

12-1-1992

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Recommended Citation

Wendy S. Albers, *Lujan v. Defenders of Wildlife: Closing the Courtroom Door to Environmental Plaintiffs—The Endangered Species Act Remains Confined to United States Borders*, 15 Loy. L.A. Int'l & Comp. L. Rev. 203 (1992).
Available at: <http://digitalcommons.lmu.edu/ilr/vol15/iss1/15>

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NOTES AND COMMENTS

Lujan v. Defenders of Wildlife: Closing the Courtroom Door to Environmental Plaintiffs — The Endangered Species Act Remains Confined to United States Borders

*Respected scientists estimate that as many as two million species will be extinct by the year 2000, primarily as a result of habitat destruction, including tropical deforestation, and construction of massive dams and highways in developing countries.*¹

I. INTRODUCTION

Environmental problems such as acid rain, global warming and endangered species do not recognize national borders, and neither should environmental laws. For years environmentalists have been unsuccessful in their attempts to force the United States government to comply with its own environmental laws abroad.² A short-lived breakthrough occurred in August 1990, when the Eighth Circuit Court of Appeals held that the Endangered Species Act (“ESA”)³ applied to federally funded projects outside the United States.⁴ In *Defenders of Wildlife v. Lujan*,⁵ environmental groups challenged a 1986 regulation promulgated by the Secretary of the Interior which limited the applicability of the ESA’s section 7 consultation provision to agency actions occurring only “in the United States or upon the high seas.”⁶ Ruling in favor of the environmental organizations, the

1. Patrick A. Parenteau, *No U.S. Aid if Species Are Endangered?*, CONN. L. TRIB., Mar. 11, 1991, Commentary, at 23.

2. See *NRDC v. Nuclear Regulatory Comm’n*, 647 F.2d 1345 (D.C. Cir. 1981) (holding that National Environmental Policy Act (NEPA) does not apply to federal action abroad). See generally Jonathan Turley, *Legal Theory: “When in Rome”: Multinational Misconduct and the Presumption Against Exterritoriality*, 84 NW. U. L. REV. 598, 627-34 (1990).

3. 16 U.S.C. §§ 1531-1544 (1988).

4. *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990), *cert. granted*, 111 S. Ct. 2008 (1991), *rev’d*, 112 S. Ct. 2130 (1992).

5. *Id.*

6. *Id.* at 118.

Eighth Circuit held that Congress intended the ESA's consultation requirement to extend to agency action in foreign countries.⁷

However, on June 12, 1992, the same day President Bush arrived at the Rio Earth Summit to defend criticism of his environmental record,⁸ the United States Supreme Court reversed the Eighth Circuit's decision, leaving intact the regulation that federal agencies need not comply with the ESA when funding projects abroad.⁹ In *Lujan v. Defenders of Wildlife*,¹⁰ the Supreme Court held that the environmental groups were not sufficiently injured by the regulation and thus lacked standing to challenge the regulation in court.¹¹ By overturning the *Defenders of Wildlife* decision on procedural grounds, the Supreme Court declined an opportunity to shape the issue of extraterritorial application of United States environmental laws. *Defenders of Wildlife* is the Supreme Court's latest decision narrowing standing for environmental plaintiffs while simultaneously broadening the powers of the executive branch.

This Note will first present a brief overview of the concept behind the Endangered Species Act — the preservation of biological diversity. It will then examine the history of the Endangered Species Act. In particular, this Note will discuss the importance of the section 7 consultation provision, the procedural background and legal analysis of the *Defenders of Wildlife* case, and the Supreme Court's reversal. This Note will also explore the way in which the Court's general presumption against extraterritorial application of United States law conflicts with the need to respond to environmental problems on an international level. Finally, this Note will assert that, in light of congressional commitment to the worldwide preservation of species and the global scope of the endangered species crisis, the Supreme Court's reversal was both inconsistent and inimical to these efforts.

II. BACKGROUND

A. *The Necessity of Preserving Biological Diversity*

"Biodiversity refers to the variety and variability among living organisms and the ecological complexes in which they occur."¹² A

7. *Id.* at 125.

8. David G. Savage, *Court Upholds Bush Wildlife Policy Limits*, L.A. TIMES, June 13, 1992, at A1.

9. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992).

10. *Id.*

11. *Id.*

12. 1989 COUNCIL ON ENVTL. QUALITY 20TH ANN. REP., at 295.

loss of biodiversity has both environmental and economic consequences. "Of the world's approximately 240,000 species of plants, only about 3,000 have even been used as food, only 150 have been cultivated on any scale, and a mere 20 account for over 85 percent of present human consumption."¹³ These statistics suggest the overwhelming potential that undiscovered wild plant species have as alternative resources for future generations.

Advocates of species protection argue that there are compelling scientific, economic and ethical arguments for the preservation of species. The vast destruction of many species threatens the advance of biomedical knowledge.¹⁴ "[E]ndangered species may possess chemical or medical properties that will never be discovered if the creatures are rendered extinct."¹⁵ For example, in enacting the ESA, Congress noted that oral contraceptives were made possible with the discovery of certain chemical properties in a previously unstudied and otherwise useless plant.¹⁶ Moreover, species of plants and animals may eventually provide the cure to cancer.¹⁷ According to Dr. Thomas Eisner, Division of Biological Sciences, Cornell University:

[M]any of the most interesting plant drugs in current use were only recently discovered, including for example some of the anti-leukemic compounds, and anticancer drugs such as vincristine, used in the treatment of Hodgkin's disease. There is no end to the potential for discovery in nature, because we have only begun the chemical exploration of nature.¹⁸

Species preservation is not only necessary for the discovery of

13. GEORGE LEDEC & ROBERT GOODLAND, *WILDLANDS: THEIR PROTECTION AND MANAGEMENT IN ECONOMIC DEVELOPMENT* 10 (1988).

14. Edwin Smith, *The Endangered Species Act and Biological Conservation*, 57 S. CAL. L. REV. 361, 374 (1984).

15. Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences*, 19 U. MICH. J.L. REF. 805, 823 (1986). During the Senate Endangered Species Act Oversight Hearings, Dr. Thomas E. Lovejoy of the World Wildlife Fund stated:

[M]an-caused extinctions are limiting the potential growth of knowledge and constitute a form of bookburning of a very frightening sort — burning of books that have yet to be written. . . . Should we throw away the owner's manual to our car before we even know the names of all the parts?

Id. n.60.

16. Smith, *supra* note 14, at 375; see also H.R. REP. NO. 412, 93d Cong., 1st Sess. 5 (1973).

17. Smith, *supra* note 14, at 375 n.56.

18. *Endangered Species Act Oversight: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 97th Cong., 1st Sess. 368 (1981).

new medicines, but is also critical to the maintenance of a diverse gene pool that could adapt to the world's continuing stresses. Genetic diversity assures the flexibility needed to cope with environmental change and variation. Preserving genetic variability will protect the world's food supply from the constant onslaught of new parasites and diseases.¹⁹ For instance, maintaining "diversity of species here and abroad serves U.S. agriculture by providing a reservoir of genetic traits that crop and livestock breeders may need in the future."²⁰ By destroying species without evaluating their potential, "we may lose precisely those resources that could make it possible to support the expanding world population."²¹ Our human existence clearly depends on the biological resources of the world.

Similarly, there are economic justifications for preserving wild plants and animals. Currently unknown or unstudied plant and animal species may produce new industrial products. For example, it was recently discovered that *Copaifera langsdorfii*, a tree which only grows in northern Brazil, produces sap that can be used directly as fuel in diesel engines.²² In an oil-short world, the economic value of such species is impossible to quantify.

The ethical arguments for species preservation go beyond research and resource value. Many species also possess aesthetic and recreational value. Some commentators have argued that the destruction of species results in a diminished appreciation for the value of all life by callously causing pain in some living entities.²³ Others argue that a moral obligation exists to protect the interests of future generations.²⁴ Because species extinction is irreversible, maintaining biological diversity preserves for future generations the opportunity to both use and enjoy these natural resources.²⁵ Harvard biologist, E.O. Wilson, commenting on the threat to global biological diversity, wrote:

The worst thing that can happen — will happen — is not energy depletion, economic collapse, limited nuclear war, or conquest by a totalitarian government. As terrible as these catastrophes would be for us, they can be repaired within a few generations. The one process ongoing in the 1980s that will take millions of years to

19. Smith, *supra* note 14, at 374.

20. 1990 COUNCIL ON ENVTL. QUALITY 21ST ANN. REP., at 147.

21. Smith, *supra* note 14, at 374.

22. LEDEC & GOODLAND, *supra* note 13, at 13.

23. Smith, *supra* note 14, at 376-77.

24. *Id.* at 376.

25. *Id.*

correct is the loss of genetic and species diversity by the destruction of natural habitats. This is the folly our descendants are least likely to forgive us.²⁶

In order to adequately address the scientific, economic and ethical concerns for species preservation, the United States government must respond to the problem of biological diversity on a global level. Scientists project that by the end of the century an average of 100 species per day will vanish from the Earth as a result of pollution, the growth in human population and the massive destruction of the rain forests.²⁷ Thus, it is urgent that the United States government coordinate its efforts to stop the loss of global biodiversity.

B. *History of the Endangered Species Act*

United States efforts to protect wildlife and wild habitats through domestic and international laws date back to the Lacey Act of 1900²⁸ and the Migratory Bird Treaty Act of 1916.²⁹ However, the most comprehensive and controversial wildlife legislation is the Endangered Species Act of 1973.³⁰ Concerned with decreasing biological diversity, Congress enacted the ESA with the express purpose of preserving endangered and threatened species and their habitats.³¹

Prior to the passage of the ESA, the scope of endangered species legislation was significantly more limited. The Endangered Species Preservation Act of 1966³² was the first legislation enacted specifically to protect endangered species. The Act called for the listing of fish and wildlife that were near actual extinction so that special protection

26. 1985 COUNCIL ON ENVTL. QUALITY 16TH ANN. REP., at 273.

27. See Rudy Abramson, *Wildlife Act: Shield or Sword?; Battle Brews over Changing the 'Crown Jewel' of Environmental Statutes. Business Feels Skewered by the Law. Conservationists Want More Protection for Endangered Species*, L.A. TIMES, Dec. 14, 1990, at A1. Abramson states:

Scientists estimate that about 100 species disappeared from the Earth between 1600 and 1900, but with the spread of pollution, the press of human populations, and massive destruction of the rain forests, projections are that an average of 100 species per day will be vanishing by the end of the century.

Id.

28. Act of May 25, 1900, 31 Stat. 188 (commonly known as the Lacey Act). See 16 U.S.C. § 3372(a) (1988).

29. Convention between the United States and Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, 39 Stat. 1702.

30. James C. Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look from a Litigator's Perspective*, 21 ENVTL. L. 499, 500-01 (1991).

31. Henry J. Blum, Note, *The Extraterritorial Application of Section 7 of the Endangered Species Act*, 13 COLUM. J. ENVTL. L. 129, 129 (1987).

32. Pub. L. No. 89-669, §§ 1-3, 80 Stat. 926 (1966).

could be provided.³³ Neither foreign species nor plant species were eligible for this listing process.³⁴ The Endangered Species Conservation Act of 1969³⁵ amended the 1966 Act. The 1969 Act expanded the endangered species program by recognizing the need to list foreign species.³⁶ In order "to help insure that the United States does not contribute to the extirpation of other nations' wildlife, the Secretary of Interior was authorized to develop a list of species or subspecies of animals that were threatened with worldwide extinction."³⁷ In addition, the 1969 Act prohibited the importation of any listed foreign species into the United States.³⁸

Four years later, Congress substantially expanded the coverage of the endangered species program when it enacted the Endangered Species Act of 1973.³⁹ The 1973 Act provided for the listing of plant species,⁴⁰ and also created the category of "threatened"⁴¹ species. A species no longer had to be on the verge of extinction before qualifying for protection. Overall, the ESA of 1973 created an elaborate framework for identifying and listing threatened or endangered species, for prohibiting federal agencies from jeopardizing listed species, and for restricting actions that could result in the taking, directly or indirectly, of listed species.⁴²

C. Section 7 Consultation Provison

Because courts have been quite active in enforcing the requirements of the ESA, the Act has become a powerful tool in environmental litigation.⁴³ One of the most significant provisions of the Act is section 7.⁴⁴ Entitled "Interagency Cooperation," section 7 is intended

33. Kilbourne, *supra* note 30, at 502-03.

34. *Id.* at 503.

35. Pub. L. No. 91-135, 83 Stat. 275 (1969).

36. *See* Kilbourne, *supra* note 30, at 503.

37. S. REP. NO. 307, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990-91.

38. S. REP. NO. 240, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 2700, 2701.

39. 16 U.S.C. §§ 1531-1544 (1988).

40. Kilbourne, *supra* note 30, at 503.

41. *Id.* *See* 16 U.S.C. § 1532(20) (1973) (defining threatened species as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range").

42. Kilbourne, *supra* note 30, at 501.

43. *See, e.g.,* Tennessee Valley Authority v. Hill, 437 U.S. 153, 187 (1978) (holding that "Congress viewed the value of endangered species as incalculable," Court authorized injunction to halt completion of multi-million dollar dam in order to preserve snail darter fish).

44. 16 U.S.C. § 1536 (1988).

to protect listed species from the potentially harmful effects of federal agency action.⁴⁵ This provision limits the actions a federal agency may undertake as well as imposing affirmative duties for the protection of species.⁴⁶ Unlike the National Environmental Protection Act ("NEPA"),⁴⁷ which requires only procedural compliance,⁴⁸ section 7 of the ESA contains a substantive prohibition.⁴⁹

Section 7(a)(1) imposes an affirmative duty on federal agencies to carry out projects for the conservation of listed species.⁵⁰ Under section 7(a)(2), federal agencies must consult with the Secretary of the Interior to ensure that their actions will not harm any listed endangered or threatened species.⁵¹ Each federal agency must inquire as to whether any listed species "may be present in the area of [its] proposed action."⁵² Depending on the species involved, the Secretary has delegated the consultation task to either the United States Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS"). If the FWS or NMFS advises the agency that a listed species may be present, the agency is required to prepare a biological assessment identifying the endangered or threatened species that are "likely to be affected by such action."⁵³ This biological assessment must be completed before the agency can enter into any contract for construction.⁵⁴ This requirement ensures informed decision-making

45. Kilbourne, *supra* note 30, at 526. Section 4 of the ESA determines which species will receive protection under the Act. See 16 U.S.C. § 1533 (1988).

46. Kilbourne, *supra* note 30, at 525.

47. 42 U.S.C. §§ 4321-4370(c) (1988).

48. See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (holding "NEPA itself does not mandate particular results, but simply prescribes the necessary process").

49. See *Plater, supra* note 15, at 821. See also Kilbourne, *supra* note 30, at 526.

50. See Kilbourne, *supra* note 30, at 525. Section 7(a)(1) states: "All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title." 16 U.S.C. § 1536(a)(1) (1988).

51. See Kilbourne, *supra* note 30, at 526. Section 7(a)(2) states:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species

16 U.S.C. § 1536(a)(2) (1988).

52. *Id.* § 1536(c)(1).

53. *Id.*

54. 50 C.F.R. § 402.12(b)(2) (1991).

on the part of the federal agencies, and thus provides significant protection to listed species.

The Department of the Interior administers the ESA by promulgating regulations. The first set of regulations, issued in 1978, required federal agencies to comply with the consultation provision even if the activity was being carried out in a foreign country.⁵⁵ However, in 1983 the Department of the Interior, under the management of the Reagan Administration, proposed to rescind the consultation requirement for agency actions in foreign countries.⁵⁶ On June 3, 1986, the Secretary of the Interior published the revised rule which stated that the consultation requirement would apply only to agency action "in the United States or upon the high seas."⁵⁷ The Department cited "the apparent domestic orientation of the consultation and exemption processes . . . and . . . the potential for interference with the sovereignty of foreign nations"⁵⁸ as justifications for this radical reversal.

Under the revised regulation, federal agencies acting abroad are no longer required to consider the environmental impact of their actions on endangered and threatened species in foreign countries. This regulation primarily affects government agencies that either fund or construct projects around the world, such as the Agency for International Development, the United States Army Corps of Engineers, and the Bureau of Reclamation.⁵⁹

III. *LUJAN V. DEFENDERS OF WILDLIFE*

A. *Procedural Background*

Disturbed by the implications of the revised regulation, three environmental groups ("the Defenders")⁶⁰ filed suit on August 27, 1986, seeking to overturn it.⁶¹ A Minnesota District Court dismissed the case for lack of standing, finding no case or controversy existed.⁶² The court held that the Defenders' mere interest in the enforcement and administration of the ESA was not an injury sufficient to confer

55. 50 C.F.R. § 402.01 (1984).

56. Parenteau, *supra* note 1.

57. 50 C.F.R. § 402.01 (1986).

58. 51 Fed. Reg. 19,926, 19,929 (1986).

59. Parenteau, *supra* note 1.

60. Defenders of Wildlife, Friends of Animals and Their Environment, and The Humane Society of the United States.

61. *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43 (D. Minn. 1987).

62. *Id.* at 44.

standing.⁶³ However, the Eighth Circuit reversed and remanded, concluding that the Defenders had alleged a sufficient injury for standing purposes in their affidavits.⁶⁴

On remand, the district court determined that Congress had intended the ESA's consultation requirement to apply to all federal activities, including those in foreign countries.⁶⁵ The court found the 1986 regulation contrary to Congress' clear intent in enacting the ESA and granted summary judgment in favor of the Defenders.⁶⁶ The district court ordered the Secretary of the Interior to reinstate regulations mandating consultation for agency action affecting endangered or threatened species, wherever found.⁶⁷ The Department of Interior appealed the case to the Eighth Circuit, which affirmed the district court's decision in all respects.⁶⁸ However, on May 13, 1991, the United States Supreme Court granted the government's petition for writ of certiorari and subsequently reversed the Eighth Circuit's decision.⁶⁹

B. *The Eighth Circuit Decision*

The *Defenders of Wildlife* case raised two separate issues. The first was whether the environmental organizations had standing to challenge the 1986 regulation issued by the Secretary of the Interior. The second issue was whether the Secretary's interpretation of the ESA's consultation provision was consistent with congressional intent.

1. Court Access for Environmental Plaintiffs

Article III of the United States Constitution limits the authority of the federal courts to hear actual "cases" or "controversies,"⁷⁰ thereby precluding the courts from intruding into "areas committed to other branches of government."⁷¹ The doctrine of standing is just

63. *Id.* at 46.

64. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988).

65. *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082 (D. Minn. 1989), *aff'd*, 911 F.2d 117 (8th Cir. 1990), *cert. granted*, 111 S. Ct. 2008 (1991), *rev'd*, 112 S. Ct. 2130 (1992).

66. *Id.*

67. *Id.* at 1086.

68. *Defenders of Wildlife*, 911 F.2d 117 (8th Cir. 1990), *cert. granted*, 111 S. Ct. 2008 (1991), *rev'd*, 112 S. Ct. 2130 (1992).

69. *Lujan v. Defenders of Wildlife*, *cert. granted*, 111 S. Ct. 2008 (1991), *rev'd*, 112 S. Ct. 2130 (1992).

70. U.S. CONST. art. III, § 2.

71. *Hodel*, 851 F.2d at 1038 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

one aspect of justiciability that stems from Article III.⁷² Standing focuses on the particular party who requests adjudication of an issue. An appropriate litigant must have "a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues."⁷³ The policy behind standing is to ensure that courts will decide important issues against the backdrop of a fully developed factual record. In *Valley Forge Christian College v. Americans United*,⁷⁴ the Supreme Court held that "at an irreducible minimum," Article III standing requires a plaintiff to show [1] an "actual or threatened injury" (injury in fact),⁷⁵ [2] that the injury "can be traced to the challenged action" (causation) and [3] that the injury "is likely to be redressed by a favorable decision" (redressability).⁷⁶

In addition to these constitutional requirements, courts may impose prudential limitations on a litigant's ability to bring a claim.⁷⁷ However, Congress has the authority to statutorily waive any prudential limitations, thereby granting certain litigants access to the courts.⁷⁸ For example, the Defenders brought their claims under the ESA's citizen suit provision which provides that any person may commence a suit to enjoin anyone who allegedly violates the statute.⁷⁹ Courts have interpreted citizen suit provisions in environmental statutes as evidence of congressional intent to waive prudential considerations.⁸⁰ Therefore, the Defenders had to satisfy only the consti-

72. Mootness, ripeness, and political questions are other Article III doctrines which limit the power of the judiciary. *Id.*

73. *Id.* (citing *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

74. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

75. *Id.* at 472 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)).

76. *Id.* (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

77. Prudential limitations do not stem from the Constitution, but are court-imposed limitations. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975) (plaintiffs cannot assert the rights or interests of third parties).

78. *See Hodel*, 851 F.2d at 1039 ("Unlike the constitutional requirements, Congress may eliminate prudential limitations by legislation"); *see also Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) ("[W]here a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' is one within the power of Congress to determine." (quoting *Flast v. Cohen*, 392 U.S. 83, 100 (1968))).

79. *See* 16 U.S.C. § 1540(g) (1988).

80. *See Katherine B. Steuer & Robin L. Juni, Court Access for Environmental Plaintiffs: Standing Doctrine in Lujan v. National Wildlife Federation*, 15 HARV. ENVTL. L. REV. 187, 231-32 (1991) (noting that "most courts have found prudential considerations superfluous to citizen's suit standing challenges").

tutional requirements for standing.⁸¹

The court of appeals held that the Defenders had established injury in fact on two grounds.⁸² First, the Defenders had alleged a substantive injury: the increasing extinction rate of endangered species in foreign countries where specific agency projects were ongoing.⁸³ Defenders' affidavits listed pending and current projects in foreign countries that were likely to harm endangered species. The specific governmental projects targeted by the Defenders included several foreign projects that had never been subjected to the ESA's consultation procedure.⁸⁴ For example, the Mahaweli water resource project in Sri Lanka, funded by Agency for International Development ("AID"), endangers such species as the Indian elephant, mugger crocodile, leopard and python.⁸⁵ The Bureau of Reclamation's Aswan High Dam project in Egypt threatens the endangered Nile crocodile.⁸⁶ AID's Picchis-Palcazu community forest project in Peru also threatens such endangered species as the jaguar, uakari and Geoldi's marmoset.⁸⁷

In sworn affidavits, members of the Defenders stated that they had visited and intended to return to these sites to view the wildlife.⁸⁸ In *Sierra Club v. Morton*,⁸⁹ the United States Supreme Court broadened the category of injuries to include a plaintiff's interest in aesthetic, conservational and recreational values.⁹⁰ However, a party seeking review must still have personally suffered an injury.⁹¹ Apply-

81. *Hodel*, 851 F.2d at 1039.

82. The court did not address the requirements of traceability and redressability because they were not challenged by the Secretary of the Interior. *Defenders of Wildlife*, 911 F.2d at 119.

83. *Id.*

84. Although these projects were initiated before the revised rule limiting consultation was promulgated, the Circuit Court recognized the ongoing need for projects to require additional consultation that would never occur under the new rule. *Hodel*, 851 F.2d at 1042.

85. *Id.* at 1041. See also Sean Kelly, *A Global Endangered Species Act?: Court Decides Law Applies to Federally Funded Projects Outside U.S.*, WASH. POST, Aug. 16, 1990, at A21.

86. *Hodel*, 851 F.2d at 1041-42.

87. *Id.* at 1041.

88. *Defenders of Wildlife*, 911 F.2d at 120. For example, Amy Skilbred, a member of the Defenders, stated that she had visited Sri Lanka to observe the wildlife and planned to return there in the future. She alleged that she would suffer harm as a result of the Mahaweli project's impact on the wildlife in that area. Similarly, Joyce Kelly, president of Defenders, stated that she had visited and intended to return to the area in Egypt where the Bureau of Reclamation's Aswan High Dam project was situated. *Id.*

89. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

90. *Id.* at 738.

91. *Id.* at 735.

ing this standard, the court found that the members here would suffer harm if the regulation remained in effect. According to the court, "[a]n interest in aesthetic, conservational, and recreational values will support standing when an organizational plaintiff alleges that its members use the area and will be adversely affected."⁹²

The court of appeals distinguished the Defenders' situation from a recent United States Supreme Court decision on standing for environmental plaintiffs, *Lujan v. National Wildlife Federation*.⁹³ In *National Wildlife Federation*, a wildlife protection organization sought to challenge the Bureau of Land Management's program to reclassify approximately 180 million acres of public land to allow for mining activities under the Federal Land Policy and Management Act of 1976, and the National Environmental Policy Act of 1969.⁹⁴ In that case, the Supreme Court held that the environmental group did not have standing to challenge the agency action.⁹⁵ The Court found the members' affidavits deficient because they failed to establish that the members used the specific land affected by the challenged agency action.⁹⁶ In contrast, members of the Defenders asserted that they had visited the specific project sites for the purpose of studying endangered species.⁹⁷ Thus, the Eighth Circuit held that the Defenders satisfied the geographical nexus necessary to establish injury by "provid[ing] specific facts, as opposed to claiming use of unspecified portions of immense tracts of land upon which the governmental activity may or may not occur, as was the case in *National Wildlife Fed'n*."⁹⁸

The Eighth Circuit also found that the Defenders satisfied standing "by demonstrating a procedural injury based upon the Secretary's failure to follow the required consultation procedure."⁹⁹ The Eighth Circuit noted that various appellate courts have "recognized that failure to comply with required procedures may constitute injury in

92. *Defenders of Wildlife*, 911 F.2d at 120 (quoting *Hodel*, 851 F.2d at 1040).

93. *Lujan v. Nat'l Wildlife Fed'n*, 110 S. Ct. 3177 (1990).

94. *Id.* at 3183-84.

95. *Id.* at 3189.

96. Because the plaintiff's affidavits claimed use of land "in the vicinity" of the agency action, rather than use of the specific land implicated in the agency action, the Supreme Court held that the affidavits were insufficient to confer standing. *Id.* at 3187-88.

97. See Brief for Respondents, *Lujan v. Defenders of Wildlife*, cert. granted, 111 S. Ct. 2008 (1991), rev'd, 112 S. Ct. 2130 (1992) (No. 90-1424), available in LEXIS, Genfed library, Briefs file [hereinafter Brief for Respondents].

98. *Defenders of Wildlife*, 911 F.2d at 121.

99. *Id.*

fact.”¹⁰⁰ In this case, the court found that the legislature intended the ESA to impose statutory duties that would in turn create “correlative procedural rights in a given plaintiff, the invasion of which is sufficient to satisfy the requirement of injury in fact in article III.”¹⁰¹ Therefore, the Secretary’s refusal to require section 7 consultation for federal actions in foreign countries constituted a procedural injury.¹⁰² Based on evidence of both a substantive and procedural injury, the Defenders established standing to challenge the revised consultation requirement.

2. Extraterritorial Application of the ESA

After determining that the Defenders had standing, the court of appeals turned to the merits of the Defenders’ claim. The Defenders alleged that the government’s actions abroad should be subject to the ESA’s consultation provision.¹⁰³ Arguing that the ESA should not extend extraterritorially, the Secretary of the Interior claimed that its regulations interpreting the ESA were entitled to deference according to the Supreme Court’s two-part test in *Chevron, U.S.A., Inc. v. NRDC*.¹⁰⁴ In *Chevron*, the Supreme Court held that when a court reviews an agency’s interpretation of the statute that it administers, a court must first determine whether Congress has addressed the precise issue.¹⁰⁵ If congressional intent is clear from the plain language of the statute, the court must give effect to the express intent of Congress.¹⁰⁶ However, if the statute is ambiguous or silent on the issue, the court must determine whether the agency has interpreted the statute reasonably.¹⁰⁷

In applying this two-part test, the Eighth Circuit examined the language of the ESA for a clearly expressed congressional intent to apply the consultation provision to agency actions in foreign coun-

100. *Id.* at 119. See, e.g., *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 428 (1st Cir. 1983); *South East Lake View Neighbors v. Dep’t of Housing & Urban Dev.*, 685 F.2d 1027, 1038-39 (7th Cir. 1982); *City of Davis v. Coleman*, 521 F.2d 661, 670-72 (9th Cir. 1975).

101. *Defenders of Wildlife*, 911 F.2d at 121 (quoting *Fernandez v. Brock*, 840 F.2d 622, 630 (9th Cir. 1988)). The court believed that both the citizen suit provision and the Act’s ambitious purpose “support[ed] a construction that Congress intended to bestow procedural rights upon environmental organizations such as Defenders.” *Id.*

102. See *id.*

103. *Id.* at 118.

104. *Id.* at 122. See *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

105. *Chevron*, 467 U.S. at 842-43.

106. *Id.*

107. *Id.*

tries.¹⁰⁸ The consultation provision of the ESA states:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that *any* action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of *any* species or result in the destruction or adverse modification of habitat of such species¹⁰⁹

Although the statute does not expressly mandate extraterritorial application, the court reasoned that Congress' use of expansive language "admits to no exceptions."¹¹⁰ Recognizing, however, that the use of all-inclusive language in this one section was not dispositive of the issue, the court examined other provisions of the Act for further indications of congressional intent.¹¹¹

The court noted that in section 2 of the ESA, Congress declares that "the United States has pledged itself as a sovereign state in the international community to conserve . . . various species of fish or wildlife and plants facing extinction."¹¹² This section identifies at least six international treaties ratified by the United States in an effort to conserve endangered species.¹¹³ In section 3, the Act defines "endangered species" without reference to any geographic limitation.¹¹⁴ Additionally, under section 4, the Secretary must take into account "those efforts, if any, being made by any State or foreign nation . . . to protect such species"¹¹⁵ when classifying a species as endangered or threatened. Furthermore, under section 4, the Secretary of the Interior is required to publish a list of all species determined to be threatened or endangered, including both foreign and domestic spe-

108. *Defenders of Wildlife*, 911 F.2d at 122.

109. 16 U.S.C. § 1536(a)(2) (1988) (emphasis added).

110. *Defenders of Wildlife*, 911 F.2d at 122.

111. *Id.*

112. 16 U.S.C. § 1531(a)(4) (1988).

113. The following international treaties are referenced in the ESA:

- (A) migratory bird treaties with Canada and Mexico;
- (B) the Migratory and Endangered Bird Treaty with Japan;
- (C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;
- (D) the International Convention for the Northwest Atlantic Fisheries;
- (E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;
- (F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora

Id.

114. *Id.* § 1532(6).

115. *Id.* § 1533(b)(1)(A).

cies.¹¹⁶ “As of May 1989, of the 1,046 species listed as endangered or threatened, 507 were species whose range is outside the United States. In addition, there are 71 listed species whose range includes both United States and foreign territory.”¹¹⁷ It is this list that determines which species are entitled to protection under the Act.

The ESA also contains a section entitled “International Cooperation” which demonstrates that the United States’ commitment to the worldwide protection of endangered and threatened species “will be backed by financial assistance, personnel assignments, investigations, and by encouraging foreign nations to develop their own conservation programs.”¹¹⁸ The Secretary of the Interior argued that this section should be viewed independently from the rest of the Act, as encompassing Congress’ complete response to the international problem of protecting endangered species.¹¹⁹ However, the court was unpersuaded that this one provision could be “so neatly excised from the larger statutory scheme.”¹²⁰

Based on the foregoing, the Eighth Circuit determined that the plain language of the Act showed clear congressional intent that the Act should extend extraterritorially. According to the court, when viewed as a whole, the Act clearly demonstrated a congressional commitment to worldwide conservation efforts.¹²¹ The court held that limiting the consultation duty to protect only domestic endangered species “runs contrary to such a commitment.”¹²² Thus, the court concluded that under the *Chevron* standard, it owed no judicial deference to the Secretary’s construction of the Act. The court stated that “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”¹²³

Once the court found that the language of the ESA expressed a clear congressional intent to apply the Act extraterritorially, the court could have ended its analysis. However, the court chose to reinforce its conclusion by examining the legislative history of the ESA.¹²⁴

116. *Id.* § 1533(c).

117. *Defenders of Wildlife*, 911 F.2d at 123 (citing Appellee’s Brief).

118. *Id.*; see 16 U.S.C. § 1537 (1988).

119. *Defenders of Wildlife*, 911 F.2d at 123.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Defenders of Wildlife*, 911 F.2d at 123.

The court observed that after Congress passed the original ESA in 1973, the Secretary of the Interior initiated a rulemaking process to implement the Act.¹²⁵ At this time, the section 7 consultation provision was subjected to extensive commentary.¹²⁶ The final rule for this provision, published on January 4, 1978, stated: "Section 7 . . . requires every Federal agency to insure that its activities or programs in the United States, upon the high seas, and *in foreign countries*, will not jeopardize the continued existence of a listed species."¹²⁷ Soon after the Department of Interior issued its regulations, Congress amended the consultation section, but made no substantive changes to it.¹²⁸ Thus, the court concluded that at the time of the amendment, congressional awareness of the "existing law," which required consultation on foreign projects, reflected "tacit approval of the prior regulation."¹²⁹

Therefore, based on both the express language and the legislative history of the ESA, the Eighth Circuit found the revised regulation, which eliminated consultation for agency action abroad, contrary to clear congressional intent.¹³⁰ Although the Secretary of the Interior urged that this construction would be an intrusion upon the sovereignty of foreign nations, the court noted that the ESA affects the actions of federal agencies, not the actions of sovereign nations.¹³¹ The consultation requirement places no limits on foreign countries taking their own actions, independent of United States involvement. Furthermore, the court stated that it is Congress' responsibility, not the courts, to determine whether the "concern for foreign relations outweighs its concern for foreign wildlife."¹³²

The Secretary also argued that the court should defer to the Department's construction of the Act based upon the presumption against extraterritorial application of United States laws established in

125. *Id.*

126. The Army Corps of Engineers, the State Department and the Defense Department opposed extraterritorial application, while the Council on Environmental Quality, the Interior Department Solicitor's Office and the General Counsel's Office of the National Oceanic and Atmospheric Administration urged that the consultation duty extend to foreign countries. *Id.*

127. *Id.* at 124 (citing from 42 Fed. Reg. at 4871 (1978) (emphasis added)).

128. *Id.* The amendments were essentially "a reorganization to allow additions to the rest of the section." *Id.* They did not change the application of the section in question.

129. *Defenders of Wildlife*, 911 F.2d at 124.

130. *Id.* at 125.

131. *Id.*

132. *Id.*

Foley Bros., Inc. v. Filardo.¹³³ In *Foley*, the Supreme Court held that United States statutes are presumed only to have domestic scope.¹³⁴ However, this presumption can be overcome if there is clear congressional intent to apply the law extraterritorially.¹³⁵ As noted above, the court found that Congress clearly expressed its intent for the law to apply abroad.¹³⁶

The court never reached the second prong of the *Chevron* analysis. The court rested its decision entirely upon the first prong of the test—clear congressional intent. If the court of appeals had addressed the second prong of *Chevron*, its conclusion most likely would have remained the same. Under *Chevron*, an agency's interpretation of the statute must only be reasonable to be entitled to deference. However, the court probably would have concluded that the Department of Interior's decision not to extend the consultation provision to endangered foreign species was unreasonable, given that the court found the overall purpose of the Act was the protection of endangered species around the world.

C. *The Supreme Court Reversal*

In reversing the Eighth Circuit decision, the Supreme Court never reached the underlying issue of whether the consultation provision extends to federally funded projects abroad. Rather, in the majority opinion, Justice Scalia dismissed the case on procedural grounds, holding that the Defenders lacked the requisite standing to challenge the regulation in court.¹³⁷ The environmental organizations argued that they had standing based on the affidavits of two of their members.¹³⁸ The members' affidavits alleged that because of the agency's noncompliance with the ESA, they would be deprived of the opportunity to observe certain endangered species when the members returned to the foreign development sites.¹³⁹ In analyzing the standing issue, Justice Scalia conceded that the Defenders' "desire to use or

133. *Id.* See *infra* notes 175-79 and accompanying text.

134. *Defenders of Wildlife*, 911 F.2d at 125.

135. *Id.*

136. See *supra* notes 108-22 and accompanying text.

137. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). Justice Scalia also held that the Defenders "failed to demonstrate redressability." *Id.* at 2140. He was not convinced that requiring consultation on foreign projects would consequently effect the foreign project in a manner that would mitigate the harm to listed species. *Id.* at 2140-42. However, this view did not command a majority of Justices.

138. See *supra* notes 84-88 and accompanying text.

139. *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2138.

observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing."¹⁴⁰ However, Justice Scalia restricted the "injury in fact" test to require "not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of [the Defenders'] members would thereby be 'directly' affected *apart from* their 'special interest in th[e] subject.'"¹⁴¹ Furthermore, Justice Scalia stated that the members' intent to return to the project sites "some day" to observe the endangered species was not a sufficient injury.¹⁴² According to Justice Scalia, "[s]uch 'some day' intentions — without any description of concrete plans, or indeed even any specification of *when* the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require."¹⁴³

The majority also rejected the argument that the Defenders had standing based on a "procedural injury."¹⁴⁴ The Eighth Circuit had found that the citizen suit provision of the ESA created a procedural right enabling the Defenders to bring a suit against the Secretary of the Interior for failure to follow the correct consultation procedures.¹⁴⁵ However, Justice Scalia repudiated the idea that Congress could "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" without a showing of concrete injury.¹⁴⁶ To permit otherwise, Justice Scalia professed, would infringe on the idea of separation of powers.¹⁴⁷

In a concurring opinion, Justice Kennedy, joined by Justice Souter, agreed that the Defenders failed to show that they were personally injured by the regulation.¹⁴⁸ Justice Kennedy noted that "this is not a case where it is reasonable to assume that the [members] will be using the sites on a regular basis."¹⁴⁹ However, Justice Kennedy wrote separately to emphasize that he would not foreclose the possibility that under a different set of facts, a theory similar to the one advanced in *Defenders of Wildlife* "might support a claim to stand-

140. *Id.* at 2137.

141. *Id.* at 2137-38 (emphasis added) (second alteration in original).

142. *Id.* at 2138.

143. *Id.* (emphasis in original).

144. *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2142-43.

145. *Id.* See *supra* notes 99-102 and accompanying text.

146. *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2145.

147. *Id.*

148. *Id.* at 2146.

149. *Id.*

ing.”¹⁵⁰ Furthermore, with regard to basing standing on a procedural injury, Justice Kennedy wrote: “In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before”¹⁵¹ However, Congress must at a minimum “identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.”¹⁵² Justice Kennedy believed the citizen suit provision of the ESA failed to meet this minimum standard because the provision did not require that the alleged statutory violation personally injure the plaintiff.¹⁵³ According to Justice Kennedy, a person bringing suit must at least demonstrate that they have been personally injured by the procedural violation.

In a separate concurrence, Justice Stevens found that the Defenders had standing,¹⁵⁴ but reversed the case on its merits.¹⁵⁵ As the only Justice to reach the underlying issue in the case, Justice Stevens believed that the consultation provision did not apply to agency activities in foreign countries.¹⁵⁶ Applying the *Foley* presumption against extraterritorial application of United States laws, Justice Stevens wrote: “[T]he absence of any explicit statement that the consultation requirement is applicable to agency actions in foreign countries suggests that Congress did not intend that § 7(a)(2) apply extraterritorially.”¹⁵⁷

In a biting dissent, Justice Blackmun, joined by Justice O’Connor, criticized the Court for its “slash-and-burn expedition through the law of environmental standing.”¹⁵⁸ Justice Blackmun called the Court’s demand for detailed descriptions of future visits an “empty formality,” noting that “[n]o substantial barriers prevent [the members] from simply purchasing plane tickets to return to the Aswan and Mahaweli projects.”¹⁵⁹ According to Justice Blackmun, a

150. *Id.*

151. *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2146-47. See *infra* notes 217-18 and accompanying text.

152. *Id.* at 2147.

153. *Id.*

154. According to Justice Stevens, “a person who had visited the critical habitat of an endangered species, has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction.” *Id.*

155. *Id.*

156. *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2149.

157. *Id.* at 2151.

158. *Id.* at 2160.

159. *Id.* at 2153. Justice Blackmun feared that the majority’s “demand for detailed de-

reasonable jury could assume that the members would return to the project sites "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."¹⁶⁰ Therefore, in Justice Blackmun's opinion, the affidavits contained sufficient facts to conclude that the members would suffer a concrete, substantive injury.

The dissent also questioned the scope of the majority's language in rejecting standing for "procedural" injuries.¹⁶¹ The majority indicated that a procedural injury without an independent showing of a concrete harm was not constitutionally cognizable. However, Justice Blackmun noted that in complex regulatory areas, such as environmental law, "Congress often legislates . . . in procedural shades of gray."¹⁶² In other words, Congress is able to guide the substantive policy goals of administrative agencies by requiring that they follow certain procedures.¹⁶³ As a result, some procedural duties become intertwined with the prevention of a concrete, substantive harm.¹⁶⁴ For example, Congress designed the consultation requirement of section 7 "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."¹⁶⁵ Clearly, Congress has relied on court enforcement of these procedures to effectuate the substantive policy goals of its legislative acts.¹⁶⁶ Justice Blackmun feared that the majority was attempting "to impose fresh limitations on the constitutional authority of Congress to allow citizen suits in the federal courts for injuries deemed 'procedural' in nature."¹⁶⁷ According to the dissent, "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

scriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not." *Id.*

160. *Id.*

161. *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2151.

162. *Id.* at 2158.

163. *Id.*

164. *Id.* at 2159.

165. *Id.* at 2158.

166. See Daniel A. Farber, *The Global Environment and the Rehnquist Court*, TRIAL, Aug. 1992, at 76. Professor Farber states: "Congress does not authorize environmental groups to file suit out of sympathy with the harms suffered by individual members of those groups. It authorizes these suits because, particularly in an era of divided government, litigation ensures that regulatory agencies follow their statutory mandates." *Id.*

167. *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2151-52.

originates and emanates."¹⁶⁸ In Justice Blackmun's opinion, the Court's decision "reflects an unseemly solicitude for an expansion of power of the Executive Branch."¹⁶⁹

Justice Blackmun proposed that the Court recognize 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."¹⁷⁰ Otherwise, in any situation in which a plaintiff could not show that he or she suffered a concrete, individualized harm, a regulatory agency's deviation from its statutory mandate would not be subject to judicial review.¹⁷¹ By not recognizing procedural injuries, the Court is, in effect, making certain decisions of administrative agencies judicially unreviewable.

The problem with Justice Scalia's approach is that environmental statutes are designed to protect everybody, not just the interests of a select few. "[T]he Endangered Species Act was not passed to protect the interests of a few wildlife observers. It is based instead on the view that we all have a stake in the ecosystem's integrity and the preservation of unique life forms, regardless of whether we observe them personally."¹⁷² Therefore, it makes no sense to require a showing of individual injury.

V. POLICY RESPONSES TO BIO-DIVERSITY CONCERNS AT THE INTERNATIONAL LEVEL

A. *Presumption Against Extraterritoriality of Environmental Laws*

In *Defenders of Wildlife*, the United States Supreme Court had the opportunity to interpret the presumption against extraterritoriality in an environmental context. Because the Court reversed the deci-

168. *Id.* at 2158.

169. *Id.* at 2159.

170. *Id.* However, as noted previously, Justice Blackmun believed that this was a case where the plaintiffs sought judicial enforcement of a procedural requirement designed to protect a threatened, concrete interest of theirs: their interest in observing and working with endangered species. *Id.* Consequently, in Blackmun's view, the Defenders satisfied the majority's requirement that plaintiffs show a separate, concrete harm.

171. See Farber, *supra* note 166, at 76-77. In discussing the impact of Justice Scalia's opinion on environmental law, Professor Farber notes the considerable obstacles that an environmental organization faces in attempting to prove that its members have suffered a concrete harm. One such example is "the difficulty that the Sierra Club might have in showing that the U.S. Environmental Protection Agency's acid-rain regulations would have a discernible effect on some individual member." *Id.* at 77.

172. *Id.*

sion on standing grounds, the question of whether the ESA applies extraterritorially remains an open issue. Unless Congress ultimately resolves the issue,¹⁷³ another challenge may satisfy the Court's burdensome standing requirements¹⁷⁴ and the Supreme Court will have to decide whether the ESA applies extraterritorially.

The presumption against extraterritorial application of United States laws became a well known canon of statutory construction in the seminal case of *Foley Bros., Inc. v. Filardo*.¹⁷⁵ In *Foley*, the United States Supreme Court held that the Eight Hour Law¹⁷⁶ did not apply to Americans employed by United States companies working in foreign countries.¹⁷⁷ The Court stated that laws are meant only to apply within the territorial jurisdiction of the United States, unless Congress has indicated a contrary intent.¹⁷⁸ The Court based its holding on the assumption "that Congress is primarily concerned with domestic conditions."¹⁷⁹

The most recent Supreme Court ruling on the issue of extraterritorial application of United States laws was also in the labor context. In *EEOC v. Arabian American Oil Co.*,¹⁸⁰ the Court held that Title VII of the Civil Rights Act did not apply extraterritorially.¹⁸¹ In *Arabian American*, a United States citizen, employed by a United States corporation in Saudi Arabia, brought a Title VII suit claiming that he was wrongfully discharged because of his race, religion and national origin.¹⁸² The Court held that Congress did not intend Title VII protections to extend to the employment practices of United States employers abroad.¹⁸³

In light of the Supreme Court's narrow stance on the extraterri-

173. See *infra* notes 217-19 and accompanying text.

174. It is interesting to note that three Justices (Blackmun, O'Connor and Stevens) found standing in the *Lujan* case, and two Justices (Kennedy and Souter), in their concurring opinion, expressed a more relaxed view of standing. Therefore, a majority of Justices may be receptive to granting standing in a renewed challenge to the current regulation.

175. 336 U.S. 281 (1949).

176. The Eight Hour Law provided that no laborer was required to work more than eight hours in a day, unless compensated one and one-half times the pay rate for all work in excess of eight hours. *Id.* at 281.

177. *Id.* Plaintiff was an American citizen who worked for a United States contractor in Iraq and Iran. *Id.* He brought suit in New York to recover overtime pay in accordance with the Eight Hour Law. *Id.*

178. *Id.* at 285.

179. *Id.*

180. 111 S. Ct. 1227 (1991).

181. *Id.*

182. *Id.*

183. *Id.* at 1231.

torial application of United States law, one can reasonably predict that the Court would be similarly unwilling to extend the reach of the ESA. With the exception of the Eighth Circuit's decision in *Defenders of Wildlife*, environmental groups have had little success in persuading lower courts to apply environmental laws extraterritorially. The issue of extraterritoriality in environmental litigation has centered primarily on interpretations of the National Environment Protection Act ("NEPA").¹⁸⁴ Like the ESA, the NEPA contains sweeping language lacking geographical limits¹⁸⁵ and calling for the recognition of worldwide environmental problems.¹⁸⁶ However, NEPA's broad statutory language has not overcome the presumption against extraterritoriality.¹⁸⁷

In *National Resources Defense Council v. Nuclear Regulatory Commission* ("NRDC"),¹⁸⁸ the D.C. Circuit Court limited NEPA to domestic application in a case involving nuclear export licensing decisions. Expanding on *Foley*, the *NRDC* court stated that overcoming the presumption against extraterritoriality required not just a clear expression of intent, but "an unequivocal mandate from Congress."¹⁸⁹ The court reasoned that if federal agencies were required to abide by United States environmental laws abroad, their actions may "unnecessarily displace" the domestic regulation of the foreign nation.¹⁹⁰ The court's decision stressed the foreign public policy of not intruding upon the sovereignty of other national governments when acting overseas.¹⁹¹

Other environmental statutes also have been subject to extraterritorial review. In *United States v. Mitchell*, the Fifth Circuit declined to apply the Marine Mammal Protection Act of 1972 ("MMPA") ex-

184. 42 U.S.C. §§ 4321-4370(c) (1988). See Turley, *supra* note 2, at 628.

185. Turley, *supra* note 2, at 628. See 42 U.S.C. § 4321 (1988).

186. 42 U.S.C. § 4332(2)(f) (1988) states: "[A]ll agencies of the Federal Government shall . . . recognize the worldwide and long-range character of environmental problems and . . . lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." *Id.*

187. Turley, *supra* note 2, at 628-29.

188. 647 F.2d 1345 (D.C. Cir. 1981).

189. *Id.* at 1357. The court did, however, limit its interpretation of NEPA to the facts of the case and thus it left open the question of whether NEPA could be applicable to some other kind of major federal action abroad. *Id.* at 1366. For a contrary view, see *Sierra Club v. Coleman*, 405 F. Supp. 53 (D.D.C. 1975) (holding NEPA applicable to Federal Highway Administration's decision to construct highway through Panama and Columbia).

190. *NRDC*, 647 F.2d at 1356.

191. *Id.*

tratorritorially.¹⁹² The decision in *Mitchell* also emphasized the sovereignty of foreign nations in regulating the exploitation of their own natural resources.¹⁹³ Overall, the lower courts tend to confine the reach of environmental legislation.

The problem with the approach taken by the courts in these cases is that circumstances have changed dramatically since the United States Supreme Court handed down its *Foley* decision in 1949. The world has gradually become more interdependent, and the United States can no longer afford to have an "isolationist mentality."¹⁹⁴ The underlying premise upon which *Foley* is based is simply not valid in an environmental context. In *Foley*, the Supreme Court noted that labor laws are primarily a local concern.¹⁹⁵ Thus, to apply United States employment laws in foreign nations could create a conflict between the interests of the United States and the interests of foreign nations.¹⁹⁶ In contrast, environmental issues are by nature an international concern because environmental problems recognize no boundaries. While there is little evidence that Congress ever intended United States labor laws to extend to foreign countries, there is abundant evidence in the ESA that Congress intended to protect endangered species worldwide.

An additional argument for applying the ESA extraterritorially is that courts have held that adverse domestic effects may be sufficient to overcome the presumption against extraterritorial application of United States laws. In other words, federal statutes have been applied to regulate actions outside of the United States if those actions would cause harmful effects within the United States.¹⁹⁷ Applying this "ef-

192. 553 F.2d 996 (5th Cir. 1977). The court reversed the conviction of an American citizen who captured dolphins off the coast of the Bahamas in violation of the MMPA. *Id.* at 997.

193. *Id.* at 1002.

194. Turley, *supra* note 2, at 657.

195. *Foley*, 336 U.S. at 286.

196. It is interesting to note that the administrative record in *Defenders of Wildlife* did not contain a single comment from a foreign government expressing any concern about the effect of applying the ESA to United States agency actions abroad. See Brief for Respondents, *supra* note 97.

197. See Brief of Amici Curiae Ecotropica Foundation of Brazil, Slovak Union of Nature and Landscape Protectors, Fundacion De Parques Nacionales of Costa Rica, and Greenpeace International in Support of Respondents, *Lujan v. Defenders of Wildlife cert. granted*, 111 S. Ct. 2008 (1991), *rev'd*, 112 S. Ct. 2130 (1992) (No. 90-1424), available in LEXIS, Genfed library, Briefs file [hereinafter Brief of Amici Curiae Ecotropica Foundation of Brazil]; see, e.g., *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952) (applying Lanham Act, which regulates deceptive and misleading use of trademarks, to acts committed in Mexico because they "radiated" effects in United States); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370

fects” test to the ESA, federal action that occurs in a foreign country would definitely have significant effects in the United States. For example, there are many migratory species protected under the ESA that spend part of the year in the United States and then migrate to foreign countries or waters.¹⁹⁸ For instance, the golden-checked warbler, an endangered migratory bird, spends the spring and summer months in Texas, and then migrates south to Guatemala in the autumn and winter months.¹⁹⁹ While the bird is in the United States, it is protected under the ESA. But under the Secretary of the Interior’s interpretation of the ESA’s consultation provision, the warbler will not receive the same protection in Guatemala. Currently, a major pesticide spraying program in Guatemala, federally funded by the United States Animal and Plant Health Inspection Service (“APHIS”), may adversely effect this species.²⁰⁰ APHIS has not consulted with the Secretary of the Interior regarding the effects of its pesticide program²⁰¹ and is presently under no obligation to do so. Thus, the current interpretation of the ESA makes any conservation efforts in the United States for these types of migratory species futile.

In addition, federal action abroad that harms non-migratory species found in both the United States and foreign territory may also have adverse effects in the United States.²⁰² To the extent that federal action abroad reduces the range of a species that also exists in the United States, the burden of protecting that species will fall more heavily upon the United States.²⁰³ If the population of a species is being depleted in a foreign country, then under the ESA, the United States would carry the obligation of ensuring that the same species in the United States does not become extinct. Thus, protecting a species’

U.S. 690 (1962) (holding that Sherman Act applies to acts of United States corporations in Canada that had effects in United States).

198. The whooping crane, peregrine falcon, gray whale, humpback whale and Kemp’s ridley sea turtle are some examples of the species protected under the Act which migrate to foreign territories. Brief of Amici Curiae City of Austin, Texas; Travis County, Texas; Am. Soc’y for the Protection of Nature in Israel; EIntl. Defense Fund, Inc.; Nat’l Wildlife Fed’n; World Wildlife Fund; Sierra Club; and Fundacion Natura in Support of Respondents, *Lujan v. Defenders of Wildlife cert. granted*, 111 S. Ct. 2008 (1991), *rev’d*, 112 S. Ct. 2130 (1992) (No. 90-1424), available in LEXIS, Genfed library, Briefs file [hereinafter Brief of Amici Curiae City of Austin, Texas].

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. See Brief of Amici Curiae City of Austin, Texas, *supra* note 198.

survival in a foreign country would lessen the conservation efforts needed to protect the same species here in the United States.

The effect of abandoning the consultation duty for federal projects in foreign countries will have strong repercussions in the United States. The loss of species in other countries also will effect both economic and medical advances in this country.²⁰⁴ Therefore, under an effects analysis, the ESA should be applied extraterritorially.

In contemporary society, all environmental statutes should presumptively apply extraterritorially. Today, "Congress is increasingly required to legislate solutions to global environmental threats."²⁰⁵ When *Foley* was decided the nation was not yet concerned with environmental issues, and there were few environmental laws.²⁰⁶ Today, transnational environmental concerns are abundant. After a series of environmental tragedies,²⁰⁷ the world's attention has now shifted to protection of the global environment, and the Supreme Court's interpretation of the ESA should reflect this understanding.

B. *International Response to Environmental Concerns*

In an attempt to cope with global environmental problems, several nations have participated in various international conventions and treaties.²⁰⁸ However in June 1992, the largest world community convention on environmental matters,²⁰⁹ the United Nations Conference on Environment and Development, met in Brazil. The conference "brought together 178 nations and more than 115 heads of state

204. See *supra* notes 14-22 and accompanying text.

205. Brief of Amici Curiae Ecotropa Foundation of Brazil, *supra* note 197. See, e.g., International Pollution Deterrence Act of 1991, S. 984, 102d Cong., 1st Sess. (1991); Waste Export Control Act, H.R. 2358, 102d Cong., 1st Sess. (1991).

206. Turley, *supra* note 2, at 658. "[M]ost environmental statutes are direct products of the rise of environmental political consciousness in the late 1960s and 1970s." *Id.* n.387.

207. In 1984, the world witnessed the worst industrial disaster in history when a Union Carbide plant in Bhopal, India exploded killing 2,000 people and injuring 200,000. *Developments in the Law — International Environmental Law*, 104 HARV. L. REV. 1484, 1487 (1991). In 1986, the Chernobyl nuclear reactor accident in the Soviet Union caused a transboundary effect. *Id.* Also in 1986, a Swiss warehouse went up in flames resulting in thirty tons of chemicals being washed into the Rhine River. *Id.*

208. *Id.* The Montreal Protocol and the Vienna Convention for Protection of the Ozone Layer are examples of international cooperation in efforts to monitor and reduce the effects of ozone depletion. *Id.* at 1487 n.5.

209. *Id.* at 1489. There has not been a global conference of this scope on the environment since the United Nations Conference on the Human Environment in Stockholm in 1972. *Id.* at 1580. The Stockholm Conference was the first time that the global community organized a system of international cooperation. *Id.* at 1580 n.4.

in a sprawling convention center on the outskirts of Rio."²¹⁰ The conference promoted environmentally sound development in all countries, making it "the first great diplomatic effort of the post-Cold War era."²¹¹ The issue of biological diversity played center stage at the Earth Summit, and the Bush Administration's refusal to sign the biodiversity treaty made the United States the only major country not to support the treaty.²¹² The biological diversity treaty, which aims at protecting threatened plants and animal species around the world, was designed "to give developing nations an economic stake in conserving their forests and species."²¹³ President Bush has been harshly criticized by environmentalists and other countries for his decision not to sign the treaty.²¹⁴ Ironically, the President's unpopular stance against the biodiversity treaty came at the same time as the Supreme Court's anti-environmental ruling in *Defenders of Wildlife*.

VI. CONCLUSION

A. Limiting Court Access to Environmental Plaintiffs

The Supreme Court's decision in *Defenders of Wildlife* is a continuation of the Court's increasingly strict rules on standing, making it more difficult for environmental groups to challenge actions in this country as well as abroad.²¹⁵ The ruling is indicative of the Rehnquist Court's inclination "to defer to the wishes of the executive branch rather than Congress."²¹⁶ Congress is currently considering reauthorization of the ESA, and in response to the Court's decision, Ohio Senator Howard Metzenbaum has introduced a bill amending the citizen suit provision to define what would constitute an injury under the Act.²¹⁷ The proposed bill would grant standing to anyone

210. Maura Dolan & Rudy Abramson, *Earth Summit Ends on Note of Hope, Not Achievement*, L.A. TIMES, June 14, 1992, at A1.

211. *Id.*

212. See Steven Greenhouse, *A Closer Look; Ecology, the Economy and Bush*, N.Y. TIMES, June 14, 1992, § 4, at 1. President Bush feared that the treaty's ambiguous language would damage the biotechnology industry. *Id.*

213. Dolan & Abramson, *supra* note 210.

214. See Ruth Marcus, *Justices Make It Harder to Press Environmental Enforcement Cases*, WASH. POST, June 13, 1992, at A4.

215. See *id.*

216. Savage, *supra* note 8.

217. S. 2953, 102d Cong., 2d Sess. (1992). The bill would revise the citizen suit provision as follows:

A person who has by studying, visiting, or other means demonstrated an aesthetic, ecological, educational, historical, professional, recreational, or scientific interest in an endangered or threatened species shall be deemed to suffer a direct and particular-

"who has by studying, visiting, or other means demonstrated an aesthetic, ecological, educational, historical, professional, recreational, or scientific interest in an endangered or threatened species."²¹⁸ The bill also would amend the consultation provision to apply to federally funded projects abroad.²¹⁹

B. United States Should Adhere to the Same Conservation Practices Abroad as It Does at Home

The Bush Administration has continued to support the 1986 policy that federal agencies need not consult with the appropriate agency regarding the effect that its overseas projects may have on endangered wildlife.²²⁰ While the ESA cannot prevent all species extinction, it is a step in the right direction. International treaties and conventions may prove to be a more effective means for worldwide species protection. However, the United States government has refused to sign the only comprehensive international treaty on biological diversity in effect today. It is hypocritical for the United States government to sympathize with the international need to protect global diversity while simultaneously allowing its federal agencies to destroy wildlife in other countries through actions that would be prohibited in this country. If the United States desires to remain a world leader in conservation, it must demonstrate its commitment to biodiversity through its actions abroad as well as at home.

The ESA was enacted due to the concern of species extinction around the world, not just in the United States. The Congressional Record indicates that the Act was designed to prevent the further extinction of the world's species.²²¹ Because it is evident from the language of the ESA and its legislative history that Congress placed

ized injury in any instance in which any person, including the United States and any other governmental instrumentality or agency, takes action that may harm or adversely affect any threatened or endangered species, or result in the destruction or adverse modification of the critical habitat of the species. A reasonable likelihood of action or a proposal to act shall be considered a sufficient threat to constitute an injury under this paragraph.

Id. § 4.

218. *Id.* § 4.

219. The proposal to amend section 7(a) adds the following paragraph: "(5) The provisions of this section shall apply to any agency action with respect to any species listed under this Act as an endangered or threatened species carried out, in whole or in part, in the United States, in a foreign country, or on the high seas." S. 2953, 102d Cong., 2d Sess. § 3 (1992).

220. See Linda Greenhouse, *Court Limits Legal Standing in Suits*, N.Y. TIMES, June 13, 1992, § 1, at 12.

221. S. REP. NO. 307, 93rd Cong., 1st Sess. (1973), reprinted in 1973 U.S.C.C.A.N. 2989. "It has become increasingly apparent that some sort of protective measures must be taken to

great significance on worldwide protection of species, the ESA should not be confined to the geographical limits of the United States. More importantly, in order to halt the loss of biodiversity, endangered species must be protected worldwide. Therefore, the United States Supreme Court's decision in *Defenders of Wildlife* was a step backward in the struggle to preserve global diversity.

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prevent the further extinction of many of the *world's* animal species." *Id.* at 2990 (emphasis added).

* Special thanks to David Hathaway for his love, support and inspiration, and to Molly White for her help and encouragement.

