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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, *TVA v. Hill*, No. 76-1701

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No. 76-1701

In the Supreme Court of the United States

OCTOBER TERM, 1976

TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

HIRAM G. HILL, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

CITATIONS

Cases:

236-039—77——1

Cases—Continued

Statutes and regulations:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1976

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TENNESSEE VALLEY AUTHORITY, PETITIONER
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Tennessee Valley Authority, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1A–21A) is reported at 549 F. 2d 1064. The opinion of the district court (App. B, *infra,* pp. 22A–44A) is reported in 419 F. Supp. 753.

JURISDICTION

The judgment of the court of appeals (App. C, *infra,* p. 45A) was entered on January 31, 1977. On April 22, 1976, Mr. Justice Stewart extended the

time for filing a petition for a writ of certiorari to and including May 31, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, when a species is listed under the Endangered Species Act of 1973, a federal water project that is substantially finished may be completed and used despite its adverse effects on the species if Congress, with full knowledge of such effects, continues to approve the project by appropriating funds necessary for its completion.

2. Whether the Endangered Species Act applies to a project substantially completed at the time of its enactment.

STATUTES INVOLVED

Section 7 of the Endangered Species Act of 1973, 87 Stat. 892, 16 U.S.C. (Supp. V) 1536 provides:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act, by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

STATEMENT

In 1966 Congress appropriated initial funds for the construction by the Tennessee Valley Authority ("TVA") of the Tellico Dam and Reservoir project, a federal multi-purpose dam and reservoir on the Little Tennessee River. Construction began in March 1967. The project has been funded annually thereafter and is now virtually completed and ready for use.

In August 1973, when the construction was half completed, a species of three-inch fish (later to be named the snail darter) was discovered in the stretch of the river scheduled to be impounded by the reservoir. (App. B, *infra,* pp. 25A, 33A.) [1]

In December 1973 the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. (Supp. V) 1531 *et seq.*,

[1] Darters, of which the snail darter is a type, are members of the perch family. There are about 130 known species of darters, 85 to 90 of which are found in Tennessee. Eight to ten new ones have been discovered in the last five years, and about twelve discovered in the last ten years. TVA's final environmental impact statement for the Tellico project (approved by the courts in *Environmental Defense Fund* v. *Tennessee Valley Authority*, 371 F. Supp. 1004 (E.D. Tenn.), affirmed, 492 F. 2d 466 (C.A. 6)) listed eleven species of darters known to occur, or which may occur, in the portions of the Little Tennessee River to be impounded and noted that "new species continue to be discovered in Tennessee at the rate of about one per year."

was enacted. Section 7 of the Act, 16 U.S.C. (Supp. V) 1536, provides in relevant part that:

> [A]ll * * * federal departments and agencies shall, in consultation with and with the assistance of the Secretary [of the Interior], utilize their authorities in furtherance of the purposes of this Act * * * by taking such action necessary to ensure that actions authorized, funded, or carried out by them do not * * * result in the destruction or modification of habitat of [species listed as endangered or threatened] which is determined by the Secretary * * * to be critical.

Subsequently respondents and others petitioned the Secretary of the Interior to list the snail darter as an endangered species pursuant to Section 4 of the Act, 16 U.S.C. (Supp. V) 1533. In November 1975, when approximately 75 percent of the construction was completed (App. B, *infra,* p. 33A), the Secretary designated the snail darter as an endangered species on the basis of his determination that the only known habitat of the fish was that portion of the Little Tennessee River scheduled to be impounded by the Tellico Reservoir and that "[t]he proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat." 40 Fed. Reg. 47506.[2] In April 1976

[2] This determination was based on the finding that "the snail darter occurs only in the swifter portions of shoals over clean gravel substrate in cool, low-turbidity water. Food of the snail darter is almost exclusively snails which require a clean gravel substrate for their survival." *Ibid.*

the Secretary designated a portion of the River included within the area of the proposed reservoir as the snail darter's "critical habitat" pursuant to Section 7 of the Act. 41 Fed. Reg. 13926.

In February 1976 respondents filed this suit seeking to enjoin the completion of the dam and the impoundment of the reservoir, alleging that those actions would violate Sections 7 and 9 of the Act, 16 U.S.C. (Supp. V) 1536 and 1538.[3]

Prior to and during this litigation, TVA Board members testified before appropriations committees of the House and Senate. In hearings in April 1975 TVA informed those committees of the discovery of the snail darter and of efforts by opponents of the project to halt its completion by relying on the Endangered Species Act. TVA testified that in its view the Act did not prohibit the completion of a project authorized long before and substantially completed at the time the Act was passed, and stated that:

> [W]hile we will do our best to preserve the darter, if it in fact proves to be a distinct

[3] While respondents contended in both the district and appellate courts that the completion of the project would violate Section 9 of the Act, that question was not reached below (App. A, *infra*, pp. 9A, n.13). Section 9 makes it unlawful to "take any [endangered] species within the United States." Section 9 does not apply here, since in defining the term "take" in Section 3(14) of the Act, Congress deleted "the destruction, modification, or curtailment of its habitat or range" from the list of prohibited activities. Compare the original language of 3(6) of S. 1983, 93d Cong., 1st Sess. (1973), with Section 3(14) of the Act.

> species and is listed as endangered, the project should be completed in any event * * *.[4]

In recommending appropriations of $29 million for the project through September 1976, the House Committee on Appropriations, in its report dated June 20, 1975, stated

> The Committee directs that the project, for which an environmental impact statement has been completed and provided the Committee, should be completed as promptly as possible for energy supply and flood protection in the public interest.[5]

The appropriations bill was passed by Congress and signed by the President in December 1975, one month after the snail darter was placed on the endangered species list. Pub. L. 94–180, 89 Stat. 1035, 1047.[6]

In appropriations hearings in March 1976 TVA again informed both the House and the Senate committees about the status of the snail darter and about the recently filed lawsuit, and reiterated its position that the Endangered Species Act should not be construed

[4] Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1976 before a Subcommittee of the House Committee on Appropriations, 94th Cong., 1st Sess. Pt. 7, 467 (1975); see also Hearings on Public Works for Water and Power Development and Energy Research Appropriations for Fiscal Year 1976 before a Subcommittee of the Senate Committee on Appropriations, 94th Cong., 1st Sess., Pt. 4, 3775–3777 (1975).

[5] H.R. Rep. No. 94–319, 94th Cong., 1st Sess. 76 (1975).

[6] The appropriations acts in this case constituted lump sum appropriations for TVA, and do not themselves identify the projects for which the sums have been appropriated. Identification of these projects requires reference to the legislative history.

as prohibiting completion of the project.[7] In addition, respondent Hiram Hill appeared before the House Committee, and gave a lengthy statement severely criticizing the Tellico project and TVA's view of the Endangered Species Act, in which he concluded that "The project should be halted now and all unused funds for the project should be recalled" (Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1977 before a Subcommittee of the House Committee on Appropriations, 94th Cong., 2d Sess., Pt. 8, 979–984 (1976)).

With these statements before them, both the House and the Senate committees recommended the full Presidential budget request of $9.7 million for Tellico. In its report of June 17, 1976, the Senate committee made the following recommendation:

> TELLICO PROJECT
>
> The bill, as reported, contains the full $9.7 million budget request for the Tellico project.

[7] TVA stated to both committees: "We are doing our best to preserve the snail darter, and the results to date have been encouraging. We cannot guarantee that the [attempt to transplant the species to another river] will ultimately be a success. In any event, we believe the Tellico project must be completed on schedule." Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1977 before a Subcommittee of the House Committee on Appropriations, 94th Cong., 2d Sess., Pt. 5, 260–262 (1976); Hearings on Public Works for Water and Power Development and Energy Research Appropriations for Fiscal Year 1977 before a Subcommittee of the Senate Appropriations Committee, 94th Cong., 2d Sess., Pt. 4, 3096–3099 (1976).

> During subcommittee hearings, TVA was questioned about the relationship between the Tellico project's completion and the November 1975 listing of the snail darter (a small 3-inch fish which was discovered in 1973) as an endangered species under the Endangered Species Act. TVA informed the Committee that it was continuing its efforts to preserve the darter, while working towards the scheduled 1977 completion date. TVA repeated its view that the Endangered Species Act did not prevent the completion of the Tellico project, which has been under construction for nearly a decade. The subcommittee brought this matter, as well as the recent U.S. District Court's decision upholding TVA's decision to complete the project, to the attention of the full Committee. The Committee does not view the Endangered Species Act as prohibiting the completion of the Tellico project at its advanced stage and directs that this project be completed as promptly as possible in the public interest. [S. Rep. No. 94–960, 94th Cong., 2d Sess. 96 (1976).]

The appropriation bill passed both houses of Congress on June 29 and was signed into law by the President on July 12, 1976. Pub. L. 94–355, 90 Stat. 889, 899.

The district court, on May 25, 1976, denied petitioner's request to enjoin the completion of the project and dismissed the complaint (App. B, *infra*). Although the court found that impoundment of the reservoir would "result in the adverse modification, if not complete destruction of the snail darter's critical habitat" (*id.* at 28A), it concluded that the Endangered Species Act was not intended to prohibit the completion of a project substantially complete when the Act was passed (App. B, *infra,* p. 36A). The court further held that "a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result" (*id.* at 36A–37A). The court found support for its view in Congress' continued appropriations for the project with full knowledge of its effect on the snail darter.

The court of appeals reversed (App. A, *infra*). The court held that the Endangered Species Act applies fully to this project, that the evidence indicated that completion of the project and impoundment of the reservoir would violate Section 7 of the Act, and that the district court abused its discretion in refusing to enjoin permanently the completion of the dam and the impoundment of the reservoir. The court refused to attribute any significance to the appropriations statutes of 1975 and 1976 or to the statements of the House and Senate committees directing the completion of the project "as promptly as possible in the public interest." The court held that those appropriations and statements did not constitute a "ratification" of the proposition that the Endangered Species Act was not intended to apply to the Tellico project, and that they were at best "advisory opinions" of certain members of Congress concerning the scope of the Act which could not bind the court "[i]f the separation of powers doctrine is to maintain its vitality" (App. A, *infra,* pp. 15A–16A).

At the time of the trial (April 29–30, 1976) approximately $80 million had been invested in the project and the project was 80 percent completed (App. B, *infra*, p. 33A). As the district court found (*id.* at 31A):

> The nature of the project is such that there are no alternatives to impoundment of the reservoir, short of scrapping the entire project.

TVA has undertaken steps to transplant the snail darter to another river and evidence to date indicates that the species is surviving and reproducing there.[7a] However, even a successful transplant would not resolve this case, since, unless the Secretary of the Interior also found the species to be no longer endangered, the Little Tennessee may continue to be a critical habitat of the species[8] (App. A, *infra*, p. 19A).

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the proper application of the Endangered Species Act. Congress, in passing legislation after the Act, has explicitly, and with knowledge of the relevant facts, expressed an intention and directive that a specific federal project be completed notwithstanding the provisions of that Act. Contrary to principles

[7a] TVA introduced evidence at trial concerning its transplant efforts and made further, updated representations to the court of appeals in Supplemental Answers to Questions Asked During Oral Argument on the matter.

[8] Moreover, as TVA informed the court of appeals, "biologists generally consider several years of data necessary before they can form a conclusive judgment on the success of a transplant". TVA's Supplemental Answers to Questions Asked During Oral Argument, p. 2.

TVA has also petitioned the Secretary of the Interior to withdraw his designation of the Little Tennessee River as a critical habitat of the snail darter on the basis of recent evidence indicating that the very existence of the dam, even without closure of the sluice gates, has made it impossible for the fish to return through the sluices already in place to its spawning grounds above the dam. To date the Secretary has taken no action on the petition and steps have been taken to preserve the status quo by removing snail darters from the river below the dam and replacing them above the dam. Accordingly, it is impossible to predict how or when that petition will be resolved.

of statutory construction reflected in decisions of this Court and other courts of appeals, the court below disregarded that legislation and thus thwarted Congress' express intent.

The decision below has immediate consequences for the future of a major federal project, threatening not only the unrecoverable loss of millions of dollars already expended in its construction but also the loss of millions of dollars of annual energy production, flood control capacity and other economic benefits that the project was designed to bring to the people of the region. The decision would also have the broader consequence of restricting Congress' ability to limit, through appropriate legislation, the application of a general statute to a specific project where it specifically deemed such application to be contrary to the public interest, and would limit Congress in such cases to the more cumbersome and inappropriate legislative process of expressly amending or repealing the general statute.

The decision also presents important questions concerning the application of the Endangered Species Act to projects substantially complete at the time of its enactment, and the exercise by the courts of their traditional equitable powers under the Act.

1. a. The court of appeals concluded that the language of Section 7 of the Endangered Species Act prohibits the final completion of a project that threatens the critical habitat of an endangered species, and requires a federal court to enjoin such completion, regardless of the degree of completion of the project when the Act was passed, the district court's assessment of the propriety of an injunctive remedy, or the reasonableness of the responsible agency's evaluation of the public interest. Whether that was Congress' intention in passing the Act is an important and unsettled question, which we discuss below. See pp. 21–23, *infra*. Here, in any event, Congress subsequently expressed a contrary intention in legislation dealing specifically with the project at issue.

It is axiomatic that the function of the courts in construing legislation is to carry out the will of Congress as best it can be ascertained, and that courts may consider all available and relevant matters in discerning congressional intent. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10; *United States* v. *American Trucking Associations*, 310 U.S. 534, 543–544.

The legislative history of Congress' appropriations for TVA and the Tellico project could not more clearly demonstrate Congress' intent, with knowledge

of the relevant facts, that the project be completed as quickly as possible notwithstanding the Endangered Species Act. That intent is expressly set forth in committee reports of both Houses of Congress,[9] and, as this Court has recognized, statements in committee reports are entitled to particular weight in discerning the legislative will. *United States* v. *International Union United Automobile, Aircraft and Agricultural Implement Workers of America*, 352 U.S. 567, 585. The court of appeals, however, dismissed this explicit evidence of congressional intent as merely reflecting "[a]dvisory opinions" (App. A, *infra*, p. 15A), relying on the canon that "repeal by implication is disfavored," particularly when "the subsequent legislation is an appropriations measure" (App. A, *infra*, p. 16A). The court's disregard of Congress' stated intent is contrary to this Court's decision in *United States* v. *Dickerson*, 310 U.S. 554, and decisions of other courts of appeals concerning the effect of subsequent appropriations legislation on earlier statutes.

United States v. *Dickerson*, involved a 1922 statute authorizing and directing the payment of bonuses to servicemen who re-enlisted in the armed services. In 1938 Congress passed a rider to the appropriations bill for the Rural Electrification Administration that provided that "'no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1939, shall be available for the payment'

[9] The court of appeals erroneously characterized the statements in the committee reports "as pronouncements of two congressional appropriations subcommittees" (App. A, *infra*, p. 18A).

236-039—77——2

[of any enlistment allowance] for 're-enlistments made during the fiscal year ending June 30, 1939, notwithstanding the applicable portions of [the 1922 Act].'" See 310 U.S. at 555. Although the 1938 appropriations measure did not expressly repeal the right to bonuses conferred by the 1922 statute for the 1939 fiscal year, the Court concluded, on the basis of its legislative history, that the measure was intended to suspend the right to bonuses for that year, and rejected the claimant's contention that the words of the appropriations act did not do so (310 U.S. at 562):

> It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words.* * * The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.

The court of appeals for the Tenth Circuit applied those principles in *Friends of the Earth* v. *Armstrong*, 485 F. 2d 1 (C.A. 10), certiorari denied, 414 U.S. 1171. In that case a 1956 statute authorized the construction of the Glen Canyon Dam but prohibited the entry of any water from the resulting reservoir in any national park or monument, and directed the Secretary of the Interior to take adequate measures to protect the Rainbow Bridge National Monument. When it later appeared that the dam would cause water from Lake Powell to back up into the Monument, a 1962 appropriations act for the dam provided that "no part of the funds herein appropriated shall be available for construction or operation of facilities

to prevent waters of Lake Powell from entering any National Monument" (485 F. 2d at 7). Although the appropriations measure did not expressly repeal, or even refer to, the prohibition in the 1956 act, or prohibit efforts to contain the water, the court concluded that the legislative history of the appropriations measure indicated an intent to repeal the prohibition.[10]

The principles of those decisions are fully applicable here. The fact that Congress in the appropriations acts did not expressly exempt the Tellico project from the provisions of the Endangered Species Act should not preclude the courts from determining that those acts and their legislative history demonstrate Congress' intent that the project be completed notwithstanding its knowledge of the threat to the habitat of a species and the claim that because of that threat the Endangered Species Act prohibits its completion. To disregard that evidence, as the court of appeals did, is simply to override Congress' will in this matter.

b. The court of appeals erred in concluding that the statements in the committee reports were merely "advisory opinions" with respect to the meaning of

[10] See, also, *Environmental Defense Fund* v. *Corps of Engineers of the United States Army*, 492 F. 2d 1123 (C.A. 5), where the court held that Congress' passage of appropriations acts after being fully informed of the environmental effects of a project constituted an authorization to proceed with the project and foreclosed judicial inquiry into the adequacy of the impact statement under the National Environmental Policy Act. Cf. *Mitchell* v. *Laird*, 488 F. 2d 611 (C.A.D.C.); *Holtzman* v. *Schlesinger*, 484 F. 2d 1307 (C.A. 2), certiorari denied, 416 U.S. 936; and *DaCosta* v. *Laird*, 448 F. 2d 1368 (C.A. 2), certiorari denied, 405 U.S. 979, holding that continued appropriations and other actions necessary

the Endangered Species Act. Those statements were not simply expressions of personal opinion by isolated congressmen or senators concerning the meaning of a prior statute, *i.e.*, the kind of "subsequent legislative history" that this Court has found unpersuasive as evidence of Congress' intent when the statute was passed. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132. Rather they were statements in committee reports recommending specific legislation that Congress subsequently enacted, presumably in reliance thereon. The Senate Committee's expression of its intention in terms of not regarding "the Endangered Species Act as prohibiting the completion of the Tellico project" is immaterial. Its intent is clear that the Act *should* not prevent the completion of the project and that the project should "be completed as promptly as possible in the public interest"—a view Congress endorsed when it enacted further appropriations for that purpose.[11]

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to maintain prosecution of the war in Vietnam reflected a congressional assent to the war notwithstanding the absence of a formal declaration.

[11] The court of appeals' reliance (App. A, *infra*, pp. 16A–17A) ~~310 U.S. at 558~~, on House Rule XXI, which provides that no appropriations bill "changing existing law [shall] be in order", is also erroneous. That rule merely permits a point of order to be raised and sustained with respect to appropriations legislation which affects existing law. It does not mean that appropriations legislation which does affect existing law is not effective legislation when, as here and as in *Dickerson*, *supra*, 310 U.S. at 558, n. 2, no point of order was raised. Indeed, the proposition that noncompliance with a House rule invalidates legislation passed pursuant to the constitutional process would raise a substantial constitutional question.

c. The court below also erred in disregarding the appropriations legislation on the basis of the canon that repeals by implication are disfavored. That canon of construction does not support the court's conclusion in the circumstances of this case.

It is, of course, well established that repeals by implication are disfavored and that—

> the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable * * * [W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.* * *

Morton v. *Mancari*, 417 U.S. 535, 550–551. Furthermore, "the principle carries special weight when we are urged to find that a specific statute has been repealed by a more general one." *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 169.

The present case, however, like *United States* v. *Dickerson*, *supra*, and *Friends of the Earth* v. *Armstrong*, *supra*, illustrates the circumstances in which "repeal by implication" (or, more accurately, "selective exemption") is fully warranted. Here the purpose of the appropriations and the effect of the Endangered Species Act, at least as contended by respondents and construed by the court of appeals, are mutually exclusive and wholly irreconcilable. This is not a case in which a statute imposes requirements with respect to the manner in which a project is carried

out (for example, equal employment practices, procurement procedures or environmental impact studies), which, although perhaps adding to the burden, do not make its implementation impossible. In this case, given the fact of the snail darter's habitat in the Little Tennessee River, completion of the project by the impounding of the river would be impossible under respondents' view of the Endangered Species Act.[12] Congress was aware of those facts and of respondents' claims under the Act when it directed the completion of the project "as promptly as possible" and appropriated funds for that purpose. In the circumstances of this case, therefore, to give effect to the alleged intent of the prior statute is necessarily to frustrate the purpose and intent of subsequent statutes.

Moreover, this is not a case where a general statute is claimed to implicitly repeal specific statutes, but a case of specific statutes implicitly exempting a particular project from the claimed operation of a prior general statute. Accordingly, as this Court has recognized, the usual considerations militating against repeal by implication are not present. *United States* v. *United Continental Tuna Corp.*, *supra*. Unlike the former situation, the very specificity of the subsequent statutes serves to ensure that Congress contem-

[12] As noted above, *supra*, p. 10, even a successful transplant of the species would not necessarily affect the designation of the Little Tennessee as one of its critical habitats, unless the species became so widespread as to warrant a determination by the Secretary of the Interior that it was no longer threatened or endangered.

plated and intended the particular consequences implicit in its legislation.

d. By mechanically rejecting the significance of appropriations legislation, notwithstanding its clear purpose, the court of appeals would deprive Congress of a reasonable and appropriate means of exempting a specific project from application of a general statute when Congress concludes that, in the particular circumstances, that application would not be in the public interest. Congress, of course, could have amended or repealed the Endangered Species Act, either in general terms or by establishing and periodically adding to a list of projects exempt from its provisions, and decisions like the one below may provide significant impetus for it to do so. But Congress should not be required to debate the general merits of the Endangered Species Act in the context of each specific situation in which it may deem an exception to that Act's consequences to be required. It is certainly reasonable, and arguably preferable, for Congress to choose to consider the pros and cons, including the environmental impacts, of a particular project in the context of a legislative proceeding focusing on the specific facts of that project rather than on the broader consequences of repealing or amending a general statute.[13] The choice is, in any event, a matter

[13] This is particularly true in the case of TVA which, unlike other federal agencies, does not obtain special authorizing legislation for its projects. Sections 4(j) and 27 of the Tennessee Valley Authority Act, 16 U.S.C. 831c(j) and 831z, are general authorizing statutes for such projects, and the appropriations committees alone recommend to Congress whether particular projects should or should not be built.

entrusted by the Constitution to the discretion of Congress rather than the courts. In short, by restricting Congress' alternatives, the court of appeals, far from honoring the principle of the separation of powers, has failed to give due deference to the Congress.[14]

This question in this case concerning the effect of appropriations legislation on general commands in existing law has arisen in a number of contexts, particularly in recent years in connection with environmental legislation. While each case depends on its particular facts, the courts of appeals have taken significantly divergent approaches to the problem. Some, like the court below, appear to view appropriations legislation as virtually incompetent evidence of congressional intent. See *Committee For Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d 783, 785 (C.A.D.C.); *Environmental Defense Fund, Inc.* v. *Froehlke*, 473 F. 2d 346, 355 (C.A. 8). Others, applying the principles of *United States* v. *Dickerson*, *supra*, have recognized its relevance. See *Friends of the Earth* v. *Armstrong*, *supra*; *Environmental Defense Fund* v. *Corps of Engineers of the United*

[14] Although made in a markedly different context, the observations of the court of appeals in *Mitchell* v. *Laird*, 488 F. 2d 611, 615 (C.A.D.C.), are pertinent in this regard. In concluding that acts by Congress other than a formal declaration of war may adequately demonstrate legislative assent to the prosecution of hostilities, the court said: "[W]e regard the Constitution as contemplating various forms of Congressional assent, and we do not find any authority in the courts to require Congress to employ one rather than another form, if the form chosen by Congress be in itself constitutionally permissible."

States Army, *supra*. Accordingly, in view of the importance of the Tellico project itself and the recurrence of this question in other contexts, this Court should review the decision below.

2. Apart from the effect of subsequent legislation, the decision below presents important and unresolved questions under the Endangered Species Act.

Contrary to the court of appeals' conclusion, it is by no means clear that the language or purpose of the statute was intended to prevent an agency that has already "carried out" (Section 7) a program to its virtual completion when the Act was passed and a species listed from completing that project because the "completion" might modify the critical habitat of an endangered species. If, for example, construction of a highway were finished on the day the Act was passed, it is not clear that the Act was intended to prohibit the responsible agency from opening the highway to traffic the next day because the noise of the traffic might modify the critical habitat of a recently discovered endangered species. Although this is the first case to present that issue squarely under the Act, decisions under comparable statutes support the proposition that Congress did not intend such a construction. As the court said with respect to the National Environmental Policy Act in *Arlington Coalition on Transportation* v. *Volpe*, 458 F. 2d 1323, 1331 (C. A. 4), certiorari denied *sub nom. Fugate* v. *Arlington Coalition on Transportation*, 409 U.S. 1000:

> At some stage, federal action may be so "complete" that applying the Act could be con-

sidered a "retroactive" application not intended by Congress.[15]

Furthermore, both the statutory language and its legislative history suggest that in cases where a project cannot be "carried out" at all within the meaning of Section 7 without some modification of a critical habitat, the agency responsible for the project retains the responsibility (subject to review for abuse of discretion) for assessing the competing interests in light of the purposes of the Act.[16]

Finally, the district court here declined to enjoin completion of the project on the basis of its careful assessment of all the competing considerations, including the extent of the project's completion, TVA's good faith efforts to conserve the snail darter and

[15] See also, *Ragland* v. *Mueller*, 460 F. 2d 1196 (C.A. 5); *Environmental Defense Fund* v. *Corps of Engineers of the United States Army*, 470 F. 2d 289 (C.A. 8), certiorari denied, 412 U.S. 931; *Pizitz, Inc.* v. *Volpe*, 467 F. 2d 208 (C.A. 5); *Greene County Planning Bd.* v. *Federal Power Commission*, 455 F. 2d 412, 424 (C.A. 2), certiorari denied, 409 U.S. 849; *Environmental Defense Fund* v. *Tennessee Valley Authority*, 468 F. 2d 1164, 1179 (C.A. 6).

[16] See *e.g.*, 119 Cong. Rec. 25690 (1973), in which Senator Tunney, one of the sponsors of the Act, stated, "[A]s I read the language [of Section 7] there has to be consultation [between the agency and the Secretary of the Interior]. However, the Bureau of Public Roads or any other agency would have the final decision as to whether such a road should be built." *See also* the Department of the Interior's proposed regulations published January 26, 1977, to the effect that the Act was not intended to "bring about the waste that can occur if an advanced project is halted" and that the "affected agency must decide whether the degree of completion and extent of public funding of particular projects justify an action that may be otherwise inconsistent with section 7." 42 Fed. Reg. 4869.

consult with other concerned agencies, and Congress' intent reflected in its continued appropriations. The court of appeals' determination that the district court abused its discretion presents the significant question whether Congress intended in the Act to deny the courts equitable discretion in deciding whether to grant injunctive remedies under the Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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*The Solicitor General is disqualified in this case.