Despite New Attacks, Citizen Suits Are Constitutional

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A recent amicus curiae filing in a high-profile Michigan Clean Air Act case targets an important aspect of environmental law — citizen suit provisions — and whether they run afoul of constitutional principles. In U.S. v. DTE Energy et al.,[1] a Michigan district court is considering arguments of two law professors who question whether citizen suits invade executive powers.

The July 30 amicus curiae brief alleges that citizen suit provisions violate the vesting and appointments clauses of Article II of the U.S. Constitution, and raise important separation of powers issues. Because all executive power, including power to enforce laws, is vested in the president under Article II, so the argument goes, private citizens or citizen groups cannot enforce laws by filing citizen suits.

Despite the relative novelty of the argument as framed, district courts have uniformly held that such provisions are constitutional, and a concurring opinion in the U.S. Supreme Court foreshadowed skepticism over disallowing private enforcement of public duties.

The case stems from a 2010 filing by the federal government against energy companies for alleged violations of the Clean Air Act at their facilities. A well-known citizen environmental group, the Sierra Club, has intervened in the case under the CAA's citizen suit provision, Title 42 of the U.S. Code, Section 7604. The court has approved the consent decree.

Most recently, some parties negotiated a separate agreement as a condition of the Sierra Club's release of claims. The Sierra Club now wants the court to approve the agreement. The government, however, opposes this agreement, claiming that private parties cannot enter into agreements that include measures beyond those requested by the government.

In addition to this argument by the government, the amicus brief mounts its constitutional challenge. The Sierra Club's attempt to impose a separate agreement on another party undercuts the power of the president and his subordinate officers to enforce the laws, they say. The amici ask the court to dismiss Sierra Club's complaint and reject the settlement.

The idea that citizen suit provisions in environmental statutes are unconstitutional is not new. In fact, this broad issue has been litigated in multiple district courts across the country since the 1980s. Federal courts have long recognized the validity of citizen suit provisions, and have unanimously rejected claims alleging their unconstitutionality.

The challenges to citizen suit provisions rejected by these courts span various

environmental statutes: the Clean Water Act; the Emergency Planning and Community Right-to-Know Act, or EPCRA; the Endangered Species Act; the Resource Conservation and Recovery Act; and the CAA. The courts agree that these citizen suit provisions are proper because Congress, in creating statutory rights and obligations in environmental statutes, can determine who may enforce them and in what manner.[2]

These courts have also stated that citizen suits do not invoke separation of power concerns, which typically arise when one branch of the federal government encroaches on the other branch, and as a result expands its powers at the expense of another. None of this is present in the citizen suit context.[3] In a concurring opinion in an EPCRA case, Supreme Court Justices John Paul Stevens, David Souter and Ruth Bader Ginsburg took on the issue: It could be argued that the Court's decision is rooted in another separation-of-powers concern: that this citizen suit somehow interferes with the Executive's power to "take Care that the Laws be faithfully executed," Art. II, § 3. It is hard to see, however, how EPCRA's citizen-suit provision impinges on the power of the Executive. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 129 (1998).

The district courts also point out that the Supreme Court has heard multiple citizen suit cases without even a hint that the citizen suit provisions may be unconstitutional.[4]

Embedded in this prior framework of precedent lies the possibility that the amici, like the federal government, view the case as a test case for their arguments. With a chance of appeal likely, this argument can be further developed and potentially considered at the appeals court level or beyond. In addition, the U.S. Department of Justice's environmental officials have on several occasions indicated that citizen suits raise constitutional questions and may warrant additional analysis, which might take place in this case.

While recognizing that lower courts have upheld citizen suits, the amicus brief purports to distinguish the case by pointing to several aspects of the citizen suit provisions the lower courts have not thoroughly explored.

One critique is that the case only concerns the private enforcement of public rights, which the amici believe Congress cannot delegate to citizens in the same fashion as Congress creates a private right of action. Another critique is that individuals who use citizen suit provisions as congressionally blessed private coprosecutors are wresting control over the litigation from the executive, interfering with its enforcement powers.

While the constitutionality of citizen suits may be defended by pointing to similarities with qui tam suits, the amicus brief argues, the comparison is inapt. This is because filing a citizen suit does not afford the government sufficient control over the litigation, unlike filing a qui tam action, where the government may intervene and take over, or override a relator's proposed dismissal or settlement even if it declines to intervene.

But these citizen rights, as the Chesapeake Bay Foundation v. Bethlehem Steel court points out, are supplementary to federal enforcement, and are particularly important when government resources are scarce. Although the amici disagree, the federal government retains control over the enforcement. After all, citizens cannot commence an action if the government has decided to pursue a violator.

As an enforcement and perhaps an awareness tool, citizen suits are deeply rooted in this nation's environmental law principles. Indeed, many years ago these suits emphasized the need to protect natural resources and highlighted significant contamination issues, shaping the body of environmental law.[5] Without doubt, overturning citizen suit provisions would

disrupt the entire playing field for citizens and environmental groups, federal and state government, and industry.

As expected, the Sierra Club defended the constitutionality of citizen suits in its opposition brief, articulating a position similar to what the district courts have found in the cited cases. Now the decision rests with the court, which may elect to bypass the arguments altogether, as they do not appear to be required to resolve the consent decree issue. Alternatively, as the amici hope, the court may elect to set in motion the precedential spiral upward to seek definitive guidance on the future of citizen suit provisions in environmental law.

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[1] U.S. v. DTE Energy et al., case No. 2:10-cv-13101-BAF-RSW.

[2] See, e.g., N. Carolina Shellfish Growers Ass'n v. Holly Ridge Assoc., 200 F. Supp. 2d 551, 555–56 (E.D.N.C. 2001) (citing Davis v. Passman, 442 U.S. 228, 241 (1979)); U.S. v. Am. Elec. Power Serv. Corp., 137 F. Supp. 2d 1060, 1065 (S.D. Ohio 2001); Delaware Valley Toxics Coal. v. Kurz-Hastings Inc., 813 F. Supp. 1132, 1138 (E.D. Pa. 1993); Chesapeake Bay Found. Inc. v. Bethlehem Steel Corp., 652 F. Supp. 620, 622 (D. Md. 1987).

[3] See, e.g., Atl. States Legal Found. Inc. v. Universal Tool & Stamping Co., 735 F. Supp. 1404, 1419–20 (N.D. Ind. 1990); Nat. Res. Def. Council Inc. v. Outboard Marine Corp., 692 F. Supp. 801, 815-17 (N.D. Ill. 1988).

[4] See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981).

[5] E.g., TVA v. Hill, 437 U.S. 153 (1978).