support that conclusion, the Court mischaracterizes our decision in *Lujan* v. *National Wildlife Federation*, ___ U.S. ___ (1990), as establishing a general rule that ``a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity.'' *Ante*, at 9. In *National Wildlife Federation*, the Court required specific geographical proximity because of the particular type of harm alleged in that case: harm to the plaintiff's visual enjoyment of

nature from mining activities. *Id.*, at ___. One cannot suffer from the sight of a ruined landscape without being close enough to see the sites actually being mined. 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, see, *e.g.*, *Japan Whaling Assn.* v. *American Cetacean Soc.*, 478 U.S. 221 (1986) (harm to American whale watchers from Japanese whaling activities), or rivers running long geographical courses, see, *e.g.*, *Arkansas* v. *Oklahoma*, ___ U.S. ___ (1992) (harm to Oklahoma residents from wastewater treatment plant 39 miles from border). It cannot seriously be contended that a litigant's failure to use the precise or exact site where animals are slaughtered or where toxic waste is dumped into a river means he or she cannot show injury.

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. *Ante*, at 10. I am unable to see how the distant location of the destruction *necessarily* (for purposes of ruling at summary judgment) 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.

I have difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims. As I understand it, environmental plaintiffs are under no special constitutional standing disabilities. Like other plaintiffs, they need show only that the action they challenge has injured them, without necessarily showing they happened to be physically near the location of the alleged wrong. The Court's decision

today should not be interpreted "to foreclose the possibility . . . that in different circumstances a nexus theory similar to those proffered here might support a claim to standing." *Ante*, at 2 (KENNEDY, J., concurring in part and concurring in the judgment).

A plurality of the Court suggests that respondents have not demonstrated redressability: a likelihood that a court ruling in their favor would remedy their injury. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74–75, and n. 20 (1978) (plaintiff must show ``substantial likelihood'' that relief requested will redress the injury). The plurality identifies two obstacles. The first is that the ``action agencies'' (*e.g.*, the Agency for International Development) cannot be required to undertake consultation with petitioner Secretary, because they are not directly bound as parties to the suit and are otherwise not indirectly bound by being subject to petitioner Secretary's regulation. Petitioner, however, officially and publicly has taken the position that his regulations regarding consultation under §7 of the Act are binding on action agencies. 50 CFR §402.14(a) (1991).[2] And he has previously taken the same

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[2]This section provides in part:

> ``(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, ...''

The Secretary's intent to make the regulations binding upon other agencies is even clearer from the discussion accompanying promulgation of the consultation rules. See 51 Fed. Reg. 19928 (1986) (``Several commenters stated that Congress did not intend that the Service interpret or implement section 7, and believed that the Service should recast the

position in this very litigation, having stated in his answer to the complaint that petitioner ``admits the Fish and Wildlife Service (FWS) was designated the lead agency for the formulation of regulations concerning section 7 of the ESA.'' App. 246. I cannot agree with the plurality that the Secretary (or the Solicitor General) is now free, for the convenience of this appeal, to disavow his prior public and litigation positions. More generally, I cannot agree that the Government is free to play ``Three-Card Monte'' with its description of agencies' authority to defeat standing against the agency given the lead in administering a statutory scheme.

Emphasizing that none of the action agencies are parties to this suit (and having rejected the possibility of their being indirectly bound by petitioner's regulation), the plurality concludes that ``there is no reason they should be obliged to honor an incidental legal determination the suit produced.'' *Ante*, at 13. I am not as willing as the plurality is to assume that agencies at least will not try to follow the law. Moreover, I wonder if the plurality has not overlooked the extensive involvement from the inception of this litigation by the Department of State and the Agency for International Development.[3] Under principles of

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regulations as `nonbinding guidelines' that would govern only the Service's role in consultation . . . The Service is satisfied that it has ample authority and legislative mandate to issue this rule, and believes that uniform consultation standards and procedures are necessary to meet its obligations under section 7.'')

[3]For example, petitioner's motion before the District Court to dismiss the complaint identified four attorneys from the Department of State and AID (an agency of the Department of State) as ``counsel'' to the attorneys from the Justice Department in this action. One AID lawyer actually entered a formal

collateral estoppel, these agencies are precluded from subsequently relitigating the issues decided in this suit.

> ``[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record.'' *Souffront* v. *Compagnie des Sucreries*, 217 U.S. 475, 487 (1910).

This principle applies even to the Federal Government. In *Montana* v. *United States*, 440 U.S. 147 (1979), this Court held that the Government was estopped from relitigating in federal court the constitutionality of Montana's gross receipts tax, because that issue previously had been litigated in state court by an individual contractor whose litigation had been financed and controlled by the Federal Government. ``Thus, although not a party, the United States plainly had a sufficient `laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel.'' *Id.*, at 155. See also *United States* v. *Mendoza*, 464 U.S. 154, 164, n. 9 (1984) (Federal Government estopped where it ``constituted a `party' in all but a technical sense''). In my view, the action agencies have had sufficient

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appearance before the District Court on behalf of AID. On at least one occasion petitioner requested an extension of time to file a brief, representing that ``[a]n extension is necessary for the Department of Justice to consult with . . . the Department of State [on] the brief.'' See Brief for Respondents 31, n. 8. In addition, AID officials have offered testimony in this action.

``laboring oars'' in this litigation since its inception to be bound from subsequent relitigation of the extraterritorial scope of the §7 consultation requirement.[4] As a result, I believe respondents' injury would likely be redressed by a favorable decision.

The second redressability obstacle relied on by the plurality is that ``the [action] agencies generally

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[4]The plurality now suggests that collateral estoppel principles can have no application here, because the participation of other agencies in this litigation arose *after* its inception. Borrowing a principle from this Court's statutory diversity jurisdiction cases and transferring it to the constitutional standing context, the Court observes: "The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*" (emphasis in original). *Ante*, at 13, n. 4 (quoting *Newman-Green, Inc.*, v. *Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)). See also *Mollan* v. *Torrance*, 9 Wheat. 537, 539 (1824) (Marshall, C.J.). The plurality proclaims that "it cannot be" that later participation of other agencies in this suit retroactively created a jurisdictional issue that did not exist at the outset. *Ante*, at 13, n. 4.

The plurality, however, overlooks at least three difficulties with this explanation. In the first place, assuming that the plurality were correct that events as of the initiation of the lawsuit are the only proper jurisdictional reference point, were the Court to follow this rule in this case there would be no question as to the compliance of other agencies, because, as stated at an earlier point in the opinion: "When the Secretary promulgated the regulation here, he thought it was binding on the agencies." *Ante*, at 12. This suit was commenced in October 1986, just three months after the regulation took effect. App. 21; 51 Fed. Reg. 19926 (1986). As the plurality further admits, questions about compliance of other agencies

supply only a fraction of the funding for a foreign project.'' *Ante*, at 14–15. What this Court might ``generally'' take to be true does not eliminate the existence of a genuine issue of fact to withstand summary judgment. Even if the action agencies supply only a fraction of the funding for a particular foreign project, it remains at least a question for the finder of fact whether threatened withdrawal of that

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with the Secretary's regulation arose only by later participation of the Solicitor General and other agencies in the suit. *Ante*, at 12. Thus, it was, to borrow the plurality's own words, "assuredly not true when this suit was filed, naming the Secretary alone," *ante*, at 13, n. 4, that there was any question before the District Court about other agencies being bound.

Second, were the plurality correct that, for purposes of determining redressability, a court may look only to facts as they exist when the complaint is filed, then the Court by implication would render a nullity part of Rule 19 of the Federal Rules of Civil Procedure. Rule 19 provides in part for the joinder of persons if "in the person's absence complete relief cannot be accorded among those already parties." This presupposes nonredressability at the outset of the litigation. Under the plurality's rationale, a district court would have no authority to join indispensable parties, because it would, as an initial matter, have no jurisdiction for lack of the power to provide redress at the outset of the litigation.

Third, the rule articulated in *Newman-Green* is that the existence of federal jurisdiction "*ordinarily*" depends on the facts at the initiation of the lawsuit. This is no ironclad *per se* rule without exceptions. Had the Solicitor General, for example, taken a position during this appeal that the §7 consultation requirement does in fact apply extraterritorially, the controversy would be moot, and this Court would be without jurisdiction.

fraction would affect foreign government conduct sufficiently to avoid harm to listed species.

The plurality states that ``AID, for example, has provided less than 10% of the funding for the Mahaweli project.'' *Ante*, at 15. The plurality neglects to mention that this ``fraction'' amounts to $170 million, see App. 159, not so paltry a sum for a country of only 16 million people with a gross national product of less than $6 billion in 1986 when respondents filed the complaint in this action. Federal Research Division, Library of Congress, Sri

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In the plurality's view, federal subject matter jurisdiction appears to be a one-way street running the Executive Branch's way. When the Executive Branch wants to dispel jurisdiction over an action against an agency, it is free to raise at any point in the litigation that other nonparty agencies might not be bound by any determinations of the one agency defendant. When a plaintiff, however, seeks to preserve jurisdiction in the face of a claim of nonredressability, the plaintiff is not free to point to the involvement of nonparty agencies in subsequent parts of the litigation. The plurality does not explain why the street runs only one way—why some actions of the Executive Branch subsequent to initiation of a lawsuit are cognizable for jurisdictional purposes but others simply are not.

More troubling still is the distance this one-way street carries the plurality from the underlying purpose of the standing doctrine. The purpose of the standing doctrine is to ensure that courts do not render advisory opinions rather than resolve genuine controversies between adverse parties. Under the plurality's analysis, the federal courts are to ignore their *present* ability to resolve a concrete controversy if at some distant point in the past it could be said that redress could not have been provided. The plurality perverts the standing inquiry.

Lanka: A Country Study (Area Handbook Series) xvi-xvii (1990).

The plurality flatly states: ``Respondents have produced nothing to indicate that the projects they have named will . . . do less harm to listed species, if that fraction is eliminated.'' *Ante*, at 15. As an initial matter, the relevant inquiry is not, as the plurality suggests, what will happen if AID or other agencies stop funding projects, but what will happen if AID or other agencies comply with the consultation requirement for projects abroad. Respondents filed suit to require consultation, not a termination of funding. Respondents have raised at least a genuine issue of fact that the projects harm endangered species and that the actions of AID and other U.S. agencies can mitigate that harm.

The plurality overlooks an Interior Department memorandum listing eight endangered or threatened species in the Mahaweli project area and recounting that ``[t]he Sri Lankan government has requested the assistance of AID in mitigating the negative impacts to the wildlife involved.'' App. 78. Further, a letter from the Director of the Fish and Wildlife Service to AID states:

> ``The Sri Lanka government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife. The donor nations and agencies that are financing the [Mahaweli project] will be the key as to how successfully the wildlife is preserved. If wildlife problems receive the same level of attention as the engineering project, then the negative impacts to the environment can be alleviated. This means that there has to be long-term funding in sufficient amounts to stem the negative impacts of this project.'' *Id.*, at 216.

I do not share the plurality's astonishing confidence that, on the record here, a factfinder could only conclude that AID was powerless to ensure the

protection of listed species at the Mahaweli project.

As for the Aswan project, the record again rebuts the plurality's assumption that donor agencies are without any authority to protect listed species. Kelly asserted in her affidavit—and it has not been disputed—that the Bureau of Reclamation was ``overseeing'' the rehabilitation of the Aswan project. App. 101. See also *id.*, at 65 (Bureau of Reclamation publication stating: ``In 1982, the Egyptian government . . . requested that Reclamation serve as its engineering advisor for the nine-year [Aswan] rehabilitation project'').

I find myself unable to agree with the plurality's analysis of redressability, based as it is on its invitation of executive lawlessness, ignorance of principles of collateral estoppel, unfounded assumptions about causation, and erroneous conclusions about what the record does not say. In my view, respondents have satisfactorily shown a genuine issue of fact as to whether their injury would likely be redressed by a decision in their favor.

The Court concludes that any ``procedural injury'' suffered by respondents is insufficient to confer standing. It rejects the view that the "injury-in-fact requirement . . . [is] satisfied by congressional conferral upon *all* person of an abstract, self-contained, noninstrumental `right' to have the Executive observe the procedures required by law." *Ante*, at 16. Whatever the Court might mean with that very broad language, it cannot be saying that ``procedural injuries'' *as a class* are necessarily insufficient for purposes of Article III standing.

Most governmental conduct can be classified as ``procedural.'' Many injuries caused by governmental conduct, therefore, are categorizable at some level of generality as ``procedural'' injuries. Yet, these injuries are not categorically beyond the pale of redress by the federal courts. When the

Government, for example, ``procedurally'' issues a pollution permit, those affected by the permittee's pollutants are not without standing to sue. Only later cases will tell just what the Court means by its intimation that ``procedural'' injuries are not constitutionally cognizable injuries. In the meantime, I have the greatest of sympathy for the courts across the country that will struggle to understand the Court's standardless exposition of this concept today.

The Court expresses concern that allowing judicial enforcement of ``agencies' observance of a particular, statutorily prescribed procedure'' would ``transfer from the President to the courts the Chief Executive's most important constitutional duty, to `take Care that the Laws be faithfully executed,' Art. II, sec. 3.'' *Ante*, at 20. In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.

Under the Court's anachronistically formal view of the separation of powers, Congress legislates pure, substantive mandates and has no business structuring the procedural manner in which the Executive implements these mandates. To be sure, in the ordinary course, Congress does legislate in black-and-white terms of affirmative commands or negative prohibitions on the conduct of officers of the Executive Branch. In complex regulatory areas, however, Congress often legislates, as it were, in procedural shades of gray. That is, it sets forth substantive policy goals and provides for their attainment by requiring Executive Branch officials to follow certain procedures, for example, in the form of reporting, consultation, and certification requirements.

The Court recently has considered two such procedurally oriented statutes. In *Japan Whaling Assn.* v. *American Cetacean Society*, 478 U.S. 221

(1986), the Court examined a statute requiring the Secretary of Commerce to certify to the President that foreign nations were not conducting fishing operations or trading which ``diminis[h] the effectiveness'' of an international whaling convention. *Id.*, at 226. The Court expressly found standing to sue. *Id.*, at 230–231, n. 4. In *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989), this Court considered injury from violation of the ``action-forcing'' procedures of the National Environmental Policy Act (NEPA), in particular the requirements for issuance of environmental impact statements.

The consultation requirement of §7 of the Endangered Species Act is a similar, action-forcing statute. Consultation is designed as an integral check on federal agency action, ensuring that such action does not go forward without full consideration of its effects on listed species. Once consultation is initiated, the Secretary is under a duty to provide to the action agency ``a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat.'' 16 U.S.C. §1536(b)(3)(A). The Secretary is also obligated to suggest ``reasonable and prudent alternatives'' to prevent jeopardy to listed species. *Ibid.* The action agency must undertake as well its own ``biological assessment for the purpose of identifying any endangered species or threatened species'' likely to be affected by agency action. §1536(c)(1). After the initiation of consultation, the action agency ``shall not make any irreversible or irretrievable commitment of resources'' which would foreclose the ``formulation or implementation of any reasonable and prudent alternative measures'' to avoid jeopardizing listed species. §1536(d). These action-forcing procedures are "designed to protect some threatened concrete interest," *ante*, at 17, n. 8, of persons who observe

and work with endangered or threatened species. That is why I am mystified by the Court's unsupported conclusion that "[t]his is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs." *Ante*, at 15.

Congress legislates in procedural shades of gray not to aggrandize its own power but to allow maximum Executive discretion in the attainment of Congress' legislative goals. Congress could simply impose a substantive prohibition on executive conduct; it could say that no agency action shall result in the loss of more than 5% of any listed species. Instead, Congress sets forth substantive guidelines and allows the Executive, within certain procedural constraints, to decide how best to effectuate the ultimate goal. See *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946). The Court never has questioned Congress' authority to impose such procedural constraints on executive power. Just as Congress does not violate separation of powers by structuring the procedural manner in which the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures.

To prevent Congress from conferring standing for ``procedural injuries'' is another way of saying that Congress may not delegate to the courts authority deemed ``executive'' in nature. *Ante*, at 20 (Congress may not ``transfer from the President to the courts the Chief Executive's most important constitutional duty, to `take Care that the Laws be faithfully executed,' Art. II, sec. 3''). Here Congress seeks not to delegate ``executive'' power but only to strengthen the procedures it has legislatively mandated. ``We have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its

coordinate Branches.'' *Touby* v. *United States*, ___ U.S. ___, ___ (1991). ``Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive *or judicial actors*'' (emphasis added). *Ibid.*

Ironically, this Court has previously justified a relaxed review of congressional delegation to the Executive on grounds that Congress, in turn, has subjected the exercise of that power to judicial review. *INS* v. *Chadha*, 462 U.S. 919, 953–954, n. 16 (1983); *American Power & Light Co.* v. *SEC*, 329 U.S., at 105–106. The Court's intimation today that procedural injuries are not constitutionally cognizable threatens this understanding upon which Congress has undoubtedly relied. In no sense is the Court's suggestion compelled by our ``common understanding of what activities are appropriate to legislatures, to executives, and to courts.'' *Ante*, at 3. In my view, it reflects an unseemly solicitude for an expansion of power of the Executive Branch.

It is to be hoped that over time the Court will acknowledge that some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty. For example, in the context of the NEPA requirement of environmental-impact statements, this Court has acknowledged ``it is now well settled that NEPA itself does not mandate particular results [and] simply prescribes the necessary process,'' but ``*these procedures are almost certain to affect the agency's substantive decision*.'' *Robertson* v. *Methow Valley Citizens Council*, 490 U.S., 332, 350 (1989) (emphasis added). See also *Andrus* v. *Sierra Club*, 442 U.S. 347, 350–351 (1979) (``If environmental concerns are not interwoven into the fabric of agency planning, the `action-forcing' characteristics of [the environmental-impact statement requirement] would be lost''). This

acknowledgement of an inextricable link between procedural and substantive harm does not reflect improper appellate factfinding. It reflects nothing more than the proper deference owed to the judgment of a coordinate branch—Congress—that certain procedures are directly tied to protection against a substantive harm.

In short, determining ``injury'' for Article III standing purposes is a fact-specific inquiry. ``Typically . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.'' *Allen* v. *Wright*, 468 U.S., at 752. There may be factual circumstances in which a congressionally imposed procedural requirement is so insubstantially connected to the prevention of a substantive harm that it cannot be said to work any conceivable injury to an individual litigant. But, as a general matter, the courts owe substantial deference to Congress' substantive purpose in imposing a certain procedural requirement. In all events, ``[o]ur separation-of-powers analysis does not turn on the labeling of an activity as `substantive' as opposed to `procedural.'" *Mistretta* v. *United States*, 488 U.S. 361, 393 (1989). There is no room for a *per se* rule or presumption excluding injuries labeled ``procedural'' in nature.

In conclusion, I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. In my view, ``[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'' *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803).

I dissent.