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## COMMENT: *Lujan v. Defenders of Wildlife*: The Need for a Uniform Approach to Extraterritoriality

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# **LUJAN v. DEFENDERS OF WILDLIFE: THE NEED FOR A UNIFORM APPROACH TO EXTRATERRITORIALITY**

## **I. INTRODUCTION**

The canon of statutory construction utilized by courts to determine the extraterritorial reach of legislation, commonly referred to as the "*Foley* Doctrine,"<sup>1</sup> dictates that "unless a contrary intent appears" all legislation will be presumed to apply only within the territorial jurisdiction of the United States.<sup>2</sup> The Supreme Court developed this presumption against extraterritoriality presumably to inject both consistency and predictability<sup>3</sup> into the "art"<sup>4</sup> of statutory interpretation. However, the history of the judiciary's application of the *Foley* Doctrine reveals that it has not resulted in any degree of certainty, but has instead led to a double standard. The geographic reach of laws regulating the protection of the environment or relating to social issues has, with rare exception, been consistently limited by the strict application of the presumption, creating an almost insurmountable barrier to extraterritorial application, even where statutes were replete with suggestions of a broader reach.<sup>5</sup> In sharp contrast, and despite the judiciary's

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1. *Foley Bros. v. Filardo*, 336 U.S. 281 (1949).

2. *Id.* at 285.

3. The Honorable Richard A. Posner in his article, *Statutory Interpretation: In the Classroom and In the Court Room*, 50 U. CHI. L. REV. 800 (1983), presents various justifications that have been advanced for upholding canons of statutory construction, but ultimately concludes that the use of canons of construction leads to inconsistent results and should be replaced by his theory of imaginative reconstruction.

4. WILLIAM N. ESKRIDGE JR. & PHILLIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY* 570 (1988).

5. *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 449 U.S. 244 (1991) (Title VII was held not to apply extraterritorially to regulate employment practices of United States employers who employ United States citizens abroad.); *DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986) (The Age Discrimination Employment Act did not provide protection for an employee in Canada.); *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985) (The Age Discrimination Employment Act had no extraterritorial reach to protect an employee who had been employed by a United States corporation in Germany.); *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*,

recognition that Congress was silent with regard to international applicability, the *Foley* Doctrine has not prevented the extraterritorial application of antitrust, securities, and trademark statutes.<sup>6</sup>

In *Lujan v. Defenders of Wildlife*,<sup>7</sup> the Supreme Court had the opportunity to explain, clarify, or eliminate the inconsistent utilization of the presumption against extraterritoriality, but did not do so. The plaintiff, Defenders of Wildlife, challenged an administrative rule change promulgated by the Department of the Interior in 1986,<sup>8</sup> which exempted federal agencies from compliance with section

647 F.2d 1345 (D.C. Cir. 1981) (The National Environmental Policy Act did not apply to the Nuclear Regulatory Commission's approval of the export of a nuclear reactor to the Philippines.); *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977) (The Marine Mammal Protection Act of 1972 did not apply to a United States citizen who captured dolphins, under the color of Bahamian law, while in the coastal waters of the Commonwealth of the Bahamas.); *Greenpeace USA v. Stone*, 748 F. Supp. 749 (D. Haw. 1990) (The National Environmental Policy Act did not apply to the Army's transportation of chemical munitions from the Federal Republic of Germany to an island in the Pacific.); see also Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990) [hereinafter Turley, "When in Rome"]; Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339 (1990) [hereinafter Turley, *Transnational*].

6. See *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (The Sherman Antitrust Act was held to apply against United States companies who were monopolizing Mexican sisal exports.); *Reebok Int'l v. Marnatech Enter.*, 970 F.2d 552 (9th Cir. 1992); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1048 (2d Cir. 1983) ("Trading activities on United States commodities markets . . . without which the [plaintiffs'] losses could not have occurred" was sufficient to confer jurisdiction in the United States.); *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) (United States had jurisdiction to adjudicate monopolistic activities consummated in Honduras.); *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969) (A United States company's sales of treasury stock below its true value in Canada violated the Securities Exchange Act of 1934.); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952) (The Trademark Act of 1946 was held to apply against trademark infringement consummated in a foreign country by a citizen and resident of the United States.); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (The Sherman Antitrust Act applied extraterritorially over Alcoa's monopolization of aluminum ingot abroad.). See also Turley, "When In Rome," *supra* note 5; James R. Doty, *Developments in International Securities Law Litigation and Technical Assistance To Emerging Securities Markets*, C700 A.L.I.-A.B.A. 125 (1991); John H. Shenefield, *Thoughts on Extraterritorial Application of United States Antitrust Laws*, 52 *FORDHAM L. REV.* 350 (1983).

7. 112 S. Ct. 2130 (1992).

8. 50 C.F.R. § 402.01(a) (1987).

7 of the Endangered Species Act (ESA)<sup>9</sup> when agencies funded projects abroad. Section 7 of the ESA requires interagency consultation where a contemplated action could impact an endangered species.<sup>10</sup> As originally implemented, consultation was mandated without regard to whether the federal action contemplated was to occur inside or outside the territorial borders of the United States.<sup>11</sup> In 1986 the Secretary of the Interior changed that policy and excluded consultation if the activities contemplated were to occur within a foreign jurisdiction.<sup>12</sup>

When presented with the Defenders of Wildlife's challenge to the rule change, the Eighth Circuit, viewing the statute in its entirety, found the Department of Interior's modification of the geographic scope of section 7 to be contrary to a clear "congressional commitment to worldwide conservation efforts."<sup>13</sup> However, the Supreme Court, without discussing the merits, reversed on procedural grounds, dismissing the plaintiffs' claim on the basis of their lack of standing.<sup>14</sup> Unlike the majority, Justice Stevens's concurring opinion concluded that the plaintiff had standing and accordingly he addressed the extraterritorial issue.<sup>15</sup> Applying a highly restrictive interpretation of the doctrine, Justice Stevens rejected the Eighth Circuit's analysis of congressional intent and espoused the view that the *Foley* Doctrine is to be applied not to the facts as a whole, but rather to the particular section within the statute. Analyzing the geographic scope of section 7 of the ESA under this interpretation, Justice Stevens was able to justify the exclusion of agency activities in foreign countries.<sup>16</sup>

This Comment examines the interpretive uncertainty and judicial discrimination which has developed in cases where the international application of a statute is raised and proposes a possible resolution. To demonstrate how *Foley* does not provide a level of predictable interpretive results, this Comment traces

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9. 16 U.S.C. §§ 1531-1543 (1988).

10. *Id.* § 1536(a).

11. 50 C.F.R. § 402.01 (1987).

12. *Id.* § 402.01(a).

13. *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 123 (8th Cir. 1990).

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

15. *Id.* at 2147 (Stevens, J., concurring).

16. *Id.*

the legislative history of the ESA, and how the same history can be used to support directly opposite conclusions. Against this backdrop this Comment compares and contrasts the judiciary's historical analysis of the issue of extraterritoriality where social action legislation, typified by environmental statutes, is under review, and where commercial legislation, exemplified by the Trademark Act of 1946<sup>17</sup> (sometimes referred to as the Lanham Act), is under review. This examination strongly suggests that different criteria are applied depending upon the type of legislation involved despite there being no logical, theoretical, or policy justification for the selective application of *Foley*. The analysis suggests that if the courts implemented the same standards of extraterritorial review regardless of the type or subject matter of the statute in question, the results would be equally as predictable and the legislative intent more accurately effectuated.

## II. THE ENDANGERED SPECIES ACT AND THE DEVELOPMENT OF THE DEPARTMENT OF INTERIOR'S CONSULTATION REQUIREMENT

### A. *Background and Intent*

From the time of President Theodore Roosevelt's administration, federal legislation has existed to protect wild animals and birds, but those earlier enacted laws were either specifically directed or narrowly tailored.<sup>18</sup> Congress's attempts to broaden these statutes in the 1960s<sup>19</sup> were deemed inadequate to protect the ever-dwindling number of species throughout the world, and in 1973, President Nixon signed into law<sup>20</sup> a comprehensive statute known as the Endangered Species Act of 1973 (ESA).<sup>21</sup>

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17. 15 U.S.C. §§ 1051-1127 (1988).

18. For example, the Lacey Act, originally passed in 1900, made it unlawful for "any person . . . to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce" any wild animal or bird "taken" in violation of any state or foreign law. 16 U.S.C. § 3372(a)(2)(A) (1988). See also Mary A. McDougall, Comment, *Extraterritoriality and The Endangered Species Act of 1973*, 80 GEO. L.J. 435 (1991).

19. Endangered Species Preservation Act of 1966, Pub. L. No. 89-699, §§ 1-3, 80 Stat. 926 (repealed 1973); Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (repealed 1973).

20. See Brad Knickerbocker, *Biodiversity: Top Concern In Saving Species*, CHRISTIAN SCI. MONITOR, Dec. 23, 1991, at 9.

21. 16 U.S.C. §§ 1531-1543 (1988).

The Act states its purpose broadly:

[T]he United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction . . . . 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 . . . .<sup>22</sup>

To insure that this far reaching objective is carried out, the Act establishes specific criteria for identifying species as either "threatened" or "endangered,"<sup>23</sup> imposes both affirmative and negative obligations upon federal agency action,<sup>24</sup> and restricts private action that might result in the "taking"<sup>25</sup> of species listed on the endangered species list.

The controversy in *Lujan v. Defenders of Wildlife*<sup>26</sup> related to obligations placed upon all federal agencies under section

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22. *Id.* §§ 1531(a)(4)-1531(b).

23. The ESA defines "endangered species" as those "in danger of extinction throughout all or a significant part of its range," and "threatened species" as those likely to become endangered in the near future. *Id.* §§ 1532(6), (20).

To gain ESA protection a species must be placed on the Endangered Species List. Section 4 of the Act requires that the Secretary of Interior be responsible for listing all terrestrial species, while marine species are placed under the auspices of the Secretary of Commerce. (For the purposes of this article the "Secretary" will be used to refer to both offices.) In addition to delegating responsibility, section 4 also establishes factors that the Secretary should use to determine whether or not to list a particular species. These are: "(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 manmade factors affecting its continued existence." *Id.* § 1533(a)(i).

For a more detailed discussion of the listing process see James C. Kilbourne, *The Endangered Species Act Under a Microscope: A Closeup Look From a Litigator's Perspective*, 21 ENVTL. L. 499 (1991) [hereinafter *Endangered Species Act Under a Microscope*]; M. Lynne Corn & Pamela Baldwin, *Endangered Species Act: The Listing and Exemption Process*, CONG. RES. SERVICE REPORT FOR CONGRESS, May 8, 1990 at 1 [hereinafter *The Listing and Exemption Process*]; see also *Endangered and Threatened Wildlife and Plants*, 50 C.F.R. §§ 17.11-17.12 (1991).

24. See generally 16 U.S.C. § 1536(a)(2) (1988).

25. The ESA defines the term "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19); see also *Endangered Species Act Under a Microscope*, *supra* note 23.

26. 112 S. Ct. 2130 (1992).

7(a)(2) of the ESA.<sup>27</sup> To facilitate compliance with the overall purpose of section 7(a)(2)—to protect listed species from the adverse effects of federal agency action<sup>28</sup>—Congress included substantive and procedural obligations in the statute.

Substantively, federal agencies are required to “insure that any action” they authorize, fund, or carry out will not “jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.”<sup>29</sup> This mandate has proven to be a powerful weapon against species extinction. For example, the Supreme Court, in the highly publicized *Tennessee Valley Authority v. Hill*,<sup>30</sup> held that because the operation of the nearly completed multimillion dollar Tellico dam would either eradicate the only known population of the endangered Snail Darter or destroy the animal’s critical habitat, section 7 prohibited completion of the dam. The Court noted that the ESA’s stated policies, and indeed every section of the statute, indicated that “the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”<sup>31</sup>

In response to *Hill*, Congress, in 1978, amended the ESA to permit exemption in certain circumstances.<sup>32</sup> Under this amendment any federal agency action presenting an “irresolvable conflict”<sup>33</sup> with section 7 may apply to the Endangered Species Committee<sup>34</sup> for relief from the obligations

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27. 16 U.S.C. § 1536(a)(2) (1988).

28. *Id.* The list is not restricted to species found within the borders of the United States. Indeed, species found only within the United States compose only a small number of all the species listed. *See infra* text accompanying note 66.

29. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1036 (8th Cir. 1988) (quoting 16 U.S.C. § 1536(a)(2) (1988)).

30. 437 U.S. 153 (1978).

31. *Id.* at 155.

32. 16 U.S.C. § 1536(h) (1988).

33. *Id.* § 1536(g)(3).

34. The 1978 amendment created the Endangered Species Committee, which is composed of the Secretary of Agriculture, the Secretary of the Army, the Secretary of the Interior, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, the Administrator of the National Oceanic and Atmospheric Administration, and one individual from the affected state. 16 U.S.C. § 1536(e) (1988). *See also The Listing and Exemption Process*, *supra* note 23, at 7.

Empowered with the authority to override the obligations imposed by the ESA the Endangered Species Committee has been dubbed the “God Squad.” In 1992, the now former Secretary of the Interior, Manuel Lujan, convened the “God

imposed by the ESA. To grant an exemption the Committee must conclude, based upon the evidence that:

- (i) there are no reasonable and prudent alternatives to the agency action;
- (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;
- (iii) the action is of regional or national significance; and
- (iv) neither the federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.<sup>35</sup>

If an exemption is granted, the Endangered Species Committee must establish reasonable mitigation measures to minimize the adverse effects of the agency action.<sup>36</sup>

#### *B. The Required Consultation Procedures*

To ensure that ESA's substantive obligations are woven into the fabric of the Federal government's decision-making process, Congress specifically incorporated a consultation procedure in the legislation. Designed to "supply advice and information,"<sup>37</sup> section 7(a)(2) requires that all agencies consult with the appropriate secretary<sup>38</sup> to ensure that the agency action<sup>39</sup> will not "jeopardize or adversely modify critical habi-

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Squad" to review whether the Bureau of Land Management should be permitted to sell federal land, including the habitat of the endangered Northern Spotted Owl, to logging companies. This highly controversial issue has been hotly debated, and is beyond the scope of this article. The focus of the debate is whether the ESA should be amended to include economic factors in determining which species to protect. Margaret E. Kriz, *Jobs v. Owls*, NAT'L J., Nov. 30, 1991, at 2913-16. See also M. Lynne Corn, *Endangered Species Act Issues*, CONG. RES. SERVICE ISSUE BRIEF, July 27, 1992 [hereinafter *Endangered Species*].

35. 16 U.S.C. § 1536(h)(1)(A) (1988).

36. *Id.* § 1536(l)(1); see also *The Listing and Exemption Process*, *supra* note 23.

37. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1037 (8th Cir. 1988).

38. For species under the auspices of the Department of the Interior the consultation agency is the Office of the Endangered Species of the United States Fish and Wildlife Service. For the marine species under the auspices of the Secretary of Commerce the consultation agency is the National Marine Fisheries Service. 50 C.F.R. § 402.01(b) (1993).

39. The Department of the Interior has defined agency action to "mean all activities or programs of any kind authorized, funded, or carried out, in whole or



tat.”<sup>40</sup> The consultation requirement requires that specific steps be taken in all cases to ascertain the potential effect of a proposed agency action on endangered species. Once an agency has informed the secretary of its proposed action, the secretary is required to issue a written opinion detailing the project’s effect on listed species, including any suggestions of possible alternative actions.<sup>41</sup> As the Eighth Circuit noted in *Defenders of Wildlife v. Hodel*,<sup>42</sup> because the ultimate decision to cancel, alter, or proceed with a planned action rests solely with the agency itself, “section 7 does not give the Department of Interior (or the Department of Commerce) a veto over the actions of other federal agencies, provided that the required consultation has occurred.”<sup>43</sup> However, the views of the department could be invaluable in later litigation, where the key issue is often whether an agency acted in an arbitrary and capricious manner or in accordance with the law.<sup>44</sup>

Despite the Supreme Court’s declaration in *Hill*<sup>45</sup> that “one would be hard pressed to find a statutory provision whose terms were any plainer,”<sup>46</sup> and that the language of the ESA “admits of no exception,”<sup>47</sup> the controversy in *Lujan v. Defenders of Wildlife*<sup>48</sup> arose out of the Secretary of the Interior’s promulgation of a regulation that effectively exempted all federal agencies from the interagency consultation obligation whenever an agency is funding projects abroad.<sup>49</sup> The final

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in part, by Federal agencies in the United States or upon the high seas.” 50 C.F.R. § 402.02 (1993).

40. *Endangered Species Act Under a Microscope*, *supra* note 23, at 526 (describing 16 U.S.C. § 1536(a) (1988)).

41. 16 U.S.C. § 1536(b)(3)(A) (1988).

42. 851 F.2d 1035 (8th Cir. 1988).

43. *Id.* at 1037 (quoting *National Wildlife Fed’n v. Coleman*, 529 F.2d 359, 371 (5th Cir. 1976), *cert. denied*, 429 U.S. 979 (1976)); *see also* *Sierra Club v. Froehlk*, 534 F.2d 1289, 1303 (8th Cir. 1976).

44. *National Wildlife Fed’n v. Coleman*, 529 F.2d 359 (5th Cir. 1976), *cert. denied*, 429 U.S. 979 (1976). *See also* *Endangered Species Act Under A Microscope*, *supra* note 23, at 534.

45. 437 U.S. 153 (1978).

46. *Id.* at 173.

47. *Id.*

48. 112 S. Ct. 2130 (1992).

49. The 1986 regulation provides that “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.” 50 C.F.R. § 402.01(a) (1987) (emphasis added).

rule, which was "engineered by the Reagan administration,"<sup>50</sup> and, supported by the Bush administration,<sup>51</sup> provides that federal agencies are under a statutory duty to consult with the Secretary only when they authorize, fund, or carry out projects "in the United States and on the high seas."<sup>52</sup> This change in the rule modified the Secretary's original interpretation of section 7, which had included a consultation requirement for agency action in foreign countries.<sup>53</sup> Despite the presence of specific references to international application in other sections of the ESA<sup>54</sup> and the absence of a general restriction on the geographic scope of section 7, the Secretary contended that this policy modification was a reasonable interpretation of the extraterritorial reach of the interagency consultation requirement. He based this view on the "apparent domestic orientation of the consultation and exemption processes resulting from the [1978] Amendments, and . . . the potential for interference with the sovereignty of foreign nations."<sup>55</sup> Not surprisingly, a challenge to the interpretation was mounted by concerned environmentalists.

### III. *LUJAN v. DEFENDERS OF WILDLIFE*

Claiming that the Secretary's rescision of the international scope of the interagency consultation requirement violated section 7 of the ESA, Defenders of Wildlife filed suit in the Federal District Court for the District of Minnesota.<sup>56</sup> The district court granted Secretary Lujan's motion to dismiss, finding that the allegations were insufficient to constitute a redressable "injury in fact," and, therefore, that Defenders of Wildlife failed to satisfy the standing requirement set forth in

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

51. *Id.*

52. 50 C.F.R. § 402.01(a) (1987).

53. The former regulation required "every Federal agency to insure that its activities and programs in the United States, upon the high seas, and in foreign countries will not jeopardize the continued existence of any listed species." 50 C.F.R. § 402.04 (1987) (emphasis added).

54. See *infra* notes 67-70 and accompanying text.

55. Brief for the Petitioner at 4, *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (No. 90-1424) (citing 51 Fed. Reg. 19,929) (1986).

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

Article III, section 2 of the Constitution.<sup>57</sup>

On appeal, the Eighth Circuit reversed and remanded.<sup>58</sup> The appellate court held that Congress, by expressly including a provision that allows "any person"<sup>59</sup> to commence a suit to enjoin any action that allegedly violates ESA, eliminated any prudential or policy limitations on the plaintiff's right to bring a claim.<sup>60</sup> In addition, the court of appeals was satisfied that the evidence supported the Defenders of Wildlife's position that it had suffered an "injury in fact" that was "fairly traceable and likely to be redressed" by an action against the Secretary. Accordingly, the Eighth Circuit overruled the district court's "case and controversy" concerns and remanded the action to the district court to consider the merits of the plaintiff's claim.<sup>61</sup> Presented with the case for a second time, the district court granted the Defenders of Wildlife's motion for summary judgment on the issue of the extraterritorial reach of the ESA.<sup>62</sup> Specifically, the district court held that Congress intended section 7's consultation requirements to apply to federal actions both in the United States and in foreign countries.<sup>63</sup>

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57. *Id.*

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

59. 16 U.S.C. § 1540(g) (1988).

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

61. *Id.* at 1039-43.

62. *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082 (D. Minn. 1989).

63. *Id.* at 1086. The court's judgment was as follows:

IT IS ORDERED That:

1. Defendant's motion for summary judgment is denied;
2. Plaintiff's motion for summary judgment is granted; and
3. The Clerk shall enter judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED That the Secretary of the Interior shall:

1. Revoke and rescind so much of 50 C.F.R. Part 402 (1987) as limits the consultation requirement of section 7 of the Endangered Species Act, 16 U.S.C. § 1536, to federal agency action that may affect endangered or threatened species in the United States or on the high seas;
2. Publish within thirty (30) days of the lifting of any stay of execution of this judgment, propose regulations clearly recognizing the full mandate of section 7 of the Endangered Species Act, expressly and affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may effect any endangered or threatened species, wherever found;
3. Publish within sixty (60) days of the lifting of any stay of execution of this judgment, final regulations clearly recognizing the full mandate of section 7 of the Endangered Species Act, expressly and affirmatively requiring that each federal agency consult with the defendant Secretary

The court explained that "Congress's concern with the international aspects of the endangered species problem is unmistakable, marked by repeated appearances throughout the statute."<sup>64</sup>

The court pointed out that congressional intent could be gleaned from the statute as a whole with emphasis upon sections which directly address the international scope of ESA. For example, section 1533 requires that the Secretary create a list of all species that are either endangered or threatened, and dictates that one of the factors the Secretary must take into account in determining which species to list is action by foreign countries.<sup>65</sup> In fact, as of January 31, 1992, of the 1,209 plants and animals listed, 528 had habitats outside the territory of the United States.<sup>66</sup>

Many other sections of ESA either expressly or implicitly relate to international applicability. For example, section 1531(a)(4), which enacts various international environmental treaties, states that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable" species of fish and wildlife throughout the world;<sup>67</sup> section 1532(6) defines the term "endangered species" without any reference or limitations to specific geographic regions;<sup>68</sup> section 1537, titled International Cooperation, dictates that, "as a demonstration of the commitment of the United States to the worldwide protection of endangered species" the President may provide foreign countries with assistance in the development and management of conservation programs;<sup>69</sup> and section 1538 prohibits trade in any species listed pursuant to section 1533.<sup>70</sup> In addition to analyzing the statute's plain language, the district court also found that the legislative history of the 1978 amendments was consistent with,

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with respect to any agency action that may affect any endangered or threatened species, wherever found . . . .

*Id.*

64. *Id.* at 1085.

65. *Id.* (construing 16 U.S.C. § 1533 (1988)).

66. 50 C.F.R. §§ 17.11, 17.12 (1991); *see also Endangered Species, supra* note 34, at 2.

67. 16 U.S.C. § 1531(a)(4) (1988).

68. 16 U.S.C. § 1532(6) (1988).

69. 16 U.S.C. § 1537 (1988).

70. 16 U.S.C. § 1538(a) (1988).

and supportive of, its conclusions.<sup>71</sup>

The Eighth Circuit affirmed.<sup>72</sup> Citing *Chevron U.S.A. v. Natural Resources Def. Council*,<sup>73</sup> the court of appeals began its analysis by posing two questions that courts are confronted with when reviewing an agency's construction of a statute. The first is whether Congress's intentions are clearly set forth in the act,<sup>74</sup> for if they are, both the court and the agency are bound by this "unambiguously expressed"<sup>75</sup> intent. However, if the statute does not specifically speak to a particular issue, the second question confronting the court is whether the agency's interpretation is "based on a permissible construction of the statute"<sup>76</sup>—with the proviso that unless a contrary intent appears, all laws are presumed to only apply within the territorial borders of the United States.<sup>77</sup>

After examining the language of section 7(a)(2), the Eighth Circuit concluded that the exemption for foreign activities was not warranted because the section requires each federal agency to consult with the Secretary regarding "any action" that is likely to jeopardize endangered species.<sup>78</sup> The court of appeals acknowledged that the use of broad, all-inclusive "any action" language, without more, was insufficient in itself to overcome the presumption against extraterritoriality.<sup>79</sup> The court then proceeded to look at the legislation as a whole and review other sections of the Act to find a "clear expression of congressional intent."<sup>80</sup> As did the district court, the Eighth Circuit found international concern apparent throughout the entire statute.<sup>81</sup> The appellate court concluded "that the Act viewed as a whole, clearly demonstrates congressional commitment to worldwide conservation efforts. To limit the consultation duty in a manner which protects only domestic species runs contrary to such a commitment."<sup>82</sup> Therefore, because the "plain

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71. *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082, 1086 (D. Minn. 1989).

72. *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990).

73. 467 U.S. 837 (1984).

74. *Lujan*, 911 F.2d at 122.

75. *Id.*

76. *Id.*

77. *Id.* at 125.

78. *Id.* at 122.

79. *Id.* (citing *Foley Bros. v. Filardo*, 336 U.S. 281 (1949)).

80. *Id.*

81. *Id.*

82. *Id.* at 123.

language”<sup>83</sup> of the Act clearly expresses Congress’s intent, the secretary’s interpretation limiting agency consultation to the domestic sphere was an invalid construction of section 7(a)(2).<sup>84</sup>

The Eighth Circuit also found that the legislative history of the Act reinforced its conclusions.<sup>85</sup> Prior to the 1978 amendment, the conference committee adopted provisions that essentially restated the original section 7, but added the exemption process and outlined the responsibilities of federal agencies with regard to endangered species.<sup>86</sup> The committee found that retaining existing law was preferable to change, since regulations governing section 7 were familiar to most federal agencies.<sup>87</sup> Therefore, the court reasoned, Congress passed the 1978 amendments presuming that an international consultation requirement was part of existing law.<sup>88</sup> Thus, it followed logically that Congress must have intended the international scope of the consultation obligation to remain in effect.<sup>89</sup>

Dissatisfied with the Eighth Circuit’s holding, Secretary Lujan sought review by the Supreme Court. Justice Scalia, writing for the majority, did not discuss the merits and dismissed the Defenders of Wildlife’s claim, holding that the plaintiffs failed to “assert sufficiently imminent injury to have standing and plaintiff’s claimed injury was not redressable.”<sup>90</sup> The only Justice to address the merits of the controversy was Justice Stevens, who concurred with the result reached by the majority but not with its reasoning. Justice Stevens found that the plaintiff did have standing, but would have reversed the Eighth Circuit’s holding on the issues of the international application of section 7(a).<sup>91</sup> Using formalistic reasoning, Justice Stevens utilized the many references to the international implications in other sections of the ESA and pointed to section 7’s silence on the issue to argue that section 7 failed to meet

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83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 124.

87. *Id.*

88. *Id.*

89. *Id.*

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

91. *Id.* (Stevens, J., concurring).

the *Foley* test.<sup>92</sup>

Justice Stevens parsed the statute and limited his search for the requisite clear congressional intent to the specific section, indeed the very subsection in question. Finding the only geographic reference in his limited field of inquiry to be "affected states" in the "critical habitat" clause of the section, Justice Stevens indicated that he was unable to find clear congressional intent that section 7 be applied extraterritorially. As a result, Justice Stevens concluded that under the *Foley* Doctrine, international scope of ESA could not be justified.<sup>93</sup>

The Eighth Circuit and Justice Stevens, in interpreting the same statutory language, arrived at completely polar results. If nothing else, the contrast between the Eighth Circuit's and Justice Stevens's analyses leads to the inescapable conclusion that the *Foley* Doctrine does not provide a realistic line of demarcation for the courts and raises the question as to the need or viability of *Foley* at all.

#### IV. THE CONCEPT OF EXTRATERRITORIALITY

An analysis of *Foley* and its application is best understood in the context of the evolution of the presumption against extraterritoriality, the development of the doctrine and the selective manner in which it has been applied. What was once a strict rule barring the extraterritorial reach of United States laws has today evolved into a rebuttable presumption, purportedly intended as a guide to discovering legislative intent, but is so readily subject to a contrary interpretation of the same "facts" as to provide little guidance at all.

##### A. *The Presumption Against Extraterritoriality in International Law*

The concept of extraterritoriality relates to the jurisdictional operation of a sovereign's laws upon "persons, rights, or jural relations"<sup>94</sup> outside the territorial borders of a sovereign state.<sup>95</sup> In order for a statute to apply extraterritorially, two basic criteria must be satisfied. First, the legislative body or

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92. *Id.*

93. *Id.*

94. BLACK'S LAW DICTIONARY 588 (6th ed. 1990).

95. *Id.*

institution must possess the authority to regulate conduct outside its territorial borders.<sup>96</sup> Second, this jurisdictional power must in fact have been exercised.<sup>97</sup>

In the United States, long standing principles of law affirm Congress's authority to proscribe conduct outside this country's borders.<sup>98</sup> Many commercial and criminal federal statutes regulating antitrust, securities, taxation, trademarks, and criminal behavior have been given extraterritorial effect.<sup>99</sup> When the courts are confronted with a dispute regarding the extraterritorial scope of a congressional enactment the question is whether Congress actually intended the statute in question to be applicable to activities in foreign countries, not whether Congress has the power to do so.<sup>100</sup>

Superimposed over the United States' broad assertion of legislative power are principles of international law which recognize only five situations in which a country has "jurisdiction to prescribe"<sup>101</sup> laws extraterritorially.<sup>102</sup> They are: (1) the territorial principle, under which a state can exercise jurisdiction over actions in its own territory; (2) the nationality

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96. Joan R. Goldfarb, Note, *Extraterritorial Compliance with NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. ENVTL. AFF. L. REV. 543 (1991) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1987)).

97. *Id.*

98. See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (The Sherman Antitrust Act is applicable to conspiracies to monopolize or restrain domestic or foreign commerce, even if the acts complained of occur outside the United States borders.); *Steele v. Bulova Watch*, 344 U.S. 280 (1952) (applying the Lanham Trademark Act to trademark infringements committed by a United States citizen acting in Mexico); *Blackmer v. United States*, 284 U.S. 421, 437 (1932) ("questions of application of acts of Congress to citizens of United States in foreign countries is one of construction, not legislative power."); *United States v. Bowman*, 260 U.S. 94, 97 (1922) ("The United States as a sovereign may regulate ships under its flag and the conduct of its citizens while on those ships."); *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977) (Congress has the authority to control the taking of marine mammals by a United States citizen in the territorial waters of another country, but it did not intend to do this by passing the Marine Mammals Protection Act of 1972.).

99. See cases cited *supra* note 98.

100. See cases cited *supra* note 98.

101. "Jurisdiction to prescribe refers to a state's authority to make its law applicable to the activities, relations, or status of persons, or the interest of persons in things." JAMES M. ZIMMERMAN, *EXTRATERRITORIAL EMPLOYMENT STANDARDS OF THE UNITED STATES; THE REGULATION OF THE OVERSEAS WORKPLACE* 160 (1992); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 401(a) (1987).

102. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 introductory note (1987).



principle, under which a state can exercise jurisdiction over its nationals; (3) the objective territorial principle, under which a state can exercise jurisdiction over conduct taking place outside its territory that has a substantial effect within its territory; (4) the protective principle, under which a state has an interest in protecting itself against acts outside its territory that threaten the state; and, (5) the universal principle, under which the state has jurisdiction over universally condemned activities.<sup>103</sup>

Even if a state possesses jurisdiction under one or more of these recognized principles to extend its laws extraterritorially, it is generally recognized that a state may not regulate foreign activities without limitation. According to the *Restatement (Third) of the Foreign Relations Law*,<sup>104</sup> a country may only exercise jurisdiction to prescribe law when the assertion of such jurisdiction is reasonable. The reasonableness of a state's interest is usually judged by the "relation of the transaction, occurrence or event, and of the person to be affected to the state's proper concerns."<sup>105</sup> This jurisdictional rule of reason

103. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(2) (1987). See also R.Y. Jennings, *Extraterritorial Jurisdiction and The United States Antitrust Laws*, 1957 BRIT. Y.B. INT'L L. 146 (1957); Goldfarb, *supra* note 96; ZIMMERMAN, *supra* note 101, at 160.

Many modern scholars also recognize a sixth principle. Under the passive personality principle a state can extend its jurisdiction over any activity that causes an injury to a state's national. Jennings, *supra* at 154.

104. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 (1987).

105. To determine the reasonableness of a State's jurisdiction, section 403 of *Restatement (Third) of Foreign Relations Law* suggests an evaluation of "all the relevant factors, including, where appropriate:"

- (a) the link of activity to the territory of the regulating state . . . ;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating

reflects the basic understanding that each individual country must account for, and not unnecessarily impinge upon, the interests properly controlled by the other members of the world community.<sup>106</sup>

These international legal precepts originally formed the basis of the presumption against extraterritoriality embodied in the *Foley* Doctrine. Recognizing that legislating in a manner which affects activities in another sovereign's territory raises the possibility of conflict between the United States and the affected sovereign, the canon leaves to Congress important policy decisions in which the danger of international discord is clear and substantial.<sup>107</sup> Congress, not the judiciary, possesses the power to create laws that conflict with either the law of nations or another sovereign's jurisdiction, and the judiciary should uphold these potentially volatile policy determinations only when Congress expressly communicates its intent.<sup>108</sup>

Neither side in *Lujan v. Defenders of Wildlife*<sup>109</sup> questioned the right of Congress to legislate extraterritorially had it chosen to. The sole issue was whether it intended to do so. Nor was there any question raised about whether a restriction imposed upon an agency was appropriate. Well before this case arose, the nationality principle had been held to include both individuals<sup>110</sup> and corporations<sup>111</sup> and it would be illogical

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the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2) a state should defer to the other state if that state's interest is clearly greater.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 403(2)-403(3) (1987).

106. LOUIS HENKIN ET AL., *INTERNATIONAL LAW CASES AND MATERIALS* 825 (2d ed. 1987).

107. See *Benz v. Compania Naveria Hidalgo S.A.*, 353 U.S. 138, 146-47 (1957); see also *Blackmer v. United States*, 284 U.S. 421 (1932); ZIMMERMAN, *supra* note 101, at 111.

108. Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308, 1312 (1983). To illustrate how the extraterritorial extension of United States jurisdiction may result in international discord see for example the European Community's and Japan's reactions to President Reagan's 1982 imposition of sanctions against the USSR pursuant to section 6 of the Export Administration Act of 1979, 50 U.S.C. §§ 2401-20 (Supp. III. 1979). *Id.*

109. 112 S. Ct. 2130 (1992).

110. *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6) (To assert a claim

to exclude the government's own agencies from the jurisdictional reach of United States law.<sup>112</sup> In addition, given the fact that the final determination of whether an agency will fund a project, wherever it is located, usually occurs at the agency's "home" office within the United States,<sup>113</sup> there is little question under either the nationality or territorial principles of jurisdiction that Congress possesses the power to control any agency's extraterritorial activity under the ESA. The critical question is whether the legislature intended that the legislation apply internationally, and it is here that the presumption and its application play a critical role.

### *B. The Presumption Against Extraterritoriality and United States Law*

Since the early 1900s, United States courts have been confronted with the issue of whether an act of Congress should apply to persons and activities occurring in foreign jurisdictions.<sup>114</sup> During the first half of the twentieth century, the United States judiciary developed and applied a general rule of statutory construction that strictly limited the scope of congressional enactments to the territorial borders of the United States.<sup>115</sup> However, as evolution in the world's economic and social fabric caused an increase in the number of transnational conflicts, the courts slowly began to broaden their interpretation of the jurisdictional scope of congressional enactments.<sup>116</sup>

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on behalf of an individual a state must prove that a genuine connection exists between it and the individual.); see RESTATEMENT (THIRD) FOREIGN RELATIONS § 402(2) (1987); see also McDougall, *supra* note 18, at 445.

111. *Barcelona Traction Light & Power Co., (Belg. v. Spain)* 1970 I.C.J. 3 (Feb. 5) (A corporation is considered a national of the state where it is incorporated.); see RESTATEMENT (THIRD) FOREIGN RELATIONS § 213 (1987); see also McDougall, *supra* note 18, at 445.

112. McDougall, *supra* note 18, at 445.

113. See McDougall, *supra* note 18.

114. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (In the Supreme Court's first decision defining the extraterritorial scope of a United States statute, the Court refused to apply the Sherman Antitrust Act to monopolistic activities in Costa Rica); see also Turley, "When In Rome," *supra* note 5, at 600.

115. Turley, "When in Rome," *supra* note 5; see, e.g., *United States v. Twenty-Five Packages of Panama Hats*, 231 U.S. 358, 362 (1913) (While it was possible to bring a proceeding against a *res* physically present in the United States, it was impossible to assert criminal jurisdiction extraterritorially.).

116. See Turley, "When In Rome," *supra* note 5, at 656-58.

Despite recognition of the need to look to world implications of legislation, the judiciary remained reluctant and retained the presumption that, unless a contrary intent was expressed, the courts should assume that extraterritorial application of a United States statute was not intended. If Congress wanted a law applied extraterritorially, the courts required precise language to that effect.<sup>117</sup> Not surprisingly, exceptions into this fairly straightforward proposition soon emerged. A watershed case in the evolving entry of the courts into areas in which Congress was silent as to its intent, was *United States v. Bowman*.<sup>118</sup> The *Bowman* decision is significant because it not only put to rest any question of Congress's right to proscribe extraterritorial behavior, it found such a right, despite a total absence of extraterritorial language in the statute in question.<sup>119</sup>

In *Bowman*, employees of a shipping company in which the United States was the sole stockholder conspired, while on the high seas and in Brazil, to overcharge the United States government for a shipment of oil.<sup>120</sup> At trial the district court refused to find any wrongdoing because the law did not include express congressional authorization to redress acts committed abroad. The district court believed itself powerless to implicitly extend a statute to overseas activities.<sup>121</sup> On appeal, after examining both the nature of the crime and the traditional jurisdictional limitations placed upon governmental power by the law of nations, the Supreme Court held that section 35 of the Criminal Code was designed to punish United States citizens who attempted to defraud the United States government, even if no overt act took place within the borders of the United States.<sup>122</sup>

In reversing the district court's decision, the Supreme Court found the requisite congressional intent by implication,

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117. See *Blackmer v. United States*, 284 U.S. 421 (1932) (Because Congress expressly indicated its desire to permit the service of process on United States citizens residing outside the country, the Court had no choice but to uphold the extraterritorial service of process.); see also Turley, "When In Rome," *supra* note 5.

118. 260 U.S. 94 (1922).

119. *Id.* The statute in question was section 35 of the Criminal Code, as amended October 23, 1918, (40 Stat. 1015 [Comp. St. Ann. Supp. 1919 § 10199]).

120. *Bowman*, 260 U.S. at 95.

121. *Id.* at 97.

122. *Id.* at 98.

finding that a contrary ruling would undermine the Act's effectiveness by creating a jurisdictional loophole through which wrongdoers could easily avoid prosecution by simply committing the proscribed activity outside the territorial borders of the United States.<sup>123</sup> The Court reasoned that "in such cases Congress has not deemed it necessary to make specific provisions in the law . . . but allows it to be inferred from the nature of the offense."<sup>124</sup> Thus, after *Bowman* the express language requirement no longer was absolute, although the Court made it clear that in contrast to laws designed to protect the government, those statutes which were designed to "affect the peace and good order of the community"<sup>125</sup> were local in nature and therefore would be presumed to apply only within the territory of the United States, unless Congress expressly states otherwise.<sup>126</sup>

After *Bowman*, courts continued, albeit tentatively, to mold and develop the concept of extraterritoriality, often in the face of Congress's lack of explicit authorization.<sup>127</sup> Although the *Bowman* decision indicated the judiciary's willingness to break with the traditionally strict bar against applying statutes to activities abroad, the Court failed to specify a clear rationale which would guide the resolution of subsequent disputes involving the extraterritorial reach of ambiguously worded statutes. During the post-*Bowman* era, courts were left without a consistent approach for ascertaining unexpressed congressional intent. Finally, in 1949, the Supreme Court seemed to provide a viable approach by adopting a canon of construction in the landmark decision of *Foley Bros. v. Filardo*.<sup>128</sup>

The issue in *Foley* centered on the question of whether the "Federal Eight Hour Law"<sup>129</sup> applied to a construction con-

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123. *Id.*

124. *Id.*

125. *Id.* The list included assault, murder, burglary, larceny, robbery, arson, embezzlement, and fraud as examples of the type of crime that affects "the peace and good order of the community." *Id.*

126. *Id.*; see also *supra* text accompanying note 117.

127. See *Blackmer v. United States*, 284 U.S. 421 (1932); see also *Turley, "When In Rome," supra* note 5.

128. 336 U.S. 281 (1949).

129. 40 U.S.C. §§ 321-26 (1988). The pertinent portion of the act, quoted in the opinion, provided that

Every contract made to which the United States . . . is a party . . .

tract between the United States and a private contractor for work performed by the contractor in the Middle East.<sup>130</sup> The plaintiff, an American citizen, was hired as a cook on a construction project in Iran and Iraq, a job that frequently required him to work well in excess of eight hours per day. Unable to persuade his employer to comply with the "time and a half" overtime provisions contained in the Fair Labor Standards Act, the plaintiff initiated suit.<sup>131</sup> At trial, the district court held that the "time and a half" regulation applied to the contract in question.<sup>132</sup> The Court of Appeals for the Second Circuit affirmed.<sup>133</sup> However, after granting certiorari, the Supreme Court reversed, concluding that neither the language, the scheme, the legislative history, nor the administrative interpretations of the statute provided any "touchstones by which [the Act's] geographic scope [could] be determined."<sup>134</sup>

The Court, while recognizing that Congress possessed the power to extend the scope of the Federal Eight Hour Law to activities in foreign countries, declined to find such an intent implicit in the statute at hand. The Court announced that "the canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, is a valid approach whereby unexpressed congressional intent may be ascertained."<sup>135</sup> The Court reasoned that "Congress is primarily concerned with domestic conditions,"<sup>136</sup> and therefore silence by Congress raises the presumption that it did not intend international application. The need for international "touchstones" raised again, albeit in slightly different wording, the pre-*Bowman* "express language" requisite. At a minimum,

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shall contain a provision that no laborer of mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor . . . shall be required or permitted to work more than eight hours in any one calendar day . . . .

*Id.* If a worker labored for more than eight hours the employer was required to provide compensation at a rate of no less than one and one-half times the basic rate of pay. *Id.*

130. *Foley Bros. v. Filardo*, 336 U.S. 281 (1949).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 288.

135. *Id.* at 285.

136. *Id.*

the court in *Foley* dictated that *Bowman* type exceptions were to be rare.<sup>137</sup>

Thus, the presumption against extraterritoriality is supposedly the standard upon which all disputes regarding the geographic scope of ambiguously worded statutes are measured.<sup>138</sup> As Justice Stevens's concurring opinion in *Lujan v. Defenders of Wildlife*<sup>139</sup> demonstrates, the *Foley* review process has, at least to some jurists, ultimately come to be a search for express language. Over the years, however, a selective and disturbing pattern has emerged with regard to when the doctrine is used, and when used, how it has been applied. Courts have, with little exception, utilized the presumption against extraterritoriality to exclude the international application of statutes relating to so-called social issues,<sup>140</sup> but during that same period the *Foley* Doctrine has not created similar barriers to statutes designed to regulate economic activities.<sup>141</sup> This dictum, and the lack of logical rationale underlying it, can be illustrated by analyzing the extraterritorial application of environmental statutes on one hand, and trademark statutes on the other, contrasting the reasoning courts have applied in finding there to be no extraterritorial application in the former, and extraterritoriality in the latter.

#### V. EXTRATERRITORIALITY IN ENVIRONMENTAL AND IN TRADE-MARK LEGISLATION CASES

The judicial attitude on the issue of extraterritoriality in trademark cases does much to highlight the illogic of the discriminating application of the *Foley* Doctrine. From a strictly technical perspective it can be argued that trademark laws are commercial statutes. They assure that the goodwill associated with a word or symbol in respect to a product or service is the goodwill and property of the first user.<sup>142</sup> With exclusive priv-

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137. *Id.*

138. See Turley, "When in Rome," *supra* note 5 at 602.

139. 112 S. Ct. 2130 (1992) (Stevens, J., concurring).

140. See *supra* text accompanying note 5.

141. See *supra* text accompanying note 6.

142. *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.* 469 U.S. 189, 198 (1985) (The purpose behind trademark protection is to secure for the owner the "goodwill of his business . . ."). See also *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916) ("The redress that is accorded in trademark cases is based upon a parties right to be protected in the goodwill of a trade or business."); Yale Elec.

ilege over the use of the particular word or symbol,<sup>143</sup> the owner is empowered to stop second comers from infringing on his or her property rights. However, in a broader sense, trademark laws are also social legislation with social implications in protecting the innocent public from being deceived by improper and mistaken association between goods and services and their alleged supplier.<sup>144</sup> When viewed in this latter context there are surprising parallels between environmental and trademark regulations. Each has ramifications extending beyond the rights of the named parties to any action. While "the essential element of a trademark is the exclusive right of its owner to use a word or device to distinguish his product,"<sup>145</sup> a basic policy justification for granting such an exclusive commercial right is the public's interest in not being deceived.<sup>146</sup> Similarly, most environmental regulations are predicated upon the underlying assumption that improving the environment will enhance the quality of all human life.<sup>147</sup> The resolution of ei-

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Corp. v. Robertson, 26 F.2d 972, 974 (2d Cir. 1928) (A person's trademark "is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill.").

143. A trademark is defined as "any word, name, symbol, or device or any combination thereof . . . (1) used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if the source is unknown." 15 U.S.C. § 1127 (1988).

144. Section 32 of the Lanham Act protects against any unauthorized action that is "likely to cause confusion, or to cause mistake or to deceive." 15 U.S.C. § 1114(1)(a) (1988). See *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942) ("A trademark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been lead to believe he wants."); *Stahly, Inc. v. M.H. Jacobs Co.*, 183 F.2d 914, 917 (7th Cir. 1950) ("It must be remembered that the trademark laws and the law of unfair competition are concerned not only with the protection of a property right existing in the individual, but also with the protection of the public from fraud and deceit and it is obvious that the right of the public to be so protected is a right which transcends the rights of the individual trademark owner and is beyond his power to waive."); see also Robert J. Shaughnessy, *Trademark Parody: A Fair Use and First Amendment Analysis*, 77 Trademark Rep. 177 (1987); J. THOMAS MCCARTHY, *TRADEMARKS AND UNFAIR COMPETITION* (1973).

145. MCCARTHY, *supra* note 144, at 45, § 2:2 (quoting *Jean Patou, Inc. v. Jacqueline Cochran, Inc.* 312 F.2d 125 (1962)).

146. MCCARTHY, *supra* note 144, at 43.

147. See *infra* note 169 (describing the policies underlying the National Environmental Policy Act of 1969); see also *Knickerbocker*, *supra* note 20, at 8 ("There is no doubt that over time the quality of human life declines as the quality of natural ecosystems declines.").

"Over half of all prescription drugs in the United States, for example, de-



ther an environmental or a trademark dispute must ultimately account for the unrepresented public whose rights are inexorably linked to the rights of the litigating parties.

The guiding United States policies underlying the concepts of property rights and economic free enterprise also find a common root in environmental and trademark regulation. Any governmental action that either limits the use of property or grants an exclusive right to an individual or corporation must be balanced against the deeply entrenched economic policy to encourage free competition within the marketplace. Any benefits derived from regulating the use of property must outweigh the harm caused by the disruption of the free market. In formulating environmental or trademark legislation, Congress balances the potential disruptive effects of the regulations against their potential benefits.

Despite the obvious parallels between environmental and trademark statutes at the legislative stage, the picture is quite different when the judiciary is called upon to interpret the legislation—particularly with regard to issues involving extraterritoriality.

#### A. *Extraterritoriality and Environmental Legislation*

Environmental legislation has rarely been granted extraterritorial application,<sup>148</sup> generally on the basis of the *Foley Doctrine*.<sup>149</sup> The judiciary's rigid application of the presumption against extraterritoriality has created a jurisdictional prison confining the geographic scope of environmental regulations to activities occurring within the United States.<sup>150</sup> A typical example is the 1977 decision in *United States v. Mitchell*.<sup>151</sup>

In *Mitchell* the Fifth Circuit refused to impose criminal

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rive from wild plant and animal species." Knickerbocker, *supra* note 20, at 8.

148. Indeed, it is only in a recent decision by the United States Court of Appeals for the District of Columbia that the National Environmental Policy Act (NEPA) was found applicable to activities of a federal agency incinerating food wastes in Antarctica, but only after finding that Antarctica was, in law, not a foreign country but rather a continent akin in law to outer space, a sovereignless region. *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 529 (D.C. Cir. 1993).

149. Turley, "When In Rome," *supra* note 5, at 607.

150. Turley, "When In Rome," *supra* note 5, at 607-08.

151. 553 F.2d 996 (5th Cir. 1977).

sanctions on a United States citizen who had allegedly violated the Marine Mammal Protection Act (MMPA)<sup>152</sup> by capturing dolphins in the territorial waters of the Commonwealth of the Bahamas.<sup>153</sup> Passed in 1972, the MMPA established, subject to specified exceptions, a moratorium on the taking, importing and selling of any marine mammal.<sup>154</sup> The defendant, a United States citizen, had obtained permission from the Bahamian government to capture a number of Atlantic Bottlenose Dolphins for exportation to Great Britain.<sup>155</sup> The defendant was indicted in the Southern District of Florida and charged with violating the MMPA, which makes it "unlawful for any person subject to the jurisdiction of the United States . . . to take any marine mammals on the high seas."<sup>156</sup> In overturning the defendant's conviction, and despite the reference to the "high seas," which are perforce outside the territory of the United States, the Fifth Circuit held that neither the Act nor its legislative history "demonstrate the clear intent required by Bowman and its progeny to overcome the presumption against extraterritorial extension of [United States] statutes."<sup>157</sup>

To reach this conclusion the Fifth Circuit subjected the MMPA to a two-part analysis. Citing *United States v. Bowman*,<sup>158</sup> the *Mitchell* court reached the very opposite conclusion of the *Bowman* Court.<sup>159</sup> The court "characterized" conservation statutes, like MMPA, as being inherently domestic because such laws derive their "nature" on a territorial basis—from the absolute control every sovereign has over its natural resources.<sup>160</sup> Thus, the court reasoned that each in-

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152. 16 U.S.C. § 1361 (1988).

153. *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977).

154. 16 U.S.C. § 1371(a).

155. *Mitchell*, 553 F.2d at 997.

156. *Id.* at 1000 (quoting Marine Mammal Protection Act, 16 U.S.C. § 1372(a)(1) (1988)).

157. *Id.* at 1004.

158. 260 U.S. 94 (1922).

159. *Mitchell*, 553 F.2d at 1002. However, the court did not note that *Bowman* might well have served as a basis to affirm the conviction. A crime was committed outside the United States in direct contravention of a United States law. Surely the decision in *Bowman* would not have been different if the Brazilian government conspired with the defendants to cheat the United States government. *Id.*

160. *Id.* The Fifth Circuit cited the United Nations resolution on "Permanent Sovereignty over National Resources" G.A. Res. 1803, U.N. GAOR 17th Sess., 1194th plen. mtg. at 107-08 (1962), and the Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, art. 14, as supporting this proposition; see *gen-*

dependent state in the world community is entitled to preserve, exploit, or draw a balance between preservation or exploitation of the resources within their territory as they deem fit.<sup>161</sup> Unlike the acts prohibited by the Criminal Code in *Bowman*,<sup>162</sup> the court found that the criminal acts proscribed in *Mitchell* were confined to the geographic locus of the United States and that such a limitation would not diminish from the Act's total effectiveness or create a safe haven where those intent on breaking the law could find shelter from prosecution.<sup>163</sup>

If there was any doubt that conservation statutes were going to be given special restrictive extraterritorial treatment, four years later another federal appeals court went even further than *Mitchell* and read *Foley* as requiring "an unequivocal mandate" in cases of environmental legislation.<sup>164</sup> The statute in issue was the National Environmental Policy Act of 1969 (NEPA).<sup>165</sup>

Like the ESA, the legislation at issue in *Defenders of Wildlife v. Lujan*,<sup>166</sup> NEPA imposes procedural obligations which require all federal agencies to take a "hard look" at the potential environmental consequences of their actions.<sup>167</sup> To ensure that NEPA's far reaching environmental policies<sup>168</sup> are

erally RESTATEMENT (THIRD) FOREIGN RELATIONS §§ 601-604 (1987).

161. *Mitchell*, 553 F.2d at 1002.

162. See *supra* text accompanying note 125.

163. *Mitchell*, 553 F.2d at 1002.

164. See *Natural Resources Defense Council Inc. v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1357 (D.C. Cir. 1981).

165. 42 U.S.C. §§ 4321-4370 (1988). See *Greenpeace USA v. Stone*, 748 F. Supp. 749, (D. Haw. 1990); *Natural Resources Defense Council Inc. v. Nuclear Regulatory Comm'n*, 647 F.2d 1345 (D.C. Cir. 1981).

166. 112 S. Ct. 2130 (1992).

167. *Robertson v. Methow*, 490 U.S. 332, 333 (1989); *Sabine River Auth. v. Texas Conservation Assoc.*, 951 F.2d 669, 676 (5th Cir. 1992).

168. The basic goals of the NEPA are specifically set forth in the Act's declaration of purpose, which states:

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare to man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and establish a Council on Environmental Quality.

42 U.S.C. § 4321 (1988).

implemented, Congress incorporated "action forcing"<sup>169</sup> procedures into the statute. Drafted in broad, all-inclusive language, NEPA mandates that "all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement . . . on the environmental impact of the proposed action."<sup>170</sup> The federal government sparked considerable controversy when it failed to apply the Act and prepare an environmental impact statement (EIS) for agency action occurring in foreign jurisdictions.<sup>171</sup> All challenges but one<sup>172</sup> have fallen under the weight of the *Foley* Doctrine.

That one exception is the case of *Environmental Defense Fund, Inc. v. Massey*,<sup>173</sup> decided in 1993 by the Court of Appeals for the District of Columbia. In *Massey* the failure to seek an EIS was held violative of NEPA, even though the activity occurred outside the borders of the United States. Unlike most extraterritorial decisions, the alleged action, the open air burning of food wastes, was not undertaken in another sovereign's territory, but in Antarctica, a continent which the court indicated to be the legal equivalent of outer space. However, where the foreign jurisdiction has been another sovereignty, NEPA has not been applied extraterritorially.

For example, in *Natural Resources Defense Council v. Nuclear Regulatory Commission*<sup>174</sup> (NRDC), the Commission, without preparing a site-specific EIS, approved Westinghouse Electric Corporation's application for a license to export a nuclear reactor and nuclear materials to the Philippines.<sup>175</sup> The

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169. *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979).

170. 42 U.S.C. § 4332(2)(c)(i) (1988).

171. See *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 647 F.2d 1345 (D.C. Cir. 1981); *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978); *Wilderness Soc'y v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972); *Greenpeace USA v. Stone*, 748 F. Supp. 749 (D. Haw. 1990); *National Org. for the Reform of Marijuana Laws v. United States Dep't of State*, 452 F. Supp. 1226 (D.D.C. 1975); *Saipan v. United States Dep't of Interior*, 356 F. Supp. 645 (D. Haw. 1973). See also Turley, "When In Rome", *supra* note 5; Goldfarb, *supra* note 96.

172. *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

173. *Id.*

174. 647 F.2d 1345 (D.C. Cir. 1981).

175. *Id.*

Commission defended its decision to forego the preparation of an EIS on two grounds. First, the Commission interpreted NEPA as only mandating the preparation of an EIS when agency action affects the territory within the United States.<sup>176</sup> Second, the Commission argued that basic principles of comity and international sovereignty prevented it from insisting upon an exploratory visit to the reactor site within the Philippines.<sup>177</sup>

In sustaining the Commission's position, the United States Court of Appeals for the District of Columbia Circuit reviewed NEPA's geographic scope under an analysis which characterized *Foley* as not merely a presumption, but rather as a general "rule against extraterritoriality"<sup>178</sup> which could only be overcome by "an unequivocal mandate from Congress."<sup>179</sup> Evaluating NEPA's geographic scope under these "anti-extraterritorial policy"<sup>180</sup> considerations the D.C. Circuit held that "NEPA does not apply to [Commission] nuclear export licensing decisions."<sup>181</sup>

This literal and formalistic utilization of the presumption against extraterritoriality continues today as the basis upon which most courts determine the geographic reach of environmental statutes. In *Greenpeace USA v. Stone*,<sup>182</sup> environmental groups unsuccessfully challenged the army's decision to forego the preparation of an EIS prior to transporting obsolete chemical munitions<sup>183</sup> from their storage site in the Federal Republic of Germany (FRG) to a disposal facility at the Johnston Atoll.<sup>184</sup> The United States Army, acting in concert

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176. *Id.* at 1348.

177. *Id.* at 1353. Considerable controversy surrounded the selected location of the reactor. "The Napot Point is about twelve miles from the Subic Bay Naval Base and forty miles from Clark Air Force Base where a total of 32,000 American armed service members are stationed." *Id.* at 1351. The concern for the military personnel stationed in such close proximity to a nuclear reactor was intensified by the fact that the selected area was known to be seismically active. *Id.*

178. *Id.* at 1365.

179. *Id.* at 1357. See also Turley, "When in Rome", *supra* note 5.

180. *Natural Resources Defense Council v. Massey*, 647 F.2d 1345, 1366 (D.C. Cir. 1981).

181. *Id.*

182. 748 F. Supp. 749 (D. Haw. 1990).

183. Approximately 100,000 rounds of nerve gas had been stockpiled in Clausan, Germany since 1968. *Id.*

184. *Id.* at 752. Located in the central Pacific Ocean approximately 800 miles southwest of Honolulu, Hawaii, Johnston Atoll is an unincorporated United States

with West Germany's Army, planned the removal to comply with an executive agreement entered into by the United States and the FRG, which mandated the complete elimination of the chemical stockpile by the end of 1990.<sup>185</sup> Refusing to apply NEPA to the removal protocol, the district court noted that although the Act's language clearly demonstrates a concern for the "global environment,"<sup>186</sup> Congress failed to explicitly indicate its desire to apply the statute to agency activity in foreign countries.<sup>187</sup> Without a clearly expressed authorization the court feared that extending NEPA's geographic scope would result in "grave foreign policy" repercussions.<sup>188</sup>

While *NRDC* and *Greenpeace USA* did not extend the jurisdictional reach of NEPA beyond the territorial borders of the United States, both courts gave lip service to the requirement that they give a case by case analysis in the future<sup>189</sup> and expressly limited their opinions to the facts. However, the impression that under different circumstances NEPA might be applied to agency conduct abroad has (with the exception of Antarctica) proven illusory.

The decisions since the Supreme Court's original attempt in *Foley* to define "a valid approach whereby unexpressed congressional intent may be ascertained,"<sup>190</sup> have been supplanted by an almost insurmountable policy against extraterritoriality even in statutes replete with extraterritorial wording and implications. Instead of scrutinizing a statute to ascertain Congress's true intent, courts focus their analysis on seeking an "unequivocal"<sup>191</sup> or explicit<sup>192</sup> statement that Congress

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territory which has been used for various military purposes since World War II.

185. *Id.*

186. *Id.* at 759.

187. *Id.*

188. *Id.* at 761.

189. *Natural Resources Defense Council, Inc., v. Nuclear Regulatory Comm.*, 647 F.2d 1345, 1366 (D.C. Cir. 1981) ("I find only that NEPA does not apply to NRC nuclear export licensing decisions and not necessarily that EIS requirement is inapplicable to some other kind of major federal action abroad."); *Greenpeace USA v. Stone*, 748 F. Supp. 749, 761 (D. Haw. 1990) ("In other circumstances NEPA *may* require a federal agency to prepare an EIS for action taken abroad . . .").

190. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

191. *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1357 (D.C. Cir. 1981).

192. *Greenpeace USA v. Stone*, 748 F.Supp. 749, 759 (D. Haw. 1990).

intended the act, or indeed the specific provision, to apply to actions in foreign territories. Even if this approach had been applied evenhandedly, it would be subject to criticism. Moreover, this type of strict interpretation is all the more disturbing in light of the strikingly more liberal approach utilized by courts to decide the extraterritorial scope of "ambiguous" economic based statutes, even those clearly linked with social interest, such as The Trademark Act of 1946 (Lanham Act).<sup>193</sup>

### *B. Extraterritoriality and the Lanham Act*

Three years after its *Foley* pronouncement, the Supreme Court interpreted the extraterritorial scope of the Lanham Trademark Act of 1946.<sup>194</sup> Unlike the restrictive and formalistic approach applied in environmental cases, a majority of the Court examined the statute as a whole to determine the extraterritorial intent of Congress where a trademark registered in the United States was being infringed by activities based in Mexico by a citizen and resident of the United States.<sup>195</sup>

In *Steele v. Bulova Watch Co.*,<sup>196</sup> the Bulova Watch Company sought to enjoin the defendant, a United States citizen who owned a watch manufacturing company headquartered in Mexico City, from stamping the plaintiff's registered mark of BULOVA on watches produced with parts bought from the United States and Switzerland, but assembled and sold in Mexico.<sup>197</sup> While none of the defendant's spurious watches were sold within the United States, the Bulova Watch Company initiated the suit in response to numerous reports by jewelers located in United States border towns that their customers were regularly bringing the defendant's defective watches in for repair.<sup>198</sup> The defendant answered Bulova's complaint by arguing that Congress did not intend the jurisdictional scope of the Lanham Act to extend to his extraterritorial activities.<sup>199</sup>

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193. 15 U.S.C. §§ 1051-1127 (1988).

194. *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

Although the Lanham Act lacked express extraterritorial language, the Supreme Court did not look for an unequivocal mandate or explicit language by Congress. Rather, the Court implicitly found congressional intent in the Act's broad assertion of jurisdictional power.<sup>200</sup> In upholding Congress's power to regulate unfair trade practices committed by United States nationals in foreign countries, the Court stressed that "the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or in foreign countries when the rights of other nations or their nationals are not infringed."<sup>201</sup> Undoubtedly cognizant of the fact that it was implicitly interfering with a business conducted under Mexican law, the Court mentioned that subsequent to its granting of certiorari, the Supreme Court of Mexico, in a separate action, nullified the defendant's registration of the BULOVA mark in Mexico.<sup>202</sup> Thus, the United States Supreme Court held that, extending the Act's geographic scope would not conflict with Mexican law.<sup>203</sup>

The Court found it significant that the defendant's "operations and their effects were not confined within the territorial limits of a foreign nation."<sup>204</sup> Not only did the defendant purchase materials from the United States, but the infiltration of his imitation BULOVA's into the United States market adversely reflected upon the Bulova Watch Company's carefully

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200. *Id.* at 285 ("In light of the broad jurisdictional grant in the Lanham Act, we deem its scope to encompass petitioner's activities here.").

The Court found that the statute's expressed intent was to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.

*Id.* at 283 (quoting 15 U.S.C. § 1127 (1988). The Act defines commerce as "all commerce which may lawfully be regulated by Congress." 15 U.S.C. § 1127 (1988).

201. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285-86 (1952).

202. *Id.*

203. *Id.* This part of the Court's analysis is somewhat peculiar in that the nullification of the defendant's Mexican registration did not necessarily mean he could not trade in BULOVA brand watches.

204. *Id.* at 286.



cultivated trade reputation.<sup>205</sup> While recognizing that the defendant's acts when viewed in isolation did not violate United States law, the Court noted that "acts in themselves legal lose that character when they become part of an unlawful scheme."<sup>206</sup> Therefore, the Court refused to allow the defendant to "evade the thrust of the laws of the United States"<sup>207</sup> by hiding "in a privileged sanctuary beyond our borders."<sup>208</sup>

Not every Justice supported the majority's interpretation of the geographic scope of the Lanham Act. In his dissent, Justice Reed, with whom Justice Douglas joined, argued that the "Lanham Act . . . should be construed to apply only to acts done within the sovereignty of the United States."<sup>209</sup> The dissenters recognized that the majority opinion was predicated its decision on what can at best be described as a very generalized statement of legislative intent. Indeed, the dissent contended that Congress's intent to apply the Act to extraterritorial activities should not be based upon some generalized terms contained within the statute.<sup>210</sup> They asserted that in interpreting the geographic scope of an ambiguous statute, courts should apply "words having universal scope . . . to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch."<sup>211</sup> Thus, according to these justices, "commerce," which the Act broadly defined as "all commerce which may be lawfully regulated by Congress,"<sup>212</sup> could not be read as extending the scope of the Lanham Act to activities consummated in foreign countries.<sup>213</sup> Yet despite all these interpretive issues, *Foley* was not applied and extraterritoriality was found to exist.

Even the dissenters' attempt to distinguish the "nature" of the Lanham Act from the "nature" of the Criminal Code interpreted in *Bowman*<sup>214</sup> could not convince their fellow justices.<sup>215</sup> The dissenters' plea for a strict textual approach to the

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205. *Id.*

206. *Id.* at 287.

207. *Id.*

208. *Id.*

209. *Id.* at 292.

210. *Id.*

211. *Id.* at 290.

212. *Id.* at 290 (quoting 15 U.S.C. § 1127 (1988)).

213. *Id.*

214. 260 U.S. 94 (1922).

215. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 291 (1952).

interpretation of the extraterritorial reach of broadly worded statutes failed to inspire a change in the majority's expansive view, despite the fact that the defendant did not engage in any illegal commercial acts.<sup>216</sup> The defendant's purchasing of parts from the United States, his stamping of the mark BULOVA in Mexico, and the bringing by the consumer, without the defendant's knowledge or prompting, of the watches into the United States, could not be viewed as illegal acts "within the control of Congress" as specified in the Lanham Act.<sup>217</sup>

Subsequent to *Bulova Watch*, the Second Circuit restated the Supreme Court's analysis as a three-part test.<sup>218</sup> For a court to apply the Lanham Act extraterritorially, the evidence must indicate that: (1) the complained of conduct has a substantial effect on the United States commerce; (2) the defendant is a United States citizen; and, (3) no conflicts exist with the defendant's trademark rights established under foreign law.<sup>219</sup> Although not in itself an insubstantial test, it is far less severe than *Foley* and lends itself to a case by case analysis. Thus, the Second Circuit refused to impose Lanham Act penalties against a Canadian citizen who used the plaintiff's United States registered trademark, under color of Canadian law, even though the defendants' acts had a substantial effect on commerce within the United States.<sup>220</sup>

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216. *Id.*

217. *Id.* at 291-92. Indeed the dissenters would likely have been satisfied with an analysis at least as thorough as the Eighth Circuit's in *Lujan v. Defenders of Wildlife*, but in the circumstances the majority obviously felt even that level of analysis was not needed.

218. See *Vanity Fair Mills v. T. Eaton & Co.*, 234 F.2d 633 (2d Cir. 1956).

219. *Id.* at 642.

220. *Id.* at 643. See also *C-Cure Chem. Co. v. Secure Adhesives Corp.*, 571 F. Supp. 808, 821 (W.D.N.Y. 1983) ("The clear import of *Vanity Fair Mills* is that the Lanham Act should not be applied to a foreign citizen allegedly committing infringing acts in his or her home country.").

Subsequent Second Circuit cases indicate that the absence of a strict compliance with each prong of the three part test is not necessarily fatal and may not preclude the extraterritorial application of the Lanham Act. For example, in *Calvin Klein Indus., Inc. v. BFK H.K., Ltd.*, 714 F. Supp. 78 (S.D.N.Y. 1989), the district court enjoined activities occurring outside the United States, even though the defendant was not a United States citizen. The court reasoned that because the defendant resided in New York and directly controlled a New York corporation, the defendant could be treated as a United States citizen and therefore subject to United States' unfair competition regulations. Therefore, in the absence of conflict with foreign trademark laws the constructive citizenship of the defendant distin-

Unlike *Foley*, the *Bulova* test is not insurmountable. Using the *Bulova Watch*/Second Circuit analysis, the Fifth Circuit in *American Rice, Inc. v. Arkansas Rice Growers Cooperative Assoc.*,<sup>221</sup> held that the Lanham Act applied to a United States merchant who affixed an infringing mark on goods in the United States, but sold the goods only in a foreign country.<sup>222</sup>

In *American Rice Growers*, the defendant and the plaintiff were farmers cooperatives fiercely competing for a share of the rice market in Saudi Arabia.<sup>223</sup> The defendant, in an attempt to break into the plaintiff's seventy-three percent share of the market, packaged its rice in containers confusingly similar to that used by the plaintiffs, and employed a confusingly similar trademark on the containers.<sup>224</sup> In affirming the district court's grant of an injunction against further sales to the Saudi Arabian market, the Fifth Circuit utilized the three prong Second Circuit analysis<sup>225</sup> and found that the actions of the defendant, a United States corporation based in Arkansas, significantly affected the commerce of the United States by diverting sales away from the plaintiff's well established brand.<sup>226</sup> Citing *Bulova Watch*, the court reasoned that so long as the defendant's actions adversely affected commerce within the United States, the fact that the customer confusion occurred on foreign soil to non-United States citizens was inconsequential.<sup>227</sup> The court found that its decision did not conflict with Saudi law absent a Saudi judicial declaration of the rights of the parties.<sup>228</sup>

The expansive approach taken by the Fifth Circuit in deciding the extraterritorial issues in *American Rice Growers* is but another illustration of the sharp contrast between the

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guishes the case from *Vanity Fair Mills*. See also *A.T. Cross Co. v. Sunil Trading Corp.*, 467 F. Supp. 47, 50 (S.D.N.Y. 1979) ("Despite the fact that [the defendant] is not a United States citizen, he was in all respects acting in his capacity as an officer of a New York corporation when engaged in the purchase and sale of counterfeit pens.").

221. 701 F.2d 408 (5th Cir. 1983).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

judiciary's review of extraterritoriality in respect to commercial legislation and its restrictive *Foley* view when examining the same issue in the context of social action legislation.

## VI. EXTRATERRITORIALITY: A UNIFIED APPROACH

The Supreme Court's failure to address the extraterritorial issue in *Lujan v. Defenders of Wildlife*<sup>229</sup> leaves the question of the geographic scope of the ESA unresolved. Since authorization for the Act expired on October 1, 1992,<sup>230</sup> the extraterritorial issue may or may not be settled by a congressional amendment specifically defining the Act's jurisdictional obligations.<sup>231</sup> Regardless of how or if the issue is legislatively resolved, the overriding *Foley* issue will not be clarified unless the judiciary's inconsistent application of this canon of statutory construction is confronted and resolved.

As originally intended, the *Foley* Doctrine's presumption against extraterritoriality was designed to assist courts in ascertaining unexpressed congressional intent.<sup>232</sup> Whatever clarity the doctrine was originally intended to provide has long been mooted, as the different results reached by the Eighth Circuit and Justice Stevens clearly illustrate. Moreover, the selective application of the doctrine depending upon the nature of the legislation raises questions of fairness. Unless modified, *Foley* will continue to permit equally ambiguous legislation to be interpreted in completely different ways. There is no legitimate purpose that a continued existence of this dichotomy will achieve. It is time for the courts to revisit the issue and employ a unified rule of interpretation.

This consolidated approach need not be a newly created one. The jurisdictional rule of reason utilized by the post-*Bulova* Second and Fifth Circuits' employment of a three-pronged balancing test is viable protocol that can be adapted to

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

230. Congress has only authorized spending under the ESA to extend to October 1, 1992. It is likely that many of the issues raised in the *Lujan v. Defenders of Wildlife* will be hotly debated at the reauthorization hearings. *Endangered Species*, *supra* note 34, at 1, 3.

231. In response to the Supreme Court's decision in *Lujan v. Defenders of Wildlife*, Senator Metzenbaum of Ohio is sponsoring a bill to specifically clarify the geographic scope of the ESA. S.74, 103d Cong., 1st Sess. (1993).

232. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949).

other types of legislation. These criteria provide a flexible, yet directed method of ascertaining unexpressed congressional intent.<sup>233</sup>

Admittedly, a rule of reason approach carries with it an air of unpredictability, but one need only compare the Eighth Circuit's application of *Foley* to that of Justice Stevens to see that *Foley* does not provide certainty or consistency. Moreover, the courts have long been able to apply a rule of reason analysis instead of a per se violation standard in antitrust cases.<sup>234</sup> Decisions by courts which have previously been deemed fair may, by examining the effect of those decisions, be called into question. The Supreme Court has, in a recent concurring opinion by Justice Thomas, specifically acknowledged that over time judges can conclude that judicial interpretation of legislation can mature as we learn more about the realities of its impact.<sup>235</sup> It has been forty-four years since *Foley* was decided. The interdependence of the world's nations has radically increased. It is time for the Supreme Court to recognize the existence of the new world order and to alter its approach accordingly. The Court can take a step in that direction by revisiting and reversing the *Foley* Doctrine's restrictive presumption against extraterritoriality.

## VII. CONCLUSION

The courts' continued disparate use of the *Foley* Doctrine to ascertain whether Congress intended ambiguously worded statutes to apply extraterritorially has resulted in a judicially created double standard which leads to interpretive uncertainty and judicial discrimination. The effect of the current application of *Foley* is that social action statutes such as environmental laws are subjected to a rigorous and strictly interpreted presumption against extraterritoriality, while commercial statutes typified by the Lanham Act have been subjected to a more flexible treatment. While consistently adhering to this lopsided approach, the courts have failed to articulate a justification for applying different criteria depending upon the type of legisla-

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233. See THE INTERNATIONAL CHAMBER OF COMMERCE, THE EXTRATERROTORIAL APPLICATION OF NATIONAL LAWS (Dieter Lang & Gary Born eds., 1984).

234. See *supra* text accompanying note 6.

235. *Two Pesos, Inc. v. Taco Cabana, Inc.* 112 S. Ct. 964 (1992).

tion involved. The divergent analyses utilized by the Eighth Circuit and Justice Stevens's concurring opinion in *Lujan v. Defenders of Wildlife*,<sup>236</sup> illustrates that the *Foley* Doctrine neither provides predictability nor the benefit intended when it was decided. Moreover, the legislative history of a statute such as the ESA may be interpreted incongruently to support directly opposing conclusions. Thus, it is imperative that the judiciary recognizes and rectifies its inconsistent approach to extraterritoriality.

When presented with a dispute in which the international scope of a statute is in issue, courts should ascertain Congress's intent without any preconceived presumptions or assumptions either for or against extraterritorial application. If the key is legislative intent, then nothing further is needed by way of presumption or otherwise. Each statute, regardless of its subject matter, should be judged according to its own language, history, and purpose. By employing an evenhanded method of interpretation, based solely on the legislative intent, the judiciary's goal of ascertaining Congress's true purpose in enacting statutes will undoubtedly be more accurately effectuated.

*Michael J. Schwab*

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236. 112 S. Ct. 2130 (1992).

