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## Think Locally, Act Globally: The Presumption against Extraterritorial Application of American Statutes and Sec. 7(a)(2) of the Endangered Species Act

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# Think Locally, Act Globally: The Presumption Against Extraterritorial Application of American Statutes and § 7(a)(2) of the Endangered Species Act

*Erick D. Rigby, Esq.\**

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## I. INTRODUCTION

In 1992, the United States Supreme Court declined to discuss the substantive merits of the plaintiff's case in *Lujan v. Defenders of Wildlife* for lack of standing,<sup>1</sup> deciding that the Defenders of Wildlife failed to make an appropriate showing to bring a claim

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1. 504 U.S. 555, 578(1992) (plurality opinion), *rev'g* 911 F.2d 117, 118 (8th Cir. 1990).

under § 7(a)(2) of the Endangered Species Act (“ESA”).<sup>2</sup> As indicated by Justice Kennedy in his concurrence, a future plaintiff may be able to make the appropriate showing regarding standing, and the court could then determine the appropriate application of § 7(a)(2).<sup>3</sup> Since that time, the question of the application of § 7(a)(2) to extraterritorial projects remains unsettled and academics have debated *Lujan* from various angles.<sup>4</sup> Some scholars have discussed the significant procedural limitations that the decision has placed on environmental actions regardless of the statute the plaintiff intends to enforce.<sup>5</sup> Others have focused on the legality of the substantive issue from which *Lujan* arose.<sup>6</sup>

This article will broaden the discussion regarding the substantive application of § 7(a)(2) by juxtaposing the habeas corpus litigation of *Rasul v. Bush*<sup>7</sup> with the extraterritorial application of § 7(a)(2).<sup>8</sup> The Court in *Rasul* found that the United States District Courts had jurisdiction to hear the habeas appeals of foreign na-

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2. *Lujan*, 504 U.S. at 569, 578. The majority opinion, written by Justice Scalia, encompasses Parts I, II, III-A, and IV and was joined by Chief Justice Rehnquist and Justices White, Kennedy, Souter, and Thomas. *Id.* at 557, 579, 581. Scalia authored the plurality opinion, Part III-B, joined by Rehnquist, White, and Thomas. *Id.* at 558 (plurality opinion). Justice Stevens concurred in the judgment only and wrote a separate concurring opinion. *Id.* at 581 (Stevens, J., concurring). Justice Blackmun and Justice O’Conner dissented. *Id.* at 589 (Blackmun, J., dissenting). Section 7(a)(2) requires Federal agencies to consult with the Secretary of the Interior to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existences of any endangered species or threatened species or result in destruction or adverse modification of a listed specie’s critical habitat.” Endangered Species Act of 1973 § 7(a)(2), 16 U.S.C. § 1536(a)(2) (2006). For a discussion of standing, see *infra* notes 63-70 and accompanying text.

3. *Lujan*, 504 U.S. at 579 (Kennedy, J., concurring) (citation omitted). Justice Kennedy stated in his concurrence that:

[I]t may seem trivial to require that [Plaintiffs] acquire airline tickets to the project sites or announce a date certain upon which they will return . . . [T]his is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis.

*Id.* Justice Kennedy went on to point out that the plaintiffs have not visited the site in question since the project began. *Id.*

4. See generally George Cameron Coggins & John W. Head, *Beyond Defenders: Future Problems of Extraterritoriality and Superterritoriality for the Endangered Species Act*, 43 WASH.U. J. URB. & CONTEMP. L. 59 (1993) (discussing the potential issues arising from extraterritorial application of the Endangered Species Act); Stanley E. Rice, *Standing on Shaky Ground: The Supreme Court Curbs Standing for Environmental Plaintiffs in Lujan v. Defenders of Wildlife*, 38 ST. LOUIS U. L.J. 199 (1993) (discussing the standing issues raised by *Lujan*).

5. Rice, *supra* note 4. Rice discussed the underlying principles of separation of powers, which necessitate proper standing. *Id.* at 201-03. With regard to environmental statutes that allow for citizens to file suit in order to enforce the statute, this creates significant problems because meeting the specific criteria of standing becomes difficult. *Id.* at 200.

6. See, e.g., Coggins & Head, *supra* note 4.

7. 542 U.S. 466 (2004).

8. Endangered Species Act of 1973 § 7(a)(2), 16 U.S.C. § 1536(a)(2) (2006).

tionals being detained in Guantanamo Bay, Cuba, because the habeas writ is directed at the jailer, not the detainee.<sup>9</sup> Under that reasoning, § 7(a)(2) would apply to any agency projects, because the requirements of the section are directed at United States federal agencies taking action that originates in the United States. This article will argue that this aspect of the *Rasul* decision adds significant weight to the argument that the presumption against extraterritorial application of American statutes (the “Presumption”) is inapplicable with regard to § 7(a)(2).

The importance of maintaining a broad reach for the ESA is overwhelming, considering the interrelated nature of Earth’s ecosystems and the impact that changes to those ecosystems can have on human life.<sup>10</sup> The United States took an important step in protecting its own population, as well as benefiting the rest of the world, when Congress passed the ESA.<sup>11</sup> However, the threat of mass extinction has not been halted.<sup>12</sup> Additional measures undoubtedly are needed,<sup>13</sup> and allowing the ESA to reach its full potential would be a significant step in the protection of not only listed species, but also human life and the global economy.<sup>14</sup>

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9. *Rasul*, 542 U.S. at 480, 483-84 (“No party questions the District Court’s jurisdiction over petitioners’ custodians.”).

10. See generally Eric Chivian & Aaron S. Bernstein, *Embedded in Nature: Human Health and Biodiversity*, 112 ENVTL. HEALTH PERSPS. A-12 (2004), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1241805/pdf/ehp0112-a00012.pdf> (discussing the impact of diminishing biodiversity on bio-medical research and development); Robert Costanza et al., *The Value of the World’s Ecosystem Services and Natural Capital*, 387 NATURE 253 (1997), available at [http://www.coralreef.gov/mitigation/costanza\\_et\\_al\\_nature\\_1997.pdf](http://www.coralreef.gov/mitigation/costanza_et_al_nature_1997.pdf) (estimating the economic value of ecosystems and their benefits to human existence); David Pimentel et al., *Economic and Environmental Benefits of Biodiversity: The Annual Economic and Environmental Benefits of Biodiversity in the United States Total Approximately \$300 Billion*, 47 BIOSCIENCE 747 (Dec. 1997); Kevin Parris, *Sustainable Agriculture Depends on Biodiversity*, OECD OBSERVER, Aug. 20, 2002, available at <http://www.oecdobserver.org/news/fullstory.php/aid/755> (discussing the impact of biodiversity on modern agriculture).

11. The ESA is structured in order to protect species from extinction and to maintain biodiversity. See 16 U.S.C. §§ 1531-44. For further discussion of the protection the ESA provides, see *infra* note 29. Biodiversity is important to a number of aspects of human life. See *supra* note 10 and accompanying text.

12. *Evolution Library: The Current Mass Extinction*, PBS.ORG, [http://www.pbs.org/wgbh/evolution/library/03/2/1\\_032\\_04.html](http://www.pbs.org/wgbh/evolution/library/03/2/1_032_04.html) (last visited Feb. 22, 2012). Historically, the base level of species’ extinction is approximately one to ten species per year or one species per million per year. *Id.* Currently, the Earth is losing approximately “27,000 species per year to extinction.” *Id.* This number is difficult to estimate due to the inclusion of species such as insects, bacteria, and fungi. *Id.*

13. See *id.*

14. See Pimentel, *supra* note 10 (discussing the environmental and economic impact of sustained biodiversity).

## II. BACKGROUND

A. *The Endangered Species Act*

While the ESA itself is nearly forty years old, its historical development stretches deeply into the past.<sup>15</sup> The ESA has gone through different stages and legislative actions since its enactment.<sup>16</sup> The Endangered Species Preservation Act of 1966 (“ESPA”) preceded the ESA.<sup>17</sup> Although a positive step in the direction of conservation, the ESPA had little coercive power.<sup>18</sup> The passage of the ESA added teeth to the legal protection of ecosystems.<sup>19</sup>

Congress codified the ESA into the United States Code in order to implement two conservation treaties to which the United States is a signatory.<sup>20</sup> The statute replaced an expanded version of the

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15. Zygmunt J.B. Plater, *Endangered Species Act: Lessons Over 30 Years, and the Legacy of the Snail Darter, a Small Fish in a Pork Barrel*, 34 ENVTL. L. 289, 291 (2004). The Endangered Species “Act is a descendant of centuries of philosophical and cultural recognitions about the role of human society in the context of the natural world.” *Id.* The underlying principles of the act can be traced back as far as the “public trust principles in the era of Emperor Justinian and even earlier.” *Id.* (citing JOHN PASSMORE, *MAN’S RESPONSIBILITY FOR NATURE: ECOLOGICAL PROBLEMS AND WESTERN TRADITIONS* 7-8 (1974)). “When humans interfere with the Tao, the sky becomes filthy, the equilibrium crumbles, creatures become extinct.” *Id.* at 291 n.8 (quoting LAO-TZU, *TAO TECHING* (c. 500 B.C.E.)).

16. See BRIAN CZECH & PAUL R. KRAUSMAN, *THE ENDANGERED SPECIES ACT: HISTORY, CONSERVATION, BIOLOGY, AND PUBLIC POLICY* 21-24 (2001). Amendments to the Endangered Species Act have been passed in 1978, 1979, 1982, and 1988. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (2006)).

17. Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926; see also Leona K. Svancara et al., *Endangered Species Time Line*, in 2 *THE ENDANGERED SPECIES ACT AT THIRTY* 25 (J. Michael Scott et al. eds., 2006), available at <http://www.law.uidaho.edu/default.aspx?pid=112338>. Through the last fifty years there have been a number of significant milestones in the protection of endangered species using legal means. See *id.* at *passim*. While these are predominately federal measures, there have been attempts by individual states to aid in the protection of endangered species as well; for example, Nevada enacted species protection measures in 1969, which gave legal protections to endangered creatures. *Id.* at 26.

18. Endangered Species Preservation Act of 1966. The ESPA became the first piece of legislation at the federal level aimed at protecting endangered species. See *id.* at 24-25. Similar to the ESA, the ESPA allowed for the listing of endangered species. *Id.* at 25. Further, it allowed for the “acquisition of endangered species habitat for inclusion in the newly established National Wildlife Refuge System.” *Id.*

19. 16 U.S.C. §§ 1531-44 (including criminal and civil penalties for failure to comply with the ESA). The ESA began humbly, but it quickly became a politically charged issue. See Plater, *supra* note 15, at 292.

20. 16 U.S.C. §§ 1531-1544; *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service: Endangered Species Act of 1973*, FISH AND WILDLIFE SERVICE, <http://www.fws.gov/laws/lawsdigest/ESACT.html> (last visited Feb. 22, 2012). Those treaties are:

ESPA, the Endangered Species Conservation Act (“ESCA”),<sup>21</sup> and has been amended several times since its enactment on December 28, 1973.<sup>22</sup> Congress intended the ESA to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . .”<sup>23</sup> To achieve

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[T]he Convention on International Trade in Endangered Species of Wild Fauna and Flora art. II, Mar. 3, 1973, 27.2 U.S.T. 1087, 993 U.N.T.S. 243 (regulating the trade of species that are either “threatened with extinction . . . or may be affected by trade”) and (T.I.A.S. 8249), signed by the United States on March 3, 1973, and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 50 Stat. 1354, 161 U.N.T.S. 193 (relating to the selection and protection of certain animal reserves such as national parks), signed by the United States on October 12, 1940.

*Id.* The Convention on International Trade in Endangered Species of Wild Fauna and Flora intends to regulate the trade of species that are either “threatened with extinction . . . or may be affected by trade.” Convention on International Trade in Endangered Species of Wild Fauna and Flora art II, Mar. 3, 1973, T.I.A.S. No. 8249. The Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere related to the selection and protection of certain animal reserves, such as national parks. Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 50 Stat. 1354. The intended effect was to protect and preserve species of flora and fauna within their natural habitats. *Id.* In addition to these treaties, the ESA lists other international treaties to which the United States is to comply. The statute also states that the ESA is intended to maintain United States compliance with: migratory bird treaties with Canada and Mexico; the Migratory and Endangered Bird Treaty with Japan; the International Convention for the Northwest Atlantic Fisheries; and the International Convention for High Seas Fisheries of the North Pacific Ocean. 16 U.S.C. § 1531(a)(4)(A)-(G).

21. FISH AND WILDLIFE SERVICE, *supra* note 20 (citing Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275). The Endangered Species Conservation Act was just one in a string of other environmental conservation statutes that led to the Endangered Species Act. *Id.* ESCA was only in effect for four years before the ESA replaced it with more strict controls. *See id.*

22. *Endangered Species Act (ESA)*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES SERVICE, <http://www.nmfs.noaa.gov/pr/laws/esa/> (last visited Feb. 22, 2012) (citing Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (2006))). The original act was signed by President Richard Nixon, and upon signing he stated that “[n]othing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed.” *Id.*

23. 16 U.S.C. § 1531(b)-(c). Under those provisions, Congress specifically dictated the purposes of the ESA as follows:

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

*Id.*

this goal, the ESA takes a comprehensive approach to the protection of organisms and ecosystems.<sup>24</sup> The statute uses a number of different methods to protect “listed species.”<sup>25</sup> A listed species is classified as either “endangered”<sup>26</sup> or “threatened,”<sup>27</sup> and classification brings with it the protections of the act.<sup>28</sup> This includes protection of the species itself from unlawful takings, protection of designated critical habitats, implementation of recovery plans, and special consultation requirements for certain activities.<sup>29</sup> Vio-

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24. *Id.* at §§ 1531-44. According to the Supreme Court of the United States, the Endangered Species Act is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The substantive provisions of the ESA are found in §§ 4, 7, and 9. Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 464 (1999). Section 4 provides for the determination of which species are threatened or endangered. 16 U.S.C. § 1533. Section 7 dictates the requirements for interagency cooperation. *Id.* at § 1536. Section 9 enumerates prohibited acts. *Id.* at § 1538.

25. See 16 U.S.C. § 1533. A “listed species” is a species that has been designated either threatened or endangered under the ESA. See *id.* at § 1533. Under § 4 of the ESA, Congress gave the Secretary of the Interior the power to promulgate regulations making the determination as to “whether any species is an endangered species or a threatened species.” *Id.* at § 1533(a)(1). In so doing, the Secretary could take into account “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or man-made factors affecting its continued existence.” *Id.* at §1533(a)(1)(A)-(E). Listing decisions must be made “solely on the basis of the best scientific and commercial data available” to the Secretary. *Id.* at § 1533(b)(1)(A). The Secretary is not permitted to take into account economic issues with regard to the determination of whether to classify a species as endangered or threatened. PAMELA BALDWIN, EUGENE H. BUCK & M. LYNNE CORN, CONG. RESEARCH SERV., *THE ENDANGERED SPECIES ACT: A PRIMER* 6 (2007). The listing of a species may be initiated by the Secretary, by a private organization, or by an individual by petition. *Id.* Additionally, the Secretary must promulgate a regulation delineating the “critical habitat” of a listed species. 16 U.S.C. § 1533(b)(6)(C).

26. 16 U.S.C. § 1532(6) (“The term ‘endangered species’ means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.”).

27. *Id.* at § 1532(20) (“The term ‘threatened species’ means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”).

28. *Id.* at §§ 1531-44. Once a species is listed, various provisions of the statute take effect. *Id.* The Secretary is directed to classify the “critical habitat” of the species and to create an appropriate recovery plan, and the species is protected from takings and has the added protection of the required § 7(a)(2) consultation process. BALDWIN ET AL., *supra* note 25, at 7-8.

29. 16 U.S.C. §§ 1531-44. Of the most important protections is the prohibition of an unlawful taking of a listed species. The term “take” under the statute means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” *Id.* at § 1532(19). The term “harass” is further defined by regulation as “intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which

lations of these provisions may result in civil or criminal penalties.<sup>30</sup> In addition to these protections, Congress also created underlying policy mandates for federal governmental agencies.<sup>31</sup> These mandates require federal agencies to “utilize their full authority to conserve” protected species.<sup>32</sup> The statute also requires federal agencies to “consult” with the Department of the Interior regarding proposed projects to ensure the protection of certain ecosystems.<sup>33</sup>

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include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3 (2006). The same section defines harm as “an act which actually kills or injures wildlife, which may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.* Additionally, the Secretary will designate certain areas “critical habitats” for listed species, which is an area that is “essential for conservation” of the species. *Critical Habitat*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES SERVICE, <http://www.nmfs.noaa.gov/pr/species/criticalhabitat.htm> (last visited Feb. 22, 2012). This is not limited to areas where the species currently lives. *Id.* Critical habitats are protected under the ESA. 16 U.S.C. § 1536(a)(2). See *infra* note 36 and accompanying text.

30. 16 U.S.C. § 1540. Civil penalties under the act can be as high as \$25,000 per violation. *Id.* Under the Act’s penalty provision:

Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this Act, or any provision of any permit or certificate issued hereunder, or any regulation issued in order to implement [the ESA] may be assessed a civil penalty by the Secretary of not more than \$25,000 for each violation. Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of any other regulation issued under this Act may be assessed a civil penalty by the Secretary of not more than \$12,000 for each such violation. Any person who otherwise violates any provision of this Act, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than \$500 for each such violation.

*Id.* at § 1540(a)(1). In addition to these civil penalties, criminal charges may be brought for some violations. *Id.* at § 1540(b)(1). Under the ESA, violators of the statute could be fined up to \$50,000 and could be imprisoned for up to a year. *Id.* Violations of regulations implementing the ESA are punishable by fines of up to \$25,000 and up to six months in prison. 16 U.S.C. § 1540(b)(1).

31. John C. Beiers, *The International Applicability of Section 7 of the Endangered Species Act*, 29 SANTA CLARA L. REV. 171, 175 (1989) (citing 16 U.S.C. § 1531(c)).

32. *Id.* Under that provision of the statute, Congress declares “that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.” 16 U.S.C. § 1531(c)(1).

33. 16 U.S.C. § 1536(a)(2). This sometimes controversial provision states that: 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 (hereinafter in this section referred to as an “agency action”) 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 which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.



*B. Section 7(a)(2)*

Under § 7(a)(2) of the ESA, a federal agency proposing to take some action (“Action Agency”) is required to consult with the Secretary of the Interior (“Secretary”) whenever the proposed action may impact an endangered or threatened species.<sup>34</sup> During the consultation, the Secretary will determine whether the proposed action is “likely to jeopardize the continued existence”<sup>35</sup> of a listed species or if the action will “result in the destruction or adverse modification of”<sup>36</sup> a critical habitat.<sup>37</sup> Specifically, § 7(a)(2) requires that:

Each federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) 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

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*Id.* Two federal agencies are in control of implementing the ESA: the United States Fish and Wildlife Service (“FWS”), which “manages land and freshwater species, while the National Marine Fishery Service (“NMFS”) manages marine and ‘anadromous’ species.” *Id.* at §§ 1531-44. However, the enforcement of the ESA is “typically citizen-prompted and opportunistic.” Plater, *supra* note 15, at 291. This enforcement is not necessarily efficient and often focuses “on one small place, one discrete species or less, one tiny slice of the vast diversity of species that exist on the planet.” *Id.* Due to the overlap in authority, there are some differences in enforcement of the ESA; however, the services promulgate most regulations jointly. See, e.g., 50 C.F.R. § 402.01 (1991); Interagency Cooperation—Endangered Species Act of 1973, 51 Fed. Reg. 19,926 (June 3, 1986). This is a jointly promulgated regulation regarding § 7 consultations. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 558 (1992).

34. 16 U.S.C. § 1536 (a)(2).

35. *Id.* Jeopardize is not defined in the ESA. See 16 U.S.C. §§ 1531-44. The term is defined in a regulation promulgated by the Services as “an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02 (2009). The United States Court of Appeals for the Ninth Circuit interpreted the requirement that the action reduce “the likelihood of both the survival and recovery” as meaning a reduction in the likelihood of survival *or* recovery, due to the statutory language of the ESA. *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059, 1059-71 (9th Cir. 2004).

36. 16 U.S.C. § 1536(a)(2). Destruction or modification of critical habitat is not defined in the ESA. See 16 U.S.C. §§ 1531-44. The term is defined in a regulation as “direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.” 50 C.F.R. § 402.02(2009). An area is a critical habitat if the Secretary determines that the area is “essential for conservation” of the species. *Critical Habitat*, *supra* note 29. This is not limited to areas where the species currently lives. *Id.*

37. 16 U.S.C. § 1536(a)(2).

which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.<sup>38</sup>

The statute does not qualify the consultation requirement.<sup>39</sup> Instead, it simply mandates that an Action Agency *shall* consult if such action will occur.<sup>40</sup> If the Secretary determines that the action would jeopardize the continued existence of a species or adversely modify a critical habitat, the Secretary must offer reasonable and prudent alternatives.<sup>41</sup> This provision is “an explicit con-

38. *Id.* In executing the mandates of this section, the agency in question is to “use the best scientific and commercial data available.” *Id.* In order to implement this mandate, FSW and NMFS follow policy provisions specified in a federal regulation. Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy on Information Standards Under the Endangered Species Act, 59 Fed. Reg. 34, 271 (July 1, 1994). That regulation states that:

To assure the quality of the biological, ecological, and other information that is used by the Services in their implementation of the Act, it is the policy of the Services:

- a. To require biologists to evaluate all scientific and other information that will be used to (a) determine the status of candidate species; (b) support listing actions; (c) develop or implement recovery plans; (d) monitor species that have been removed from the list of threatened and endangered species; (e) to prepare biological opinions, incidental take statements, and biological assessments; and (f) issue scientific and incidental take permits. This review will be conducted to ensure that any information used by the Services to implement the Act is reliable, credible, and represents the best scientific and commercial data available.
- b. To gather and impartially evaluate biological, ecological, and other information that disputes official positions, decisions, and actions proposed or taken by the Services during their implementation of the Act.
- c. To require biologists to document their evaluation of information that supports or does not support a position being proposed as an official agency position on a status review, listing action, recovery plan or action, interagency consultation, or permitting action. These evaluations will rely on the best available comprehensive, technical information regarding the status and habitat requirements for a species throughout its range . . .

*Id.* See also Michael J. Brennan, David E. Roth, Murray D. Feldman & Andrew Robert Greene, *Square Pegs and Round Holes: Application of the “Best Scientific Data Available” Standard in the Endangered Species Act*, 16 TUL. ENVTL. L.J. 387 (2003).

39. 16 U.S.C. § 1536(a)(2).

40. *Id.* at § 1536 (a)(1).

41. *Interagency Consultation (ESA Section 7)*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES SERVICE, <http://www.nmfs.noaa.gov/pr/consultation/> (last visited Feb. 22, 2012). The Court of Appeals for the Eight Circuit offered this explanation of the requirements of § 7(a)(2):

{T}he Act requires each federal agency to consult with the Secretary to “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.” After consultation, the Secretary must issue a written opinion to the agency describing how the proposed agency action would affect the endangered species or critical habitat.

gressional decision to require [federal] agencies to afford first priority to the declared national policy of saving endangered species."<sup>42</sup>

The United States Fish and Wildlife Service ("FWS") is an administrative agency and must exercise its authority within its statutory mandate.<sup>43</sup> If an agency exercises power beyond its statutory authority, those actions are unconstitutional.<sup>44</sup> At times, agencies such as the FWS can exercise executive, legislative, and judicial powers.<sup>45</sup> This ability to exercise power triggers a need for strict limits on agency power in order to respect the doctrine of

The Secretary must also suggest reasonable alternatives if the agency action would jeopardize the existence of the species or habitat. *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 118 (8th Cir. 1990), *rev'd*, 504 U.S. 555 (1992) (citations omitted).

42. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978). While *Tennessee Valley Authority* concerned a previous version of the ESA, the provision in § 7(a)(2) is essentially the same today. Steven G. Davison, *Federal Agency Action Subject to Section 7(a)(2) of the Endangered Species Act*, 14 MO. ENVTL. L. & POLY REV. 29, 33 (2006); see Act of Nov. 10, 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3752-60 (1978); Pub. L. No. 96-159, § 4, 93 Stat. 1225, 1226-28 (1979); Pub. L. No. 97-304, § 4, 96 Stat. 1411, 1417-2060 (1982). This was acknowledged by the Court of Appeals for the Ninth Circuit in *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 n.10 (9th Cir. 1987). There, the court of appeals stated that the "amendments do not diminish the precedential force of the Supreme Court's decision in *TVA v. Hill*." *Id.* The court in *Sierra Club v. Marsh* summarized the changes as follows:

The obligation of federal agencies now is to "insure that any action. . . is not likely to jeopardize the continued existence of any endangered species," and is found in § 7(a)(2). 93 Stat. at 1226, codified at 16 U.S.C. § 1536(a)(2) (1982) (emphasis added). In the 1978 amendments, Congress prohibited agencies from making "any irreversible or irretrievable commitment of resources" during consultation "which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." 92 Stat. at 3753, codified at 16 U.S.C. § 1536(d). These amendments also created a procedure whereby agencies could seek exemptions for projects unable to conform with section 7(a)(2) and meeting several stringent criteria. *Id.* at 3753-60, codified at 16 U.S.C. § 1536(e)-(p). We find it significant that Congress gave the power to grant exemptions to the Endangered Species Committee, not to the courts. See 16 U.S.C. § 1536(e) & (g). The 1979 amendments sought to clarify the exemption process. 93 Stat. at 1227-28; see also H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess. 14-15, reprinted in 1979 U.S. Code Cong. & Admin. News 2557, 2572, 2578-79. Congress again altered section 7 in 1982 in order to shorten and improve the consultation process. 96 Stat. at 1417-20; see also H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 25-28, reprinted in 1982 U.S. Code Cong. & Admin. News 2807, 2860, 2866-69.

*Id.* (citations omitted). After considering these changes, the court found that *TVA v. Hill* had not been overruled by any of the amendments that followed the decision. *Id.*

43. See John Montana, *Administrative Agencies and the Administrative Process*, RECORDS MGMT. Q., Apr. 1, 1997. Agencies must derive any power that they exercise from governmental authorities. *Id.* Nothing in the constitution grants authority directly to administrative agencies. *Id.* Therefore, "an agency may only exercise authority within the delegation of authority provided for in its enabling legislation or subsequent legislation granting specific additional power." *Id.*

44. *Id.*

45. *Id.*

separation of powers.<sup>46</sup> Therefore, agencies are required to remain true to the statutes that provide for their authority.<sup>47</sup> Here, that statute is the ESA, which gives the agency the power to promulgate regulations in order to enforce the ESA.<sup>48</sup> Any action of the FWS under the ESA that is contrary to or beyond the scope of the ESA is invalid.<sup>49</sup>

The original regulation promulgated by the FWS and the National Marine Fishery Service (“NMFS”) (collectively referred to as the “Services”) in 1978 required that the § 7(a)(2) consultation process be utilized for federal agency actions overseas.<sup>50</sup> A year later, the Secretary of the Interior began to rethink the decision to include overseas actions.<sup>51</sup> In 1986, the Services revised the regulation to eliminate the requirement of the consultations for overseas activities, and the regulation specifically states:

Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat.<sup>52</sup>

Following the provisions of this statute, the Services do not require §7(a)(2) consultations for overseas activities, and thus, the ESA has no practical effect on such activities.<sup>53</sup> This has remained

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46. *Id.* An agency will often litigate issues as to whether it has exceeded the scope of the power given to the agency. *Id.* This is often a lawsuit between the agency as regulator and the parties being regulated by the agency. *Id.* In *Lujan*, plaintiffs were arguing that FWS exceeded its statutory mandate by promulgating a rule that did not extend § 7 consultations to overseas actions. See 504 U.S. at 587-88 (Kennedy, J., concurring).

47. Montana, *supra* note 43.

48. See 16 U.S.C. § 1531-44.

49. Montana, *supra* note 43.

50. Interagency Cooperation—Endangered Species Act of 1973, 50 C.F.R. § 402.04 (1978); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 558 (1992).

51. *Lujan*, 504 U.S. at 558.

52. Interagency Cooperation—Endangered Species Act of 1973, 51 Fed. Reg. 19,926 (June 3, 1986); 50 C.F.R. § 402.01.

53. Memorandum from the U.S. Dep’t of the Interior Fish and Wildlife Serv., to the Reg’l Dir., Lower Colo. Region, Bureau of Reclamation, (Jan. 11, 2005) (available at [http://nctc.fws.gov/EC/Resources/dev\\_ba/legal/all\\_american\\_canal\\_%20fws\\_memo.pdf](http://nctc.fws.gov/EC/Resources/dev_ba/legal/all_american_canal_%20fws_memo.pdf)).

This document regarded a “request for guidance on the most appropriate process to address concerns regarding potential effects of the Canal Lining Project in the Republic of Mexico . . .” *Id.*

the position of the Department of the Interior ever since the Services promulgated that regulation.<sup>54</sup>

### C. Lujan v. Defenders of Wildlife

In *Lujan*, the Defenders of Wildlife<sup>55</sup> litigated the application of the requirements of §7(a)(2) to international projects in the federal court system.<sup>56</sup> At the Eighth Circuit Court of Appeals, the Defenders of Wildlife prevailed.<sup>57</sup> The court applied the Presumption against extraterritorial application, but was convinced that “the words of the Act and . . . its legislative history . . . [shows] that Congress intended for the consultation obligation to extend to all agency actions affecting endangered species, whether within the United States or abroad.”<sup>58</sup> Thus, the Defenders of Wildlife were able to rebut the Presumption at that level.<sup>59</sup> However, at the United States Supreme Court, the Secretary successfully argued that the Defenders of Wildlife lacked standing to bring the claim.<sup>60</sup>

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54. *Id.* According to the FWS, “neither section 7 of the ESA[] nor the section 7 consultation and analysis process under the ESA’s implementing regulations addresses species outside the borders of the United States.” *Id.*

55. “Defenders of Wildlife is an organization dedicated to the protection of species and the habitats upon which they depend.” *Our History*, DEFENDERS OF WILDLIFE, [http://www.defenders.org/about\\_us/history/index.php?utm\\_source=B\\_Version\\_NoFlash&utm\\_medium=Top\\_Nav&utm\\_content=AU\\_History&utm\\_campaign=HP\\_AB\\_Round2](http://www.defenders.org/about_us/history/index.php?utm_source=B_Version_NoFlash&utm_medium=Top_Nav&utm_content=AU_History&utm_campaign=HP_AB_Round2) (last visited Feb. 22, 2012).

56. See *Lujan*, 504 U.S. at 555; *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990), *rev’d*, 504 U.S. 555. The Supreme Court did not reach the merits of the § 7(a)(2) issue, because it found that the Plaintiffs’ lacked standing to bring the action. *Lujan*, 504 U.S. at 555. The Court of Appeals for the Eighth Circuit, however, reached the merits of the case and found that the regulation promulgated by the Secretary was unlawful. *Lujan*, 911 F.2d at 125. While this left open the possibility for future litigation regarding the regulation, none has been forthcoming. The application of the regulation, which limits the scope of the requirement under § 7(a)(2) for interagency consultations to domestic projects, remains in effect. 50 C.F.R. § 402.01 (1986); Interagency Cooperation—Endangered Species Act of 1973, 51 Fed. Reg. 19,926 (June 3, 1986).

57. *Lujan*, 911 F.2d at 125. The court of appeals had previously reversed the district court’s dismissal of the action. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1036-37 (8th Cir. 1988), *rev’g* 707 F. Supp. 1082 (D. Minn. 1988). After remand, the District Court found in favor of the plaintiffs, and the Eighth Circuit later affirmed. *Lujan*, 911 F.2d at 125. The crux of the appeal by the Department of the Interior was that the plaintiffs lacked standing and that Congress did not intend for § 7(a)(2) to apply to projects in foreign countries. *Id.* at 118. In a change of policy, the Secretary had limited § 7(a)(2)’s impact by promulgating a regulation that limited the consultation requirement to projects “in the United States or upon the high seas.” 50 C.F.R. § 402.01 (1986). The previous regulation had required consultations even in the case of projects in foreign countries. See 50 C.F.R. § 402.04 (1978).

58. *Lujan*, 911 F.2d at 125.

59. *Id.* (citation omitted).

60. *Lujan*, 504 U.S. 555.

Justice Scalia wrote the majority opinion for the Supreme Court,<sup>61</sup> but did not reach the merits regarding the question of whether § 7(a)(2) consultations are required for overseas activities by federal agencies.<sup>62</sup> Instead, the Court found that, under the facts of this case, the Defenders of Wildlife lacked the standing necessary to sue.<sup>63</sup> In order for a federal court to have jurisdiction, a plaintiff must meet the requirements of standing, which include a concrete injury, which was caused by the action complained of, and a likelihood that a favorable decision will redress the problem.<sup>64</sup> In the majority opinion, Justice Scalia argued that the Defenders of Wildlife failed to show a concrete injury.<sup>65</sup> A majority of the Court agreed that the Defenders of Wildlife would not suffer a concrete injury if the § 7(a)(2) consultations did not take place and the overseas project continued, even though the project may harm listed species.<sup>66</sup> The Court argued that since the project was happening far away from the Defenders of Wildlife, they would not be directly impacted.<sup>67</sup>

Only a plurality decided that the case lacked the requisite potential for redressability.<sup>68</sup> The plurality noted that a district court would not have the authority to stop funding for the project under these circumstances, and even if it did, the project was an international cooperative project and would go on with or without American support.<sup>69</sup> Therefore, even if the Court forced a § 7(a)(2)

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61. *Id.* at 557-78.

62. *Id.* at 558.

63. *Id.* at 578.

64. *Id.* at 560-61 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38-42 (1976); *Warth v. Seldin*, 422 U.S. 490, 508 (1975)).

65. *Lujan*, 504 U.S. at 564. The plaintiffs in *Lujan* claimed that the lack of any consultation with regard to the proposed activity would cause an increase to "the rate of extinction of endangered and threatened species." *Id.* at 562 (citation omitted). The Court highlighted that "the desire to use or observe an animal species, even for purely aesthetic purposes," would qualify as an injury. *Id.* at 562-63. However, the Court felt that the Plaintiffs in *Lujan* failed to show that they themselves were injured. *Id.* at 563. Here, the plaintiffs argued that it was enough that they had traveled to the area in question to observe the endangered animals and planned to again. *Id.* The Court felt that a mere desire to return was not concrete enough to constitute an injury for standing purposes. *Lujan*, 504 U.S. at 564.

66. *Id.* at 562.

67. *Id.* at 562-67 (citations omitted).

68. *Id.* at 579 (Kennedy, J., concurring) (citations omitted). Justice Kennedy determined that the plaintiffs lacked standing, but that the plaintiffs only lacked a concrete injury. *Id.* (citations omitted).

69. *Id.* at 562-71. According to Justice Scalia, the Plaintiffs in *Lujan* failed to make any showing that the projects in question would "either be suspended, or do less harm to listed species, if the United States withdrew its funding." *Id.* at 571. While the plaintiffs'

consultation, and the federal agency was not allowed to continue its action, other nations would finish the project, and the alleged injury would still occur.<sup>70</sup>

In his concurring opinion, after finding that the Defenders of Wildlife did have standing, Justice Stevens reached the merits of the case.<sup>71</sup> Despite writing separately and disagreeing with the majority's standing analysis, Justice Stevens agreed in the result, because he determined that § 7(a)(2) consultations are not required for overseas actions by federal agencies.<sup>72</sup> Justice Stevens argued that Congress intended to limit § 7(a)(2) consultations to domestic activities.<sup>73</sup> This was predominately based on Justice Stevens' application of the Presumption to § 7(a)(2)<sup>74</sup> and the fact that the statute lacks the necessary reference to overseas activities to overcome the Presumption.<sup>75</sup>

In defense of his stance, Justice Stevens pointed out that there are procedures for protecting endangered species living outside of the United States.<sup>76</sup> For example, § 8 of the ESA grants authority to aid other nations in the protection of endangered species.<sup>77</sup> Section 9 of the ESA further incorporates international issues by regulating the international trafficking of endangered species.<sup>78</sup> Justice Stevens' final argument was that the ESA does not require international application of § 7(a)(2), because the need to protect

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ultimate goal is certainly the protection of species, this litigation regarded the consultation process itself. Therefore, the fact that the project may have continued is not necessarily determinative of the redressability issue. The plaintiffs were contesting a failure to consult as required by § 7(a)(2). A positive outcome would have required that consultation. Therefore, the plaintiffs would have gained what they sought and the problem would have been redressed.

70. *Lujan*, 504 U.S. at 571.

71. *Id.* at 581-82 (Stevens, J., concurring).

72. *Id.* at 585.

73. *Id.* at 585-86 (citations omitted).

74. *Id.* at 586.

75. *Lujan*, 504 U.S. at 587 (citations omitted). Justice Stevens points out that the only place that geography comes into this portion of the statute is with regard to adverse modification of critical habitat. *Id.* The statute "mentions 'affected States'" in describing declaration of critical habitat. *Id.* Beyond the language of the statute, courts should look to the legislative history and the administrative regulations in order to determine Congressional intent. See *Foley Bros. v. Filardo*, 336 U.S. 281, 285, 287-90 (1949); Randall S. Abate, *Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, 31 COLUM. J. ENVTL. L. 87, 91 (2006).

76. *Lujan*, 504 U.S. at 588 (Stevens, J., concurring).

77. Endangered Species Act of 1973 § 8, 16 U.S.C. § 1537(a) (2006).

78. *Id.* at § 1538(a)(1)(A), (E), (F).

endangered species *within the United States* is one of the enumerated purposes of the Act.<sup>79</sup>

Justice Blackmun authored his own opinion in dissent, disagreeing with the Court with regard to standing, but without reaching the merits.<sup>80</sup> Even without analyzing the merits, Justice Blackmun impliedly distanced himself from Justice Stevens' concurrence.<sup>81</sup> The underlying theme of Justice Blackmun's opinion is that the Court is dealing a large blow to standing in environmental cases that will have a detrimental effect on jurisprudence in that area of the law.<sup>82</sup>

The issue of standing was the major hurdle that the Defenders of Wildlife could not overcome in *Lujan*.<sup>83</sup> By focusing on the issue of standing and not on the merits, the Court left open the question of whether § 7(a)(2) applied to international actions by federal agencies.<sup>84</sup> Considering the implication that a plaintiff with concrete plans to visit the region would have standing,<sup>85</sup> in his concurrence, Justice Kennedy noted that there is a reasonable probability that standing could exist in a case where the plaintiffs had such specific plans.<sup>86</sup>

#### *D. The Presumption Against Extraterritorial Application of American Statutes*

A major hurdle for any piece of environmental legislation that may have an international impact is the Presumption against ex-

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79. *Lujan*, 504 U.S. at 588 (Stevens, J., concurring). Justice Stevens argued that the lack of mention of protecting such species overseas indicates that Congress did not intend to include international actions. *Id.*

80. *Id.* at 590-606 (Blackmun, J., dissenting). Justice Blackmun argues that this case was not an appropriate case for granting summary judgment with regard to standing. *Id.*

81. *See id.*

82. *Id.* at 606 (citation omitted).

83. *Id.*

84. *Lujan*, 504 U.S. at 606.

85. *Id.* at 579 (Kennedy, J., concurring).

86. *Id.* *Lujan* was decided nearly twenty years ago. *Id.* at 555 (majority opinion). As of the beginning of 2012, there have been no successful challenges to the current regulation which limits § 7(a)(2) of the ESA (requiring consultation with the Secretary for projects taken place in the United States or upon the high seas), which is codified, in relevant part, at 16 U.S.C. § 1536 (a)(2) (2006). Accordingly, the Supreme Court has yet to have an opportunity to review the merits of such a claim. Since that time, the Presumption, as argued by the Secretary and relied upon by Justice Stevens, has developed further. *See, e.g., Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010). These developments have increased the likelihood that the Court would find the Presumption inapplicable with regard to the requirement of consultations for projects taking place in the United States or on the high seas pursuant to § 7(a)(2) of the ESA.



tratrerritorial application of Congressional acts. In *Lujan*, the Secretary of the Interior gave great weight to the Presumption in his argument against the application of § 7(a)(2) of the Endangered Species Act of 1973 to overseas projects.<sup>87</sup> Under this canon of construction, any act of Congress is presumed to apply only to domestic affairs absent a contrary intent of Congress.<sup>88</sup> The underlying policy is to prevent American laws from conflicting with the laws of sovereign nations within their own territories.<sup>89</sup>

Once it is determined that the Presumption applies, the burden is on the moving party<sup>90</sup> to demonstrate a “clear expression of Congress” in favor of the proposed extraterritorial application of the American statute.<sup>91</sup> In determining whether a clear expression or intent of Congress exists, a court is not “limited to the text of the statute itself. To the contrary, [a court is] permitted to consider ‘all available evidence’ about the meaning of the statute, including its text, structure, and legislative history.”<sup>92</sup> An easily overlooked, yet critical step of the analysis is to decide whether application of the Presumption is in fact appropriate.<sup>93</sup> This requires judicial determination of whether a dispute is domestic or international.<sup>94</sup> If the Presumption is applicable, courts are to consider the language of the statute, the legislative history of the statute, and the administrative regulations regarding the statute to determine if Congress intended the statute to be applied extraterritorially.<sup>95</sup>

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87. Brief for the Petitioner at 15, *Lujan*, 504 U.S. 555 (No. 90-1424) (citations omitted).

88. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 n.8 (2006). The Supreme Court stated that it will “assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is ‘the affirmative intention of the Congress clearly expressed,’ we must presume it ‘is primarily concerned with domestic conditions.’” *Id.* (citations omitted).

89. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285-86 (1949) (holding that American employment laws do not apply abroad).

90. *Labor Union of Pico Korea, Ltd. v. Pico Prods., Inc.*, 968 F.2d 191, 194 (2d Cir. 1992) (citation omitted).

91. *See United States v. Mitchell*, 553 F.2d 966, 1003 (5th Cir. 1997).

92. *United States v. Gatlin*, 216 F.3d 207, 211-12 (2d Cir. 2000) (quoting *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993)); *see also* *Smith v. United States*, 507 U.S. 197, 201-03 (1993).

93. *See* Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. U. L. REV. 655, 661 (2011).

94. *Id.*

95. *Foley Bros. v. Filardo*, 336 U.S. 281, 285, 287-90 (1949). In *Foley Brothers*, the Court listed administrative regulations as a consideration; however, there was no mention of why executive actions would be an indication of congressional intent. *Id.* at 288.

The Presumption has a long history in American jurisprudence.<sup>96</sup> The Supreme Court first discussed the Presumption in *Murray v. Schooner Charming Betsy* in 1804.<sup>97</sup> Since then, the Presumption has been reaffirmed and reshaped.<sup>98</sup> Following a period of consistent application, the strict application of the Presumption began to yield in the twentieth century.<sup>99</sup>

The federal courts have avoided the application of the Presumption through a variety of analytical frameworks.<sup>100</sup> The courts have become less likely to apply the Presumption in instances where the conduct complained of has some impact on the United States.<sup>101</sup> Judge Learned Hand of the Second Circuit Court of Appeals summarized this trend in *United States v. Aluminum Co. of America*, stating that “it is settled law . . . that any [country] may impose liabilities . . . for conduct outside its borders that has consequences within its borders which the [country] reprehends . . . .”<sup>102</sup> Following this theory, courts have avoided application of the Presumption when the conduct regulated has some impact that occurs within the United States.<sup>103</sup> In *Environmental Defense Fund v. Massey*, the mere fact that the decision-making process leading up to the execution of the project took place in the United States was enough to avoid the Presumption.<sup>104</sup>

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96. *Abate*, *supra* note 75, at 91.

97. 6 U.S. 64 (1804). In that case, the ship in question was traveling between nations when it was captured by a French privateer. *Id.* at 64. The ship was then recaptured by an American vessel. *Id.* The vessel was brought back to the United States for a violation of U.S. law that “prohibit[ed] all intercourse between the United States and France . . . .” *Id.* at 116. The Court held that U.S. law should not be construed to violate laws of other countries when other possible constructions are available. *Id.* at 118.

98. *See, e.g.*, *Steele v. Bulova Watch Co.*, 344 U.S. 280, 281-83 (1952) (regarding application of the Lanham Trade-Mark Act to an American businessman who was in violation of the law through his operations in Mexico); *Foley Bros.*, 336 U.S. 281, 282 (1949) (regarding application of the United States’ eight hours per day labor law to a U.S. corporation acting abroad).

99. *See Abate*, *supra* note 75, at 93.

100. *See* *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531-32 (D.C. Cir. 1993) (citations omitted).

101. *See Steele*, 344 U.S. at 286; *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (holding that the Sherman Act could be applied to actions carried out abroad when there was a conspiracy between U.S. citizens that was formed within the United States); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968), *rev’d en banc on other grounds*, 405 F.2d 215 (2d Cir. 1968) (citations omitted).

102. 148 F.2d 416, 443 (2d Cir. 1945) (citing *Ford v. United States*, 273 U.S. 593, 620-21 (1927); *Lamar v. United States*, 240 U.S. 60, 65-66 (1916); *Strassheim v. Daily*, 221 U.S. 280, 284, 285 (1911); *RESTATEMENT (FIRST) OF CONFLICT OF LAWS* § 65 (1934)).

103. *Massey*, 986 F.2d at 531.

104. *Id.* at 532.

The courts have also applied a continuum analysis while trying to determine whether to apply the Presumption.<sup>105</sup> Under this framework, “the closer the United States is to completely controlling the place of conduct, the more likely the federal courts are to apply U.S. Law.”<sup>106</sup> In *Environmental Defense Fund v. Massey*, the District of Columbia Circuit Court of Appeals used the continuum analysis and declined to apply the Presumption in a case where the project was taking place in Antarctica, a continent where the United States has some control.<sup>107</sup> These frameworks weaken the legal arguments of those who propose applying the Presumption to § 7(a)(2) of the Endangered Species Act of 1973. The complexity of determining whether or not an action is indeed extraterritorial in nature has not been lost on the Supreme Court.<sup>108</sup> Recently, in *Morrison v. National Australia Bank Ltd.*, the Supreme Court made clear that an action might be domestic in nature even if it reaches beyond the U.S. borders.<sup>109</sup>

#### E. *Rasul v. Bush*

Over the past decade the Supreme Court has heard a string of cases relating to the detention of enemy combatants in Guantanamo Bay, Cuba.<sup>110</sup> While the situation that gave rise to those cases was new to American courts, the underlying tenants of law that the Court applied resonate in a variety of legal areas.<sup>111</sup> *Rasul v. Bush* was no exception,<sup>112</sup> which presented a narrow but cru-

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105. See *Abate*, *supra* note 75.

106. Paul Boudreaux, *Biodiversity and a New “Best Case” for Applying the Environmental Statutes Extraterritorially*, 37 ENVTL. L. 1107, 1121-22 (2007) (internal citations omitted).

107. *Id.* (citing, inter alia, *Massey*, 986 F.2d at 533) (citations omitted).

108. See, e.g., *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

109. See *id.* at 2869 (citations omitted).

110. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 732-33 (2008) (holding that the Military Commissions Act violated the Constitution of the United States by denying detainees the right of habeas corpus); *Hamdan v. Rumsfeld*, 548 U.S. 557, 626 (2006) (holding that military commissions in their form at the time lacked the power under the Uniform Code of Military Justice and the Geneva Convention to try detainees); *Rasul v. Bush*, 542 U.S. 466, 483 (2004) (holding that U.S. federal courts have jurisdiction to hear any petition for a writ of habeas corpus brought by Guantanamo Bay detainees).

111. See *Rasul*, 542 U.S. at 466; *Massey*, 986 F.2d at 528.

112. The *Rasul* Court cited cases as deep into history as *Ex Parte Milligan. Rasul*, 542 U.S. at 474-75 (citing *Ex Parte Milligan*, 71 U.S. 2 (1866)). Further, the analysis of the Court regarding the presumption against extraterritorial application of American statutes is consistent with the developing history of the Presumption. See *id.* at 480 (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949))

cial question regarding the rights of detainees.<sup>113</sup> The Court decided that American courts had jurisdiction to hear petitions for habeas corpus challenging the detention of foreign nationals who were captured and detained outside of the United States as part of military operations.<sup>114</sup> In so doing, the doors of the federal courthouses were opened to detainees.<sup>115</sup> Further, the Court's reasoning buttressed a line of argument regarding the international application of certain statutory provisions, including § 7(a)(2) of the ESA—namely, the domestic nature of some actions that seem to be extraterritorial upon initial examination.<sup>116</sup>

The Court's legal analysis begins with 28 U.S.C. § 2241(a) and (c)(3) which state that federal courts have “within their respective jurisdictions, the authority to hear applications for habeas corpus by any person who claims to be held ‘in custody in violation of the Constitution or laws or treaties of the United States.’”<sup>117</sup> The writ of habeas corpus has a history that stretches well beyond its statutory implementation;<sup>118</sup> however, the continuing changes to the statute and its interpretation have broadened the rights of individuals seeking the writ.<sup>119</sup> The Court took great time to explain the history and development of the writ of habeas corpus while reaching a solution to a modern question.<sup>120</sup>

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113. *Id.* at 470.

114. *Id.* at 470-71, 484-85. The Supreme Court identified the issue as “whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty.’” *Id.* at 475.

115. The Court did not weigh in on the likely outcome of such a habeas proceeding. *Rasul*, 542 U.S. at 485.

116. See *Env'tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

117. *Rasul*, 542 U.S. at 473 (citing 28 U.S.C. § 2241(a), (c)(3) (2006)).

118. Justice Jackson has characterized the history as follows:

Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.

*Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 218-19 (1953) (Jackson, J., dissenting). This history has developed a great deal over the centuries. *Rasul*, 542 U.S. at 474.

119. *Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977). “The habeas statute clearly has expanded habeas corpus ‘beyond the limits that obtained during the 17th and 18th centuries.’” *Rasul*, 542 U.S. at 474 (quoting *Swain*, 430 U.S. at 380, n.13 (1977)).

120. *Rasul*, 542 U.S. at 473 (citations omitted). Currently, the writ of habeas corpus is a statutory right. 28 U.S.C. § 2241(a), (c)(3) (granting the right of habeas corpus relief to any person who is held “in custody in violation of the Constitution or laws or treaties of the United States”). The history of the statute itself dates back to 1789. *Rasul*, 542 U.S. at 473. Section 14 of the Judiciary Act of 1789 gave the power to grant a writ of habeas corpus to petitioners who are “in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same.” Act of Sept. 24, 1789, ch. 20, § 14, 1

The Court also analyzed case law, most notably *Johnson v. Eisentrager*.<sup>121</sup> In *Eisentrager*, the Court found that U.S. courts lacked jurisdiction to issue a writ of habeas corpus to German citizens who were apprehended by the U.S. military in China and were subsequently convicted of war crimes.<sup>122</sup> The *Rasul* court distinguished *Eisentrager* based upon a number of factual differences.<sup>123</sup> The Court pointed out that in *Rasul* the individuals seeking writs were:

[N]ot nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.<sup>124</sup>

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Stat. 73; see *Rasul*, 542 U.S. at 473 (citation omitted). Congress broadened the reach of the writ of habeas corpus in 1867. *Rasul*, 542 U.S. at 473. The writ then applied to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." *Id.* (quoting the Judiciary Act of 1867—Act of Feb. 5, 1867, ch. 28, 14 Stat. 385) (citing *Felker v. Turpin*, 518 U.S. 651, 659-60 (1996)). This statutory lineage, however, is only a portion of the history of the writ. *Id.* "Habeas corpus is . . . 'a writ antecedent to statute, . . . throwing its root deep into the genius of our common law.'" *Id.* (citing *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945)). The heritage of the writ began in English law centuries ago, and it "became 'an integral part of our common-law heritage' by the time the Colonies achieved independence," where it was recognized in the Constitution of the United States. *Id.* at 473-74 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973)); U.S. CONST. art. I, § 9, cl. 2 (prohibiting the suspension of "[t]he Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it."). The writ has continued to evolve "beyond the limits that obtained during the 17th and 18th centuries." *Swain*, 430 U.S. at 380 n.13.

121. 339 U.S. 763 (1950); see *Rasul*, 542 U.S. at 466 (citation omitted).

122. *Eisentrager*, 339 U.S. at 765-68, 790-91. The Court in *Eisentrager* found certain facts to be critical to its decision to decline to extend habeas corpus rights to the detainees. *Id.* Those factors included whether the prisoner:

- (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

*Rasul*, 542 U.S. at 475-76.

123. *Rasul*, 542 U.S. at 476. The *Rasul* Court distinguished *Eisentrager*, noting that "[n]ot only are petitioners differently situated from the *Eisentrager* detainees, but the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' constitutional entitlement to habeas corpus." *Id.* (citations omitted).

124. *Id.*

The Court pointed out that the Presumption has less impact on this particular scenario, using the United States' exercise of "complete jurisdiction and control" over Guantanamo Bay as a way to differentiate *Rasul* from *Eisentrager*.<sup>125</sup> While this somewhat blunts the effect of the parallel reasoning in *Rasulas* would be applied to § 7(a)(2), the impact on the application of the Presumption is still significant.

### III. THE INAPPLICABILITY OF THE PRESUMPTION TO § 7(a)(2) CONSULTATIONS

#### A. *Continuum Analysis*

While the Presumption against the extraterritorial application of U.S. statutes has had a long history in American jurisprudence, courts have often avoided the effect of the Presumption.<sup>126</sup> Some of these cases represent instances where the court applied the Presumption and found adequate congressional intent for the extraterritorial application of the statute; however, courts have also found that certain circumstances that seem extraterritorial in nature are in fact domestic, and therefore, the Presumption is inapplicable.<sup>127</sup>

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125. *Id.* at 480 (citation omitted). This hedging is similar to that in *Env'tl. Def. Fund, Inc., v. Massey*, where the District of Columbia Circuit Court of Appeals found that the Presumption did not apply to the National Environmental Policy Act's ("NEPA") requirement of preparing environmental impact statements for projects in Antarctica. 986 F.2d 528, 531 (D.C. Cir. 1993). There, the court found that the presumption did not apply, or applied with minimal strength, for two reasons. *Id.* at 531-32. First, because the preparation of an environmental impact statement is a domestic decision-making issue, and second, because the project was taking place in Antarctica where the United States exercised some control. *Id.*

126. Boudreaux, *supra* note 106, at 1115. See *Hartford Fire Ins. v. California*, 509 U.S. 764, 814-15 (1993) (stating that the Presumption does not apply to antitrust actions); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285-89 (1952) (finding that the Presumption did not apply to the Lanham Trade-Mark Act, as applied to prosecute a producer of counterfeit watches in Mexico); *Massey*, 986 F.2d 528, 536-37 (finding that the National Environmental Policy Act required the National Science Foundation to prepare an environmental impact statement for projects in Antarctica) (citation omitted). See also John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40SW. L. REV. 635 (2011). The application of the Presumption has been inconsistent. John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 389 (2010).

127. See Boudreaux, *supra* note 106, at 1118-24 (citations omitted); *Massey*, 986 F.2d 528, 536-37 (holding that the regulation of the decision-making process which takes place in the United States is not extraterritorial, despite the fact that a project being considered would be completed overseas). In *Massey*, the court found that the requirement of preparing an Environmental Impact Statement applied to overseas projects. *Id.* This decision was based on the conclusion that, because the preparation of the statement was part of the

Courts have used different avenues to avoid applying the Presumption.<sup>128</sup> Professor Boudreaux,<sup>129</sup> in his article entitled *Biodiversity and a New "Best Case" for Applying the Environmental Statutes Extraterritorially*, analyzed the federal courts' decisions on the matter.<sup>130</sup> Initially, he found that courts are more likely to avoid applying the Presumption when there is what he termed a "factual 'spillover.'"<sup>131</sup> This regards the domestic impact of extraterritorial events.<sup>132</sup> In addition to spillover, Professor Boudreaux found that where "the potentially regulated conduct, although related to substantive action within another country, occurs, at least in part, *within* the United States," courts are more likely to avoid applying the Presumption.<sup>133</sup>

In addition to these categories of cases, a broader continuum analysis has emerged.<sup>134</sup> Under this structure, if the United States has total control of the area where the conduct occurs, there is a higher probability that a federal court will apply U.S. law.<sup>135</sup> This continuum-based analysis was recognized in *Environmental Defense Fund v. Massey*, where the United States Court of Appeals for the District of Columbia Circuit Court of Appeals outlined "three general categories of cases for which the presumption against the extraterritorial application of statutes clearly does not apply."<sup>136</sup> Those categories are: (1) where Congress has clearly expressed its

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decision-making process, and that process takes place within the United States, the Presumption did not apply. *Id.*

128. Boudreaux, *supra* note 106, 1115-25 (internal citations omitted).

129. Professor Paul Boudreaux is a Professor of Law at Stetson University College of Law, teaching classes in Environmental Law, Legislation, Land-Use Planning, Real Property, and a Natural Resources Law Seminar. *Profile of Paul Boudreaux*, STETSON UNIV., <http://www.law.stetson.edu/faculty/boudreaux-paul/> (last visited Feb. 23, 2012).

130. Boudreaux, *supra* note 106, at 1115-25.

131. *Id.* at 1116. This was the case in the United States Supreme Court's decision in *Steele*, where the Court gave significant weight to the fact that the counterfeit products that were the subject of the litigation were being found within the United States. 344 U.S. at 289. The Court found support for this conclusion in *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927). The Court in that case underscored the importance of permitting legislation to exist that would curb activities abroad which may bring "about forbidden results within the United States." *Id.*

132. Boudreaux, *supra* note 106, at 1116.

133. *Id.* at 1118 (emphasis added).

134. *See generally* Abate, *supra* note 75.

135. Boudreaux, *supra* note 106, at 1122. This type of analysis appears throughout the jurisprudence regarding the Presumption. *See, e.g.,* *Rasul v. Bush*, 542 U.S. 466, 480-81 (2004) (analyzing the presumption with regard to the United States controlled area of Guantanamo Bay, Cuba); *Env'tl. Def. Fund, Inc., v. Massey*, 986 F.2d 528, 530-32 (D.C. Cir. 1993) (finding that the analysis regarding the Presumption is different in the "global commons" area which is Antarctica) (citations omitted).

136. *Massey*, 986 F.2d at 531.

intention that the statute apply extraterritorially; (2) where application of the Presumption will adversely affect the United States; and (3) where the action regulated occurs within the United States.<sup>137</sup> In addition, the Court pointed out that there are areas of the world where the Presumption applies with less force.<sup>138</sup> These are places where the United States exercises some degree of control.<sup>139</sup> The more control the United States exercises, the weaker the Presumption becomes.<sup>140</sup>

Professor Boudreaux applied this continuum structure to social issues regarding clashes between the policies of the United States and those of a nation in which a U.S. law may be applied.<sup>141</sup> Under this framework, “[i]f applying law extraterritorially would insinuate American social standards into a foreign society, the more likely it is that there would be a direct clash of cultures, and the more sensible it is to apply the Presumption.”<sup>142</sup> This analysis reconciles two similar yet conflicting cases.<sup>143</sup> In *EEOC v. Arabian Am. Oil Co.*, (“*Aramco*”), the Supreme Court held that a U.S. citizen was not entitled to protection under American labor laws while working for an overseas branch of a company that also operates within the United States.<sup>144</sup> In *Steele v. Bulova Watch Co.*, the Court found that the Lanham Act applied to the actions of American citizens abroad.<sup>145</sup>

While both of these cases dealt with the regulation of the conduct of American people or enterprises, the difference was the cultural impact of enforcing the statutes abroad. In *Aramco*, the

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137. *Id.* (citations omitted).

138. *Id.* at 533 (citations omitted).

139. *Id.* (regarding Antarctica). See also *Rasul*, 542 U.S. at 480-81 (regarding Guantanamo Bay).

140. See *Abate*, *supra* note 75, 103 (citing *Massey*, 986 F.2d at 533). The geographic continuum has “[at] one end . . . the United States, and at the other end . . . sovereign foreign territories.” *Id.* at 104. The grey area of the continuum includes areas like Antarctica where “the U.S. has some measure of legislative control.” *Id.* These areas are considered “global commons’ areas.” *Id.* (quoting *Massey*, 986 F.2d at 533). However, the continuum analysis would also be applicable to areas where the United States exercises control, even though it does not rise to the level of a global common area.

141. Boudreaux, *supra* note 106, at 1123.

142. *Id.*

143. Compare *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), with *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, as recognized in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 n.8 (2006).

144. *Aramco*, 499 U.S. at 246-47.

145. *Steele*, 344 U.S. at 285-89. Unlike in *Aramco*, the Court in *Steele* determined that the Presumption did not apply. See *id.* Interestingly, *Steele* dealt with a similar situation in which an American business was acting abroad. *Id.*; *Aramco*, 499 U.S. at 246-47.



plaintiff was a U.S. citizen who was employed at an overseas operation of Aramco,<sup>146</sup> the defendant corporation.<sup>147</sup> The plaintiff brought suit against Aramco under the Civil Rights Act of 1964.<sup>148</sup> Considering the fact that the company likely employed local workers at that same facility,<sup>149</sup> imposing a requirement that the company follow U.S. labor laws that stem from “American standards of ethnic and religious tolerance”<sup>150</sup> could easily create tension.<sup>151</sup> However, in *Steele*, that conflict would not have emerged. The trademark laws in question were being applied only to an American citizen who resided within the United States.<sup>152</sup> The court implied that there was no imposition of American values on a foreign country, and there was no risk that certain employees would be treated differently based on whether they were under the umbrella of American law.<sup>153</sup>

With regard to § 7(a)(2), this analysis leads to a conclusion that the presumption should not apply.<sup>154</sup> The effect of § 7(a)(2) is to create an obligation on federal agencies to consult with FWS or NMFS, and the consultation is part of a deliberation process in

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146. *Aramco*, 499 U.S. at 247. Aramco was a Delaware company which had business operations worldwide. *Id.* This included subsidiaries in Texas, where the company was licensed to do business. *Id.*

147. *Id.* Aramco employed the petitioner, who was an American citizen born in Lebanon. *Id.* The petitioner worked for the company within the United States, but was later transferred to Saudi Arabia at his own request. *Id.* He was discharged from the company while he was working abroad. *Id.* As a result, the plaintiff filed a claim against Aramco with the EEOC, claiming that his discharge was the result of discrimination. *Aramco*, 499 U.S. at 247. His cause of action came to federal court where the litigation continued to the Supreme Court. *Id.*

148. *Id.*

149. Boudreaux, *supra* note 106, at 1123.

150. *Id.* (citations omitted).

151. *Id.* (citation omitted). The implementation of the Civil Rights Act of 1964 derives from the values of the Civil Rights movement in the United States. Eric Ledger, *Relevance is Irrelevant: A Plain Meaning Approach to Title VII Retaliation Claims*, 44 AKRON L. REV. 583, 591-92 (2011) (citations omitted). The legislation brought the force of law to protect equality even within private ventures. *See id.*

152. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 281 (1952) (internal citation omitted).

153. Boudreaux, *supra* note 106, at 1123 (citations omitted). This is in line with the landmark Presumption case, *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949). In that case, a U.S. citizen was working for the defendant company in Iran. *Filardo*, 336 U.S. at 283. The plaintiff argued for the application of American labor laws to his overseas employment. *Id.* This “would have created a difference in employment standards among workers” within the same facility in Iran. Boudreaux, *supra* note 106, at 1123. Under these circumstances, there was a great potential for social conflicts as the United States attempted to impose its own labor standards in another country. *Id.* Therefore, the finding that the labor laws were unenforceable in this situation was appropriate.

154. Boudreaux, *supra* note 106, at 1124 (citation omitted).

which the Action Agency engages prior to beginning a project.<sup>155</sup> While the outcome of that process may have an effect on another country, the decision of whether to participate in a project must be left to the discretion of the United States and its agencies. There would not be a potential conflict created by differential treatment of individuals or entities as there was in *Aramco*.

### B. *The Spillover Effect*

As Professor Boudreaux points out, the continuum analysis seems to indicate that the Presumption should not apply to § 7(a)(2).<sup>156</sup> This is consistent with the analysis under other approaches that courts have taken regarding the Presumption. Under the spillover analysis, U.S. courts are more likely to find that the Presumption does not apply when the overseas action has some tangible impact on the United States.<sup>157</sup> This framework is best illustrated by the *Steele* case where the Supreme Court avoided applying the Presumption to the Lanham Act.<sup>158</sup> The Court held that the Presumption did not apply under the circumstances.<sup>159</sup> In *Steele*, the Defendant was a U.S. citizen living in Texas.<sup>160</sup> Defendant's company manufactured counterfeit Bulova watches in Mexico, and because the watches were finding their way into the American market, the Supreme Court found a large enough impact on the United States to avoid the application of the Presumption.<sup>161</sup>

As applied to § 7(a)(2) of the ESA, the "spillover" model would favor the courts avoiding application of the Presumption. There are many different examples of how international protection of wildlife could impact the territorial United States. Most simply,

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155. *Id.*

156. *Id.*

157. *Id.* at 1116.

158. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285 (1952). The Lanham Trade-Mark Act prohibits:

Any person who shall, without the consent of the registrant [from using] in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

Lanham Trade-Mark Act, 15 U.S.C. § 1114(1)(a) (2006). The Act provides for civil liability for those that operated in contravention of the statute. *Steele*, 344 U. S. at 284 (citations omitted).

159. Boudreaux, *supra* note 106, at 1115.

160. *Steele*, 344 U.S. at 281.

161. *See id.*

an impact on migratory animals that inhabit both the United States and foreign lands would affect the United States.<sup>162</sup> While this is an important potential argument, its impact is dulled because it would not apply to all listed species. A more comprehensive avenue of argument would be to consider the impact of global biodiversity<sup>163</sup> on the territorial United States.

While even the term biodiversity itself has only recently been developed,<sup>164</sup> its scientific importance is paramount.<sup>165</sup> The significance of the natural ecosystem is vital not just for the purpose of preserving cherished wildlife, but it is also imperative in terms of protecting existing human civilization.<sup>166</sup> In recent years, the

162. Boudreaux, *supra* note 106, at 1134 (citations omitted). In certain scenarios, the wellbeing of species within the United States may depend on the use of conservation measures abroad. For instance, migratory birds could be well protected within the United States, but if they are subjected to harsh conditions in their summer roosts, the creatures may still face extinction. *Id.* (citations omitted). This can be applied to more remote scenarios as well. For instance, if a species lives only in the United States, but its food supply travels between nations, then the United States has an interest in protecting that food supply despite the fact that the food supply may reside outside the territories of the United States. *Id.* (citations omitted).

163. Biodiversity is "defined as the presence of a large number of species of animals and plants." *Nat'l Ass'n of Home Builders v. Babbit*, 130 F.3d 1041, 1052 (1997). According to the Babbit court:

The variety of plants and animals in this country are, in a sense, a natural resource that commercial actors can use to produce marketable products. In the most narrow view of economic value, endangered plants and animals are valuable as sources of medicine and genes. Fifty percent of the most frequently prescribed medicines are derived from wild plant and animal species. Such medicines were estimated in 1983 to be worth over \$15 billion a year. In addition, the genetic material of wild species of plants and animals is inbred into domestic crops and animals to improve their commercial value and productivity.

*Id.* at 1152-53 (citations omitted).

164. *Biodiversity*, IBN INST. FOR BIODIVERSITY, <http://www.biodiv.de/index.php?id=13&L=1> (last visited Feb. 23, 2012). The term was created in 1986 at the "National Forum on Biodiversity" in the United States. *Id.*

165. See Dale D. Goble, *What are Slugs Good For? Ecosystem Services and the Conservation of Biodiversity*, 22 J. LAND USE & ENVTL. L. 411, 114n.7 (2006). Even the fruit fly "can yield crucial clues to human development." Jennifer Ackerman, *Journey to the Center of the Egg*, N.Y. TIMES, Oct. 12, 1997, at 45 (internal quotations omitted).

166. SCIENTIFIC COMMITTEE ON PROBLEMS OF THE ENVIRONMENT (SCOPE), BIODIVERSITY CHANGE AND HUMAN HEALTH: FROM ECOSYSTEM SERVICES TO SPREAD OF DISEASE 2 (Osvaldo E. Sala, Laura A. Meyerson & Camille Parmesan eds., 2009). In terms of the health of human beings, ecosystems provide the basic elements of life, prevent the transmission of disease, and provide platforms for medical research. *Id.* Furthermore:

At least 40 per cent of the world's economy and 80 per cent of the needs of the poor are derived from biological resources. In addition, the richer the diversity of life, the greater the opportunity for medical discoveries, economic development, and adaptive responses to such new challenges as climate change.

Anup Shah, *Why is Biodiversity Important? Who Cares?*, GLOBAL ISSUES (July 20, 1998), <http://www.globalissues.org/article/170/why-is-biodiversity-important-who-cares> (citing CONVENTION ON BIOLOGICAL DIVERSITY, available at

complexity of ecosystems has become a vibrant area of study. These studies have not only shown the fragility of ecosystems, but also their interwoven nature.<sup>167</sup> Each piece of an ecosystem plays a role that may be irreplaceable.<sup>168</sup> Importantly, science has recently begun to unravel the extent to which the ecosystems of the world depend on one another.<sup>169</sup> Researchers are thereby showing that seemingly isolated ecosystems have a global impact.<sup>170</sup> In addition to the biological issues, there are substantial economic benefits to promoting biodiversity.<sup>171</sup> Efforts to maintain biodiversity and protect ecosystems abroad will have a positive impact on the United States. These efforts are exactly the type of spillover benefit that the Supreme Court found to be an overriding circumstance in *Steele*.

The protection of biodiversity would benefit the United States in a number of ways. While the aesthetic and recreational pleasures of living in a rich environment certainly benefit human beings, biodiversity has a deeper impact on human life.<sup>172</sup> Biodiversity impacts climate issues,<sup>173</sup> agriculture,<sup>174</sup> human health,<sup>175</sup> business, and genetic research.<sup>176</sup> This is arguably a more significant “spill-

<http://www.cbd.int/doc/publications/cbd-leaflet.asp>). See also, CARLOS CORVALAN, SIMON HALES & ANTHONY MCMICHAEL, WORLD HEALTH ORGANIZATION, ECOSYSTEMS AND HUMAN WELL BEING: HEALTH SYNTHESIS: A REPORT OF THE MILLENNIUM ECOSYSTEM ASSESSMENT (José Sarukhán et al. eds., 2005), available at <http://www.who.int/globalchange/ecosystems/ecosys.pdf>.

167. See Goble, *supra* note 165, at 412-13.

168. See Paul Ehrlich, *The Loss of Diversity: Cause and Consequences*, in BIODIVERSITY 21, 21 (E.O. Wilson ed., 1988). “Each time a species becomes extinct, the pool of wild species diminishes. This, in turn, has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes.” *Babbitt*, 130 F.3d at 1053.

169. See generally Michel Loreau & Andy Hector, *Partitioning Selection and Complementarity in Biodiversity Experiments*, 412 NATURE 72 (2001), available at <http://biology.mcgill.ca/faculty/loreaupdfs/loreauhectornature.pdf>.

170. See *id.*

171. Shah, *supra* note 166. The importance of protecting biodiversity has been noted by at least one federal court. See *Babbitt*, 130 F.3d at 1052-53. Even “[a] species whose worth is still unmeasured has what economists call an “option value”—the value of the possibility that a future discovery will make useful a species that is currently thought of as useless.” See *id.* at 1052-53 (citing Bryan Nolan, *Commodity, Amenity, and Morality: The Limits of Quantification in Valuing Biodiversity*, in BIODIVERSITY, *supra* note 168, at 200, 202).

172. See Goble, *supra*, note 165 at 412.

173. Costanza et al., *supra* note 10 at 255 (citation omitted) (internal quotation marks omitted).

174. See Parris, *supra* note 10.

175. See Chivian & Bernstein, *supra* note 10, at A-12.

176. See Pimentel et al., *supra* note 10, at 750. The benefit of preserving endangered species is critical as “tourists travel to see them, scientists study and learn from them, and people get aesthetic pleasure from them. In addition, every species offers some clues to the

over” than the Supreme Court pointed out in *Steele*. There, it was merely the appearance of counterfeit watches in the American market that prompted the United States Supreme Court to refrain from applying the Presumption.<sup>177</sup> With regard to the conservation efforts implemented through § 7(a)(2), the beneficial results rise beyond a merely commercial influence. Given these circumstances, the “spillover” model tends to weigh in favor of not applying the Presumption.

### C. *The Impact of Rasul*

In *Lujan*, the Secretary of the Interior, in arguing for the appropriateness of the regulation limiting the application of § 7(a)(2) to domestic projects, attributed great weight to the Presumption.<sup>178</sup> Under the Presumption, laws passed by the U.S. Congress will be interpreted to apply “only within the territorial jurisdiction of the United States.”<sup>179</sup> Application of this particular canon of construction seems straightforward. In reality, recent developments in this area of law have led to a reshaping of the judicial interpretation of the canon.<sup>180</sup> Previously, the burden would be on the party attempting to show that the statute should be applied to extraterritorial activities by showing the “clear expression” of Congress.<sup>181</sup> However, that application of the Presumption presupposes that the statute is, in fact, acting extraterritorially.

However, the Presumption should not apply where the statute in question regulates the decision-making process of federal agencies, because that process is wholly domestic. The District of Co-

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path of the evolutionary chain that produced it and to the role of certain genes also found in humans.” *Babbitt*, 130 F.3d at 1052 n.11.

177. *Steele*, 344 U.S. at 281.

178. *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 125 (8th Cir. 1990), *rev'd*, 504 U.S. 555 (1992) (citation omitted). According to the circuit court, “the Secretary relie[d] heavily upon the canon of statutory construction that statutes are presumed to have domestic scope only.” *Lujan*, 911 F.2d at 125 (citation omitted).

179. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (citation omitted). In *Foley Brothers*, the Court noted that the underlying justification for this particular canon of construction lied with “the assumption that Congress is primarily concerned with domestic conditions.” *Id.* While this assumption may make sense in certain contexts, the canon itself is an oversimplification of the Congressional thought process in its passage of sweeping legislation. *See id.*

180. *Brilmayer*, *supra* note 93, at 661.

181. *Lujan*, 911 F.2d at 125. According to the Court, “[t]o overcome the presumption that the statute was not intended to have extraterritorial application, there must be clear expression of such congressional intent.” *Id.* (citing *United States v. Mitchell*, 553 F.2d 996, 1003 (5th Cir. 1977)). Notably, the court of appeals in *Lujan* found such intent. 911 F.2d at 125.

lumbia Circuit Court of Appeals has relied on this proposition in avoiding the application of the Presumption,<sup>182</sup> and that approach has been advanced in the academic community.<sup>183</sup> The Guantanamo Bay detainee case, *Rasul v. Bush*, has become an unlikely source of support for this reasoning.<sup>184</sup>

In *Massey*, the District of Columbia Circuit Court of Appeals relied upon the underlying principle of this argument.<sup>185</sup> In *Massey*, the Environmental Defense Fund (“EDF”) brought an action to compel the National Science Foundation (“NSF”) to prepare an Environmental Impact Statement (“EIS”), as required by the National Environmental Policy Act (“NEPA”).<sup>186</sup> This procedure is similar to the consultation procedure in § 7(a)(2).<sup>187</sup> The issue was whether the requirement of preparing an EIS applied to the NSF’s actions in Antarctica.<sup>188</sup> The argument raised by the NSF was that the Presumption against extraterritorial application of U.S. stat-

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182. See *Envtl. Def. Fund, Inc., v. Massey*, 986 F.2d 528, 531-32 (D.C. Cir. 1993).

183. Boudreaux, *supra* note 106, at 1115.

184. 542 U.S. 466, 480 (2004) (citations omitted).

185. See *Massey*, 986 F.2d at 530 (citations omitted). At issue in *Massey* was the National Science Foundation’s (“NSF”) plans to incinerate food waste in Antarctica. *Id.* at 529 (citations omitted). The lower court found in favor of NSF on the grounds that the Presumption applied and that the Environmental Defense Fund (“EDF”) was not able to make a showing of clear congressional intent to rebut the Presumption. *Id.* at 530. NEPA requires that:

[E]very recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, [contain] a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(C) (1969). Compare 42 U.S.C. § 4332(C), with 16 U.S.C. § 1536 (a)(2) (1973).

186. See *Massey*, 986 F.2d at 529. The NSF “is an independent federal agency created by Congress in 1950 ‘to promote the progress of science; to advance the national health, prosperity and welfare; [and] to secure the national defense.’” *About the National Science Foundation*, NAT’L SCI. FOUND., <http://www.nsf.gov/about/> (last visited Jan. 22, 2012). The EDF is an organization dedicated to the preservation of “the natural systems on which all life depends.” *Our Mission and History*, ENVTL. DEF. FUND, <http://www.edf.org/about/our-mission-and-history> (last visited Jan. 22, 2012).

187. The two requirements are similar in that they both pertain to the decision-making process of the government and deal with a requirement that action agencies exercise forethought prior to taking action that may impact wildlife. See 16 U.S.C. § 1536(a)(2); 42 U.S.C. § 4332(C).

188. *Massey*, 986 F.2d at 530.

utes applied and weighed in favor of this action's exclusion from the normally required preparation of an EIS.<sup>189</sup>

The court found that the Presumption did not apply in this situation.<sup>190</sup> According to the court, "the presumption against extraterritoriality is not applicable when the conduct regulated by the government occurs within the United States."<sup>191</sup> If there is no regulation of conduct outside the United States, then there is no issue as to the extraterritorial application of a statute.<sup>192</sup> The court applied this principle to the NEPA's requirement of preparing an EIS and found that because the "NEPA is designed to control the decision making process of U.S. federal agencies," the statute only regulated domestic conduct.<sup>193</sup>

The court reasoned that the EIS section of the statute bound "only American officials and controls the very essence of the government function: decision making."<sup>194</sup> Because that process takes place almost exclusively within the United States, it is a domestic matter.<sup>195</sup> Importantly, the NEPA did not dictate a certain substantive course of conduct on the part of a federal agency; it only pertained to the decision-making process.<sup>196</sup> Therefore, the statute was exclusively domestic and the Presumption did not apply.<sup>197</sup>

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189. *See id.* (citation omitted).

190. *Id.* at 532.

191. *Id.* at 531.

192. *Id.*

193. *Massey*, 986 F.2d at 532.

194. *Id.* *See also* Comment, *NEPA's Role in Protecting the World Environment*, 131 U. PA. L. REV. 353, 371 (1982) (citation omitted).

195. *Massey*, 986 F.2d at 532 (citation omitted). The court backed off from this holding to a certain extent by indicating that the unique status of Antarctica as a global commons area gave the court more leeway in avoiding the application of the statute. *See id.* at 533-34. There had been previous cases where the District of Columbia Circuit Court of Appeals found that the presumption against extraterritoriality did not apply to Antarctica for this reason. *See Beattie v. United States*, 756 F.2d 91, 98 (D.C. Cir. 1984). A similar line of reasoning applied in *Rasul v. Bush*, where the United States Supreme Court indicated that the presumption against extraterritoriality did not apply with great weight, because the individuals in question were being held at Guantanamo Bay, Cuba, which was under the exclusive control of the United States. 542 U.S. 466, 480-84 (2004).

196. *Massey*, 986 F.2d at 532 (citations omitted); *see Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (citations omitted).

197. *Massey*, 986 F.2d at 537. This decision has been complicated by the Court's inclusion in its opinion of a declaration that the Presumption applies with less force when the project in question is taking place in a territory under the partial control of the United States. Boudreaux, *supra* note 106, at 1119.

Recently, the Supreme Court adopted a similar view in limiting the applicability of the Presumption.<sup>198</sup> In *Morrison v. National Australian Bank*,<sup>199</sup> the Court noted a preliminary question in determining whether the Presumption even applies is whether the dispute before the Court is in fact extraterritorial in nature.<sup>200</sup> Under that framework, a court determines the true extraterritoriality by examining the “focus” of the dispute.<sup>201</sup> The term “focus” is a recent development in the judicial application of the Presumption.<sup>202</sup> Therefore, the definition has yet to be solidified. However, the term seems to refer to “the essence of the cause of action.”<sup>203</sup> If the essence of the cause of action is within the United States, the “focus” would be domestic and not extraterritorial.<sup>204</sup> In such a case, the Presumption would not apply.<sup>205</sup>

A similar line of reasoning applied in *Rasul*. The crucial aspect of that case, as it relates to the international application of other statutory provisions, is the Court’s acknowledgement that “the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody.”<sup>206</sup> This decision changed the perspective regarding the determination of whether jurisdiction exists in such cases, because it refocused the attention of the Court onto the organizations of the United States that would clearly be under the jurisdiction of the courts of this country.<sup>207</sup> The Court dispensed with the issue of the Presumption against extraterritorial application of Congressional legislation by noting that Guantanamo Bay is within the “territorial jurisdiction” of the United States.<sup>208</sup> In addition, the Court pointed out that the statute in question did not differentiate between “Americans and aliens held in federal custody,” and because of that, there is no “reason to think that Con-

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198. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010). The decision in this case was 8-0, and the majority opinion was authored by Justice Scalia. *Morrison*, 130 S. Ct. at 2875. Justice Sotomayor did not participate in the proceeding. *Id.* at 2875.

199. 130 S. Ct. at 2869.

200. *Id.* at 2884; Brilmayer, *supra* note 93, at 661.

201. Brilmayer, *supra* note 93, at 661.

202. *Id.* According to Brilmayer, “[t]he ‘focus’ that the majority refers to is a relative newcomer to the jurisprudence of extraterritoriality.” *Id.*

203. *Id.*

204. *Id.*

205. *Id.* Because the presumption would not apply, application of this principal would prevent the necessity of trying to determine Congressional intent. *Id.*

206. *Rasul v. Bush*, 542 U.S. 466, 478 (2004) (quoting *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494-95 (1973)).

207. See *Rasul*, 542 U.S. 466.

208. *Id.* at 480.



gress intended the geographical coverage of the statute to vary depending on the detainee's citizenship.<sup>209</sup>

Similarly, Congress would not have intended the effect of § 7(a)(2) on the decision-making process to vary depending on the location of the project. As it is currently applied, § 7(a)(2) requires federal agencies to consult with the Secretary regarding projects that the agency is participating in within the United States.<sup>210</sup> Projects that do not fall within the scope of § 7(a)(2), by virtue of being located outside the United States, do not currently require consultation.<sup>211</sup> While the legality and propriety of this application of the statute is questionable, the main argument of proponents of the current regulation depends on the Presumption.<sup>212</sup> Regardless of whether the Presumption could be overcome in such a case, the current state of the case law lends itself to the argument that the application of the Presumption would be inappropriate in and of itself.

With the decision in *Rasul*, the Court determined that the focus of a writ of habeas corpus is upon the jailer, not the jailed.<sup>213</sup> Therefore, the application of the habeas corpus statute under those circumstances is domestic, because the jailer, the U.S. government, is a domestic entity. Similarly, § 7(a)(2) controls the actions of federal agencies.<sup>214</sup> These agencies doubtlessly fall under the jurisdiction of Congress. Further, the agency actions, even while engaging in international projects, are rooted within the United States. While the execution of the project may be overseas, the funding and organizational structure is within the United States. This is similar to the jailers in *Rasul*. While the affected party, the detainee, was overseas, the writ itself was directed at a domestic party. Here, while the project may be overseas, the stat-

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209. *Id.* at 468.

210. Interagency Cooperation—Endangered Species Act of 1973, 50 C.F.R. § 402.01 (2012).

211. *Id.*

212. Brief for Petitioner at 15, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1991) (No. 90-1424).

213. *See Rasul*, 542 U.S. at 483 n.15. The Court stated that:

Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'

*Id.* (citing 28 U.S.C. § 2241(c)(3) (2006)). According to the Court "[n]o party questions the District Court's jurisdiction over petitioner's custodians." *Id.*

214. Endangered Species Act of 1973 § 7(a)(2), 16 U.S.C. § 1536 (a)(2) (2006).

ute is directed at a domestic party.<sup>215</sup> Therefore, the “focus” of an action to enforce § 7(a)(2) consultations for extraterritorial projects is domestic in nature. Under these circumstances, the Presumption against extraterritorial application of a statute would not apply, because the action in question is a domestic one.

It is important to note that the analysis of the Supreme Court in *Rasul* followed a similar pattern to the District of Columbia Circuit Court of Appeals’ analysis in *Massey*, where, after making a broad determination regarding the domestic nature of the dispute, the court supported its argument by pointing out the implications of the territorial status of the locations of the overseas aspects of the issue.<sup>216</sup> While in *Massey*, it was the global commons argument regarding Antarctica,<sup>217</sup> in *Rasul* it was the fact that the United States had exclusive control over Guantanamo Bay.<sup>218</sup> These arguments, while increasing the persuasiveness of the opinions, are parallel to the domestic issue analysis, instead of being interwoven. The inclusion of the additional support for the decisions weakens the argument regarding the domestic issue analysis.<sup>219</sup> Nonetheless, the case law is building in favor of avoiding application of the Presumption to issues such as applying the requirements of § 7(a)(2) to overseas projects.

The reasoning in *Rasul* and *Morrison* is in line with the District of Columbia Circuit Court of Appeals’ reasoning in *Massey*. The strength of this argument has now been buttressed by the Court’s acknowledgement that some circumstances that seem international in nature are, in fact, domestic for the purposes of the Presumption.<sup>220</sup> This result is consistent with the underlying policy concerns that gave rise to the Presumption.

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215. 16 U.S.C. §§ 1531-44 (2006).

216. *Env’tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 533-34 (D.C. Cir 1993) (citations omitted).

217. *Id.* at 533-34 (citations omitted).

218. *Rasul*, 542 U.S. at 480 (2004).

219. Boudreaux, *supra* note 106, at 1119 (“The strength of the conclusion in *EDF v. Massey* was dulled . . . by the fact that the court added an additional and alternative ground for its holding.”). *Id.* That alternative ground was the fact that Antarctica was a global commons area over which the United States exercised some control. *Massey*, 986 F.2d at 533-34 (citations omitted). The Court stated that it had “not decided . . . how NEPA might apply to actions in a case involving an actual foreign sovereign.” *Id.* at 537 (citations omitted). However, the reasoning underlying the domestic decision-making analysis still adds credence to that argument for the inapplicability of the Presumption as applying to the requirement of § 7(a)(2) consultations to overseas projects.

220. *Rasul*, 542 U.S. at 480-82 (citations omitted).

#### IV. WHY AVOIDING APPLICATION OF THE PRESUMPTION IS APPROPRIATE

The Presumption is premised on the assumption that "Congress 1) hesitates to authorize the application of laws that conflict with the laws of another sovereign, and 2) is 'primarily concerned with domestic conditions.'"<sup>221</sup> Through the Presumption, the goal of avoiding conflicts with foreign laws is effectuated. Given these underlying reasons for the Presumption approach, it follows that if the fears of conflicts with foreign laws is obviated, the necessity of applying the Presumption weakens.<sup>222</sup> Likewise, in the event that an action that seems extraterritorial is actually domestic, the argument for the Presumption grows even feebler.<sup>223</sup>

With regard to the avoidance of conflicts with foreign laws, the application of § 7(a)(2) does not present much risk.<sup>224</sup> The U.S. government argued before the Supreme Court in *Lujan* that the application of § 7(a)(2) to extraterritorial projects would create the type of conflict that the courts have tried to avoid.<sup>225</sup> However, there is a small likelihood that such an issue would arise. As previously noted, the consultation process is part of an agency's decision-making process.<sup>226</sup> It would be a great leap for the courts to

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221. Anna D. Stasch, *2005 Ninth Circuit Environmental Review: Chapter: ARC Ecology v. United States Department of the Air Force: Extending the Extraterritorial Reach of Domestic Environmental Law*, 36 ENVTL. L. 1065, 1067-68 (2006) (citations omitted). Even from very early cases, the Supreme Court has striven to avoid conflicts between the laws of the United States and the laws of foreign nations. See *Murray v. Charming Betsy*, 6 U.S. 64, 118 (1804). In *Murray*, the Supreme Court stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ." *Id.* at 118. Additionally, case law has consistently held that the Supreme Court will interpret legislation with the assumption that the primary concern of Congress is domestic. See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

222. Boudreaux, *supra* note 106, at 1123.

223. *Id.*

224. *Id.* It is unclear from the case law revolving around the Presumption whether the Supreme Court is particularly concerned with a direct conflict of laws or just the creation of diplomatic or social conflict on a more basic level. *Id.*

225. Brief for Petitioner at 15, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1991) (No. 90-1424). The petitioners argued that:

[S]everal courts of appeals have pointed out, conditioning assistance to a foreign nation on compliance with our own environmental standards "directs that nation's choices just about as effectively as a law whose explicit purpose is to compel foreign behavior," and would likely be seen by that nation as a "disguised way of substituting United States regulatory standards for the [foreign nation's] own."

*Id.* at 46 (quoting *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1356-57 (D.C. Cir. 1981); *accord* *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977)).

226. See *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993) (dealing with NEPA) (citations omitted).

consider placing limitations on the manner in which U.S. federal agencies come to make policy decisions in order to prevent potential social conflicts with foreign nations.<sup>227</sup>

The conflicts contemplated by the Court in promulgating the Presumption are not of concern regarding § 7(a)(2). Furthermore, as previously argued, this line of reasoning also indicates that the consultation process is actually domestic in nature. These circumstances show that the underlying concerns that created the Presumption are not an issue regarding consultations. Therefore, a court's decision not to apply the Presumption would be in line with the long history of jurisprudence in this area.<sup>228</sup>

## V. CONCLUSION

The application of § 7(a)(2) consultation requirements to international projects has not been litigated since *Lujan*. However, considering the current jurisprudence regarding the Presumption, there is a good chance that a plaintiff with standing could easily overcome this hurdle. While the court of appeals found that the Presumption was overcome by indications of congressional intent, recent decisions of federal courts have indicated that even initial application of the Presumption may not be necessary in the case of § 7(a)(2) consultations.<sup>229</sup> Most notably, because § 7(a)(2) is directed at the decision-making process of federal agencies, it is therefore domestic in nature. This theory has been prominent in circuit court decisions; however, the Supreme Court's decision in *Rasul* may be an indication of the Court's willingness to accept such an argument.<sup>230</sup>

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227. *Id.* at 532 (citations omitted); *see also* Comment, *supra* note 194, at 371.

228. *See Morrison v. Nat'l. Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952); *Murray v. Charming Betsy*, 6 U.S. 64 (1804); *Massey*, 986 F.2d 528.

229. *See Morrison*, 130 S. Ct. 2869; *Massey*, 986 F.2d 528; *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990).

230. *See, e.g., Massey*, 986 F.2d 528. *See also Rasul v. Bush*, 542 U.S. 466 (2004).

